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For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

SEVENTY-FIVE YEARS OF THE *ANNUAL SURVEY*

Each year, the newly inaugurated class of 2L staff editors receives packets with the *Annual Survey* "essentials": our style guide, an overview of our production process, a picture book of the editorial staff members, and a copy of the late Professor Julius Marke's 1992 retrospective, *The* Annual Survey of American Law *at Fifty*.[1]

Professor Marke recalls the birth of a publication whose mission would be not so much ambitious as laughable today: an academic journal that summarizes in some detail "the significant trends in the more important branches of the law throughout the year."[2] The original *Annual Survey* really did aim to provide a survey of the American legal landscape as it changed from year to year. With chapters titled "Criminal Procedure," "Torts," and "Election Law," the journal endeavored to summarize changes in entire fields of law—in roughly twenty-page segments.[3] There were, of course, specialists at the time, but the *Annual Survey*'s founder, Dean Vanderbilt, recognized that a generalist survey could be of use even to them.[4]

The world has changed. Not only has law continued to specialize, but it has grown. What is "important" to some is insignificant to others. Indeed, one might debate what "the more important branches of the law" even are these days. Illustratively, Congress enacted 115 public laws in 2015;[5] that same year, administrative agencies promulgated over 24,600 new regulations.[6] Prior to those regulations' codification, an interested reader would have had to peruse more than 81,000 pages of the *Federal Register*.[7] A motley

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1. Julius L. Marke, *The* Annual Survey of American Law *at Fifty*, 1992/1993 N.Y.U. Ann. Surv. Am. L. 1.

2. *Id.* at 2 (quoting Arthur T. Vanderbilt II, *Foreword*, 1942 N.Y.U. Ann. Surv. Am. L. v, vi).

3. 1978 N.Y.U. Ann. Surv. Am. L. 1.

4. *See id.*

5. *See Public Laws*, Congress.Gov, https://www.congress.gov/public-laws/114th-congress/.

6. *See* Maeve P. Carey, Cong. Research Serv. R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register* 19 (2016).

7. Fed. Reg., *Federal Register Pages Published 1936–2015*, at 2, https://www.federalregister.gov/uploads/2016/05/stats2015Fedreg.pdf. Of course, this phenomenon was not unknown even in the nascent years of the *Annual Survey*. *See* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387 (1947) (Jackson, J., dissenting) ("If [a farmer] were to peruse [the *Federal Register*] as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops.").

crew of law school students could scarcely imagine reading all of that, let alone synthesizing it.

Student involvement marks another major change since Dean Vanderbilt's time: the *Annual Survey* is no longer professor-run, but student-run. Further, just like our sister journals at the Law School, we publish scholarly pieces from both faculty and students. We continue to distinguish ourselves among journals in a variety of ways. Apart from our unique history, we focus on usefulness to practitioners and judges, valuing practical insight over philosophical queries, though recognizing that the two often overlap. We have resisted the trend to specialize and instead welcome articles that span the scope of today's complex legal world, recognizing that each issue we publish will appeal to different readers. And we have continued, without interruption, the tradition started by Dean Vanderbilt to dedicate each volume to a remarkable figure in American law. We could not be prouder of this Volume's dedication to Justice Sonia Sotomayor of the United States Supreme Court.

What we remain proudest of is the rich place the *Annual Survey* occupies in the intellectual life of its members and indeed of the Law School. We continue to organize an annual symposium dedicated to a novel legal topic, we continue to question and develop our authors' legal theories, and we continue the vibrant intellectual conversations among ourselves—your editors—in response to today's changes and challenges in the law. Above all else, we will strive to continue these traditions for the next seventy-five years.

Alison Wall
Editor-in-Chief, 2016–2017

Leonid Grinberg
Editor-in-Chief, 2017–2018

NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

2016–2017 BOARD OF EDITORS

This Volume of

New York University Annual Survey of American Law

is respectfully dedicated to

JUSTICE SONIA SOTOMAYOR

Justice Sonia Sotomayor

JUSTICE SONIA SOTOMAYOR

Sonia Sotomayor, Associate Justice, was born in Bronx, New York, on June 25, 1954. She earned a B.A. in 1976 from Princeton University, graduating *summa cum laude* and receiving the university's highest academic honor. In 1979, she earned a J.D. from Yale Law School where she served as an editor of the Yale Law Journal. She served as Assistant District Attorney in the New York County District Attorney's Office from 1979–1984. She then litigated international commercial matters in New York City at Pavia & Harcourt, where she served as an associate and then partner from 1984 until 1992. In 1991, President George H.W. Bush nominated her to the U.S. District Court, Southern District of New York, and she served in that role from 1992 until 1998. She served as a judge on the United States Court of Appeals for the Second Circuit from 1998 until 2009. President Barack Obama nominated her as an Associate Justice of the Supreme Court on May 26, 2009, and she assumed this role August 8, 2009.

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* In memoriam

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TRIBUTE TO JUSTICE SONIA SOTOMAYOR

AUSTIN WILKINS

My name is Austin Wilkins, and I am the Editor-in-Chief of the *N.Y.U. Annual Survey of American Law*. So, we are here tonight to celebrate the dedication of our seventy-third volume to the Honorable Justice Sonia Sotomayor, which we are very excited about. But before I get started, I want to take a few seconds to, first of all, thank my incredible staff for all of their hard work this year. It really takes everybody to run a journal like ours. Also, I want to thank our wonderful guest speakers for coming out here tonight. It couldn't happen without you. You are what make it special. And of course I want to thank Dean Morrison and everyone at this school, especially Tracee Nwafor, for all of their help in putting this event together and making it a success every year.

So, some of you are probably familiar with the *N.Y.U. Annual Survey of American Law*. Some of you may have been to these events in past years or even spoken at them before, as I know some of you have. But for many of you this is your first exposure to our journal. So, I just wanted to take a second to kind of explain the significance of these events that we do every year. The *Annual Survey of American Law* has for many years—since 1942, actually—published a volume every year, sometimes of multiple issues, chronicling and helping to analyze the recent developments in American law. That very first volume was dedicated to then Chancellor of the New York University, Harry Woodburn Chase. And since that first dedication, we have dedicated each subsequent volume to a person, an individual, who we believe has made a significant impact on American law in recent years.[1] And tonight we are welcoming Justice Sonia Sotomayor for this honor. You can see on the back of your programs tonight the list of all of our past dedicatees, and it is really an amazing club of very distinguished individuals.

This tradition that we have of every year holding this event and dedicating our volume, our work, to a person, I think signifies our journal's understanding of the law as more than just the written words on a page of a statute, or in a judicial opinion, or on the pages of a law review. But it is really also the people behind the law: the people who work to create it, to improve it, and to expound upon it every day. And so, in events like these, we celebrate those

1. 1942 N.Y.U. ANN. SURV. AM. L.

titans of American jurisprudence for all of their hard work. But it is also important to remember that the law is not just the law of these very distinguished individuals. It is also the law of the common American: the people who every day are affected and affect the law very subtly in their own way. And this is not a lesson lost on tonight's honored guest. She grew up just north of here but in a very different world. At a recent gathering of the Bronx Defenders, she told them that instead of being called by her full designation, the Honorable Justice to the Supreme Court, she would rather be known as "Sonia from the Bronx." And I think that is a big reason why we picked her. She really is a justice of the people who knows what it is like for everyday Americans out there. And she is working to make sure that they really have a law that works for them.

Not too long ago—only twelve, twelve years ago—at the sixtieth anniversary of this event, a Second Circuit judge sat in one of these chairs over here and gave a lovely tribute to that night's dedicatee, a certain John Sexton.[2] And tonight we are overjoyed to welcome that judge back into our community, only this time as a Justice of the United States Supreme Court—and this time as the one who is to be receiving those tributes.

So, next is going to be Dean Morrison to introduce our guests, but I just want to say "welcome" from the journal, our staff, and everyone here to the Honorable Justice of the Supreme Court of the United States, Sonia "from the Bronx" Sotomayor.

2. 60 N.Y.U. ANN. SURV. AM. L. (2004).

TRIBUTE TO JUSTICE SONIA SOTOMAYOR

JUDGE ROBERT KATZMANN

Thank you, Dean Morrison.

Thank you, Austin.

Good evening to everyone.

It is a great privilege to be part of this tribute to the extraordinary and special Sonia Sotomayor. Not only a brilliant jurist, but the people's justice. A wholly accessible and giving justice, who inspires us to do better, who has given hope to people of all hues, including those who must struggle every day—people she has encouraged to dream and live their dreams, who feel now that their dreams can be realized because of her.

Last week, Sonia and I were at a panel about statutory interpretation—the panel, comprised of four judges, one of the judges having once been a legislator, with a litigator as a moderator. We had a great discussion that morning that ranged from how legislation gets made and passed, the often misunderstood work of agencies in the work of legislation, the helpful critiques by some textualists on how legislative history gets used, the stances of the justices in some recent cases. I spoke first and talked a bit about my book on statutes. Sonia spoke next, managing in a few short minutes to present to the audience difficult concepts in wholly understandable form and to connect with the audience in ways unmatched by anyone else I know. As she said that morning, she and I use similar methods and tools when approaching the often thorny task of discerning the meaning of a statute.

In her remarks, the Justice said something that I found particularly striking. She said that she always looks at the structure of a statute while trying to unpack it—striking, because structure is an idea that has been an important principle in Justice Sotomayor's approach to judging and life. And, in my brief time, I want to talk about how structure has been important to Justice Sotomayor in law and in life.

Structure.

In her masterful book, which I, like many others, predict will be a classic in American literature—the coming-of-age story of a brilliant young Latina [who] faces and triumphs over a series of adversities—the Justice frequently uses and refers to structure. She writes that she was, and I quote, "[D]rawn to psychology and sociol-

ogy, having always been interested in the patterns of individual behavior, as well as the structure of communities."[3] She writes of her college professor who urged her to develop an argumentative structure in organizing her facts. Critiquing her mother's writing for her nursing degree, Sonia said, "There's no structure here, Mami. It wanders."[4]

The way Bob Morgenthau, The Boss, structured the office was a model of efficiency and integrity. Writing about her love for the law, she observed, and I quote, "[That] the law gives structure to most of our relationships, allowing us to promote our interests at once, in the most harmonious way."[5] She continued, and I quote, "[T]hrough the law, you could change the very structure of society and the way[s] communities functioned."[6] She writes of the law as the structure for upholding society.

With her analytical mind, deep concern for society, for fairness, and, of course, fondness for Nancy Drew stories and Perry Mason, it is no surprise that the law appealed to her. What is structure and why does she like it so much as she writes about the law?

To be a pure textualist for a moment—and only for a moment—and use a dictionary: Structure pertains to the relationship or organization of the component parts of a work of art or literature; or a mode of building construction or organization; arrangement of parts, elements, or constituents; or a complex system considered from the point of view of the whole, rather than of any single part; or anything composed of parts arranged together in some way; an organization; something built or constructed, as a building, bridge, or dam.[7]

But what does structure mean to Sonia Sotomayor?

From a young woman's orderly, disciplined mind, law—with its history, language, the use of precedents—appeared and made sense to her . . . , a person who liked the big picture, who liked seeing the order and, yes, the structure of the system, [the] intellectual discipline of, yes, statutes. Law, with its myriad and vibrant connection[s] to the practical lives of human beings, spoke to her the way a song or piece of music can speak to us when we immediately recognize something that makes sense to us. And we feel it and know it in our bones. By looking at the big picture—the Constitu-

3. Sonia Sotomayor, My Beloved World 129 (2013).

4. *Id.* at 139.

5. *Id.* at 255.

6. *Id.*

7. Random House, *Structure*, Dictionary.com, http://www.dictionary.com/browse/structure (last visited Apr. 21, 2017).

tion, the legislation, the problems to be addressed—she could start to see the principles and priorities guiding it. For someone who could live, literally, thanks to the structure of her daily insulin shots—which she started to administer herself, to herself, at not yet eight years of age—the structure of a law, along with its dynamic qualities, speaking to her zest for life, had to make total sense.

She loves the law: how it works, how it lives, how the writing and analysis of it are some of those components. Sonia, are you sure you weren't a Talmudic scholar in some earlier part of your life?

As someone very proud to call Sonia a close friend, I can personally attest to her extraordinary prowess and excellence on the bench. Sure, I know that Judge Calabresi would certainly agree. Sonia is a judge's judge. A lawyer's lawyer. No one loves the law, its structure, its history, its language, more than she does. Taking apart an argument, pulling apart the pieces, analyzing the logic, tracing the precedent, connecting a case to the Constitution, relating the history and issues to today's world, would satisfy her intellectually and, I think, emotionally. She loves what she does. No one on the bench is more prepared than she is for oral arguments. And no one more eager than she to explore what is going on in a case: the history of it, the contingencies, the ramifications, and to make the right and fair decision. Unique among Supreme Court Justices is her trial court experience. She has a deep appreciation of not just legal principles, but also to facts, on how decisions affect the realities on the ground and the need to be sensitive to those realities.

Her career as a prosecutor, [as a] commercial lawyer in private practice, as a district court and appellate court judge give[s] her a well, deep, and experienced perspective and wisdom. I love how Justice Sotomayor loves the world from which she came, and how joining the Supreme Court made her want to write better and want to better understand her childhood. From her vivid descriptions of the public housing development in the Bronx where she grew up—the brick of the buildings, the window out of which she and her father gazed at the moon and imagined worlds far away, the neighbors and relatives whose apartments were as familiar to her as her own—Sonia describes the built and human world, this beloved world, with its characters, its part and pieces, its landscape in sounds and tastes, its woes and comedies. And to her, clarity and willingness to share her hopes and anxieties. Any reader can feel connected to her and to the world of the South Bronx. Yes, the structure of that world has been made available to us through her wonderful book.

Although from reading *My Beloved World*, you get the sense that other people and others' dreams, problems, and joys are deeply important to her, those of us who have the privilege of being part of her world palpably feel the kind of person Sonia Sotomayor is. The structure she has created for the way she lives her life is a gift to all of us. She manages to pack more in a day into life than anyone I know—a person of indefatigable energy. A typical week might involve intense and full devotion to court work; hosting student groups and classes; staying close to family, old friends, clerks. Indeed, attending to the problems of friends and family with complete focus. Perhaps convening a poker game, attending dance performances; traveling and immersing herself in the world in which she is in, [or] attending community events in her former neighborhood in the Bronx.

She is very much someone for whom others are important and who will inconvenience herself for the sake of someone else. The examples I could give are legion. I remember one, when a friend of hers was dying right around Christmas. It was out on Long Island. Sonia, in Washington and needing also to attend to her mother, found a way to visit and sit with that friend on Christmas Eve, if I remember correctly. This is not unusual for her. If you're a part of her circle and her friends and her family, there is no "I" and "you," but truly "we."

I feel pretty confident that I can speak with some authority about this extraordinary person who is a sister to me. After all, we were born within fourteen months of each other in the same city. We went to the same law school and overlapped. We worked together on the same court for a decade. In the ten years that we sat together, my clerks did a survey, we agreed one-hundred percent of the time. 238 cases. There is not one difference between us, which is really pretty amazing. Sonia presided in those cases, so I was just following the leader.

The sum and total of what I have I have talked about is but one window into Sonia Sotomayor's greatness. I use "greatness" in a very particular way. There are those who achieve great things in life, but they are not great people. They lack the concern for others; the kindness; the capacity to be generous with their time, energies, and commitment. Not so with Sonia Sotomayor, who is the total package, who in my book is in the pantheon of great human beings. What a joy it is, what a privilege it is to know her! Sonia, thank you. Thank you for all you do. Thank you for everything you are. You are fantastic, and I love you.

TRIBUTE TO JUSTICE SONIA SOTOMAYOR

JUDGE GUIDO CALABRESI

It's a great, great joy to be back here—to be back for this event, where I was the subject some years ago; to walk by the portraits of Ricky [Revesz] and John [Sexton], two remarkable deans; and most of all, to be here to honor Sonia, to honor Sonia. I've heard many quite correct descriptions of what makes Sonia the wonderful judge and human being that she is: great intelligence, empathy, grounding in facts and in her own remarkable life experience—and as those who were at the civil justice [know]—humor and humanity. They're all true.

But there is one quality that I have not heard mentioned which makes all of the others, all of the other attributes, work. It is courage. And it is on that quality that I would like to focus my remarks today. I don't know much about physical courage; I don't really understand it. I've never been called to exercise it. I'm not sure that I would if I had to. It's another form of courage that I'm concerned with. It's moral courage. It's moral courage that I have in mind, and it is moral courage that characterizes Sonia. That quality, both rare and wonderful to behold, is what for me makes all the rest of Sonia so powerful.

Let me give a few examples of Sonia's moral courage. I start long, long ago with a very young Hispanic girl from Puerto Rico and the New York projects. She arrives at the Yale Law School, a place that tries to be nice but that scares any number of kids who have all sorts of safety nets underneath them. They react by giving back to their teachers what their teachers told them, almost word for word. They make no mistakes, they take no chances, and they sell themselves short out of a very understandable form of what, dare I call it, is cowardice. Perhaps it even happens in as nice a place as NYU. But not Sonia. I taught her torts, and I know. Where she got the guts, I can't say. But right from the start she took chances, used her imagination, and disagreed when she did not agree. Courage.

Later, as a district judge—when everyone said be careful, be cautious, don't be controversial, and you will have a great future and a great career—"SS," as we call her on our court, paid no heed. Read those early opinions and you'll see what I mean. And of course, it resulted in opposition that almost derailed her appointment to the Second Circuit. Go back and see what some senators

were saying. But Sonia had refused to let cautious careerism keep her from doing what she believed justice and law required. And if it made appointment and confirmation impossible, too bad. Courage.

On our court, it was the same again. Many a very good circuit judge gets mentioned in the press as a possible appointment to the Supreme Court, and all of a sudden you see that very good judge start to waffle—a sad, but understandable, sight. Sonia was talked of for the Court from the moment she came to us. And I dare anyone to find anything she did that might in any way have seemed to bend to that wind.

But there is more. Sonia was and is devoted to her mentor and great role model for Hispanics and Puerto Ricans: the brilliant, powerful, and charismatic José Cabranes. José is, unlike me, a person of strong views. He probably expected that Sonia would out of deference and perhaps "juniority fear" go along with him. But there too Sonia was always herself. Agreeing with her mentor when she did—and standing up to him, fiercely even, when she didn't. And this is what is more remarkable. She did this while constantly reaffirming her affection, gratitude, love, and deep debt to him. Courage.

And on the Supreme Court, how easy it is for a junior justice to be silent, to go along with revered seniors out of fear of stepping out of line! Even very great ones have done so. My own judge, Hugo Black, told me of how, to his sorrow, he went along with Cardozo and voted to allow a clear double-jeopardy execution in *Palko v. Connecticut*, to his everlasting dismay.[8] "I was new, and I did not dare to stand up to the great Cardozo," he said to me. I could mention many, many others among justices whom I greatly admire, but who have failed in this regard.

But not Sonia. Here too and from the very beginning, she knew what she believed law and justice required, and she said so whether with others or alone. Has that made her seem less cozy to some of her Supreme Court colleagues? Perhaps. I don't know. Holding to one's belief is always costly. But to me it bespeaks a quality that is most rare in public life and in private life as well. It is a quality that made me think somehow of a poem by the great abolitionist poet James Russell Lowell.

> Once to every man and nation
> Comes the moment to decide,
> In the strife of truth with falsehood,

8. Palko v. Connecticut, 502 U.S. 319 (1937).

For the good or evil side;
Some great cause, some great decision,
Offering each the bloom or blight,
And the choice goes by forever,
'Twixt that darkness and that light.
Then to side with truth is noble,
When we share her wretched crust,
Ere her cause bring fame and profit,
And 'tis prosperous to be just;
Then it is the brave one chooses,
While the coward stands aside.
Till the multitude makes virtue
Of the faith they had denied.[9]

Sonia has never stood aside. She has always spoken the faith that law and justice required. And it is that quality that makes all the others—brains, imagination, empathy, a background that qualifies one for a job, et cetera, et cetera—meaningfully effective, because without courage they don't do anything. It is a quality that shines on and commands respect when much else has passed away. It is a quality that makes Sonia as truly admirable as she surely is. Thank you.

9. James Russell Lowell, *The Present Crisis*, *in* POEMS OF JAMES RUSSELL LOWELL 96 (1912), *as adapted in Once to Every Man and Nation*, *in* WILLIAM J. PETERSON & ARDYTHE PETERSON, THE COMPLETE BOOK OF HYMNS 185 (2006).

TRIBUTE TO JUSTICE SONIA SOTOMAYOR

JUDGE DEBORAH A. BATTS

I have been given the honor and privilege of giving a tribute to my dear and constant friend, former colleague, and big boss, the Honorable Sonia Sotomayor. Or, to put it another way, our mission tonight—and my colleagues up here and I come from a very deep bench of Sotomayor fans—is to try to do justice to the Justice. I would call this truly a mission impossible. And when you heard me just say "deep bench of fans," you may have wondered how did I mean it. Bench, of course, is often a term used to describe judges, as in "appointed to the bench." Deep bench, however, is sports terminology, which means having a large number of very talented players. As not all players can play at the same time, other very talented players will be sitting on the bench waiting to go in. Bob, Guido, Dawn, and I are very lucky that we get to play on the starting Sotomayor team tonight, whose other loving members are legion. Being here, talking to you now in that capacity, is better than being elected to the Baseball Hall of Fame.

Why all this sports talk? Because I want to talk briefly about a case that affected millions of baseball fans, that is historic and interesting, and was decided by then-District Court Judge Sonia Sotomayor, and which prompted President Obama in June of 2009 to introduce her to the world as not only his Supreme Court nominee, but as, quote, "the woman who saved baseball," close quote.[10] I want to talk about *Silverman v. MLB Players Relations Committee*.[11] The petitioner, or plaintiff, was the regional director for region two of the National Labor Relations Board. The respondent, or defendant, was the collective bargaining representative for the twenty-eight Major League Clubs, or the "Owners."

The National Labor Relations Board ("NLRB") issued a complaint on the basis of charges filed by the players that the Owners had violated the National Labor Relations Act by unilaterally eliminating, before an impasse had been reached, salary arbitration for certain reserve players, competitive bargaining for certain free agents, and the anti-collusion provision of their collective bargain-

10. President Barack Obama, Remarks at the Nomination Ceremony of Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009).

11. Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y. 1995).

ing agreement.[12] The NLRB sought an injunction against the Owners' unfair labor practices. In December of 1993, the basic agreement had expired, and negotiations began for a new agreement in March of 1994. Negotiations were ongoing, but on August 12, 1994, the players commenced a strike. The Owners wanted a salary cap, elimination of the salary arbitration system, and a more restricted free agency system. The players objected to the salary cap, but were open to a tax system on high paying clubs to deter extravagant wage offers.

On March 29, 1995, the players offered to return to work if the court issued an injunction restoring the full terms of the expired basic agreement. If the court did not issue the injunction, opening day with replacement players was scheduled for April 2, 1995. Now, notice the very short window between March 27, 1995, when the NLRB petition for an injunction was filed, and opening day on April 2, 1995. However, Judge Sotomayor's opinion was rendered on March 31, 1995.

In enjoining the unilateral action of the Owners and restoring the terms of the expired basic agreement, then-Judge Sotomayor said:

> The Owners argue that the right to bid competitively or collectively must be a permissive type of bargaining, because if it were a mandatory topic, the Owners would be forced to give up their statutory right to bargain collectively. Courts in addressing the antitrust area of law have easily recognized, however, that the essence of collective bargaining in professional sports is the establishment and maintenance of reserve and free agency systems in which owners agree to bid competitively for some players and collectively for others. The Owners' argument has a superficial appeal in its attempt to harken back to the unionizing cry of employees when they banded together to create this nation's union [sic] laws. What the Owners have missed here, and the NLRB has not, is that the statutory right to join collective bargaining units belongs to employees, not employers. *The NLRA gives only employees the right to bargain collectively through an elected representative.* . . . In other words, the term "employer union" for collective bargaining purposes is not meaningful.[13]

Or in other words, play ball!

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12. *Id.*

13. *Id.* at 256.

You know, earlier I said Justice Sotomayor's friends are legion and that those of us up here are so fortunate to represent them. Of the four of us, I am the new kid on the block, since I only met Justice Sotomayor in 1991, shortly after Senator Daniel Patrick Moynihan put both our names forward for district court judges. We went to dinner, talked all night, and have been fast friends ever since. As a friend, she is wonderful—intensely loyal, supportive, loving, considerate, funny, candid when it is not easy to be, and always there for you and with you.

Now many songs have been written about enduring friendship. Carole King's "You've Got a Friend"[14] comes to mind. But because Justice Sotomayor's friends all know that she will always be there for them, another song comes to mind as well. Even though many of you are not old enough to have seen the first run of the TV show, [*The*] *Golden Girls*, there is a good chance you have seen the reruns on cable television. The show's theme song was written by Andrew Gold, and it is called "Thank You for Being a Friend." Oh, no no no, there is no need to lock the doors. I'm not going to sing it. I am going to quote the first stanza however.

> "Thank you for being a friend.
> Traveled down the road and back again.
> Your heart is true, you're a pal and a confidant.
> I'm not ashamed to say I hope it always will stay this way.
> My hat is off, won't you stand up and take a bow."[15]

Sonia, on behalf of all of us, thank you for being our friend.

14. Carole King, *You've Got a Friend*, *on* Tapestry (Ode Records, 1971).
15. Andrew Gold, Thank You for Being a Friend (Asylum Records 1978).

TRIBUTE TO JUSTICE SONIA SOTOMAYOR

DAWN CARDI

Before I talk about her, I just want to say that before you get out there and practice law, you never know who your colleague is going to become. You never know who your adversary is. It is terribly important to be respectful of each other, and to listen [to each other,] and not judge from where they stand. Because had we not done that, I would not be here today and I would not have had the best friend in the world. So that's just a little aside.

When I was invited to speak tonight, I was honored and touched to do so. So, I asked if there was a theme, and I was told that I should speak about Sonia's achievements. Well I thought, achievements, wow, how many hours do we have this evening? And then I was told I should only speak about eight to ten minutes and I was relieved, because clearly, I was not expected to speak about all of her achievements.

So, I began to think about what aspects of her achievements I should discuss. And I decided that most people know about her professional achievements, and some who have read her memoir know about her personal achievements. There is so much I could tell you about her. Don't worry Sonia, I promise not to tell everything.

I was struggling to organize my thoughts, when I heard President Obama interviewed on *60 Minutes*. And when he was asked what was he looking forward to when he left the White House, one of his first answers was "living outside the bubble." And my first thought was of Sonia. One of her biggest fears when she was nominated, and ultimately named to the Supreme Court, was that she would be trapped somehow by the bubble. The bubble, as you know, is that world that famous, powerful people live in whether they want to do so or not. It is the way that people start to treat you differently because you are famous and powerful; it's what happens to your head when people start to treat you this way and when you live in the bubble.

I suddenly realized that one of Sonia's greatest achievements has been that she has transcended the bubble. I will tell you how she's done it, and it will resonate, I am sure, with those in this room who know her and love her for it.

Sonia, despite her staggering work schedule, always makes time for family and friends, and her clerks are her family. How many

weddings has she done, how many showers, christenings, birthdays, anniversary parties has she arrived with a gift in tow, and her down-to-earth, warm, and friendly manner? People at your party or event who have never met her are often taken by surprise at how warm and affectionate she is to all. If someone is ill or has a problem or there's a death in the family, she will be there if she can. And if she cannot, she will call or text or send an e-mail. Or sometimes she writes a lovely hand-written note. I don't know how she does it. Is there a single person on the planet who has asked her to sign a book and she said no? Not only does she sign the book though, but she wants to know about the person who is receiving the book, so that she can write a personal note that applies to that person. Who lives in the bubble and does this?

One of the most important ways that she has transcended the bubble is through her intentional outreach to children of all ages, ethnicity, socio-economic backgrounds. She especially gives to those children who may have struggles, be it poverty, language, health issues, and the like. She will make an extra effort to hug them, to smile with them, bring them close to her, and share with them confidence to follow their dreams.

Many of you know, but some of you may not, that in almost every single trip that she makes to address distinguished groups, be it lawyers, judges, law schools, professors, the rich and famous who court her company, she schedules a visit to children in the poorest neighborhoods, to families and organizations who service those needs. Wherever it is, she insists that she visits places where no Supreme Court Justice has ever been. Every summer, she participates in the major event for the children of the Bronx, [The] Dream Big [Initiative]. And she gets other famous people who can inspire these children to come and join the event. Just a week or so ago, she visited a school in the poorest neighborhood of Newark because the principal called her chambers and so impressed her that she said okay. She has not forgotten her roots: what it was like to be that poor child with health issues—that child whose family struggled to make it in a very tough world.

Whenever we go to a restaurant, she will patiently take photos with every one of the staff who asks her—and I have taken hundreds of photos with their iPhones. She is especially kind to the kitchen staff, who are thrilled to be treated with such respect and spoken to with such warmth.

I was in Washington one weekend and we were walking to her apartment. And some law student came up to tell her how much they admired her and asked to take a photo with her. "Of course,"

she said, "Yes." And I thought, would that law student feel as comfortable approaching some of her other colleagues on the Supreme Court bench?

Sonia often visits her mother, Celina, in Florida, and when Celina's husband Omar was ill and dying, she sought out as many medical professionals to try to help him. She made extra visits to be there for him and her mother. She was and remains a beloved and devoted daughter who has never let the Supreme Court duties prevent her from being there for her mother when she needs her the most.

And her kindness extends to my husband's parents: Mike, a retired bus driver, and Eve, a homemaker, who passed away last year at the ages of 103 and 96. She never missed a visit with them. When she came, their eyes would light up as she came to the door. She makes my in-laws feel so special, and they loved her for it. I promise you that she does this for so many, many people who cross her path. What she does is she gives the gift of herself. We would all do well to try to emulate her this way. The world would be a much nicer place.

I watch her closely when she is doing an event and I listen to her speak: "It can be very hard when you live in a bubble to keep your true voice." She has kept her true voice. It is the same voice of the Sonia I met in 1980, when we were both just baby lawyers, just beginning in the profession we both loved then and still love now.

Sonia is very generous. She has opened her very exciting world of meeting famous and amazing people, or doing very exciting or prestigious events with the people she knew before she was famous. Others who live in the bubble might seek out new, more prestigious friends, but not Sonia. While she has, and will continue to enjoy the amazing people and experiences that have opened for her since she's come to the Supreme Court, she never forgets to share those exciting experiences with the people she knows and loves. My son Zachary will never forget that he went with her to Vice President Joe Biden's swearing in because he was staying with her because he wanted to be there for President Obama's inauguration. He had no idea when she offered him a place to stay that she would invite him to such an event. She just said, "Hey Zach, do you have something to wear like a shirt and a tie?" Actually, he surprisingly did, and off they went. This is who Sonia is, and Zach will never forget that experience for the rest of his life.

Every summer when she visits at my underwhelming beach club, she greets people who she's met before and seeks out some

senior members of the club, asking them about their health, their grandchildren, their life, and she really listens. She really cares.

Last summer, a teacher in a poor school in Brooklyn told her how much her class idolized her. And she made arrangements for them to meet her at the Supreme Court when they came to Washington.

A dear criminal defense attorney passed away suddenly last year, Ed Wilford, who had been one of my officemates at Legal Aid. Ed and Tony Ricco, his partner, went on to become premier criminal defense attorneys, fighting bigotry, racism, and injustice for all. Sonia wrote the most beautiful letter to his daughter and his son about Ed. Tony Ricco wept when he gave it to the family.

She dances salsa with Notorious RBG. She loves to play poker, and if she's not winning you are not allowed to leave. When the criminal justice system or the family law that I practice still sometimes makes me weep for my clients, she tells me when I stop weeping for my clients I will stop practicing law.

She who goes into her office and helps decide the legal issues of the century never, never makes me feel that my practice is one iota less important than hers. One of her finest examples of transcending the bubble may surprise some of you who don't know her. Despite the fact that her job is to be one of the top judgers in the world, she rarely, if ever, is judgmental in her personal life. Sonia always looks deeper into the person and the behavior, seeking out the reasons or motivations, which compel behavior among the people she knows. Sonia may find the behavior problematic, but doesn't judge the person. I've often heard her say, "Good people can make bad decisions." I believe it's why she's so able to negotiate the world that she must and get along so well with people who may have starkly different views. Sonia has maintained her humility. Isn't that a wonderful accomplishment?

So, my dear friend Sonia, what you feared the most was this job would change you, that the bubble would somehow make you different, that you would lose the sense of who you are and the roots from which you sprung. Well my friend, you have transcended the bubble, you have made a difference, because of who you are. And we all in this room love you for it.

Acknowledgment

JUSTICE SONIA SOTOMAYOR

I think you can understand when I say I'm overwhelmed. I turned to Austin and said this wasn't supposed to make me cry, but I am. I was going to start by thanking the *Annual Survey* for touching me by dedicating journal seventy-three to me. I thought, and still do, that it was a tremendous, tremendous honor. And I thank all of you who have had a part in making it happen. My grandmother's upstairs in heaven playing seventy-three as her number for the week. She's probably boxing it so—for those who don't know what it means look at the Internet.

You know, Connie Motley, the legendary Justice Constance Baker Motley, who I was graced to sit with on the Southern District of New York bench, came to me after I decided the baseball case.[16] And she came down and sat with me and said, "Sonia it doesn't matter what you do in life. When you die, your obituary will start with 'Baseball Judge Dies.'" Connie, as with so many things, was absolutely right.

But what the *Annual Survey* has done for me is a greater gift. It's the gift of palpably knowing, palpably feeling, the love of friends who I adore. Every one of you has played such a special part of my life. One that has helped me with some of the toughest times, one who's gotten me to the Supreme Court—I don't always forgive him for that, especially when I'm back home—but I am blessed with so many things, but not the least of which is friends who are so special and treasured to me. Thank you.

I thought that the greatest gift of the nomination process, despite Trevor—a process I will never ever, ever repeat—was seeing my brother cry on television one day. 'Cause I knew how much he loved me. You can watch me cry and know how much I love you. Thank you, my friends. And thank you to everyone in this audience. So many of my former law clerks, so many of my judicial colleagues—who if I mention one and then I forget somebody, and then I'm going to be horribly embarrassed—but to the others, who have spent their time with me, and with whom I have shared so much, it is an honor. John, I had no understanding at your tribute

16. Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y. 1995).

how you felt, because I thought it was all true. What happens when you don't think it's all true but you're grateful anyway?

I am grateful. Thank you all. This is deeply, deeply touching.

FAST & FURIOUS: THE MISREGULATION OF DRIVERLESS CARS

*TRACY HRESKO PEARL**

[I]nasmuch as nature abhors a vacuum, lawmakers might hate vacuums more. If there is an unlegislated topical issue, legislators will fill that empty space.

—John Frank Weaver[1]

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1. JOHN FRANK WEAVER, ROBOTS ARE PEOPLE TOO: HOW SIRI, GOOGLE CAR, AND ARTIFICIAL INTELLIGENCE WILL FORCE US TO CHANGE OUR LAWS 45 (2014).

On May 7, 2016, the United States suffered its first fatality in a car accident involving a partially self-driving vehicle.[2] Joshua Brown, a forty-year-old business owner and former Navy SEAL, was driving his 2015 Tesla Model S down a highway in Williston, Florida, when the vehicle drove under the trailer of an eighteen-wheel truck that had turned left in front of his vehicle moments before.[3] The impact sheared the roof off the Tesla.[4] Mr. Brown was pronounced dead at the scene.[5]

Use of the phrase "the vehicle drove" is a correct description of the accident. At the time of his death, Mr. Brown had the vehicle's "Autopilot" engaged.[6] This feature allowed the vehicle "to steer itself within a lane, change lanes, and speed up or slow down based on surrounding traffic or the driver's set speed."[7] In Autopilot mode, the vehicle could also "automatically apply brakes and slow the vehicle," as well as scan for parking spaces and parallel park on its own.[8] Prior to May 7, 2016, Tesla's Autopilot feature "managed to log a combined 130 million miles without a single crash involving a fatality."[9] The technology involved seemed so reliable, in fact, that Elon Musk, Tesla's famous and sometimes controversial CEO, went on record earlier in the year saying that the probability of having an

2. Tom Krisher & Joan Lowy, *Tesla Driver Killed in Crash While Using Car's 'Autopilot'*, Associated Press (June 30, 2016, 10:26 PM), http://bigstory.ap.org/article/ee71bd075fb948308727b4bbff7b3ad8/self-driving-car-driver-died-after-crash-florida-first.

3. *Id.*; Mike Spector & Ianthe Jeanne Dugan, *Tesla Draws Scrutiny After Autopilot Feature Linked to a Death*, Wall St. J. (June 30, 2016), http://www.wsj.com/articles/tesla-draws-scrutiny-from-regulators-after-autopilot-feature-is-linked-to-a-death-1467319355.

4. Krisher & Lowy, *supra* note 2.

5. *Id.*

6. Spector & Dugan, *supra* note 3.

7. Krisher & Lowy, *supra* note 2.

8. *Id.*

9. Zach Epstein, *Man Who Died in Fatal Crash with Model S on Autopilot Was Allegedly Watching a Movie*, BGR (July 1, 2016, 6:44 AM), http://bgr.com/2016/07/01/model-s-autopilot-accident-movie/.

accident in a Tesla Model S with Autopilot engaged was "50 percent lower" than it would be with a human driver in total control.[10]

Somewhat ironically, Mr. Brown was also a champion of Tesla's Autopilot technology. He was known in the Tesla community for "testing the limits of the Autopilot function, documenting how the vehicle would react in blind spots, going around curves and other more challenging situations," and posting numerous videos online that showed how the feature worked.[11] Merely a month before his untimely death, moreover, Mr. Brown posted a video in which he credited the Autopilot system for saving his life by avoiding a crash when a truck swerved into his lane on an interstate.[12] "Hands down the best car I have ever owned and used to its full extent," he wrote in the caption to his video.[13] Tragically, a glitch in the Autopilot system appears to have been at least a partial factor in his death weeks later: "his car's cameras failed to distinguish the white side of [the] turning tractor-trailer from a brightly lit sky and didn't automatically activate its brakes."[14]

In the weeks after the crash, driverless vehicle technologies faced increased—and often hostile—scrutiny from both the media and industry insiders who voiced reservations about "the progress of automated cars," and significant concerns about their safety.[15] The *New York Times* asserted that the Tesla accident brought "the belief that computers can operate a vehicle more safely than human drivers" into question.[16] *Fortune* worried that Mr. Brown's death could "cast a shadow on the emerging world of self-driving cars, which are under development by some of the world's biggest auto and tech companies . . . ."[17] Karl Brauer, an analyst for *Kelley*

10. Anthony Cuthbertson, *Elon Musk: Tesla's Autopilot Reduces Crashes by 50%*, NEWSWEEK (Apr. 25, 2016), http://www.newsweek.com/elon-musk-teslas-autopilot-reduces-crashes-50-451929.

11. Rachel Abrams & Annalen Kurtz, *Joshua Brown, Who Died in Self-Driving Accident, Tested Limits of His Tesla*, N.Y. TIMES (July 1, 2016), http://www.nytimes.com/2016/07/02/business/joshua-brown-technology-enthusiast-tested-the-limits-of-his-tesla.html.

12. Joshua Brown, *Autopilot Saves Model S*, YOUTUBE (Apr. 5, 2016), https://www.youtube.com/watch?v=9I5rraWJq6E.

13. *Id.*

14. Krisher & Lowy, *supra* note 2.

15. Spector & Dugan, *supra* note 3.

16. Neal E. Boudette & Bill Vlasic, *Self-Driving Tesla Was Involved in Fatal Crash, U.S. Says*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/business/self-driving-tesla-fatal-crash-investigation.html?_r=0.

17. Katie Fehrenbacher, *Regulators Examine a Fatal Crash with Tesla's Autopilot*, FORTUNE (June 30, 2016, 2:54 PM), http://fortune.com/2016/06/30/regulators-examine-a-fatal-crash-with-teslas-autopilot/.

Blue Book, said that the accident was "a bit of a wake-up call" and that perhaps industry insiders needed to "reassess" their view that driverless technologies would be ready for the market soon.[18] A Florida news affiliate said that the crash was "raising safety concerns" for everyone in the entire state.[19] Perhaps the strongest reaction, however, came from Clarence Ditlow, Executive Director of the Center for Auto Safety, who said that "[t]he Tesla vehicles with Autopilots are vehicles waiting for a crash to happen," and asserted that they ought to be recalled so that Tesla could disable the feature until the federal government could issue safety guidelines.[20]

While this single car accident yielded seemingly hundreds of pages of news coverage and online discussion, behind every article, blog post, and social media comment lurked two fundamental questions: (1) who should be held responsible for autonomous vehicle crashes and (2) what should the consequences be? With regard to the first, opinions varied. The initial accident report from the Florida Highway Patrol noted that the truck driver "failed to yield right-of-way" before turning in front of Mr. Brown's Tesla.[21] Subsequent reports were more damning of Mr. Brown's behavior, revealing that a DVD player was found at the scene of the accident and that Mr. Brown may have been watching a Harry Potter movie at the time of his death, despite the fact that Tesla had explicitly warned customers that its Autopilot feature was "not reliable enough for a driver to stop paying attention [to the road]" while the feature was engaged.[22] Finally, other commentators suggested that perhaps Tesla itself should be held responsible for the crash for, among other things, using "human guinea pigs" to beta-test its

18. Boudette & Vlasic, *supra* note 16.

19. Nick Bolton, *How the Media Screwed Up the Fatal Tesla Accident*, VANITY FAIR (July 7, 2016), http://www.vanityfair.com/news/2016/07/how-the-media-screwed-up-the-fatal-tesla-accident (quoting ABC Action News, *Witnesses to Aftermath of Deadly Tesla Say Autopilot Continued to Drive Car for Hundreds of Yards*, YOUTUBE (July 1, 2016, 5:00 AM), https://www.youtube.com/watch?v=gQNMvHbL3jU).

20. Jim Puzzanghera, *Fatal Tesla Crash Exposes Lack of Regulation over Autopilot Technology*, L.A. TIMES (July 1, 2016, 4:45 PM), http://www.latimes.com/business/la-fi-hy-tesla-selfdriving-safety-20160701-snap-story.html.

21. Barbara Liston & Bernie Woodall, *DVD Player Found in Tesla Car in Fatal May Crash*, REUTERS (July 1, 2016, 11:04 PM), http://www.reuters.com/article/us-tesla-autopilot-dvd-idUSKCN0ZH5BW.

22. Mahita Gajanan, *Tesla Driver May Have Been Watching Harry Potter Before Fatal Crash*, VANITY FAIR (July 2, 2016), http://www.vanityfair.com/news/2016/07/tesla-driver-may-have-been-watching-harry-potter-before-fatal-crash.

autonomous driving technologies before they had been proven safe.[23]

With regard to the second question—what the larger consequences of the crash should be—there was even greater ambiguity and uncertainty in the commentary. Should this accident force car manufacturers to delay their roll-out of new autonomous technologies,[24] or was it merely a tragic but unavoidable (and perhaps ultimately helpful) setback on what should be a determined march towards fully driverless cars?[25] Had states done enough to regulate these vehicles? Might greater *federal* regulation be the answer?[26] No one seemed quite sure.

Coverage of this accident, along with scores of other news and scholarly articles about autonomous vehicles, suggests that there is an even more basic problem than mere uncertainty lurking behind the analysis of accidents like this one: a fundamental confusion about driverless cars among journalists, scholars, lawmakers, and the general public that (a) makes assessing responsibility in incidents like this one unduly difficult, and (b) impedes the ability of policymakers to pass sound laws and regulations pertaining to the design and use of autonomous vehicles. Most notably, individuals within all of these sectors almost constantly conflate *fully* autonomous and *semi*-autonomous cars. This distinction, this Article argues, is extremely significant from a legal perspective and offers tremendous clarity to what might otherwise be thorny questions of law and public policy. In failing to make this distinction, lawmakers risk severely and unduly hampering the development of a technology that has the potential to radically improve and transform society within the next decade. Indeed, this Article argues, while it may seem counterintuitive, drawing a *legal* distinction between fully autonomous and semi-autonomous vehicles—and regulating the former significantly less—is the best way to promote needed technological advancement while simultaneously protecting human life.

Part I of this Article describes the current state of driverless car technology in the United States, the key differences between semi-

23. Patrick Lin, *Is Tesla Responsible for Deadly Crash on Auto-Pilot? Maybe.*, FORBES (July 1, 2016, 12:55 AM), http://www.forbes.com/sites/patricklin/2016/07/01/is-tesla-responsible-for-the-deadly-crash-on-auto-pilot-maybe/#1955a9ed5bbc.

24. Boudette & Vlasic, *supra* note 16.

25. Bolton, *supra* note 19 (suggesting that the crash provided a learning opportunity for car manufacturers).

26. Puzzanghera, *supra* note 20.

autonomous and fully autonomous cars, and the two divergent approaches that manufacturers are taking towards the development of driverless cars. Part II analyzes the key benefits offered by fully autonomous cars: the dramatic ways in which they stand to improve highway safety, reduce traffic, increase productivity, and provide greater access to reliable transportation. Part III examines both existing state laws that pertain to driverless cars and the growing call for federal regulation. Parts IV and V examine two provisions that states commonly include in their driverless car laws: operator provisions and override provisions. These sections explore the limitations of those laws when applied to, respectively, semi-autonomous and fully autonomous vehicles, and the nonsensical and problematic legal issues that arise from each. The Article concludes in Part VI by proposing a series of "legislative best practices" that state lawmakers should follow when contemplating driverless car legislation so that any resulting laws will both promote the development of autonomous vehicle technologies and enhance, rather than undermine, highway safety.

I.
DRIVERLESS CARS IN THE UNITED STATES

Driverless cars, also known as autonomous vehicles (this Article uses these terms interchangeably), are those that do not require "real-time human input to operate or navigate. Instead, these vehicles use various sensors and computer software to collect and process information about the surrounding environment."[27] These sensors "collect information about both internal conditions, such as speed and direction, and external conditions, such as the environment and vehicle location."[28] As discussed at greater length below, fully autonomous cars require no driver input other than (a) turning on the vehicle and (b) inputting a destination. Semi-autonomous vehicles, however, only direct "*some* aspects of safety-critical control function (e.g., steering, throttle, or braking) . . . without driver input," but require supervision from a licensed driver.[29]

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27. Kyle L. Barringer, Comment, *Code Bound and Down . . . A Long Way to Go and a Short Time to Get There: Autonomous Vehicle Legislation in Illinois*, 38 S. ILL. U. L.J. 121, 122 (2013).

28. *Id.*

29. Press Release, Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., U.S. Department of Transportation Releases Policy on Automated Vehicle Development (May 30, 2013), https://www.transportation.gov/briefing-room/us-department-transportation-releases-policyautomated-vehicle-development.

A. Impending Release

While fully driverless cars may still seem like a futuristic novelty item to members of the general public, the commercial availability and widespread use of these vehicles appears to be "an imminent reality."[30] Industry experts expect such cars to be "commercially available by 2020,"[31] with several positing that they may be in showrooms even earlier than that.[32] Indeed, Nissan,[33] General Motor's Cadillac division,[34] Ford,[35] and Toyota[36] have all publicly commented that they hope to have fully driverless models of their cars available by 2020, and Tesla expects to have a fully driverless model available by 2018.[37] Even the most conservative estimates predict that these cars are, at most, "10 to 15 years out."[38]

Once on the market, industry experts predict that consumer adoption of fully driverless vehicles is likely to occur quickly.[39] IHS Automotive, for example, predicts that there will be fifty-four million self-driving cars worldwide by 2035 and that "nearly all of the vehicles in use are likely to be self-driving cars or self-driving com-

30. Matthew DeBord, *2 Things You Really Need to Know About Self-Driving Cars*, BUS. INSIDER (Jan. 9, 2015, 12:24 PM), http://www.businessinsider.com/2-things-you-really-need-to-know-about-self-driving-cars-2015-1.

31. WEAVER, *supra* note 1, at 55.

32. Josh Sanburn, *Self-Driving Cars Available by 2019, Report Says*, TIME (Aug. 16, 2012), http://business.time.com/2012/08/16/self-driving-cars-available-by-2019-report-says/.

33. *Nissan Plans to Begin Selling Self-Driving Cars by 2020*, REUTERS (Aug. 27, 2013), http://www.reuters.com/article/us-autos-nissan-autonomous-idUSBRE97Q0VI20130827.

34. Doug Newcomb, *You Won't Need a Driver's License by 2040*, WIRED (Sept. 17, 2012), http:// www.wired.com/autopia/2012/09/ieee-autonomous-2040/.

35. Trefis Team, *General Motors Inching Closer to Self-Driving Cars*, FORBES (Mar. 16, 2016), http://www.forbes.com/sites/greatspeculations/2016/03/16/general-motors-inching-closer-to-self-driving-cars/#725cc71116ad.

36. *Id.*

37. *Id.* On October 19, 2016, Elon Musk, Tesla's CEO, announced that Tesla customers will have the option of purchasing a "self-driving package," which will allow the car to drive fully autonomously, when they purchase a new car. *See* Kirsten Korosec, *4 Reasons Why Tesla's Autonomous Driving Announcement* Matters, FORTUNE (Oct. 20, 2016), http://fortune.com/2016/10/20/tesla-self-driving-hardware-matters/.

38. Lou Fancher, *Hard Drive: Self-Driving Cars Are Closer Than They Appear*, S.F. WKLY. (Feb. 19, 2014), http://www.sfweekly.com/sanfrancisco/hard-drive-self-driving-cars-are-closer-than-they-appear/Content?oid=2829328.

39. *See* Andrew R. Swanson, *"Somebody Grab the Wheel!": State Autonomous Vehicle Legislation and the Road to a National Regime*, 97 MARQ. L. REV. 1085, 1094 (2014) ("In fact, it has been predicted that approximately seventy-five percent of vehicles on the road will be autonomous by 2040.").

mercial vehicles sometime after 2050."[40] Similarly, Boston Consulting Group estimates that fully autonomous vehicles "may capture 25% of the new car market" by 2035.[41] Thus "a world of driverless vehicles" appears to be far closer than most people realize.[42]

Even though the commercial sale of fully autonomous vehicles is currently several years away, cars that are semi-autonomous, like the Tesla Model S discussed above, are already being sold to consumers, with more set for release in the coming months.[43] Volvo's XC90 sport utility vehicle, for instance, "has a semi-autonomous feature called 'pilot assist' intended for congested traffic" that allows the vehicle to travel "hands-free for miles at speeds up to 30 miles per hour on a properly marked road."[44] Nissan has promised to release "the first elements of [a] suite of technology, dubbed 'Intelligent Drive,'" which will allow their cars to "follow lines and navigate heavy traffic" without driver guidance, within the next year.[45] And Cadillac plans to release a semi-autonomous system called "Super Cruise" by 2017.[46] Super Cruise will include "hands-off lane following" and "braking and speed control" technologies.[47]

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40. Press Release, IHS Markit, Self-Driving Cars Moving into the Industry's Driver's Seat (Jan. 2, 2014), http://press.ihs.com/press-release/automotive/self-driving-cars-moving-industrys-drivers-seat.

41. *Autonomous Vehicle Adoption Study*, Boston Consulting Group, http://www.bcg.com/expertise/industries/automotive/autonomous-vehicle-adoption-study.aspx (last visited March 6, 2017).

42. Brad E. Haas, *Autonomous Vehicles May Impact Legal Profession*, 17 J. Allegheny County B. Ass'n 1 (Oct. 2, 2015), http://www.marshalldennehey.com/media/pdf-articles/O%20383%20by%20B.%20Haas%20%2810.02.15%29%v20Journal%20Allegheny%20County%20Bar.pdf.

43. *See* Paul Ingrassia et al., *How Google Is Shaping the Rules of the Driverless Road*, Reuters (Apr. 26, 2016), http://www.reuters.com/investigates/special-report/autos-driverless/.

44. Aaron M. Kessler, *Hands-Free Cars Take Wheel, and Law Isn't Stopping Them*, N.Y. Times (May 2, 2015), http://www.nytimes.com/2015/05/03/business/hands-free-cars-take-wheel-and-law-isnt-stopping-them.html?_r=0.

45. John McIlroy, *Nissan IDS Concept: Japan's Affordable Rival to the Tesla Model S?*, CNN (Nov. 3, 2015), http://www.cnn.com/2015/11/03/autos/nissan-tokyo-motor-show/.

46. Joe Lorio, *Cruise Slip: Cadillac's Semi-Autonomous Super Cruise Tech Won't Arrive Until 2017*, Car & Driver (Jan. 14, 2016), http://blog.caranddriver.com/cruise-slip-cadillacs-semi-autonomous-super-cruise-tech-wont-arrive-until-2017/.

47. Anita Lienert, *GM Delays Super Cruise Technology on Cadillac CT6*, Edmunds.com (Jan. 14, 2016), http://www.edmunds.com/car-news/gm-delays-super-cruise-technology-on-cadillac-ct6.html.

B. SAE International Levels of Automation

The multitude of semi-autonomous and fully autonomous vehicle technologies that (a) already co-exist and (b) are likely to multiply in coming years led SAE International, a global association of engineers, to divide vehicle automation into six levels to provide "common terminology for automated driving" as well as to provide a technical description of the differences between levels of automation.[48] These six levels are as follows:

- Level 0—No Automation: In Level 0 vehicles, a human driver is in total control of the primary vehicle controls (brake, steering, acceleration) at all times and is responsible for monitoring both the road and the vehicle.[49] For example, a car without cruise control capabilities would be considered a Level 0 vehicle.
- Level 1—Driver Assistance: Vehicles at this level have automation options for "either steering or acceleration/deceleration using information about the driving environment and with the expectation that the human driver perform all remaining aspects of the *dynamic driving task*."[50] An example of a Level 1 vehicle would be a car with cruise control or electronic stability control. The driver has overall control of the vehicle at all times; "there is no combination of vehicle control systems working in unison that enables the driver to be disengaged from physically operating the vehicle by having his or her hands off the steering wheel AND feet off the pedals at the same time."[51] Most cars currently on the road, as of early 2017, are Level 1 vehicles.
- Level 2—Partial Automation: Level 2 vehicles have "automation of at least two primary control functions designed to work in unison to relieve the driver of control of those functions."[52] "[C]ombined functions" are the hallmark of Level 2 vehicles and include features like "adaptive cruise control [working] in combination with lane centering" that allow the driver to "disengage from physically operating the vehicle by having his or her hands off the steering wheel AND

48. SAE Int'l, Automated Driving: Levels of Driving Automation Are Defined in New SAE International Standard J3016 1, https://www.sae.org/misc/pdfs/automated_driving.pdf.

49. *Id.*

50. *Id.*

51. Nat'l Highway Traffic Safety Admin., Preliminary Statement of Policy Concerning Automated Vehicles 4 (2013).

52. *Id.* at 5.

foot off the pedal at the same time."[53] The driver, however, "is still responsible for monitoring the roadway . . . and is expected to be available for control at all times and on short notice."[54] Some cars bought within approximately the last three years are Level 2 vehicles. They only drive semi-autonomously when their drivers engage both adaptive cruise control and lane centering and they must be monitored by a human driver at all times.[55]

- Level 3—Conditional Automation: Vehicles at this level "enable the driver to cede full control of all safety-critical functions under certain traffic or environmental conditions and in those conditions to rely heavily on the vehicle to monitor for changes in those conditions requiring transition back to driver control."[56] While the driver must be available for "occasional control," the vehicle is designed to both ensure safe operation during automated driving and to provide the driver with a "sufficiently comfortable transition time" to reassume control over the vehicle.[57] An example of a Level 3 vehicle would be a "self-driving car that can determine when the system is no longer able to support automation, such as from an oncoming construction area, and then signals to the driver to reengage in the driving task . . ."[58] The National Highway Traffic Safety Administration (NHTSA) also notes that "[t]he major distinction between level 2 and level 3 is that at level 3, the vehicle is designed so that the driver is not expected to constantly monitor the roadway while driving."[59] There are no Level 3 vehicles currently available to consumers although, as discussed in Part I.A, this may change soon in light of Tesla's recent announcement.
- Level 4—High Automation: Level 4 vehicles are "designed to perform all safety-critical driving functions and monitor roadway conditions for an entire trip."[60] Unlike drivers of Level 3 vehicles, drivers of Level 4 vehicles are "not expected to be available for control at any time during the trip" other than to "provide destination or navigation in-

53. *Id.*
54. *Id.*
55. SAE INT'L, *supra* note 48, at 1.
56. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 51, at 5.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

put."[61] The entire responsibility for safe operation falls on the vehicle. However, "the automated system can operate only in certain environments and under certain conditions."[62] Level 4 vehicles are not yet available to consumers.

- Level 5—Full Automation: In Level 5 vehicles, "the automated system can perform all driving tasks, under all conditions that a human driver could perform them."[63] A human being is not needed to supervise, monitor, or control the vehicle in any setting, and is not needed as a "fallback" option in the event of system failure.[64] Level 5 vehicles have not yet been developed.

As of mid-2016, "currently available automation technologies are . . . at Level 2, and moving into Level 3,"[65] although several companies are currently test-driving Level 4 vehicles in several American cities.[66]

C. Two Roads to Automotive Autonomy

If few Americans realize how imminent the arrival of autonomous vehicles truly is, fewer still likely realize that companies are taking one of two approaches in their approach to these technologies—(1) a gradualist approach or (2) an "all-in" approach—and that a debate is raging between the two camps.[67] Understanding the differences between these two approaches—and their respective benefits and drawbacks—is helpful to understanding the types of laws that are needed to regulate driverless cars appropriately and effectively.

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61. *Id.*

62. Nat'l Highway Traffic Safety Admin., Federal Automated Vehicles Policy 9 (Sept. 2016), https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf.

63. *Id.*

64. SAE International, Automated Driving: Levels of Driving Automation Are Defined in New SAE International Standard J3016 1 (2014), https://www.sae.org/misc/pdfs/automated_driving.pdf.

65. Dorothy J. Glancy, *Autonomous and Automated and Connected Cars-Oh My! First Generation Autonomous Cars in the Legal Ecosystem*, 16 Minn. J.L. Sci. & Tech. 619, 633 (2015).

66. Marcus E. Johnson, *The Drive for Autonomous Vehicles: Idaho's Race to Catch Up*, 59 Advocate. 28, 29 (2016).

67. *See, e.g.*, Ingrassia, *supra* note 43; Justin Pritchard, *How Can People Safely Take Control from a Self-Driving Car?*, Associated Press (Nov. 30, 2015), http://bigstory.ap.org/article/84c6f179beb24f758a40acac1340ce78/how-can-people-safely-take-control-self-driving-car.

1. The Gradualist Approach

Traditional automakers are gradually phasing in autonomous technologies to their models.[68] Their strategy involves adding a few more automated features each year, eventually producing a "truly self-driving car" at some point in the future.[69] Accordingly, their vehicles will slowly evolve from the Level 2 cars of today to the Level 3 cars of tomorrow before (presumably) reaching Level 4 status at a much later date.[70] This conservative approach is consistent with the slow (but steady) evolution of vehicles that has been occurring for decades: "[A]n evolution that has gone from cruise control to anti-lock brakes to electronic stability control."[71] As one journalist notes:

> For automakers . . . self-driving is more about evolution than revolution—about building incrementally upon existing features like smart cruise control and parking assist to make cars that are safer and easier to drive, although the driver is still in control. Full autonomy may be the eventual goal, but the first aim is to make cars more desirable to customers.[72]

An engineer at Volkswagen agrees, noting that "a lot of this is getting people comfortable with the technology, showing people a benefit . . . The idea is the driver is always in control—the vehicle is there to help you."[73]

Increasing public acceptance of autonomous vehicles is perhaps the largest benefit of the gradualist approach. Recent studies have repeatedly shown that, despite the rate at which the technology is advancing, autonomous vehicles have a major public relations hurdle to overcome.[74] Indeed, the Institute of Electrical and Electronics Engineers (IEEE) "predicts that the biggest barrier to

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68. Pritchard, *supra* note 67.

69. *Id.*

70. *See id.*

71. Kessler, *supra* note 44.

72. Henry Fountain, *Yes, Driverless Cars Know the Way to San Jose*, N.Y. TIMES (Oct. 26, 2012), http://www.nytimes.com/2012/10/28/automobiles/yes-driverless-cars-know-the-way-to-san-jose.html?pagewanted=all&_r=0.

73. *Id.*

74. *See, e.g.*, *Three-Quarters of Americans "Afraid" to Ride in a Self-Driving Vehicle*, AAA NEWSROOM (Mar. 1, 2016), http://newsroom.aaa.com/2016/03/three-quarters-of-americans-afraid-to-ride-in-a-self-driving-vehicle/; Mark Vallet, *Autonomous Cars: Will You Be a Co-Pilot or a Passenger*, INSURANCE.COM (Jul. 28, 2014), http://www.insurance.com/auto-insurance/claims/autonomous-cars-self-driving.html; Mike Masnick, *Hilarious Attack Ad in Florida Suggests That Legalizing Autonomous Vehicles Puts Old People at Risk*, TECHDIRT (Aug. 16, 2012), http://www.techdirt.com/articles/20120816/02114020071/hilarious-attack-ad-florida-suggests-that-legalizing-autonomous-vehicles-puts-old-people-risk.shtml.

pervasive adoption of driverless cars may have nothing to do with technology, but will be general public acceptance."[75] A January 2016 poll by AAA, for instance, found that "three out of four U.S. drivers report feeling 'afraid' to ride in an autonomous car."[76] Another poll of 2,000 licensed drivers found that 64% of those surveyed thought humans "are better at decision-making than computers," that 61% of them believed they personally could drive better than a computer, and that 75% of them "would not trust a fully autonomous vehicle to drive their child to school."[77] Driverless cars have also been the subject of a political attack ad in at least one state: "A local campaign ad in Florida attacked candidate Jeff Brades for [voting to] legalize 'driverless cars.'"[78] The commercial centered on "the idea that driverless cars are going to run down little old ladies in the street."[79] By slowly introducing consumers to greater amounts of vehicle automation, the gradualist approach aims to combat those fears and gradually increase public acceptance of fully driverless vehicles over time.[80]

The gradualist approach, however, may have a major flaw: Level 2 and Level 3 vehicles, as explained below, may actually be *more* dangerous than fully driverless Level 4 vehicles.[81] This is the concern motivating the second approach to driverless car development: the all-in approach.[82]

2. The All-In Approach

The all-in approach is the far more aggressive approach to autonomous vehicle development being taken by tech companies, like Google,[83] and a small number of traditional automakers, like Ford.[84] This approach involves developing and testing fully driverless Level 4 vehicles immediately rather than starting with semi-au-

75. Newcomb, *supra* note 34.
76. AAA NEWSROOM, *supra* note 74.
77. Mark Vallet, *supra* note 74.
78. Mike Masnick, *supra* note 74.
79. *Id.*
80. *See* Fountain, *supra* note 72.
81. *See* Pritchard, *supra* note 67.
82. *See id.*
83. *Id.*; Alex Davies, *Google's Self-Driving Car Hits Roads Next Month–Without a Wheel or Pedals*, WIRED (Dec. 23, 2014, 1:24 PM), http://www.wired.com/2014/12/google-self-driving-car-prototype-2/.
84. Ingrassia, *supra* note 43 ("Ford Motor is developing both L3 cars and L4 cars, says Ken Washington, vice president for research and advanced engineering. But Ford prefers L4 technology because, like Google, it doesn't think a quick handoff from machine to human is feasible.").

tonomous cars.[85] Google's current prototype, for example, lacks a steering wheel and pedals and limits human control to "go and stop buttons."[86] Instead of relying on human supervision to ensure safe operation, these Level 4 vehicles use combinations of lasers, radar sensors, and cameras to gather highly detailed second-by-second information about the vehicle's surroundings.[87] One journalist describes Google's patented "LIDAR" system for its Level 4 cars as follows:

> The laser provide[s] three-dimensional depth: its sixty-four beams spin around ten times per second, scanning 1.3 million points in concentric waves that begin eight feet from the car. It [can] spot a fourteen-inch object a hundred and sixty feet away. The radar [has] twice that range but nowhere near the precision. The camera [is] good at identifying road signs, turn signals, colors, and lights. All three views [are] combined and color-coded by a computer in the trunk, then overlaid by the digital maps and Street Views that Google had already collected. The result [is] a road atlas like no other: a simulacrum of the world.[88]

In addition to these sensors, Level 4 vehicles utilize software that can "recognize objects, people, cars, road markings, signs and traffic lights, obeying the rules of the road and allowing for multiple unpredictable hazards including cyclists" and road construction sites.[89] Google is even honing its "honking algorithm" to "use different types of honks depending on the situation," much like a human driver would.[90]

Companies taking the all-in approach want to skip over semi-autonomous Level 2 and 3 vehicles because these vehicles present "one of the biggest challenges with this technology: how to safely transfer control from the computer to the driver, particularly in an

85. *Id.*

86. *Id.*

87. *See* Fountain, *supra* note 72.

88. Burkhard Bilger, *Auto Correct: Has the Self-Driving Car at Last Arrived?*, THE NEW YORKER (Nov. 25, 2013), http://www.newyorker.com/magazine/2013/11/25/auto-correct.

89. Samuel Gibbs, *Google's Self-Driving Car: How Does It Work and When Can We Drive One?*, THE GUARDIAN (May 29, 2014), https://www.theguardian.com/technology/2014/may/28/google-self-driving-car-how-does-it-work.

90. *Google Self-Driving Car Project Monthly Report: May 2016*, GOOGLE (May 2016), https://static.googleusercontent.com/media/www.google.com/en//selfdrivingcar/files/reports/report-0516.pdf.

emergency."[91] One writer observes that this is "a balancing act, one that requires providing drivers with the benefits of autonomy—like not having to pay attention—while ensuring they are ready to grab the wheel if the car encounters something it can't handle."[92] Thus far, however, this has been a balancing act that companies have been unable to perform successfully.

Tesla, for instance, recently had to explain that its Level 2 Autopilot feature "did not mean drivers could stop paying attention" after multiple videos online showed drivers doing pretty much everything *other* than paying attention to the road when Autopilot was engaged:

> Some people played games while driving. Other people pretended to sleep. One moron thought it would be a good idea to climb into the passenger seat and leave the driver's seat empty while Autopilot drove his car down the highway at about 70MPH. The proud future Darwin Awards candidate was even interviewed by *Inside Edition*. "Yeah it's a little dangerous but I have a lot of faith in [Tesla's] Autopilot system," the man said.[93]

Google discovered that Level 2 and 3 technologies could be unsafe even earlier, in 2012, when it asked some of its employees to test-drive its semi-autonomous prototypes. Although the volunteers "agreed to watch the road at all times and be ready to retake control if needed," Google filmed the volunteers being lulled by the technology into "silly behavior[s]" like searching for items in the backseat while the car was traveling at 65 miles an hour.[94] Audi conducted studies, moreover, that showed that humans are seemingly incapable of resuming control of a Level 3 vehicle quickly: "its tests show it takes an average of 3 to 7 seconds, and as long as 10, for a driver to snap to attention and take control, even with flashing lights and verbal warnings," a remarkably dangerous lag time when a vehicle is traveling at a high rate of speed.[95]

In light of these incidents and studies, all-in companies don't believe that "a quick handoff from machine to human is feasible,"

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91. Alex Davies, *Ford's Skipping the Trickiest Thing About Self-Driving Cars*, WIRED (Nov. 10, 2015), https://www.wired.com/2015/11/ford-self-driving-car-plan-google/.

92. *Id.*

93. Zach Epstein, *A Compilation of Very Stupid People Doing Very Stupid Things with Tesla Autopilot Engaged*, BGR (July 8, 2016, 10:21 AM), http://bgr.com/2016/07/08/tesla-autopilot-crash-reason-compilation-video/.

94. Ingrassia, *supra* note 43.

95. Davies, *supra* note 91.

and thus have decided to focus their efforts on designing fully driverless vehicles that are safe enough to handle *all* driving scenarios and environments without human direction or intervention.[96] Google, for instance, is currently testing over fifty Level 4 autonomous vehicles and has driven "over 2 million miles with no human control on the roads in California, Texas, and Washington State."[97]

The major flaw with the all-in approach, of course, is the public relations issue discussed immediately above. Members of the general public and proponents of the gradualist approach are "not ready for humans to be completely taken out of the driver's seat," as Mary Cummings, director of Duke University's Humans and Robotics Laboratory, testified before the U.S. Senate in March 2016,[98] and so all-in companies may experience a lack of market demand for their Level 4 vehicles if and when they are released.[99] Further, as discussed at length below, lawmakers in many states are in the process of passing—or have already passed—laws that require autonomous vehicles to permit human intervention, thus essentially outlawing Level 4 vehicles.[100] All-in companies, therefore, may have burgeoning legal battles ahead of them before they are able to sell their cars to the general public.[101]

These legal battles may be a reflection of the strange status of driverless car development in the United States: given the two competing camps of thought described above, both semi- and fully autonomous vehicles are being developed simultaneously and are likely to come to market within roughly the same period of time. More advanced Level 2 cars may be released within the same general timeframe as Level 3 *and* Level 4 cars, depending on whether their developers are all-ins or gradualists. Meanwhile, as discussed at greater length below, driverless car laws and regulations do not (as of yet) distinguish between them, creating headaches for all developers, but for all-in companies, in particular.

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96. Ingrassia, supra note 43.

97. Johnson, *supra* note 66.

98. Ingrassia, *supra* note 43.

99. *See* Tom Krisher & Justin Pritchard, *Autonomous Cars Aren't Perfect, But How Safe Must They Be?*, SALON (Mar. 17, 2016), http://www.salon.com/2016/03/17/autonomous_cars_arent_perfect_but_how_safe_must_they_be/.

100. *See* WEAVER, *supra* note 1, at 56–57 (analyzing District of Columbia legislation that requires that autonomous vehicles have a human being in the driver's seat "prepared to take control of the autonomous vehicle at any moment"); Swanson, *supra* note 39, at 1139 (discussing a Nevada regulation that "requires a device that allows the autonomous vehicle to be easily overridden by the driver").

101. *See infra* Part III.

II.
THE LIKELY IMPACTS OF DRIVERLESS CARS

Any analysis of the laws and regulations that are warranted in response to automated vehicles must be grounded in an understanding of the various impacts that this form of technology will likely have on American society, as those impacts are likely to be profound:

> Autonomous vehicles (AVs) are now poised to be the next great transformative transportation technology. They will comprise new market opportunities for products and services. They are predicted to have a significant impact on how we live, work, and use our time. They may play a critical role in our infrastructure, land use, and regional planning decisions. They have the potential to help address many enduring social needs (e.g., mobility for the disabled, improved safety, reduced pollution), but also present significant, complex, and uncertain social risks in terms of their potential to disrupt or displace existing social and economic systems. They will redefine and redistribute individual freedoms and responsibilities vis-à-vis those of the state and industry.[102]

Rushing to pass laws without a nuanced appreciation of these impacts—as many states have already done—risks undermining many of the largest benefits of autonomous vehicles, creating nonsensical criminal and civil liabilities, and stifling further development (and improvement) of the technology.[103] Four likely impacts, in particular, are highly significant.

A. Safety

Autonomous vehicles stand to make their most significant impact through improvements in traffic safety.[104] Currently, driving and riding in motor vehicles in the United States is surprisingly dangerous. Although motor vehicle crashes have declined fairly significantly over the past decade, motor vehicle crashes are still the

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102. Leili Fatehi & Frank Douma, *Autonomous Vehicles: The Legal and Policy Road Ahead*, 16 MINN. J.L. SCI. & TECH. 615, 617 (2015).

103. *See* WEAVER, *supra* note 1, at 61; Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and Its Assimilation of Innovations*, 52 SANTA CLARA L. REV. 1241, 1256 (2012); Laura Putre, *Speed Up Self-Driving Regulations, Says Volvo CEO*, INDUS. WKLY. (Oct. 9, 2015), http://www.industryweek.com/regulations/speed-self-driving-regulation-says-volvo-ceo.

104. Adeel Lari et al., *Self-Driving Vehicles and Policy Implications: Current Status of Autonomous Vehicle Development and Minnesota Policy Implications*, 16 MINN. J.L. SCI. & TECH. 735, 750 (2015).

leading cause of death for individuals at age 11 and between the ages of 16 and 24.[105] Each year, car accidents kill approximately 33,000 Americans.[106] To give that number some context, this amounts to over 90 fatalities every day,[107] or "the equivalent of a Boeing 737 falling out of the sky five days a week."[108] And those are just the accidents that involve fatalities. There are several *million* more non-fatal accidents each year.[109] In 2009, for instance, there were 10.8 million automobile accidents on American roadways, amounting to over 29,000 accidents and 6,000 injuries per day.[110]

Why do car accident fatalities and injuries remain so high despite significant improvements in automobile safety over the last several decades? The evidence overwhelmingly points to one culprit: human drivers.[111] One journalist explains:

> Human beings make terrible drivers. They talk on the phone and run red lights, signal to the left and turn to the right. They drink too much beer and plow into trees or veer into traffic as they swat at their kids. They have blind spots, leg cramps, seizures, and heart attacks. They rubberneck, hotdog, and take pity on turtles, cause fender benders, pileups, and head-on collisions. They nod off at the wheel, wrestle with maps, fiddle with knobs, have marital spats, take the curve too late, take the curve too hard, spill coffee in their laps, and flip over their

105. Nat'l Highway Traffic Safety Admin., Traffic Safety Facts: 2014 Data: Summary of Motor Vehicle Crashes 1 (May 2016), http://www-nrd.nhtsa.dot.gov/Pubs/812263.pdf.

106. Nat'l Highway Traffic Safety Admin., 2013 Motor Vehicle Crashes: Overview 1 (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812101.pdf.

107. John Villasenor, *Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation*, *in* The Brookings Institution: The Robots Are Coming: The Project on Civilian Robots 1, 3 (April 2014).

108. *Google Makes the Case for a Hands-Off Approach to Self-Driving Cars*, NPR: All Tech Considered (Feb. 24, 2016, 6:26 PM), http://www.npr.org/sections/alltechconsidered/2016/02/24/467983440/google-makes-the-case-for-a-hands-off-approach-to-self-driving-cars.

109. U.S. Census Bureau, Statistical Abstract Of The United States: 2012, at 693 (2011), http://www.census.gov/prod/2011pubs/12statab/trans.pdf.

110. *Id.*

111. *See* Carrie Schroll, *Splitting the Bill: Creating a National Car Insurance Fund to Pay for Accidents in Autonomous Vehicles*, 109 Nw. U. L. Rev. 803, 804 (2015); Nat'l Highway Traffic Safety Admin., Traffic Safety Facts: 2014 Data: Alcohol-Impaired Driving 1 (Dec. 2015), http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf; *New Allstate Survey Shows Americans Think They Are Great Drivers–Habits Tell a Different Story*, Allstate Newsroom (Nov. 3, 2011), https://www.allstatenewsroom.com/news/new-allstate-survey-shows-americans-think-they-are-great-drivers-habits-tell-a-different-story-2/.

> cars. Of the ten million accidents that Americans are in every year, nine and a half million are their own damn fault.[112]

Indeed, studies have consistently shown that approximately 94% of all motor vehicle accidents are caused by human error, with less than 6% being caused by product defects or malfunctions.[113] Two driving issues, in particular, account for a significant number of accidents.

First, despite large scale—and fairly successful—public health campaigns over the last twenty years, alcohol and drug-impaired driving is still an enormous problem in the United States.[114] In 2014, for instance, alcohol-impaired traffic accidents killed 9,967 people, amounting to approximately 31% of all traffic-related fatalities and averaging one fatality every 53 minutes.[115] Further, the annual cost of alcohol-related motor vehicle accidents typically exceeds $59 billion.[116]

Second, distracted driving is a significant and growing problem on American roadways. In a survey of 1,000 American drivers conducted by Allstate, seven in ten respondents said that "as a result of being distracted while driving, they [had] slammed their brakes or swerved to avoid an accident, missed a traffic signal, or actually caused an accident."[117] Thirty-four percent of respondents admitted to having sent a text message or e-mail while driving, although the rate was significantly higher for younger drivers: 63% of respondents ages 18 to 29 and 58% of respondents ages 30 to 44 admitted to texting or e-mailing while driving.[118]

There are other human driver issues that contribute to high motor vehicle accident rates as well. Eighty-nine percent of drivers admit that they've driven over posted speed limits, with 40% saying they've driven more than twenty miles per hour over that limit.[119] Forty-five percent of drivers "say they have driven while excessively tired—to the point of almost falling asleep."[120] Even cautious and

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112. Bilger, *supra* note 88.

113. *See* Schroll, *supra* note 111, at 805.

114. Nat'l Highway Safety Traffic Admin., Alcohol-Impaired Driving, *supra* note 118.

115. *Id.*

116. *Id.* at 2.

117. Allstate, *supra* note 111.

118. *Id.*; *see also* Bilger, *supra* note 88 ("More than half of all eighteen-to-twenty-four-year-olds admit to texting while driving, and more than eighty per cent drive while on the phone.").

119. Allstate, *supra* note 111.

120. *Id.*

conscientious drivers occasionally make mistakes, misperceive their surroundings, or experience lapses in judgment.[121]

In light of these numbers, most autonomous vehicle researchers agree that fully autonomous vehicles can drastically improve highway safety in the United States because they take the most dangerous part of motor vehicles—human drivers—out of the proverbial equation.[122] One scholar notes that "[a]utonomous systems do not get drunk. Nor do they get tired or suffer from such distractions as texting while driving."[123] Beyond that, autonomous vehicles are likely to be safer than human-driven vehicles because they do not suffer from the limitations of human perception and have faster reaction times:

> I don't care how good of a driver you are (or you think you are): your car, being for all practical purposes a robot, can digest a huge amount of data and make a decision about the best course of action to take in approximately the same amount of time it takes for you to move your foot from the gas to the brake. Our brains just don't work fast enough to keep up, and if something goes wrong, your car will be vastly better than you are at keeping you (and your passengers) from harm.[124]

Indeed, unlike human drivers, automated vehicles have 360-degree perception and the ability to make driving decisions twenty times per second.[125] A poignant story told by Dmitri Dolgov, the lead programmer for Google's driverless car initiative, highlights the ways in which these vehicles can improve upon human driving:

> Dolgov was riding through a wooded area one night when the [driverless] car suddenly slowed to a crawl. "I was thinking, What the hell? It must be a bug," he told me. '"Then we no-

121. *See* Villasenor, *supra* note 107, at 3.

122. *See* Barringer, *supra* note 32, at 137; Neal Katyal, *Disruptive Technologies and the Law*, 102 GEO. L.J. 1685, 1688 (2014); Lari, *supra* note 104, at 735; David Levinson, *Climbing Mount Next: The Effects of Autonomous Vehicles on Society*, 16 MINN. J.L. SCI. & TECH. 787, 795 (2015); Schroll, *supra* note 111, at 805; Evan Ackerman, *Study: Intelligent Cars Could Boost Highway Capacity by 273%*, IEEE SPECTRUM (Sept. 12, 2012), http:// spectrum.ieee.org/automaton/robotics/artificial-intelligence/intelligent-cars-could-boost-highway-capacity-by-273; J. Lutin et al., *The Revolutionary Development of Self-Driving Vehicles and Implications for the Transportation Engineering Profession*, ITE J., July 2013, at 28.

123. Lutin, *supra* note 122, at 28.

124. Ackerman, *supra* note 122.

125. Abby Haglage, *Google, Audi, Toyota, and the Brave New World of Driverless Cars*, THE DAILY BEAST (Jan. 16, 2013), http://www.thedailybeast.com/articles/2013/01/16/google-audi-toyota-and-the-brave-new-world-of-driverless-cars.html.

> ticed the deer walking along the shoulder." The car, unlike its riders, could see in the dark.[126]

Accordingly, researchers believe that if even just 10% of the motor vehicles used in the United States were autonomous, 1,100 fewer people would die in car accidents each year.[127] At a 50% market penetration, 9,600 lives would be saved and 2 million fewer traffic accidents would occur each year.[128] At a 90% market penetration, 21,700 lives would be saved and there would be over 4 million fewer crashes each year in the United States.[129] One scholar theorizes that "[w]e might plausibly imagine a reduction to hundreds of deaths per year in the United States as we achieve full deployment" of autonomous vehicles.[130] In fact, driverless cars are predicted to reduce accidents by so much that the automobile insurance industry is preparing for its revenues to shrink considerably and premiums to "drop as much as 60 percent in 15 years as self-driving cars hit the roads."[131]

B. Traffic Reduction

Widespread use of autonomous vehicles could also drastically reduce highway congestion in the United States, an issue which currently costs the country approximately $100 billion in wasted fuel and reduced productivity each year.[132] The reason for this likely improvement is fairly simple:

> Because they are safer, autonomous vehicles can have shorter headways. They can follow other each other at a significantly reduced distance. Because they are safer and more precise and more predictable, autonomous vehicles can stay within much narrower lanes with greater accuracy. Lateral distances can be closer; lanes can be narrower.[133]

Human drivers, however, require fairly significant headway between cars and for a good reason: our (comparatively) slower reaction

126. Bilger, *supra* note 88.

127. Jeffrey K. Gurney, *Driving into the Unknown: Examining the Crossroads of Criminal Law and Autonomous Vehicles*, 5 WAKE FOREST J.L. & POL'Y 393, 402 (2015).

128. Adam Thierer & Ryan Hagemann, *Removing Roadblocks to Intelligent Vehicles and Driverless Cars*, 5 WAKE FOREST J.L. & POL'Y 339, 353 (2015).

129. Katyal, *supra* note 122, at 1688.

130. Levinson, *supra* note 122, at 795.

131. Noah Buhayar & Peter Robison, *Can the Insurance Industry Survive Driverless Cars?*, BLOOMBERG BUSINESSWEEK (July 30, 2015, 5:00 AM), http://www.bloomberg.com/news/articles/2015-07-30/can-the-insurance-industry-survive-driverless-cars-.

132. Lari et al., *supra* note 104, at 796–97.

133. Levinson, *supra* note 122, at 796–97.

times mean that we have to stay some distance away from the vehicle ahead of us in order to safely respond if that vehicle comes to a sudden stop.[134] Consequently, even on a highway filled to capacity by human drivers, cars currently take up only about eight percent of the available road space.[135]

This number will likely change dramatically as autonomous vehicles take the road. One study, for instance, showed that replacing human-driven cars with autonomous vehicles would boost the capacity of U.S. roads by a "staggering" 273%.[136] Even the most conservative estimates suggest that widespread use of autonomous vehicles would double road capacity.[137] Other similar types of potential improvements include "fewer lanes needed due to increased throughput, narrower lanes because of accuracy and driving control of [autonomous vehicles], and a reduction in infrastructure wear and tear through fewer crashes."[138] Fuel efficiency will likely increase significantly as well.[139]

C. Increased Productivity

Fully driverless cars also allow would-be drivers to regain their commute time and channel it into activities other than monitoring the roadway and the vehicle.[140] If recent studies are correct, this would result in substantial time savings:

> According to the [U.S.] Census, there were a little over 139 million workers commuting in 2014. At an average of 26 minutes each way to work, five days a week, 50 weeks a year, that works out to something like a total of 1.8 *trillion* minutes Americans spent commuting in 2014. Or, if you prefer, call it 29.6 billion hours, 1.2 billion days, or a collective 3.4 million years. With that amount of time, we could have built nearly 300 Wikipedias, or built the Great Pyramid of Giza 26 times—all in 2014 alone. Instead, we spent those hours sitting in cars and waiting for the bus.[141]

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134. *Id.*

135. WEAVER, *supra* note 1, at 178.

136. Ackerman, *supra* note 122.

137. WEAVER, *supra* note 1, at 178.

138. Lari, *supra* note 104, at 752.

139. Barringer, *supra* note 27, at 136.

140. WEAVER, *supra* note 1, at 49.

141. Christopher Ingraham, *The Astonishing Human Potential Wasted on Commutes*, WASH. POST, Feb. 25, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/02/25/how-much-of-your-life-youre-wasting-on-your-commute/.

During this regained time, would-be drivers will be able to work, read, sleep, watch television, or complete tasks that they would not have otherwise been able to work on had they been driving.[142] Even if this time is not used to complete tasks associated with formal employment (e.g., participating in conference calls, drafting reports, contacting clients, etc.), there are still presumably significant gains for productivity as a whole:

> [I]f you give a person two free hours, he's probably not going to spend that time working. He'll watch TV or play Candy Crush or drink beer with his friends, or do other things that are not necessarily productive. But over time, that person will have more time to be civically engaged. He'll have more time to take care of his kids or his health or his marriage. He'll be better-rested, and a better worker for it. The benefits are potentially limitless.[143]

Additionally, to the extent that empty driverless cars could eventually be dispatched to pharmacies, restaurants, and other similar types of establishments to pick up items that human beings would otherwise have to spend time fetching, Americans could regain at least a portion of the vast amount of time they currently spend driving vehicles for "personal and family-related purposes."[144]

D. Accessibility

One of Google's first advertisements for its driverless car initiative was a commercial featuring a blind man named Steve Mahan.[145] The commercial shows Mahan climbing into the "driver's" seat of a Level 4 vehicle and then piloting the vehicle around town to pick up fast food and dry cleaning.[146] Mahan is thrilled with the car and comments that access to driverless cars would give him a significantly greater amount of independence and flexibility given that, currently, he has to rely on family members or a transit system for disabled individuals if he wishes to go somewhere.[147]

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142. Barringer, *supra* note 27, at 134–35.

143. Ingraham, *supra* note 141.

144. *See* Bryant Walker Smith, *Managing Autonomous Transportation Demand*, 52 Santa Clara L. Rev. 1401, 1410 (2012) (quoting Office of Highway Policy Info., U.S. Dep't of Transp. Fed. Highway Admin., Highway Finance Data Collection: Our Nation's Highways: 2011, http://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm (last updated Nov. 7, 2014)).

145. Google, *Self-Driving Car Test: Steve Mahan*, YouTube (Mar.28, 2012), https://www.youtube.com/watch?v=cdgQpa1pUUE.

146. *Id.*

147. *Id.*

Greater flexibility and independence for populations of people who are unable to drive are two of the major perks of fully driverless cars that Google continues to emphasize.[148] In fact, one of the reasons that Google has embraced an "all-in," rather than gradualist, approach to autonomous vehicles is that it believes that "requiring human controls makes driverless cars useless for elderly, blind and disabled people who can't operate a vehicle," all surprisingly large populations in the United States.[149] Indeed, nine percent of adults identify as blind or report vision impairment issues, thirteen percent of the population is sixty-five or older, and almost one-third of the population does not have a driver's license.[150] Increased accessibility for these populations is likely to have two benefits.

First, access to Level 4 cars amounts to more than a mere convenience issue for disabled (or simply "license-impaired") individuals:

> For those who, either voluntarily or otherwise, lose the privilege to drive, lack of mobility can lead to a serious reduction in one's quality of life and health. Social isolation due to the inability to interact with friends and family, and the inability to shop and get to health care services, can lead to depression and degradation of one's physical and emotional well-being. While public transportation can fulfill many needs, some of the same disabilities that prevent one from driving can limit one's ability to use transit, and for many people, especially those living in suburban and rural areas, public transportation may be limited or unavailable for many trips.[151]

Fully driverless cars can thus greatly enhance many aspects of the lives of the "license-less," beyond those that we might expect.

Second, Level 4 cars may help ameliorate many of the growing issues presented by America's aging population. According to the U.S. Census, the population of Americans age sixty-five and older will increase from 47.7 million to 65 million in the ten-year period between 2015 and 2025.[152] Some percentage of this population may lose the ability to drive while others might actually increase danger on U.S. roads as their driving skills become compromised by de-

148. *See* Ingrassia, *supra* note 43.

149. *Id.*

150. Smith, *supra* note 144, at 1409.

151. Lutin et al., *supra* note 122, at 29.

152. *2012 National Population Projections: Summary Table 2*, U.S. CENSUS BUREAU, http://www.census.gov/population/projections/data/national/2012/summarytables.html.

clines in vision, hearing, and/or cognitive functioning.[153] Access to fully driverless cars would allow these elderly Americans to maintain independence, ease the burden on caregivers who might otherwise have to spend significant quantities of time chauffeuring their elderly charges to doctors' appointments or other errands, and enhance roadway safety by taking weaker individuals out of the driver's seat.[154]

III.
THE STATE OF THE LAW

Given the imminent arrival of autonomous vehicles on American roads and the dramatic impact that they stand to make on society, lawmakers at both the state and federal levels have begun to pass laws and regulations designed to address this technology.[155] While there is already a robust body of laws pertaining to automotive and highway safety, there also seems to be a consensus that those laws must be amended because they are based on the underlying assumption that human beings are operating the vehicle.[156] Furthermore, given that autonomous technology innovations are "severely outpacing legislation designed to allow for [their] use," lawmakers appear to be feeling some urgency to make those amendments or at least pass some semblance of a framework of laws pertaining to driverless cars.[157] New York, for instance, which has not yet passed any laws pertaining to driverless cars, has an existing traffic law requiring drivers to keep one hand on the steering wheel at all times, a provision that lawmakers might want to reconsider in the context of a Level 3 or Level 4 vehicle, particularly one like Google's prototype, which lacks a steering wheel altogether.[158]

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153. *See* National Institute of Health, *Older Drivers: How Aging Affects Driving*, NIH SENIOR HEALTH, http://nihseniorhealth.gov/olderdrivers/howagingaffectsdriving/01.html (last visited July 24, 2016).

154. *See* Lutin, *supra* note 122, at 30.

155. WEAVER, *supra* note 1, at 55.

156. John Markoff, *Google Cars Can Drive Themselves, in Traffic*, N.Y. TIMES (Oct. 9, 2010), http://www.nytimes.com/2010/10/10/science/10google.html?_r=0.

157. Johnson, *supra* note 66, at 28.

158. Bryant W. Smith, *Automated Vehicles Are Probably Legal in the United States*, 1 TEX. A&M L. REV. 411, 413 (2014) (citing N.Y. VEH. & TRAF. LAW § 375 (McKinney 2013)); *see also* Andrew Dalton, *A 45-Year-Old New York Law Is Holding Up Autonomous Vehicles*, ENGADGET (May 31, 2016), https://www.engadget.com/2016/05/31/new-york-law-holding-up-autonomous-vehicles/.

Technology companies and more traditional automobile manufacturers have also expressed a desire for a comprehensive legal scheme for driverless cars.[159] One scholar explains:

> Although the government typically lags behind technology when it passes laws, the current application of criminal and traffic laws to autonomous vehicles will make programming the vehicles challenging. It will [also] make the enforcement of the laws difficult, and it creates anomalous results.[160]

Driverless car manufacturers must program their vehicles to comply with the law, and customers are unlikely to buy such vehicles if they do not, so both government and industry are feeling a strong sense of urgency to pass appropriate and consistent laws nationwide.[161]

A. State Laws & Legislation

Thus far, the call to pass driverless car laws, those designed to regulate the use and liability associated with autonomous vehicles, has been answered almost entirely by states.[162] The National Highway Transportation Safety Administration (NHTSA) recently released a *Federal Automated Vehicles Policy*, but intends for a significant amount of the regulation of driverless cars to continue at the state level.[163] Indeed, this new policy contains a model driverless car statute designed for states.[164] States, however, began tackling this issue well before NHTSA's model policy:

> [S]ince the introduction of the first autonomous vehicle legislation [in Nevada] in 2011, the rate that autonomous vehicle legislation has been introduced has been growing fervently. In the two years following Nevada's initial proposed legislation in 2011, four other jurisdictions introduced and enacted autonomous vehicle legislation. In addition to California and Florida, which introduced and enacted legislation in 2012, four other states introduced autonomous vehicle legislation in 2012. Thus, legislation was introduced in seven jurisdictions (six

159. *See* Alex Davies, *The Feds Will Have Rules for Self-Driving Cars in the Next 6 Months*, WIRED (Jan. 14, 2016), https://www.wired.com/2016/01/the-feds-want-rules-for-self-driving-cars-in-the-next-6-months/; Putre, *supra* note 109.

160. Gurney, *supra* note 127, at 442.

161. *See id.*; Lari et al., *supra* note 104, at 759.

162. WEAVER, *supra* note 1, at 55.

163. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FEDERAL AUTOMATED VEHICLES POLICY, supra note 62, at 37.

164. *Id.*

states and the District of Columbia) in 2012, and nearly half of those jurisdictions enacted the proposed legislation.[165]

Since 2012, six more states have passed laws pertaining to driverless cars,[166] and another eight are actively considering driverless car legislation.[167] While no state other than Florida has, as of yet, passed a law explicitly permitting the use of fully driverless vehicles for anything other than testing by manufacturers,[168] there is also an "emerging agreement" among academics that such vehicles are not *illegal* in any state (although, as discussed at length below, other provisions may have the impact of outlawing Level 4 cars).[169] For example, in his seminal article, *Automated Vehicles Are Probably Legal in the United States*, Professor Bryant Walker Smith makes the compelling argument that nothing in state, federal, or international law would "categorically prohibit" the use of fully automated vehicles.[170]

B. Federal Involvement

As growing numbers of states pass "a patchwork of rules" pertaining to driverless cars, industry officials have grown concerned about inconsistencies between those rules and about their own ability to manufacture autonomous vehicles that will comply with the laws of all fifty states.[171] Accordingly, both tech companies and car manufacturers have called for the federal government to step in

165. Swanson, *supra* note 39, at 1100–01.

166. H.B. 1143, 2016 Leg., 42d Reg. Sess. (La. 2016); S.B. 600, 2015 Gen. Assemb., Reg. Sess. (N.C. 2016); H.B. 1065, 2015 Leg., 64th Leg. Reg. Sess. (N.D. 2015); MICH. COMP. LAWS ANN. §§ 257.1–.923 (West 2015); MICH. COMP. LAWS ANN. § 600.2949(b) (West 2015); TENN. CODE ANN. § 55-8-202 (2015); TENN. CODE ANN. § 55-9-105(c) (2015); S.B. 1561, 109th Gen. Assemb., 2nd Reg. Sess. (Tenn. 2016); H.B. 1564, 2016 Leg. 109th Reg. Sess. (Tenn. 2016); UTAH CODE ANN. §§ 41-26-101 to 102 (LexisNexis 2016).

167. S.B. 1841, 2015 Gen. Ct., 189th Sess. (Mass. 2015); H.B. 4321, 189th Gen. Ct. Sess. (Mass. 2015); H.B. 2977, 2015 Gen. Ct., 189th Sess. (Mass. 2015); S. Files 2569, 89th Leg. Reg. Sess. (Minn. 2015); H. Files 3325, 89th Leg., 2nd Reg. Sess. (Minn. 2015); A.B. 3745, 2016 Gen. Assemb., 217th Leg. Sess. (N.J. 2016); Assemb. 851, 2016 Leg., 217th Sess. (N.J. 2016); Assemb. 554, 2016 Gen. Assemb., 217th Sess. (N.J. 2016); S. 343, 2016 Leg., 217th Sess. (N.J. 2016); S. 7879, 2015 Leg., 238th Sess. (N.Y. 2016); Assemb. 31, 2015 Leg., 238th Reg. Sess. (N.Y. 2015); S. 1368, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015); S. 2514, 2015 Gen. Assemb., 2016 Sess. (R.I. 2016); H.D. 1372, 2016 Leg. Sess. (Va. 2016); H.R. 2106, 2015 Leg., 64th Sess. (Wash. 2015).

168. *Compare* Lutin, *supra* note 122, *with* H.R. 7027, 2016 Leg., 118th Reg. Sess. (Fl. 2016).

169. Lari, *supra* note 104, at 759.

170. Smith, *supra* note 158, at 419.

171. Davies, *The Feds Will Have Rules*, *supra* note 159.

and regulate the autonomous car industry to remedy this issue and promote innovation.[172] In March 2016, for instance, representatives from Google, General Motors, Lyft, and Delphi—all key developers of autonomous technologies—appeared before a hearing of the U.S. Senate Committee on Commerce, Science and Transportation to request federal regulation of autonomous vehicles.[173] At that hearing, Chris Urmson, a leaders of Google's driverless car initiative, testified:

> If every state is left to go its own way without a unified approach, operating self-driving cars across state boundaries would be an unworkable situation and one that will significantly hinder safety innovation, interstate commerce, national competitiveness and the eventual deployment of autonomous vehicles.[174]

Urmson's comments echoed those made by Volvo President and CEO Hakan Samuelsson several months earlier during a speech at a Washington, D.C. seminar about the future of self-driving cars.[175] Samuelsson remarked that, unless the federal government acted "swiftly" to create a unified set of rules to regulate both the operation of and liability arising from autonomous vehicles, the United States "could lose its lead" in their development.[176]

In response to these calls and concerns, the Obama administration proposed spending $3.9 billion over the next ten years to promote the development of both self-driving cars and "vehicle-to-infrastructure communication," which would allow driverless cars and roadway infrastructure features to transmit critical safety and operational information to one another.[177] Moreover, Secretary of Transportation Anthony Foxx tasked the Department of Transportation with drafting comprehensive rules governing the testing and regulation of driverless cars.[178] Those rules were issued on Septem-

172. Nathan Bomey, *Self-Driving Car Leaders Ask for National Laws*, U.S.A. TODAY (Mar. 15, 2016), http://www.usatoday.com/story/money/cars/2016/03/15/google-alphabet-general-motors-lyft-senate-commerce-self-driving-cars/81818812/.

173. *Id.*

174. *Id.*

175. Putre, *supra* note 103.

176. *Id.*; *see also* Davies, *The Feds Will Have Rules*, *supra* note 159 ("'The technology benefits [from] uniformity from state to state and between states and the federal regulations,' says Audi spokesperson Brad Stertz. Sean Walters, director of compliance and regulatory affairs at Daimler, which introduced an autonomous 18-wheeler last May, agrees: 'National standards are critical to the trucking industry, especially with respect to new and innovative technologies.'").

177. Bomey, *supra* note 172.

178. Davies, *supra* note 159.

ber 13, 2016 and require, among other things, driverless car developers to share extensive amounts of data with both the federal government and one another and to complete fifteen-point "safety assessments" for their vehicles.[179] They also provide model regulations that states may choose to adopt.[180] These model regulations, however, deal extensively with the registering and testing of Level 3 and 4 vehicles and fail to address the regulatory problems raised below.[181]

Federal involvement in the regulation of autonomous vehicles could change the traditional balance of power between states and the federal government in matters of traffic safety.[182] Historically, "[t]he feds control how cars are made—they can require airbags and seat belts, for example—but it's the states that regulate how vehicles behave, through the power of traffic laws."[183] NHTSA is trying to maintain this balance by proposing "model policy guidance" for state lawmakers, rather than promulgating federal regulations, in furtherance of "a nationally consistent approach to autonomous vehicles."[184] It remains to be seen, however, whether states will adopt NHTSA's proposed rules or whether state-by-state inconsistency in driverless car laws will remain an issue that requires more direct federal involvement and a reconfiguration of the federal/state division of automotive regulation. Interestingly, at least one state has already signaled a willingness to yield to a federal regulatory regime in this area of the law: South Carolina's proposed driverless car legislation states that "[f]ederal regulations promulgated by the [NHTSA] shall supersede the provisions of this chapter when found to be in conflict with any other state law or regulation."[185]

C. Common State Law Provisions

Two types of provisions appear repeatedly in state laws and pending legislation: (1) "operator" provisions, which define the human who engages an automated vehicle as the "operator" of that vehicle, and (2) override provisions, which require some degree of

179. Nat'l Highway Traffic Safety Admin., *supra* note 62 at 15–20.

180. *Id.* at 37.

181. *See id.*

182. Kessler, *supra* note 44.

183. Davies, *supra* note 159.

184. Nat'l Highway Traffic Safety Admin., "DOT/NHTSA Policy Statement Concerning Automated Vehicles: 2016" Update to "Preliminary Statement of Policy Concerning Automated Vehicles" (2016).

185. H.R. 4015, 120th Gen. Assemb., 1st Reg. Sess. §1 (S.C. 2013).

supervision and/or intervention on the part of the human occupants of automated vehicles in given scenarios.[186] Neither of these provisions, nor the overall driverless car laws in which they appear, however, differentiate between Levels 2, 3, 4, or 5 autonomous vehicles.[187] Instead, these provisions create blanket requirements for all driverless cars regardless of how manufacturers either (a) design those cars or (b) intend for them to be used. Indeed, as discussed at length below, some of these provisions, which are appropriate in the context of Level 2 or even Level 3 vehicles, implicitly outlaw the use of Level 4 and 5 vehicles and create criminal and civil liability that is highly problematic or nonsensical. This, in turn, may actually undermine the underlying public policy objectives of these laws and outright prohibit the "all-in" approach, discussed above, that is being taken by certain companies. A more thorough analysis of both types of provisions reveals why.

IV.
"OPERATOR" PROVISIONS

Historically, both criminal and civil liability for automobile accidents or traffic law infractions attached to the operator of a vehicle.[188] Traditional motor vehicle laws defined the term "operator" to mean the individual actively controlling the vehicle—typically from the driver's seat.[189] Professor Bryant Walker Smith elaborates:

> '"Actual physical control'" can be broader than operation but probably does involve physical presence. Under the classic definition first proffered by Montana's high court, a person is in actual physical control of a motor vehicle if she "has existing or present bodily restraint, directing influence, domination or regulation, of" it. Florida juries are told that "'[a]ctual physical control' of a motor vehicle means the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether [he or she] is actually operating the vehicle at the time." Where the phrase is used in

186. *See* WEAVER, *supra* note 1, at 58; GURNEY, *supra* note 127, at 446.

187. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 257.1–.923 (West 2015) (drawing no distinction between Level 3 and Level 4 cars); H.B. 1143, 2016 Leg., 42d Reg. Sess. (La. 2016) (same); S.B. 600, 2015 Gen. Assemb., Reg. Sess. (N.C. 2016) (same); H.B. 1065, 64th Leg. Reg. Sess. (N.D. 2015) (same); TENN. CODE ANN. § 55-8-202 (2015) (same); TENN. CODE ANN. § 55-9-105(c) (2015) (same); UTAH CODE ANN. §§ 41-26-101 to 102 (LexisNexis 2016) (same).

188. *See* WEAVER, *supra* note 1, at 58.

189. Frank Douma & Sarah Aue Palodichuk, *Criminal Liability Issues Created by Autonomous Vehicles*, 52 SANTA CLARA L. REV. 1157, 1162 (2012).

> drunk-driving statutes, some states provide a precise definition, while others ask juries to consider the "totality of the circumstances" with a view toward establishing whether the defendant "actually posed a threat to the public by the exercise of actual control over it while impaired."[190]

A critical question in both civil and criminal cases involving automobiles, therefore, has been *who*, specifically, was in control of the vehicle at the time of the incident in question.[191]

Both fully and semi-autonomous vehicles, however, complicate that inquiry significantly.[192] These vehicles may have a human being in only partial or intermittent control or may lack a human driver altogether. Are human beings in all of these situations the "operators" of these vehicles? Thus far, states have answered that question with a resounding "yes."[193] Nevada's Department of Motor Vehicle's autonomous vehicle regulations state that whoever engages a driverless car (i.e., turns on the engine) is considered the "operator," even if that operator is not in the vehicle while it is engaged.[194] Similarly, Florida's law states that "a person shall be deemed to be the operator of an autonomous vehicle operating in autonomous mode when the person causes the vehicle's autonomous technology to engage, regardless of whether the person is physically present in the vehicle while the vehicle is operating in autonomous mode."[195] California's law states that the operator of an autonomous vehicle "is the person who is seated in the driver's seat, or if there is no person in the driver's seat, causes the autonomous technology to engage."[196] Oregon, Nevada, Texas, New York, and the District of Columbia have all passed similar provisions.[197] These laws seem to be "based on the belief that the person who presses the 'start button' should accept the consequences of what that entails. Thus, the captain should be responsible for her ship."[198]

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190. Smith, *supra* note 158, at 473 (internal citations omitted).

191. *See* Schroll, *supra* note 111, at 810.

192. Smith, *supra* note 158, at 413.

193. *See infra* notes 201–04 and accompanying text.

194. Nev. Admin. Code § 482A.020 (2014).

195. Fla. Stat. Ann. § 316.85 (West 2016).

196. Cal. Veh. Code § 38750(a)(4) (West 2015).

197. D.C. Code § 50-2351(2) (2013); Nev. Admin Code § 482A.020 (2012); S. 7879, 2015 Leg., 238th Sess. (N.Y. 2016); Assemb. 31, 2015 Leg., 238th Reg. Sess. (N.Y. 2015); S.B. 620, 78th Oregon Legis. Assemb., 2015 Reg. Sess. (Or. 2015); H.R. 2932, 2013 Leg., 83d Reg. Sess. (Tex. 2013).

198. Gurney, *supra* note 127, at 414.

These types of provisions, however, raise two questions: (1) can human beings be held legally responsible—either civilly or criminally—for actions of autonomous vehicles driving in autonomous mode, and (2) if so, is this form of liability fair? With regard to the first question, under current laws, the answer seems to be "yes." California's law explicitly states as much: the operator of an autonomous vehicle is also considered the "driver" for purposes of the enforcement of traffic laws, meaning that they can be held legally responsible if the car exceeds the speed limit, makes an illegal turn, etc.[199] Nevada's law is also explicit about this.[200] Additionally, the "operator" provisions in the states that do not explicitly address liability are likely to be interpreted in a way that holds human drivers liable, as discussed at length below.[201]

The second question—whether such liability is fair—is more complicated. The answer to that question, this Article argues, depends on (a) the type of autonomous car being driven and (b) the nature of any traffic infraction or injury that occurs.

A. Level 2 and 3 Cars

Level 2 and 3 cars (1) "can handle themselves in limited situations (like highway driving) but "need a human [driver] at the helm the rest of the time," and (2) need monitoring while they are driving in autonomous mode.[202] Because the autonomous capabilities of these vehicles are intended to *supplement* rather than entirely replace human driving, manufacturers of these vehicles intend for a human driver either to remain in the driver's seat monitoring the road when the car is driving itself (in the case of Level 2 vehicles), or to be available to retake control of the vehicle quickly if signaled to do so (in the case of Level 3 vehicles).[203] In some cases, therefore, holding human operators either criminally or civilly liable for injuries or traffic infractions caused by their autonomous vehicles while driving in autonomous mode makes sense. Take, for instance, the following scenarios:

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199. NEV. ADMIN. CODE § 482A.030 (2012).

200. Rachael Roseman, *When Autonomous Vehicles Take over the Road: Rethinking the Expansion of the Fourth Amendment in a Technology-Driven World*, 20 RICH. J.L. & TECH. 1, 13 (2014).

201. See discussion *infra* Part III.A–C.

202. Alex Davies, *California's New Self-Driving Car Rules Are Great for Texas*, WIRED (Dec. 17, 2015), https://www.wired.com/2015/12/californias-new-self-driving-car-rules-are-great-for-texas/.

203. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 51, at 5.

> SITUATION A: A Level 2 vehicle operating in autonomous mode comes upon a construction zone with a speed limit significantly lower than what is normally posted. The vehicle does not detect this change. The human in the driver's seat is reading a book rather than paying attention to the road and thus fails to retake control of the vehicle and slow the vehicle's speed down to the construction zone limit. The vehicle travels through the site at twenty miles per hour over the posted speed limit.
>
> SITUATION B: A Level 3 vehicle operating in autonomous mode encounters a storm. The rain impedes the ability of the car's laser system to detect the vehicle's surroundings. An alarm goes off inside the vehicle, signaling that a human needs to retake control. The human, however, is listening to loud music while wearing headphones and does not hear the alarm. The car subsequently hits another vehicle.

In both of these cases, criminal and civil liability would be fair. Civilly speaking, the human has acted unreasonably and has breached a clear duty in both situations: the duty to monitor the vehicle (in Situation A) and the duty to respond appropriately to the vehicle's alarm (in Situation B).[204]

Criminal liability would be appropriate, as well. Both Situation A and Situation B meet the fundamental elements of U.S. criminal law: "First, there must be culpability—a decision to risk harm for insufficient reasons [the *mens rea*]. Second, there must be an act that 'unleashes' that risk of harm [the *actus reus*]."[205] With regard to *mens rea*, the humans in both of these situations chose to act negligently, at a minimum, and perhaps even recklessly. By picking up a book and putting on headphones, moreover, and then failing to respond to the situation appropriately, they took actions that "unleashed" risk, the *actus reus*. Their behavior was thus morally blameworthy and punishment would be just.[206]

However, there are other situations in which holding a human "operator" of a Level 2 or Level 3 car liable would make little sense:

> SITUATION C: The cruise control and lane centering features of a Level 2 car suddenly malfunction while engaged. The car accelerates abruptly and plows into the vehicle in front of it. The malfunction happens so quickly that the human in the

204. Obviously, a plaintiff in either situation would also have to demonstrate some injury from the negligence in order to recover.

205. Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 Ohio St. J. Crim. L. 375, 376 (2008).

206. Gurney, *supra* note 127, at 405–06.

> driver's seat—who is otherwise monitoring the vehicle—does not have time to respond.
>
> SITUATION D: A Level 3 car experiences a severe technological glitch while driving in heavy traffic. The glitch disables the car's alarm that would otherwise signal to the human passenger that she needs to retake control of the vehicle. The human, who is occupied on her computer but listening for the sound of the alarm, does not realize that the car is experiencing a malfunction. The car hits a pedestrian.

Neither criminal nor civil liability would be appropriate in either situation. With regard to civil liability, the human in both scenarios has not acted unreasonably and thus did not breach any duty of due care, so there would be no basis on which to find them negligent. Furthermore, the human was not the cause of the injuries. Indeed, there was nothing that the human could have done in either case to prevent the accidents from happening: the vehicles experienced a technological glitch that the human either did not have time to respond to or have knowledge of.

Further, there is no *mens rea* or *actus reus* in either situation that would support criminal liability. In both cases, the human did what was expected of them and what was appropriate given the level of autonomous technology: constantly monitoring the vehicle in Situation C, and being readily available to retake control of the vehicle if an alarm sounded in Situation D. Any injuries that result from the malfunctions of these vehicles would thus be the product of a lack of an opportunity to respond rather than a morally blameworthy act or omission on the part of the humans.

The problem, however, is that states with "operator" provisions make *all* autonomous vehicle-related traffic or driving infractions strict liability offenses, much like the rest of the traffic and driving violations currently on the books in most states.[207] In these jurisdictions, human "operators" would be guilty of traffic violations in all four of the situations discussed above: the two situations in which liability is clearly warranted and also the two in which it clearly is not.[208] These laws assume that human drivers will be "able to exercise human judgment" in all situations and do not take response time or even capability to respond into account.[209] Instead, they create a situation in which humans drivers in semi-autonomous cars are responsible in *all* situations in which a traffic violation occurs,

207. *Id.* at 409 (discussing the strict liability nature of "most traffic or driving violations").

208. *Id.* at 414.

209. Smith, *supra* note 158, at 413.

regardless of (a) whether their car was operating in autonomous mode at the time of the violation and (b) if it was, whether the human had the capability to have stopped that violation from occurring.[210]

B. Level 4 and 5 Cars

If strict "operator" liability makes little sense in some situations involving Level 2 and 3 cars, it *never* makes sense with regard to Level 4 and 5 cars.[211] These vehicles are intended to drive without the need for any human supervision or intervention and, depending on the design of the vehicle, may entirely lack the means by which a human could control, influence, or override the vehicle's operations.[212] Thus, liability is even less warranted with these vehicles than it is with Level 2 and 3 vehicles.[213] This is particularly true in scenarios in which the "operator" is not even physically present in the vehicle, a situation that many "operator" provisions explicitly contemplate.[214] Thus, under existing "operator" provisions, the human in each of the following situations would be guilty of a traffic violation:

> SITUATION E: A human turns on his Level 4 vehicle, programs the vehicle to drive to a colleague's house, puts several work documents in the backseat of the car, and then dispatches the otherwise empty vehicle to deliver them. The human returns to his house to take a nap. On the way to the colleague's house, the car malfunctions and drives the wrong way down a one-way street, causing a head-on collision with another vehicle.

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210. Gurney, *supra* note 127, at 414.

211. *See id.* at 417.

212. *Id.*

213. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 51, at 5.

214. FL. STAT. ANN. § 316.85(2) (West 2016) ("For purposes of this chapter, unless the context otherwise requires, a person shall be deemed to be the operator of an autonomous vehicle operating in autonomous mode when the person causes the vehicle's autonomous technology to engage, regardless of whether the person is physically present in the vehicle while the vehicle is operating in autonomous mode."); MICH. COMP. LAWS ANN. § 257.36 (2014) ("'Operate' or 'Operating' means 1 or more of the following . . . 'Causing an automated motor vehicle to move under its own power in automatic mode upon a highway or stress regardless of whether the person is physically present in that automated motor vehicle at that time.'"); NEV. REV. STAT. ANN. § 482A.020 (West 2012) ("For purposes of this chapter, unless the context otherwise requires, a person shall be deemed the operator of an autonomous vehicle which is operated in autonomous mode when the person causes the autonomous vehicle to engage, regardless of whether the person is physically present in the vehicle while it is engaged.") (repealed 2013).

> SITUATION F: A human is riding in a Level 4 vehicle that lacks a steering wheel and pedals. While the human sits in the backseat reading a book, the car runs a stop sign and hits a pedestrian.

In neither case did the human have the ability to stop the accident from occurring, nor did the human intend for a violation to occur, and yet, in both cases, under existing laws, the human would be liable. This would clearly be a nonsensical and unjust result for the same reasons as in Situations C and D above.

C. The Twisted Logic of Operator Provisions

Holding human "operators" strictly liable for the actions of autonomous vehicles is extremely problematic for at least two additional reasons. First, such liability is inconsistent with some of the most basic philosophical underpinnings of criminal law: the goals of retribution, deterrence, and rehabilitation.[215] One scholar explains why in the context of Level 4 and 5 vehicles:

> With an autonomous vehicle like Google's prototype, certainly no objectives of punishment are served by holding the operator criminally liable for traffic violations . . . [T]he vehicle lacks a steering wheel, accelerator, and brake pedal. Therefore, the operator does not cause, nor has any opportunity to prevent, the violation. In such a case, the person does not have any blameworthiness to punish; no one— the operator or society— is deterred because owners of a vehicle like Google's prototype can do nothing to prevent the violation; isolating the person will not provide any benefit to society; and no additional instruction could prevent the offense in the future.[216]

The same reasoning applies to operator liability in the context of Level 2 and 3 vehicles.[217] While *some* liability might be appropriate, liability for violations that humans had no reasonable capacity to stop serves no traditional criminal law purposes.[218]

Second, holding human operators strictly liable for the actions of their autonomous vehicles may strongly deter people from using autonomous cars at all.[219] If humans are concerned that they may be charged for an accident or violation caused by a vehicle that (a) they do not have the ability to control and (b) they may not have

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215. *See* Stephen J. Morse, *The Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 61 (2003).

216. Gurney, *supra* note 127, at 417.

217. *See id.*

218. *Id.*

219. *Id.*

even been present in at the time of the incident, owning and operating a driverless car is likely to be viewed as too risky by all but the most courageous (and amply insured) of us. This would be a net loss for society because we would lose the extraordinary benefits that can come from greater use of autonomous vehicles.[220]

While one might attempt to allay concerns about "operator" provisions by theorizing that courts will interpret those laws in a manner that would preclude a finding of liability in scenarios like Situations C, D, E, and F, even a brief foray into traffic violation case law shows that this is unlikely to be the case. Indeed, courts throughout the United States have a long history of ignoring the traditional criminal law elements of *mens rea*, *actus reus*, and causation in vehicle automation cases and finding human drivers liable in situations in which they were not in control of a vehicle.[221] In *State v. Packin*, for instance, a 1969 New Jersey case, the defendant was convicted of driving sixty-nine miles per hour in a fifty-miles-per-hour zone.[222] The defendant argued that he was not "driving" the vehicle at the time of the infraction because the cruise control was engaged.[223] He also argued that the cruise control—which had been repaired earlier that day—had malfunctioned and accelerated the vehicle beyond the fifty-miles-per-hour speed that he had set.[224] Thus, he asserted, "his guilt was negated by his intention, as evidenced by his setting of the cruise control . . . to keep within the speed limit."[225] The court in *Packin* disagreed, saying that it did not matter whether the vehicle's cruise control was engaged:

> We find [the defendant's] contentions to be devoid of merit. A motorist who entrusts his car to the control of an automatic device is "driving" the vehicle and is no less responsible for its operation if the device fails to perform a function which under the law he is required to perform. The safety of the public requires that the obligation of a motorist to operate his vehicle in accordance with the Traffic Act may not be avoided by delegating a task he normally would perform to a mechanical device.[226]

The reasoning in this case appears to be the same reasoning underlying the passage of the "operator" provisions being discussed: "the

220. *See* Lari, *supra* note 104, at 750.
221. *See* State v. Packin, 257 A.2d 120, 120 (N.J. Super. Ct. App. Div. 1969).
222. *Id.*
223. *Id.*
224. *Id.* at 120–21.
225. *Id.* at 121.
226. *Id.*

captain should be responsible for her ship."[227] The court seems to be implying that the setting of the cruise control, rather than the speeding itself, was a sufficient *actus reus* for criminal culpability and that drivers use automation features at their own risk.[228]

The court in *State v. Baker*, a 1977 cruise control case, adopted this theory more explicitly.[229] In that case, the defendant was convicted of driving his vehicle at a speed of seventy-seven miles per hour in a fifty-five-miles-per-hour zone.[230] The defendant argued that he had set the cruise control at the posted speed limit, that the cruise control had malfunctioned, and that he unsuccessfully attempted to deactivate the cruise control "by hitting the off button, and the coast button and tapping the brakes."[231] The court upheld the conviction, reasoning:

> We believe it must be said that the defendant assumed the full operation of his motor vehicle and when he did so and activated the cruise control attached to that automobile, he clearly was the agent in causing the act of speeding. The safety and welfare of the public require that the motorist operate his vehicle in accordance with the maximum speed limits . . . and other rules of the road, and such libations may not be avoided by delegating a task which he normally would perform to a mechanical device such as cruise control.[232]

Interestingly, the court distinguished the malfunction of a cruise control system from "unexpected brake failure and unexpected malfunction of the throttle on an automobile" because, in the court's mind, brakes and throttles are "essential components to the operation of the vehicle," whereas cruise control is a voluntary option and thus need not be utilized.[233]

Cases like these reveal a deep and historic mistrust of vehicle automation on the part of courts and a strong preference for human control of vehicles, even with regard to cruise control, which offers fairly little automation and requires drivers to be ac-

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227. Gurney, *supra* note 127, at 414.

228. *See Packin*, 257 A.2d at 121. As a seeming afterthought, the court points out that the defendant also could have resumed control of the vehicle and brought it back down to a lawful speed by touching the brakes to disengage the cruise control, ignoring the fact that it noted several paragraphs above that the defendant stated he was in the process of doing so when he was "flagged by the state trooper." *Id.*

229. *See* State v. Baker, 571 P.2d 65, 69 (Kan. Ct. App. 1977).

230. *Id.* at 66.

231. *Id.*

232. *Id.* at 69.

233. *Id.*

tively engaged with the vehicle at all times. Given this precedent and recent polling, which reveals strong reservations on the part of the general public about the safety of autonomous vehicles, it seems, if not likely, at least a distinct possibility that courts will use "operator" provisions to hold humans both criminally and civilly liable for malfunctions of Level 2, 3, 4, and 5 autonomous vehicles, despite the issues explored above.

V.
OVERRIDE PROVISIONS

Override provisions are a second common type of law that states have passed or considered in preparation for autonomous cars.[234] Nevada, California, Florida, and the District of Columbia all have provisions of this type in their driverless car laws,[235] and a number of states are considering similar legislation.[236] For example, the District of Columbia's driverless car law requires that driverless cars have a driver "seated in the control seat of the vehicle while in operation who is prepared to take control of the autonomous vehicle at any moment."[237] Other laws require autonomous cars to have features that allow a human to override the autonomous technology and retake control of the car.[238] Oregon's bill, for instance, states that autonomous vehicles must give drivers the ability to override the car "using the brake, the accelerator or the steering wheel."[239] Colorado's proposed legislation is similar and mandates that drivers be able to override the vehicle through the use of brakes, a steering wheel, or an "override switch."[240] New York's legislation, moreover, would require autonomous vehicles to have an easily accessible means of engaging or disengaging the vehicle's autonomous technologies.[241]

Furthermore, some states that have not passed driverless car laws have existing "due care" traffic laws that may have the same

234. WEAVER, *supra* note 1, at 59.

235. CAL. VEH. CODE § 38750 (West 2015); D.C. CODE § 50-2352 (2016); FL. STAT. ANN. § 319.145 (2016); NEV. REV. STAT. § 482A.080 (2012).

236. S.B. 113, 153rd Gen Assemb., Reg. Sess. (Ga. 2015); H.R. 286-D, 28th Leg., Reg. Sess. (Haw. 2015); S. 7879, 2015 Leg., 238th Sess. (N.Y. 2016); S.B. 620, 78th Oregon Legis. Assemb., 2015 Reg. Sess. (Or. 2015); H.B. 4194, 84th Leg. (Tex. 2015).

237. D.C. CODE § 50-2352 (2016).

238. *See* S.B. 13-016, 69th Leg., 1st. Reg. Sess. (Colo. 2013); 2015 Leg., 238th Reg. Sess. (N.Y. 2015); S.B. 620, 2015 Reg. Sess. (Or. 2015).

239. S.B. 620, 78th Oregon Legis. Assemb., 2015 Reg. Sess. (Or. 2015).

240. S.B. 13-016, 69th Leg., 1st. Reg. Sess. (Colo. 2013).

241. A.B. 31, 2015 Reg. Sess. (N.Y. 2015).

impact as the override provisions. These laws require drivers in *every* vehicle to pay constant attention to the road.[242] For example:

> In Georgia, "[a] driver shall exercise due care in operating a motor vehicle on the highways of this state and shall not engage in any actions which shall distract such driver from the safe operation of such vehicle. . . ." Variations of this include Tennessee's due care statute, which requires: Every driver of a vehicle [to] exercise due care by operating the vehicle at a safe speed, by maintaining a safe look out, by keeping the vehicle under proper control and by devoting full time and attention to operating the vehicle, under the existing circumstances as necessary in order to be able to see and avoid [hitting anything or anyone].[243]

Since these laws do not differentiate between Level 1, 2, 3, 4, or 5 vehicles, presumably, they apply to all vehicles within their jurisdictions, although, as of yet, there has been no litigation that would clarify their boundaries.

A. The Untested Assumptions of Override Provisions

Both override provisions and due care laws appear to be rooted in a very significant assumption: that human-driven cars are safer than autonomously driven ones.[244] Indeed, fears about driverless cars running amok seem to be driving much of the current debate surrounding the regulation of these vehicles, and human driver supervision appears to be the solution that lawmakers have chosen to allay them.[245] Almost entirely absent from these discussions, however, is empirical data that would support the idea that human oversight and, if needed, override of driverless cars, actually enhances traffic safety. Instead, there are only the mere presumptions that: (1) human drivers will adequately supervise autonomous vehicles, (2) human drivers have the capacity to regain control of autonomous vehicles quickly and safely when necessary, and (3) human intervention is the safest option available (or at least is not more dangerous than leaving control with the automated technology) if and when autonomous vehicles malfunction or encounter difficulties on the road.

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242. Gurney, *supra* note 127, at 424–25.

243. *Id.* (internal citations omitted).

244. *See* Swanson, *supra* note 39, at 1139.

245. *See, e.g.*, *id.* at 1112 ("By including this [override provision] subsection, Oregon's legislature provides a simple guide to manufacturers, while relieving any latent driver fears of runaway vehicles."); Bolton, *supra* note 19.

Recent studies, however, suggest that all three presumptions are not only likely wrong but also potentially dangerous. These studies demonstrate that relying on human oversight and override of autonomous vehicles may actually *undermine* highway safety rather than enhance it. In addition to Tesla's and Google's informal findings that drivers of Level 2 and 3 vehicles have an extremely difficult time focusing on the road while autonomous technologies are activated, a number of academic studies have reached similar conclusions.[246] A 2014 study of Level 3 cars, for example, showed that drivers "exhibited significant increases in eccentric head turns and secondary tasks during automated driving, even in the presence of a researcher," and that a shocking twenty-five percent of test subjects engaged in some form of "reading while the vehicle was in autonomous mode."[247] These results led the researchers to conclude that while "[t]he effect of automation on a driver's attention level remains an open question . . . early research suggests that a driver cannot immediately take over control of [an autonomous] vehicle safely. Most drivers will require some type of warning time."[248] This plainly undermines the assumption of lawmakers—and the reasoning underlying override provisions—that human drivers will be able to intervene at a moment's notice if needed.

A 2013 study generated similar results under similar circumstances. Drivers were asked to sit in the driver's seat and monitor a Level 3 vehicle driving down a test track with both adaptive cruise control (ACC) and lane centering (LAAD) features engaged for forty-five minutes to an hour.[249] The study found that:

> Overall, drivers were estimated to be looking away from the forward roadway approximately 33% of the time . . . Comparisons between ACC and LAADS head [position] data reveal a significant increase in time spent looking away from the forward roadway under semi-autonomous relative to ACC-only driving . . . [D]rivers tended to increase the percentage of time spent looking off-road by an average of 33 percent while driving under LAADS, suggesting that drivers were paying some-

246. Epstein, *supra* note 93; Ingrassia, *supra* note 43; R.E. Llaneras et al., *Human Factors Issues Associated with Limited Ability Autonomous Driving Systems: Drivers' Allocation of Visual Attention to the Forward Roadway*, *in* Proc. Of the Seventh Int'l Driving Symp. On Hum. Factors in Driver Assessment, Training, and Vehicle Design 92, 94 (Bolton Landing, 2013).

247. Noah J. Goodall, *Machine Ethics & Automated Vehicles*, *in* Road Vehicle Automation 93, 96 (Gereon Meyer & Sven Beiker eds., 2014).

248. *Id.*

249. R.E. Llaneras et al., *supra* note 246, at 94.

> what less attention to the forward roadway under the autonomous driving mode. This general finding is consistent with the secondary task data presented earlier suggesting that drivers engaged in more secondary activities under LAADS driving. Although this pattern was generally reliable, there were substantial individual differences in the magnitude of the effect across individuals, with some drivers showing no increase under LAADS driving relative to ACC driving. Approximately one-third of the drivers (4 out of 12) showed substantial increases in the percentage of time spent looking off-road of at least 73% when operating under LAADS.[250]

The drivers in this study did more than just look off the road. With both ACC and LAADS engaged, there were also "significant increases in . . . eating, reaching for an item in the rear compartment, dialing and talking on the cell phone, and texting/e-mailing."[251] There were also "widespread" increases in "very risky tasks" such as watching movies and reading.[252] These findings led researchers to conclude that "the introduction of automation which controls vehicle speed maintenance [and] longitudinal and steering functions is likely, if not well designed or implemented, to further increase the frequency and nature of secondary task engagements as well as increase extended glances away from the forward roadway."[253]

These findings undermine yet another primary assumption of override provisions: that human drivers can intervene effectively and appropriately if needed. Making appropriate blink-of-an-eye decisions in highway driving situations (as drivers often have to do) is already a fraught (and sometimes deadly) task, as traffic accident and fatality data show.[254] Doing so while distracted might be a veritable impossibility. A literature review conducted by yet another group of researchers agrees:

> Reduced awareness has been associated with a delay in an appropriate braking response when faced with failures in ACC both in a driving simulator . . . and in more naturalistic, test-track conditions . . . . Similar work has also uncovered complacency and delay when drivers are confronted by the malfunction of land keeping systems . . . . These observations have been attributed to reduced driver workload, commonly associ-

250. *Id.* at 96.
251. *Id.*
252. *Id.*
253. *Id.* at 93.
254. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2013 MOTOR VEHICLE CRASHES, *supra* note 106.

> ated with semi-automated driving when compared to manual driving . . . .[255]

As a result, these researchers conclude that expecting a driver to monitor the road during the automation of driving tasks can be just as risky as overloading a driver with too many driving tasks at one time.[256]

These results mirror the findings from other industries in which automation has become prevalent. Some airplane safety experts blame the deadly 2009 ocean crash of an Air France plane flying between Rio de Janeiro, Brazil, and Paris, France on the inability of the pilot to retake control quickly enough when the plane's autopilot failed.[257] Further, studies of interactions between humans and highly-automated industrial machinery have shown that

> [w]hen an operator is removed from a control loop due to allocation of system functions to an automated/computer controller, the level of human system interaction is limited and, consequently, operator awareness of system states may be reduced. This poses a serious problem during normal operations preceding system errors, malfunctions or breakdowns because operators are often slower to respond to such events when removed from a control loop versus actively controlling a system. Further, during failure modes, operators who have been removed from system control may not know what corrective actions need to be taken to stabilize the system and bring it into control.[258]

Thus, operators of any type of automated machinery can be expected to display impaired performance when called upon to operate a system manually after machine failure, especially when compared to operators of non-automated machinery.[259]

As with operator provisions, however, the overall value and wisdom of override provisions varies with the level of autonomous cars at issue. The empirical data above suggest that they may actually be

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255. A.H. Jamson, et al., *Behavioural Changes in Drivers Experiencing Highly-Automated Vehicle Control in Varying Traffic Conditions*, 30 TRANSP. RES. PART C: EMERGING TECHS 30, 116, 117 (2013).

256. *Id.* at 117.

257. Ingrassia, *supra* note 43.

258. David B. Kaber & Mica R. Endsley, *Out-of-the-Loop Performance Problems and the Use of Intermediate Levels of Automation for Improved Control System Functioning and Safety*, 16 PROCESS SAFETY PROGRESS 126, 127 (1997).

259. Paula A. Desmond, *Fatigue and Automation-Induced Impairments in Simulated Driving Performance*, 1628 TRANSP. RES. REC. 8, 13 (1998).

a warranted—though clunky—form of regulation for Level 2 and 3 vehicles but disastrously ill-conceived and counterproductive for Level 4s and 5s.[260]

B. Level 2 and 3 Vehicles

Manufacturers and state legislators appear to be on the proverbial same page with regard to Level 2 and 3 autonomous cars in the sense that both agree that some human supervision of these vehicles is necessary. However, while there may congruence between override provisions and manufacturers' guidelines, the reasoning behind the two could not be more different. Tesla, for example, "strenuously warns customers to pay attention" when the Autopilot feature in their vehicles is engaged.[261] General Motors, moreover, is contemplating including driver "monitoring systems and steering-wheel alerts" that would remind drivers of the need to pay attention when using their Level 2 "Super Cruise" technology.[262] These warnings and driver alert systems make sense: Level 2 and Level 3 vehicles are not *intended* to operate fully autonomously, and thus human supervision of these vehicles (and intervention when appropriate) is a critical component of their safe operation.[263] In other words, Level 2 and 3 cars may require human supervision and intervention in some situations because of the inherent technological limitations of their autonomous driving systems. In contrast, lawmakers seek to mandate human supervision and intervention because they believe that human beings are fundamentally better drivers than autonomous systems in *all* situations, an assumption that is contradicted by empirical data, as discussed above.

At first glance, therefore, override provisions or due care laws seem necessary and appropriate because they either legally mandate such supervision[264] or require that all cars have features that allow human drivers to intervene if necessary.[265] A Level 2 or 3 car *should* have a human driver monitoring it, along with an easy way

260. *See discussion* Part III.B–C.

261. Simon Parkin, *Learning to Trust a Self-Driving Car*, THE NEW YORKER (July 15, 2016), http://www.newyorker.com/tech/elements/learning-to-trust-a-self-driving-car?ReillyBrennanFoT.

262. Charlie White, *Almost Self-Driving Car: 'Super Cruise' Enters Real-World Testing*, MASHABLE (May 1, 2013), http://mashable.com/2013/05/01/self-driving-super-cruise/#82ucFMStf5q7.

263. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PRELIMINARY STATEMENT OF POLICY, *supra* note 56, at 5.

264. D.C. CODE § 50-2352 (2016).

265. CAL. VEH. CODE § 38750(b)(2) (West 2015); FL. STAT. ANN. § 319.145 (West 2016); NEV. REV. STAT. ANN. § 482A.070 (2013).

for that driver to retake control if necessary. Furthermore, that human driver should be held liable in some instances in which a failure to supervise and intervene leads to injury, such as in Situations A and B above.[266] Override provisions arguably provide a mechanism for imposing such liability and thus strongly incentivize drivers to resist becoming distracted.[267]

However, a closer analysis of override provisions, at least as they are currently written, reveals that, despite their initial "curb appeal," they are both under-inclusive and overbroad with regard to Level 2 and 3 vehicles. To start, these laws arguably do not go far enough. Given, for example, that the autonomous technologies in Level 2 cars are often not designed to handle issues like bad weather, poor lane markings, construction sites, or even non-highway driving, mere human supervision may be insufficient to ensure safe autonomous operation in many situations.[268] Use of autonomous technologies in these vehicles, therefore, should be subject to appropriate time, place, and manner restrictions (e.g., laws that would ban the use of Level 2 autonomous technologies in heavy rain or in construction zones). Thus far, no legislature has considered or passed such a law.

Override provisions are also overbroad, particularly with regard to Level 3 vehicles. These vehicles are designed to require only minimal driver supervision and, importantly, to signal to drivers when human intervention is needed and to provide a "sufficiently comfortable transition time" for them to retake control of the vehicle.[269] Override provisions, like the one passed by the District of Columbia, that require constant human supervision, make little sense in this context and undermine many of the most valuable aspects of autonomous vehicles.[270] As one scholar points out, "[i]t is the technological equivalent of having your cake and not eating it: 'Feel free to use [Level 3] cars in Washington, D.C., but make sure you're not enjoying the experience.'"[271]

Furthermore, there may be situations in which human intervention in a Level 2 or Level 3 car is actually *less* safe, and thus less desirable, than letting the vehicle handle the situation on its own,

266. Gurney, *supra* note 127, at 425–26.

267. *See* CAL. VEH. CODE § 38750 (West 2015); FL. STAT. ANN. § 319.145 (West 2016); NEV. REV. STAT. ANN. § 482A.070 (2013).

268. Electric Jen, *Tesla Autopilot Limitations; Heavy Rain*, TESLARATI (Dec. 7, 2015), http://www.teslarati.com/tesla-autopilot-limitations-heavy-rain/.

269. *Id.*

270. *See* D.C. CODE § 50-2352 (2016).

271. WEAVER, *supra* note 1, at 57.

particularly because human drivers are so prone to distraction.[272] This may be the case, for instance, in situations in which the human does not have adequate time to assess the situation and respond appropriately.[273] It may also become the case that, as autonomous technologies grow in prevalence and use, drivers become less skilled at driving and thus less able to capably respond to emergency situations, particularly as compared to the autonomous technologies themselves.[274] Lastly, autonomous technologies in Level 2 and 3 cars may eventually become so sophisticated that they are objectively better than humans at responding to *most* roadway situations.[275] In fact, this might already be true in some Level 2 and 3 vehicles, but the lack of empirical data on this issue means that lawmakers can only speculate.[276] Override and due care provisions arguably incentivize humans to do the less safe thing in all of these situations: to err on the side of intervening—even hastily and poorly—out of a fear that, if they do not, they will be found guilty of breaking the law and held liable for injuries in any subsequent accident.

Override provisions are thus an inadequate way to enhance the safety of Level 2 and 3 driverless cars at best and are counterproductive and overly stringent at worst. More empirical data should be gathered in order to assess both what design and what legal measures actually enhance safety and what measures undermine it. This Article's prediction is that such data will reveal that current override provisions are woefully clumsy and ill-honed.

C. Level 4 and 5 Vehicles

If override provisions are clunky and problematic with regard to Level 2 and Level 3 cars, they are disastrous with regard to Levels 4 and 5 cars. Indeed, the two are fundamentally and intractably at odds: Level 4 and 5 vehicles neither require human supervision nor have a way for humans to take control, whereas override provisions require at least one and, in some cases, both.[277] Thus, Google's forthcoming Level 4 cars, which lack both a steering wheel and

272. Alexander Hevelke & Julian Nida-Rumelin, *Responsibility for Crashes of Autonomous Vehicles: An Ethical Analysis*, 21 SCI. & ENG'G ETHICS 619, 619 (2015).

273. *See id.*

274. Douma & Palodichuk, *supra* note 189, at 1164.

275. Hevelke & Nida-Rumelin, *supra* note 272.

276. *Id.*

277. *Compare* NAT'L HIGHWAY TRANSP. SAFETY ADMIN., PRELIMINARY STATEMENT OF POLICY, *supra* note 56, at 5, *with* CAL. VEH. CODE § 38750(b)(2) (West 2015), D.C. CODE § 50-2352 (2016), FL. STAT. ANN. § 319.145 (2016), *and* NEV. REV. STAT. § 482A.080 (2012).

brakes,[278] will presumably be illegal to operate in the District of Columbia, California, Florida, and Nevada,[279] and possibly Oregon, Colorado, and New York, if pending override legislation passes.[280]

Level 4 and 5 vehicles, however, represent the apex of autonomous technology and offer many more advantages than do Level 2 and 3 cars. Banning them before the technology has been fully developed, optimized, and tested not only suppresses important technological development (in particular, the "all-in" approach to driverless car development discussed above), but also drastically minimizes the full panoply of social and economic benefits that these vehicles stand to offer the United States.[281] People with physical disabilities and visual impairments, for example, will not be able to use these vehicles independently if laws require the presence of a human capable of supervising and overriding the vehicle if necessary.[282] Productivity gains would also be hampered drastically and perhaps for little corresponding benefit:

> To increase productivity, the operator must be able to engage in other activities. Perhaps, while some drivers may trust the technology enough so they are able to engage in other activities, others would be more reluctant to do so if they know they are responsible for traffic violations. If the reluctance outweighs the ability of someone to engage in another activity, the loss in utility may outweigh the benefit of the person watching the road. This is especially true if the vehicles are safely operating. In other words, if the vehicles are safely operating and obeying traffic laws, requiring someone to pay attention to the traffic laws would be inefficient.[283]

Without Level 4 and 5 cars available in the marketplace, the best that consumers can hope for by way of productivity gains is the ability to work in Level 3 (but not Level 2) vehicles, while simultaneously listening for the vehicle's alert to sound and being prepared to intervene at a moment's notice, a form of multitasking that does not seem particularly appealing.

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278. Ingrassia, *supra* note 43.

279. *See* CAL. VEH. CODE § 38750(c)(1)(D) (West 2015); D.C. CODE § 50-2352 (2016); FL. STAT. ANN. § 319.145 (2016); NEV. REV. STAT. § 482A.080 (2012).

280. *See* S.B. 620, 78th Oregon Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 13-016, 69th Leg., 1st. Reg. Sess. (Colo. 2013); A.B. 31 2015 Reg. Sess. (N.Y. 2015).

281. *See* Thierer & Hagemann, *supra* note 128, at 339.

282. Robert Sykora, *The Future of Autonomous Vehicle Technology as a Public Safety Tool*, 16 MINN. J.L. SCI. & TECH. 811, 817–18 (2015).

283. Gurney, *supra* note 127, at 415.

The greatest tragedy in tacitly banning Level 4 and 5 cars, however, is likely to lie in significantly diminished safety gains. As discussed at length above, override laws assume that human supervision of (and possibly intervention in) driverless cars is a safer prospect than allowing the technology to function on its own, though empirical studies suggest that the opposite proposition is likely true in many situations.[284] This opposite proposition—that autonomous vehicles may actually be better at responding to risky driving situations than human drivers in many cases—is likely to be even *more* accurate with regard to Level 4 and 5 cars than it is with Level 2 and 3 cars. Remember: the safety drawbacks of Level 2 and 3 cars—the inability of human drivers to adequately supervise them—are motivating companies like Google and Ford to skip them altogether.[285] These companies, moreover, are developing Level 4 vehicles that are capable of responding safely to *all* driving situations and that have far more advanced perception capabilities than human drivers.[286] This development is what is fueling predictions that driverless cars could reduce accidents by several million per year.[287]

Ultimately, what may be the most troubling aspect of override provisions is their implicit overconfidence in human drivers despite decades of evidence that human beings, considered as a whole, are actually fairly terrible at driving. Indeed, given that human drivers cause over 25,000 accidents in the United States *per day*,[288] over 303,000 traffic-related fatalities per year,[289] and cost the country $37 billion annually,[290] it is surprising that legislators are not trying to *remove* human beings from the driver's seat as quickly as possible. Moreover, since human driver error is the cause of approximately 94% of all accidents, compared with only 6% caused by product defects or malfunctions, the assumption that human judgment reigns supreme to that of autonomous driving technologies is presumptuous at best and outright laughable at worst.[291] Passing laws, like override provisions, that may have the impact of stalling the full

284. *See supra* notes 275–92 and accompanying text.

285. *See* Davies, *supra* note 91; Ingrassia, *supra* note 43.

286. Ingrassia, *supra* note 43.

287. *See* Katyal, *supra* note 122, at 1688.

288. Schroll, *supra* note 111, at 807.

289. Levinson, *supra* note 122, at 795.

290. Brad Plumer, *Here's What It Would Take for Self-Driving Cars to Catch On*, WASH. POST (Oct. 23, 2013), http:// www.washingtonpost.com/blogs/wonkblog/wp/2013/10/23/heres-what-it-would-take-for-self-driving-cars-to-catch-on/.

291. *See* Schroll, *supra* note 111, at 805.

development and exploitation of these technologies, therefore, is reckless and unwarranted.

VI.
LEGISLATIVE BEST PRACTICES

Given the extremely rapid nature of technological development and change in this area, and the early stages of deployment of Level 3 and 4 vehicles, formulating a highly granular set of recommendations at this moment in time would arguably be both premature and highly dependent upon speculation.[292] A series of broader "best practices" for driverless car legislation, however, derived from the analysis of operator and override provisions discussed above, might provide helpful guidance to state lawmakers and assist them in avoiding similar mistakes in the future that could either unduly hamper the development of this technology or undermine highway safety.[293]

First, statutes and regulations that pertain to driverless cars should both distinguish between and be tailored to specific autonomous vehicle levels. As discussed at length above, one of the most significant problems with existing driverless car laws is that they treat all autonomous vehicles exactly the same despite the fact that variations in semi-autonomous and fully autonomous cars pose unique sets of challenges and strengths. This nuance-less treatment of driverless cars is arguably being fueled by news stories that make the exact same mistake. One journalist, for example, criticizes the *New York Times* article that ran in the wake of the Tesla Autopilot fatality discussed above as follows:

> The headline of the front page piece, "A Fatality in a Self-Driving Car Forces Tesla to Confront its Limits" is misleading. While the car was in Autopilot mode — akin to advanced cruise-control — it is not accurate to say that the car was self-driving . . . . The title sensationalizes the incident, and plays into the fear factor involved when new technology is released.[294]

As demonstrated above, a regulation, like an override provision, that may be warranted in response to Level 2 vehicles may be draconian or nonsensical when applied to Level 4s, and may actually have

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292. *See* Swanson, *supra* note 39, at 1087 ("[I]t is difficult for the law to maintain the break-neck speed at which technology is racing ahead.").

293. *See id.* at 1094–95.

294. Hope Reese, *Tesla's Fatal Autopilot Accident: Why the New York Times Got It Wrong*, TechRepublic.com, (July 6, 2016), http://www.techrepublic.com/article/teslas-fatal-autopilot-accident-why-the-new-york-times-got-it-wrong/.

a much more severe impact on the development of autonomous technologies than intended. Until lawmakers understand the nuanced differences between the different levels of autonomous vehicles—and legislate in a manner that responds to those differences—they have little hope of drafting sensible, appropriately tailored laws.

Second, to enhance the clarity of driverless car statutes and regulations, state lawmakers should utilize the same terminology employed by federal agencies, namely the National Highway Traffic Safety Administration, to describe the type(s) of autonomous vehicle(s) to which those laws and regulations are intended to apply. For instance, if a state only intends to regulate those autonomous vehicles that require constant driver supervision when autonomous features within the vehicle are engaged, the state's law should explicitly state that the statute or regulation applies to "Level 2" vehicles, as NHTSA has termed them.[295] Greater congruence between NHTSA's terminology and the language used in state laws will assist drivers, law enforcement officers, manufacturers, and courts in assessing which laws apply to which vehicles and, in the case of drivers and manufacturers, how to adjust their behavior or designs to comply with those laws. Currently, no state driverless car laws refer to which level of autonomy they apply.

Third, state lawmakers should rely on empirical data rather than intuition, speculation, or fear when drafting driverless car laws. This can be a particularly difficult task when attempting to regulate new technologies, as the general public has a tendency to "exaggerate the harms associated with an innovation" and demand significantly more severe laws than are warranted.[296] A 1908 article in the *Yale Law Journal*, for instance, called for harsh restrictions on the use of motor vehicles, a new and radical innovation at the time.[297] The author explained:

> To the *insider* they exhibited only their attractive features; to the outsider, only their repulsive ones. To nearly everyone but the occupants they were an inconvenience; to many a nuisance, and to some a veritable terror . . . . In dry weather they raised a stifling cloud of dust and smoke; their engines produced a disturbing noise, and their speed frightened horses, and rendered the roads so unsafe that it became a question whether they could be tolerated at all. Under such conditions,

295. NAT'L HIGHWAY TRANSP. SAFETY ADMIN., PRELIMINARY STATEMENT OF POLICY, *supra* note 51, at 5.

296. Graham, *supra* note 103, at 1256.

297. H. B. Brown, *The Status of the Automobile*, 17 YALE L.J. 223, 229 (1908).

> it is little wonder that they became so obnoxious that they were prohibited altogether in certain localities, such as Mount Desert and Nantucket Islands, and largely in private grounds. As soon as their beauty and peculiar construction had lost their novelty, and the public had ceased to wonder at their speed, the spectacle of a dangerous and irresistible machine tearing through the streets of a village at thirty or forty miles an hour, raised a storm of indignation, and sometimes called forth a volley of stones, or of eggs which had outlived their usefulness for every other purpose.[298]

Decades later, however, that analysis seems overly hysterical and unwarranted. Lawmakers are at risk of making the same mistake now. Neither override nor operator provisions appear to be based in any empirical understanding of how driverless cars work or how human drivers or occupants are likely to interact with them.

Lawmakers should thus resist the call to regulate out of fear and uncertainty and instead engage in careful review of highway safety data, studies of autonomous technologies, and real world experience, before attempting to respond to the regulatory challenges posed by driverless cars. This data may run counter to intuition about human behavior and highway safety, but it provides significantly better guidance on the types of laws that will both promote safe operation of autonomous cars and maximize the benefits they offer. The operator and override provisions discussed above demonstrate the ways in which laws can be nonsensical, overbroad, and otherwise problematic when such data is not utilized.

Fourth, state lawmakers should create exceptions to otherwise strict liability traffic laws for Level 4 and 5 vehicles and, to a lesser extent, Level 2 and 3 vehicles, to (a) avoid conflicts between this body of law and laws created specifically for driverless cars, (b) clarify the legal obligations of the "drivers" of autonomous cars, and (c) remove opportunities for nonsensical liability to be imposed upon them. While, as discussed above, some forms of liability for the "drivers" of autonomous cars may be appropriate, such as in situations where drivers fail to monitor Level 2 vehicles, in many others, liability might be more appropriately placed on the manufacturer via a products liability or negligence suit, a possibility explored quite ably by a number of other legal scholars.[299] Maintaining a

298. *Id.* at 225–26.

299. *See, e.g.*, Villasenor, *supra* note 107; David C. Vladeck, *Machines Without Principals: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117, 147–49 (2014); Kevin Funkhouser, Note, *Paving the Road Ahead: Autonomous Vehicles, Products Liability, and the Need for a New Approach*, 2013 UTAH L. REV. 437, 462 (2013);

canon of strict liability traffic laws with no carve out for autonomous cars, however, makes it difficult for courts to explore these nuances and assess where liability properly lies.[300]

Fifth, state lawmakers should be mindful that not all driverless car incidents warrant a legislative response. Inevitably, more driverless car-related fatalities and accidents will occur, but such incidents will not necessarily indicate that driverless car laws are not strict or extensive enough. Nor should lawmakers demand a perfect safety record:

> Inevitably, some will insist that anything short of totally eliminating risk is a safety compromise. They might feel that humans can make mistakes, but not machines. But waiting for autonomous vehicles to operate perfectly misses opportunities to save lives by keeping far-from-perfect human drivers behind the wheel . . . . Moreover, perfection could be a standard that is unattainable or that is not economically viable for developers, putting the kibosh on the industry. This would be a classic case of the perfect being the enemy of the good.[301]

Lawmakers, therefore, "may have to accept that [driverless] cars will cause a limited number of crashes, including deadly ones, if overall they save thousands of lives."[302]

Sixth, when in doubt about the necessity of new driverless car laws, state lawmakers should choose not to legislate. There are "inherent danger[s] in trying to design legislation too soon for new technology."[303] Such legislation could stifle development and thus undermine the benefits that the technology has to offer.[304] Moreover, given that the United States is still within the early stages of driverless car roll out, it is difficult to accurately assess what the biggest regulatory needs will be.[305] As one scholar sagely observes, "To borrow from screenwriter William Goldman, when predicting how

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Kyle Colonna, *Autonomous Cars and Tort Liability*, 4 CASE W. RES. J.L. TECH. & INTERNET 81, 96–97 (2012).

300. One of the more interesting possibilities explored in literature about driverless cars and products liability is the creation of a victim compensation fund that would be "funded by the collection of a small fee when each [autonomous vehicle] is purchased and that [would pay] for damages caused by the relevant [autonomous vehicles]." WEAVER, *supra* note 1, at 181.

301. Nidhi Kalra, *With Driverless Cars, How Safe Is Safe Enough?*, U.S.A. TODAY (Feb. 1, 2016), http://www.usatoday.com/story/opinion/2016/01/31/driverless-cars-autonomous-vehicles-safety-innovation-death-accidents-column/78688584/.

302. Krisher & Pritchard, *supra* note 99.

303. WEAVER, *supra* note 1, at 61.

304. Thierer & Hagemann, *supra* note 127, at 340; Putre, *supra* note 103.

305. Graham, *supra* note 103, at 1241.

tort law will interact with innovations, nobody knows anything — at least for a while."[306] State lawmakers should thus opt to take a "wait and see" approach rather than an "anticipate and legislate" one.

VII.
CONCLUSION

The United States is on the cusp of a revolution in transportation. The sale and widespread use of both semi-autonomous and fully autonomous vehicles are both imminent and likely to significantly change the way in which citizens commute, interact, and travel. These cars are being developed in both Detroit and Silicon Valley and use combinations of radar, laser, camera, and software technologies to allow them to perform driving tasks that have historically been the responsibility of human drivers. In the process, they raise significant questions about appropriate regulation and liability.

While there is substantial concern amongst lawmakers and the general public about the overall safety and desirability of driverless cars, experts predict that fully autonomous cars will dramatically improve highway safety by preventing millions of accidents and saving tens of thousands of lives per year. In addition, these vehicles are likely to significantly reduce traffic, increase productivity, and greatly enhance the independence of people who lack the ability to obtain a license: the physically disabled, the visually impaired, and the elderly.

Lawmakers, however, motivated by fears of these new types of cars and by an unfounded assumption that human drivers are far superior to automated technologies, have begun passing laws that create significant liability issues while doing very little to enhance road safety. These laws ignore the differences between Level 2, 3, 4, and 5 autonomous vehicles, chill technological advancement, impose unwarranted liability on human drivers in many circumstances, and may actually incentivize human driver behavior that is less safe than letting the vehicle drive autonomously. Both "operator" and override provisions—two very common types of driverless car laws—make these mistakes.

"Operator" provisions, for example, consider human drivers the "captain" of their ships and hold them responsible for any and all malfunctions of their semi- or fully autonomous cars regardless of whether those humans had the ability to prevent or control them. While undoubtedly some liability for human drivers is appro-

306. *Id.*

priate in some driverless car contexts—for instance, in situations in which humans were not appropriately monitoring Level 2 or 3 vehicles—imposing liability in other circumstances (and in all contexts involving Level 4 and 5 cars) runs counter to the most fundamental underpinnings of both civil and criminal law.

Override provisions, which require constant human monitoring of driverless cars or the installation of mechanisms within driverless cars that would permit human intervention, are similarly problematic. Constant driver supervision may be an appropriate (though perhaps too limited) requirement for Level 2 vehicles, but it is both overly strict and unnecessary for Levels 3, 4, and 5. Moreover, these laws are based on several flawed assumptions about the likelihood and ability of human drivers to supervise and intervene appropriatelyand in a timely manner. A wealth of empirical studies cast significant doubt on the ability of human drivers to do either. Most troublingly, these laws outlaw fully autonomous vehicles—those that stand to offer the most benefits to both drivers and society—and pose a serious threat to companies, like Google and Ford, taking an "all-in" approach to the development of these cars.

Lawmakers who wish to pass sensible driverless car laws must carefully tailor those laws to the specific types of autonomous technologies at issue. Partially autonomous cars raise an entirely different set of regulatory challenges than fully autonomous cars and thus should be treated differently under the law. Lawmakers should also use language consistent with that being used by federal agencies when describing autonomous technologies in order to promote clarity and consistency between the states. Perhaps most importantly, however, lawmakers should use empirical data, rather than intuition or speculation to inform their decisions about whether to legislate and how to do so appropriately. Given the profound benefits that driverless cars have to offer, suppressing the development of those technologies now through legislative overreach would be a situation almost as tragic as the current rates of injuries and deaths on U.S. roads. Drivers and passengers deserve better.

PATRON DATA PRIVACY PROTECTION AT PUBLIC LIBRARIES: THE ETHICAL MODEL BIG DATA LACKS

*EMMA TROTTER**

TABLE OF CONTENTS

I. INTRODUCTION

We live in the information age.[1] Defining features include the idyllic: search engines give us instant access to facts on the go, social media helps us stay connected to friends and professional contacts throughout our lives, and online marketplaces quickly deliver

* New York University School of Law, *cum laude*, 2016; Notes Editor, *Annual Survey of American Law*, 2015–2016. I would like to thank Professors Ira Rubinstein, Katherine Strandburg, and Jason Schultz for their advice on this Note. My colleagues in the Notes Writing Program at *Annual Survey*—Harry Black, Ameneh Bordi, Ben Mejia, Georgia Stasinopoulos, and Ashley Sun—also provided extremely valuable support and suggestions.

1. *See generally* MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE (2d ed. 2010) (analyzing contemporary society's use of information).

global products right to our doorsteps. But these benefits have come at a dear, though often unnoticed, price. This Note describes the gradual erosion of user privacy and argues that we should look to public libraries for the solution: big data regulation that more effectively protects that privacy.[2]

In Part I, this Note defines "privacy" and explains how it is vitally important to our intellectual freedom. It also unpacks the term "big data" and explains how the current regulatory framework has allowed for unethical use of such data and the erosion of our privacy.

Part II draws a distinction between library "values" at a theoretical level and library "practices" on the ground day-to-day in order to illustrate the tension between them created by changing technology. Two areas—anonymous Internet browsing for users and libraries' hesitation to utilize data beyond the purpose for which it was originally collected ("secondary use")—illustrate how library values have generally withstood the pressure big data has placed on libraries to erode patron privacy protections in practice.

Part III advances an ethical model that looks to libraries, given this robustness of library values, for big data regulation. In this model, stakeholders maintain the ability to access information while review criteria, applied to each commercial use proposed, also ensure better protection of user privacy. For their part, libraries serve as the safe-keepers of big data and make it available for use by entities other than the provider of the information only if certain procedural safeguards are met (a function which is called a "personal data store"), thereby solving the problem set out in Part I and alleviating the tension raised in Part II. Because of their values, public libraries are ideally positioned to perform this function and help provide the ethical regulation big data lacks.

II.
BIG DATA THREATENS USER PRIVACY, A VITAL PILLAR OF INTELLECTUAL FREEDOM

This Part addresses three questions: what is privacy, how does big data threaten privacy, and why does privacy matter?

2. This Note uses the terms "user," "consumer," "customer," and "patron" interchangeably.

A. What is privacy?

Any discussion of privacy must first acknowledge that the term has no fixed meaning.[3] Definitions attempted by commentators have fallen into three general categories.

One category of attempted definitions seeks to find one essential unifying feature of privacy from which a broader set of rights or obligations flows. Responding to the advent of personal camera use, attorney Samuel Warren and Supreme Court Justice Louis Brandeis defined privacy as the "right to be let alone,"[4] a formulation which seeks to protect emotions and personality by prohibiting the unauthorized use of images.

A second category of attempted definitions seeks to exhaustively list privacy harms. Early on, legal theorist William Prosser enumerated four basic harms: intrusion upon seclusion; public disclosure of private facts; publicity which places the victim in a false light; and, similar to Warren and Brandeis' formulation, appropriation of the victim's name or likeness.[5] While arguably comprehensive at the time, these four torts no longer capture the wide variety of privacy harms that can occur in the information age.[6] Supplementing Prosser, privacy expert Daniel Solove more recently put forth a "taxonomy" of privacy harms, which share no one defining feature, but rather resemble each other, as Solove puts it, based on a set of characteristics—much like an extended family.[7] The characteristics include harm to dignity and broader architectural problems with the ways data systems are structured.[8] One of Solove's harms, "secondary use" of information originally disclosed for an initial, primary purpose, is discussed in Part II.

A third category looks to the interaction of multiple norms. In Professor Helen Nissenbaum's view, privacy regulation should be informed by social values, and such values can be different depend-

3. *See, e.g.*, Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 479–80 (2006).

4. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

5. Solove, *supra* note 3, at 482.

6. One reason for this is that tort law protects physical bodily integrity at a more absolute level than it protects against emotional or dignitary harms. *See, e.g.*, *id.* at 487.

7. *Id.* at 486. The sixteen privacy harms Solove identifies in his taxonomy are surveillance, interrogation, aggregation, identification, insecurity, secondary use, exclusion, breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation, distortion, intrusion, and decisional interference. *Id.* at 490–91.

8. *Id.* at 487.

ing on the context of a particular transaction.[9] Nissenbaum calls this framework "contextual integrity," which calibrates privacy protection based on the norms of specific contexts, demanding "compatibility with presiding norms of information appropriateness and distribution."[10] The framework determines "whether a particular action is determined a violation of privacy" by looking to "several variables, including the nature of the situation or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination."[11] These variables change depending on the context such that what is a violation within one context would be perfectly normal in another.[12] This vaguer, norms-based formulation of the right to privacy has the effect of defining privacy in a broader and more flexible manner compared to either the theory of Warren and Brandeis or that of Solove, and, as analyzed in Parts II and III, maps well onto the public library context.

In sum, this Note defines privacy as a collection of specific protections against specific violations, as well as an umbrella term encompassing social values we have traditionally held.

B. How does big data—and the way it's currently regulated—threaten privacy?

The information age has coincided with a gradual erosion of user privacy, and a primary reason for this is what we have come to call "big data." Due to ever-increasing analytical capability, big data makes the collection of highly detailed information about our Internet browsing behavior more efficient and allows those datasets to translate much more cheaply and easily into actionable insights, enabling corporations to better target us with advertisements or use scoring algorithms to assess and reduce their risk when taking on

9. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004). Nissenbaum has also written about the power of search engines to serve as a force for either democratization, much like a library card catalog, or the further entrenchment of mainstream commercial interests. *See, e.g.*, Lucas Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, THE INFORMATION SOCIETY 169, 169–70 (2000), http://www.nyu.edu/projects/nissenbaum/papers/Shaping%20the%20Web.pdf.

10. Nissenbaum, *supra* note 9, at 155.

11. *Id.*

12. *Id.*

new customers.[13] The term "big data" encompasses several different aspects of this ongoing process. As Professors Kate Crawford and Jason Schultz write, "First, it refers to technology that maximizes computational power and algorithmic accuracy. Second, it describes types of analyses that draw on a range of tools to clean and compare data. Third, it promotes the belief that large data sets generate results with greater truth, objectivity, and accuracy."[14] In the information age, more data are collected and readily accessed by people, corporations, and governments than ever before. The rest of this Section explores how current privacy laws are ill-equipped to address the harms caused by big data and may even backfire as applied to public libraries.

1. Inadequacy of the FIPs

Privacy regulation has not kept pace with big data. The most influential approach to privacy law in the United States—the Fair Information Practices (FIPs)—percolates through dozens of sectoral laws,[15] is decades old,[16] and inadequately regulates the use of big data. Taken together, the aim of the FIPs is to protect privacy in an increasingly global and impersonal world, where consumers are no longer in contractual privity with each entity that has access to their personal data.[17] The most widely used version was developed in 1980 by the Organisation for Economic Co-operation and Development.[18] The principles are:

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13. *See generally* Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93 (2014) (describing big data's rise, applications, and drawbacks).

14. *Id.* at 96.

15. In the context of privacy laws, "sectoral" means aimed at one particular sector of the economy. For example, the financial industry has the Fair Credit Reporting Act (FCRA) and the health insurance industry has the Health Insurance Portability and Accountability Act (HIPAA). Two sectoral laws, the Children's Online Privacy Protection Act (COPPA) and the Family Educational Rights and Privacy Act (FERPA), are discussed in the next Section.

16. The FIPs were originally put forward in a 1973 report, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS (1973).

17. *Protection of Privacy and Personal Data*, ORGANISATION FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/internet/ieconomy/protectionofprivacyandpersonaldata.htm (last visited Feb. 9, 2017).

18. *Privacy Principles*, ORGANISATION FOR ECON., CO-OPERATION & DEV., http://oecdprivacy.org/ (last visited Feb. 9, 2017).

- Collection limitation: Requires that personal data be obtained by lawful and fair means, such as through consent of the data subject.
- Data quality: Requires that data collected be appropriate to the purpose for which they are collected and kept up-to-date to ensure accuracy.
- Purpose specification: Requires that the reason for collecting data be clearly expressed at the time of collection.
- Use limitation: Requires that personal data only be disclosed with the consent of the data subject or as required by law.
- Security safeguards: Requires that data be protected against unauthorized use or disclosure.
- Openness: Requires that practices and policies about the use of personal data be reasonably transparent.
- Individual participation: Requires that an individual have the right to access data collected about him and to make corrections if necessary.
- Accountability: Requires that data controllers have the responsibility to successfully implement the principles.[19]

Because of their emphasis on informed consent of the data subject, the FIPs are sometimes summarized as "notice and choice," with roughly the first four FIPs guaranteeing adequate notice and the sixth and seventh FIPs emphasizing choice. Essentially, if a person is told what a data controller plans to do with her data and, based on this knowledge, decides—sometimes simply by using a service—to allow for such usage, the data practice would be unassailable under most of the FIPs, with the possible exception of security, the fifth FIP.

As currently implemented, the FIPs are inadequate to protect user privacy because, as implemented through sectoral privacy laws in the United States, they reflect a simpler time.[20] Though arguably well-suited to an era in which consumers disclosed data directly to certain businesses and maintained one-on-one relationships with most entities with access to their data, the FIPs as currently implemented have not kept pace with the advent of big data, data bro-

19. *Id.*

20. *See, e.g.*, Florencia Marotta-Wurgler, *Understanding Privacy Policies: Content, Self-Regulation, and Market Forces* 6 (N.Y.U. L. & Econ., Working Paper, Paper 435, 2016), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1439&context=nyu_lewp (describing limitations of current regulatory scheme).

kers, and the interoperability[21] of datasets.[22] The FIPs emphasize notice and consent of the individual user, but in an increasingly interconnected and online world, people generally lack the capacity to make an informed judgment about sharing information with a particular entity. There are many reasons for this paradigm shift, addressed below, including difficulty assessing risk, the enhanced possibility of re-identification, and the growing prevalence of automated data processing.

Consumers often have difficulty assessing the risk of having their privacy violated because of the sheer number of online services a typical consumer uses. For example, a user might search for a product on Google before buying it on Amazon, then open Facebook to share a status update, then click a link to a news article a friend shared. Each of these sites might track the user's activity, and spending hours trying to opt out of data collection site-by-site is not reasonable. A user might also be unaware of the possibility that data anonymously provided to one service can be re-identified though aggregation of data collected across different services, which increases the difficulty of accurately assessing and responding to threats to privacy.[23] Professor Katherine Strandburg explains,

> [B]ecause it is so difficult to assess the marginal expected disutility related to data collection by any single product or service, consumers may well view avoiding data collection by any one particular product or service as a futile gesture in light of continued data collection by other products and services she uses.[24]

Essentially, though a given user may value her privacy across the range of services she uses, she may view updating her preferences on each individual service as more trouble than it's worth from a privacy perspective. The collection of data related to the user from others who do not update their preferences to better protect privacy further complicates this situation.[25] For example,

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21. Aaron K. Perzanowski, *Rethinking Anticircumvention's Interoperability Policy*, 42 U. CAL. DAVIS. L. REV. 1549, 1553 (2009) (defining interoperability as "a relationship between two or more systems by which they exchange usable information").

22. By some accounts, the increasing irrelevance of FIPs-based regulation has led, or will soon lead, to an overall decrease in privacy suits. *See, e.g.*, Ross Todd, *Wave of Privacy Suits Peters Out*, THE RECORDER (May 29, 2015), http://www.therecorder.com/id=1202727906735/Wave-of-Privacy-Suits-Peters-Out.

23. Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 159 (2013).

24. *Id.*

25. *Id.*

Facebook apps can often access data about a user's friends even if those friends have not consented to use the service.[26] The combined effect of these realities is that even a user who values her privacy may not be incentivized—or may feel powerless—to protect it in a particular transaction.

Another concern is that data a user provides separately to different service providers increasingly can be aggregated and, in some cases, stripped of anonymity protections. The first piece of this equation is data brokers, entities that aggregate and sell user data. For example, Acxiom is a data broker that sells consumer information to its clients so that they can target consumers for advertising campaigns.[27] Though a consumer may think data she provides to a particular service provider will stay there, many service providers sell or share consumer data with partners. Acxiom contracts with many of these service providers to further aggregate data, and then sells these datasets to still more service providers. This is problematic because data which in isolation does not identify the consumer can, in the aggregate, do just that. For example, when AOL in 2006 released supposedly de-identified information[28] consisting of search queries, journalists quickly demonstrated that at least some of the searchers could be identified based on their search terms:

> [S]earch by search, click by click, the identity of AOL user No. 4417749 became easier to discern. There are queries for 'landscapers in Lilburn, Ga,' several people with the last name Arnold and 'homes sold in shadow lake subdivision gwinnett county georgia [sic].' It did not take much investigating to follow that data trail to Thelma Arnold, a 62-year old widow who lives in Lilburn, Ga., frequently researches her friends' medical ailments and loves her three dogs. 'Those are my searches,' she said, after a reporter read part of the list to her.[29]

Similarly, in a recent study researchers were able to identify 80 percent of participants simply by tracking which websites a partici-

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26. *Social Networking Privacy: How to Be Safe, Secure and Social*, PRIVACY RIGHTS CLEARINGHOUSE, https://www.privacyrights.org/social-networking-privacy (last visited Feb. 19, 2017).

27. Anna Maria Virzi, *Acxiom Names Scott Howe CEO*, CLICKZ (July 28, 2011), http://www.clickz.com/clickz/news/2097642/acxiom-names-scott-howe-ceo.

28. Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1841 (2011).

29. Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. TIMES, Aug. 9, 2006, at A1, http://www.nytimes.com/2006/08/09/technology/09aol.html.

pant clicked on through Twitter.[30] The researchers then "crawled through millions of Twitter profiles to see who [participants were] following" and used that information to deduce their identities.[31] The researchers noted that "[a]lthough we happen to use Twitter, it's not like Twitter is uniquely vulnerable . . . . It doesn't take a lot of recorded characteristics to have people become unique."[32] These findings are troublesome for people who think they are engaging in anonymous Internet activity. "Vanity searching," a term for when an individual searches the Internet for her own name in conjunction with various other terms and a pastime in which 47 percent of American adult Internet users reportedly engage, makes the process of re-identification even easier.[33] Even when consumers try to protect their privacy by giving out information sparingly, the prevalence of data brokers and the astonishing ease of re-identifiability mean that consumers can unwittingly expose more personal information than they intended.[34]

Finally, the increasing use of automated data processing and decision-making means that consumers, in addition to inadequately assessing the risks posed by sharing their data, must also contend with a lack of notice about how that data may be used to their detriment. The classic example of automated decision-making is credit score algorithms. When looking at her credit report, a consumer has a general idea that making two late payments in five years may have negatively affected her score. But big data capabilities have drastically increased the number and kinds of variables automated decision-making algorithms, such as credit scoring systems, can consider. Therefore, a consumer may not know that a "credit card company uses behavioral-scoring algorithms to rate consumers' credit risk because they used their cards to pay for marriage counseling, therapy, or tire-repair services," that "[a]utomated systems rank [job] candidates' talents by looking at how others rate their online contributions," that "[t]hreat assessments result in arrests or the inability to fly even though they are based on erroneous information," or that "[p]olitical activists are designated as 'likely' to

30. Vignesh Ramachandran, *You Are Less Anonymous on the Web Than You Think — Much Less*, STAN. ENGINEERING (Oct. 20, 2016), https://engineering.stanford.edu/news/you-are-less-anonymous-web-you-think-much-less.

31. *Id.*

32. *Id.*

33. Duncan Riley, *Do You Use Google for Vanity Searching? You're Not Alone*, TECHCRUNCH (Dec. 16, 2007), http://techcrunch.com/2007/12/16/do-you-use-google-for-vanity-searching-youre-not-alone.

34. *See generally* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701 (2010).

commit crimes."[35] And she would have no way of finding out due to the proprietary nature of scores, which some claim violates the constitutional right to due process.[36] Yet again, the consumer, who may have consented to the data collection initially, finds herself the victim of a harm that seems to bear little logical relation to the original disclosure. In this manner, big data threatens user privacy in a way that the FIPs have been powerless to prevent.

2. Counter-productivity of COPPA and FERPA in the public library context

Two statutes, the Children's Online Privacy Protection Act (COPPA)[37] and the Family Educational Rights and Privacy Act (FERPA),[38] are part of the sectoral FIPs-based privacy regulation system currently charged with controlling the use of big data.[39] Though libraries are categorically not subject to either law, a pattern of over-compliance[40] threatens library values of privacy protection and access to information[41]—values which, as this Note explores in Part III, are critical to libraries' potential role as the ethical model big data lacks. Therefore, these laws illustrate how big data regulation is currently ineffective and even counterproductive.

As a preliminary matter, it is quite clear from analysis of plain meaning and agency guidance that libraries are not subject to either COPPA or FERPA. COPPA requires operators of commercial websites to obtain parental consent before collecting, using, or disclosing personal information of children under the age of 13.[42] The Federal Trade Commission (FTC), which administers COPPA, states in its guidelines that nonprofit entities are "exempt" from

35. Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 4 (2014).

36. *Id.* at 27–28.

37. 15 U.S.C. § 6502 (2012).

38. 20 U.S.C. § 1232g (2015).

39. COPPA emphasizes notice and choice, while FERPA allows for individual participation. 15 U.S.C. § 6502(b)(1)(A); 20 U.S.C. § 1232g(a)(1)(A).

40. An entity over-complies with a law when it follows a law that does not actually apply to it, either categorically or given a particular set of facts. *See, e.g.*, Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools that Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 502 (2013) (discussing schools' over-compliance with FERPA).

41. For more on the connection between privacy and access to information see Part III.

42. 15 U.S.C. § 6502(b)(1)(A)(ii).

COPPA.[43] Since many public libraries are nonprofits or city agencies rather than commercial website operators, they are not subject to COPPA under FTC guidance.[44] Similarly, the text of FERPA and the Department of Education (ED) FERPA guidelines define and discuss covered institutions in a manner that suggests public libraries are exempt. FERPA imposes restrictions on the disclosure of student records that: "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[45] According to the statute, covered entities are "any public or private agency or institution which is the recipient of [ED] funds under any applicable program."[46] ED's FERPA guidelines consistently refer to covered institutions as "schools" or "a school" and make no mention of public libraries, so the agency interpretation seems to be that this law applies primarily to schools or school libraries.[47] Any public library not receiving ED funding[48] is, thus, categorically

43. Bureau of Consumer Protection Business Center, *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMMISSION (July 2013), http://www.business.ftc.gov/documents/0493-Complying-with-COPPA-Frequently-Asked-Questions.

44. The legislative history of COPPA also supports the argument that public libraries are exempt from the law. The American Library Association (ALA) weighed in on an early draft, expressing concern that the current draft "would include many non-profit organizations, including libraries." *Children's Online Privacy Protection Act of 1998: Hearing on S.2326 Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 55 (1998). Subsequent drafts and the final text of the act included the nonprofit exception discussed above.

45. 20 U.S.C. § 1232g.

46. *Id.*

47. *Id. Cf.* Lee S. Strickland et al., *Patriot in the Library: Management Approaches When Demands for Information Are Received from Law Enforcement and Intelligence Agents*, 30 J.C. & U.L. 363, 401 n.195 (2004) (regarding the special case of libraries within schools: "Library records are not specifically mentioned in FERPA . . . yet many universities interpret these records to be covered as educational records."). *Accord* JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 19-11 (2d ed. 1990). This argument can be limited to libraries situated within schools, though, so public libraries are still exempt under Strickland's analysis. *See also* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 520 (5th ed. 2015) (asserting that under FERPA, "which regulates the privacy of student data at schools, parties receiving student data from schools are not directly regulated by [ED]"). This is in contrast with the Department of Health and Human Services rule, which extends liability to business associates of covered entities. 45 C.F.R. § 164.502 (2017).

48. According to the ALA, "the majority of federal library program funds are distributed through the Institute of Museum and Library Services," an agency separate from ED, which means most libraries probably do not receive ED funding. *Appropriations*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/libfunding/fed (last visited Feb. 9, 2017).

not subject to FERPA under the law's plain meaning and as interpreted by ED.[49] Taken together, the plain meaning of the text of COPPA and FERPA and the guidelines provided by the implementing agencies support the conclusion that the laws do not apply to non-university public libraries.

The American Library Association (ALA) has adopted this interpretation and stated in a variety of formats that it does not believe COPPA and FERPA apply to libraries. For example, ALA Deputy Director of the Office for Intellectual Freedom Deborah Caldwell-Stone sums up COPPA as only applying to commercial enterprises: "You're not selling data—that's the last thing you're doing as a library."[50] More formally, in contrast to COPPA's parental consent requirement, the ALA website states that "librarians should not breach a child's confidentiality by giving out information readily available to the parent from the child directly. Libraries should take great care to limit the extenuating circumstances in which they will release such information."[51] Regarding FERPA, the ALA states that "the definition of educational institution . . . excludes a library unless it is incidentally connected to an institution . . . consider[ed] educational. . . . Thus a university library might qualify as an educational institution, but the New York Public Library would not."[52] The ALA's approach is wholly distinct from what some libraries are doing in practice,[53] which has resulted in an erosion of privacy pro-

49. The legislative history of FERPA also lends itself to the proposition that the law does not apply to libraries. Similar to the ED guidelines, the text of hearings and statements reflects that senators treated the broad "agency or institution" language as referring more narrowly to schools. *See, e.g.*, *School Violence and Vandalism: Hearing Before the S. Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 94th Cong. 132 (1975) (characterizing "educational institutions" as "such schools").

50. Sarah Bayliss, *With Tighter COPPA Regulations, Librarians See Hurdles to Kids' Internet Use*, SCH. LIBR. J.: THE DIGITAL SHIFT (July 9, 2013), http://www.thedigitalshift.com/2013/07/k-12/with-tighter-coppa-regulations-librarians-seed-hurdles-to-kids-internet-use.

51. *Questions and Answers on Privacy and Confidentiality*, AM. LIBR. ASS'N., http://www.ala.org/Template.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15347 (last visited Feb. 9, 2017).

52. *Freedom of Information Act Fees*, *in* AM. LIBRARY ASS'N., GOVERNMENT DOCUMENTS ROUNTABLE 137 (1987), http://sul-derivatives.stanford.edu/derivative?CSNID=80000092&mediaType=application/pdf.

53. *See, e.g.*, Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 784 (2011) (calling the ALA's approach "entirely different . . . from that of COPPA [and] FERPA."). *But see* BJ Ard, *Confidentiality and the Problem of Third Parties: Protecting Reader Privacy in the Age of Intermediaries*, 16 YALE J.L. & TECH. 1, 37 n.177 (2014) (calling the ALA's approach more similar to

tection and could threaten access to certain types of library materials.

Nevertheless some public libraries have chosen to comply with COPPA. For example, the Boston Public Library (BPL) requires that children ages twelve and under apply for a library card in person rather than online, and a staff member confirmed in 2012 that the reason for that restriction was to comply with COPPA.[54] Libraries that voluntarily comply with COPPA by requiring this level of parental involvement are actually failing to protect the privacy of children, thereby subverting the purpose of the law. Professor danah boyd writes, "I've always been under the impression that librarians are also committed to making sure that children have access to information, even information that might upset their parents," such as materials about abuse or homosexuality.[55] Thus over-compliance with COPPA can result in libraries unnecessarily providing children's private reading histories to their parents, therefore resulting in the erosion of privacy protections for children, contrary to COPPA's purpose. Furthermore, this result weakens libraries' historically robust protection of patron privacy, jeopardizing their ability to serve as the ethical model big data lacks.

When it comes to FERPA, schools, not libraries, needlessly comply with the statute, and this can still undermine library values. For example, Stephen F. Austin State University's "Interviewer Release Form" requires oral history interviewers to expressly authorize disclosure of the interviews "to the extent that the [i]nterviews would be considered an education record under federal law."[56] FERPA defines an educational record as "records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution," and excludes "[g]rades on peer-graded papers before they

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that of COPPA: "Contrast the position articulated by ALA in interpreting the Library Bill of Rights, which affirm[s] the responsibility and the right of all parents and guardians to guide their own children's use of the library and its resources and services." (internal quotation marks omitted)).

54. danah boyd, *Are Librarians Encouraging Libraries to Abide by COPPA?*, SHEKNOWS (Feb. 24, 2012), http://www.blogher.com/are-librarians-encouraging-public-libraries-abide-coppa (assessing that BPL "seems to be going further than similar institutions"). The New York Public Library has similar requirements. *Apply for a Library Card*, N.Y. PUB. LIBR., http://www.nypl.org/help/library-card#apply (last visited Feb. 9, 2017).

55. boyd, *supra* note 54.

56. *Interviewer Release Form*, STEPHEN F. AUSTIN STATE UNIV., http://www.sfasu.edu/heritagecenter/6868.asp (last visited Feb. 9, 2017).

are collected and recorded by a teacher," among other exemptions.[57] Based on these definitions, it is not at all clear that oral history interviews would qualify as an educational record, since they are arguably focused on someone else and not directly related to a student, as well as closer to the assignment status of "peer-graded papers" than the final grade status of a bona fide record. Though it may be more efficient for schools to assume every record is an educational record subject to FERPA, this over-compliance threatens libraries' core value of access to information, a value served by projects like oral history interviews, which libraries also conduct.[58] By weakening access to information, FERPA over-compliance similarly jeopardizes libraries' ability to serve as the ethical model big data lacks.

Libraries are not subject to either COPPA or FERPA. Moreover, unnecessary compliance is actually *less* protective of privacy than noncompliance and curtails legitimate access to information. As such, COPPA and FERPA are examples of big data regulation backfiring.

In sum, big data threatens user privacy by allowing for aggregation and further use of data beyond the point of collection. Current regulation of big data grounded in the FIPs has not been effective at preventing these harms to user privacy and in some cases can even exacerbate that harm.[59] Part III returns to this problem and proposes a solution.

C. Why does privacy matter?

Some people hear the word "privacy" and think, "*I don't need privacy. I have nothing to hide.*" But the point of privacy has nothing to do with having something to hide and everything to do with the freedom to formulate intellectual views free from scrutiny.

Underlying all three definitions of privacy discussed in Part I.A is the premise that privacy is worthy of protection and that its violation constitutes a legally cognizable harm.[60] This idea is well established, perhaps most illustriously in the Fourth Amendment to the U.S. Constitution, which protects against unlawful searches and seizures.[61] However, the realities of technology, widespread government surveillance, and a host of other factors have led some com-

57. 34 C.F.R. § 99 (2017).

58. *See, e.g.*, *Community Oral History Project*, N.Y. PUB. LIBR., http://oralhistory.nypl.org/ (last visited Feb. 9, 2017).

59. *See* Crawford & Schultz, *supra* note 13, at 108.

60. *Id.*

61. U.S. CONST. amend. IV.

mentators to throw up their hands and declare that privacy is "dead."[62] Others insist on privacy's continuing vitality,[63] at least if Americans are to continue to live in a fundamentally free society[64] that frowns upon discrimination based on viewpoint.[65] During the release of the recent Consumer Privacy Bill of Rights, former President Obama stated, "Even though we live in a world in which we share personal information more freely than in the past, we must reject the conclusion that privacy is an outmoded value."[66] A recent study shows that people are approximately equally split between the two camps.[67]

Professor Neil Richards has argued that privacy is essential to the development of ideas in a free society.[68] This intellectual aspect of privacy is "the idea that records of our reading habits, movie watching habits, and private conversations deserve special protection."[69] Richards argues that this type of intellectual exploration is essential to how we formulate our views on political and social issues.[70] The ability to engage in intellectual exploration free from fear of surveillance, or the possibility of having our interests broadcast and being exposed to social judgment—an idea rooted in Warren's and Brandeis's insistence on our right to be let alone—permits us to entertain ideas other people might find offensive.[71] Richards is an absolutist on the subject of intellectual privacy, argu-

62. *See, e.g.*, Matt Hamblen, *McNealy Calls for Smart Cards*, COMPUTER WORLD (Oct. 12, 2001), http:// www.computerworld.com/s/article/64729/McNealy_calls_for_smart_cards_to_help_security.

63. *See, e.g.*, LAWRENCE LESSIG, CODE 201 (2d ed. 2006) ("There are both changes in law and changes in technology that could produce a much more private (and secure) digital environment.").

64. *See, e.g.*, NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE, 176–77 (2015).

65. *See, e.g.*, Citron & Pasquale, *supra* note 35, at 27 (arguing that due process should inform basic safeguards in regard to consumer scores and automated decision-making).

66. *See, e.g.*, Kashmir Hill, *Obama Says Privacy Isn't Dead as White House Calls For 'Consumer Privacy Bill of Rights'*, FORBES (Feb. 23, 2012, 9:33 AM), https://www.forbes.com/sites/kashmirhill/2012/02/23/obama-says-privacy-isnt-dead/#2f761cc916a4.

67. *See* Heather Kelly, *Survey: Will We Give Up Privacy Without a Fight?*, CNN (Dec. 18 2014, 10:05 AM), http://www.cnn.com/2014/12/18/tech/innovation/pew-future-of-privacy/.

68. RICHARDS, *supra* note 64 at 176–77.

69. Danielle Citron, *Neil Richards on Why Video Privacy Matters*, CONCURRING OPINIONS (Jan. 4, 2012), http://concurringopinions.com/archives/2012/01/neil-richards-on-why-video-privacy-matters.html.

70. *Id.*

71. *Id.*

ing it is equally vital "whether we're reading communist or anti-globalization books; or visiting web sites about abortion, gun control, cancer, or coming out as gay; or watching videos of pornography, or documentaries by Michael Moore, or even The Hangover 2."[72]

The difficulty of browsing the Internet anonymously and the ease of exploiting consumer data wrought by big data threaten exactly this type of privacy. One example of how intellectual privacy is under threat is the use of automated decision-making discussed in the last Section in which seemingly fragmented data can be re-aggregated and lead to, for example, a consumer's credit score decreasing. Another example is a tactic known as "doxing" or "Kompromat," in which information gleaned from Internet behavior is released online as a form of retaliation;[73] the practice has risen in prevalence as big data tools have gotten more robust and would certainly mortify Warren and Brandeis, who feared mere cameras. Furthermore, all Americans are vulnerable to intrusive government monitoring of Internet and phone use,[74] which may inhibit free inquiry.[75] Given these threats, if a person logically becomes—even ever so slightly—less likely to search online or discuss with friends a certain concept, then, according to Richards, the development of ideas necessary for a free society comes under threat, because people are less likely to formulate or discuss ideas in the first place.

III.
PUBLIC LIBRARY "VALUES" AND "PRACTICES" AS APPLIED TO ANONYMOUS BROWSING AND SECONDARY USE

The remainder of this Note focuses on public libraries as a potential solution to the problems caused by big data. Public libraries

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72. *Id.*

73. *See* Joseph Cox, *I Was Taught to Dox by a Master*, THE DAILY DOT (Dec. 11, 2015), http://www.dailydot.com/layer8/dox-doxing-protection-how-to/.

74. James Ball et al., *Revealed: How US and UK Spy Agencies Defeat Internet Privacy and Security*, THE GUARDIAN (Sept. 6 2013), https://www.theguardian.com/world/2013/sep/05/nsa-gchq-encryption-codes-security.

75. "[A]fter Edward Snowden revealed the extent of the National Security Agency's spying on citizens in 2013, Google searches for terrorism-related terms such as *al Qaeda* dropped." Matthew Hutson, *Even Bugs Will Be Bugged: Exploring the Next Frontiers in Surveillance*, THE ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/even-bugs-will-be-bugged/501113/.

are some of America's most trusted institutions[76] and have historically operated as paragons of user privacy.[77] These values make them a natural source of possible solutions to the erosion of privacy caused by big data. But libraries have also not been immune to the pressures of big data. In practice, new technologies available to librarians, such as Amazon e-books and the BiblioCommons card catalog system,[78] exert pressure to loosen historically protective privacy

76. *See, e.g.*, CENTER FOR AN URBAN FUTURE, RE-ENVISIONING NEW YORK'S BRANCH LIBRARIES 35 (2014), https://nycfuture.org/pdf/Re-Envisioning-New-Yorks-Branch-Libraries.pdf (outlining how "libraries are the most trusted institution for immigrants"); 18 U.S.C. § 2709(g) (2015) (excluding libraries from the definition of "wire or electronic communication" covered by the Stored Communications Act). Moreover, as libraries evolve beyond their traditional collection function, a 2015 study showed that over "two-thirds of Americans agree that libraries are important because they improve the quality of life in a community, promote literacy and reading, and provide many people with a chance to succeed." *The State of America's Libraries: 2015*, AM. LIBR., Apr. 2015, at 2, http://www.ala.org/news/sites/ala.org.news/files/content/0415_StateAmLib_0.pdf. Furthermore, in 2012, "there were 92.6 million attendees at the 4 million programs offered by public libraries [representing] a 10-year increase of 54.4% in program attendance." *Id.* at 3. With libraries continuing to play an important role in American communities, it is worth focusing on—and working to address—the privacy issues they face.

77. *See, e.g.*, *Privacy Policy*, S.F. PUB. LIBR., http://sfpl.org/index.php?pg=2000001301 (last visited Feb. 9, 2017) ("Protecting library user privacy and keeping confidential information that identifies individuals or associates individuals with their use of library books, materials, equipment, programs, facilities, and/or staff assistance is an integral principle of the Library."). The privacy of borrowing history has traditionally been protected even by states with lax library privacy laws, in part because the constitutional aspect of the right to privacy, embodied in the First Amendment, has long encompassed the idea of intellectual freedom to explore ideas in private. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."). This value flies in the face of the modern practice of sharing every last search term with the highest bidding online advertiser in order to provide more targeted search results.

78. *See, e.g.*, April Glaser & Alison Macrina, *Librarians Are Dedicated to User Privacy. The Tech They Have to Use Is Not*, SLATE (Oct. 20, 2014, 12:33 PM), http://www.slate.com/blogs/future_tense/2014/10/20/adobe_s_digital_editions_e_book_software_and_library_patron_privacy.html ("When you check out a library e-book for Amazon Kindle . . . Amazon keeps a list of the library e-book titles checked out, with no option to 'opt-out' of this data collection—in addition to the other personally identifiable information Amazon collects with cookies."); *The Digital Revolution: Tough Challenges and Exciting Possibilities*, AM. LIBR. ASS'N, http://www.ala.org/news/mediapresscenter/americaslibraries/librariestechnology (last visited May 17, 2015) (arguing that "the digital revolution shows no signs of slowing, and the library community is both struggling to keep up and envisioning future library ser-

standards.[79] Libraries also have a long history of combating government incursions into user records,[80] a commitment that these new technologies may not share. The advent of Amazon e-books, BiblioCommons, and other new technologies creates a problem for users.[81]

This Part discusses how library values—primarily ALA guidelines—are, despite the pressure big data has placed on libraries to loosen privacy protections, honored in libraries' day-to-day practices, specifically those regarding anonymous browsing and secondary use.

A. Library values

The ALA[82] places a high value on user privacy. For example, the ALA's patron bill of rights imports many FIPs-like concepts into the library context. First, both the use limitation and collection limitation FIPs are neatly embodied in the following directive: "Limit the degree to which personally identifiable information is collected,

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vices that incorporate new philosophies, new technologies and new spaces to meet the needs of all users more effectively than ever before").

79. For example, the privacy policy for the popular card catalog software BiblioCommons is much less protective than the privacy policy of a typical public library, and pinging it can involve sending requests to unsecured sites and servers. Eric Hellman, *Analysis of Privacy Leakage on a Library Catalog Webpage*, GO TO HELLMAN (Sept. 15, 2014), http://go-to-hellman.blogspot.com/2014/09/analysis-of-privacy-leakage-on-library.html.

80. *See, e.g.*, Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1050 (Colo. 2002) (in which "[a]n official from the American Library Association testified about the chilling effect that results from disclosure of library circulation records"); *ALA and National Security Letters 2009*, AM. LIBR. ASS'N, http://www.ala.org/news/mediapresscenter/presscenter/onlinemessagebook/nationalsecurityletters_tp (last visited Feb. 9, 2017) ("ALA has actively opposed the use of National Security Letters since the USA PATRIOT Act was introduced, believing that the protection of library users' privacy and confidentiality is necessary for the protection of intellectual freedom."). Sharing records with an additional party may also be an issue for Fourth Amendment privacy protection because of third-party doctrine. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 744 (1979).

81. *See, e.g.*, Bonnie Tijerina, *Developing a Consensus Framework for Patron Privacy*, MEDIUM (Apr. 7, 2015), https://medium.com/@bonlth/developing-a-consensus-framework-for-patron-privacy-7668094ad4f8 ("When there's so much to gain from translating raw patron data into meaningful and useful information to learn about our communities or improve services and products, how do [you] know where to draw the line on use or non-use of our patron's information?").

82. The ALA is "the oldest and largest library association in the world." *About ALA*, AM. LIBR. ASS'N, http://www.ala.org/aboutala/ (last visited Nov. 3, 2016). Its mission is "to provide leadership for the development, promotion and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all." *Id.*

monitored, disclosed, and distributed."[83] Second, different policies exemplify the FIPs as summarized by the ideas of notice and choice. The ALA recommends placing "the user in control of as many choices as possible," a directive that necessarily implies a user would also have notice about those choices.[84] Finally, the openness and individual participation FIPs are reflected in user access to their borrowing histories through the online systems employed by many libraries, a transparent practice which enables users to know what data are being collected about them.[85] Measured by the FIPs, libraries protect patron privacy at a high level.

Nissenbaum's emphasis on context[86] helps explain why libraries protect privacy at such a high level; libraries' core mission of access to information and their lack of a profit motive create and constantly reinforce norms that are highly protective of patron data privacy. At the heart of the mission of a public library is access to information. Libraries exist as repositories of information, and staff members stand by to assist patrons in their research questions. Layering on Richards's argument that freedom from scrutiny of research is essential to the development of new ideas, it becomes clear that a commitment to information access carries with it an implied commitment to anonymous information access. In order to fully explore ideas and make up their minds on complicated issues, people need to feel free from the type of scrutiny created by search engines that log every query and allow re-identification of even purportedly anonymous data. Richards writes,

> For generations, librarians have understood this. Libraries were the Internet before computers—they presented the world of reading to us, and let us as patrons read (and watch) freely for ourselves. But librarians understood that intellectual privacy matters. A good library lets us read freely, but keeps our

83. *Resolution on the Retention of Library Usage Records*, AM. LIBR. ASS'N, http://www.ala.org/Template.cfm?Section=ifresolutions&Template=/ContentManagement/ContentDisplay.cfm&ContentID=135888 (last visited Feb. 9, 2017).

84. *Privacy: An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS'N, http://www.ala.org/PrinterTemplate.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=132904 (last visited Feb. 9, 2017).

85. *See, e.g.*, *Quick Start Guide*, N.Y. PUB. LIBR., https://www.nypl.org/sites/default/files/BCQSGGettingStartedPRIVACY.pdf (last visited Feb. 9, 2017) ("Your borrowing history is visible only to you."). In contrast, patron browsing histories are typically not stored at all. *See, e.g.*, *Your Privacy on Public Computers*, NORTH OLYMPIC LIB. SYS., http://www.nols.org/about-nols/public-computer-privacy.html (last visited Mar. 8, 2017).

86. *See* Nissenbaum, *supra* note 9.

> records confidential in order to safeguard our intellectual privacy.[87]

Through libraries, patrons are free to read whatever they want and are therefore free to think and express whatever they want. In contrast, in the heavily scrutinized and minutely tracked world of online search, this latter kind of freedom is curtailed.

Additionally, public libraries have a core public-service mission that is unadulterated by a profit motive, which could lead libraries to use information for purposes other than those for which it was collected, something commercial data brokers like Acxiom do routinely.[88] With no need to seek out ever-more-profitable customers, libraries are free to adopt the approach of doing right by everyone and honoring the commitments made in their privacy policies.[89] Richards explains, "[S]haring has to be done on [patrons'] terms, not on those that are most profitable for business."[90] Honoring this belief has made libraries trusted above and beyond other institutions in the United States.[91]

Because the twin goals of providing the public service of access to information while ethically limiting the use of patron information define the library context as used by Nissenbaum,[92] certain actions are off-limits for libraries. For example, contextually, it would be inappropriate for libraries to use patron data for reasons other than those for which it was collected, and it would therefore violate the integrity of the library context for libraries to sell data to third parties, like commercial data brokers do. Patrons provide their personal data to apply for a library card and borrow books, and both the nonprofit framework and libraries' commitment to intellectual freedom dictate that this data—from name and email address to browsing history—not be shared elsewhere. Similarly, it would be

87. Danielle Citron, *Neil Richards on Why Video Privacy Matters*, CONCURRING OPINIONS (Jan. 4, 2012), http://concurringopinions.com/archives/2012/01/neil-richards-on-why-video-privacy-matters.html. *See also* Melissa Morrone, *How Your Local Library Can Help You Resist the Surveillance State*, WAGING NONVIOLENCE (July 8, 2014), http://wagingnonviolence.org/feature/local-library-can-help-resist-surveillance-state/ (characterizing libraries as "community anchor institutions").

88. Jason Morris & Ed Lavandera, *Why Big Companies Buy, Sell Your Data*, CNN (Aug. 23, 2012), http://www.cnn.com/2012/08/23/tech/web/big-data-acxiom/.

89. See *infra* Table 1.

90. Citron, *supra* note 87.

91. *See, e.g.*, CENTER FOR AN URBAN FUTURE, *supra* note 76 (outlining how "[l]ibraries are the most trusted institution for immigrants"); 18 U.S.C. § 2709(g) (2015) (excluding libraries from the definition of "wire or electronic communication" covered by the Stored Communications Act).

92. Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 WASH. L. REV. 119 (2004).

contextually inappropriate for librarians to deny access to information based on disagreeing with the content of certain materials such as political manifestos or religious texts.

Despite pressures wrought by big data to erode people's privacy as discussed in Parts I.B and III, library values retain a strong commitment to the protection of patron privacy as illustrated by two library practices that embody their values: allowing anonymous browsing and minimizing secondary use.

B. Practice #1: Anonymous browsing

Many libraries allow users to conduct research and browse the Internet anonymously, which is a dying commodity in the information age. This practice is very closely aligned with library values.

Libraries enable anonymous browsing in a several ways. First, many public library computers do not require logins,[93] and those that do often do not keep track of browsing history.[94] If a patron uses the computer solely to do research and refrains from logging into any services tied to his identity,[95] he can effectively browse anonymously.[96] Though search engines can still log queries associated with the computer's IP address, the risk of re-identification, as described in Part I.B, is comparatively low because multiple users access the computer. Libraries do not allow anonymous browsing by mere happenstance; rather, ALA policies point to the important reasons behind allowing such intellectual exploration: "In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized

93. *See, e.g.*, *Library Services: Computer and WiFi Access*, DALL. PUB. LIBR., https://dallaslibrary2.org/services/wifi.php (last visited Feb. 9, 2017) (specifying that "[c]atalog and database computers at the library do not require any card to use").

94. *See, e.g.*, *Acceptable Use Policy*, THE PUB. LIBR. OF BROOKLINE, https://www.brooklinelibrary.org/wp-content/uploads/2016/06/AcceptableUsePolicy.pdf (last visited Feb. 9, 2017) (revealing that "although the library keeps no records of your Internet activity, it does record login and logout times linked to the barcode on your library card"). The fact that Patron X logged in at 2:15 and logged out at 3:15 reveals very little information and is almost as good as not requiring a login.

95. *See, e.g.*, Samantha Felix, *This Is How Facebook Is Tracking Your Internet Activity*, BUSINESS INSIDER (Sept. 9, 2012), http://www.businessinsider.com/this-is-how-facebook-is-tracking-your-internet-activity-2012-9?op=1/#-started-off-as-just-a-normal-day-1 (describing how Facebook tracks browsing activity on other websites while a user is logged in).

96. Because of big data capabilities, this feat is nearly impossible on a personal computer. *See, e.g.*, Barbaro & Zeller, *supra* note 29.

by others."[97] Similarly, "[p]rotecting user privacy and confidentiality is necessary for intellectual freedom and fundamental to the ethics and practice of librarianship."[98] As discussed in Part I.C, Richards has argued that this kind of privacy in accessing information is essential to the development of ideas in a free society.[99] By enabling anonymous research and consequently the exploration and formation of intellectual ideas free from scrutiny or judgment, libraries provide what Richards considers an essential service in our democracy.

Other commentators view untraceable browsing with more fear. For them, with anonymity comes a lack of accountability that could allow Internet users to carry out crimes, such as those against children, without getting caught.[100] But the Children's Internet Protection Act (CIPA) requirement that public library computers filter out Internet content that could be harmful to children, such as pornographic or violent material, somewhat tempers this concern.[101] A full analysis of CIPA is beyond the scope of this Note, but it suffices to say that, although patrons may not access the full range of the Internet's dark corners on public library computers, libraries provide a vital service to our democracy by allowing patrons to browse anonymously. By allowing anonymous browsing, libraries are honoring in practice the privacy values espoused by the ALA.

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97. *An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS'N, http://www.ala.org/PrinterTemplate.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=132904 (last visited Mar. 8, 2017).

98. *Resolution on the Retention of Library Usage Records*, AM. LIBR. ASS'N, http://www.ala.org/Template.cfm?Section=ifresolutions&Template=/ContentManagement/ContentDisplay.cfm&ContentID=135888 (last visited Feb. 9, 2017).

99. *See supra* Part I.C; RICHARDS, *supra* note 64 at 176–77.

100. *See, e.g.*, Solon Barocas & Helen Nissenbaum, *Big Data's End Run Around Anonymity and Consent*, *in* PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT 50 (Victoria Stodden et al. eds., 2014); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 377 (1995) (Scalia, J., dissenting) (arguing that anonymity in the election context should be secondary to the "universal and long-established American legislative" tradition of disclosure).

101. Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, § 1701, 114 Stat. 2763A-335 (2000). As a condition of federal funding, CIPA requires libraries and schools to use Internet filtering, among other measures, to protect children from viewing harmful content online. CIPA was deemed not to violate the First Amendment in *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003).

C. Practice #2: Secondary use

In many contexts, data are transmitted from one entity to another for a particular, limited purpose. For example, a person might consent to provide her doctor with information about her recent symptoms for the purpose of allowing the doctor to make an informed diagnosis. She would be less likely to consent to publication of the same information in her local newspaper. Big data, however, makes exactly this type of "secondary use" attractive, because automated scoring or targeted advertisements become easy and cheap to accomplish using larger and larger datasets.[102] But secondary use is a violation of contextual integrity as defined by Nissenbaum[103] because information can be shared across contexts without regard for why and to whom it was originally shared.

The remainder of this Section demonstrates that libraries, with some exceptions, generally act in keeping with their values by employing an opt-in approach to secondary use. Libraries collect data, such as name, address, e-mail address, and phone number, when users apply for library cards, and they typically will not use this data for any other purpose, such as fundraising, unless the user opts in. Though the FIPs require the consent of the data subject, they do not specify whether that consent must be opt-in rather than opt-out.[104] But the opt-in approach generally taken by libraries provides a superior level of protection to data subjects, because they have knowledge of and control over purposes for which their data may be used. Therefore, libraries' approach to secondary use in practice is generally consistent with their values.

The difference between the opt-in and opt-out approaches turns on whether the default is consent or lack thereof. While an opt in means that inaction by the customer leads to no data processing conducted, "[a]n 'opt out' means that a consumer's information will be processed unless she takes action to contact the data processing entity and indicate her contrary wishes."[105] For example, if a library card applicant at San Jose Public Library (SJPL), when confronted with the below choice, takes no action (i.e., leaves the

102. *See supra* Part I.C; William Hersch, *Secondary Use of Clinical Data from Electronic Health Records*, https://dmice.ohsu.edu/hersh/secondary-use-trec.pdf.

103. *See generally* Nissenbaum, *supra* note 9.

104. *But see, e.g.*, J. C. Bruno & Elsa Crozatier, *Compliance with the European Union Directive in the Transfer of Employee Personal Data*, 83 MICH. B.J. 48, 49 (2004) (discussing the EU Directive's requirement of opt-in consent for "sensitive" information).

105. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 791 (2015).

box unchecked) she will not receive fundraising requests from SJPL's "supporting organizations."

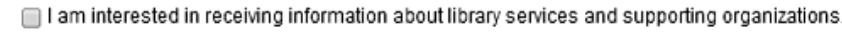

Figure 1: San Jose Public Library,[106] Opt-In

In contrast, if a library card applicant at Seattle Public Library (SPL), when confronted with the below choice, takes no action (i.e., leaves the YES button selected) she will probably receive fundraising requests from SPL's Foundation at least a few times a year.

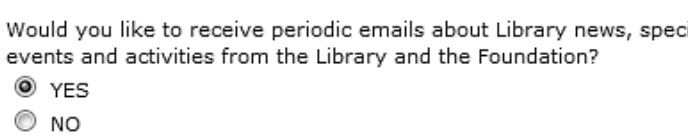

Figure 2: Seattle Public Library, Opt-Out[107]

Whether the default is set to opt-in or opt-out is particularly important because studies show that people are very likely to simply accept the default presented to them rather than taking any action.[108] Thus the opt-out approach is less protective of user privacy but attractive to businesses who may enter the big data marketplace and re-identify or sell user data without further consent.

Supporters of the opt-out approach generally emphasize that opt-in would be expensive for businesses to comply with, but this argument is flawed. For example, Professors Michael Staten and Fred Cate hypothesize "higher prices, reduced benefits, diminished service, and higher acceptance standards for new credit products" if financial institutions were required to use opt-in consent.[109] But this argument takes as a given that the benefit of having access to yet another credit card offer at a potentially cheaper rate trumps the harm to consumers of turning over their data to a seemingly endless array of service providers looking to market to them. This is partly because the argument about higher expenses inherently favors the side best able to quantify costs, and privacy is hard to pin

106. *Online Library Card Application: Adult*, San José Libr., https://catalog.sjlibrary.org/selfreg/public (last visited Feb. 9, 2017).

107. *Library Card Application*, Seattle Pub. Libr., https://www.spl.org/using-the-library/get-started/library-card-application (last visited Feb. 9, 2017).

108. Eric J. Johnson et al., *Defaults, Framing and Privacy: Why Opting In-Opting Out*, 13 Marketing Letters 5, 13 (2002), https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/1173/defaults_framing_and_privacy.pdf.

109. Michael E. Staten & Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Markets: A Case Study of MNBA*, 52 Duke L.J. 745, 776 (2003).

down to a specific monetary value.[110] The argument is also overly simplistic, because it is expensive for businesses to perform or seek any service, but some such expenses must be deemed acceptable costs of doing business.[111] Staten and Cate have not demonstrated that an opt-in requirement is economically irrational based on a weighing of the costs and benefits that encompasses the value of user privacy.

Supporters of the opt-in approach, on the other hand, argue that the unrestricted data sharing facilitated by the opt-out approach constitutes harm to consumers and, as such, data processors should be required to bear additional costs to mitigate that harm. For example, Professor Jeff Sovern points out that businesses have little incentive to use opt-in systems when, under current regulation, the opt-out approach allows them to "engage[ ] in an activity that imposes costs on others but [does not] require[ ] [them] to take those costs into account when deciding whether to pursue the activity."[112] He continues, "An opt-in system . . . can shift costs and thereby 'internalize' this externality."[113] Similarly, Professors Edward Janger and Paul Schwartz point out the information asymmetry problem inherent in the opt-out approach. Specifically, opt-out default laws "fail[ ] to create any penalty on the party with superior knowledge" (i.e., businesses) and "leave[ ] the burden of bargaining on the less informed party, the individual consumer."[114] For this reason, proponents of opt-in argue that the burdens and costs of placing consumer data in jeopardy should fall squarely on service providers, who are the primary beneficiaries of consumer data and the cheapest cost-avoiders of the potential harm to consumers.

Some critics of notice and choice believe that the advent of predictive big data analytics, which use data that consumers provide to guess other personal information about them, makes informed opt-in impossible. Crawford and Schultz argue that these "predictive privacy harms," such as guessing who is gay or who carries a certain disease, in circumstances where users would not disclose that information directly, cannot be addressed by opt-in because consumers cannot have full knowledge of what they are opting in

110. *See, e.g.*, James P. Nehf, *Incomparability and the Passive Virtues of Ad Hoc Privacy Policy*, 76 U. COLO. L. REV. 1, 29 (2005).

111. *Cf.* Diana Farrell, *The Real New Economy*, HARV. BUS. REV. (Oct. 2003), https://hbr.org/2003/10/the-real-new-economy.

112. Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH L. REV. 1033, 1106 (1999).

113. *Id.*

114. Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINN. L. REV. 1219, 1241 (2002).

to.[115] Even if a website discloses that data collected will be used to predict other attributes about a user, a user cannot know what exactly will be predicted about her and thus cannot accurately assess the risk. But this argument fails to account for how granular opt-in consent could be, based on, for instance, authorized types of data, authorized recipients of the data, authorized uses of the data, or any combination thereof. If consent is made granular enough, thereby allowing users to opt in to none, some, or all of these options, and information is stored centrally so that a person only has to update privacy preferences in one location, the opt-in approach can overcome this type of critique. Part III will continue this analysis of the unexplored potential of transparency, centrality, and individual access in the big data context.

The ALA comes down strongly in favor of the opt-in approach, noting "[a]ny use of [personally identifiable information] beyond circulation or administration should be authorized only on an opt-in basis."[116] Following the ALA's lead, the majority of public libraries do not use patron directory information for fundraising purposes. Of the seventeen U.S. public libraries examined,[117] only four use a fully opt-out approach; one uses a hybrid approach, and the rest operate as opt-in:

Name	Opt-in or opt-out?	Location of policy
Atlanta-Fulton PL	Opt-in.	"Ask a Librarian" chat session, July 9, 2014.[118]
Boston PL	Opt-out.	Disclaimer.[119]
Chattanooga PL	Opt-in.	Email exchange, July 23, 2014.
Cleveland PL	Opt-in.	Checkbox (default is unchecked).[120]
Chicago PL	Opt-in.	"Ask a Librarian" chat session, July 9, 2014.

115. Crawford & Schultz, *supra* note 13, at 95.

116. Am. Libr. Ass'n, *supra* note 51.

117. These seventeen libraries were chosen as industry leaders in consultation with public library staff.

118. In a typical exchange, I would ask if the library ever used the e-mail address I provided to register for a library card to contact me for fundraising purposes. More often than not, I got responses such as "Of course not," or "No, never," reflecting among librarians a high degree of sensitivity to privacy issues and an understanding of their responsibility to protect user privacy.

119. *Patron Privacy Policy*, Bos. Pub. Libr., http://www.bpl.org/general/policies/privacy.htm (last visited Feb. 9, 2017) ("We may use your email address for notices and library promotions.").

120. *Library Card Application*, Clev. Pub. Libr., https://onlinereg.cpl.org/ (last visited Feb. 9, 2017).

Name	Opt-in or opt-out?	Location of policy
County of Los Angeles Library System	Opt-in.	Disclaimer.[121]
Free Library of Philadelphia	Opt-in.	Disclaimer.[122]
Hennepin County Library	Opt-in.	Disclaimer.[123]
Houston PL	Opt-in.	"Ask a Librarian" text message exchange, July 23, 2014.[124]
King County PL	Opt-in.	Checkbox (default is unchecked).[125]
Los Angeles PL	Opt-in.	"Ask a Librarian" text message exchange, July 9, 2014.
Multnomah County Library	Hybrid.	Disclaimer.[126]
New York PL	Opt-out.	Checkbox (default is checked).[127]
San Francisco PL	Opt-in.	Checkbox (default is unchecked) and disclaimer.[128]

121. *Privacy Policy*, County L.A. Pub. Libr., http://www.colapublib.org/privacy.php (last visited Feb. 9, 2017) ("We do not permit this information to be used for marketing purposes.").

122. *Site Privacy*, Free Libr. Phila., https://libwww.freelibrary.org/policies/privacy/%20htm (last visited Feb. 9, 2017) ("Our primary use of the personal information you volunteer is to contact you regarding service issues, or if you opt for it, news information about Library services and partnerships.").

123. *Privacy and Security*, Hennepin County Libr., http://www.hennepin.us/your-government/open-government/accessibility-privacy-security (last visited Feb. 9, 2017) ("The county won't collect personal information about you unless you choose to provide it. The county doesn't give, share, sell, or transfer any personal information for commercial purposes.").

124. "Houston Library Foundation will not send you any unsolicited information, including email regarding any commercial offers or advertisements at any time." Text message from Houston Library Found. to author (July 9, 2014) (on file with author).

125. *Get A Library Card*, King County Libr. Sys., https://w3.kcls.org/get-a-library-card (last visited Feb. 9, 2017).

126. *Privacy and Confidentiality of Library Records*, Multnomah County Libr., https://multcolib.org/policies-manuals/statement-privacy-and-confidentiality-library-records (last visited Feb. 9, 2017). ("The Library will not collect or retain your . . . information without your consent.).

127. *Apply for a Library Card*, N.Y. Pub. Libr., https://catalog.nypl.org/selfreg/patonsite (last visited Feb. 9, 2017).

128. *Privacy Policy*, S.F. Pub. Libr., http://sfpl.org/index.php?pg=2000001301 (last visited Feb. 9, 2017) ("Library users may choose to opt in and enable My Check-out History. . . . Any information the library user chooses to provide will be used only to provide or improve library services, such as information gathered through voluntary library user surveys.").

Name	Opt-in or opt-out?	Location of policy
San Jose PL	Opt-in.	Checkbox (default is unchecked).[129]
Seattle PL	Opt-out.	Checkbox (default is checked) and disclaimer.[130]
Topeka and Shawnee County PL	Opt-out.	Phone call, Feb. 27, 2017.

By employing an opt-in approach to secondary use, most libraries are honoring in practice the privacy values espoused by the ALA.

Given the robustness of library commitments to user privacy, as underscored by library practices of anonymous browsing and secondary use, libraries are well-positioned to serve as a new ethical model for big data, primarily due to their context: lack of a profit motive and inherent expertise in handling and ensuring access to information. The next Part advances one idea for how libraries could achieve this goal.

IV.
PUBLIC LIBRARIES CAN PROVIDE THE ETHICAL MODEL BIG DATA LACKS BY SERVING AS PERSONAL DATA STORES IN TOMORROW'S BIG DATA MARKETPLACE

Because libraries' privacy-protective values, non-profit context and expertise in handling information have inspired the kind of consumer trust that could generate better data and, ultimately, better, more ethically-driven research, libraries are well-positioned to help regulate big data. Richards reminds us that in order to fully explore ideas and make up their minds on complicated issues, people need to feel free from scrutiny, as they traditionally have at libraries.[131] While, as Richards acknowledges, "librarians aren't often thought of as particularly imaginative or innovative . . . this stereotype is wrong. Librarians are our first and oldest information pro-

129. *Online Library Card Application: Adult*, SAN JOSÉ LIBR., https://catalog.sjlibrary.org/selfreg/public (last visited Feb. 9, 2017). *See also* Figure 1, *supra*.

130. *Library Card Application*, SEATTLE PUB. LIBR., https://www.spl.org/using-the-library/get-started/library-card-application (last visited Feb. 9, 2017). *See also* Figure 2, *supra*.

131. *See* Danielle Citron, *Neil Richards on Why Video Privacy Matters*, CONCURRING OPINIONS (Jan. 4, 2012), http://concurringopinions.com/archives/2012/01/neil-richards-on-why-video-privacy-matters.html. *See also* Melissa Morrone, *How Your Local Library Can Help You Resist the Surveillance State*, WAGING NONVIOLENCE (July 8, 2014), http://wagingnonviolence.org/feature/local-library-can-help-resist-surveillance-state/ (characterizing libraries as "community anchor institutions").

fessionals, with special expertise in the issues intellectual records raise."[132] This Part explains how libraries could serve as "personal data stores" once this technology is fully developed.

One of the most salient problems with the FIPs, addressed in Part I.B, is that they place the onus on the user to become informed about her choices and take steps to change default settings to better protect her privacy. For example, the "individual participation" FIP[133] allows users to find out what information exists about them and how that information is used. But this approach works best for people who already care about privacy and are therefore willing to take the time to educate themselves about how their data are being used and then implement the preferences they develop during this process. Some users lack this inherent interest, and thus the incentive to take any steps away from the defaults given. Additionally, as discussed in Part I.B.1, even users who want to protect their privacy may decide that it is simply not efficient to do so under the current regulatory framework.

In the library context, this problem is compounded by structural incentives to over-comply with privacy laws like COPPA and FERPA, as discussed in Part I.B.2. Regarding COPPA, intended to protect children's privacy and safety online, libraries could of course simply stop over-complying, but this is unlikely to happen without broader structural change. Economist John E. Calfee and Professor Richard Craswell explain that a rational actor is incentivized to over-comply when the cost of over-compliance is minimal and the risk of incurring liability is still present despite compliance given the ambiguous norm.[134] Acting rationally, librarians might determine that the additional costs of requiring parental consent for children to obtain library cards is relatively small compared to the risk of either the legal norm shifting (i.e., the FTC changing its guidelines and deciding to enforce the law against nonprofits that operate websites for children) or societal norms coming to strongly

132. RICHARDS, *supra* note 64, at 176–77. Furthermore as libraries evolve beyond their traditional collection function, a 2015 study showed that over "two-thirds of Americans agree that libraries are important because they improve the quality of life in a community, promote literacy and reading, and provide many people with a chance to succeed." *The State of America's Libraries: 2015*, AM. LIBR., Apr. 2015, at 2, http://www.ala.org/news/sites/ala.org.news/files/content/0415_StateAmLib_0.pdf. Furthermore in 2012, "there were 92.6 million attendees at the 4 million programs offered by public libraries [representing] a 10-year increase of 54.4% in program attendance." *Id.* at 3.

133. ORGANISATION FOR ECON. CO-OPERATION & DEV., *supra* note 17.

134. John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966–67 (1984).

favor parental consent and access over children's privacy. Regarding FERPA, intended to protect students from unwanted disclosure of their academic records, schools may have simply found over-compliance a convenient rationale for keeping hidden various other kinds of records, from ethical lapses in athletic management to violent crimes among students.[135] Therefore, neither libraries nor schools are properly incentivized by the existing FIPs structure to stop over-complying, which is detrimental to the library values of both privacy and access to information.

Because of the inadequacy of the FIPS, there is a void between how much we as a society may value privacy and how much we as individual users can do to protect it. If libraries are willing to fully embrace the potential of big data—and the responsibility that comes with it—they have a chance to position themselves at the center of the action by becoming personal data stores (PDS), a term for systems that could provide consumer data access to both consumers and, after consent, entities seeking to conduct research using that data.[136] According to Professor Ira Rubinstein, PDS are a still-developing concept that in execution could "provide both a secure data store for a wide variety of personal information (including official records like birth and marriage certificates, licen[s]es, and passports, transaction records, online profiles, and social media content, and user names and passwords) as well as a new class of user-driven services."[137] Library-managed PDS could offer user-friendly and privacy-protective access to information in keeping with libraries' historically high privacy standards, allowing the archaic FIPs approach—and with it the incentive to over-comply—to be phased out.

A necessary first step to implementing library-managed PDS would be convincing libraries to rise to this challenge. There is

135. *See* Silverblatt, *supra* note 40 at 502–04.

136. *See* Richards, *supra* note 64, at 169. ("[O]ften law is not enough. The law has limits, and law alone cannot solve all of the problems of privacy and free speech. If we care about these values as a society, we must protect them beyond the legal system, as part of our culture and social norms."). Already, intermediaries like Facebook and Twitter play an important role in mediating our ability to speak freely, and such entities "need to recognize that they have a special responsibility in the twenty-first century to safeguard expression." *Id.* at 174. "In determining the content of their ethical rules, information professionals in the digital age should also look to older kinds of professionals[,] most importantly to librarians." *Id.* at 176.

137. Ira Rubinstein, *Big Data: The End of Privacy or a New Beginning?*, 3 INT'L DATA PRIVACY L. 74, 82 (2013), http://idpl.oxfordjournals.org/content/early/2013/01/24/idpl.ips036.full.

some evidence that libraries are already willing to move away from traditional book-loaning functions. For example, many libraries have already moved in the direction of offering educational services, a step outside their traditional function just as becoming PDS would be. The New York Public Library (NYPL) offers after-school programs for kids as well as English conversation groups, literacy classes, and technology trainings geared toward adult learners.[138] The Los Angeles Public Library (LAPL) recently expanded on a similar portfolio of services with a 2014 launch of "a library-based program [aimed at adults] that will confer accredited high-school diplomas on city residents" to combat the city's high dropout rate of sixty to seventy percent in some neighborhoods.[139] Because of these recent forays into new services, libraries may be swayed to take further action in the tech sector. Richards argues that PDS "serve a compelling need—they help individuals organize and manage their daily lives and give them tools for realizing the inherent value of their own data. Thus, they are both convenient and a source of insight (via a new class of apps for monitoring and analysing one's own behaviour)."[140] This fits well with libraries' recent increased activity in the education sector and may consequently be viewed as a natural next step. Public libraries are the original data aggregators, and continuing to be so in the future as PDS thus fits with their mission and values.[141]

The fact that consumers trust libraries to protect their interests,[142] in part because they lack a profit motive, also would make libraries the ideal stewards of big data. This trust could lead to consumers providing better data and enriching the big data universe.

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138. *Classes & Workshops*, N.Y PUB. LIBR., http://www.nypl.org/events/classes/calendar (last visited Feb. 9, 2017).

139. Sommer Mathis, *Los Angeles Public Library/ High* School, *in Five Creative Solutions*, THE ATLANTIC (June 25, 2014), http://www.theatlantic.com/magazine/archive/2014/07/creative-solutions/372285/.

140. RICHARDS, *supra* note 64, at 176–77.

141. Though libraries may appear to some to be hopeless relics of the past, librarians are in fact "thriving in a technology fueled world. . . . Libraries today house more than books, and librarians are more than good stewards of materials. Both have morphed and evolved to meet the changing needs of their patrons, by embracing technological advancements." Frankie Rendon, *How Innovation and Technology Are Shaping Libraries of Today*, HUFFINGTON POST (May 1, 2014), http://www.huffingtonpost.com/frankie-rendon/how-innovation-and-techno_b_5244601.html. Many open-minded librarians may embrace the PDS project as their next role in enhancing meaningful information access. After all, "[s]earch engines do provide a plethora of information, quickly and easily, but there is no guarantee of the quality of the information." *Id.*

142. *See, e.g.*, CENTER FOR AN URBAN FUTURE, *supra* note 76.

Rubinstein writes, "Data mining and ad targeting are based on guesswork, whereas in [PDS], potential customers would knowingly and intentionally reveal data that are likely more to be detailed, accurate, complete, and up-to-date than any inferred data."[143] Putting trusted libraries in the PDS role would facilitate this type of information transfer and benefit consumers as well as industry with a freer flow of more accurate data. It is worth acknowledging, however, that libraries' lack of a profit motive or potential inability to support PDS technology could also be impediments to the successful implementation of the PDS project. Libraries and the ALA might need to explore private partnerships or look to other privacy-protective technologies like the search engine DuckDuckGo, which protects user privacy and avoids personalized results, in order to run the PDS project on at least a cost-recovery basis.[144] But libraries' trustworthiness and lack of a profit motive would likely be crucial to the project getting off the ground initially.

Furthermore, with personnel on staff who have studied information system design, libraries are well set up to selectively grant access based on different kinds of user needs.[145] The library PDS model could grant three kinds of access: an individual's access to her own personal data, a limited public dashboard only displaying data subject to stringent re-identifiability safeguards, and a robust business or government user platform with access granted subject to a review process similar to Institutional Review Boards (IRBs) at research universities, which vet and approve research projects based on ethical standards. The IRB could consider the following criteria, derived from Cate's suggested updates to the FIPs, in deciding whether or not to allow the use of information by businesses for specific projects: "the degree and likelihood of benefits resulting from such uses," "the degree and likelihood of harm posed by such uses," and "the measures in place to guard against such harm."[146] This process could allow the approval of commercial projects that maximize benefit while minimizing harm and disallow projects that do not satisfy Cate's criteria. Meanwhile the individual, having already opted in by providing data, could be granted a gran-

143. Rubinstein, *supra* note 137, at 86.

144. DuckDuckGo is supported through advertisements. Jackie Chou, *DuckDuckGo Startup Profile*, CHOU PROJECTS (Jan. 29, 2015), http://chouprojects.com/duckduckgo-search-engine/.

145. RICHARDS, *supra* note 64, at 176–77. Whether or not all users of the PDS should be registered library patrons is another question.

146. Fred H. Cate et al., *Data Protection Principles for the 21st Century: Revising the 1980 OECD Guidelines* 17 (2014), http://www.oii.ox.ac.uk/publications/Data_Protection_Principles_for_the_21st_Century.pdf.

ular opt-out right, while the IRB-like process could serve as an additional check against uses of consumer data that are against the public interest.[147] The public dashboard, in contrast, would provide a baseline level of access to any user looking to conduct research and pursue innovation. These distinctions among different types of users would enable many benefits of big data to proceed in a more controlled, privacy-protective manner compared to the current free-for-all state[148] of regulation, and libraries would be the natural choice to design and implement this new type of information system.[149]

Ideally, libraries would serve as PDS after the FTC, which regulates privacy,[150] and industry stakeholders, who are happy with currently less effective regulation, get on the same page about the need to protect consumer privacy, rendering the current ineffective, FIPs-based approach to privacy regulation obsolete. There is some evidence that this, too, could be accomplished with relative ease. The FTC has indicated support for the kind of interests, such as security and individual access, served by PDS. For instance, a recent speech by the FTC Chair suggested that "[a]ny system based on trading of property rights [like that currently underpinning the big data marketplace] further requires service providers providing a safe trading infrastructure and services to individuals."[151] As stated above, libraries are well-positioned to provide that infrastructure. This policy statement may mean that the FTC would be interested

147. This may require vetting third party service providers, and libraries are equipped to do that too. *See, e.g.*, *Privacy Guidelines for Electronic Resources Vendors*, INT'L COALITION LIBR. CONSORTIA, http://icolc.net/statement/privacy-guidelines-electronic-resources-vendors (last visited Feb. 9, 2017) (asserting that "the ICOLC issues these guidelines with respect to the privacy interests of our member libraries' users in the interest of informing the companies with which we do business about what is acceptable in the products and services that we license").

148. *See supra* Part I.B.

149. An IRB-like process for big data would flip typical U.S. privacy regulation on its head. "Most information privacy law focuses on collection or disclosure and not use. Once data ha[ve] been legitimately obtained, few laws dictate what may be done with the information." Paul Ohm, *Changing the Rules: General Principles for Data Use and Analysis*, *in* PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT 96 (Victoria Stodden et al. eds., 2014).

150. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMMISSION, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited Feb. 9, 2017).

151. Lokke Moerel, Professor of Glob. ICT Law, Tilburg Univ., Lectured Delivered During Acceptance of Professorship, *in* Big Data Protection: How to Make the Draft EU Regulation on Data Protection Future Proof 25 (Feb. 14, 2014), http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Moerel_oratie.pdf.

in getting involved in or even leading the IRB-like process. Benefits could inure to industry, too. PDS "quite possibly would lower compliance costs for firms that rely on data in PDS as opposed to collecting and storing data in their own data stores."[152] More research is necessary on this point, but public libraries serving as PDS could provide a foundation for big data regulation that the FTC and industry find satisfactory.

If successfully implemented, libraries serving as PDS would help safeguard the privacy of non-patrons and patrons alike. Public libraries—along with pretty much every industry and sector of the global economy—now face additional challenges due to the fast-paced evolution of technology. Pressed to stay relevant in the digital age when many books, movies, and other sources of information and entertainment can be easily located online, libraries are facing pressures created by big data to depart from their historically strong commitment to user privacy, which could threaten the credibility of libraries to serve as an ethical model for the regulation of big data. A primary reason for this is that librarians are using more technology. Even if librarians and library policies remain as committed as ever to patron privacy, new contracts with vendors such as Amazon and BiblioCommons (an online version of a card catalog with various interactive features) may be overriding these efforts.[153] For example, when a user checks out a library e-book using an Amazon Kindle reader, she completes that action using an Amazon account.[154] Amazon then stores her reading history—often alongside a wealth of other consumption habits, financial information, and personal information—and offers her no way to opt out of that storage.[155] Similarly, as recently as fall 2016, the default setting of BiblioCommons, which is in use in over 200 public libraries in the United States, Canada, Australia, and New Zealand,[156] was to share user content, including ratings, lists, and comments, across all li-

152. Rubinstein, *supra* note 137, at 86.

153. *See, e.g.*, Glaser & Macrina, *supra* note 78 ("Adobe's Digital Editions e-book software collects and transmits information about readers in plain text. That insecure transmission allows the government, corporations, or potential hackers to intercept information about patron reading habits, including book title, author, publisher, subject, description, and every page read.").

154. *Id.*

155. *Id.*

156. *BiblioCommons Features Local Library Staff Recommendations and Reviews*, LIBR. TECH. GUIDES, https://librarytechnology.org/news/pr.pl?id=19506 s (last visited Feb. 9, 2017).

braries that utilize the software,[157] thereby violating, in Richards' view, an important aspect of their intellectual privacy.[158] Though BiblioCommons promises to forgo sharing "your information or activity with ad networks or other entities that are not directly involved in the services you choose to use"[159] and now offers users better control over which parts of their borrowing history are visible,[160] BiblioCommons can revert, at will, back to a less privacy-protective default. The faster processing and slick new sharing features of these products can lure librarians,[161] who may be unknowingly subjecting their patrons' data to uses to which they did not consent. Requiring patrons to use Amazon, BiblioCommons or similar products to access library materials means that patron data—including highly sensitive aspects of intellectual freedom, such as reading history—are being tracked much more than they were historically. But as PDS, libraries could address the threats technologies like Amazon and BiblioCommons pose for patron privacy—as well as the threats posed by similar technologies in other industries—by subjecting consumer data to the IRB-like process and granular user opt-out right discussed above. Under that process, no user would find her borrowing history—or any other information—suddenly made public without her informed consent.

V.
CONCLUSION

Big data poses a threat to privacy the likes of which Warren and Brandeis could hardly have imagined when they first spoke out

157. *Our Platform*, BIBLIOCOMMONS, https://web.archive.org/web/20150609212240/http://bibliocommons.com/how-we-work/our-platform (last visited Feb. 9, 2017).

158. *See supra* Part I.C.

159. *See, e.g.*, *BiblioCommons US Privacy Statement*, BROOKLYN PUB. LIBR., https://brooklyn.bibliocommons.com/info/privacy (last visited Feb. 9, 2017). Biblio Commons appears to have a privacy policy specific to each library with which it contracts.

160. *BiblioCore Features Sheet*, BIBLIOCOMMONS https://static1.squarespace.com/static/586d7efa2994cab071cbb4ae/t/5878f25b6b8f5bb797912ab3/1484321373369/BiblioCore+Feature+Sheet+2017.pdf (last visited Feb. 9, 2017) ("Privacy controls allow patrons to choose to share, or keep their content private.").

161. *See, e.g.*, Bonnie Tijerina, *Developing a Consensus Framework for Patron Privacy*, MEDIUM (Apr. 7, 2015), https://medium.com/@bonlth/developing-a-consensus-framework-for-patron-privacy-7668094ad4f8 ("When there's so much to gain from translating raw patron data into meaningful and useful information to learn about our communities or improve services and products, how do [you] know where to draw the line on use or non-use of our patron's information?").

against the growing use of cameras in 1890. In the information age, our privacy laws and commitment to the importance of privacy in a free society have not kept pace with technology's increased capacity to inflict harm. Despite facing their own challenges given the FIPs structure and new products with problematic sharing features, public libraries remain well-suited to reverse that trend. Libraries' enablement of anonymous browsing and refusal to condone secondary use reflect a robust understanding of the importance of privacy. Librarians' wealth of knowledge regarding system design and their commitment to providing access to information would make them ideal stewards of big data. By becoming PDS, public libraries could provide the ethical model big data lacks and reorient us to a better privacy future.

THE DUTY TO DEFEND AND FEDERAL COURT STANDING: RESOLVING A COLLISION COURSE

*T. PATRICK CORDOVA**

In June 2013, the Supreme Court issued two highly anticipated rulings on same-sex marriage: *Hollingsworth v. Perry*[1] and *United States v. Windsor*.[2] The decisions generated a great deal of attention, most of which focused on their practical impact on lesbian, gay, bisexual, and transgender (LGBT) rights: *Hollingsworth* restored same-sex marriage in California while *Windsor* invalidated the section of the Defense of Marriage Act that defined marriage for purposes of federal law as that between one man and one woman.[3]

Yet *Windsor* and *Hollingsworth* represent far more than civil rights victories; they are "blockbusters in the underdeveloped field of [federal] appellate standing."[4] In particular, both cases confronted the impact on standing of a government lawyer's decision not to defend the constitutionality of a duly enacted law. In that regard, *Hollingsworth* stands for the proposition that when a state chooses not to defend the constitutionality of a successful ballot initiative, the initiative's proponents cannot demonstrate Article III standing as the state's agents.[5] *Windsor* holds that the United States' agreement with a plaintiff as to the unconstitutionality of a federal

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1. 133 S. Ct. 2652 (2013).

2. *Id.* at 2675.

3. *See, e.g.*, Andrew Cohen, *Prop 8 Ruling Gives California Same-Sex Marriage, and Other States an Opening*, ATLANTIC (June 26, 2013), http://www.theatlantic.com/national/archive/2013/06/prop-8-ruling-gives-california-same-sex-marriage-and-other-states-an-opening/277241; Cheryl Wetzstein, *Supreme Court Hands Double Win to Gay-Marriage Backers*, WASH. TIMES (June 26, 2013), http://www.washingtontimes.com/news/2013/jun/26/court-strikes-down-federal-anti-gay-marriage-law.

4. Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 68 (2014).

5. *See Hollingsworth*, 133 S. Ct. at 2656.

statute does not necessarily deprive a case of Article III standing.[6] Yet *Windsor* identifies an additional hurdle in the non-defense scenario—that the justiciability concerns flowing from the lack of adversity may necessitate countervailing considerations, such as the presence of amici ready and able to defend the law, to satisfy prudential standing limitations.[7]

Refusing to defend duly enacted laws in federal court may, therefore, render appellate judicial review unavailable. Consequently, these holdings enable government lawyers to "nullify" laws with which they disagree.[8] In other words, the Supreme Court has created an "Attorney General Veto."[9] This state of affairs has left many (understandably) uneasy, as the ability of a government official to nullify the political preferences of constituents by preventing judicial review is contrary to judicial supremacy and undermines the separation of powers.[10] Because "with great power comes great responsibility,"[11] more must be expected of government lawyers faced with the decision whether to defend the constitutionality of their jurisdiction's laws. This Note offers a solution: the "reasonable probability" standard, which requires a government lawyer to defend a duly enacted law if there is a reasonable probability that, if he or she fails to do so, no other party would have standing to defend the law on appeal, such that the controversy would be deprived of judicial review.

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6. *Windsor*, 133 S. Ct. at 2685–86.

7. *Id.* at 2687.

8. Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After* Hollingsworth v. Perry, 71 WASH. & LEE L. REV. 229, 229 (2014); Kyle La Rose, Note, *The Injury-in-Fact Barrier to Initiative Proponent Standing: How Article III Might Prevent Federal Courts from Enforcing Direct Democracy*, 44 ARIZ. ST. L.J. 1717, 1731 (2012).

9. *See* Jeremy R. Girton, Note, *The Attorney General Veto*, 114 COLUM. L. REV. 1783, 1790–92 (2014); Orin Kerr, *Walter Dellinger on the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011, 11:45 PM), http://volokh.com/2011/02/23/walter-dellinger-on-the-decision-not-to-defend-doma.

10. *See* Paul Waldman, *Why the Prop. 8 Decision Should Make Liberals Uneasy*, AM. PROSPECT (June 27, 2013), http://prospect.org/article/why-prop-8-decision-should-make-liberals-uneasy; Linda Greenhouse, Opinion, *Standing and Delivering*, N.Y. TIMES: OPINIONATOR (Dec. 12, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/12/12/standing-and-delivering; *Do State Attorneys General Have a Duty to Defend State Laws?*, FEDERALIST SOC'Y (Apr. 4, 2014), http://www.fed-soc.org/multimedia/detail/do-state-attorneys-general-have-a-duty-to-defend-state-laws-podcast (statement of Professor Neal E. Devins).

11. Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part); *see also* STAN LEE & STEVE DITKO, AMAZING FANTASY NO. 15: SPIDER-MAN! 11 (1962) ("[W]ith great power there must also come—great responsibility!").

Part I introduces the duty to defend by documenting its evolution at the federal level and by offering a brief overview of the diversity of standards and approaches to the duty at the state level. Part II tells the story of *Hollingsworth* and *Windsor*, from the enactment of the challenged laws to the Supreme Court's grants of certiorari. Part III reviews the doctrines of Article III standing and prudential standing and, applying these doctrines, explains *Hollingsworth* and *Windsor*'s jurisdictional holdings. Part IV details two nightmare scenarios made possible by *Hollingsworth* and *Windsor*; in each, the government lawyer is the only party with Article III and/or prudential standing to defend a duly enacted law in constitutional litigation—his or her failure to do so, then, precludes appellate judicial review, threatening judicial supremacy and allowing the Executive Branch lawyer to exercise an "Attorney General Veto." Part V introduces the "reasonable probability" standard as a solution to the Attorney General Veto problem; and concludes by considering and responding to likely objections to the standard.

I.
THE DUTY TO DEFEND

A. The Basic Framework

Article II of the Federal Constitution vests the Executive with the duty not only "to preserve, protect, and defend the Constitution as the supreme law of the land"[12] but also to "take Care that the Laws be faithfully executed."[13] The duty to defend the constitutionality of duly enacted laws is viewed as incidental to the duty to faithfully execute them.[14] A conflict arises between these two duties when the president—or any other government lawyer or officeholder sworn to uphold the Constitution[15]—is faced with defend-

12. Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 972 (1983) (citing U.S. CONST. art II, § 1, cl. 8; *id.* art. VI, cl. 2).

13. U.S. CONST. art. II, § 3.

14. *See* Note, *supra* note 13, at 970; Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 601 (1997); Tony Mauro, *Duty to Defend? Not Always*, NAT'L L.J. (Oct. 25, 2010), http://www.nationallawjournal.com/id=1202473803028.

15. Virtually every officeholder in the United States is duty-bound to defend and uphold the Constitution by his or her oath of office. *See, e.g.*, CAL. CONST. art. XX, § 3 ("I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States. . . ."); 5 U.S.C. § 3331 (2012) (requiring elected and appointed officials to swear to support and defend the Constitution). Indeed, every lawyer is so bound by his or her oath of admission to the bar. *See, e.g.*,

ing a duly enacted law that he or she deems unconstitutional.[16] Whether the President (or government lawyer) should *sometimes*, *always*, or *never* defend such laws regardless of his or her legal conclusion[17] on the merits has been the subject of much debate.

While some commentators have vigorously contended that government lawyers should always[18] or never[19] defend laws they deem unconstitutional, a context-driven approach most "closely accords with the stated position and actual practice of the Executive Branch."[20] Indeed, "the Constitution is best interpreted not as providing a unitary answer across contexts, but as requiring the President to make sometimes difficult evaluations that depend on the specific statutory provision and the circumstances surrounding its enactment."[21] At the federal level, this circumstance-specific ap-

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TENN. SUP. CT. R. 6(4) ("I, _____, do solemnly swear or affirm that I will support the Constitution of the United States. . . .").

16. *See* John Ashcroft, Att'y Gen. of the United States, Address at the Federalist Society 20th Anniversary Gala (Nov. 14, 2002), http://www.justice.gov/archive/ag/speeches/2002/111402finalfederalistsociety.htm.

17. Unlike a law for which he or she has constitutional doubts, it is clear that a government lawyer may *not* fail to defend a law on the basis of a policy disagreement. *See The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 315 (2011) (statement of Edward Whelan, President, Ethics & Public Policy Center) ("[I]t is essential to distinguish between laws that an administration opposes or disfavors on policy grounds only and laws that it regards as unconstitutional. When a President opposes a law on mere policy grounds, he is nonetheless obliged to defend it. . . ."); *see also* John E. Harris, *Holes in the Defense: Evaluating the North Carolina Attorney General's Duty to Defend and the Responses of Other Government Actors*, 92 N.C. L. REV. 2027, 2037 (2014) ("[O]ther considerations, such as policy or political preferences, should be left out of the analysis.").

18. *See, e.g.*, Curt Levey, Opinion, *An Attorney General's Job Is to Defend the Law—No Exceptions*, FOX NEWS (Feb. 25, 2014), http://www.foxnews.com/opinion/2014/02/25/attorney-general-job-is-to-defend-law-no-exceptions.html; Jay Sekulow, *A President Is Not Above the Law*, AM. CTR. FOR L. & JUST. (June 8, 2011), http://aclj.org/traditional-marriage/a-president-is-not-above-the-law.

19. *See, e.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Ilya Somin, *Do Presidents Have a Duty to Defend the Constitutionality of Laws They Believe to Be Unconstitutional?*, VOLOKH CONSPIRACY (Feb. 23, 2011, 11:45 PM), http://volokh.com/2011/02/23/do-presidents-have-a-duty-to-defend-the-constitutionality-of-laws-they-believe-to-be-unconstitutional.

20. Scott, *supra* note 4, at 85.

21. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 10 (2000); *see* Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 78 (2011) ("In determining whether to defend a statute, the President and his advisers should reject categorical positions about his constitu-

proach manifests in two recognized exceptions to the duty to defend: when the law raises separation of powers concerns,[22] and when there is otherwise not a "reasonable basis" for defending the law's constitutionality.[23] A few examples will help to illuminate these categories.

B. Statutes Creating Separation of Powers Concerns

The first category of cases in which the failure to defend is considered acceptable is when the challenged law arguably violates the separation of powers. The Executive and Legislative branches may occasionally find themselves in dispute as to their relative power in the constitutional design.[24] When such a dispute occurs in the context of the validity of a statute, the President's lawyers defend the

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tional authority in this area and instead pursue a context-driven approach. . . ."); *see also* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1212 (2012) (arguing that the duty to defend is not a "monolithic concept, a fixed obligation of the Executive Branch that always arises in exactly the same way and carries with it exactly the same responsibilities").

22. *See* Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1084 (2001). "The President may have more latitude to refuse to defend provisions that encroach on the President's constitutional powers than to refuse to defend statutes on other grounds because 'it is well understood that the best way to reach a constitutional equilibrium in this area is for each branch to vigorously enforce its own interests.'" Gussis, *supra* note 14, at 606 n.68 (quoting John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 389 n.44 (1993)).

23. *See* Scott, *supra* note 4, at 85. The standard embedded in this second exception has evolved over time. In the 1970s, the Ford administration spoke of a "patently unconstitutional" standard. *See Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 6 (1976) (statement of Rex Lee, Assistant Att'y Gen. of the United States). In the 1980s, the Reagan administration adopted a "clearly unconstitutional" standard. *See* Press Release, William French Smith, Att'y Gen. of the United States (May 6, 1982) (on file with N.Y.U. Ann. Surv. Am L.) ("[T]he Department of Justice has the responsibility to defend acts of Congress unless they . . . are clearly unconstitutional. . . ."). In the 1990s, Clinton administration officials argued that non-defense was permissible when "no professionally respectable argument c[ould] be made in defense of [a] statute." Drew S. Days, III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 499–500 n.71 (1994). In 2011, the Obama administration announced it would no longer defend the Defense of Marriage Act as no "reasonable argument c[ould] be made in [its] defense," while noting that "the Department does not consider every plausible argument to be a 'reasonable' one." Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

24. *See, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015); *see also* Waxman, *supra* note 22, at 1084 (noting that such disputes are "not surprising").

"President's powers and prerogatives," which may be consistent with invalidating the statute.[25] Otherwise, if a statute, for example, called for Congress to assume power as Commander in Chief of the Army and Navy—almost certainly a violation of the Commander in Chief Clause[26]—the President would be forced to defend the unconstitutional cessation of his or her own powers. *United States v. Lovett* and *INS v. Chadha*, *infra*, are consistent with, albeit less extreme applications of, this principle.

United States v. Lovett[27] concerned the Urgent Deficiency Appropriations Act, which included a rider barring three named executive branch employees from receiving salaries.[28] President Roosevelt signed the Act "because it appropriate[d] funds which were essential to carry on the activities of almost every agency of Government," but refused to defend it, voicing concerns that it constituted an unconstitutional bill of attainder.[29] When the named employees challenged the provision in the Court of Claims,[30] the House of Representatives authorized special counsel to defend the statute as amicus curiae.[31] The Court of Claims struck down the statute as a bill of attainder, at which point the Solicitor General—despite the administration's substantive agreement with the court's decision—filed a certiorari petition "because of the Government's belief that important constitutional issues [we]re involved . . . and because *amici curiae*" had "no independent means of access to the

25. Waxman, *supra* note 22, at 1084.

26. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. . . ." U.S. CONST. art. II, § 2.

27. 328 U.S. 303 (1946).

28. Urgent Deficiency Appropriations Act, ch. 218, § 304, 57 Stat. 431, 450 (1943). The concern of some Members of Congress that the named officials were communist sympathizers appears to have motivated the rider. *See* John Hart Ely, United States v. Lovett*: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 2–4 (1975).

29. Franklin Delano Roosevelt, Statement of the President Condemning Rider Prohibiting Federal Employment of Three Named Individuals (Sept. 14, 1943), *reprinted in* 1943 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 385–86 (Samuel I. Rosenman ed., 1950). Indeed, a majority of U.S. Senators *also* believed that the statute was unconstitutional, yet voted for enactment "because it was a rider to a necessary appropriations bill and after several conferences the House refused to recede." *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 6 (1976) (statement of Rex Lee, Assistant Att'y Gen. of the United States). *See* 89 CONG. REC. 6694 (1943) (This "seems . . . to have been the impetuosity of the [House of Representatives] in passing this bill of attainder.") (statement of Sen. Alben W. Barkley).

30. *See* Lovett v. United States, 66 F. Supp. 142, 143–44 (Ct. Cl. 1945).

31. *Lovett*, 328 U.S. at 306.

Court."[32] The Supreme Court eventually upheld the judgment of the Court of Claims.[33] Notably, "no Justice suggested that the President had overstepped his authority, or even acted improperly, by refusing to defend the statute."[34] Akin to the Commander in Chief example *supra*, it would have been inappropriate, or odd, to require President Roosevelt to defend a statute that unconstitutionally granted power to Congress at the Executive Branch's expense.

Likely the most famous example of presidential non-defense is *INS v. Chadha*.[35] In the 1950s, Congress passed the Immigration and Nationality Act, which vested the Attorney General with the authority, subject to the veto of either House of Congress, to suspend deportation proceedings and grant permanent residence to aliens.[36] Pursuant to the Act, the Attorney General suspended deportation proceedings in the case of Jighar Chadha, at which point the House exercised its statutorily granted veto power, and the Immigration and Naturalization Service (INS)—having decided it lacked the authority to rule on the constitutionality of Congress' directive[37]—accordingly processed Chadha's deportation.[38] On appeal to the Ninth Circuit, the INS joined Chadha in arguing that the deportation order was invalid as the product of an unconstitutional legislative veto;[39] the House and Senate, on the other hand, each authorized intervention as amicus curiae to defend the statute.[40] The Ninth Circuit struck down the statute, handing the INS an adverse judgment with which it substantively agreed.[41] After the

32. Brief for Petitioner, United States v. Lovett, 328 U.S. 303 (1946) (No. 809), *in* 24 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 41, 53 (Philip B. Kurland & Gerhard Casper eds., 1975).

33. *See Lovett*, 328 U.S. at 315–16.

34. Gussis, *supra* note 15, at 607–08

35. 462 U.S. 919 (1983); Simon P. Hansen, Comment, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159, 1170 (2013).

36. Immigration and Nationality Act, ch. 477, § 244, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2012)). Prior to *Chadha*, "nearly every President refused to abide by such provisions on the ground that they were unconstitutional." Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 267 (1994) (citing E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125).

37. Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1019 (2012).

38. *Chadha*, 462 U.S. at 924–27.

39. *See* Chadha v. INS, 634 F.2d 408, 411 (9th Cir. 1981).

40. *See* S. Res. 40, 97th Cong. (1981); H.R. Res. 49, 97th Cong. (1981).

41. *See Chadha*, 634 F.2d at 435–36.

INS appealed,[42] the Supreme Court upheld the Ninth Circuit's ruling invalidating the statute.[43] Again, the President acted consistently with his own prerogatives—seeking to maintain the power to suspend deportation hearings and grant permanent residence to aliens—rather than advocating for the diminution and transfer of his own power (in the form of the one-house veto provision) to Congress.

C. Statutes Lacking a "Reasonable Basis" for Defense

When a statute lacks a "reasonable basis" for defense, the relevant tension is no longer between the Executive and Legislative Branches, but instead, the Executive and Judicial Branches. The government lawyer "has an obligation to honor the important doctrine of stare decisis and a duty to respect the rulings of the [c]ourt[s]."[44] In other words, the government lawyer's continued defense of a statute in the face of clearly contrary precedent undermines the principles of stare decisis and judicial supremacy.[45] For example, immediately after the Supreme Court announced that same-sex couples were constitutionally entitled to the freedom to marry,[46] many state attorneys immediately ceased defending state laws that defined marriage as between one man and one woman.[47] *Metro Broadcasting, Inc. v. FCC*[48] and *United States v. Dickerson*,[49] major constitutional rulings in their own right, are illustrative of this category of cases.

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42. *See* Brief for Appellant-Respondent, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80–1832, 80–2170, 80–2171), 1982 WL 607268, at *6 (arguing that the statute "encroaches upon the powers of the Executive in administrating the Immigration and Nationality Act").

43. *Chadha*, 462 U.S. at 928.

44. Waxman, *supra* note 22, at 1085–86.

45. While it is true that government lawyers occasionally ask the courts to reconsider constitutional precedent, "[t]hese are isolated exceptions . . . that prove the general rule." *Id.* at 1087. One high-profile is example was Solicitor General Perlman's request of the Supreme Court to reconsider *Plessy v. Ferguson*, 163 U.S. 537 (1896) in 1950. *See* Brief for the United States at 12, 23–66, Henderson v. United States, 339 U.S. 816, 823 (1950) (No. 25).

46. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

47. *See* Nora Kelly & Brian Resnick, *What Are States with Same-Sex Marriage Bans Doing Now?*, ATLANTIC (June 26, 2015), http://www.theatlantic.com/politics/archive/2015/06/what-are-states-with-same-sex-marriage-bans-doing-now/448503 (cataloging responses of state governments in which same-sex marriage bans were in place at the time of *Obergefell*).

48. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995).

49. 530 U.S. 428 (2000).

In *Metro Broadcasting*, the Supreme Court was faced with deciding the constitutionality of the Federal Communication Commission's (FCC) minority preference policy for the awarding of broadcast licenses.[50] The H.W. Bush Justice Department—despite pleas from the FCC Chairman to the contrary[51]—refused to defend the statute, having independently concluded that the minority preferences were unconstitutional,[52] a position it took as amicus curiae supporting Metro Broadcasting.[53] While the Bush Administration concluded that the minority preferences violated the equal protection component of the Fifth Amendment, "few observers would have contended that no colorable argument for the statute's constitutionality could have been advanced."[54] What is particularly "odd" and "unique" about *Metro Broadcasting* is that the same president whose Justice Department refused to defend the Act had signed the legislation containing the provision in question, yet never publicly—in a signing statement or elsewhere—questioned its constitutionality.[55] The Supreme Court eventually held that the FCC's policies were not unconstitutional, a ruling it overturned five years later in *Adarand Constructors, Inc. v. Peña*.[56]

The next example of presidential non-defense is notable in that the law was repealed before any legal challenge necessitating defense could be mounted. In 1996, Congress passed a defense authorization bill containing a rider mandating the discharge of all

50. *Metro Broadcasting*, 497 U.S. at 552.

51. *See* Letter from Alfred C. Sikes, Chairman, Fed. Commc'ns, to Dick Thornburgh, Att'y Gen. of the United States (Jan 12, 1990) (on file with N.Y.U. ANN. SURV. AM. L.).

52. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 295–96 (1994). The Solicitor General, however, permitted the FCC to independently represent itself before the Court. *See* Brief for Federal Communic'ns Comm'n, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89–453), 1990 WL 513123.

53. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89–453), 1989 WL 1126975. Then Deputy Solicitor General John Roberts authored the brief, which would later be thought to "offer a rare glimpse" into his perspective on civil rights as a Supreme Court nominee. *See* Jo Becker, *Work on Rights Might Illuminate Roberts's Views*, WASH. POST (Sept. 8, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702394_pf.html.

54. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1203 (2012).

55. Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in* Metro Broadcasting v. FCC, BALKINIZATION (Sept. 8, 2005), http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html.

56. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995), *overruling* Metro Broad., Inc., v. FCC, 497 U.S. 547, 552 (1990).

HIV-positive service members.[57] President Clinton—despite calling the legislation "blatantly discriminatory" and concluding that it was unconstitutional as failing to further any "legitimate governmental purpose"[58]—signed the bill because "he considered the $265 billion in funding for military defense programs vital to national security and troop morale."[59] President Clinton then gave his "full support" to efforts to legislatively repeal the provision,[60] and also instructed the Attorney General to decline to defend any legal challenge to the statute.[61] The Clinton Administration did, however, choose to enforce the ban, in part because doing so "w[ould] create the condition under which a lawsuit might appropriately be brought on behalf of the potentially affected military men and women."[62]

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57. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104–106, § 567, 110 Stat. 186, 328, *repealed by* Act of Apr. 26, 1996, Pub. L. No. 104–134, § 2707, 110 Stat. 1321, 1321–30.

58. Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC., *supra* note 59, at 260–261. It is not clear precisely what standard the Clinton administration invoked in concluding that the statute was indefensible; the Office of Legal Counsel only orally advised the President on the matter. *See* Letter from Andrew Fois, Assistant Att'y Gen. of the United States, to Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (Mar. 22, 1996) (on file with N.Y.U. ANN. SURV. AM. L.). Some have argued that the provision was not, contrary to the President's conclusion, violative of the Equal Protection Clause. *See, e.g.*, H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 383 (1998) ("[I]t seems doubtful that a court would have concluded that 'there was no conceivable state of facts justifying Section 567's discrimination.") (internal quotation marks omitted)).

59. Gussis, *supra* note 14, at 597 (citing Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 260, 260–61 (Feb. 10, 1996)). President Clinton had vetoed a previous version of the defense authorization bill, in part over concerns that the discharge provision was unconstitutional. *See* Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 1996, 31 WEEKLY COMP. PRES. DOC. 2233, 2234 (Dec. 28, 1995).

60. Memorandum on Benefits for Military Personnel Subject to Involuntary Separation, 32 WEEKLY COMP. PRES. DOC. 228, 228 (Feb. 9, 1996). These efforts were eventually successful, as Congress voted to repeal the discharge provision only months later. *See* Philip Shenon, *Mandate that H.I.V. Troops Be Discharged Is Set for Repeal*, N.Y. TIMES (Apr. 25, 1996), http://www.nytimes.com/1996/04/25/us/mandate-that-hiv-troops-be-discharged-is-set-for-repeal.html.

61. Alison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, N.Y. TIMES, Feb. 10, 1996, at A1.

62. White House Press Briefing by Counsel to the President Jack Quinn and Assistant Att'y Gen. Walter Dellinger (Feb. 9, 1996), http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html (statement of Jack Quinn).

Finally, in 1998, the Fourth Circuit in *United States v. Dickerson* held that a provision of the Omnibus Crime Control and Safe Streets Act of 1968[63]—providing that confessions obtained in violation of *Miranda v. Arizona*[64] were nevertheless admissible evidence in a federal criminal trial—was constitutional.[65] On the criminal defendant's appeal to the Supreme Court, the Solicitor General refused to defend the statute,[66] and instead argued that the statute was unconstitutional, positing at oral argument that "section 3501 . . . cannot be reconciled with *Miranda*."[67] In other words, the Clinton Administration concluded that the challenged statute was inconsistent with existing Supreme Court precedent, namely, *Miranda*. The Justice Department's position, while not eliciting any mention from the Court, induced a congressional battle of the briefs; the House Bipartisan Legal Advisory Group[68] and ten Republican U.S. Senators[69] filed briefs in the Supreme Court urging affirmance of the Fourth Circuit's ruling,[70] while the House Democratic Leadership filed a brief in support of the petitioner, Mr. Dickerson.[71] In 2000, the Supreme Court reversed the Fourth Circuit, finding the statute unconstitutional.[72]

D. Duty to Defend in the States

How attorneys at the state level respond to the duty to defend is relevant to the topic of this Note because both prudential and

63. Pub. L. No. 90–351, § 701(a), 82 Stat. 210–11 (codified as amended at 18 U.S.C. §§ 3501–02 (2012) (invalidated by Dickerson v. United States, 530 U.S. 428 (2000)).

64. 384 U.S. 436 (1966).

65. 166 F.3d 667, 672 (4th Cir. 1998), *rev'd*, 530 U.S. 428 (2000).

66. *See* Brief for the United States, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99–5525), 2000 WL 141075.

67. Oral Argument at 20:21, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99–5525), https://www.oyez.org/cases/1999/99-5525.

68. *See* Brief for the Bipartisan Legal Advisory Group of the United States House of Representatives as Amicus Curiae Supporting Respondent, Dickerson v. United States, 538 U.S. 428 (2000) (No. 99–5525), 2000 WL 271995.

69. *See* Brief for Senator Orrin G. Hatch et al. as Amici Curiae Supporting Respondent, Dickerson v. United States, 538 U.S. 428 (2000) (No. 99–5525), 2000 WL 272002 at *1.

70. *See* Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 265 n.70 (2000).

71. *See* Brief for the House Democratic Leadership as Amicus Curiae Supporting Petitioner, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 126192.

72. *Dickerson*, 530 at 444.

Article III standing requirements apply whenever a state law is challenged in federal court.[73]

Despite the abundance of attention on the Federal Executive's duty to defend, "there is virtually no scholarly literature on the question of *state* executives and decisions not to defend *state* statutes following an independent determination of unconstitutionality."[74] The dearth of scholarly attention is a consequence of the great diversity in approaches to the duty to defend across states—itself a product of an "absence of clear law and the abundance of politics"[75]—making any broad conclusions difficult to reach.[76] This section will provide a brief glimpse into these varied approaches.

State government lawyers have offered a variety of standards that must be satisfied before declining to defend a duly enacted law: if the issue has been decided by a court of controlling jurisdiction;[77] if the law is "blatantly unconstitutional . . . as a matter of objective law";[78] if the law is "discriminatory";[79] if the Supreme Court "gives the final word";[80] or if "controlling precedent so overwhelmingly shows . . . that no good-faith argument can be made in

73. *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013) ("[S]tanding in federal court is a question of federal law, not state law.").

74. Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 217 (2014).

75. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 142 YALE L.J. 2100, 2103 (2015).

76. Shaw, *supra* note 74, at 217.

77. *Do State Attorneys General Have a Duty to Defend State Laws?*, *supra* note 10 (statement of John W. Suthers, Attorney General, State of Colorado); *see also* Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer,* 22 PROF. LAW., no. 3, 2014, at 4, 11 (Mr. Cardozo is the former Corporation Counsel for the City of New York.).

78. Video Recording, *Dereliction of Duty: State Attorneys General Failing to Defend Marriage Laws in Court*, HERITAGE FOUND. (Mar. 14, 2013), http://www.heritage.org/events/2014/03/dereliction-of-duty (statement of Ken Cuccinelli, Former Attorney General, Commonwealth of Virginia).

79. Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST (July 11, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban/ (The Pennsylvania Attorney General "was obligated to drop the case 'because [she] endorse[s] equality and anti-discrimination laws.'").

80. Letter from J.B. Van Hollen, Att'y Gen., Dep't of Justice, State of Wis., to David D. Haynes, Editorial Page Editor, Milwaukee Journal Sentinel (June 17, 2014), http://www.thewheelerreport.com/wheeler_docs/files/0617doj.pdf.

its defense."[81] By contrast, some government lawyers have vowed to *always* defend duly enacted laws.[82]

States have also employed different approaches—designed to ensure that laws receive faithful legal defenses—when a government lawyer ordinarily charged with defending the relevant law chooses not to do so. Some states have turned to outside counsel,[83] while others have authorized the state legislature[84] or state agencies[85] to intervene to take on the defense.

Government lawyers have also sometimes chosen a middle ground—to argue both sides of an issue.[86] In *Susan B. Anthony List*

81. Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 515 (2015) (Indiana Attorney General).

82. *E.g.*, IDAHO ATTORNEY GENERAL WASDEN WILL CONTINUE TO DEFEND STATE'S GAY MARRIAGE BAN (Boise State Public Radio 2014).

83. *See* Brett Barrouquere, *Kentucky Gay Marriage Appeal Will Be Handled by Ashland Firm Under $100K Contract*, COURIER-J. (Mar. 13, 2014), http://www.courier-journal.com/story/news/local/2014/03/13/kentucky-gay-marriage-appeal-will-be-handled-ashland-firm-under-100k-contract/6388039/; Laura Vozzella, *Cuccinelli Won't Defend School Take-Over Law Championed by McDonnell*, WASH. POST (Sept. 3, 2013), https://www.washingtonpost.com/local/virginia-politics/cuccinelli-wont-defend-school-take-over-law-championed-by-mcdonnell/2013/09/03/af8469b8-14fb-11e3-880b-7503237cc69d_story.html.

84. *See* Karcher v. May, 487 U.S. 72, 75 (1987) (New Jersey).

85. *See, e.g.*, Delchamps, Inc. v. Ala. State Milk Control Bd., 324 F. Supp. 117, 118 (M.D. Ala. 1971) (leaving the Alabama Milk Control Board to defend the constitutionality of the Alabama Milk Control Act after the Attorney General refused to do so); *Arkansas AG: Martin's Office to Defend Voter ID*, BAXTER BULL. (Sept. 24, 2014), http://www.baxterbulletin.com/story/news/local/2014/09/24/arkansas-ag-martins-office-defend-voter/16188715/ (leaving the defense of a voter identification law to the Arkansas Secretary of State); Salvador Rizzo, *Chris Christie's Administration Declines to Defend Gun Laws in Court Battle*, STAR LEDGER (Dec. 30, 2013), http://www.nj.com/politics/index.ssf/2013/12/chris_christies_administration_declines_to_defend_gun_laws_in_court_battle.html (recounting how after Governor Christie refused to defend certain gun laws in New Jersey state court, a local district attorney assumed responsibility for defending the laws); VIRGINIA'S NEW ATTORNEY GENERAL WILL NOT DEFEND GAY-MARRIAGE BAN (National Public Radio 2014) (noting that several Virginia county clerks had stepped in to defend the Commonwealth's same-sex marriage prohibition); Amy Worden, *Kane Won't Defend Controversial Gun Law*, PHILA. INQUIRER (Dec. 6, 2014), http://articles.philly.com/2014-12-06/news/56761407_1_kane-new-law-renee-martin ("The attorney general determined it would be more efficient and in the best interest of the commonwealth for the Office of General Counsel to handle this matter.").

86. This strategy was pioneered by then-Solicitor General Robert Bork, who, in *Buckley v. Valeo*, 424 U.S. 1 (1976), was faced with defending the constitutionality of parts of the Federal Election Campaign Act he deemed unconstitutional. *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 32 (2003). Bork filed two briefs in the Supreme Court: one on behalf of the United States as a party vigorously defending the statute, and another on behalf of the United States as amicus curiae attacking the statute. *Id.* at 32–33.

v. Driehaus,[87] the Ohio Attorney General submitted a respondent's brief defending the statute at issue and, at oral argument, offered an "unadulterated defense."[88] However, because the Attorney General had concluded that the statute was likely unconstitutional, his office retained pro bono counsel to submit a second brief, as amicus curiae, to alert the Court to his concerns.[89]

II.
WINDSOR AND HOLLINGSWORTH

In June 2013, the Supreme Court issued rulings in two cases, both historic victories for the LGBT rights movement:[90] *United States v. Windsor*[91] and *Hollingsworth v. Perry*.[92] In addition to their impact on LGBT civil rights, these decisions have raised complex issues with regards to federal court standing in the context of the duty to defend.[93] This Part introduces these cases, from passage of the relevant laws to the Supreme Court's grants of certiorari.

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87. 134 S. Ct. 2334 (2014).

88. Marty Lederman, *Commentary: The Return of the Robert Bork "Dueling Briefs" Strategy:* Buckley v. Valeo*,* Susan B. Anthony List*, and Ohio Attorney General DeWine*, SCOTUSBLOG (Mar. 17, 2014, 11:42 AM), http://www.scotusblog.com/2014/03/commentary-the-return-of-the-robert-bork-dueling-briefs-strategy-buckley-v-valeo-susan-b-anthony-list-and-ohio-attorney-general-dewine/; Brief for Respondent, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 1260424.

89. *See* Brief for Ohio Attorney General Michael DeWine as Amicus Curiae Supporting Neither Party, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 880938. The Ohio Attorney General was later quoted as suggesting that the dual brief strategy "certainly is rare, and it should be rare." Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, N.Y. TIMES, Mar. 25, 2014, at A16.

90. These rulings are, of course, no longer the most historic American LGBT legal rights victories post-*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing a constitutional right to same-sex marriage).

91. 133 S. Ct. 2675 (2013).

92. *Id.* at 2652.

93. *See, e.g.*, Ilya Somin, *Right, Left and the Standing Issues in the Gay Marriage Cases*, VOLOKH CONSPIRACY (June 26, 2013, 2:18 PM), http://volokh.com/2013/06/26/right-left-and-the-standing-issues-in-the-gay-marriage-cases.

A. United States v. Windsor

In 1996, Congress overwhelmingly[94] passed the Defense of Marriage Act (DOMA),[95] Section Three of which defined marriage for the purposes of federal law as "a legal union between one man and one woman as husband and wife."[96] A decade later, Edith Windsor and Thea Spyer, a lesbian couple from New York, were married.[97] When Spyer died in 2009, leaving her entire estate to Windsor,[98] Windsor sought to avail herself of the spousal deduction from federal estate taxes[99] but was unable to do so because, pursuant to DOMA, she was not married to Spyer within the meaning of the United States Code.[100] Windsor brought suit against the United States in federal district court seeking an estate tax refund by contending that DOMA violated the Fifth Amendment.[101]

While Windsor's lawsuit was pending, Attorney General Holder announced that the United States would no longer defend the constitutionality of DOMA in court.[102] The Obama administration had previously defended DOMA in litigation across the country. Unlike in those cases, however, *Windsor* was filed in a jurisdiction not sub-

94. DOMA passed in the House by a vote of 342 (yea) to 67 (nay) to 2 (present) to 22 (not voting), 142 CONG. REC. H7505–06 (daily ed. July 12, 1996), and in the Senate by a vote of 85 (yea) to 14 (nay) to 1 (not voting), 142 CONG. REC. S10129–01 (daily ed. Sept. 10, 1996).

95. Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013). Congress appears to have been motivated to act in response to gay rights litigation in Hawaii. *See* H.R. REP. NO. 104–664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. In 1990, three same-sex couples sought, yet were denied, marriage licenses pursuant to a state statute defining marriage as between one man and one woman. *See* Hetali Lodaya, *DOMA History: How Did Such a Discriminatory Law Ever Pass?*, POL'Y MIC (June 26, 2013), http://mic.com/articles/51207/doma-history-how-did-such-a-discriminatory-law-ever-pass#.OnRB8bD6a. The couples challenged the constitutionality of the statutory scheme, and in an historic ruling, the Hawaii Supreme Court held that excluding same sex couples from marriage constituted discrimination for which the State was required to demonstrate a compelling interest to survive constitutional attack. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

96. 1 U.S.C. § 7 (2012).

97. *Windsor*, 133 S. Ct. at 2683.

98. *Id.*

99. *See* 26 U.S.C. § 2056(a) (2012).

100. *Windsor*, 133 S. Ct. at 2683.

101. *See* Complaint, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435), 2010 WL 5647015.

102. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to Cong., *supra* note 24. The Attorney General is required, pursuant to 28 U.S.C. § 530D(a)(1)(B)(ii) (2012), to notify Congress in any instance in which he or she decides not to defend the constitutionality of a federal statute.

ject to circuit court precedent holding that classifications based on sexual orientation were subject only to rational basis review.[103] President Obama was thus free to conclude "that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."[104] With that standard in mind, the President determined that no "reasonable arguments" could be made that DOMA was constitutional, such that the statute's defense, but not enforcement, would be abandoned.[105] The announcement was celebrated by the Left as a major civil rights victory.[106] Yet many conservative commentators lambasted the decision as an outrageous power grab.[107] Soon thereafter, the Biparti-

103. The applicable level of scrutiny for analyzing a legal classification under the Equal Protection Clause depends on the basis of the classification. *See generally* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989). Suspect classifications (e.g., race, national origin) are subject to strict scrutiny; the law must be necessary to achieve a compelling government interest. Fisher v. Univ. of Tex. 136 S. Ct. 2198, 2208 (2016). Quasi-suspect classifications (e.g., sex) must survive intermediate scrutiny; the law must be substantially related to an important government interest. United States v. Virginia, 518 U.S. 515, 533 (1996). All other classifications, however, are "presumed to be valid" and will be sustained so long as they are "rationally related to a legitimate government interest." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). By late 2012, eleven circuits (not including the Second)—and arguably, although not definitely, the Supreme Court, Romer v. Evans, 517 U.S. 620, 631–32 (1996)—had held that classifications on the basis of sexual orientation only warranted rational basis scrutiny. *E.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989).

104. Letter from Eric H. Holder, Jr., Att'y Gen., to Cong., *supra* note 24.

105. *Id.*

106. *See, e.g.*, Press Release, Human Rights Campaign, Administration Drops Defense of Discriminatory DOMA Law (Feb. 23, 2011), http://www.hrc.org/press/administration-drops-defense-of-discriminatory-doma-law (praising the President's "move as [a] rare and extraordinary step for same-sex couples and their families"); Doug Mataconis, *Is It Proper for President Obama to Decline to Appeal the DOMA Cases?*, OUTSIDE THE BELTWAY (Feb. 25, 2011), http://www.outsidethebeltway.com/is-it-proper-for-president-obama-to-decline-to-appeal-the-doma-cases/ ("[I]t is clear that the Obama Administration's decision here was both appropriate and correct."); *Obama White House Backs Repeal of DOMA, Groups Respond*, WINDY CITY TIMES (July 20, 2011), http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=32863 (quoting then-Senator John Kerry as saying: "President Obama has made it clear his Administration will continue to lead as no Administration has done before in the effort to end discrimination against gay Americans.").

107. *See, e.g.*, Paul Bedard, *Newt Gingrich: Obama Could Be Impeached Over Gay Marriage Reversal*, U.S. NEWS & WORLD REP. (Feb. 25, 2011, 3:50 PM), http://www.usnews.com/news/blogs/washington-whispers/2011/02/25/newt-gingrich-obama-could-be-impeached-over-gay-marriage-reversal (quoting former House Speaker Newt Gingrich as encouraging the House of Representatives to impeach the Presi-

san Legal Advisory Group of the House of Representatives ("BLAG"), then consisting of three Republican and two Democrats,[108] voted to intervene to defend DOMA.[109]

A federal district court,[110] followed by a three-judge panel of the Second Circuit,[111] found DOMA unconstitutional, with the United States (and the BLAG) appealing each judgment. In late 2012, the Supreme Court granted certiorari, while directing the parties to brief and argue, in addition to the merits, "whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether [the BLAG] has Article III standing in this case."[112]

B. Hollingsworth v. Perry

In May 2008, the California Supreme Court ruled that the California Constitution guaranteed the right to marry to same-sex couples.[113] Six months later, a majority of California voters[114] ap-

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dent for his decision no longer to defend DOMA); Richard Epstein, *Dumb on DOMA*, RICOCHET (Feb. 24, 2011), https://ricochet.com/archives/dumb-on-doma/ ("[T]he DOJ's invocation of a history of discrimination against gays and lesbians and a call for a level of heightened scrutiny is not the way in which this question should be resolved."); Curt Levey, *Defense of Marriage, ObamaCare and Kagan*, COMMITTEE FOR JUST. BLOG (Feb. 23, 2011, 4:58 PM), http://committeeforjustice.blogspot.com/2011/02/doma-obamacare-and-kagan.html ("The President's refusal to defend DOMA, a federal statute enacted by overwhelming margins . . . flies in the face of Justice Department policy and principles of democratic government.").

108. Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 5, 2011, at A16.

109. Molly K. Hopper, *House Leaders Vote to Intervene in DOMA Defense*, HILL (Mar. 9, 2011, 10:43 PM), http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense. The district court granted intervention as an interested party, but denied the BLAG's motion to intervene by unconditional right because the Justice Department was already representing the United States. *See* Windsor v. United States, 797 F. Supp. 2d 320, 325 (S.D.N.Y. 2011).

110. Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

111. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

112. United States v. Windsor, 133 S. Ct. 786, 787 (2012).

113. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008). The ruling was "denounced" by conservative groups who immediately promised to support a state ballot initiative to amend the California Constitution to overrule the court. Adam Liptak, *California Supreme Court Overturns a Ban on Gay Marriage*, N.Y. TIMES (May 16, 2008), http://www.nytimes.com/2008/05/16/us/16marriage.html.

114. Proposition 8 passed with just over fifty-two percent of the vote. Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008), http://www.wsj.com/articles/SB122586056759900673.

proved Proposition 8, a statewide ballot initiative that overruled the California Supreme Court's ruling by amending the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[115]

Soon after Proposition 8's passage, two same-sex couples filed suit in federal district court against various California officials responsible for enforcing the enacted marriage ban, challenging the amendment under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[116] The Governor,[117] the Attorney General,[118] and each of their successors[119] refused to defend, yet continued to enforce, the amendment. As a result, the original proponents of the ballot measure sought and were granted the right to intervene in the district court proceedings.[120] The district court thereafter found Proposition 8 unconstitutional.[121]

The ballot proponents alone[122] appealed to the Ninth Circuit, which in turn certified to the California Supreme Court the question whether the proponents "possess[ed] either a particularized interest in the initiative's validity or the authority to assert the state's interest in the initiative's validity."[123] The California Supreme Court addressed only the latter—whether the proponents

115. CAL. CONST. art. I, § 7.5.

116. *See* Complaint at 3, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-02292-VRW), 2009 WL 1490740. A parallel proceeding challenged Proposition 8 in California state court on procedural grounds; in *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009), the California Supreme Court rejected that challenge, finding Proposition 8 to have been properly enacted under California law.

117. Maura Dolan, *Schwarzenegger Decides Against Defending Prop. 8 in Federal Court*, L.A. TIMES (June 18, 2009), http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18.

118. Bob Egelko, *Brown Asks State High Court to Overturn Prop. 8*, S.F. CHRON. (Dec. 20, 2008), http://www.sfgate.com/news/article/Brown-asks-state-high-court-to-overturn-Prop-8-3179666.php.

119. Aaron Glantz, *Kamala Harris Won't Defend Prop. 8*, BAY CITIZEN (Dec. 2, 2010, 11:58 AM), https://www.baycitizen.org/blogs/pulse-of-the-bay/kamala-harris-wont-defend-prop-8. Jerry Brown, California Attorney General at the time the *Hollingsworth* case was filed, became Governor Schwarzenegger's successor, whereupon he continued to refuse to defend Proposition 8. *See* Chris Megerian, *Prop. 8 Battle Gives Jerry Brown Link to His Father*, L.A. TIMES (June 28, 2013), http://www.latimes.com/local/political/la-me-pc-california-jerry-brown-proposition-8-20130628-story.html.

120. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

121. *Id.* at 1004.

122. Perry v. Schwarzenegger, 628 F.3d 1191, 1195 (9th Cir. 2011) ("Proponents appealed the district court order, but the named officials did not.").

123. *Id.* at 1193.

had authority to assert the state's interest—and answered in the affirmative.[124] In turn, the Ninth Circuit concluded that the proponents had standing to appeal the lower court's judgment,[125] yet ultimately affirmed the lower court's decision on the merits.[126]

In 2012, the Supreme Court granted certiorari, while directing the parties to brief and argue "[w]hether [the ballot proponents] have standing under Article III, § 2, of the Constitution . . . ."[127]

III.
JURISDICTIONAL LIMITATIONS ON FEDERAL COURTS

In granting certiorari in *Hollingsworth* and in *Windsor*, the Supreme Court requested additional briefing on whether the parties seeking review had standing to do so.[128] This Part will provide an overview of two types of federal court standing[129]—Article III and prudential—and explain how the Court determined that the ballot proponents in *Hollingsworth* lacked Article III standing to defend Proposition 8, and how the United States, despite substantive agreement with plaintiff on the merits, satisfied both Article III and prudential standing requirements in *Windsor*.

A. Article III Standing

Article III of the Constitution limits the power of the federal judiciary to deciding only "Cases" or "Controversies."[130] "One essential aspect of this requirement is that any p[arty] invoking the

124. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

125. Perry v. Brown, 671 F.3d 1052, 1070–71 (9th Cir. 2012).

126. *Id.* at 1076, 1095.

127. Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (granting certiorari).

128. *Id.*; United States v. Windsor, 133 S. Ct. 786, 787 (2012).

129. Article III and prudential standing only apply to the federal courts. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or . . . a federal statute."). Whether the failure to defend a duly enacted statute would deprive an action of *state* appellate jurisdiction is beyond the scope of this article. For a helpful discussion of standing in state courts, see John DiManno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008).

130. The "cases" or "controversies" limitation is a "bedrock requirement," Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982), and the "mo[st] fundamental" principle "to the judiciary's proper role in our system of government." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976).

power of a federal court must demonstrate standing to do so."[131] Article III standing "serves to identify those disputes which are appropriately resolved through the judicial process,"[132] which is thereby prevented "from being used to usurp the powers of the political branches."[133] Standing must persist "through all stages of litigation"[134]—it must be satisfied not only by plaintiffs appearing in courts of first instance, but also by appellants seeking review.[135]

Demonstrating Article III standing requires, among other things,[136] the party seeking relief "to have suffered an injury in fact that is both (a) concrete and particularized and (b) actual or imminent"[137] as opposed to a mere "generalized grievance."[138] Drawing a meaningful distinction between injuries that are judicially cognizable within this framework and those that are not has proven difficult.[139] For example, the invasion of an individual's aesthetic desire to view species in the wild is judicially cognizable,[140] while "generalized harm to the forest or the environment" is not.[141] A taxpayer's

131. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (citing U.S. CONST. art III, § 2). Other Article III, Section 2 doctrines include ripeness, mootness, "and the restriction on hearing political questions." F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 419 n.7 (2013) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)).

132. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

133. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). Some have argued that current standing doctrines sometime fail to serve this purpose. *See, e.g.*, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 297–300 (1988).

134. Already, L.L.C. v. Nike, Inc., 133 S. Ct. 721, 726 (2013).

135. Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (citing Diamond v. Charles, 476 U.S. 54, 56 (1986)). "The standing to appeal requirements closely parallel those the Court has identified for standing to sue." Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 840 (2004).

136. In addition to the requirement of establishing a judicially cognizable injury, the party seeking a judicial determination (i.e., a plaintiff or appellant) must demonstrate that the injury is caused by, or is fairly traceable to, the defendant (or appellee), and that a favorable judicial decision will redress that injury. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000).

137. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 65 (D.D.C. 2015) (citing United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013)).

138. United States v. Richardson, 418 U.S. 166, 176–77 (1974).

139. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with consistency in all of the various cases decided by this Court which have discussed it.").

140. Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

141. Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

injury from the government's expenditures on textbooks for parochial schools is judicially cognizable,[142] while an American citizen's lack of information about CIA activities is not.[143]

Standing was satisfied at the trial court level in both the *Hollingsworth* and *Windsor* cases as, among other things, both sets of plaintiffs suffered from judicially cognizable injuries: Perry had been denied the official sanction of marriage;[144] Windsor was required to pay estate taxes.[145]

In *Hollingsworth*, the officeholders responsible for enforcing the enacted proposition chose not to appeal the district court's ruling. The parties seeking appellate review, and thus bearing the burden of establishing standing at that juncture,[146] were the sponsors of the ballot initiative. Those sponsors attempted to establish standing by "asserting both their own independent interest in the law's validity and the state's enforceability interest."[147]

As to their "independent interest," the Court ruled that the proponents' "only interest was to vindicate the constitutional validity of a generally applicable California law."[148] In other words, the proponents' only injury was that of any other Californian who wished for his or her state's laws to be upheld, a merely generalized injury.

Thus, the ballot proponents argued in the alternative that they were California's agents, and thereby able to derive standing from the state's injury of having suffered a ruling that its law was unconstitutional.[149] Because states have a cognizable interest in the continued enforceability of their laws, they suffer an injury worthy of

142. Flast v. Cohen, 392 U.S. 83, 85, 102–03, 106 (1968).

143. *Richardson*, 418 U.S. at 176–77.

144. Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013). There were four parties in *Hollingsworth*—two same-sex couples—but "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006) (citing Forum for Acad. & Institutional Rights, Inc. v. Rumsfeld, 390 F.3d 219, 228 n.7 (3d Cir. 2004)).

145. United States v. Windsor, 133 S. Ct. 2675, 2685 (2013). "[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599 (2007) (emphasis omitted).

146. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990) (quoting McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) and Warth v. Seldin, 422 U.S. 490, 518 (1975)).

147. Girton, *supra* note 9, at 1790.

148. *Hollingsworth*, 133 S. Ct. at 2662.

149. *Id.* at 2663.

standing upon a judicial declaration that a state law is unconstitutional.[150] Further, states may designate agents to represent that interest in federal court.[151] The Supreme Court disagreed with the ballot proponents; while states can designate officials to represent their interests on appeal, the Court had never, and would not, recognize the standing of a *private* party to do so.[152] The Court noted that, unlike state officials, the ballot proponents were missing "an essential element of agency[:] . . . the principal's right to control the agent's actions."[153] And unlike state officials, the ballot proponents were unelected; there were no provisions for their removal, nor were they accountable to anyone (i.e., the state's constituency) for the legal arguments they chose to assert.[154]

As the appellants were unable to establish Article III standing on either theory, the Supreme Court, and the Ninth Circuit, did not have jurisdiction to consider the case, and the appeal was dismissed.[155]

In *Windsor*, however, the United States was able to demonstrate Article III standing, because the rulings from which it appealed imposed a concrete injury—the requirement of issuing a refund to Windsor.[156] The Court likened the United States' injury in *Windsor* to the INS's in *Chadha*, *supra*: "the INS was sufficiently aggrieved by the Court of Appeals decision" because it was thereby "prohibit[ed] . . . from taking action it otherwise would take."[157] In other words, because the INS had lost in the Ninth Circuit, it was precluded from deporting Chadha, which it otherwise would have done. Similarly, the United States was, by nature of the adverse ruling, prohibited from taking the action of denying Windsor's estate tax refund claim, which *it* otherwise would have done. In the *Windsor* Court's view, this was sufficient to "preserve a justiciable dispute."[158]

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150. *See* Maine v. Taylor, 477 U.S. 131, 137 (1986).

151. Poindexter v. Greenhow, 114 U.S. 270, 288 (1885).

152. *See Hollingsworth*, 133 S. Ct. at 2662–68.

153. *Id.* at 2666 (quoting 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f (2005)).

154. *Id.* at 2666–67.

155. *Id.* at 2668.

156. *See* United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) ("That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.").

157. *Id.* (internal quotation marks omitted) (quoting INS v. Chadha, 462 U.S. 919, 930 (1983)).

158. *See id.*

B. Prudential Standing

Prudential standing is a doctrine of "flexible 'rule[s] . . . of federal appellate practice.'"[159] Without these limitations, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[160] Among other things,[161] prudential standing demands a "real, earnest, and vital controversy" as opposed to a "friendly, non-adversary, proceeding" which may arise when "a party beaten in the legislature [attempts] to transfer to the courts an inquiry as to the constitutionality of the legislative act."[162] Importantly, "[u]nlike Article III requirements . . . the relevant prudential factors that [may] counsel against hearing [a] case are subject to 'countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.'"[163]

In *Windsor*, the risk of a "friendly, non-adversary, proceeding" created by "[t]he Executive's agreement with Windsor's legal argument" was outweighed by several of these considerations.[164] First, "adversarial presentation of the issues [wa]s assured by the participation of *amici curiae* [here, the BLAG] prepared to defend with vigor the constitutionality of the legislative act."[165] Second, extensive litigation would have ensued—"in cases involving the whole of

159. *Id.* (quoting Deposit Guar. Nat. Bank v. Roper, 445 U.S. 326, 333 (1980)).

160. Warth v. Seldin, 422 U.S. 490, 500 (1975) (citing Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222 (1974)).

161. Other prudential standing doctrines include the limitation on third-party standing, *see, e.g.*, Craig v. Boren, 429 U.S. 190, 194–97 (1976), and the zone of interest test, *see, e.g.*, Bennett v. Spear, 520 U.S. 154, 162–63 (1997).

162. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (internal quotation marks omitted) (quoting Chi. & Grand Truck Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

163. United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (quoting Warth v. Seldin, 422 U.S. 490, 500–01 (1975)).

164. That the United States satisfied both Article III and prudential standing meant "the Court [did not] need [to] decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority." *Id.* at 2688. Justice Alito, in dissent, did reach this question, and answered in the affirmative. *See id.* at 2712 (Alito, J., dissenting). Justice Scalia also reached this question in dissent, but answered in the negative. *See id.* at 2703–05 (Scalia, J., dissenting). The *Hollingsworth* Court, by contrast, never reached prudential standing; there was no reason to do so, as the case had already been found to lack Article III standing.

165. *Id.* at 2687.

DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations"—had the Court chosen not to rule on the merits, meaning that the "[r]ights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent."[166]

With both Article III and prudential standing satisfied, the court had jurisdiction to consider the case, and proceeded to rule on the merits of Edie Windsor's claim.[167]

IV.
THE PROBLEMATIC CONSEQUENCES OF *WINDSOR* AND *PERRY*'S HOLDINGS: THE NIGHTMARE SCENARIO

Windsor and *Hollingsworth*, through their developments of the Article III and prudential standing doctrines, created the possibility for government lawyers, by choosing not to defend the constitutionality of their jurisdiction's laws, to deprive federal appellate courts of the power to engage in judicial review.

This Part proceeds first to examine how this phenomenon might manifest, the so-called "Nightmare Scenario." It then explains how depriving federal appellate courts of judicial review threatens judicial supremacy, an important element of the constitutional design. Finally, this Part considers the practical and legal challenges that would prevent the legislature from defending the challenged law when the Executive branch fails to do so.

A. The Nightmare Scenario[168]

i. Post-*Hollingsworth*

Consider this realistic hypothetical: It is 2016, and voters in the State of Florida,[169] fed up with politics as usual, propose and enact a ballot initiative to amend the Florida Constitution to impose back-

166. *Id.* at 2688.

167. *See id.* at 2689.

168. The nightmare scenario of federal courts being deprived of jurisdiction over the question of a law's constitutionality has gained both popular and scholarly attention. *E.g.*, Cardozo, *supra* note 77, at 30; Erwin Chemerinsky, Opinion, *Prop 8. Deserved a Defense*, L.A. TIMES (June 28, 2013), http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628; Bob Egelko, *Did Toppling Prop. 8 Undercut Initiative Process?*, S.F. GATE. (June 30, 2013, 12:29 PM), http://www.sfgate.com/politics/article/Did-toppling-Prop-8-undercut-initiative-process-4630002.php.

169. Florida is one of twenty-four states with an initiative process. *See* M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11–12 (2003).

ground checks on all firearm purchases. A gun-show vendor files suit in federal district court in Miami, challenging the constitutionality of the initiative on Second Amendment grounds.[170] The Governor[171] and Attorney General,[172] both ardent supporters of the Second Amendment, only nominally defend the law. When the district court rules against the initiative, those same officials decline to appeal. After *Hollingsworth*, what can be done to ensure a single district court cannot overrule the will of millions of Florida voters without further judicial review?

ii. Post-*Windsor*

Also in 2016, Congress enacts legislation mandating background checks for gun sales in Washington, DC.[173] A gun-show vendor challenges the constitutionality of the statute in DC District Court and wins.[174] By the time the District Court strikes down the legislation, a new president has been elected—one who believes background checks violate the Constitution. The new president's administration continues to enforce the legislation. However, upon appeal to the D.C. Circuit, the President's administration joins the plaintiff in challenging the law. Given the much narrower sweep of the legislation in comparison to DOMA, the "countervailing" considerations may be insufficient, unlike in *Windsor*, to overcome the prudential standing requirement of adverseness.[175] The D.C. Cir-

170. The gun-show vendor would almost certainly have a judicially cognizable injury to satisfy the standing inquiry—the requirement of background checks would decrease business (the whole point of the measure) and may cost him or her time and administrative resources.

171. *See* Marc Caputo, *NRA Endorses Rick Scott*, TAMPA BAY TIMES (Sept. 18, 2014, 9:38 AM), http://www.tampabay.com/blogs/the-buzz-florida-politics/nra-endorses-rick-scott/2198286 ("Governor Scott rejects expanded licensing and registration schemes, and so-called 'universal background checks.'").

172. *See* Marion P. Hammer, *Florida Attorney General Pam Bondi Is a True Second Amendment Supporter*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Jan. 30, 2013), https://www.nraila.org/articles/20130130/alert-florida-attorney-general-pam-bondi-is-a-true-second-amendment-supporter.

173. Pursuant to the District Clause of the Federal Constitution, Article I, Section 8, Clause 17, Congress has "continuing plenary power over all subjects affecting the District." Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 168 (1991).

174. Washington, D.C. is no stranger to challenges to the constitutionality of gun rights restrictions. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

175. The other countervailing factor—amici willing and able to defend the law—is probably omnipresent; the Supreme Court has a practice of appointing amici to argue positions that no party to the case supports. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 466 (2009). *See also* Brian P. Goldman, Note,

cuit, not to mention the Supreme Court, is deprived of standing to hear the appeal, which is an "untenable" state of affairs.[176]

Having two different presidents is by no means a necessary condition for this particular result. Allowing a single federal district court to decide the constitutionality of a federal statute could be achieved, for example, if a president refused to defend the statute after having signed it himself or herself (perhaps having voiced constitutional objections in a signing statement thereto)[177] or even if the president *never* signs the law, with its enactment occurring through the override of a presidential veto.[178]

iii. Judicial Supremacy

What is it about these scenarios that is threatening, disturbing, or legally wrong? The answer is that depriving the judiciary of the last word on constitutional interpretation is directly contrary to a concept fundamental to the separation of powers: judicial supremacy.

The principle of judicial supremacy provides "that the executive must treat the courts' constitutional interpretations as authoritative" and "call[s] for the political branches to conform their conduct to the rules, including the reasoning, of judicial decisions, particularly those of the Supreme Court."[179] In other words, when a law "is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' "[180]

Judicial supremacy does not altogether prohibit the states or federal political branches from making constitutional determina-

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Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?, 63 STAN. L. REV. 907 (2011).

176. *Cf.* Glenn Kessler & Ed O'Keefe, *Administration Is Expected to Appeal 'Don't Ask' Injunction*, WASH. POST (Oct. 14, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/13/AR2010101307092.html (statement of Professor Walter Dellinger describing the "untenable" result of one district judge setting the law in a case that has not reached the Supreme Court).

177. The practice of challenging the constitutionality of a duly enacted statute through a signing statement is an increasingly popular, yet exceedingly controversial, practice. *See* Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. GLOBE (Apr. 30, 2006), http://www.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws.

178. U.S. CONST. art. 1, § 7, cl. 3.

179. Meltzer, *supra* note 54, at 1188.

180. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *accord* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

tions.[181] To the contrary, "the process of constitutional interpretation *benefits* from the thoughtful participation of the elected representatives of the people in the public dialogue about the meaning of the Constitution."[182] Thus, it is well accepted that the federal executive may, for example, engage in a variety of interpretative tasks,[183] such as reviewing the constitutionality of proposed litigation,[184] or considering the constitutional challenges posed by national security actions.[185] And when Congress enacts legislation, "it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[186]

In fact, not only are states and the other federal branches permitted to engage in constitutional interpretation, they may in some instances do so exclusively.[187] But in those situations in which the "judiciary is limited, properly, in its ability to enforce the Constitution . . . by Article III's requirements of jurisdiction and jus-

181. *See* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1694–97 (2011) (*citing* John Marshall, Speech Delivered in the House of Representatives of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (1800), *in* 4 THE PAPERS OF JOHN MARSHALL VOLUME IV: CORRESPONDENCE AND PAPERS, JANUARY 1799-OCTOBER 1800, at 103 (Charles T. Cullen & Leslie Tobias eds, 1984)) ("A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court.").

182. Johnsen, *supra* note 21, at 11-12.

183. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268 (1996). The executive is to carry out its interpretive responsibility with "great deference" to, "and respect for," Congress. Memorandum from Walter Dellinger, Assistant Att'y Gen. of the United States, to Abner J. Mikva, White House Counsel (Nov. 2, 1994). In a similar vein, "[t]he Solicitor General's willingness to presume and defend the constitutionality of Acts of Congress is an assertion of due regard for the constitutional functions of the Legislature as a co-equal branch of government." Dalena Marcott, Note, *The Duty to Defend: What Is in the Best Interests of the World's Most Powerful Client*, 92 GEO. L.J. 1309, 1320 (2004).

184. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711–12 (2005).

185. *See, e.g.*, Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), https://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0 (describing how executive branch lawyers confronted constitutional challenges in justifying the campaign to assassinate Osama bin Laden).

186. City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

187. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (noting that the opinions of the Office of Legal Counsel in the Department of Justice often represent the final word in constitutional interpretation of executive action because the issues are "unlikely ever to come before a court in justiciable form").

ticiability" the non-judicial branch's "obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened."[188] If, instead, "executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system."[189]

It is perfectly suitable, then, for executive actors to exercise constitutional interpretation when the federal courts have been constitutionally or prudentially precluded from doing so. But those actors must not be the *source* of the limitations on the federal courts' role to undertake judicial review. In other words, those responsible for defending duly enacted laws would be abusing their duty to engage in constitutional interpretation if doing so were a means, based upon the law as voiced in *Windsor* and in *Hollingsworth*, of precluding judicial review.[190]

This threat to judicial supremacy has not gone unnoticed. As the Court in *Windsor* observed:

> [I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's.[191]

Similarly, the dissenters in *Hollingsworth* understood that the Court's decision would undermine the ballot initiative process, and prevent the judiciary from asserting its proper role, when necessary, to restrain the political branches:

> The doctrine [of justiciability] is meant to ensure that courts are responsible and constrained in their power, but the Court's

188. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 180 (1996).

189. The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 56 (1980).

190. While not the subject of this paper, the challenges to judicial supremacy of the executive's decision not to *enforce* a law he or she deems unconstitutional are even more consequential; without enforcement, a case might not be brought even in the first instance, as few parties will be injured by a dormant statute. *See* Parker Rider-Longmaid, Comment, *Take Care That the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 307 (2012) (explaining that a President's decision to enforce but not defend a law invites judicial action while preventing facial challenges for lack of a case or controversy).

191. United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).

> opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed.[192]

B. Can the Legislature Be the Savior?

The nightmare scenario seems nightmarish, but isn't there a *deus ex machina* lying in wait? If the executive branch lawyer responsible for defending the law chooses not to do so, may the legislature (or legislators) step in, and in so doing, satisfy the Article III and prudential standing requirements necessary to keep the legal challenge alive? There are three players who could potentially come to a law's aid: Congress, Members of Congress, and state legislatures.

i. Congress

Several commentators have, without explanation, simply assumed that Congress would have independent standing to defend the constitutionality of a duly-enacted law.[193] The strongest argument for that conclusion comes from *INS v. Chadha*, in which the Court wrote: "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[194] Yet this statement must be read in context.

First, Congress was merely an intervenor in *Chadha*, defending the statute in question alongside the INS. The INS was able to demonstrate Article III standing because it "would have deported

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192. Hollingsworth v. Perry, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

193. *See* Jube Shiver, Jr., *Justice Dept. Won't Defend 'Must Carry' Cable Rule*, L.A. TIMES (Nov. 6, 1992), http://articles.latimes.com/print/1992-11-06/business/fi-1371_1_cable-operators; Gerard V. Bradley, *Obama's Unreasonable Abandonment of DOMA*, PUB. DISCOURSE (Feb. 28, 2011), http://www.thepublicdiscourse.com/2011/02/2804/; William C. Duncan, *Obama Tells DOJ to Take a Dive on DOMA Cases*, NAT'L REV. (Feb. 23, 2011, 1:19 PM), http://www.nationalreview.com/corner/260500/obama-tells-doj-take-dive-doma-cases-william-c-duncan; Maggie Gallagher, *President Obama on DOMA*, NAT'L REV. (Feb. 23, 2011, 1:40 PM), http://www.nationalreview.com/corner/260505/president-obama-doma-maggie-gallagher.
Others have argued that Congress, regardless of its ability to demonstrate standing, is not constitutionally authorized to intervene to defend its handiwork. *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 573 (2014); James W. Cobb, Note, *By "Complicated and Indirect" Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205, 208 (2004).

194. 462 U.S. 919, 940 (1983) (citing Cheng Fan Kwok v. INS, 392 U.S. 206, 210 n.9 (1968)).

Chadha absent the Court of Appeals' judgment."[195] Yet the Supreme Court has never resolved an existing circuit split on whether an intervenor must demonstrate Article III standing *independent* of the proper party, in that case the INS.[196] Indeed, a majority of the Circuits deciding this issue have concluded that intervenors need *not* independently demonstrate Article III standing if another party with which they are aligned has already done so.[197] Thus, it is quite possible that the Supreme Court was not necessarily suggesting that Congress had Article III standing to defend the statute in the United States' stead, but that it was a proper intervenor, permitted to defend the statute *so long as* the United States remained as a proper party able to independently demonstrate Article III standing.

Second, even if the Court *was* suggesting that Congress had Article III standing, *Chadha* was a unique case. In *Chadha*, Congress had an independent, judicially cognizable injury: the statute in question, authorizing a one-house veto, directly affected Congress's interests as a governing body.[198] Losing in the Ninth Circuit deprived Congress of its power to exercise a one-house veto, a concrete injury. In the regular course, by contrast, where the challenged statute does not independently confer additional powers unto Congress, Congress's purported injury would be the mere invalidation of its handwork.

Even assuming, *arguendo*, that Congress could demonstrate Article III appellate standing based simply upon a lower court ruling that its enacted legislation was unconstitutional, it may not be a player that can be politically relied upon.

The Senate Legal Counsel's Office, designed "to serve the institution of Congress rather than the partisan interest of one party or another,"[199] is only authorized to act upon receiving the consent of

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195. *Id.* at 939.

196. *See* Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 464–68 (2002).

197. *See* San Juan Cty. v. United States, 503 F.3d 1163, 1172 (10th Cir. 2007); Ruiz v. Estelle, 161 F.3d 814, 830 (5th Cir. 1998); Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989); United States v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind., 466 F.2d 573, 577 (7th Cir. 1972). *But see* Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996); Bldg. & Constr. Trades Dep't v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994).

198. Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 92 STAN. L. REV. ONLINE 92, 102 (2013).

199. S. REP. NO. 95-170, at 84 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4300.

two thirds of the Senate Joint Leadership Group,[200] a body composed of four members of the majority party, and three members of the minority party.[201] This requirement "serves to protect the interests of the minority party,"[202] or, in other words, "ensures a minority party 'veto.'"[203] And even assuming authorization by the Senate Joint Leadership Group, participation in any legal proceeding also requires a resolution of the full Senate,[204] which is subject to filibuster by any one Senator.[205] Thus the presence of a single senator who is of the same political party as, and/or in substantive agreement with, the president vis-à-vis the statute's constitutionality may jeopardize the Senate's intervention.

Like the Senate Counsel, the House Counsel participates in litigation on behalf of the entire body, but unlike the Senate counsel, its authority to act necessitates only a majority vote of the Bipartisan Legal Advisory Group ("BLAG").[206] Because the BLAG is composed of the Speaker, Majority Leader, Majority Whip, Minority Leader, and Minority Whip,[207] the House Counsel is far more—if not solely—responsive to the majority.[208] Thus the leadership of the majority party in the House, if not in partisan unity and/or substantive agreement with the president, may easily authorize defense over the dissent of the minority party and its leadership.

Yet majorities change.[209] In *Karcher v. May*, the New Jersey State Legislature enacted, over a gubernatorial veto, legislation pro-

200. *See* 2 U.S.C. § 288a(b) (2012).

201. *See Id.* § 288b(a).

202. S. REP. NO. 95-170, at 86.

203. Grove & Devins, *supra* note 6, at 613.

204. 2 U.S.C. §§ 288b(b), (c), 288e(a) (2012).

205. STANDING RULES OF THE SENATE, R. XXII (2), *reprinted in* S. DOC. NO. 106–15, at 15–16 (2000).

206. *See* Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 944 (2012); Brief of the Speaker and Leadership Group of the House of Representatives as Amici Curiae, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87–1279), 1988 WL 1031594, at *2 n.2.

207. MARTIN O. JAMES, CONGRESSIONAL OVERSIGHT 122 (Susan Boriotti et al. eds., 2002).

208. Congressman Robert Kastenmeier once described the House Counsel as "the majority counsel." 136 CONG. REC. 5002 (1990). Indeed, upon its establishment in the 1970s, "[t]hat the office would be responsible to the Speaker of the House, the leader of the majority party, was not contested." Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, *in* 20 CONGRESS & THE PRESIDENCY 131, 148 (1993).

209. On the other hand, partisan unity between Congress and the President has, over time, become less frequent, such that divided government is now "the norm"; at least one of the two Houses of Congress was controlled by a party other than the President's between 1955 and 2000, or seventy-four percent of the time.

viding for the observance of a moment of silence at the beginning of every public school day.[210] After the Governor and Attorney General, both Republicans, refused to defend the statute from an Establishment Clause challenge, the Speaker of the Assembly and President of the Senate, both Democrats, sought and obtained permission to defend the statute on behalf of the legislature.[211] But between losing in the Third Circuit and appealing to the Supreme Court, the Speaker and President lost their posts as presiding officers upon changes in partisan control of their chambers.[212] Their successors withdrew the appeal, which deprived the Supreme Court of appellate jurisdiction over the matter.[213]

ii. Individual Members of Congress

Given the political and legal difficulties facing Congress's ability to defend its handiwork, might individual legislators be able to save the day?

The Supreme Court has twice recognized Article III standing in the context of a legislator's challenge to the constitutionality of legislative actions. Yet the Court has never ruled on whether an individual member or members could have standing to *defend* a statute. In *Powell v. McCormack*, the Court determined that a Member of Congress's constitutional challenge to his exclusion from the House of Representatives constituted an Article III case or controversy.[214] In *Coleman v. Miller*, twenty Kansas state senators had standing to challenge the constitutionality of procedures used in ratifying the Child Labor Amendment.[215] When a resolution to ratify the Amendment came to a vote in the Kansas Senate, twenty senators were in support, and twenty—the eventual plaintiffs—were opposed.[216] The Lieutenant Governor cast a tie breaking vote in support of ratification—arguably in violation of the constitutional amendment procedures set forth in Article V—such that the senators who opposed the Amendment were injured; their votes would ordinarily have been sufficient to defeat ratification, but instead were "virtually held for naught."[217]

Daryl J. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2330–31 (2006).

210. Karcher v. May, 484 U.S. 72, 74 (1987).

211. *Id.* at 75.

212. *Id.* at 76.

213. *See id.*

214. Powell v. McCormack, 395 U.S. 486 (1969).

215. Coleman v. Miller, 307 U.S. 433 (1939).

216. *Id.* at 436.

217. *Id.* at 438.

Raines v. Byrd has since greatly constricted the scope of individual legislator standing.[218] In *Raines*, six current and former members of the House and Senate challenged the constitutionality of the Line Item Veto Act,[219] which authorized the President to "cancel" spending and tax measures after enactment.[220] The plaintiffs argued that the Act injured them, in so far as it "dilute[d] their Article I voting power."[221] The Court disagreed.

The *Raines* Court read *Coleman* narrowly, as standing "at most . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[222] Similarly, *Powell* was limited to cases in which members are "singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies" and not to "institutional injur[ies] . . . which necessarily damage[ ] all Members of Congress and both Houses of Congress equally."[223] Thus, because the votes of the Members were not sufficient to defeat the legislation, and because the alleged vote dilution injury was visited upon the institution of Congress, not the Members individually or personally, the Court concluded that the *Byrd* plaintiffs lacked Article III standing.[224]

It seems unlikely, therefore, that individual legislators would have standing to defend a challenged law from constitutional attack. *Coleman* will be distinguishable unless (a) more than a majority of both Houses—"whose votes would have been sufficient to . . . enact . . . a specific legislative act"—bring the suit, *and* (b) the legislation has "not gone into effect."[225] It is arguable that so long as the Executive *enforces* the challenged law, it has "gone into effect" within the meaning of *Coleman*. *Powell* will be difficult to invoke as well; it seems unlikely that much legislation will individually or personally affect the litigant Member or Members rather than Congress as a whole.

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218. *See* Raines v. Byrd, 521 U.S. 811 (1997).

219. *See* Line Item Veto Act, Pub. L. No. 104–130, § 1021(a), 110 Stat. 1200, *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

220. RICHARD H. FALLON, JR., ET AL., HART AND WESCHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 131 (7th ed. 2015).

221. Raines v. Byrd, 521 U.S. 811, 811 (1997).

222. *Id.* at 823.

223. *Id.* at 821–22.

224. *See id.* at 829–30.

225. *Id.* at 823.

iii. State Legislatures

Contrary to congressional standing, *Karcher v. May*, *supra*, suggests that state legislative defense *is* a legally permissible alternative to executive defense, so long as the "state law is clear—and where legislative actors authorized to defend by state law choose to do so for the duration of litigation."[226] In other words, state legislatures may defend the constitutionality of state laws from constitutional attack if (a) they are legally authorized to do so, and (b) they exercise that authority.

As to the first requirement, some states have authorized their state legislatures to defend state laws from constitutional attack.[227] But other states have either failed to grant such authority or have expressly prohibited their state legislatures from do so.[228]

As to the second requirement, that the legislature actually exercises the authority it has been granted, many of the political factors that militate against defense at the federal level may plague state legislatures as well. As in *Karcher*, defense may hinge upon which party controls the legislative chamber, which is subject to change in any election.

State legislatures may be *particularly* hesitant to defend laws enacted by ballot initiative. Not only are these initiatives often opposed by deep-pocketed interest groups with which the legislators may seek to align themselves,[229] in many cases the obstinacy of the legislators to enact the law is the precise reason it was proposed as a state ballot initiative in the first instance.[230] For example, voters have repeatedly turned to the initiative system to enact term limits when self-interested legislators have refused to do so.[231] In cases

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226. Shaw, *supra* note 74, at 248.

227. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1841 (2010); IND. CODE ANN. §§ 2-3-9-2 to 2-3-9-3 (2012); N.C. GEN. STAT. § 1-72.2 (2014).

228. *See, e.g.*, Planned Parenthood v. Ehlmann, 137 F.3d 573, 578 (8th Cir. 1998) (rejecting the Missouri legislature's attempt to intervene to defend a statute, as doing so was not authorized by law); Op. Tenn. Att'y Gen. No. 81–470 (1981), 1981 WL 169418, at *1 ("[T]here exists no authorization for the General Assembly or the speakers of either house to employ legal counsel to defend the constitutionality of a statute where the Attorney General declines to defend said statute.").

229. *See, e.g.*, Lee Drutman, *NRA's Allegiances Reach Deep into Congress*, SUNLIGHT FOUND. (Dec. 18, 2012, 5:22 PM), http://sunlightfoundation.com/blog/2012/12/18/nra-and-congress/ (documenting the NRA's political spending which "highlight[s] the primary obstacle to quick action on gun control").

230. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting).

231. *See* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 161–62 (2009).

like these, relying upon legislators to protect the initiative system is tantamount to allowing the fox to guard the henhouse.

V.
TOWARD A MEANINGFUL SOLUTION

At a 2009 meeting of the National Association of Attorneys General, former Colorado Attorney General Gale Norton[232] suggested that the standard government lawyers use in determining whether to defend their jurisdictions' laws in constitutional litigation should vary based upon the circumstances.[233]

Secretary Norton is correct; and while officials have adhered to different tests in deciding whether to defend laws they deem unconstitutional, *supra*, a threshold inquiry should precede these tests: whether there is a "reasonable probability" that, in refusing to the defend the duly enacted law, the lawyer charged with doing so will deprive the constitutional challenge of federal appellate judicial review.

This Part proceeds first to explain the reasonable probability standard, and then to demonstrate how it solves the "Attorney General Veto" problem. Finally, this Part suggests, and responds to, likely objections to the standard.

A. The Test Explained

Pursuant to this newly articulated standard, a government lawyer must defend a law he or she deems unconstitutional if there is a reasonable probability that, if he or she fails to do so, the controversy will be deprived of federal appellate review, that is, the dispute will no longer be justiciable because Article III and/or prudential standing are absent.

In order to faithfully apply this standard, the government lawyer must consider all of the facts and circumstances relevant to an Article III and prudential standing inquiry. The government lawyer, for example, should pose and answer the following questions: Are amici ready and willing to defend the law? Is the law's breadth such that great (if not irreparable) harm will be done if the reviewing

232. Ms. Norton also served as Secretary of the Interior under President George W. Bush. *About Gale A. Norton*, NORTON REG. STRATEGIES, http://nortonregs.com/about.html (last visited Mar. 1, 2016).

233. *See* Video Recording, *2009 Ethics Update*, NAT'L ASS'N OF ATT'Y GENS. SUMMER MEETING (Sept. 21, 2009), http://media.law.columbia.edu/stateag/ethicsupdate090921.html (statement of Gale A. Norton, Former Attorney General, State of Colorado).

court fails to reach the merits of the claim? Does the state legislature (or Congress) have a concrete injury apart from its general interest in having its handiwork upheld? Will the litigation span more than one election cycle, such that legislative defense may become insuperable upon a change in partisan control of one or both chambers? Will a ballot initiative's proponents be willing to defend the constitutionality of the resulting law? If so, do those proponents have a judicially cognizable injury aside from asserting the state's interest in having its laws upheld?[234]

Clearly, the reasonable probability standard requires rigorous legal analysis and much foresight. Yet determining the reasonable probability of legal outcomes is a task familiar to executive branch lawyers—it is at the heart of the *Brady* obligation imposed on criminal prosecutors.[235] In *Brady v. Maryland*, the Supreme Court announced that, as an element of Due Process, prosecutors are required to disclose all "materially exculpatory" evidence to criminal defendants before trial.[236] "Materiality" has been defined as a "*reasonable probability* that the suppressed evidence"—had it been disclosed to the defense—"would have produced a different verdict."[237]

Thus, *Brady* requires prosecutors to engage in "anticipatory hindsight review"[238] by determining *ex ante* whether there is a reasonable probability that the trial would have come out differently *ex post* had they disclosed the relevant exculpatory evidence.[239] In other words, prosecutors are duty bound to determine the impact of disclosure on a trial's result "before any evidence has been adduced or the defense strategy [has been] divulged at trial."[240]

The government lawyer applying the reasonable probability standard faces a similar inquiry. At the time of choosing whether to defend the law, *ex ante*, she must predict whether the controversy

234. This list is, of course, merely exemplary, not exhaustive.

235. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression by the prosecution of evidence material either to guilt or to punishment of the defendant violates due process).

236. *Id.* The *Brady* doctrine covers not only evidence of factual innocence but also impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154–55 (1972).

237. Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (emphasis added).

238. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006).

239. Alafair S. Burke, *Commentary:* Brady's *Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576 (2007).

240. *See* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010).

will remain justiciable on appeal, *ex post*, regardless of his or her participation.

B. Applying the Standard

The primary value of the reasonable probability standard is its impact on the "Attorney General Veto" problem. This is best illustrated by applying the reasonable probability standard to the nightmare scenarios set forth *supra*, and demonstrating the likely results.

i. The Nightmare Scenario Post-*Hollingsworth* Redux

The post-*Hollingsworth* nightmare scenario involved a Florida constitutional amendment requiring gun-show vendors to administer criminal background checks on firearm sales. The Governor and Attorney General refused to defend the law, citing their belief that it violated the Second Amendment.

Had the Governor and Attorney General faithfully applied the reasonable probability standard, they would have concluded that there *was* a reasonable probability that their failure to defend would deprive the controversy of Article III standing upon review of a decision striking down the amendment.

First, *Hollingsworth* instructs that ballot proponents may not assert the interests of the state in demonstrating Article III standing.[241] Second, the state legislature may not be counted on to defend the statute—that the provision was enacted as a state constitutional amendment, rather than a statute, likely reflected the obstinacy of the legislature,[242] perhaps because of the strength of the gun lobby.[243] Third, the standing of any individual legislator to defend a state's law is legally disfavored.[244] Finally, private citizens would be hard-pressed to establish standing independently; one could imagine a Florida citizen arguing that the challenged law decreases the likelihood that he or she will be the victim of gun vio-

241. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013).

242. *Cf. Id.* (Kennedy, J., dissenting) (explaining that the initiative system is used "to control and to bypass public officials—the same officials who would not defend the initiative").

243. *See* Samantha Lachman, *GOP-Controlled State Legislatures Passing Wave of Bills Expanding Gun Rights*, HUFFINGTON POST (Mar. 17, 2015), http://www.huffingtonpost.com/2015/03/17/gun-rights-bills-_n_6886564.html.

244. *See* Raines v. Byrd, 521 U.S. 811, 821 (1997).

lence, but that is far too speculative to constitute a judicially cognizable injury worthy of Article III standing.[245]

Thus, the Governor and/or Attorney General would, pursuant to the reasonable probability standard, be forced to defend the law, and appellate judicial review would be restored.

ii. The Nightmare Scenario Post-*Windsor* Redux

The post-*Windsor* scenario concerned a similar background check regime imposed by Congress upon the District of Columbia. By the time the District Court strikes down the legislation, a newly elected President who is hostile to gun control measures vows to enforce, but not to defend, the statute.

Had the President faithfully applied the reasonable probability standard, he or she would have concluded that there *was* a reasonable probability that his or her substantive agreement with the plaintiff, and thus non-defense of the statute, would deprive the controversy of prudential standing, and thus of appellate judicial review.

Windsor stands for the proposition that because adverseness is an element of *prudential* standing, it can be overcome by countervailing interests.[246] The two relevant countervailing interests in *Windsor* were the presence of amici "prepared to defend [the law] with vigor," and the extensive litigation that would ensue if the court were not to reach the merits.[247] Admittedly, a challenge to the constitutionality of background checks would quite likely, as in *Windsor*, attract amici to defend the law.[248] But unlike *Windsor*, this is not a provision by which the "[r]ights and privileges of hundreds of thousands of persons would be adversely affected" *sans* judicial review on the merits. Unlike DOMA, which applied across the country to *any* same sex couple seeking the federal benefits of marriage, this provision only affects the "[r]ights and privileges" of gun-show vendors and consumers in a single city. There is a *very* reason-

245. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (finding the possibility of a Los Angeles citizen being harmed by the use of a chokehold by a Los Angeles police officer to be too speculative to constitute standing to enjoin the practice).

246. United States v. Windsor, 133 S. Ct. 2675, 2687 (2013).

247. *Id.* at 2687–88.

248. *Cf.* Ben Winograd, *Amicus Briefs for D.C. Available in Guns Case*, SCOTUSBLOG (Jan. 12, 2008, 10:59 AM), http://www.scotusblog.com/2008/01/amicus-briefs-for-dc-available-in-guns-case/ (listing nineteen amicus briefs in support of the petitioner (in favor of gun control) in District of Columbia v. Heller, 554 U.S. 570 (2008)).

able probability that, by failing to defend the statute, the President would deprive the controversy of federal appellate review.

With this in mind, a President complying with the standard would, pursuant to the reasonable probability standard, be forced to defend the law, restoring the possibility of judicial review.

C. The Value of the Standard in Non-Defense

As demonstrated through the application of the reasonable probability standard to the nightmare scenarios *supra*, faithful application of, and compliance with, the standard solves the "Attorney General Veto" problem.

Of course, some government lawyers may refuse to comply with or even apply the standard. When that's the case, the standard still has value, as it holds accountable lawyers who choose not to defend laws in the face of, and without regard for, the likely impact on standing. There is no more plausible deniability of the consequences, simply a voluntary decision to proceed despite the reasonably probable result being the deprivation of federal appellate review. In other words, the existence of the standard forces the government lawyer to internalize the consequences of a conscious disregard for the impact of his or her actions on judicial review, and the separation of powers.

D. Likely Objections and Responses

The reasonable probability standard solves the problem of executive nullification of duly enacted laws by employing an analysis familiar to government lawyers. Yet critics may challenge the standard on numerous grounds, including that it is an exception that swallows the rule, will result in less than zealous advocacy by government lawyers, is inert as externally unenforceable, is difficult to apply; and is unnecessary given existing external pressures on government lawyers to defend their jurisdictions' laws. These objections, and responses, are considered in turn.

i. The Exception That Swallows the Rule

Based upon the application of the standard to the nightmare scenario *supra*, it may seem as if government lawyers will *always* be required to defend laws they've concluded are unconstitutional. That, however, is inaccurate. Notwithstanding *Hollingsworth* and *Windsor*, there are many instances in which applying the standard will permit the government lawyer not to defend the challenged law

if he or she so chooses. Two examples, both from the abortion rights context, will help to demonstrate this concept.

a. The Exception to the Rule Post-*Hollingsworth*

In 2016, Oregon[249] voters enact a ballot measure amending the Oregon Constitution to "make[ ] it a crime to stand on a public road or sidewalk within thirty-five feet of any abortion clinic in the state."[250] The goal of the amendment is to establish a "buffer zone" to "protect patients from harassment [and] violence and intimidation at abortion clinics."[251]

Several individuals who regularly protest and/or communicate with patients while standing within the buffer zone challenge the law in federal district court in Portland, arguing that the prohibition abridges their First Amendment right to free speech. The protesters quite likely have standing to bring the suit—their conduct subjects them to the threat of criminal prosecution under the statute.[252]

After applying the reasonable probability standard, the publicly "pro-life" Governor and Attorney General of Oregon refuse to

249. Oregon is one of twenty-four states with an initiative process to amend the State Constitution. *See* M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11–12 (2003). It is not unreasonable to assume that Oregon voters would enact such a provision at the statewide level; not only are abortion rights currently in vogue, *see* Lydia Saad, *Americans Choose "Pro-Choice" for First Time in Seven Years*, GALLUP (May 29, 2015), http://www.gallup.com/poll/183434/americans-choose-pro-choice-first-time-seven-years.aspx, but Oregon is one of the ten most liberal states in the country. Frank Newport, *Mississippi, Alabama and Louisiana Most Conservative States*, GALLUP (Feb. 6, 2015), http://www.gallup.com/poll/181505/mississippi-alabama-louisiana-conservative-states.aspx.

250. Amy Howe, *Court Strikes Down Abortion Clinic "Buffer Zone": In Plain English*, SCOTUSBLOG (June 27, 2014, 5:22 PM), http://www.scotusblog.com/2014/06/court-strikes-down-abortion-clinic-buffer-zone-in-plain-english. This scenario is based on McCullen v. Coakley, 134 S. Ct. 2518 (2014), in which the Supreme Court struck down a Massachusetts statute imposing criminal penalties on those who violated the so-called "buffer zone." Since *McCullen*, the Commonwealth of Massachusetts has sought to more narrowly tailor its prohibition in an effort to comply with the Supreme Court's decision. *See After Abortion Ruling, Mass. Pushes to Replace Buffer Zone Law*, NAT'L PUB. RADIO (July 18, 2014), http://www.npr.org/2014/07/18/332584617/after-abortion-ruling-massachusetts-pushes-retooled-buffer-zone.

251. *Cf.* Laura Bassett, *Abortion Clinic Buffer Zones Crumble Around the Country*, HUFFINGTON POST (July 9, 2014), http://www.huffingtonpost.com/2014/07/09/abortion-clinic-buffer-zo_n_5571516.html.

252. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (finding the possibility of administrative review and criminal prosecution to constitute a judicially cognizable injury).

defend the law; they accurately determine that other parties almost certainly will have standing to defend the law in their absence—pregnant women seeking care from the clinics around which the protesters congregate. Indeed, the burdens on accessing reproductive healthcare (here, the protestors' conduct, which the amendment seeks to proscribe) are precisely how women have gained access to the federal courts to challenge legislation restricting their right to reproductive choice.[253]

b. The Exception to the Rule Post-*Windsor*

In 2016, Congress enacts the Weldon Amendment, withdrawing certain federal funding from states and municipalities that discriminate against healthcare providers for refusing to "provide, pay for, provide coverage of, or refer for abortions."[254] The State of California, in turn, enacts statute requiring certain healthcare providers, at the threat of losing their licenses, to provide medical services "for any condition in which the p[atient] is in danger of loss of life, or serious injury or illness."[255] As California's statutory regime—which contains no exception for abortion services—subjects healthcare providers in violation thereof to the possibility of loss of licensure, it arguably discriminates against healthcare providers within the meaning of the Weldon Amendment, exposing the state to potential deprivation of federal funding.[256]

The State of California files suit in federal district court, challenging the Weldon Amendment as in excess of Congress's spending power;[257] the State would almost certainly have standing in the first instance—it suffers from being deprived federal funding to which it would otherwise be entitled.[258]

After losing in federal district court, the Obama administration appeals the judgment to the Ninth Circuit. President Obama, oft

253. *See* Margaret G. Farrell, *Revisiting* Roe v. Wade*: Substance and Process in the Abortion Debate*, 68 IND. L.J. 269, 285–87 (1993) (discussing theories of standing for plaintiffs challenging abortion rights restrictions).

254. Consolidated Appropriations Act of 2005, Pub. L. No. 108–447, § 508(d), 118 Stat. 2809, 3163.

255. CAL. HEALTH & SAFETY CODE § 1317(a) (West 2005).

256. *Cf.* California *ex rel.* Lockyer v. United States, 450 F.3d 436, 440–41 (9th Cir. 2006).

257. *Cf. id.* at 439.

258. Not only do financial injuries "almost always meet the definition of an injury in fact," Wis. Carry, Inc. v. City of Milwaukee, 35 F. Supp. 3d 1031, 1035 (E.D. Wis. 2014), states as sovereigns are "entitled to special solicitude in . . . standing analysis." Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

described as pro-choice,[259] vows to enforce, but no longer to defend, the Weldon Amendment. His decision would be consistent with the reasonable probability standard: The United States retains an Article III injury, as in *Windsor*, because the district court's ruling that the Weldon Amendment is unconstitutional means that the Treasury is required to discharge funds to the State of California that, pursuant to the Amendment, would otherwise have been withheld.[260]

And while the Executive's substantive agreement with the State of California creates a prudential standing concern for lack of adversity, both of *Windsor*'s countervailing factors would likely be present. First, *many* amici would almost certainly line up to defend the statute.[261] Second, "extensive" litigation might ensue if the Court chose not to decide the case on the merits. The Weldon Amendment, unlike DOMA in *Windsor,* is not a definitional provision in-

259. *E.g.*, Steven Ertelt, *Planned Parenthood: Obama the Most Pro-Abortion President Ever*, LIFE NEWS (Apr. 23, 2013, 12:10 PM), http://www.lifenews.com/2013/04/23/planned-parenthood-obama-the-most-pro-abortion-president-ever/ ("Planned Parenthood essentially says there has never been a better pro-abortion champion in the White House as President than Obama."); Tracy Weitz, *What President Obama Should Say on the 40th Anniversary of* Roe v. Wade, HUFFINGTON POST (Jan. 22, 2013, 4:49 PM), http://www.huffingtonpost.com/tracy-weitz/roe-v-wade-40th-anniversary_b_2528847.html (calling President Obama "a 'pro-choice' President").

260. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) ("That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.").

261. The plethora of amicus briefs filed in cases concerning abortion rights has most recently been demonstrated with regards to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 499 (2015). *See, e.g.*, Marcia Brown, *University Affiliates Submit Amicus Briefs in Supreme Court Abortion Case*, DAILY PRINCETONIAN (Mar. 2, 2016), http://dailyprincetonian.com/article/2016/03/university-affiliates-submit-amicus-briefs-in-supreme-court-abortion-case. Indeed, a majority of the Bipartisan Legal Advisory Group—a sufficient number to authorize Congressional intervention in litigation—have been described as "pro-life," meaning that the BLAG, just as in *Windsor*, could be "prepared to defend with vigor the constitutionality of the legislative act." *See* Steven Ertelt, *House Elects Pro-Life Congressman Paul Ryan as Speaker, Pro-Life Groups Offer Congratulations*, LIFE NEWS (Oct. 29, 2015, 11:03 AM), http://www.lifenews.com/2015/10/29/house-elects-pro-life-congressman-paul-ryan-as-speaker-pro-life-groups-offer-congratulations/ (Speaker Paul Ryan); Steven Ertelt, *Pro-Life Rep. Kevin McCarthy Elected Republican House Majority Leader Replacing Cantor*, LIFE NEWS (June 19, 2014, 3:44 PM), http://www.lifenews.com/2014/06/19/pro-life-rep-kevin-mccarthy-elected-republican-house-majority-leader-replacing-cantor/ (Majority Leader Kevin McCarthy); Penny Starr, *Scalise: 'Missing Ingredient' in Effort to Defund Planned Parenthood Is a Pro-Life President*, CYBERCAST NEWS SERV. (Jan 22, 2016, 5:14 PM), http://cnsnews.com/news/article/penny-starr/scalise-missing-ingredient-effort-defund-planned-parenthood-pro-life (Majority Whip Steve Scalise).

corporated into a multitude of U.S. Code sections. But failing to reach the merits on a challenge to the Weldon Amendment *will* affect the rights and privileges of hundreds of thousands of individuals–physicians operating all across America, of which there are almost one million.[262]

There are plenty of examples, then, in which the reasonable probability test, if properly applied, does not preclude the government lawyer from choosing not to defend a law he or she deems unconstitutional.

ii. Inducing A Less Than Zealous Defense

One of the likely consequences (and indeed the intent) of the reasonable probability standard is that government lawyers will be compelled to defend laws in instances in which they might otherwise decline to do so. An expected criticism, then, is that by forcing less-than-committed government lawyers into court, the standard undermines one of the purposes underlying standing—that litigants in the judicial process be zealous advocates.[263]

As an initial matter, it is no longer clear how important zealous advocacy is as a principle underlying standing; had it been, one would imagine *Hollingsworth* coming out differently—the most certain way of ensuring a zealous defense of Proposition 8 would have been to recognize that the ballot proponents had standing to appeal.[264]

Zealous advocacy is also not merely an *option* for lawyers, it is a *requirement* of ethical and professional legal practice.[265] This objection thus untenably presumes that government lawyers will violate the rules of professional conduct.

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262. *Total Professionally Active Physicians*, THE HENRY J. KAISER FAM. FOUND. (Jan. 2016), http://kff.org/other/state-indicator/total-active-physicians.

263. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 101 (1968); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 624 (2004).

264. *See* Vikram David Amar, *Standing Up for Direct Democracy: Who Can Be Empowered Under Article III to Defend Initiatives in Federal Court?*, 48 U.C. DAVIS L. REV. 473, 481 (2014) (arguing that, if anything, the ballot proponents in *Hollingsworth* may have been *over*-zealous, "driven in their tactical litigation decisions by an ideological purity or zeal that did not exist among the electorate that passed the measure").

265. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2008) ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); Sylvia Stevens, *Whither Zeal?*, OR. ST. BAR BULL. (July 2005), https://www.osbar.org/publications/bulletin/05jul/barcounsel.html ("I suspect, if asked to describe in one word the primary responsibility of lawyers, most of us would say it is zealousness.").

Most importantly, this critique ignores a fundamental aspect of government legal practice—that government lawyers are repeat players. "Judges . . . get to know government lawyers (as repeat players) better and expect more of them by way of competence, candor, civility, credibility, and consistency."[266] Because of how frequently they appear, government lawyers "know that they will need the Court's support in the future. As such, they must prepare for the future; they must concern themselves with it always; and they must zealously protect their reputations."[267]

Failing to advocate zealously in front of a tribunal is precisely the type of conduct that would deprive a government lawyer, as a repeat player, of his or her standing and reputation in front of the court. In *Log Cabin Republicans v. United States*, a political organization challenged the constitutionality of "Don't Ask, Don't Tell," the policy on gay, lesbian, and bisexual military service.[268] The district court, in ruling for the plaintiffs, excoriated the government's lawyers for "call[ing] no witnesses, put[ting] on no affirmative case, and only enter[ing] into evidence the legislative history of the Act."[269] And the government lawyers' performance received harsh criticism from outside the courtroom as well.[270]

Given the government lawyer's unique position as a repeat player before the courts, the possibility of being reprimanded as were the lawyers in *Log Cabin Republicans* is a strong deterrent force against abdication of the duty of zealous advocacy.

iii. An Unenforceable Rule

Because the reasonable probability standard is an internally imposed rule, not an externally enforceable requirement, critics may argue that it is toothless and ineffectual. But internal rules are valu-

266. Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 128 (1998).

267. RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 35–36 (2014). *But see* Joel B. Grossman et al., *Do the "Haves" Still Come Out Ahead?*, 33 L. & SOC'Y REV. 803, 803 (1999) ("Repeat players have low stakes in the outcome of any particular case and have the resources to pursue their long term interests.").

268. 716 F. Supp. 2d 884 (C.D. Cal. 2010).

269. *Id.* at 928.

270. *See, e.g.*, Hans A. von Spakovsky, *Don't Ask, I'll Just Tell You What the Law Should Be:* Log Cabin Republicans v. United States, HERITAGE FOUND. (Sept. 10, 2010), http://thf_media.s3.amazonaws.com/2010/pdf/wm3011.pdf5, 2016) (accusing the government lawyers of "throw[i]n[g]" the case); Ed Whelan, *Yesterday's Anti-DADT Ruling*, NAT'L REV. (Sept. 10, 2010, 11:22 AM), http://www.nationalreview.com/bench-memos/246208/yesterdays-anti-dadt-ruling-ed-whelan (calling the lack of defense a "dereliction of duty").

able in establishing norms of practice, regardless of external enforceability. Indeed, the law is replete with examples of unenforceable rules that nevertheless guide government lawyers in fulfilling their duties. Two cases, both from the criminal grand jury context, are illustrative of the role non-enforceable standards play in influencing norms of practice.

First, in *United States v. Williams*, a criminal defendant argued that United States Attorneys should be required to disclose any and all exculpatory material to the grand jury in the course of seeking an indictment.[271] The Supreme Court refused to impose such a requirement to its supervisory authority over the federal courts.[272] Yet the United States Attorneys' Manual—both at the time of *Williams* and still today—instructs Assistant United States Attorneys to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation" when the prosecutor is personally aware of such evidence.[273] Thus, government lawyers have adopted an internal standard of legal conduct even in the absence of an externally (here judicially) imposed rule.[274]

Second, the Federal Rules of Criminal Procedure prohibit prosecutors from "disclos[ing] . . . matter[s] occurring before the grand jury."[275] The Rule is thought to serve multiple purposes, such as ensuring that those who face, but are exonerated by, the grand jury do not bear the burden of public ridicule from having been accused by the government of committing a crime.[276] Disclosures in violation of the Rule are particularly difficult to prove, making the Rule largely unenforceable, "because often those most knowledgeable about the source of the leak—people in the media—are not

271. 504 U.S. 36 (1992).

272. *Id.* at 46–47, 54–55.

273. U.S. Department Dep't of Justice, UNITED STATES ATTORNEYS' MANUAL § 9-11.233 (1997).

274. *Cf.* Eric Citron, *Cases and Controversies: Not Your Typical Grand Jury Investigation*, SCOTUSBLOG (Nov. 25, 2014, 3:00 PM), http://www.scotusblog.com/2014/11/cases-and-controversies-not-your-typical-grand-jury-investigation.

275. FED. R. CRIM. P. 6(e)(2)(B)(vi).

276. Other purposes of the grand jury secrecy rule include "(1) prevent[ing] the escape of those whose indictment may be contemplated; (2) insur[ing] the utmost freedom to the grand jury in its deliberations; (3) prevent[ing] subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it," and "(4) encourag[ing] free and untrammeled disclosures by persons who have information with respect to the commission of crimes." Douglas Oil Co. v. Petrol Stops. Nw., 441 U.S. 211, 219 n.10 (1979).

compelled to disclose *their* sources."[277] Given the inability to, or at least great difficulty, in enforcing the Rule, it is best understood as "articulating a norm that will be . . . internalized by investigative personnel,"[278] including government lawyers.

The same can easily be said for the reasonable probability standard. True, it will not be externally enforceable, but as a norm of behavior, the standard may very well impact the functioning of government lawyers, over time becoming an essential component of the obligations of their practice.

iv. The Difficulty of Applying the Standard

Another potential critique of the standard is that it may be difficult for government lawyers to apply. The *Brady* test, which (as discussed *supra*) resembles the reasonable probability standard herein developed, has been similarly criticized.[279] In *Kyles v. Whitney*, however, the Supreme Court summarily dismissed this argument, noting that "prosecutor[s] would still be forced to make judgment calls" regardless of the standard employed.[280]

Admittedly, the Article III and prudential standing doctrines are not particularly coherent.[281] Yet the parties for whom this inquiry matters—for whom the reasonable probability standard has been designed—are those who would have already determined that the law in question is unconstitutional, such that they would other-

277. RONALD J. ALLEN ET AL., CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1000–01 (2011). Sometimes, however, the source of the leak can be identified; in the grand jury investigation of President Clinton, a leak to the New York Times led to an internal Justice Department investigation which identified Charles G. Bakaly, III, then Counselor to the Independent Counsel, as the source. *In re* Sealed Case No. 99-3091, 192 F.3d 995 (D.C. Cir. 1999). Mr. Bakaly was later tried for, and acquitted of, contempt for denying that he was the source of the leaked material. Gary Fields, *Starr Assistant Is Not Guilty of Contempt*, WALL ST. J., Oct. 9, 2000, at A26.

278. RONALD JAY ALLEN ET AL., *supra* note 277, at 1001; *accord* Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999).

279. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 162–79 (2012); Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1795–809 (2007).

280. 514 U.S. 419, 439 (1995).

281. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); Poe v. Ullman, 367 U.S. 497, 508 (1961) ("Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) ("The structure of standing in the federal courts has long been criticized as incoherent.").

wise not defend it.[282] These lawyers must have first engaged in rigorous constitutional analysis of the underlying claim, which will *itself* be difficult.[283] It seems difficult to imagine that lawyers who are able to conclude that a statute exceeds Congress's commerce power, or fails intermediate scrutiny, or is a bill of attainder, would be unable to render an analysis as to the likely impact on standing of their decision not to defend the challenged law.

And to the extent government lawyers have difficulty in applying the standard, there is a simple solution: defend the law.

v. The Standard Is Unnecessary

As documented above, the Obama administration's decision no longer to defend DOMA was met with much academic and political criticism. It might be argued that external pressures are sufficient to compel government lawyers to defend statutes when it is prudent for them to do so. Two factors militate against such a conclusion.

First, the external attention and scrutiny dedicated to the *Windsor* and *Hollingsworth* cases are not replicable for every case in which a government lawyer refuses to defend the law at issue. Those cases were remarkable. Proposition 8 was enacted in the most populous state in the country after its proponents and opponents spent more than $100 million combined on its enactment campaign.[284] And *Windsor* has been described as a "landmark" case,[285] a "major ruling,"[286] and an "historic opinion[ ]."[287] Academic, political and

282. If a lawyer has decided to defend the law regardless of the merits of the underlying claim, there is no need for the reasonable probability standard.

283. *See* IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTIVE WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT 12 (Karl Thompson & Pamela Harris, eds., American Constitution Society for Law and Policy 2009) ("[C]onstitutional interpretation is frequently difficult."); JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 149–51 (2002) (noting the difficulty of ascertaining legislative intent where relevant for determining the constitutionality of Congress's enactments).

284. Reid Wilson, *The Most Expensive Ballot Initiatives*, WASH. POST., May 17, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/17/the-most-expensive-ballot-initiatives.

285. Editorial, *The Expanding Power of U.S. v. Windsor*, N.Y. TIMES, Jan. 27, 2014, at A18.

286. Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 27, 2013, at A1.

287. Garrett Epps, *Kennedy's Marriage Ruling Is About Gay Rights, Not State Rights*, THE ATLANTIC (June 26, 2013), http://www.theatlantic.com/national/archive/2013/06/kennedys-marriage-ruling-is-about-gay-rights-not-states-rights/277251.

social pressure, therefore, simply cannot be relied upon in the regular course.

Second, this argument ignores the significant pressure exerted in the *other* direction, encouraging the government lawyer *not* to defend an unpopular law. In the weeks leading up to the announcement of the President's decision, the Human Rights Campaign sought to mobilize its more than one million members to encourage President Obama to cease defending DOMA.[288] Indeed, one of the virtues of the reasonable probability standard is that it offers political cover to government lawyers charged with defending unpopular laws. In the face of such pressure, the government lawyer is emboldened to respond that the reasonable probability standard compels him or her to maintain the legal defense regardless of his or her agreement as to the merits.

VI.
CONCLUSION

In 2013, the Supreme Court made history, not only in expanding rights for LGBT people, but also by continuing to develop the standing doctrines that limit federal court jurisdiction. These rulings, *Windsor* and *Hollingsworth*, may render appellate judicial review more difficult to achieve in the context of duly enacted laws that the government lawyer chooses not to defend. This in turn threatens judicial supremacy, a cornerstone of the separation of powers, and thus of American democracy.

One solution is to add a threshold inquiry to the government lawyer's decision whether to defend a potentially unconstitutional law—whether there is a reasonable probability that, if he or she fails to do so, no party will have standing to defend the law, such that the controversy will be deprived of judicial review. The consequence is that government lawyers will be far less likely to exercise the "Attorney General Veto," thus preserving judicial supremacy.

Much also depends on how, and to what extent, the standing doctrines evolve over time. While the *Windsor* court did not decide whether Congress has Article III standing to defend the constitutionality of federal laws,[289] at least one current member of the Court, Justice Alito, concluded that, in at least some circumstances,

288. *See* Press Release, *HRC Urges President Obama to Support Marriage Equality for All Americans*, HUMAN RIGHTS CAMPAIGN (Jan. 13, 2011), http://www.hrc.org/press/hrc-urges-president-obama-to-support-marriage-equality-for-all-americans.

289. United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).

it does.[290] If, in a future case, the Court adopts Justice Alito's reasoning, and Congress may assert standing to defend its handiwork when the Executive fails to do so, the importance of executive defense in the first instance—at least for the purposes of preserving a justiciable controversy—will diminish substantially. That is, the likelihood that the reasonable probability standard will be satisfied will increase with precedent establishing that Congress has standing to defend its own laws.

Not only is Article III standing in flux, so too is prudential standing. In 2014, the Supreme Court in *Lexmark International, Inc. v. Static Control Components, Inc.*[291] suggested that the bar on generalized grievances—previously thought to be an element of prudential standing[292]—was an Article III requirement. Thus, after *Lexmark*, a party seeking to defend a law and whose injury is merely generalized, not particularized, may no longer look to the "countervailing considerations" that *Windsor* noted as having the potential to overcome a lack of prudential standing. This, then, makes the reasonable probability standard *more* difficult to achieve, counseling toward government lawyers more consistently defending their jurisdictions' laws.

Ultimately, as the law continues to develop, only time will tell if government lawyers will exercise the great responsibility that their newly acquired (and perhaps only fleeting) great power demands of them.

290. *See id.* at 2714 (Alito, J., dissenting) ("[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.").

291. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014).

292. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)). While never as overt as in *Lexmark*, that the bar on generalized grievances was a requirement of Article III, rather than prudential standing preceded *Lexmark*. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (listing "particularized," the antonym of generalized, as a requirement of an Article III injury in fact).