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

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A MISER'S RULE OF REASON: THE SUPREME COURT AND ANTITRUST LIMITS ON STUDENT ATHLETE COMPENSATION

*HERBERT HOVENKAMP**

I. INTRODUCTION

The Supreme Court's decision in *NCAA v. Alston* is one of the most important antitrust rule of reason cases in history—significant both for what it does and what it does not do.[1] Notably, it is a truly rare decision that private antitrust plaintiffs proceeding under the rule of reason have won. At the same time, it indicates just how narrow the rule of reason path to victory has become. In effect, plaintiffs can win, but perhaps only when they are challenging a cartel or something close. As a result, the decision does little to change the view that the rule of reason, as the courts currently apply it, is a powerful anti-enforcement tool. In its current form, it remains one of the most important roadblocks to antitrust reform.

This article briefly examines *Alston*, against the backdrop of the large number of antitrust cases that have been brought against the NCAA, and also queries whether the decision moves the strongly tilted anti-enforcement rule of reason in a positive direction. It also considers how we got to this point, where about the only time that plaintiffs can win a rule of reason case is when they are suing what is in fact a naked cartel, although one with some complicating features.

The Supreme Court unanimously agreed with the lower courts that certain restrictions that the NCAA imposed on member schools limiting compensation to student athletes violated § 1 of the Sherman Act.[2]

The plaintiffs were football and basketball players subjected to these limitations. The lower courts had struck down specific NCAA rules that limited collateral, education-related benefits that student

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1. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

2. *Id.* Justice Gorsuch delivered the opinion, which was unanimous. Justice Kavanaugh wrote a brief concurring opinion.

athletes could receive, including graduate or vocational school scholarships.[3] They declined to condemn regulations that the NCAA, an organization of 1,100 member schools, applied to direct scholarships and other aid related to athletic performance.[4] Nor did they pass judgment on any issue regarding player compensation more generally, such as whether NCAA member schools could individually pay students any salary they wished. Finally, the decision did not raise issues about the numerous restrictive rules that the NCAA imposes that do not involve athlete compensation, nor about the question of compensation for NCAA coaches or other staff members.

The NCAA had argued that the district court overreached by weakening its restraints on education-related athlete compensation.[5] The student athletes, by contrast, said that the court should have enjoined all of the challenged compensation limits, including those not related to education, as well as restrictions on the size of athletic scholarships and cash awards.[6] The district court agreed with the student plaintiffs tat the restrictions imposed "significant anticompetitive effects" by permitting the NCAA to use its monopsony power to "cap artificially the compensation offered to recruits."[7] It found that in the absence of these restrictions, compensation would have been higher.[8]

To examine the legality of the relevant practices, the court applied the antitrust test known as the rule of reason. Under the rule of reason, once a plaintiff has made out a prima facie case showing anticompetitive effects, the burden of proof shifts to the defendants to show a justification. If the defendants succeed, the plaintiff can still prevail by showing that the same justification could have been achieved through a less restrictive alternative.[9]

The district court also rejected many of the NCAA's proffered justifications. One of them, that the restrictions increased output in the product market, was not pursued to the Supreme Court.[10] Another was that the rules were designed to preserve amateurism in

3. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020).

4. *Id.* at 1109.

5. Brief for Petitioners at 14–15, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (No. 20-520).

6. *Alston*, 141 S. Ct. at 2154.

7. *Id.* at 2152 (quoting the district court, 375 F. Supp. 3d at 1097).

8. *Id.*

9. *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505 (4th ed. 2017).

10. *Alston*, 141 S. Ct. at 2152.

collegiate sports, and that this was a benefit that accrued to consumers rather than to the student athletes themselves.[11] The district court had responded that the concept of amateurism was never very well defined.[12] Further, the link between amateurism and consumer demand was never established.[13] It did suggest, however, that a rule against unlimited compensation might have operated to distinguish collegiate from professional athletics and thus "help sustain consumer demand for college athletics."[14]

Under the third step of rule of reason analysis, the students also attempted to show less restrictive alternatives to those rules for which the court had found justifications, and the court concluded that they had partially done so. The less restrictive alternative was to permit a cap on compensation, provided that it was not less than the full cost of attendance.[15] It declined to enjoin the rules limiting compensation to the full cost of an education and those that restricted benefits unrelated to their education. However, it found that the caps limiting scholarships for graduate or vocational school, payments for academic tutoring, or post-eligibility internships were unlawful because these could not be confused with the compensation given to professional athletes.[16] As the Supreme Court subsequently observed:

> Nothing in the [lower court's] order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually).[17]

The Ninth Circuit affirmed the entire decree.[18] The NCAA, but not the students, petitioned the Supreme Court with respect to

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11. *Id.*
12. *Id.*
13. *Id.* at 2152–53.
14. *Id.* at 2153 (citing the district court, 375 F. Supp. 3d 1058, 1083 (N.D. Cal. 2019)).
15. *Id.*; *see* discussion *infra* notes 97–106.
16. *Alston*, 141 S. Ct. at 2153.
17. *Id.*
18. *Id.* at 2154.

those parts of the decree that were averse to it. As a result, the Court's decision addressed only the NCAA's disputes with the lower courts. With respect to those, the Supreme Court affirmed the district court's decree in all respects.

The Supreme Court posed the question as whether the NCAA was seeking "immunity from the normal operation of the antitrust laws . . . ."[19] It opened with a colorful history of intercollegiate sports, including the highly disorganized and indefensible mechanisms that the schools used to recruit athletes and compensate them for play.[20] These included such things as the temporary hiring of ringers to play for a single game and side payments to prominent athletes from wealthy fans.[21] Much of the debate prior to this decision involved the student athletes' status as "amateurs" and the various rules intended to permit schools to compensate athletes for the cost of tuition, room and board, and some other elements of school attendance, but not more. Over the years these rules had evolved, permitting some additional compensation, but always significantly limited to below market levels, at least for superstar athletes. The Court also observed that intercollegiate sports, particularly football and basketball, had evolved into multibillion dollar enterprises, paying very high salaries to principal employees such as athletic directors and head coaches.[22]

The Supreme Court noted that the district court had been compelled to apply the rule of reason, as the Supreme Court's own 1984 *Oklahoma Board of Regents* decision had instructed.[23] On the question of market power, it then concluded that the NCAA enjoys "near complete dominance" and "monopsony power" in a relevant market defined as "athletic services in men's and women's Division I basketball and FBS [(Football Bowl Subdivision)] football."[24] This was essentially "the relevant market for elite college football and basketball."[25]

The Supreme Court observed that neither side challenged the district court's market definition or the proposition that the NCAA enjoys monopsony power in the labor market in question. Nor did

19. *Id.* at 2159.

20. *Id.* at 2148–51.

21. *Id.*

22. *Id.*

23. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984).

24. *Alston*, 141 S. Ct. at 2151–52 (citing the district court, 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019)).

25. *Id.* at 2152 (citing the district court, 375 F. Supp. 3d at 1067).

the NCAA dispute the fact of price fixing, or that the restrictions operated so as to decrease student compensation in fact.[26] Nor did they dispute that these limitations tended to depress both the quantity and quality of participation by student athletes.[27] As a result, the soundness of the plaintiffs' prima facie case was largely assumed.

A. The Exercise of Monopsony Power

The Court also held that suppression of competition on the buying (student athlete) side of the relevant market was all the competitive harm that was necessary; that is, the plaintiffs did not additionally need to show harm to the selling side of the market.[28] The importance of this distinction is that cognizable monopsony harm to the buy-side of the market alone is sufficient. It is not merely derivative of harm on the selling, or monopoly, side of the market. This has always been clear in the economic theory of monopsony,[29] and most have thought that it was clear in antitrust law as well.[30]

If a cartel or firm has market power on both the buying side and the selling side of its market, then harm to both sides is likely. The purchasing cartel forces a reduced purchase price by reducing the quantity it purchases, which would usually show up as reduced output on the sell-side as well. If the sell-side controlled some market power, the result would be competitive harm on both the buying and selling side of the market. If the selling side was competitive, however, then the result would be competitive harm on the buying side but not on the selling side. Assuming that the NCAA wielded power in both the market where it purchased athletic services and the markets where it sold game tickets and adver-

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26. *Id.* at 2154–55.

27. *Id.* at 2154 (citing 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2011b (4th ed. 2019)).

28. *Id.* (first citing 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 352c (2014); and then citing 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2011a).

29. *See, e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991); ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (Cambridge Univ. Press, 2d ed. 2010). On the relationship between market power and output on the two sides, see Herbert Hovenkamp, *Worker Welfare and Antitrust*, UNIV. CHI. L. REV. (2022) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015834 [https://perma.cc/5S3N-F9ZE].

30. *See, e.g.*, 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575 (5th ed. 2020); 4A *id.* ¶¶ 980–82 (4th ed. 2016).

tising, the athlete-buying cartel very likely did result in a restraint on the sell-side as well, but the Court did not require that showing.

The idea that harm to the buy-side of the market is independently challengeable under the antitrust laws makes it unnecessary to prove competitive harm on the selling side of the market. The Supreme Court had already established this in *Mandeville Island Farms v. American Crystal Sugar Co.*[31] It approved a price-fixing complaint in the market for sugar beets, which was local because sugar beets could be shipped only a short distance to a refiner. However, the beets were processed into sugar that was sold in a much more competitive national market, and also in competition with cane sugar.[32] Both the district court and the Ninth Circuit had dismissed the complaint for failure to show any effect on the market for refined sugar.[33] The Supreme Court reversed, concluding that a showing of harm to the national refined sugar market was unnecessary, provided that the restraint occurred in the local purchasing market.[34] Justices Jackson and Frankfurter dissented on that point.[35]

Because § 2 of the Sherman Act[36] does not reference either buyers or sellers, it also applies equally to buy-side monopoly. Section 7 of the Clayton Act[37] is similar, applying equally to both sell-side and buy-side anticompetitive effects from mergers.[38] By contrast, § 3 of the Clayton Act, which covers exclusive dealing and tying, explicitly covers only sellers.[39]

The question of offsetting benefits on the selling side of the market is analytically distinctive from the question of harm on both sides. The student athletes did not dispute that it would be permissible for the NCAA to justify labor market restraints by pointing to offsetting benefits on the consumer side of the market. The Court

31. 334 U.S. 219 (1948). The Supreme Court cited *Mandeville* for this proposition. *See Alston*, 141 S. Ct. at 2154.

32. *See* Philip Marcus, *Antitrust Bugbears: Substitute Products – Oligopoly*, 105 U. PA. L. REV. 185 (1956).

33. *See* Mandeville Island Farms v. Am. Crystal Sugar Co., 64 F. Supp. 265, 268 (S.D. Cal. 1946); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 159 F.2d 71, 71–72 (9th Cir. 1947).

34. *Mandeville Island Farms*, 334 U.S. at 228–29.

35. *Id.* at 247 (Jackson, J., dissenting).

36. 15 U.S.C.A. § 2 (2004).

37. 15 U.S.C.A. § 18 (1996).

38. On mergers with anticompetitive effects in purchasing markets, see 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 980–82 (4th ed. 2017).

39. 15 U.S.C.A. § 14 ("It shall be unlawful . . . to lease or make a sale . . . .").

noted that some amici had argued that such "out of market" offsets would not be permissible, but the parties themselves did not pursue it and neither did the Court.[40]

The offsetting benefits question is complex and depends on the rationale for the buy-side price reduction. As noted above, when a buying cartel suppresses compensation by limiting its purchases, the result typically harms the sell-side as well because output goes down.[41] By contrast, when a buyer is able to achieve lower costs through more efficient procurement, the result is typically higher output on the buying side and typically on the selling side as well. For example, if a manufacturer adopts more automated technology that enables it to hire fewer or less-skilled workers, the result would be lower aggregate wages. Mergers or other consolidations that limit unnecessary duplication can do the same thing. These would not result from a buy-side output reduction, however, but rather from reduced production costs that would ordinarily lead to higher output on the selling side.

B. The Rule of Reason in Antitrust Challenges to the NCAA

In the 1984 *Oklahoma Board of Regents* decision, the Supreme Court concluded that the rule of reason should apply to restraints established by agreement among NCAA members because cooperation among teams was necessary in order to create the product in question at all.[42] The NCAA in the present case argued that this legal rule supported its argument that there should be truncated deferential review favoring the restrictions in this case.[43] The Court dismissed that argument, but it also did not conclude that this was either a per se unlawful or a per se lawful restraint. While some restraints could be evaluated "in the 'twinkling of an eye,'"[44] that was true only for "restraints at opposite ends of the competitive spectrum," not for those in the "great in-between."[45] Among the former would be restraints in which market power was clearly lack-

40. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155 (2021) ("[W]e express no views on [these matters.]").

41. *See* Hovenkamp, *Worker Welfare and Antitrust*, *supra* note 29 (noting that labor is a variable cost and thus its output is suppressed when output in the product market is suppressed).

42. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (Some "horizontal restraints on competition are essential if the product is to be available at all.").

43. *Alston*, 141 S. Ct. at 2155.

44. *Id.* (quoting Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37–38 (Fed. Jud. Ctr., June 1981)).

45. *Id.*

ing.[46] In this case, however, the NCAA did not dispute the fact of its market power.[47] As a result, the Court concluded that a "quick look" was not appropriate.[48]

Then, getting to the rule of reason itself, the Court noted its own previous references to a "three-step, burden-shifting framework" for identifying anticompetitive restraints.[49] However, these three steps "do not present a rote checklist," but must be used flexibly, providing a rule that is "meet for the case, looking to the circumstances, details, and logic of a restraint."[50] Here, the district court had required "the student-athletes to show that 'the challenged restraints produce significant anticompetitive effects in the relevant market.'"[51] The Court noted that this was "no slight burden" and that "courts have disposed of nearly all rule of reason cases in the last 45 years on that ground."[52] But this case was different:

> . . . based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion.[53]

The second step the district court followed was to determine whether "the NCAA could muster a procompetitive rationale for its restraints."[54] Here, the NCAA claimed error in that the district court looked at the restraints collectively in order to determine competitive harm, but individually in order to assess offsetting benefits. This "mismatch," the defendants argued, required the defendant to prove that each individual rule that was challenged was "the

46. *Id.* at 2156 (first citing Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 217 (D.C. Cir. 1986); and then citing 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1507a (4th ed. 2017)).

47. *Alston*, 141 S. Ct. at 2156–57.

48. On the "quick look," see discussion *infra* notes 103–13.

49. *Alston*, 141 S. Ct. at 2160 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

50. *Id.* (first citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999); and then citing 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1507a (4th ed. 2017), which it described as offering a "slightly different 'decisional model' using sequential questions").

51. *Id.* (quoting the district court, 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019)).

52. *Id.* at 2161. On the importance of this, see discussion *infra* note 77.

53. *Alston*, 141 S. Ct. at 2161 (quoting the district court, 375 F. Supp. 3d at 1067).

54. *Id.* (citing the district court, 375 F. Supp. 3d at 1070).

least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them."[55]

Here, the Court agreed with the NCAA's premise "that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes."[56] The Court should not be second guessing "degrees of reasonable necessity" because "skilled lawyers" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements."[57] It later warned that courts should give "wide berth to business judgments before finding liability."[58] The Court also cautioned against rules that attempt to micro-manage the details of business judgments. Along these lines, the Court stated that "[t]o know that the Sherman Act prohibits only unreasonable restraints of trade is thus to know that attempts to '"meter" small deviations is not an appropriate antitrust function.'"[59]

The Court agreed with the district court that the NCAA's proffered defenses failed to "have any direct connection to consumer demand."[60] The Court then qualified:

> To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.[61]

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55. *Id.* at 2161.

56. *Id.*

57. *Id.* (citing 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913b (2018); and for a slightly different proposition, 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505b).

58. *Id.* at 2163.

59. *Id.* at 2161 (quoting Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. L. & BUS. 369, 377 (2016)).

60. *Id.* at 2162 (quoting the district court, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)).

61. *Id.* (quoting the district court, 375 F. Supp. 3d at 1082–83, 1104).

It continued:

> Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits . . . . "To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative".[62]

Effectively, this meant that the district court had correctly found, not that the rules were the least restrictive means of preserving consumer demand, but rather that the restraints were "patently and inexplicably stricter than is necessary" to achieve the declared procompetitive benefits.[63]

II.
THE RULE OF REASON: ONE STEP OR THREE?

In its 1984 *Oklahoma Board of Regents* decision, the Supreme Court held that the rule of reason should be applied to a joint venture if the product could not be produced at all without collaborative activity.[64] The *Alston* Court did not overrule that formulation, and the rule of reason has become all but automatic in all antitrust cases against the NCAA, as well as other sports leagues and many other joint ventures that involve collaborative product development. At one point, the Court noted, however, that the fact that "some restraints are necessary to create or maintain a league sport" does not mean all "aspects of elaborate interleague cooperation are."[65]

The Court's 1984 conclusion about the scope of the rule of reason was stated more broadly than it needed to be to address the case at hand. The result has been to make economic evaluation of

62. *Id.* (quoting 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505 (4th ed. 2017)).

63. *Id.* (quoting the district court, 375 F. Supp. 3d at 1104).

64. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (Some "horizontal restraints on competition are essential if the product is to be available at all.").

65. *Alston*, 141 S. Ct. at 2156 (quoting Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 199 n.7 (2010)).

practices in joint ventures excessively cumbersome and costly—a result that reaches far beyond the NCAA sports cases.[66]

Some practices within the NCAA need to be coordinated in order to make the product available, while others do not. For example, suppose the NCAA promulgated a rule fixing the price of hot dogs sold in stadiums hosting NCAA events. Is there any reason to subject that practice to all of the cost that accompanies rule of reason treatment, including an assessment of market power, simply because other practices that do require cooperation must be treated more deferentially? The rule of reason is a costly tool. It is worth its price only if its use produces sufficiently greater accuracy.

The well-established antitrust distinction between "naked" and "ancillary" restraints would actually work quite well for this purpose. An ancillary restraint is one that is reasonably necessary for the functioning of the venture and achievement of its purpose.[67] Further, its profitability does not depend on the exercise of market power. To be sure, the NCAA presents some unusual complexities because of its nonprofit status and its role in the education process as well as its responsibility *in loco parentis* for student growth and discipline. But these are largely addressed "jurisdictionally," by considering whether the challenged restraint is commercial in character and thus within the Sherman Act's limitations to commerce.[68]

The *Alston* Court also observed that prior courts had adopted a three-step burden-shifting framework for analyzing restraints under the rule of reason.[69] This decision-making approach is a significant improvement over Justice Brandeis' original statement of the rule of reason in the *Chicago Board of Trade* case.[70] Looking at an agreement that both restrained prices and promised to make a market perform better, Justice Brandeis queried whether the restraint

66. *See, e.g.*, *In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1014 (N.D. Cal. 2008) (network coordination); Martin v. Am. Kennel Club, Inc., 697 F. Supp. 997, 1001 (N.D. Ill. 1988) (collaborative rules for dog shows); *see also* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing, Co., 472 U.S. 284, 295 (1985) (citing this language in concluding that the activities of a cooperative buying association should be addressed under the rule of reason); *cf.* United States v. Apple, Inc., 791 F.3d 290, 326 (2d Cir. 2015) (finding that the language did not apply to a naked boycott agreement); Dagher v. Saudi Ref., Inc., 369 F.3d 1108, 1122 (9th Cir. 2004) (did not apply to a production joint venture), *rev'd*, 547 U.S. 1 (2006).

67. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006).

68. *See* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 260 (5th ed. 2020) (commercial activities generally); *id.* ¶ 261 (nonprofit organizations); *id.* ¶ 262 (noncommercial activities); *see* discussion *infra* notes 132–40.

69. *Alston*, 141 S. Ct. at 2151 (citing Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

70. Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

"merely regulated and perhaps thereby promotes competition," or whether it might "suppress or even destroy competition."[71] To answer that question, he concluded that the court would have to consider the history of the business and the restraint, the condition of the market before and after the restraint was imposed, and its "effect, actual or probable."[72] In other words, the parties were invited to throw in everything relevant to the business and see what sticks. That formulation led to a rule of reason jurisprudence that required enormous records and trials.[73]

Today's rule of reason takes an approach that is both more focused and more transactional, insisting on market power and the identification of practices that threaten to reduce market output and raise price.[74] The burden-shifting framework is designed to guide this query, placing the burden of proof where it is calculated to produce results efficiently in the majority of cases. The prima facie case must initially be made by the plaintiff, who should be able to plead and prove a theory of competitive harm and, if necessary, injury. By contrast, because the defendant is the author of the conduct, it should be in the best position to understand its motives and perceived effects. Under this framework, the plaintiff has an initial burden of making a prima facie case showing that the challenged restraint has a "substantial anticompetitive effect."[75] At that point, the burden shifts to the defendant to prove a procompetitive rationale. If the defendant shows one, then the burden shifts back to the plaintiff for an opportunity to show that the procompetitive rationale could be achieved by less anticompetitive means.[76]

In *Alston*, the Supreme Court observed, however, that plaintiffs rarely get past the first step. In fact, 90% of cases litigated in the previous 45 years were dismissed because the plaintiff failed at the first stage.[77] The Court found the present case to be one of the

71. *Id.*

72. *Id.*

73. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 5.6 (6th ed. 2020).

74. *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 15 (4th ed. 2017).

75. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2160 (2021).

76. *Id.* (citing 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1507a (4th ed. 2017)).

77. *Id.* at 2160–61 (citing Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae at 21 n.9, *Alston*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520)). For the empirical work supporting this proposition, see Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (1999); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the*

exceptions.[78] And, of course, it should have been, given that the challenge was to what amounted to a naked cartel.

The Court did not seek to determine why plaintiffs' cases fail so frequently at the first, or prima facie, stage. One possibility, of course, is that plaintiffs bring a lot of weak cases. Another one, however, is that the plaintiff's burden created by the courts for the first stage is unreasonably harsh. If that is the case, then some harmful restraints escape because of judicial, rather than plaintiff, error.

A likely explanation for this is exaggerated judicial confidence that markets will usually correct anticompetitive practices, and more quickly than the courts can do it. Today, a wealth of empirical observation and literature shows that this premise is both theoretically and empirically incorrect, but it has had surprising durability in antitrust policy.[79] It shows up powerfully in federal court tendencies to articulate a three-part rule of reason, but then to load all of the important requirements into the first part—effectively, a one-part rule of reason. That increases the plaintiff's burden while minimizing the defendant's need to justify its restraint.

This bias shows up mainly in the ways that the courts address the first stated step. As this Court described it, the plaintiff must show that "the challenged restraint has a substantial anticompetitive effect."[80] Does that mean substantial anticompetitive effect after all efficiencies are netted out? If it does, then the requirement effectively wipes out the second step of the rule of reason because it rolls harms and offsetting efficiencies all into the first step, assigning the burden for both to the plaintiff.

The merger statute, § 7 of the Clayton Act, uses roughly analogous language for assessing mergers—"where . . . the effect . . . may be substantially to lessen competition . . . ."[81] The statute does not contain an efficiency defense, and there has always been some dispute about how efficiencies should be considered.[82] But the current formulation of merger policy expressed in the Merger Guidelines is that the government makes out a prima facie case

21st Century, 16 GEO. MASON L. REV. 827 (2009); Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50 (Spring 2019).

78. *Alston*, 141 S. Ct. at 2161.

79. *See* Herbert Hovenkamp, *Antitrust Error Costs*, U. PA. J. BUS. L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282 [https://perma.cc/G5UU-T94F].

80. *Alston*, 141 S. Ct. at 2160 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

81. 15 U.S.C.A. § 18 (1996).

82. *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 970–73 (4th ed. 2017).

based largely on structural evidence, and then the burden shifts to the defendant to establish offsetting efficiencies.[83]

Most rule of reason cases do not involve naked or nearly naked cartels. They are concerned with production or research joint ventures, vertical restraints, professional association rules, standard setting, or other types of agreements whose effects are more ambiguous. *Alston* was the unique rule of reason case in which the practice that the Court was confronting was in fact very close to a naked cartel. The NCAA did very little to undermine that view in its defense. In any other setting, it would have been governed by the per se rule but for an idiosyncratic history that compelled the rule of reason.

Further, the Court often incorporates an anti-enforcement bias that prevents it from seeing competitive harm even when it is right in front of them. A good example is the *American Express* case, where the Court held that the plaintiff had not met its initial burden.[84] While the American Express card offered greater perquisites—such as cash back, extended warranties, and travel miles—than competing cards, it also charged significantly higher fees to merchants. The merchants were, in effect, paying for benefits that accrued to the card user. The challenged anti-steering rule forbade merchants from informing customers that card fees for use of an American Express card were significantly higher than those for use of a competing card such as Visa or MasterCard. It also forbade them from offering customers a discount for switching to a different card.[85]

Had the Court applied a more focused, transaction-specific analysis to these rules, it would not have had the trouble that it did in seeing competitive harm. Suppose that the merchant fee for using an American Express card on a large purchase was $15, while the fee for accepting a Visa card was $10. That difference created $5 worth of bargaining room. In that case, the merchant might have offered the customer a $3 discount for using a different card. That bargain, had it occurred, would have benefitted the customer by $3 less foregone AmEx perquisites. It would have benefitted the merchant by $2. The customer would accept the offer only if she valued the discount by more than the foregone perquisites, so the deal would have been a Pareto improvement looking at the two bar-

83. *See id.* ¶ 970f.

84. *Am. Express Co.*, 138 S. Ct. at 2287.

85. *See* Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713, 728 (2019).

gaining parties.[86] It would permit substitution to the Visa card precisely in those circumstances where use of the Visa card was efficient.

What the Court did not see is that *every single instance* in which the no-steering rule prevented such a transaction actually caused harm on both sides of the market—i.e., to both the affected customer and the affected merchant. No sensible enforcement-neutral approach to antitrust would have dropped the inquiry. Indeed, the *Alston* Court expressly characterized the challenged harms resulting from NCAA compensation limitations in terms of price and output.[87] Rather, the *American Express* Court should have held that once the plaintiffs showed that the anti-steering rule caused competitive harm on both sides of affected transactions, the burden shifted to American Express to provide a procompetitive justification for its rule. By combining the analysis of anti-competitive effects and pro-competitive effects into one "step" of analysis, the Court set too high of a bar for the plaintiffs.

The Court also did a version of this in the *California Dental* case, where it concluded that a dental association's restrictions on advertising that prohibited quality advertising and effectively prohibited most forms of price advertising were not sufficiently threatening to require the defendant to provide an explanation.[88] Once again, it is possible that upon further investigation we might discover that the potential for abuse is so severe that the rules were justified under the circumstances, but the Court effectively cut that inquiry short.[89]

If the only time that plaintiffs can successfully proceed through the "three-step" rule of reason case is when the challenged restraint amounts to little more than naked collusion, then the rule of reason is not doing its job and is not really a three-step rule of reason at all. In most rule of reason challenges, including those brought by the government, the plaintiff's prima facie case depends on market evidence that supports reasonable inferences of competitive harm. By contrast, when the burden shifts, the defense typically depends on evidence that pertains to the defendant's own conduct and the rationales for it.

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86. *See* Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. Rev. 489, 514 (2021).

87. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2158 (2021).

88. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 758 (1999).

89. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 98–114 (2018).

As a matter of decisional quality, cases that raise significant issues of efficiency or other competitively benign explanations will be more accurately resolved at the second stage, where the *defendant* has the burden, rather than at the first stage. This does not mean that trivial claims or claims against firms that clearly lack power should go forward. It does suggest, however, that at the first stage, the plaintiff should bear a smaller burden. It should be regarded somewhat more like the probable cause requirements that judges and magistrates use in issuing a search warrant: it should raise reasonable suspicions warranting a further inquiry.

For example, in *American Express*, the plaintiff had established that each instance of enforcement of the anti-steering rule caused exclusion of a rival credit card that injured both the affected merchant and the affected card holder.[90] Each time the rule applied, the merchant was denied a less costly card and that customer was denied a discount or other perk that may have been offered in exchange. The only benefit was to American Express itself, which was able to retain a sale that it would have lost in a more competitive setting. At that point, the burden should have shifted to American Express to show that the challenged steering rule (not its overall business model) served a procompetitive purpose and was not simply a way for it to get merchants and users of non-AmEx cards to subsidize its business by denying them the right to bargain for a cheaper payment mechanism. In fact, *American Express* should have been an easy case, given that each instance of enforcement of the anti-steering rule resulted in harm to both sides of the affected transaction.[91]

While harm to competition entails higher prices and reduced output, most cases do not require actual empirical evidence of such effects. In the *Alston* case itself, the Court acknowledged that it was easy, mainly because the NCAA never disputed that the "restrictions in fact decrease the compensation that student athletes receive compared to what a competitive market would yield."[92] Further, no one questioned that these decreases in compensation also "depress[ed] participation by student-athletes."[93] As a result, both price and output were depressed.[94]

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90. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

91. *See* discussion *supra* note 71.

92. *Alston*, 141 S. Ct. at 2154.

93. *Id.*

94. *Id.* (citing 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2011b (4th ed. 2019)).

In most cases, the proof consists in reasonable inferences that can be drawn from the practices plus our own knowledge of rational behavior under the circumstances. For example, because an AmEx card holder and a merchant in the previous illustrations would agree to a discount for use of a different card, we can infer that, as between the two of them, prices are lower and output higher as a result of the deal. This is not because we have taken an actual empirical measurement of increased output or lower prices, but because parties never make voluntary agreements unless they expect to benefit. As a result, the conclusion that the no-steering rule tended to raise prices and reduce output is sufficient, certainly for a prima facie case.

In a case such as *FTC v. Actavis, Inc.*, which involved a pay-for-delay patent settlement in pharmaceuticals, the inference of harm is strong as well.[95] The effect of the pay-for-delay patent settlement is to enable the patentee to retain its exclusive right for the duration of the settlement agreement. Prices are significantly higher than they would be in the absence of the settlement agreement. Otherwise, the payment for delay would not be worth it. That still leaves the question whether the agreement is justified because the patent could be valid, but that question is generally determinable by looking at the size of the payment. A person who owns good title to a property interest will typically not be willing to pay hundreds of millions of dollars to exclude trespassers. So a high payment is a strong signal that the parties' expectations are that the patent is invalid.[96]

The *Alston* Court did not expressly refer to causation, although both causation and harm were clearly implicit in the conclusion that compensation and output were actually suppressed by the challenged rules. A private plaintiff seeking damages would have to show causation and be able to quantify its harm,[97] while a private plaintiff seeking an injunction would have to show "threatened loss or damage."[98]

95. FTC v. Actavis, Inc., 570 U.S. 136 (2013).

96. *See* 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2046c (4th ed. 2020).

97. *See* Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 788, 836–51 (2021).

98. *Id.*; *see* 15 U.S.C.A. § 26 (1995) (causation requirement for private entitlement to antitrust injunction).

III.
BALANCING AND THE "QUICK LOOK"

One goal of the changes in the rule of reason in the time since Justice Brandeis has been to avoid, or at least limit, the need for "balancing"—a proposition with which the *Alston* district court agreed.[99] The term balancing always sounds pleasing until someone actually has do to it. Further, it is important to remember that in economics most of the important values are cardinal—i.e., they need to have values attached to them before they are of very much use. This is not invariably true. For example, the Pareto principle is able to identify welfare improvements without balancing because the only time it measures welfare at all is when there is nothing to balance. Unanimity, for instance, is a useful indicator of a Pareto-optimal condition.[100]

As soon as the prospect of both gains and losses is present, however, the issues become more complex. In the 1960s and 1970s Oliver Williamson in economics and Robert H. Bork in law developed a welfare tradeoff, or balancing, approach that netted out consumer losses from monopoly against productive efficiency gains.[101] Bork then did antitrust an enormous disservice by naming this the "consumer welfare" principle even though one of its most potent effects is to approve of antitrust rules that harm consumers. The confusion has plagued antitrust to this day and almost certainly accounts for much of the opposition to the consumer welfare principle. By contrast, the true consumer welfare principle asks only if output is higher, or prices lower, as a result of a certain event; it

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99. *See In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *see also id.* at 1108 (quoting 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1507d (4th ed. 2017)):

> A better way to view balancing is as a last resort when the defendant has offered a procompetitive explanation for a prima facie anticompetitive restraint, but no less restrictive alternative has been shown . . . . The court must then determine whether the anticompetitive effects . . . are sufficiently offset by the proffered defense.

The Supreme Court did not discuss balancing.

100. *See* Amartya Sen, *Liberty, Unanimity and Rights*, 43 ECONOMICA 217, 219–20 (1976); Kenneth Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950); *see also* Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949, 950 (1990).

101. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 106 (1978).

does not try to balance the effects of reduced output against claimed offsetting efficiencies.[102]

As soon as an antitrust tribunal is required to balance in any situation that is not immediately obvious, it is out of its element. Competitive losses or harms would have to be quantified. That would require a court to identify all the costs of an exercise of market power and also to put a cardinal value on efficiencies.[103] No court can do these things except in the easiest cases.

Beginning with that premise, the three-stage rule of reason inquiry was designed in order to limit the circumstances when a court needs to engage in balancing. First, one looks at harms alone. They do not have to be quantified in any technical sense, but they must be determined to be substantial. Second, one looks at claimed benefits or other offsets. If there are none, then we have an easy case—all harms and nothing else. If benefits are proven, then we are in a more difficult situation because harms and benefits would have to be quantified. That is the paradigm that Oliver Williamson contemplated in his essay on welfare tradeoff models.[104]

Third, the less restrictive alternative is best viewed as a backstop—or another opportunity to make balancing unnecessary. If the defendants can achieve most of their objective through an available and effective less restrictive alternative, then the harm will be either eliminated or at least mitigated.

The Court found that the NCAA was quite correct in its argument that antitrust law does not require a firm to employ "anything like the least restrictive means of achieving legitimate business purposes."[105] Indeed, the use of least restrictive alternatives is much narrower than that. The query becomes relevant only after the first two steps of the rule of reason have been completed. The proffered alternative must be realistically available.[106] Importantly, however, cardinal balancing can be completely avoided in the great majority of cases.

For example, suppose that a joint venture's aggregation of patents or other intellectual property rights has been shown to be un-

102. *See* Hovenkamp, *Antitrust Harm and Causation*, *supra* note 97.

103. See, for example, Williamson, *supra* note 101, which would have required courts to quantify the deadweight loss from created monopoly and then net this out against efficiency gains.

104. *See id.*

105. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2161 (2021).

106. *Id.* ("[A] 'skilled lawyer' will 'have little difficulty imagining possible less restrictive alternatives to most joint arrangements.'" (quoting 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913b, at 398 (2018))).

reasonably exclusionary. The defendant is able to show that a particular acquisition or aggregation is valuable for innovation, but at that time the plaintiff might be able to show that a non-exclusive license could give the defendant everything it needs to improve its own technology, but not the right to exclude. Further, it is no answer that the non-exclusive right would be worth much less to the selling firm. The market determines that. In this case, an order compelling non-exclusivity would very likely address the competition problem fully.[107]

The more problematic issue respecting less restrictive alternatives was the district court's use of that idea to regulate the *size* of the compensation limit. Under the order, which the Supreme Court upheld, the NCAA could limit education-related benefits,[108] "but only so long as those limits are no lower than the cash awards allowed for athletic achievement."[109] This puts the court in a position uncomfortably close to that of a price regulator. For example, in a per se case in which defendants fixed the price of widgets at $10 each, we would never say that fixing the price at $9 is a less restrictive alternative. Of course, the per se rule would not permit such an approach. The price fix is unlawful no matter what its size.

If the price fix is subject to the rule of reason however—as it currently would be under the Supreme Court's holding that the rule of reason applies to all NCAA rules—then just such a possibility might arise. For example, suppose that the NCAA fixed the price of season tickets offered by individual teams—something that we would ordinarily expect to be covered by the per se rule. We would not want to get into the position of saying that pricing season tickets at $500 is unlawful but a less restrictive alternative would be to price them at $400. That would in fact turn the court into a price regulator.

In the one significant NCAA price-fixing case that did not involve compensation of amateur athletes, *Law v. NCAA*, the Tenth

107. *Cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 12.3 (6th ed. 2020) (acquisition of nonexclusive right in order to render merger competitively harmless).

108. The district court listed these benefits as "academic achievement or graduation awards; summer school; fifth-or sixth-year aid; tutoring; academic support services; international student fees and taxes; professional program testing; and supplies." *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1072–73 n.15 (N.D. Cal. 2019).

109. *Alston*, 141 S. Ct. at 2153.

Circuit felt obligated to apply the rule of reason.[110] It applied what it characterized as a "quick look" to an NCAA rule fixing the maximum salaries for secondary basketball coaches. In effect, the rule was deeply suspicious—all the way to the anticompetitive end of Justice Gorsuch's spectrum.[111] The court then found that there were no offsetting procompetitive benefits. As a result, it held that it was unnecessary to pursue the issue of less restrictive alternatives.[112]

The Supreme Court in *Alston* also declined the NCAA's suggestion that the Court adopt a "quick look," which the NCAA had characterized as "abbreviated deferential review" to the compensation limitations.[113] The principal argument by the NCAA was that "collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition."[114] The Court did agree that, if they apply at all, "quick look" approaches can work in both directions.[115] In some cases, they can offer a quick path to condemnation, as the FTC requested in the *California Dental*[116] and *Actavis*[117] cases, but they can offer a quick path to salvation, as the NCAA was seeking in *Alston*.

The Supreme Court has never been enthusiastic about the "quick look" doctrine, which calls for an intermediate query that falls between the per se rule and the rule of reason. Prior to *Alston*, it discussed the rule three times, but only to reject its use in the particular case before it.[118] On the other hand, it has permitted forms of truncated analysis that fall somewhere short of the full rule of reason.[119] While refusing to embrace a quick look, the *Alston* Court did observe that the *Oklahoma Board of Regents* case did sup-

110. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998). While Justice Gorsuch came from the Tenth Circuit, he was not yet on it at the time.

111. *See id.*

112. *Id.* at 1024 n.16.

113. *See Alston*, 141 S. Ct. at 2155.

114. *Id.* (citing 13 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2100c (4th ed. 2020)).

115. *Id.*

116. Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

117. FTC v. Actavis, Inc., 570 U.S. 136 (2013).

118. *Actavis, Inc.*, 570 U.S. at 159 (declining to apply "quick look"); Texaco, Inc. v. Dagher, 547 U.S. 1, 5–6 (2006) (observing, and not questioning, that the district court had refused to apply quick look doctrine); *Cal. Dental Ass'n*, 526 U.S. at 781 (declining to grant FTC's request for "quick look" analysis).

119. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (truncated proof of anticompetitive effects); *Actavis, Inc.*, 570 U.S. at 158–59 (truncated proof of both power and effects).

port "abbreviated antitrust review."[120] That has always been the best way to think about the issue—not as three silos with per se, quick look, and full rule of reason as three discrete points along a line. Rather, methods of analysis lay along a "sliding scale" with varying amounts and kinds of evidence being necessary depending on the issues and the nature and availability of evidence.[121] In *Alston* itself, application of the rule of reason was easy, mainly because the NCAA had conceded the central points—namely that the restraint had resulted in reduced compensation and reduced output.[122]

IV.
LABOR SUPPRESSION: THE SEEN AND THE UNSEEN

Alston is a forceful statement of one aspect of antitrust concern for labor. The Court spoke categorically of labor's interest in a competitive marketplace. In the process, it made clear that labor market competition is not in any sense derivative of competition on the other (output) side of the market. A cartel that suppresses wages is unlawful whether or not it also raises prices in product markets.[123] This can be especially important when a firm or group of firms wield power in the labor market in which they purchase but are competitive in the output market where they sell their product.

Given that the issue in *Alston* was athlete compensation, the players and the teams existed in at least a quasi-employer-employee relationship. As a result, the decision is an example of the Supreme Court's relatively infrequent incursions into the relationship between labor and the antitrust laws. It was made all the more infrequent by the fact that there was no labor union.[124]

Nevertheless, the fact remains that this is only a small part of the antitrust interest in labor market competition. There is another very important sense in which the fortunes of labor are dependent on competition in product markets. Monopoly in product markets

120. *Alston*, 141 S. Ct. at 2157 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984)).

121. *See Actavis, Inc.*, 570 U.S. at 159 (adopting a "sliding scale" approach (quoting *Cal. Dental Ass'n*, 526 U.S. at 780)); *see also* Hovenkamp, *Rule of Reason*, *supra* note 89, at 122–23.

122. *See* discussion *supra* notes 26–27.

123. *See* discussion *supra* notes 28–31.

124. On antitrust and labor laws for unionized labor, see *Brown v. Pro-Football, Inc.*, 518 U.S. 231, 249–50 (1996) (unionized football times); *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981) (line between employees and independent contractors). Other decisions are discussed in 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 255–57 (5th ed. 2020).

reduces output. Further, nearly all of labor, and particularly at lower salary levels, is a variable cost. As a result, reduced output in product markets leads directly and often proportionately to reduced demand for labor. The negative impact for labor of product market monopoly is very likely many times higher than the negative impact of labor market restraints.[125]

A. "Amateurism" and Student Labor

The Court also observed that the 1984 decision had included a lengthy discussion of "amateurism." Here, however, it found the concern to be relatively unimportant except perhaps for market definition—as a way of distinguishing the audience for collegiate athletics from that for professional athletics.[126] Indeed, this suppression of amateurism as a fundamental concern may be one of the most enduring features of the *Alston* decision. The NCAA will no longer be able to justify a practice that suppresses student compensation simply by citing the preservation of amateurism.

The NCAA has a long tradition of promoting amateurism in collegiate athletics. *Alston* quoted this passage from the 1984 *Oklahoma Board of Regents* decision:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[127]

Notwithstanding that strong statement, in fact, the 1984 decision had relatively little to do with amateurism. At issue was nationwide commercial television contracts for the broadcast of NCAA football games. The NCAA had argued for a connection between the preservation of amateurism and limitations that served to equalize access to broadcasting to preserve competitive balance, but the Court disagreed.[128] By contrast, Justice White's dissent in the 1984 case found a strong link between the NCAA's interest in preserving

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125. *See* Hovenkamp, *Worker Welfare and Antitrust*, *supra* note 29; *see also* Edgar K. Browning, *A Neglected Welfare Cost of Monopoly – and Most Other Product Market Distortions*, 66 J. PUB. ECON. 127 (1997). One of the seminal studies was Leonard W. Weiss, *Concentration and Labor Earnings*, 56 AM. ECON. REV. 96 (1966).

126. Amateurism is discussed further *supra* notes 101–10.

127. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2157 (2021) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).

128. *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 119.

amateurism and the policy of limiting televised games. He argued that it served to spread revenue more evenly among participating schools, thus giving amateur athletes from schools with less successful athletic programs a fair chance.[129]

Subsequent lower court decisions did involve athlete compensation, however, and they made the role of amateurism more prominent.[130] The *Alston* decision stands in contrast to that. Justice Kavanaugh's concurring opinion wrote as if concerns about amateurism were not that important.[131] The majority did not go quite that far. Rather, the Court observed that the NCAA's own conception of amateurism had evolved very considerably since 1984, and that the NCAA had "dramatically increased the amounts and kind of benefits schools may provide to student-athletes."[132] Most of these included things like larger scholarships or greater amounts of assistance to struggling students.[133] Accompanying this, the amount of revenue produced by broadcasting of collegiate sports had increased many times—including a 70-fold increase in the price of broadcast rights for the annual March Madness NCAA basketball tournament.[134] Further, "[w]hile the NCAA asks us to defer to its

129. *Id.* at 124, 135–36 (White, J., dissenting) (citations omitted):

> [T]he [television restriction] plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[t]he restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement." The collateral consequences of the spreading of regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice.

130. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1059, 1063–66 (9th Cir. 2015); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998); *In re* Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005); Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275 (D. Kan. 1999).

131. *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

132. *Id.* at 2158 (majority opinion).

133. *Id.*

134. *See id.* (observing that "[f]rom 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. In

conception of amateurism, the district court found that the NCAA had not adopted any consistent definition."[135] Rather, its definition had "shifted markedly over time."[136] The Court did not rule that concerns about preserving amateurism are irrelevant to the antitrust analysis, but clearly they are now less central.

The more important question for antitrust policy is whether and how these concerns about amateurism fit into Sherman Act analysis under the rule of reason. A strong concern to protect amateurism might effectively yield to the NCAA *carte blanche* to determine the appropriate compensation for its student athletes. The Court clearly rejected that. It also rejected the NCAA's own use of the term to defend a concept that had shifted over time and in fact had no clear definition.[137] At the same time, however, the Court wrote a decision that was no broader than necessary to strike down rules in a way that permitted member schools to award limited compensation that certainly seems modest in comparison with professional salaries.

Absent intervention by Congress, this suggests either that the next shoe to drop will be any agreed-upon limitations whatsoever on student athlete compensation, or else a more stable and acceptable definition of amateur athletics and what kinds of limitations on competition that entails.

The antitrust laws are not an invitation to price regulation by another name. An agreement limiting student athletes to, say, $100,000 would be just as unlawful under the Sherman Act as an agreement to deny them compensation altogether. These problems emerged in the Court's discussion of the lower court's decree, developed below.[138]

One approach would be for Congress to intervene, perhaps in the process defining the term "amateur" and proscribing reasonable limits on compensation and support. Another might be to permit the NCAA to produce a more defensible and stable idea of amateurism. Unfortunately, that train may already have left the station.

2016, those annual television rights brought in closer to $1.1 billion." (citations omitted)).

135. *Id.* at 2163.

136. *Id.* (citing the district court, 375 F. Supp. 3d 1058, 1070–74 (N.D. Cal. 2019)).

137. *Id.* at 2163–64.

138. *See infra* notes 169–81.

B. Athlete Compensation and Competitive Balance

The district court had rejected the NCAA's argument that limitations on athlete compensation were essential to achieving "competitive balance among teams."[139] The NCAA did not pursue the argument on appeal.

"Balance" can mean a number of things. The Supreme Court noted one particularly large imbalance, which was between student compensation and the multimillion-dollar salaries paid to some NCAA coaches, athletic directors, and the president of the NCAA.[140]

What the Court did not mention, however, was that the NCAA had attempted to cap the salaries of at least some coaches, but Justice Gorsuch's own previous court, the Tenth Circuit, had condemned the salary rules as antitrust violations in *Law v. NCAA*.[141] As a result, member schools became liable for large treble damages awards.[142] So the NCAA has been operating in a legal environment in which restraints on professional salaries were presumed to be unlawful. The result has been bidding wars among the top sports schools, with salary differentials on the order of as much as eighty-to-one in various classifications of NCAA coaches.[143]

What happened to coaching salaries in the wake of *Law* may be a predictor of what will happen to student athlete salaries in a market in which all NCAA-imposed caps are removed. As a matter of perspective, however, only a small percentage of collegiate athletes go into professional leagues. For example, in 2020 there were 73,712 NCAA football participants, of whom 16,380 were deemed to be draft eligible. Of these, 254 were actually drafted. In basketball, 3,669 out of 16,509 were draft eligible but only 36 were

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139. *Alston*, 141 S. Ct. at 2152.

140. *See id.* at 2151.

141. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).

142. After the decision, the parties settled for a damages award of $54,500,000. *See NCAA to Pay Coaches $54.5M*, CBS NEWS (Mar. 9, 1999, 6:32 PM), https://www.cbsnews.com/news/ncaa-to-pay-coaches-545m/ [https://perma.cc/E9ZK-4EY5].

143. *See* Emily S. Sparvero & Stacy Warner, *The Price of Winning and the Impact on the NCAA Community*, 6 J. INTERCOLLEGIATE SPORT 120, 127 (2013). For example, as of 2011, salaries of Division I coaches ranged from a low of $23,950 to a high of $1,832,594. Since then, a relatively small number of high paying NCAA coaches have earned salaries in the $5m to $9m range. In 2020, Nick Saban of the University of Alabama was at the top with a reported salary of $9.3 million. *See* Scott Prather, *10 Highest Paid College Football Coaches in 2020*, ESPN LAFAYETTE (Oct. 30, 2020), https://espn1420.com/10-highest-paid-college-football-coaches-in-2020/ [perma.cc/E9ZK-4EY5].

drafted.[144] Of course, many others might go to minor or foreign leagues, although at significantly smaller salaries. But a very likely result will be that high offers will chase after a very small number of superstar athletes, very likely going to schools with strong athletic reputations in a particular sport.

In sum, it does not necessarily follow that the fixing of maximum student compensation in *Alston* presents exactly the same problem as the fixing of stadium hot dog prices. A stronger case can be made that student athlete compensation must be controlled in order to maintain competitive balance—a defense that is virtually universally rejected in the general run of cartel cases. But athletic conferences are owned by universities that have a broader educational mission. As a result, they may have an interest in maintaining broad participation in intercollegiate activities.[145] For example, they regularly enforce such things as equalizing the number and size of scholarships that individual teams may offer.[146] They select schools for particular "divisions" based on size and largely limit intercollegiate games to schools within a division, so that very large schools do not often play against very small ones.[147] More generally, there is a well-supported belief that intercollegiate sports is best served by a situation in which teams of roughly equal ability and resources play one another.[148] In the *Name and Likeness* licensing antitrust litigation, the district court denied summary judgment on the issue, although after expressing some doubts.[149]

In its 1984 decision, the Supreme Court agreed that the NCAA had a legitimate role in maintaining competitive balance within NCAA football, but it also held that this did not serve to justify the

144. *See* NCAA, *Estimated Probability of Competing in Professional Athletics*, NCAA (Apr. 8, 2020), https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics [https://perma.cc/B6G7-6KUC].

145. A wide literature has discussed the issue. *See* E. Woodrow Eckard, *The NCAA Cartel and Competitive Balance in College Football*, 13 Rev. Indus. Org. 347 (1998) (finding that competitive balance has not improved notwithstanding NCAA efforts); Steven Salaga & Rodney Fort, *Structural Change in Competitive Balance in Big-Time College Football*, 50 Rev. Indus. Org. 27 (2017).

146. *See* Daniel Sutter & Stephen Winkler, *NCAA Scholarship Limits and Competitive Balance in College Football*, 4 J. Sports Econ. 3 (2003).

147. *See* Brian M. Mills & Steven Salaga, *Historical Time Series Perspectives on Competitive Balance in NCAA Division I Basketball*, 16 J. Sports Econ. 614 (2015).

148. *See* Allen R. Sanderson & John J. Siegfried, *Thinking About Competitive Balance*, 4 J. Sports Econ. 255, 256 (2003).

149. *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1149–50 (N.D. Cal. 2014).

challenged restraint on nationally televised games.[150] In *Alston*, the Supreme Court paid very little attention to the issue, after noting that the district court had rejected it and observing that the NCAA did not appeal on that question.[151] The district court in the closely-related *O'Bannon* case had also rejected an argument based on competitive balance after concluding that the NCAA presented insufficient evidence on the issue.[152] In particular, that court cited the lack of adequate evidence that concerns about competitive balance affected desirability or audience size.[153] Justice Kavanaugh also raised the issue briefly in his concurring opinion in *Alston* when discussing how the NCAA would operate in a regime in which all agreements governing athlete compensation were declared unlawful.[154]

Surprisingly, on this issue, professional sports appear to differ. In the *American Needle* case, the Supreme Court recognized concerns for maintaining competitive balance as "legitimate and important" in the development of professional (NFL) football.[155] And in *Major League Baseball v. Salvino, Inc.*, the Second Circuit found it to be an important interest to the preservation of professional baseball.[156] In fact, the court in that case approved of a system in which revenues from the licensing of the intellectual property rights of the individual teams were pooled and distributed among them equally.[157]

One wonders why the concern about competitive balance should be regarded as legitimate for professional sports but not for collegiate sports. Intuitively, the opposite conclusion might seem more sensible. For the future, more extensive fact finding on this issue would be helpful, including more elaborate articulation by the NCAA.

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150. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117, 119–20 (1984).

151. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2153–54 (2021).

152. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1001–02 (N.D. Cal. 2014).

153. *Id.* The Ninth Circuit affirmed the district court's ruling in part, reaching the same conclusion about competitive balance. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1059 (9th Cir. 2015).

154. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

155. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010) ("'[T]he interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984))).

156. Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 328–29 (2d Cir. 2008).

157. *Id.* at 334.

A related concern was balance as between professional and collegiate sports. More to the point, do we want NCAA athletics in the strongest schools to be nothing more than professional athletics by another name? The *Alston* Court did not disturb lower court findings that gave some credence to the argument that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand."[158] The lower court had observed:

> [W]hen compared with having no limits on compensation, some of the challenged compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education such as those seen in professional sports leagues . . . . [H]owever, not all of the challenged rules in their current form are necessary to achieve this procompetitive effect, and there is a less restrictive alternative to the set of current challenged compensation restrictions.[159]

This close focus on consumer demand as the distinguishing feature dividing amateur and professional athletics seems far too narrow. The reason that collegiate athletics is distinctive is not simply because consumers view it that way, but also because colleges play an essential role in educational and personal development that professional teams do not. That issue, as noted below, has unfortunately been buried in a set of fundamentally jurisdictional concerns that involve the scope of "commerce." Once a court concludes that a particular restraint does not pertain to commerce, all debate over the antitrust merits of that restraint must end.

V.
"COMMERCIAL ENTERPRISE"

The Sherman Act was passed under Congress' power to regulate commerce and applies only to commercial activities.[160] This jurisdictional limitation has enabled the NCAA to show that at least some of its restraints are not commercial in nature and thus not governed by the Sherman Act. In addition, the NCAA is a nonprofit

158. *Alston*, 141 S. Ct. at 2153 (quoting the district court, 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019)).

159. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1101 (N.D. Cal. 2019).

160. Sherman Antitrust Act of 1890, 15 U.S.C.A. §§ 1–2.

organization comprised mainly, although not entirely,[161] of non-profit educational institutions. Its principal job is not athletics but rather the education of students at an important transitional time in their lives. Most college athletes are 18 to 21 years old. In fact, the great majority of students who participate in NCAA athletics are not only amateurs at the time, but they will also never become professional athletes.[162]

For its part, the Sherman Act pays very little attention to the distinction between profit and non-profit institutions, although it pays a great deal of attention to the distinction between commercial and noncommercial *activities*. That is, whether the Sherman Act applies depends on the nature of the restraint, not of the entities who are engaged in it. This is not a consequence of any deep thought about the nature of educational institutions but rather that the jurisdictional reach of the antitrust laws extends only to "commerce."[163]

This distinction has actually served the educational community fairly well because the division between "commercial" and "non-commercial" permits universities to do a great many things that are an important part of educational policy, although probably not of antitrust policy, such as guaranteeing that student athletes obtain a good education and acting as partial substitutes for parents in a student's transitional period of life.

In *Alston*, the Court dismissed any claim that the NCAA and its member schools were not involved in a "commercial enterprise," but rather "oversee intercollegiate athletics 'as an integral part of the undergraduate experience.'"[164] Commercial status seems unquestionable in this case, as it was in the *Board of Regents* case,[165] which involved lucrative television contracts.

The statement should not be read to mean that the Court regarded every regulation that the NCAA might impose as a commercial one. Ordinarily the nature of the *restraint*, rather than of the

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161. *See* Stephen L. Carter, *What Is a For-Profit College, Anyway? And Who Decides?*, BLOOMBERG (Mar. 18, 2021, 11:30 AM), https://www.bloomberg.com/opinion/articles/2021-03-18/what-is-a-for-profit-college-anyway-and-who-decides [https://perma.cc/9HH4-73HM].

162. *See* discussion *supra* note 144.

163. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 (1995) (stating that mere possession of a firearm is not commerce, and thus not reachable under federal statute).

164. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2158 (2021) (quoting Brief for Petitioner at 31, *Alston*, 141 S. Ct. 2141 (No. 20-512)).

165. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

organization, determines its commercial character.[166] As a result, nonprofit entities can be subjected to the antitrust laws, but their laws reach only "commercial" activities.[167] To illustrate, suppose a student with low grades challenged the NCAA requirement that students must maintain a "C" average in order to participate in intercollegiate sports.[168] Such a rule is literally output restricting, in the sense that some students otherwise able to play and perhaps even desirable for that purpose would be excluded. To that extent, it can even be said to "restrain trade." But the minimum GPA requirement is not a regulation of commerce, but rather of the school's academic enterprise. It is noteworthy that the NCAA and its teams very likely do not profit by limiting participation based on GPA. The same thing is true of NCAA disciplinary rules, which are "noncommercial" even though they can have a significant negative impact on a school's revenue. For example, the NCAA did not violate the antitrust laws by disciplining Penn State University for a set of incidents involving sexual abuse of collegiate athletes, at least some of whom were minors at the time.[169] Finding that the NCAA's regulation of the conduct was not commercial entailed that the antitrust court lacked jurisdiction.[170]

On a related issue, the Court had no occasion to overrule baseball's long-standing judicially created immunity from the antitrust laws.[171] That immunity was also based on Justice Holmes's conclusion in the early 1920s that baseball was not "commerce."[172] In *Alston*, the Court appeared not to think very much of the baseball

166. *See* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 260–62 (5th ed. 2020).

167. *See, e.g.*, Missouri v. Nat'l Org. for Women (NOW), 620 F.2d 1301, 1302 (8th Cir. 1980) (political boycott against states that did not ratify the Equal Rights Amendment not reachable under Sherman Act).

168. *See* Agnew v. Nat'l Collegiate Athletic Ass'n, No. 1:11-CV-0293, 2011 WL 3878200, at *8 (S.D. Ind. Sep. 1, 2011) (noting NCAA's minimum GPA requirement).

169. Pennsylvania v. Nat'l Collegiate Athletic Ass'n, 948 F. Supp. 2d 416 (M.D. Pa. 2013).

170. *Id.* at 422:

> To establish its Section 1 antitrust claim under the Sherman Act, Plaintiff cannot allege just any harm, but must point to harm directed at commercial activity of the type the Sherman Act is designed to address. Further, Plaintiff must establish that Defendant's action affected the kind of antitrust activity over which this Court has jurisdiction.

171. *See* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922); 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 251(h)(2) (5th ed. 2020).

172. *Fed. Baseball Club of Baltimore*, 259 U.S. at 208–09 ("[E]xhibitions of base ball" are not "trade or commerce in the commonly accepted use of those

exemption, but it noted that the route to overruling it was through Congress, and the same thing should apply to the present decisions concerning athlete compensation.[173] It noted that Congress had created antitrust immunities in the past,[174] "[b]ut until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone – 'competition is the best method of allocating resources' in the Nation's economy."[175]

VI.
THE *ALSTON* DECREE

A. Scope

The *Alston* Court was also concerned about administrability of the lower court's decree,[176] and the NCAA proffered some objections. In this case, however, the Court saw the proper approach as keeping the decree open to continual modification rather than rejecting its use. The Court acknowledged that "static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition."[177] As a result, "[j]udges must be open to reconsideration and modification of decrees in light of changing market realities" because conditions may vary over time.[178] Further:

> "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court "'impose a duty . . . that it cannot explain or adequately and reasonably supervise.'" In short, judges make for poor "central planners" and should never aspire to the role.[179]

The Court more-or-less dismissed concerns raising the possibility that the NCAA would act in bad faith. For example, the district court's injunction permitting some post-eligibility internships could

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words . . . . [P]ersonal effort, not related to production, is not a subject of commerce.").

173. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2160 (2021).

174. *Id.* at 2159 (giving examples).

175. *Id.* at 2160 (quoting Nat'l Soc'y of Pro. Engineers v. United States, 435 U.S. 679, 695 (1978)).

176. *Id.* at 2163 ("Judges must be wary . . . of the temptation to specify 'the proper price, quantity, and other terms of dealing'—cognizant that they are neither economic nor industry experts." (quoting Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP (*Trinko*), 540 U.S. 398, 408 (2004))).

177. *Id.* at 2161 (citing *Trinko*, 540 U.S. at 414).

178. *Id.* at 2163 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999)).

179. *Id.* (quoting *Trinko*, 540 U.S. at 415, 408).

be circumvented by the use of different terminology. It might permit a school to grant "a sneaker company or auto dealership" with "extravagant salaries" as a post-eligibility "internship."[180] In any event the NCAA, subsequent to the district court's opinion, had adopted new regulations that only a "conference or institution" may fund post-eligibility internships.[181] Further, the NCAA retained the ability to define appropriate educational benefits, thus "leaving . . . room to police phony internships."[182] It concluded that "the NCAA may seek whatever limits on paid internships it thinks appropriate."[183]

The NCAA also attacked a part of the decree permitting schools to limit academic or graduation achievement awards, provided that those limits were "no lower than its aggregate limit on parallel athletic awards," which were at the time "$5,980 per year."[184] The Court also noted that under the decree, "the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a 'no Lamborghini' rule."[185]

B. Antitrust Regulatory Decrees: Uses and Limitations

The Court observed that even a complex decree such as this one could be subject to clarification and, if necessary, modification. Further, the NCAA "remains free" to seek such guidance, but it has done so only once.[186]

The Court also noted that the district court gave the NCAA "considerable leeway" even with respect to education-related benefits:

> [T]he court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. And the

180. *Id.* at 2164 (quoting Brief for Petitioner at 37–38, *Alston*, 141 S. Ct. 2141 (No. 20-512)).

181. *Id.* (citation omitted).

182. *Id.*

183. *Id.* at 2165.

184. *Id.*

185. *Id.*

186. *Id.* at 2165–66.

> court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still.[187]

The very last sentence of the quoted statement is peculiar because the individual conferences within the NCAA also operate as agreements among the participating teams. It is unclear why, if a restraint covering the entire NCAA is unlawful, a restraint covering only the Big Ten or Pac-12 conference would be permissible, but the Court did not elaborate.

The Court rejected a variety of objections to the decree. Nevertheless, it bears observing that all of the challenges were from the NCAA, arguing that the decree limited the NCAA's control excessively. The Court clarified that its focus was "only on the objections the NCAA [ ] raised."[188] It "express[ed] no views" on other issues.[189] The Court did not categorically approve the restrictions on other compensation that might sometime be challenged by the players as too expansive. It then closed with:

> Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: "The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law." That review persuades us the district court acted within the law's bounds.[190]

In the context of the complex and enduring antitrust issues that relate to the NCAA's governance of collegiate athletics, there may be no alternative to a decree such as this one. The Court's largely enthusiastic approval should not be read, however, as a categorical endorsement of ongoing regulatory decrees in other anti-

187. *Id.* at 2164 (citations omitted).

188. *Id.* at 2155.

189. *Id.*

190. *Id.* at 2166 (quoting the Ninth Circuit, 958 F.3d 1239, 1265 (9th Cir. 2020)).

trust areas. Whether it does so remains to be seen. But as a starting premise, the line between antitrust and regulation involves the persistently difficult question of when markets can govern themselves and when they require ongoing governmental supervision. One shudders to think, for example, of a regime that left competitively threatening mergers in place subject to ongoing judicial supervision by regulatory decree. As a result, the impulse is strong that a merger decree must restore the market to a position where it can operate competitively without ongoing administration.[191] One problem is that structural relief in a case such as NCAA is neither desirable nor practical. In any event, no one was asking for it.

VII.
JUSTICE KAVANAUGH AND UNRESOLVED ISSUES

Justice Kavanaugh alone concurred. The principal point of his concurring opinion was to suggest that the NCAA's remaining but unappealed compensation rules might be unlawful under the Sherman Act as well, effectively leaving the compensation issue to the market.[192] Given the length that the Court's opinion went to emphasize what the district court did not do, this decision reads a little more like a partial dissent rather than a concurrence. Under the Court's characterization, he observed, comments about amateurism should be regarded as "stray" and not to be accorded much weight. Indeed, he described them as "dicta" that "have no bearing on whether the NCAA's current compensation rules are lawful."[193] Further, he believed that all the compensation limitations imposed by the NCAA should be subject to ordinary rule of reason analysis, and the Court had made clear that the NCAA is not entitled to an antitrust exemption.[194]

From that point, Justice Kavanaugh found "serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny."[195] As he observed, "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[196]

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191. On antitrust regulatory decrees in mergers, see 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 990c (4th ed. 2016).

192. *Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring).

193. *Id.* at 2167.

194. *Id.*

195. *Id.*

196. *Id.*

Justice Kavanaugh also acknowledged the possibility of legislation as an alternative to antitrust litigation.[197] Another possibility is collective bargaining which would presumably subject NCAA athlete employment issues to the labor immunity, which limits the application of the antitrust laws to much of professional sports.[198] Somewhat mysteriously, he also suggested "some other negotiated agreement."[199] In general, however, an agreement that violated the Sherman Act would not be enforceable. He did end, however, with this supplication on behalf of the athletes:

> Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.[200]

VIII.
CONCLUSION

The *Alston* decision did not address every question about student athlete compensation. The Supreme Court also made clear that it was addressing only the NCAA's, not the students', objections to the district court's decree. One can anticipate future challenges from students claiming, as Justice Kavanaugh suggested, that all agreed-upon restrictions on student athlete compensation are unlawful. But they will do so in the face of a unanimous decision that was sympathetic to the district court's decree overall. Even the Supreme Court's dicta will be taken seriously.

That does not necessarily mean that Congressional intervention is unlikely or ill-advised. There is also good precedent for it. For many years, medical schools have run a "resident matching" program for recent graduates that assigns them by lottery to a particular employer for a residency. That practice would almost certainly constitute market division, per se unlawful under the Sherman Act. After a district court held just that, Congress passed legislation that immunized the practice from the antitrust laws.[201] If Congressional action occurs in the NCAA situation, however, it is

197. *Id.* at 2168.

198. *See* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 255–57 (5th ed. 2020).

199. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

200. *Id.* at 2169.

201. Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs, 15 U.S.C.A. § 37b; *see* Jung v. Ass'n of Am. Med. Colls., 339 F. Supp. 2d

very likely that more than student compensation will be on the table.[202]

The one fundamental thing that the Court did not seriously address, however, is the one that concerns antitrust policy rather than the complex role played by the NCAA in both education and athletics. Has the Court made it any easier for the next private rule of reason plaintiff to win a case, particularly where the challenged practice is more ambiguous than the nearly naked cartel that the *Alston* case involved?

26, 34 (D.D.C. 2004), *aff'd*, 184 Fed. Appx. 9 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1156 (2007).

202. For example, Congress has already entertained proposals to limit the salaries of highly paid college coaches. *See* Dennis Dodd, *Proposed Federal Law Seeks to Limit Skyrocketing Salaries of College Coaches*, CBS SPORTS (Jan. 28, 2020, 2:22 PM), https://www.cbssports.com/college-football/news/proposed-federal-law-seeks-to-limit-skyrocketing-salaries-of-college-coaches/ [https://perma.cc/S5MJ-5HF3].

OTHER JUDGES' CASES

*MELISSA B. JACOBY**

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* Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. Over its long life, this project has benefitted from constructive feedback from judges around the country; because some preferred anonymity, the same is provided for all, with gratitude. While still a law professor, Dana Remus was indispensable to thinking through the judicial ethics analysis. For comments on this and prior versions of the article, thanks to Ron Barliant, Christopher Bradley, Andrew Chin, Elizabeth Gibson, Andy Hessick, Ted Janger, Merrilee MacLean, Troy McKenzie, Denise Neary, Gene Nichol, Tyler Nurnberg, Bob Rasmussen, Cassandra Burke Robinson, Kathryn Sabbeth, Michael Temin, Mark Weidemaier, and Jay Westbrook. The project was enriched by discussions at the Utah Bankruptcy Lawyers Forum, the 2018 UNC Festival of Legal Learning, and a UNC School of Law faculty workshop many years ago. Nicole Downing, Dave Hansen, and Nor Ortiz provided excellent library support. For research and editorial assistance over many years, thanks to Sarah Russell Cansler, Robert El-Jaouhari, Mary Ellen Goode, Caleb Johnson, Amy Leitner, Britton Lewis, Safa Sajadi, Anne Andrews, Alexandra Dodson, Debra Rogers Edge, Samantha Owen, and Rachel Rogers. Errors are mine.

INTRODUCTION

Picture a judge at work. What do you see? If you have studied or worked in courts, you might envision the judge laboring on educational, administrative, or other professional obligations. Federal judges do a great many things, after all. If your image involves work on a specific case, though, you likely assume the judge presides over that case.

In today's federal judiciary, that assumption is sometimes incorrect. It has become popular for a presiding judge to assign settlement oversight responsibilities to another sitting judge, often under the label of mediator.[1] Decades of academic federal courts work that dissects judicial obligations, including "managerial" work designed to close cases and control dockets, have not given this stripe of activity its fair share of attention.[2]

This lack of attention is a mistake because sitting judges as mediators present a puzzle. The Federal Rules of Civil Procedure authorize presiding judges to actively manage their own cases, including by holding pre-trial conferences about settlement.[3] Additionally, Congress has encouraged court-annexed alternative dispute resolution that enlists the services of private neutrals.[4] Why, then, would judges oversee negotiations in other judges' cases?

One possibility is that judges take on mediation work as a reform measure. The practice reduces overinvolvement of presiding judges and increases access to justice for litigants who cannot afford to pay private mediators.

But the practice also implicates judicial power. Using judges as mediators can not only present separation-of-powers problems and introduce dynamics that may strike some participants as coercive,

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1. *See infra* Part I(A).

2. For the typical foundational examples, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

3. FED. R. CIV. P. 16(c)(2).

4. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5093; Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, 2993–95.

but can also undercut key justice system values like transparency and impartiality.

Resolving these issues is not merely an academic exercise. Discussions of judicial legitimacy too often focus on formal opinions of the United States Supreme Court.[5] Yet, litigants are far more likely to encounter the lower courts (including the bankruptcy court) than the high courts, which hear few appeals and issue even fewer opinions.

Some readers might contend it is too narrow to focus on judges mediating in other judges' cases when modern federal court practice involves many other models of delegation.[6] Yet mediating judges have received far less attention than other delegations in recent decades. Furthermore, existing scholarship has focused on the judge as a delegat*or* far more so than on the judge as a delegat*ee*. This configuration affects how well existing judicial accountability measures apply. For example, while some judges are known to be proactive as presiding judges,[7] accountability mechanisms are likely to be more germane as applied to presiding judges than as to mediating judges.

Every project has caveats, and this one has several. First, this article focuses on federal rather than state courts. Within the federal judiciary, the focus is primarily on Article III judges, but some observations apply to bankruptcy judges and magistrate judges as well. Administrative law judges are not considered.

Second, this article does not focus on explicit Congressional directives for federal judges to work on other judges' cases. For example, a magistrate judge works on a district judge's cases.[8] Similarly, in multidistrict litigation, a panel of judges consolidates cases assigned to other judges with a single district judge.[9] Although

5. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1563–66 (2021) (critiquing that focus).

6. *See* Order Appointing Settlement Master, Concerned Pastors for Social Action v. Khouri, No. 16-10277 (E.D. Mich. Dec. 28, 2016) (appointing Paul Manicatti in Flint toxic water cases).

7. *See, e.g.*, RICHARD SOBEL, BENDING THE LAW 23–48, 60–68 (1991) (discussing the presiding district judge in A.H. Robins); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 348–51 (1986) (discussing the presiding district judge in Agent Orange); Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 673 (2019) (discussing methods of the judge presiding over National Prescription Opioid multidistrict litigation).

8. 28 U.S.C. §§ 631, 636.

9. 28 U.S.C. § 1407. However, MDL judges outsource to a wide range of other parties, including mediators who mostly are private neutrals. *See* Elizabeth Cham-

these contexts are mentioned, this article's primary focus is on cross-judge delegation of negotiation oversight absent an act of Congress, with many examples drawn from cases in which Article III judges are the mediators.

Third, the distinction between the terms mediation and settlement conferences can be slippery when used in federal courts. I use the term "mediating judge" expansively to include both, even though a traditional settlement conference may be quite different from the more wide-ranging activities associated with mediation.

The analysis proceeds as follows. After documenting the role of mediating judges in today's federal courts, Part I considers both reform narratives and power narratives explaining their use. To add context and specificity, Part I presents case studies based on original research. While these examples have unusual features, they illustrate the breadth of potential mediating judge activities and offer more of a citable record than can be found for other cases. The first involves the largest municipal bankruptcy in American history.[10] The second starts with the bankruptcy of a founder of a nationwide assisted living facility enterprise, who also solicited retirees to make "can't miss" financial investments.[11] Part I expressly disaggregates the cases' routine and exceptional elements. Finally, Part I highlights the separation-of-powers considerations that the case studies invite. It also shows how the Supreme Court's vague guidance on separation of powers yields conflicting messages about how mediating judges should go about their business.

Part II considers the impact of prominent judicial accountability measures on mediating judge practices.[12] The discussion illustrates why these systems do not operate effectively with respect to mediating judge practices. One of the biggest reasons is founda-

blee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2154, 2159 (2020).

10. *See infra* Part I(D). *See generally* Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 Yale J. Reg. 55, 55–108 (2016).

11. *See infra* Part I(D).

12. This discussion excludes impeachment as too far afield and already the subject of considerable high-profile scholarship. The mechanisms reviewed in Part II are somewhat different in composition and scope than those featured in other scholarship. *See, e.g.*, CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY (2016); Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 558–64 (2012) (reviewing appeals, mandamus and habeas corpus); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 52–60, 85–86 (1995) (identifying precedent, limiting jurisdiction to case or controversy, appellate review, juries, impeachment, prosecution for criminal law violations, informal discipline, and judicial misconduct laws).

tional to the mediation task: lack of a record of what transpired in behind-the-scenes negotiations. Another reason is an unduly restrictive definition of what constitutes extrajudicial activity.

Part III prescribes an agenda to preserve the virtues of the mediating judge model while managing the risks. It directs the work to institutions that make rules and policy for the federal judiciary, particularly within the powerful Judicial Conference of the United States. In addition to targeted queries arising from the research this article reflects, the agenda should address big questions, including the application of separation-of-powers principles and whether judges act in a judicial capacity when they mediate.

I.
THE FUNDAMENTALS

A. Mediation's meaning

Judges often use the term "mediator" when delegating negotiation oversight to a colleague. Do they mean what mediation theorists mean by the term? Likely not. Then again, even private neutrals have strayed from the original concept.[13]

Scholarship on mediation offers an idealized model that highlights process values and party autonomy.[14] While time, place, and methods can be molded for the situation, alternative dispute resolution (ADR) theorists expect that "[e]ach party can walk out at any time without any explanation or reason and without any sanction being levied, in contrast to the obligatory nature of the legal process, which does not allow unilateral departure."[15] In addition to promoting free exchange in negotiation, mediators are not supposed to threaten to report a lack of progress to a presiding judge due to coercion concerns.[16] Facilitative mediation generally is premised on the belief that the parties will generate better solutions

13. *See* Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. DISP. RESOL. 123 (2016); Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. DISP. RESOL. 373, 374–76 (2018); Charles Bultena, Charles Ramser & Kristopher Tilker, *Mediation Madness V: Misfit Mediators*, 11 S. J. BUS. & ETHICS 53 (2019).

14. Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L.J. 467, 470 (2011).

15. *Id.* at 469–70 (party control and voluntariness as hallmarks).

16. Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 273 (2005).

than the neutral mediator.[17] The facilitative mediator enables a principally party-driven process.[18] Evaluative mediation is a contested category among those who worry its proactivity is inconsistent with basic mediation premises.[19] Nonetheless, the mediator's assessment of the strengths and weaknesses of the parties' claims is ostensibly grounded in party autonomy.[20]

Federal courts do not necessarily contemplate a powerless mediator model when they order parties to mediate with any type of mediator (whether or not parties have requested the court to order mediation). Local rules of procedure routinely authorize mediators to control the time, location, and duration of mediation and instruct parties to attend until released by the mediator. Some commentators find the mere act of requiring that parties mediate inconsistent with mediation theory.[21] In addition, whereas mediation literature traditionally reflects warm themes—reconciliation, community building, flexibility—courts often pursue a cool theme, efficiency, in judicial administration.[22]

The American Bar Association and the American Arbitration Association have promulgated model standards for mediation, but it is not obvious that mediating federal judges consider this a key resource by which to abide. The Model Standards define mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[23] Here again, party autonomy is a key theme: parties determine the procedures, the duration of mediation sessions, and the substance of any settlements.[24] The Model Standards' constraints on matters such as confidentiality tend to be directed toward the mediator.[25]

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17. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTS. TO HIGH COST LITIG. 9 (1994).

18. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 73 (2006).

19. *See* Love & Waldman, *supra* note 13, at 138.

20. Hedeen, *supra* note 16, at 274 ("The centrality of self-determination in the mediation community cannot be overstated.").

21. *Id.* at 278–79 (discussing whether mandatory mediation is an oxymoron).

22. Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 257 (1986).

23. American Arbitration Association, American Bar Association & Association for Conflict Resolution, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) [hereinafter "MODEL STANDARDS"].

24. *See* Hedeen, *supra* note 16, at 274; Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. DISP. RES. 363, 381, 401 (2011).

25. MODEL STANDARDS, at Standard V.

B. The empirical claim

The federal judiciary does not publish statistics about mediating judges.[26] Given the examples and footnotes that follow, it should not be considered controversial to say that it has become common for presiding judges to select other judges to "mediate" in their cases.

Article III judges are among the many who serve as mediating judges in a variety of cases.[27] Magistrate judges regularly serve as mediating judges at the request of district judges and each other.[28] The mediating judge model is popular in bankruptcy courts too: more than a decade ago, 82% of bankruptcy judges reported that

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26. Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 986 (2016). *But see* Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *The Shadow Judiciary*, 39 REV. LITIG. 303, 353, tbl.10 (2020) (reporting the category of non-case ending magistrate judge activity from United States courts).

27. *See, e.g.*, Order for Mediation, Grigoryants v. Safety-Kleen Corp., No. 11-267 (W.D. Pa. Dec. 20, 2013) (appointing District Judge Hornak); Order on Motions to Enter Alternative Dispute Resolution, *In re* River City Towing Servs., Inc., No. 04-291-C-1 (M.D. La. July 19, 2005) (appointing District Judge Brady); Order, Lowe v. Moskal Gross Orchosky Inc., No. 1:09-CV-1890 (N.D. Ohio Feb. 26, 2010) (appointing District Judge Polster); Order, Vincze v. Robinson, No. 2:02-CV-01719-LKK-KJM (E.D. Cal. Mar. 10, 2010) (appointing District Judge England); *see also* Andrew Marshall, *Microsoft Faces Prospect of Death by Lawyer*, INDEP. (London), Apr. 3, 2000, at 15 (in antitrust case, district court ordering parties to mediation with Seventh Circuit Judge Posner, who withdrew after finding party differences "too deep-seated to be bridged"); Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from* Microsoft *and Other Megacases*, 86 B.U. L. REV. 1171, 1181 (2006) (Judge Posner served as mediating judge for 4 months); Steven J. Miller, *Judicial Mediation: Two Judges' Philosophies*, 38 LITIG. 31, 38 (2012) (quoting district Judge Polster: "I have frequently mediated cases for my colleagues"); David A. Katz, *Mediation – A Judge's Views on Judicially Monitored Settlement Conferences*, 35 LITIG. 3 (2009) (district judge explaining reasons for involvement in settlement, including as mediating judge, and how he addresses ethical issues).

28. *See, e.g.*, Robert J. Niemic, *Mediation in Bankruptcy – Results of FJC Survey*, 18 AM. BANKR. INST. J. 1, 31 (1999) (identifying as a possibility and presenting potential pitfalls); Judge Judith Gail Dein, *Wearing Two Hats: Being a Mediator and a Trial Judge*, BOS. B.J. (Dec. 19, 2012), https://bostonbarjournal.com/2012/12/19/wearing-two-hats-being-a-mediator-and-a-trial-judge/ [https://perma.cc/52J3-E393] (magistrate judge identifying benefits of mediating judges); Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L. REV. 73, 98 (2017); Karen K. Klein, *A Judicial Mediator's Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice*, 81 N.D. L. REV. 771, 771 (2005) (has conducted mediations in hundreds of civil cases); Welsh, *supra* note 26, at 984; Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 745 (1994); Order on Motion for Sanctions, Sherwin v. Infinity Auto Insurance Co., No. 2:11-cv-00043-MMD-GWF (D. Nev. March 19, 2013) (one presiding magistrate judge appointing another magistrate judge as a mediating judge).

their courts had used non-presiding judges for settlement or mediation.[29]

Some cases featuring mediating judges have distinctive features: national forests and environmental groups,[30] civil war in Papua New Guinea,[31] voting rights and redistricting,[32] and the Commonwealth of Puerto Rico's debt crisis.[33] Federal judges also have mediated criminal plea bargaining, a controversial practice.[34]

Mediation assignments in bankruptcy cases likewise reflect sensitive topics. Examples include sexual abuse claims in Catholic diocese cases,[35] disputes in the Purdue Pharma bankruptcy between

29. Ralph Peeples, *The Uses of Mediation in Chapter 11 Cases*, 17 A.B.I. L. REV. 401, 419 (2009); *see also* Niemic, *supra* note 28, at 1, 30–31 (bankruptcy judges ordered mediation sua sponte in a quarter of matters sent to mediation).

30. *See, e.g.*, Order Referring Case to Mediation, Alaska v. Village of Kake, No. 09-cv-00023-JWS (9th Cir. Dec. 13, 2012).

31. *See, e.g.*, Sarei v. Rio Tinto, PLC, 625 F.3d 561 (9th Cir. 2010) (Judge Leavy appointed to explore the possibility of mediation); Claudia L. Bernard, *Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal*, 17 DISP. RESOL. MAG. 16 (2011).

32. *See, e.g.*, Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO ST. J. ON DISP. RESOL. 325 (2012); Miya Shay, *Harris County, Plaintiffs at Mediation over Redistricting Map Lawsuit* (Nov. 14, 2011, 4:57 PM), https://abc13.com/archive/8431056/ [https://perma.cc/PU5L-PPB6]; *Talks on Redistricting Held*, AUGUSTA CHRON., Mar. 11, 1997.

33. *See, e.g.*, Order Appointing Mediation Team, *In re* Fin. Oversight and Mgmt. Bd. for P.R., No. 17-3283 (D.P.R. June 23, 2017), Dkt. No. 430 (five mediating judges—two bankruptcy judges and three Article III judges—from outside Puerto Rico); *Puerto Rico Governor Meets with Fiscal Board in Texas to Discuss Debt Mediation*, CARIBBEAN BUSINESS (Aug. 21, 2017), https://caribbeanbusiness.com/puerto-rico-governor-meets-with-fiscal-board-in-texas-to-discuss-debt-mediation/ [https://perma.cc/6JMG-ZD23].

34. *See, e.g.*, Order, United States v. Lee, No. 1:99-cr-01417 (D.N.M. Dec. 10, 1999) (Judge Leavy selected by defense counsel and DOJ to mediate). The Advisory Committee on the Federal Rules of Criminal Procedure rejected a proposal to expressly permit mediating judges in plea discussions due to the potential for a "coercive effect on defendants, who will be reluctant to reject plea concessions endorsed (or even suggested) by *any* judge." Memorandum from Professors Sara Sun Beale & Nancy King to Criminal Rules Advisory Committee, Re: Background for Sept. 9, 2014 Conference Call at 19 (Aug. 27, 2014) (citing concerns that "counsel and defendants will be needlessly and inappropriately pressured when settlement conferences do not initially result in a plea agreement"); *see also* John Paul Ryan & James J. Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 L. & SOC'Y REV. 479, 482 (1979) (judicial involvement "may induce the defendant to plead guilty even if he is innocent").

35. *See, e.g.*, Rose Krebs, *Retired Del. Bankruptcy Judge to Join Richards Layton*, LAW360 (Mar. 13, 2020), https://www.law360.com/articles/1253058/retired-del-bankruptcy-judge-to-join-richards-layton [http://perma.cc/AT7C-FCMP] (judge appointed as mediator in "emotionally, politically and financially charged bankruptcy dispute" involving sexual abuse allegations); Kevin Parrish, *Diocese Bank-*

the Sackler family and state attorneys general regarding responsibility for the opioid crisis,[36] and allegations of undisclosed conflicts of interest by high-profile restructuring professionals.[37] Sitting judges have mediated in most large municipal bankruptcies, cases that inherently carry political and social ramifications. Presiding judges delegated to mediating judges in the bankruptcies of Stockton,[38] San Bernardino,[39] the Town of Mammoth Lakes,[40] and the City of Detroit, to provide a few prime examples. These cases did not use the term "mediator" in a consistent way; some exercised considerably more authority than others.[41] Nonetheless, courts seem to find

ruptcy Case Mediator Named, THE REC. (Stockton), Feb. 8, 2014 (Judge Zive appointed as mediating judge in Stockton diocese bankruptcy); Tom Corrigan, *Diocese of Duluth, Abuse Victims to Enter Mediation in July*, WALL ST. J. (May 26, 2016), https://www.wsj.com/articles/BL-BANKB-22022 [https://perma.cc/93EF-L2W3] (Judge Zive appointed as mediating judge in Duluth diocese bankruptcy).

36. *See, e.g.*, Order Appointing the Hon. Shelley C. Chapman as Mediator, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. May 7, 2021), Dkt. No. 2820; Order Establishing the Terms and Conditions of Mediation Before the Hon. Shelley C. Chapman at 3, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. May 18, 2021), Dkt. No. 2879.

37. *See, e.g.*, Tom Corrigan, *Bankruptcy Judges Send Jay Alix, McKinsey to Mediation*, WALL ST. J. PRO, Jan. 15, 2019 (presiding judges in separate districts jointly sent parties to a mediating judge); Gretchen Morgenson & Tom Corrigan, *McKinsey Broke the Rules, Now It Wants to Rewrite Them*, WALL ST. J., Apr. 11, 2019; Mediator's Notice to Court, *In re* Westmoreland Coal Co., No. 18-35672, (Bankr. S.D. Tex. Feb. 19, 2019), Dkt. No. 1406.

38. *See, e.g.*, Order Appointing Mediator and Setting Mediation Conference, *In re* City of Stockton, No. 12-32118-C-9 (Bankr. E.D. Cal. July 11, 2012), Dkt. No. 384.

39. *See, e.g.*, Order Appointing the Hon. Gregg W. Zive as Mediator, *In re* City of San Bernardino, No. 6: 12-bk-28006 MJ (Bankr. C.D. Cal. Aug. 12, 2013), Dkt. No. 742; Stipulation to Submit to Nonbinding Mediation Between City of San Bernardino and SBCPF, *In re* City of San Bernardino, No. 6: 12-bk-28006 MJ (Bankr. C.D. Cal. Nov. 21, 2012), Dkt. No. 220; Tim Reid, *Bankrupt U.S. City to Dispute Debt with California Pension Fund*, REUTERS, Nov. 25, 2013, https://www.reuters.com/article/us-usa-municiplality-bernardino/bankrupt-u-s-city-to-dispute-debt-with-california-pension-fund-idUSBRE9AO0CO20131125 [https://perma.cc/DWG6-MWZF]; Opinion at 6, San Bernardino City Prof. Firefighters Local 891 v. City of San Bernardino, No. 5:14-cv-02073-ODW (C.D. Cal. May 7, 2015), Dkt. No. 47.

40. *See, e.g.*, Order Appointing Mediator and Setting Mediation Conference, *In re* Town of Mammoth Lakes, No. 12-32463-B-9 (Bankr. E.D. Cal. July 17, 2012), Dkt. No. 98.

41. In Stockton, the court deferred to the parties on issues to be mediated and preserved the parties' power to select a mediator. The Mammoth Lakes mediation order reserved the parties' right to select private mediators. In San Bernardino, the parties affirmatively requested mediation, identified their preferred mediator, and submitted the issues they wished to be mediated. *See supra* notes 38–40. As Part I(D) will detail, the City of Detroit mediation took a different approach.

municipal bankruptcy cases to be a welcome context for a mediating judge.[42]

Whatever the readers' views on the virtues and costs of mediating judges at this point, it is a practice sufficiently pervasive to warrant closer examination.

C. The puzzle

The popularity of mediating judges in federal courts presents a puzzle. Assuming that trained private neutrals are ready, willing, and able to serve in court-annexed alternative dispute resolution, why would a presiding judge instead delegate to a mediating judge sua sponte or strongly encourage the parties to prefer a judge to a private neutral? What drives lawyers to request a mediating judge rather than a private neutral?

1. The reform narrative

One way to think about the mediating judge phenomenon is as a reform measure. It could be a response to a range of perceived problems.

a. Avoiding too much information (for presiding judges)

Existing scholarship has fleshed out the incentives for judges to actively manage cases.[43] Among the well-known byproducts is the use of a pretrial conference with the presiding judge for settlement purposes.[44] Settlement conferences with presiding judges run the risk of coercion.[45] To the extent a settlement conference is not lim-

42. Federal Judicial Center, *Navigating Chapter 9 of the Bankruptcy Code*, 48–49 (2017).

43. *See, e.g.*, Resnik, *supra* note 2, at 378; Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986) (commenting on judges' "forthright and ardent embrace of active participation in settlement negotiations"). To compare case management in district courts and bankruptcy courts, see generally Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571 (2015). For an important recent contribution on the virtues of actually litigating cases, see ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (arguing that litigation promotes democracy through enforcing legal rights, information disclosure, and participation in self-government).

44. FED. R. CIV. P. 16.

45. *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2085–86 (1993); Hon. Michael M. Baylson, *Are Civil Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic and Cultural Imperative: A Response to Judge Higginbotham and Judge Hornby*, at 7 (2010), https://www.uscourts.gov/sites/default/files/judge_baylson_are_civil_jury_trials_going_the_way_of_the_dodo.pdf [https://perma.cc/6J4K-7836] (examples of aggressive settlement promotion);

ited to information already on the record, a judge exposed to informal discussions cannot readily discard that information when later asked to preside over a trial.[46]

> Bifurcation of roles is somewhat responsive to this conflict: the presiding judge handles adjudicative responsibilities and designates someone else to oversee settlement negotiations.[47] Indeed, academics concerned about the excesses of case management suggested bifurcation.[48]

b. Evaluative capacity

As suggested earlier, giving private neutrals an evaluative role is contested among alternative dispute resolution experts. Yet, parties and lawyers may want some evaluation of their legal arguments and may think it especially useful to get that evaluation from someone in the business of ruling on legal disputes. A mediating judge there-

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Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 302–03 (2011); *see also* Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (vacating district judge's imposition of penalty, stating "pressure tactics to coerce settlement simply are not permissible").

46. *See, e.g.*, James Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11; Daisy Hurst Floyd, *Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 62 (1994); Hedeen, *supra* note 16, at 280; Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113 (2009).

47. *See* Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ARB. & MEDIATION 111 (2013) (meta-analysis of scholarly writings about mediation by sitting and retired state and federal judges, including the lateral hand-off of settlement responsibilities); Welsh, *supra* note 26, at 986 (role of magistrate judges in settlement); Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879, 900–01(2015) (taxonomy of judicial roles related to conflict resolution includes short section on separate settlement judges); Wissler, *supra* note 45, at 302–03 (discussing settlement efforts by both presiding and non-presiding judges).

48. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 643 (2005) (proposing "national rules should prohibit the judge assigned to try a case from participating in the negotiations about its disposition"); Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003) (documenting shift to bifurcated model); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2029 (1997) (splitting settlement and adjudication roles would address some critiques of active presiding judge oversight such as in Agent Orange); Peterson, *supra* note 12, at 81 (litigators are more comfortable with judicial settlement oversight by a non-presiding judge); Deason, *supra* note 28, at 75, 139 (bifurcation as a solution to coercion and partiality problems).

fore may offer a credible and valuable reality check to clients with unrealistic expectations about a trial. Due to their experience evaluating debt restructuring plans, bankruptcy judges are thought to be especially valuable as mediators of multilateral disputes in that context.[49] Relatedly, bifurcation of presiding and negotiation oversight may foster a sense among parties that a real (and neutral) judge has looked at their case closely.[50]

c. Access to justice

If a presiding judge believes she should not oversee in-depth negotiations and orders parties to mediate, the identity of the mediator will affect how much the parties will pay. When a judge mediates, the public, not the parties, pays for the mediator's time. Given that private neutrals typically expect payment for their services, mediating judges can therefore be seen as an access-to-justice measure.[51] While pro bono mediation programs and staff mediators exist, they are not prominent in federal trial courts.[52] Court-or-

49. *See* AMERICAN BANKRUPTCY INSTITUTE, THE ABI GUIDE TO BANKRUPTCY MEDIATION, at Chapter IV *16 (2d ed. 2009); Edward L. Schnitzer, *Bankruptcy Mediation*, 28 J. BANKR. L. & PRAC. 6 (2019).

50. *See* Miller, *supra* note 27, at 33 (quoting Judge Polster: "there is something about wearing the robe that creates an aura of credibility. . . . It's a profound experience for people . . . to sit in a room talking with a federal judge one-on-one and to know that the judge is spending all this time just on their case."); Brunet, *supra* note 48, at 237 ("Institutional respect for judges helps to make judicial mediation effective. Parties may respect an individual judge for reasons unrelated to an independent judiciary – namely, positive prior interactions or a general positive personal reputation."); *id.* at 239 ("Parties naturally respect judges, whether they are judging, sentencing, or mediating."); Louis Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 365–66 (2006) (discussing the "perception of the judicial office as one of impartiality, which confers on judges a degree of moral authority," knowledge of the law, and a commitment to dispensing justice).

51. For concerns about outsourcing to paid private actors in the MDL context, see Burch & Williams, *supra* note 9, at 2187, 2214 (discussing lack of transparency about non-magistrate mediator compensation). *See also In re* Atlantic Pipe Corp., 304 F.3d 135, 145–47 (1st Cir. 2002) (district judge abused discretion by failing "to set reasonable limits on the duration of the mediation;" cost "should not be left to the mediator's whim;" "[a] court intent on ordering non-consensual mediation should take other precautions as well").

52. *See* Anne M. Burr, *Building Reform from the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation*, 12 OHIO ST. J. ON DISPUTE RES. 311, 346 (1997); Hon. Alan S. Trust, *Is My Neutral Neutral?*, 34 AM. BANKR. INST. J. 28, 28 n.5 (2015) (discussing E.D.N.Y. bankruptcy court pro bono mediation program); Welsh, *supra* note 26, at 1016 (pro bono mediation programs in federal districts are not the majority); Schnitzer, *supra* note 49 (discussing two districts that require registered mediators to do small amounts of pro bono mediation in order to get

dered mediation with private neutrals can therefore generate distributional consequences when one or more parties have limited resources, especially if others in the same case are blessed with deep pockets.[53] This is especially pertinent in bankruptcy cases, given that typically at least one party has severe financial difficulties.[54]

I should not overstate the cost argument. Even if a presiding judge orders mediation with a sitting judge, parties still pay the mediator's expenses,[55] as well as their lawyers for the time spent on the mediation.[56] In addition, it does not feel right to characterize the time and efforts of mediating judges as "free." Federal judge time is a precious commodity; when they are working on other judges' cases, they are necessarily deferring or discarding other activities. Some might find this loss acceptable in the name of access to affordable resolution services, while others might prefer options such as staff mediators and expanded pro bono programs.

d. Diversity, equity, and inclusion considerations

A growing body of evidence suggests that demographic diversity generates better solutions to problems and enhances legitimacy.[57] Existing data on private neutrals used in complex litigation

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paid mediation work). ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS FEDERAL JUDICIAL CENTER 13 (2d ed. 2006) (use of retired judges as in-house appellate mediators).

53. *See generally* Brunet, *supra* note 48 (sua sponte appointments); Coben & Thompson, *supra* note 18, at 105 ("Courts are inclined to order mediation on their own initiative."); ROBERT J. NIEMIC, DONNA STIENSTRA & RANDALL E. RAVITZ, FED. JUD. CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 70 (2001) (if parties are going to pay, they want to pick).

54. *See, e.g.*, Tresas Baldas, *Detroit Mediator Pick Viewed as Ideal Negotiator*, DETROIT FREE PRESS (Aug 15, 2013), https://www.usatoday.com/story/news/nation/2013/08/14/judge-picked-as-detroit-mediator-viewed-as-ideal-negotiator/2658099/ [https://perma.cc/VLQ3-NJTL] ("He's free — unlike private mediators.").

55. *See* Welsh, *supra* note 26, at 999 (magistrate judge said that "parties would benefit more from the services of magistrate judges than private mediators who would charge for their services and thus were likely to increase the parties' costs").

56. *In re* Smith, 524 B.R. 689, 704 (Bankr. S.D. Tex. 2015) (cost of lawyer time to participate in potentially unnecessary mediation); *id.* at 703 ("Mediation is not free. The parties must pay . . . their respective counsel for participating in the mediation.").

57. *See, e.g.*, Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 PROC. OF THE NAT'L ACAD. OF SCI. 18524 (2014); Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POLS. 90, 90–101 (2010). For more background, see Brooke Coleman, *A Legal Fempire? Women in Complex Civil Litigation*, 93 IND. L.J. 617, 617 (2018); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715 (2018).

suggest less diversity than on the federal bench.[58] It therefore is possible that the shift to mediating judges has diversity, equity, and inclusion (DEI) benefits.

Without the federal judiciary keeping statistics on mediation, we do not know how the demography of *mediating* judges compares to the judiciary overall. In addition, at least until there is greater heterogeneity on the federal bench, there is a risk of unduly burdening the fraction of judges who are not white men with more uncompensated labor. Thus, while it is premature to say that DEI considerations help explain preferences for mediating judges, it is a possible consideration.

2. The power narrative

The reform narrative, standing alone, does not consider the inherent authority of a sitting judge, no matter the nature of the activity or the intentions of the judicial actor. This section turns to the dynamics that arise when judges oversee negotiations in other judges' cases.

a. Resituating the role of consent and party autonomy

The American adversarial system is built on the premise of party autonomy constraining judicial power.[59] Mediation, in theory, is based even more heavily on party autonomy. Yet, few who en-

58. White men are significantly overrepresented in life-tenured federal judge positions relative to the general population. *See The Importance of a Diverse Federal Judiciary: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021) (written testimony of Professor Maya Sen, comparing data from Federal Judicial Center to Census data). Yet, they appear to be overrepresented even more in alternative dispute resolution. *See* NEW YORK BAR ASSOCIATION, IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND IN ADR (2017); James Jenkins, *Arbitrators and Mediators Should Reflect Society's Diversity*, LAW360, Jan. 16, 2019, at 1; Reynolds, *supra* note 47 (reporting on judges' articles that have identified an expanding range of voices in the dispute resolution process as an advantage of court-connected mediation). *But see* Stephen B. Goldberg, Margaret L. Shaw & Jeanne M. Brett, *What Difference Does a Robe Make? Comparing Mediators with and Without Prior Judicial Experience*, 25 NEGOT. J. 277, 279 (2009) (in a study of private mediation, with a large composition of *retired* judges, finding roughly analogous gender breakdown to the contemporaneous federal judiciary). Data on AAA arbitrators (who may not also be certified as mediators) indicates that they are overwhelmingly straight white men. AM. ASS'N FOR JUST., WHERE WHITE MEN RULE: HOW THE SECRETIVE SYSTEM OF FORCED ARBITRATION HURTS WOMEN AND MINORITIES 2–3 (2021).

59. Marian Neef & Stuart Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L. F. 123, 155 (1974) (adversarial system respects individual autonomy by granting the individual control over the "basic mode of his participation in the adjudicatory process").

counter the legal system are unaware that federal judges have special authority. To the extent that a mediation's success is measured by whether and how quickly a settlement is reached, that may be a byproduct of this authority rather than mediation per se. If a judge proposes a mediating judge sua sponte, or strongly encourages it (by mentioning multiple times that "one of my colleagues down the hall is available"), lawyers and parties may feel less than free to object, particularly if the issue arises early in a case or if they are likely to see either judge in future cases. Even when presiding judges give parties and their lawyers an opportunity to respond to a proposed mediating judge, consent may be impaired if parties believe one or both judges will be offended or disappointed by their replies.[60] In other words, although a bifurcated model was thought to have the potential to promote party autonomy within the settlement process, judges as mediators run the risk of *increasing* pressure to reach a resolution without trial.[61]

Lawyers and parties sometimes request both mediation and a sitting judge to be the mediator. Perhaps they perceive opposing parties as being unreasonable and hope that a judge will help them see the light. Perhaps they see a mediator as bolstering leverage for a particular party or position that otherwise is lacking. The implicit power of judges may be at play when a presiding judge appoints a mediating judge after negotiations overseen by private neutrals have stalled. The evaluative capacity of a sitting judge might be part of the explanation, but there also could be a sense that someone

60. Jacoby, *supra* note 10, at 57–58 (explaining the difficulty of evaluating the quality of the party consent to soft judicial power).

61. Reynolds, *supra* note 47, at 126 (recognizing the theme of "efficiency-centric" articles in judicial writing on mediation, resulting in "thinning vision of [party] self-determination"); *id.* at 132 (finding, even in personal-narrative-driven articles, an association of judicial identity with facilitating settlement, which outweighs other dispute resolution values); Hedeen, *supra* note 16, at 277 (pressure to settle in court-annexed mediation); Peeples, *supra* note 29, at 401–02 ("Settlement mediation need not, but often does, have a more coercive flavor . . . . [P]arties mediate because they have been ordered to do so, usually by a court."); *id.* at 419–20 (sitting judge involvement "seems to up the stakes for the parties. There may be new risks for being reluctant to settle"); Brunet, *supra* note 48, at 234 ("muscle mediation" is when a judge "presents a rough case evaluation to the parties, and seeks to extract settlement offers that mirror the judge's analytical perception of the dispute"); *id.* at 248 ("The judge who evaluates a case, whether or not assigned to her, is often an arm-twister by nature."); *id.* at 251 ("A national survey of trial judges revealed that over two-thirds thought their intervention in the settlement process was subtle. . . ."). *See generally* Terry A. Maroney, *Judicial Temperament Explained*, 105 JUDICATURE 48 (2021) (analyzing human temperament on axes of emotional reactivity and self-regulation, and inability "to fundamentally reorient or transcend them").

with more power and authority can close a deal that private neutrals could not.[62] For example, the Purdue Pharma bankruptcy was meant to preclude diffuse and protracted opioid crisis litigation. The debtor's lawyer endorsed the presiding judge's offer to appoint a fellow judge as the mediator after some of the toughest matters, involving protection of the Sackler family from state court lawsuits, remained unresolved after mediation with private neutrals. In some cases, perhaps lawyers are trying to give their own clients a reality check, hoping that someone who owns a robe and holds stature in society can convey what they could not.[63] The potential divergence of motives and interests between lawyer and client might raise professional responsibility issues outside of the scope of this article.[64]

In the Detroit case study that lies ahead, the mediating judge sought to resolve the fractious bankruptcy case by raising money for a global settlement from foundations, governments, and private parties. When the head of a foundation, among the first solicited for funds, quipped to a reporter that "I was always scared to death of those guys,"[65] referring to federal judges, she might have been joking, but likely not entirely.

b. Use of formal judicial powers when not the presiding judge

The prior subsection referred to implicit power and authority. Sitting judges have many formal powers. Can they use them even if they are not presiding over a case? A common example is signing and entering orders on the docket that control aspects of media-

62. In addition, some believe that judges, on the whole, are less patient mediators, perhaps expecting that parties will come around more readily because of their status. BRYAN CLARK, LAWYERS AND MEDIATION 132 (2012) (mediating judges "tend to cut to the quick in mediation compared to others" and spend less time in mediation); Brunet, *supra* note 48, at 238 ("Paid by salary and mediating from a set of institutional pressures rather than a profit motive, judges naturally can devote less time to mediation than private mediators."); Harold Baer, Jr., *Mediation-Now Is the Time*, 21 LITIG. 5, 6 (1995) ("sitting judges are often poor mediators" because they are busy and lack patience); Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 856–61 (2013) (identifying and responding to judges' concern that they do not have time for live Rule 16 conferences even in their own cases).

63. Miller, *supra* note 27, at 34 (Judge Dan Polster: "I get requests from attorneys saying they have a difficult client and need some help in getting them to see what's at stake and what the risks are. One side contacts me for a settlement conference but doesn't want it to become known that they had requested it. I'm open to that.").

64. *See generally* Michael Moffitt, *Settlement Malpractice*, 86 U. CHI. L. REV. 1825 (2019).

65. NATHAN BOMEY, DETROIT RESURRECTED: TO BANKRUPTCY AND BACK 137 (2016) (quoting Mariam Noland).

tion sessions.[66] A less well-documented, but more concerning, example is fear that the mediating judge will threaten or impose sanctions for reluctance to settle.[67] A third example involves a mediating judge granted power by stipulation to preside over disputes with no possibility of appeal.[68] Using judicial powers as a non-presiding judge generates a confusing mixture of roles.

c. Information leakiness as a source of (unintentional) leverage

Private neutrals operating under official mediation standards, such as those described earlier, are themselves bound to confidentiality.[69] Federal judges typically are not. Parties and lawyers might reasonably worry about the extent to which a mediating judge and presiding judge talk amongst themselves about the case and the behavior of lawyers and parties.[70] If judges are colleagues in the same district and known to trade off mediating responsibilities (as well as to get together for a meal a few times a week), lawyers might be even more likely to suspect dialogue between the judges absent explicit efforts to manage that impression.[71] Some judges explicitly endorse private dialogue, including about substantive matters, to move along the cases.[72] Lawyers and parties likely suspect it hap-

66. *See, e.g.*, AMERICAN BANKRUPTCY INSTITUTE, *supra* note 49, at Chapter VI *34 (discussing as a benefit that sitting judges can issue orders in aid of mediation).

67. *See infra* Part I(D).

68. *See id.*

69. MODEL STANDARDS, at Standard V.

70. Wissler, *supra* note 45, at 286–87 (lawyers felt more confident in private mediators' assurances of confidentiality than in mediating judges'); Burch & Williams, *supra* note 9, at 2159 (discussing leverage-related concerns about back-channel judge-mediator communications, regardless of the identity of the mediator).

71. For example, in the debt restructuring case of the Commonwealth of Puerto Rico, the presiding judge and lead judicial mediator committed to communicating through appearances in open court and public docket entries. *See, e.g.*, Order Appointing Mediation Team at 3, *In re* Fin. Oversight and Mgmt. Bd. for Puerto Rico, No. 17-3283 (D.P.R. June 23, 2017) (no information sharing between judges about party positions or substance of mediation); Notice of Submission of Written Remarks, *In re* Fin. Oversight and Mgmt. Bd. for Puerto Rico, No. 17-3283 (D.P.R. Nov. 15, 2017) (Judge Houser submitting written remarks on the docket); Notice of Breach of Mediation Confidentiality at 2, *In re* Fin. Oversight and Mgmt. Bd. for Puerto Rico, No. 17-3283 (D.P.R. Nov. 20, 2017) (Judge Houser: "imperative . . . that the mediation process proceed on an entirely separate track from the litigation").

72. *See infra* Part I(D)(2). This dynamic may occur in cases even if the mediator is not a sitting judge. *See, e.g.*, Order Establishing Mediation Protocol at 6, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. Mar. 18, 2022), Dkt. No. 1780 ("The Co-Mediators are permitted, at their discretion, to speak ex parte with the Court . . . [a]bout the Mediation Issues.").

pens even when judges do not expressly signal willingness to engage in back-channel communication.[73] Lawyers may not want to exit even those mediations they perceive as futile, worried the presiding judge will learn who walked out first.

The same standards that discourage certified private neutrals from talking to a presiding judge ex parte also apply to talking to the public or the press about the case. As illustrated below, some judges may not feel so constrained. Perhaps it is not formal power, but rather a perceived exemption from the rules and norms of private neutral alternative dispute resolution, that shifts the dynamics.

D. Case studies

The following examples demonstrate a range of acts that mediating judges might take in multi-party cases where a global nonlitigated resolution is perceived as particularly desirable. The mediating judges were outspoken about their methods, creating more of a citable record than is typically available. The mediating judges were life tenured and have since retired from the bench to engage in private ADR practice. The case studies draw on primary sources to the maximum extent, drawn particularly from court dockets. I do not claim these cases are representative or randomly selected. They were selected for their rich array of examples and access to information. Although these examples involve bankruptcy, the activities could be used in a wide array of multi-party federal litigation.

1. City of Detroit

a. Backstory

The City of Detroit bankruptcy has received no shortage of attention. This discussion focuses on the mediation overseen by Chief District Judge Gerald Rosen of the Eastern District of Michigan. The City of Detroit's bankruptcy filing in July 2013 was large and contentious, with no obvious path to a successful reorganization at the outset.[74] Complicating the landscape were wildly disparate creditors with complicated and contested legal rights, including public pensioners, a paucity of essential services for residents, and a distrust among residents of a bankruptcy initiated by Governor Rick

73. Lawyers have reported "deep concerns" about being forthcoming with mediating judges. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

74. *See* Jacoby, *supra* note 10, at 56.

Snyder and his hand-selected Emergency Manager, Kevyn Orr, who displaced local elected officials for many key purposes.

b. Perception of litigation and the master mediation order

Both the presiding judge and the mediating judge recognized that many of Detroit's legal disputes were uncharted waters. Yet, both also believed that the city and its residents could not handle prolonged litigation.[75] Accordingly, the ink on Detroit's bankruptcy petition was barely dry when the presiding judge, the Honorable Steven Rhodes, announced he intended to select Chief Judge Rosen to whip this case into shape behind the scenes as a mediator.[76]

The master mediation order delegated broad authority to the mediating judge, including the power to appoint additional mediators, to "enter any order necessary for the facilitation of mediation proceedings," and to "direct the parties to engage in facilitative mediation on substantive, process and discovery issues."[77] The substantive scope of the mediation was vast. The first order referring matters to mediation encompassed dozens, if not hundreds, of legal questions regarding the treatment of creditors' claims and the renegotiation of collective bargaining agreements.[78] Subsequent orders referenced mediating a dispute over terminating an interest-rate-swap contract, matters pending with twenty unions, the creation of a regional water authority (this time, at the request of an outlying county), and the City's residential water shutoff policy.[79] Hundreds of constitutional and state law tort actions were also directed to arbitration under Chief Judge Rosen's umbrella.[80] Even after the City's restructuring plan was approved, mediation contin-

75. Brookings Institute, *The Muni Market in the Post-Detroit and Post-Puerto Rico Era: Panel Discussion*, YouTube (July 15, 2016), https://www.youtube.com/watch?v=6wLUxzf8sdA [https://perma.cc/M7XX-XFVJ] (Rosen: "we could've had scorched earth litigation for a decade with the many cert. worthy, cert. worthy for those who aren't lawyers, issues that could've gone up to the Supreme Court, but there would have been nothing left of Detroit but dust. And who would have profited from that?").

76. Unlike in *Harder*, discussed later, the City of Detroit had not asked the court to appoint a mediator. If parties had objections to the identity of the mediator, they were to be delivered to chambers in sealed envelopes. Jacoby, *supra* note 10, at 82 (quoting primary sources).

77. Mediation Order, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 13, 2013), Dkt. No. 322. For information about the other mediators, see Jacoby, *supra* note 10.

78. First Order Referring Matters to Facilitative Mediation, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 16, 2013), Dkt. No. 333.

79. *See* Jacoby, *supra* note 10, at 83 nn.201 & 203.

80. *Id.* at 83 n.202.

ued, including over professional fees[81] and the regional water authority.[82]

It was not a foregone conclusion that the presiding judge would automatically approve settlements with the mediating judge's stamp of approval. Judge Rhodes rejected an early settlement brokered by Chief Judge Rosen for failing to meet the legal standards for settlements in bankruptcy cases. But Judge Rhodes also made clear to lawyers in the case that he never again wanted to be in a position where he had to override Chief Judge Rosen's handiwork.[83] From then on, rather than seeking court approval of subsequent individual settlements, Chief Judge Rosen announced settlements via press release. The settlements were not brought to the presiding judge until they were incorporated into the restructuring plan, raising the stakes of rejecting a settlement part and parcel of the broader deal.

c. Channels of communication

The master mediation order prohibited parties from disclosing anything "incident to the mediation," but the presiding and mediating judges neither promised nor delivered a strict wall of separation between them. The presiding judge indicated that he sometimes adjusted the case's pace or held hearings to accommodate requests from Chief Judge Rosen or his team; sometimes the presiding judge refrained from issuing a ruling because, "Judge Rosen, my mediator, kept saying 'you can't do that Steve! If you do that you'll ruin my mediations!'"[84]

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81. *See* Scheduling Order Regarding Process to Determine the Disclosure and Reasonableness of Fees under 11 U.S.C. § 943(b)(3), *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 15, 2014), Dkt. No. 8710.

82. *See* Nolan Finley, *Judge's Gag Order Is Gagging Democracy*, DETROIT NEWS (June 4, 2015), https://www.detroitnews.com/story/opinion/columnists/nolan-finley/2015/06/03/finley-hackel-bucks-gag-order/28426647/ [https://perma.cc/CG97-3HE7] ("[O]nce that public board was in place, the private backroom dealing should have stopped and the gag order lifted.").

83. Jacoby, *supra* note 10, at 87 n.229 (after the court cleared the room of non-attorneys, the court said, "[g]uys, don't ever do that to me again with Rosen").

84. Ford School, *Detroit Grand Bargain Panel*, YOUTUBE (Oct. 21, 2015), https://www.youtube.com/watch?v=OSMKun3hP9U [https://perma.cc/4UEA-Q3GU]. At this event, Judge Rosen followed up to explain that "if we had told the DIA at the outset that it wasn't going to be monetized that would have been game, set, match. . . . I would have had nothing to do." *Id.* ABI Videos, *Saturday Lunch Panel with Judge Rhodes*, VIMEO (Apr. 18, 2015), https://vimeo.com/126086212 [https://perma.cc/FF73-9PZA] (Judge Rhodes explaining how "my mediators" would ask him to slow the pace of the case due to settlement developments, and other times,

d. Thumbs on the scale and more

No one was likely to forget that the mediator was an Article III judge, with strong powers and the willingness to exercise them.[85] He regularly signed orders in the Detroit bankruptcy case even though he was not the presiding judge.[86] Through such orders, he controlled the parties' ability to exit mediation sessions—participants were made to stay, potentially for days, "until released by the mediators," they stated.[87]

The deal known as the Grand Bargain illustrates the breadth of what a creative mediating judge might do. Although Detroit's Emergency Manager had expressed openness to selling the city's valuable art collection to pay creditors and to support other initiatives, the mediating judge did not believe that Detroit should do that.[88] Instead, he sought to save the art museum from sale while also limiting cuts to public retiree pensions.[89] To achieve this, he asked non-profit foundations, which were not parties in the bankruptcy case, to contribute hundreds of millions of dollars.[90] He solicited the Governor of the State of Michigan and members of the

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mediators said, "'we need you to hold a hearing and ask very hard questions'. . . and then the case settled").

85. Jacoby, *supra* note 10, at Part III(C); Dep't of Emergency Manager Kevyn D. Orr at 41, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 31, 2013), https://www.detroitmi.gov/Portals/0/docs/EM/Reports/OrrDeposition123113.pdf [https://perma.cc/7AUG-ZYVX] (Orr testifying that Chief Judge Rosen said he would hold creditors in contempt if they did not agree to particular settlements).

86. Jacoby, *supra* note 10, at Part III(C).

87. *See, e.g.*, Order for Continuing Mediation, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 11, 2014), Dkt. No. 7419 (ordering mediation for eleven parties "continuing day-to-day thereafter as deemed necessary, until released by the mediators").

88. *See* Ford School, *supra* note 84 ("If we liquidated [the DIA] I thought it would be like dropping a bomb in the middle of midtown [Detroit], a hydrogen bomb, it would just suck the life out of midtown."); Steven W. Rhodes & Gerald E. Rosen, *From a Doodle to the Grand Bargain: How the Bankruptcy in Detroit Was Resolved Through Mediation*, MICH. L. WKLY., May 1, 2017 (selling the art "would be an exclamation point on a Detroit obituary that many were already writing").

89. BOMEY, *supra* note 65, at 130; Tresa Baldas, *Gerald Rosen, the Judge Who Helped Save Detroit, Retires*, DETROIT FREE PRESS (Jan. 22, 2017, 6:13 PM), http://www.freep.com/story/news/local/detroit-reborn/2017/01/21/gerald-rosen-judge-detroit-retirement/96850154/ [https://perma.cc/W6PS-ABYC].

90. Jim Lynch, *Rosen Gives Behind-the-Scenes Look at Bankruptcy Case*, DETROIT NEWS (Nov. 10, 2014, 11:08 AM), https://www.detroitnews.com/story/news/local/wayne-county/2014/11/09/rosen-gives-behind-scenes-look-bankruptcy-case/18761871/ [https://perma.cc/TM6P-BHX5].

state legislature,[91] while also making sure to be on hand at the state capitol when the legislature voted on related matters.[92]

We also know that Chief Judge Rosen remained in close contact with Detroit's Emergency Manager, Kevyn Orr, throughout the case. For example, he encouraged Orr to put extra effort and resources into convincing retirees to support the settlement, seeking a "coordinated media blitz."[93]

By securing retiree support, Chief Judge Rosen's Grand Bargain altered the leverage of everyone else. Like dominoes, each financial creditor group fell into a deal—"People who buy the last tickets get run over by the train," the Chief Judge warned.[94] Although some creditors who had not been at the negotiating table opposed the plan, the major voting blocs supported it, as it contained the settlements they had signed onto. The parties and lawyers understood that trying to negotiate outside of Chief Judge Rosen's mediation program was not a viable option. Insisting on litigation ran the risk of disfavor with both judges.[95] For the most part, grumbles about the mediation were leaked to the press without attribution.[96] In a few instances, parties integrated concerns about mediator activities into other pleadings, which generally gained no traction.[97]

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91. "I think we'll get to $350 [million] and I think you should match it," Chief Judge Rosen said to the governor. Daniel Howes, Chad Livengood & David Shepardson, *Bankruptcy and Beyond for Detroit*, DETROIT NEWS (Nov. 13, 2014, 10:13 AM), https://www.detroitnews.com/story/news/local/wayne-county/2014/11/13/detroit-bankruptcy-grand-bargain/18934921/ [https://perma.cc/T3LR-NT8N]; *see also* BOMEY, supra note 65, at 149–50 ("'It's time to go back to the governor,' [Rosen] said. Rosen and Driker, armed with good news, drove to Lansing to ask Snyder for money a second time."); *id.* at 198 ("Rosen, who had been trekking to Lansing for private meetings with legislators about the grand bargain, pressed the city's labor creditors for support too."); Press Conference, Governor Snyder (Jan. 22, 2014) (summary on file with author) (Michigan Senate Majority Leader stating that lead mediator asked to meet with him on or around Christmas Eve 2013).

92. *See* Kathleen Gray, *State Approves Historic $195M Deal for Detroit*, DETROIT FREE PRESS (June 4, 2014) (reporting Chief Judge Rosen "met with senators" and "stayed to witness the bill[']s passage").

93. BOMEY, *supra* note 65, at 200 ("You don't know what you're doing. You're not treating it like a political campaign.").

94. *Id.* at 204.

95. Jacoby, *supra* note 10, at 87.

96. Matthew Dolan & Emily Glazer, *Mediator in Detroit Bankruptcy Walks Fine Line Between City, Creditors*, WALL ST. J. (Feb. 14, 2014, 7:32 PM), https://www.wsj.com/articles/SB10001424052702304703804579383124012396700 [https://perma.cc/M6V5-P49R].

97. Hearing Re. Status Conference on Plan Confirmation Process at 34–37, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 26, 2014), Dkt. No. 5697

In expressing appreciation for getting the case across the finish line in just eighteen months, Judge Rhodes acknowledged the range of activities Chief Judge Rosen undertook: "The mediator's job is to resolve disputes between parties. But here, Judge Rosen and his team did much more than that. They went outside of their roles as mediators and brought money to the table to help solve the problem."[98]

In light of the miraculously quick bankruptcy resolution, the distributional consequences of the Grand Bargain can get lost in the shuffle. The money was raised for, and dedicated to, protecting the prized collection of Detroit's art museum and limiting pension cuts for public workers. Disappointed capital markets creditors were vocal about the consequence: more money flowing to other parties meant less for them. While a different mediator might have prioritized arguments for satisfying capital market expectations over art and retirees, less frequently discussed is whether a different judicial mediator would have raised money instead for police brutality victims, or for low-income residents whose overpriced water had been cut off in the heat of summer. As is true in many cases, a mediator's thumb on the scale for one group means less for another.

e. Public statements

We know more about this case than might be typical because Chief Judge Rosen spoke publicly during and after the case, including while the appellate process was nominally still in play. Chief Judge Rosen praised the Grand Bargain participants for easing pension cuts and protecting the Detroit Institute of Arts.[99] In a "Big Three" press conference, he applauded the auto companies:

> [Y]ou are very much the face of not just Detroit but of Michigan and to have come forward in this way speaks volumes

(For example, in a discovery dispute, creditors pointed to press reports of Chief Judge Rosen's remarks in connection with the mediation's confidentiality); *id.* at 38 ("I didn't quite hear what the relevance is to any of your objections."). Objecting to a memo that the mediating judge filed endorsing a settlement, creditors questioned whether this activity qualified as facilitative in addition to breaching confidentiality. Objection to Mediators' Recommendation at 6–7, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 26, 2014), Dkt. No. 2365. The court rejected that settlement but did not mention these issues.

98. Ford School, *supra* note 84.

99. *See, e.g.*, Press Conference at 9:59–13:12 (June 3, 2014) (transcript on file); Karen Pierog, *Detroit Hold-out Creditor Lashes out at Courts*, REUTERS (June 11, 2014, 3:00 PM), https://www.reuters.com/article/usa-detroit-bankruptcy-syncora-idUSL2N0OS1B320140611 [https://perma.cc/DQ6D-TNXA].

> about the commitment that all three of you have to Detroit and to Michigan.[100]

He also paid homage to the retiree association leaders:

> I've saved the best for last and none of this would be possible without all of us keeping a clear vision firmly in mind about who this is really about. It's about Detroit's retirees who have given decades and decades of their lives devoted to Detroit.[101]

Moments after Judge Rhodes announced his decision to confirm Detroit's debt restructuring plan—which Chief Judge Rosen viewed privately from his chambers with Governor Snyder[102]—Chief Judge Rosen spoke at a courthouse press conference, lauding elected officials, including Governor Snyder (a Republican),[103] and Mayor Mike Duggan (a Democrat).[104] Two days later, at an event in the suburbs, he spoke about the negotiations.[105] He later participated in a law-firm-sponsored panel discussion of bondholders and other creditors in Chicago.[106] At a Brookings Institution event, he characterized his impression of how financial creditors felt about retirees and the importance of this mediation assignment to him personally.[107] In a newspaper interview about his retirement, Chief Judge Rosen described his role in Detroit's bankruptcy as to "pro-

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100. Press Conference, Gerald Rosen, C.J. E.D. Mich., at 5:00–6:58 (June 9, 2014) (transcript on file).

101. *Id.* at 6:58.

102. BOMEY, *supra* note 65, at 137.

103. *See* Press Conference, Gerald Rosen, C.J. E.D. Mich., at 3:44 (Nov. 7, 2014) (saying thanks to good friend, longtime friend, Rick). *See generally* Howes, Livengood & Shepardson, *supra* note 91 ("Rosen and Snyder go back more than 30 years. As a student at the University of Michigan, Snyder worked as a volunteer on Rosen's unsuccessful bid for Congress in 1982.").

104. Press Conference, Gerald Rosen, C.J. E.D. Mich., at around 6:09–6:44 (Nov. 7, 2014) ("I am going to editorialize a little bit here, but Detroit has a great mayor. I have known Mike for many years. He's the son of one of my colleagues, so part of the extended court family. Knowing Mike is at the helm makes me more confident. . . .").

105. Lynch, *supra* note 90. Speaking about Ford Foundation President, Chief Judge Rosen apparently said, "'Darren, if you're going to do this . . . it shouldn't be a token connection, you should make a statement. Little did I know . . . he was already thinking big,' Rosen said. 'Darren called me and said, "I have good news for you, the Ford Foundation is going to come in," Rosen recalled. 'He said, "I've been talking to the board. We believe we need to make a statement, and we are prepared to make the largest single contribution we've ever made in our history to Detroit's future." He said, 'That's $125 million.' I almost fell out of my chair. That was the first moment when I thought, you know, this thing may get some legs." *Id.*

106. Jacoby, *supra* note 10, at 101 n.334.

107. Brookings Institute, *supra* note 75.

tect the pensions, the art collection, and most importantly, 'it was about saving the City of Detroit.' "[108]

Chief Judge Rosen's commentary about the mediation continued after his retirement from the bench. For example, he discussed how Detroit was an "assetless bankruptcy" and described the settlement he brokered as "trying to figure out a way to monetize the art without liquidating it, and giving the proceeds to the retirees. Neat trick."[109]

Near the end of the case, a creditor cited the ABA-AAA Model Standards for mediators in an objection to the city's restructuring plan, taking note of Chief Judge Rosen's public statements in favor of the primary beneficiaries of the Grand Bargain: art and retirees.[110] The pleading contended, among other things, that this approach was in "violation of basic standards of conduct for mediators."[111]

The presiding judge found that the "highly personal attack on Chief Judge Rosen in the Objection was legally and factually unwarranted, unprofessional and unjust."[112] The court opinion does not discuss the Model Standards in its decision explaining why it struck the pleading, but suggests that mediation is categorically incapable of fitting the creditor's objections:

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108. Baldas, *supra* note 89.

109. Kirk Pinho, *Rosen Talks About Detroit's Grand Bargain, the City's Future and Kwame Kilpatrick*, CRAIN'S DETROIT BUS. (Jan. 22, 2017, 12:01 AM), http://www.crainsdetroit.com/article/20170122/NEWS/170129969/rosen-talks-about-detroits-grand-bargain-the-citys-future-and [https://perma.cc/9C3D-EANC]; *see also* Daniel Howes, *Five Years After Bankruptcy, Detroit Shows Real Gains*, DETROIT NEWS, (July 18, 2018, 9:04 AM), https://www.detroitnews.com/story/business/columnists/daniel-howes/2018/07/17/five-years-later-detroit-bankruptcy/792784002/ [https://perma.cc/6U65-USDQ] (speaking of a panel commemorating five-year anniversary of bankruptcy filing, "[I]t's probably safe to say Chief Mediator Gerald Rosen . . . will recount the 'grand bargain' that helped speed a consensual settlement of the largest municipal bankruptcy in American history.").

110. Supplemental Objection to Chapter 9 Plan Syncora Guarantee Inc. and Syncora Capital Assurance Inc.'s Second Objection to the Debtor's Plan of Adjustment, *In re* City of Detroit, 2014 WL 8396419 (Bankr. E.D. Mich. Aug. 12, 2014) (No. 13-53846), Dkt. No. 6651 [hereinafter "Syncora's Stricken Objection"] (copy on file with author); Syncora Guarantee Inc. and Syncora Capital Assurance Inc.'s Objection to the City's Motion to Strike at 26–27, *In re* City of Detroit, 2014 WL 8396419 (Bankr. E.D. Mich. Aug. 22, 2014) (No. 13-53846), Dkt. No. 7007 [hereinafter "Syncora's Objection to City's Motion to Strike"]. The "record shows it was Judge Rosen . . . who hatched the idea of marrying up the twin imperatives." Syncora's Stricken Objection at 17.

111. Syncora's Stricken Objection at 22–23.

112. *In re* City of Detroit, 2014 WL 8396419, at *11 (Bankr. E.D. Mich. Aug. 28, 2014).

> [The mediators] were in no position to "collude" with anyone, to "orchestrate" or "engineer" anything, to "execute a transaction," or to "pick winners and losers." These allegations misunderstand the nature of mediation. Even assuming that the mediators are as powerful as Syncora argues . . . and even assuming that the mediators did suggest solutions and compromises during their mediation sessions, as their role requires, it is nevertheless the parties who decide whether and how to resolve their disputes. . . . [T]he [mediators] could not impose their will, their plans, their agenda or their bias upon the parties through the mediation process, assuming they had any of those.[113]

If it were indeed impossible for any mediator to be partial or to be coercive, then official mediation standards would not have to discuss those dangers as much as they do. Under this rationale, the *concept* of facilitative mediation, rather than the actual activities and statements of a mediating judge, does the heavy lifting.

Chief Judge Rosen has since retired from being a judge and moved onto the alternative dispute resolution business.[114] His current biography lists his role as "Chief Judicial Mediator" in the Detroit bankruptcy as one of his signature achievements.[115]

2. Harder/Sunwest Management

a. Backstory

Jon Harder was a cofounder and officer of Sunwest Management, which at its height managed almost three hundred assisted living facilities across the country. Harder held interests in special purpose entities that owned each facility. Each facility borrowed money on its own behalf from lenders, although Harder personally guaranteed some of those debts. As an investment broker, Harder sold investments in these facilities to older people planning their retirements, promising a stable tax-deferred investment. Among the

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113. *Id.* at *8.

114. *Neutrals*, JAMS DETROIT MEDIATION, ARBITRATION AND ADR SERV., https://www.jamsadr.com/detroit#neutrals [https://perma.cc/CE3Z-YA22] (last visited May 12, 2022). Judge Rhodes originally joined this JAMS office upon retirement as well, as did one of Detroit's lead bankruptcy attorneys, David Heiman. Neither is listed currently.

115. *Gerald E. Rosen*, JAMS, https://www.jamsadr.com/rosen/ [https://perma.cc/3SXG-YWXE] (last visited May 12, 2022) ("Notably, he served as the Chief Judicial Mediator for the Detroit Bankruptcy case—the largest, most complex municipal bankruptcy in our nation's history—which resulted in an agreed upon, consensual plan of adjustment in just 17 months.").

twelve hundred people who accepted Harder's invitation to invest in his teetering enterprise, the average age was sixty-eight.[116]

By 2007 Sunwest Management was falling into disarray. As some facilities bled money, Harder shifted funds from one place to another, one investor to another, one business entity to another. He stopped paying investors in July 2008, just when the Global Financial Crisis would make it difficult for them to find other means to support themselves.[117] Individual entities within the Sunwest enterprise defaulted on mortgages. By late 2008, sixty-five foreclosure sales were pending, with some nearly complete.

While Harder would eventually go to prison for financial crimes, he first tried to use his own bankruptcy case to alter the rights and obligations of Sunwest entities and their lenders. An Article III judge would be instrumental to making that happen, initially as a mediator.

b. Harder's bankruptcy

Harder wanted to use his bankruptcy to stop lenders from exercising their rights against separate entities, namely the assisted living facilities. Prior to filing for bankruptcy, Harder had consulted with a federal district judge from Oregon, the Honorable Michael Hogan, about serving as a mediating judge.[118] Upon filing, Harder quickly asked the bankruptcy court to appoint Judge Hogan as a mediating judge and also to direct lenders to individual facilities (not part of the bankruptcy) to participate.[119] Lenders to these non-bankrupt entities opposed these requests.[120]

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116. Sentencing Memo at 17, United States v. Harder, No. 12-485 (D. Or. Nov. 10, 2015), Dkt. No. 201.

117. *Id.* at 13.

118. Plaintiff's Motion for Mediation at 2–3, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Dec. 31, 2008), Adv. Dkt. No. 3; Reply Brief for Appellants at *13, SEC v. ING USA Annuity and Life Ins. Co., 360 F. App'x 826 (9th Cir. July 1, 2009) (No. 09-35250), Dkt. No. 47 (reporting that Judge Hogan had a 3.5-hour meeting on December 19, 2008 with the chief restructuring officer of Sunwest to discuss a strategy for obtaining a bankruptcy injunction against lenders and that Harder filed for bankruptcy on December 29).

119. Plaintiff's Motion for Mediation, *supra* note 118, at 2–3; *see also* Declaration of Stephen English in Support of Plaintiff's Motion for Mediation at 2–3, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Dec. 31, 2008), Adv. Dkt. No. 4 (arguing that doing so would be in best interests of facility residents while protecting interests of creditors to facilities).

120. *See, e.g.*, Joint Objection of Lenders to Harder's Motion for Court-Annexed Mediation, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 99; Joinder by LTC Properties, Inc. to Joint Lender Group Opposition to Debtor's Motion for Order Referring Case and Ad-

The presiding bankruptcy judge made mediation available with willing Article III judges: Judge Hogan and Senior Ninth Circuit Judge Edward Leavy.[121] But the bankruptcy judge emphasized that mediation was voluntary, and she also declined Harder's request to use his bankruptcy to protect a broader range of nonbankrupt special purpose entities.[122]

The mediating judge nonetheless would have a big impact on this case. As one early example, when Judge Hogan mediated the allocation of proceeds from a sale of multiple properties, the settlement result was "a new governance structure for the [assisted living facility special purpose entities]."[123] Among other things, the agreement gave Judge Hogan the right to rule on disputes about the settlement, with no appellate process.[124]

c. Securities fraud

A few months after Harder filed for bankruptcy, the United States Securities and Exchange Commission (the "SEC") sued Harder and Sunwest Management (but not most of the individual special purpose entities) for civil securities fraud in the District of Oregon.[125] The SEC sought a temporary restraining order to freeze the assets of Harder and related parties and to halt allegedly fraudulent activities.[126] The federal district court clerks' office assigned

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versary Proceeding to Mediation, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 95. For example, Charter Bank had already received appointment of a receiver for its retirement home debtor; because Harder already had resigned from his management position, Charter Bank argued it had nothing to mediate with Harder. Objection by Charter Bank to Plaintiff's Motion for Mediation at 4–5, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 93; *see also* Defendant Tennessee Commerce Bank's Objection to Plaintiff's Motion for Mediation, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 104 (lender to three non-debtors in Georgia and Kentucky).

121. Order Appointing Mediator at 1–2, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 30, 2009), Adv. Dkt. No. 297.

122. Amended Order Appointing Mediator, *In re* Harder, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Feb. 6, 2009), Adv. Dkt. No. 324 ("Participation in such mediation shall be purely voluntary, and no party shall be compelled to mediate, except to the extent that this Court may subsequently order otherwise.").

123. Reply Brief for Appellants, *supra* note 118.

124. Memorandum in Support of Motion to Recuse the Hon. Michael R. Hogan at 6, SEC v. Sunwest Mgmt., Inc., No. 09-6056 (D. Or. Mar. 9, 2009), Dkt. No. 30.

125. *See* Complaint at 2–7, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Mar. 2, 2009), Dkt. No. 1.

126. *See* Ex Parte Application for Temporary Restraining Order, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Mar. 02, 2009), Dkt. No. 2.

the request to Judge Hogan.[127] Instead of holding a public hearing on a request for a temporary restraining order, Judge Hogan oversaw a full day of negotiations on the issue of whether the SEC should get a preliminary injunction and its impact on a variety of other parties, including lenders to the individual special purpose entities that were not named in the SEC complaint.[128]

Perhaps on a safety-in-numbers theory, lenders banded together to request that Judge Hogan disqualify himself from presiding over the SEC case as well as substantive challenges to the injunction Judge Hogan entered in the SEC case.[129] The involvement of the same federal judge in two overlapping cases, as a mediating judge and as a presiding judge, might raise appearance issues at the very least, they explained. Even if he had no personal bias or expectation of personal gain, having an opinion on how things should go based on information obtained through informal mediation should itself be grounds for recusal.[130] Judge Hogan's early involvement mediating in the Harder bankruptcy exposed him to factual assertions and party positions related to the SEC matter. On a broader theory of partiality, he had exposure to facts outside of the ordinary evidentiary process. The lenders also documented ex parte communications, such as private conversations between Judge Hogan as mediator and parties associated with Harder, and how Judge Hogan, as mediator, had urged lenders to participate in his global settlement process.

Judge Hogan and a magistrate judge both rejected the lenders' request for recusal or disqualification.[131] The magistrate judge used reasoning found throughout recusal opinions relating to settlement activity: Judge Hogan could not have the kind of bias at issue in the disqualification statute because the mediation was not an "extraju-

127. Magistrate judges and district judges were assigned cases on the same civil wheel. The SEC matter landed with a magistrate judge, but parties did not consent to a non-Article III judge hearing and deciding the request for injunctive relief. The backup Article III judge was Judge Hogan. *See* SEC v. Sunwest Mgmt., Inc., No. 09-6056, 2009 WL 1065053, at *1 (D. Or. Apr. 20, 2009).

128. Memo. in Support of Motion to Recuse the Hon. Michael R. Hogan, *supra* note 124, at 10.

129. Motion to Recuse the Hon. Michael R. Hogan and Dissolve the Order Issued Mar. 2, 2009, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Mar. 9, 2009), Dkt. No. 29. Lenders argued the relief gave individual entities that owned assisted living facilities the benefits of bankruptcy without its obligations.

130. *See* Memo. in Support of Motion to Recuse the Hon. Michael R. Hogan, *supra* note 124.

131. Transcript of Proceedings at 9–10, *Sunwest Mgmt., Inc.*, 2009 WL 10700899 (D. Or. Mar. 10, 2009) (No. 09-6056), Dkt. No. 77.

dicial" source.[132] That might not have been accurate in this case, however, if the mediating judge was already in communication with a party *before* the commencement of any federal judicial proceeding.[133] Still, by this reasoning, knowledge obtained from negotiations in a mediation within a federal case could not be used to disqualify a judge from presiding over a closely related case.

d. Combining the cases

With Judge Hogan presiding over the SEC matter implicating a broader range of parties, Harder's next big move was to ask Judge Hogan to take over his bankruptcy, requesting that the district court withdraw his bankruptcy case from the presiding bankruptcy judge.[134] The stated logic was that the bankruptcy and the SEC matter overlapped, creating an interplay between federal statutes. The conventional wisdom is that district judges, plenty busy with other things, are not eager to preside over bankruptcies. Yet conventional wisdom always has exceptions.

The lenders objected, citing the facts Judge Hogan had gathered from overseeing negotiations in both the bankruptcy and the SEC matters.[135] The government watchdog for the bankruptcy system also harbored "serious concerns" about whether Judge Hogan could preside over the bankruptcy after having been an active mediating judge behind the scenes.[136]

Judge Hogan nonetheless agreed to withdraw the reference from the bankruptcy court and preside over Harder's bankruptcy himself.[137] Lenders renewed requests to disqualify Judge Hogan in the SEC matter based on his prior information access and related

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132. SEC v. Sunwest Mgmt., Inc., 2009 WL 10700899, at *1–2 (D. Or. Mar. 10, 2009).

133. *See supra* note 118.

134. Technically, that requires filing a request to "withdraw the reference" of the case from the bankruptcy court. *See* Debtor-In-Possession's Motion for Withdrawal, *In re* Harder, Case No. 08-37225 (Bankr. D. Or. Mar. 17, 2009), Dkt. No. 412.

135. Motion for Order of Recusal at 2–3, *In re* Harder, Case No. 08-37225 (Bankr. D. Or. Apr. 1, 2009), Dkt. No. 467 (referring to a judge having negotiated and executed a settlement and then presiding over the decision whether to approve the settlement).

136. Transcript of Proceedings on April 6, 2009 at 58, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Apr. 9, 2009), Dkt. No. 159; *see also* U.S. Trustee's Memorandum in Support of Motion to Dismiss, *In re* Harder, Case No. 08-37225 (Bankr. D. Or. Mar. 17, 2009), Dkt. No. 409.

137. Order, *In re* Harder, No. 08-37225, No. 09-6074, Adv. No. 08-03265 (Bankr. D. Or. Apr. 8, 2009), Adv. Dkt. No. 382.

matters, but these efforts failed.[138] In an unpublished opinion, the Ninth Circuit resisted the notion that his active mediation of the bankruptcy precluded impartiality, calling it speculation.[139] According to the Ninth Circuit, there "was no authority for the proposition that judges must recuse themselves if they served as mediators in a related proceeding."[140] Another judge declined to let the lenders present their recusal arguments in open court, declaring that "quite enough time and money [had] been spent on this issue."[141]

Upon switching from mediating to presiding judge in the Harder bankruptcy, while also helming the SEC matter, Judge Hogan could order all sorts of people to participate in status conferences, change deadlines, appoint more mediators, and do what the bankruptcy judge would not: corral the Sunwest lenders to participate in some sort of global resolution that disregarded corporate boundaries.[142] Judge Hogan made clear these cases should be on a fast track: if big companies like Chrysler and General Motors could financially restructure in a just a few weeks, why couldn't this case go quickly, too?[143]

e. Outcome

The ultimate resolution to the SEC matter and the bankruptcy, approved over objections, stemmed from Judge Hogan's combination of the two matters and involved the creation of a new consolidated enterprise using federal equity powers. In the process of getting over the finish line, Sunwest press releases touted the input of stakeholders in the mediation and the increased efficiency of the case by avoiding litigation.[144] The court influenced many elements of the resolution's structure and the behind-the-scenes path that

138. SEC v. Sunwest Mgmt., Inc., No. 09-6056, 2009 WL 1065053, at *2 (D. Or. Apr. 20, 2009); SEC v. ING USA Annuity and Life Ins. Co., 360 F. App'x 826, 828 (9th Cir. 2009).

139. *ING USA Annuity and Life Ins. Co.*, 360 F. App'x at 828.

140. *Id.*

141. *Sunwest Mgmt., Inc.*, 2009 WL 1065053, at *5; *see also* Reply Brief for Appellants, *supra* note 114, at *15 (citing the record of court suspending bankruptcy for several months at a time and staying all pending deadlines).

142. *See* Record of Order, *In re* Harder, No. 09-6074 (D. Or. Apr. 21, 2009), Dkt. No. 520; Scheduling Order, *In re* Harder, No. 09-6074 (D. Or. May 19, 2009), Dkt. No. 751; Order, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Oct. 7, 2009), Dkt. No. 893.

143. *See* Transcript of Proceedings (Mediation) at 4, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. July 20, 2009), Dkt. No. 456.

144. Press Release, Sunwest Receiver and Chief Restructuring Officer File Plan with Court: Mediated Plan Expected to Win Wide Support (Aug. 27, 2009).

got them there.[145] Unfortunately, the contested resolution seems inconsistent with core bankruptcy principles and stretched the limits of federal court power. For example, the resolution mixed assets and liabilities of separate legal entities, many of which were not bankruptcy filers. The resolution allowed Harder to retain an equity interest even though higher priority claimants did not get paid in full or consent to the deal.[146] Objections in court and on appeal were to little avail.

The prosecutors acknowledged that victims of securities fraud received greater recovery because Judge Hogan took "extraordinary" steps in the bankruptcy and SEC actions to control assets outside of the bankruptcy estate and compel lender participation in his process.[147] Essentially, the deal brokered by Judge Hogan had transferred value from secured lenders to shareholders. The prosecutors also characterized the settlement as generous to Harder, who retained an interest in the reorganized enterprise and received debt forgiveness from Sunwest and related entities.[148]

This story had a twist ending: Jon Harder, the original bankruptcy debtor, went to prison for having committed the biggest investment fraud in Oregon history.[149] Playing no part in these

145. *See, e.g.*, SEC v. Sunwest Mgmt., Inc., 524 F. App'x 365, 367 (9th Cir. 2013) (citing 2011 district court order: "the court proactively created the trust and through settlement resolved the issues rather than through protracted motions and procedural practice").

146. *See* Declaration of Professor Robert Rasmussen in Support of Coordinating Lenders' Opposition to Proposed Distribution Plan at 26, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Sept. 22, 2019), Dkt. No. 813 (explaining that the bankruptcy plan "erroneously treats all of the assets of the Sunwest entities as being part of a single entity or single pool of assets"). Rasmussen concluded that the plans brokered by Judge Hogan through this blended process of SEC action and some entity bankruptcies violated bankruptcy law. *Id.* at 28.

147. Sentencing Memo, *supra* note 116, at 43 ("It was only because of the extraordinary remedy that Judge Hogan ordered (a stay on all secured creditors) and requiring mandatory mediation of all claims that defendant's interest in all the Sunwest assets weren't quickly liquidated at various foreclosure auctions.").

148. *Id.* at 45; *see also id.* at 46 ("Defendant has received much for his participation and cooperation in the SEC and Bankruptcy Proceedings.").

149. *See* Bryan Denson, *Former Sunwest CEO Jon Harder Gets 15 Years for "Mass Financial Destruction"*, THE OREGONIAN (Nov. 17, 2015), https://www.oregonlive.com/portland/2015/11/former_sunwest_ceo_jon_harder.html [https://perma.cc/GMB6-MGTQ]. Five years into the prison sentence, President Trump pardoned Harder, thus resulting in his release, on the president's last full day in office. *See* Jeff Manning, *Trump Commutes 15-Year Sentence of Convicted Oregon Fraudster Jon Harder, Sunwest's Founder*, THE OREGONIAN (Jan. 21, 2021, 4:42 PM), https://www.oregonlive.com/business/2021/01/trump-commutes-15-year-sentence-of-convicted-oregon-fraudster-jon-harder-sunwests-founder.html [https://perma.cc/HN8M-W4NY]. Harder's restitution obligation was not affected.

criminal matters, Judge Hogan had already retired from the federal bench to open Hogan Mediation, a private dispute resolution business.[150]

3. Takeaways

Distinctive features of these stories may stoke doubt that they could happen again. Yet, extreme examples can be a valuable learning and teaching tool to help others identify their own boundaries and sources of disagreement.

In addition, although both examples involve bankruptcy, their lessons apply to a range of large and sprawling cases.[151] Bankruptcy is one of many forms of complex litigation.[152] These examples present some issues likely to be relevant to other cases. They include:

- Orders entered on the docket by the mediating judge, instructing parties and lawyers to appear, not to be released until the mediator says so;[153]
- Off-the-record communication (or suspected communication) between the mediating and presiding judges;
- Requirements that parties mediate in good faith, lest reports be made to the presiding judge;
- The role of the mediator as heavily evaluative and proactive, even if mediation is labelled as facilitative; and

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The United States government had issued an indictment for mail and wire fraud, among other things, associated with the same transactions and acts that were central in the bankruptcy and the SEC's civil action. Compounding the misdeeds through the bankruptcy, Harder had lied about assets and transactions in papers submitted to the bankruptcy court under penalty of perjury and in oral interviews with the government watchdog and creditors. *See* Sentencing Memo, *supra* note 116, at 15.

150. *See Judge Michael Hogan*, HOGAN MEDIATION, http://hoganmediation.net/judge-hogan/ [https://perma.cc/5LW9-4L4T] (last visited June 25, 2021) (Judge Hogan "has led thousands of disputes to a fruitful settlement," the bankruptcy cases he mediated had "billions of dollars in the balance," and he was known for bringing "'the gentle touch' to successful settlements in civil cases").

151. *See generally* Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOKLYN J. OF CORP. FIN. & COMM'L L. 39 (2017).

152. *See* Troy A. McKenzie, *Internal and External Governance in Complex Litigation*, 84 L. & CONTEMP. PROBS. 207, 207 (2021).

153. *See, e.g.*, Mediator's Report at 1–2, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. July 7, 2021), Dkt. No. 3119 (145 telephone conversations between mediating judge and various parties, followed by 11.5-hour and 15-hour days of in-person negotiation).

- The concept of mediating judges affirmatively proposing elements of resolutions that have distributive effects.[154]

More exceptional features of the case studies include:

- Combining mediation of one case with oversight of a separate federal case;
- Outreach to non-parties to encourage participation;
- Granting mediator powers by stipulation to resolve disputed issues with no appeal;
- Fundraising for a settlement designed by the mediator;
- Involvement in the state or federal legislative or political process;
- Extensive public speaking by the mediator about the case; and
- The mediator commenting publicly about elected officials.

To characterize these features as exceptional does not mean that they will never happen again. The legal world has few one-offs.

E. Separation of powers

The case studies should activate imaginations on the range of things a mediating judge might do, especially with Article III protections. Considering the separation-of-powers implications of this arrangement is the next logical step. Might zealous acts of a mediating judge overstep the boundaries of the judicial branch?

Separation of powers refers to the Constitution's allocation of responsibilities to three distinct branches.[155] As conceded even by separation-of-powers formalists, "classifying government power is an elusive venture."[156] The boundaries on the judicial branch are likely the most slippery.

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154. *Id.* at 2 (referring to the judicial mediator's proposal and revised proposal to settle matters between non-consenting states and the Sackler family and other parties).

155. Although the Supreme Court and commentators associate separation of powers with a variety of justifications, *see, e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 382–85 (2016) (identifying liberty, effective administration, democratic accountability, and rule of law as normative underpinnings of separation-of-powers jurisprudence), some find the individual liberty arguments particularly persuasive, *see, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 450 U.S. 50, 57–60 (1982); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991).

156. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring); *see also* Brown, *supra* note 155, at 1524 (calling it a "highly questionable premise" that "legislative, executive, and judicial powers are inherently distinguishable as well as separable"); Huq & Michaels, *supra* note 155, at 349 (noting the perception of case law as "unmoored and unprincipled"); Nikolas Bowie & Daphna Renan, *The Separation of Powers Counterrevolution*, 131 YALE L.J.

Article III of the Constitution says little about the scope of judicial power.[157] Separation-of-powers questions have been raised about a variety of judicial activities, including civil rulemaking,[158] rate setting for compulsory copyright music licensing,[159] and managerial judging.[160] It is worth asking a parallel question about creative practices of mediating judges that go well beyond mere settlement oversight.

The Supreme Court decision in *Mistretta v. United States* is a useful entry point. In that case, the defendants complained that the United States Sentencing Commission, an independent agency within the judicial branch, exercised legislative authority: the "quintessentially political work of establishing sentencing guidelines."[161] The Court upheld the constitutionality of this activity. Although some responsibilities may be incompatible with Article III service, said the Court, the "ultimate inquiry" remains "whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch," citing the Code of Conduct for United States Judges to indicate that the concern flows both from the Constitution and judicial ethics.[162] The Court resolved *Mistretta* by characterizing Sentencing Commission service as an "essentially neutral

(forthcoming 2022) (observing longstanding dispute and arguing that separation of powers is "contingent political practice reflecting policy needs, governance ideas, and political struggles of the moment").

157. *See, e.g.*, Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1316 (1993).

158. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 655 (1941) (upholding as constitutional the allocation of rulemaking authority to the judiciary under the Rules Enabling Act); Robert G. Bone, *The Process of Making Process*, 87 GEO. L.J. 887, 896, 908, 917–18 (1999) (questioning judges' abilities to determine optimal process through individual discretion as compared to legislatures or central rulemaking committees); Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 502 (1991) (considering whether local rulemaking interferes with congressional judgments or usurps congressional power by allowing the district court to make a different judgment, and whether local rulemaking undermines the function of district courts); *cf.* Mullenix, *supra* note 157, at 1297–98, 1314 (arguing that the Civil Justice Reform Act, which requires courts to incorporate ADR, is a legislative encroachment on the judiciary).

159. *See* McKenzie, *supra* note 152, at 229 (discussing the role of the Southern District of New York in implementing ASCAP and BMI consent decrees).

160. *See* Peterson, *supra* note 12, at 78.

161. Mistretta v. United States, 488 U.S. 361, 384 (1988).

162. *Id.* at 404.

endeavor and one in which judicial participation is particularly appropriate."[163] The Court's opinion nonetheless reflects uncertainty:

> We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.[164]

These issues notwithstanding, "the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time."[165] Consistent with that premise, the Court emphasized that its holding in *Mistretta* was based in part on the authority to exercise sentencing guidelines being vested in a distinct Sentencing Commission, rather than within a court.[166]

Observing that the Sentencing Commission had no purpose beyond activity typically delegated to the legislature, Justice Antonin Scalia's lone dissent recognized that policymaking might be okay when ancillary to the exercise of judicial power.[167] However, making criminal sentencing policy, he noted, is "heavily laden (or ought to be) with value judgments and policy assessments."[168] Justice Scalia predicted that "in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."[169] That point alone might be useful in thinking about policy choices embedded in the activities of mediating judges.

Challenging mediating judge practices on separation-of-powers grounds through a lawsuit would likely go nowhere. The *Mistretta* majority counseled that a law passed by Congress and signed by the

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163. *Id.* at 407.

164. *Id.*

165. *Id.* at 404.

166. *Id.* at 393.

167. *Id.* at 413, 417 (Scalia, J., dissenting).

168. *Id.* at 414 (Scalia, J., dissenting); *see also id.* at 420–21 (Scalia, J., dissenting) (calling the Sentencing Commission a "pure delegation of legislative power," distinct from the exercise of judicial powers).

169. *Id.* at 425, 427 (Scalia, J., dissenting).

President "that confronts a vexing national problem" should be invalidated "only for the most compelling constitutional reasons."[170] (This view ebbs and flows with Supreme Court composition, of course.) The activities that tax the boundaries of the judiciary are more likely byproducts of judicial creativity than of express Congressional authorization, and thus even more difficult to challenge in light of the vagueness of the *Mistretta* standard, that considers whether the activity "undermines the integrity of the Judicial Branch,"[171] coupled with broad recognition that federal courts have inherent powers to fulfill their case management responsibilities.

Separation of powers is thus better deployed here as an organizing principle to guide mediating judges. Readers will interpret mediating judge activity in light of their own leanings about the judiciary's role and comparative institutional competence.[172] Some might see mediation oversight as a natural extension of judicial power. Others might interpret *Mistretta* as discouraging mediating judges from exercising *any* official power while mediating to avoid role-mixing.[173] Still others might doubt any serious implication of separation-of-powers issues due to the accountability measures noted below.[174] Wherever one falls on these questions, judges should consider separation-of-powers issues when deciding what they will do as mediators.

170. *Id.* at 384; *see also* CFTC v. Schor, 478 U.S. 833, 844 (1984).

171. *Mistretta*, 488 U.S. at 397. For scholarship critiquing the vagueness of Supreme Court jurisprudence, see Mullenix, *supra* note 157 ("twin ills of indeterminacy and linguistic skepticism"); Brown, *supra* note 155, at 1517–18 ("Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle[.]" "It has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting-point for debate."). *But see* Huq & Michaels, *supra* note 155, at 349 (offering an explanatory theory of cycling through rules and standards).

172. *See* McKenzie, *supra* note 152, at 228 ("Legislatures, it is often said, have greater access to expertise and more subtle levers of power to shape a response to a society-wide problem.").

173. If mediating judge activities raise separation-of-powers concerns, consent cannot necessarily cure a constitutional problem. *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 715 (2018).

174. *See* Huq & Michaels, *supra* note 155, at 403 (the federal judiciary is more cloistered from external forces than other branches due to rules about ex parte communication and norms against political engagement).

II.
ACCOUNTABILITY MEASURES AND OTHER JUDGES' CASES

The next step is to review existing guidance and remedies for judicial activities, and to consider the impact of these accountability measures on mediating judge practices. In theory, the court system and Congress provide guidance and remedies for activities that exceed judicial authority. The prevailing oversight mechanisms, however, work more effectively for formal court acts that create a record than for activities in other judges' cases that happen behind the scenes.[175]

A. Judicial ethics

The Code of Conduct for U.S. Judges reflects the judiciary's attempt to strike a delicate balance between independence and accountability.[176] Adopted by the Judicial Conference of the United States in 1973, and periodically updated, the Code of Conduct applies to all federal judges, including bankruptcy judges, but not Supreme Court justices.[177] The judiciary characterizes the Code as a behavioral guideline, a framework for judges to decide for themselves ex ante how to conduct themselves.[178] It accepts that judges may not agree amongst themselves how to apply the Code to particular situations: "Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation."[179]

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175. For one example of the shortcomings of procedures outside of formal cases, see the failure of federal courts to protect employees from sexual harassment. *See* Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599 (2020); Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. 446 (2021); Heidi S. Bond, *Pride and Predators*, 119 MICH. L. REV. 1069, 1078–79 (2021).

176. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1 commentary (last revised Mar. 2019) ("The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions."); *id.* ("Although judges should be independent, they must comply with the law and should comply with this Code."); *id.* at Canon 2 (calling on judges to "avoid impropriety and the appearance of impropriety in all activities," applicable to professional and personal conduct).

177. *Id.* at Introduction.

178. *See* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 4 Commentary (last revised Mar. 2019).

179. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1 commentary.

Departures from the Code of Conduct are not actionable, strictly speaking.[180] It might be cited in connection with other accountability measures,[181] but the grounds for any resulting legal or equitable remedy come from a source other than the Code.

The Code of Conduct technically applies to mediating judges.[182] Yet, it says little about what that means. The following subsections explore specific issues.

1. Impartiality

After stating that "a judge should perform the duties of the office fairly, impartially and diligently," Canon 3 divides responsibilities into "adjudicative" and "administrative."[183] A judge "shall" disqualify himself if his "impartiality might reasonably be questioned."[184] The Canon's specific examples (e.g., personal prejudice, a relative, financial interest, has served as a lawyer in the matter) are quite far removed from a judge's zeal for settlement.

In an advisory opinion, the Judicial Conference Committee on Codes of Conduct explicitly addressed judges acting in a settlement

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180. *Id.* ("[T]he Code is not designed or intended as a basis for civil liability or criminal prosecution."); *see also* Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426 (2007); *In re* Boston's Children First, 244 F.3d 164, 168 (1st Cir. 2001) (explaining that a judge can violate Canons without it being grounds for disqualification and a judge might have to be disqualified even if she has not violated a Canon).

181. For example, the Seventh Circuit cited the Code of Conduct when ruling that a district judge should have disqualified himself in a diocese bankruptcy matter involving a cemetery in which that judge's parents were buried and whose plots he had bought. Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 751 (7th Cir. 2015). Objectors to a Flint water case settlement cited the Code of Conduct in a writ of mandamus asking the Sixth Circuit to require the presiding district judge to "cease holding off-the-record substantive ex parte meetings that exclude petitioners' counsel" (among other things). Petition for Writ of Mandamus at 30, *In re* Raymond Hall, No. 21-2655 (6th Cir. June 25, 2021), Dkt. No. 1. In the section on disqualification, we will see the active use of Canon 3 by a Third Circuit panel majority and critique of that reliance by the dissent. *In re* Kensington Int'l Ltd., 368 F.3d 289 (3d Cir. 2004); *see also infra* Part II(B)(2).

182. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(B)(2) ("A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge."); *id.* at Canon 4(A)(4) ("A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law"); *id.* at Canon 3(A)(4)(d) (limited exception to the prohibition on ex parte communication for mediation and settlement activities with parties' consent).

183. *Id.* at Canon 3.

184. *Id.* at Canon 3(C)(1).

capacity.[185] It says a presiding judge who tries to settle a case need not necessarily recuse himself in later phases. Recusal is the right step "only where a judge's impartiality might reasonably be questioned because of what occurred during the course of those discussions."[186] The odds of impropriety, in the eyes of this committee, go down further in the event of a jury rather than a bench trial.[187] The opinion recognizes that "comments a judge makes in the course of settlement discussions may create an appearance of bias[,]" but emphasizes that "practices must be examined on a case-by-case basis to determine their ethical propriety."[188] The opinion heavily emphasizes party consent.

If the Judicial Conference doubts that heavy settlement involvement creates a problem for a presiding judge, a mediating judge might interpret this as an invitation to be even more active.[189] Although mediation and settlement are not identical, the distinctions are slippery indeed.

2. Ex parte communication

Under Canon 3, partiality or unfairness may flow from ex parte communication, defined as communication in the course of a judicial proceeding undertaken outside the presence of all parties to that proceeding.[190] Discouragement of ex parte communication is not limited to substantive matters.[191] The Canon includes an excep-

185. *See Advisory Opinion No. 95*, *in* 2 GUIDE TO JUDICIARY POLICY (2009) (discussing judges acting in a settlement capacity).

186. *Id.*

187. *Id.*

188. *Id.* This opinion "extends the discretion granted in [Federal Rule of Civil Procedure] Rule 16 from procedural rules to ethical rules." *See* Deason, *supra* note 28, at 130.

189. *See, e.g.*, *In re* Complaint of Judicial Misconduct, No. 17-90006 (9th Cir. Jud. Council Mar. 23, 2017) (rejecting the complaint about ex parte communications involving the magistrate judge assigned to oversee settlement: "a judge who is assigned to a case for settlement purposes only—as a neutral engaged in alternate dispute resolution—is permitted to hold ex parte communications, encourage settlement, or express views about the strength of a case").

190. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4) ("Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.").

191. *See id.* at Canon (3)(A)(4)(b) (scheduling and administrative matters should not be discussed ex parte unless "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result"); *see also* GEYH ET AL., 1 JUDICIAL CONDUCT AND ETHICS § 5.03 (6th ed. 2020) ("[C]ommunications concerning drafting errors, admissibility of certain evidence,

tion for individualized ex parte discussions in a mediation or settlement context with party consent.[192] The commentary to Canon 3 recognizes awareness that a zeal to settle may cross a line, advising judges to "not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts."[193]

The application of these precepts seems clearer for bilateral litigation than for multi-party actions. Who are the "parties to that proceeding" for any given segment of a big case? How should a judge, presiding or mediating, obtain consent for ex parte discussions in a case with hundreds or thousands of stakeholders?

3. Public commentary

Canon 3 also discourages judges from public commentary on "the merits of a pending or impending action." The admonition against public comment about the merits continues until the appellate process is complete.[194] The goal is to avoid the risk of actual partiality, bias, or prejudgment, or the appearance thereof.[195] The Canon includes an exception, however, for the issuance of public statements "in the course of the judge's official duties."[196] If mediation is deemed to be within a judge's official duties, more active mediating judges might not see this Canon as applicable guidance for their conduct.

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and attorneys' fees" have been found to be violations. (internal footnotes omitted)).

192. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(d). For skepticism about waivers in other judicial ethics contexts, see John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & CONTEMP. PROBS. 43, 63 (1970) (discussing the ineffectiveness of waivers in the "conventional hometown court situation" when lawyers expect to regularly appear before the judge).

193. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4).

194. *Id.* at Canon 3(A)(6) Commentary.

195. *See, e.g.*, U.S. v. Microsoft, 253 F.3d 34, 107, 115 (D.C. Cir. 2001) ("Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. . . . Appearance may be all there is, but that is enough to invoke the Canons and § 455(a).").

196. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(6) (any pending action, not applicable to "public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education"); *see also In re* Boston's Children First, 244 F.3d 164, 168 (1st Cir. 2001) (calling for district judge to be disqualified after statements in press, acknowledging that the Canon recognizes public statements in official duties, but the commentary counsels that particular care be taken to prevent erosion of public confidence).

4. Extrajudiciality, fundraising, political activity

Canon 4 addresses "extrajudicial" activities—a term that deserves more unpacking than it gets.[197] Canon 4 discourages sitting judges from, say, engaging in the practice of law on the side. Putting aside such extreme examples (by modern standards anyway), other non-remunerative activities of judges to contribute to public life can be controversial however constructive they might be. The Code of Conduct does not apply to Supreme Court justices, but scholars have used examples, such as Justice Earl Warren helping investigate the death of President John F. Kennedy and Justice Robert Jackson serving on the Nuremberg War Crimes Trial, to illustrate the ethical tensions that arise with such service.[198] Judges may make attractive candidates to serve in such capacities due to their perceived impartiality, but "non-judicial service tends to erode the appearance of impartiality which is essential to judging itself."[199]

Canon 4 also tells judges not to fundraise other than among other judges outside of their supervision. The concern relates to "the use of the prestige of judicial office for that purpose."[200] "[J]udges must not be in the position of asking members of the community to support a cause by pledging monies, no matter how worthy that cause is."[201]

The Code of Conduct does not address the challenges for mediating in cases that inherently carry strong political dimensions.[202] Focusing on political activity, however, Canon 5 states that "[a] judge should not . . . make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office."[203] Canon 5 discourages federal judges from engaging in political activity more generally.[204] These tenets might call to mind the

197. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4.

198. *See, e.g.*, GEYH ET AL., *supra* note 191, at § 8.03[2] ("Although it is beyond question that these assignments were undertaken to advance the public good, they were not uncontroversial. . . . [E]ven the most selfless service on such commissions cannot help but tend to diminish the prestige of the court[.]").

199. *Id.*; *see* Robert P. McKay, *The Judiciary and Non-Judicial Activities*, 35 L. & CONTEMP. PROBS. 9, 25, 28–29, 34 (1970) ("Participation in such a process by members of the judiciary is less likely to settle a troublesome public issue than to lend credence to the all-too-common charge that the courts are part of the political process.").

200. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4(C).

201. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS L.J. 1067, 1072 (1996).

202. *See supra* Part I(A) (discussion of politically sensitive cases).

203. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 5.

204. *Id.* at Canon 5(A)(2). Canon 4(F) discourages forms of government service if the judge's governmental duties would tend to undermine the public confi-

comments made about the governor and the mayor at press conferences during the Detroit bankruptcy. Perhaps the term "candidate" is meant to distinguish between someone actively running for office versus someone already elected. In addition, some might argue that making favorable statements about both Democratic and Republican politicians might also counteract allegations of partisanship. Still, this is another dimension in which more guidance would be welcome when sitting judges serve as mediators in cases inherently intertwined with politics.

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The Code of Conduct was meant to help judges calibrate their own ethical compasses, which vary greatly based on individual philosophies. The discussion above suggests that the Code and its commentaries could support a judge's justification to *refrain* from some activities as a mediating judge that we already have seen. And perhaps it has. There is no record of acts considered and rejected, the proverbial dog that does not bark. With flexible language and vague exceptions, however, the Code arguably offers cover for judges who believe the ends of resolving cases justify the means.

What about any effect of interaction among judges? Political scientists and ethicists agree: judges care what other people think of them, especially their peers.[205] As Judge Irving Kaufman wrote when opposing Congressional intervention in judicial oversight, "[p]eer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law."[206]

Given how much the federal judiciary favors case management and docket control, one might expect judicial peers to reinforce rather than discourage expansive mediation practices. Even if a judge would not endorse the full range of techniques we saw in the case studies, she might be reluctant to try to persuade a peer accordingly, particularly if the Code of Conduct is less than clear.

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dence in the integrity, impartiality, or independence of the judiciary. *See id.* at Canon 4(F); GEYH ET AL., *supra* note 191, § 9.03.

205. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 54 (2006); Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 277–309 (1993) ("a friendly, off-the-record chat in one case, a stern dressing-down in another, raising the specter of formal disciplinary action in a third, and a threatened disclosure to the press in a fourth").

206. Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 709 (1979).

B. Congressional constraints

Congress has authority over court structure, budgets, and judicial pay raises, as well as impeachment (which is not addressed in this analysis). Consistent with separation-of-powers principles, the application of and elaboration on some matters are left to the judiciary. The discussion below explores how three categories of oversight fall short of remediating particularly aggressive mediation activities.

1. Structuring public trials and appellate review

Title 28 of the United States Code establishes the jurisdiction and venue of federal courts and elaborates on the Constitutional right to a jury trial. The structure of the adversarial system, with a public trial as the centerpiece, is itself a foundational check on judicial conduct.[207] In federal courts, "litigants have a due process right to an impartial judge."[208] In addition, the First Amendment of the Constitution imposes limits on private case disposition,[209] highlighting the importance of law playing out in public. Appellate review of trial court decisions is expected to provide an additional check on case-related judicial conduct.[210] Beyond error correction, having more judicial eyes on a matter fosters confidence.[211] The appellate

207. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925 (2000) (importance of public trials and danger of secrecy); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980) (right of public access to criminal trials); *id.* at 585 (Brennan, J., concurring) (role of the public acting as a check on the system). Jury trials add another watchdog. Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 773 (2018) (watchdog function of the jury, reminding judge to consider a broader range of viewpoints).

208. CHARLES GARDNER GEYH, FED. JUD. CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1 (2d ed. 2010) (citing Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)); *see also* Robertson, *supra* note 207, at 740.

209. *See* Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 521 (3d Cir. 2013) (striking down the use of sitting Delaware Chancery Court judges as arbitrators for a fee: "Because there has been a tradition of accessibility to proceedings like Delaware's government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations").

210. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1263 (2013); John P. Sahl, *Secret Discipline in the Federal Courts-Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 204 n.230 (1994).

211. *See* Robertson, *supra* note 210, at 1272 ("[T]he value of the appellate system's ability to increase public trust in judicial outcomes may exceed the amount of error correction actually accomplished.").

process offers the public additional opportunities to participate in and witness the courts at work.[212]

The case management and settlement promotion world that judicial mediation inhabits is often aimed at public trial *avoidance*, or at least narrowing the issues tried.[213] Occasionally, a litigant will prevail in a challenge to mediation.[214] Yet, the lack of a citable record from mediation makes any such challenge an uphill battle.[215] For example, in one case where a plaintiff complained she was "harangued" by a mediator to settle, and was told she would otherwise "never see a dime" based partly on incorrect legal information, a court could do little more than say what happened in the mediation was "hotly contested and not verifiable on the record before us."[216]

The Detroit case demonstrates the limits of the appellate process in a system that values alternative resolutions. Bankruptcy court decisions are generally appealed to the district court. Chief Judge Rosen's colleague in the district court who had received appeals from the Detroit bankruptcy sua sponte stayed them all as a matter of course.[217] When the bankruptcy court endorsed a direct appeal to the Sixth Circuit regarding its ruling that Detroit was eligible for bankruptcy, the court also requested that the Circuit defer to the mediator, Chief Judge Rosen, on the optimal timing of any such

212. *See* Robertson, *supra* note 207, at 766, 773.

213. *See* Resnik, *supra* note 207, at 925.

214. *See, e.g.*, *In re* A.T. Reynolds & Sons, Inc., 452 B.R. 374, 381 (S.D.N.Y. 2011), *rev'g* 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (reversing bankruptcy court's sanction, noting that "inquiry into the parties' conduct in a mediation, backed by the threat of sanctions, may exact a coercive influence on the parties to settle").

215. *See* Coben & Thompson, *supra* note 18, at 73 ("Successful challenges to judicially compelled mediation are rare."). For cases about sanctions against parties who resist mediation or settlement conferences, see, for example, Spradlin v. Richard, 572 F. App'x 420, 422 (6th Cir. 2014) (vacating lower court decision on other grounds but affirming award of sanctions for party's lack of preparation, late arrival, lack of full settlement authority, and failure to participate in good faith); Pucci v. 19th Dist. Ct., No. 07-10631, 2009 U.S. Dist. LEXIS 20390, at *12 (E.D. Mich. Mar. 6, 2009) (inherent authority to order nonconsensual mediation, and sanctioning party for failure to send representative with settlement authority); Frontier Ins. Co. v. Blaty, 454 F.3d 590, 598 (6th Cir. 2006) ("unenviable position of arguing that a magistrate should not encourage settlements" and affirming denial of a Rule 60(b)(6) motion by the party subject to default judgment after failing to send a representative to settlement conference).

216. Chitkara v. N.Y. Tel. Co., 45 F. App'x 53, 54 (2d Cir. 2002).

217. *See* Jacoby, *supra* note 10, at 86. One creditor successfully filed a writ of mandamus to compel that judge to rule on one matter. *In re* Syncora Guarantee, Inc., 757 F.3d 511 (6th Cir. 2014). The district judge summarily affirmed shortly thereafter. Syncora Guarantee Inc. v. City of Detroit, No. 13-CV-14305, 2014 WL 12531519 (E.D. Mich. July 11, 2014).

appeal, and the Sixth Circuit agreed to do so.[218] Individual objectors to Detroit's restructuring plan appealed the bankruptcy court's approval of it. Over a dissent, the Sixth Circuit declined to rule on the merits, instead resorting to a doctrine known as equitable mootness.[219] The dissenting judge warned that the appellants' lack of access to substantive review of major issues in Detroit's bankruptcy plan threatened the constitutionality of the bankruptcy system.[220]

The appellate process may serve as a check on settlement promotion in unusual cases where, say, a district judge tries to write his own local rule.[221] But circuit decisions imposing limits on the informal power of mediating judges are likely to be few and far between. How to get the issue before a circuit judge is itself a challenge. If fewer disputes are litigated, fewer final orders can be appealed. A writ of mandamus, while possible, is a rarely granted, extraordinary step. Appellate courts may doubt parties' allegations of coercion if the parties already signed documents indicating that they freely agreed to a mediated resolution.[222]

In other words, there are limits on what the appellate process can do in a culture that tells judges they have the inherent right to control their dockets and promotes a public policy favoring settlement. Under such a system, public trials and the appellate process

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218. Jacoby, *supra* note 10, at 85–86 (quoting from the court order and letter from Sixth Circuit clerk). Settlements ultimately mooted the appeal of the eligibility decision, as well as other appeals. One issue that did not get mooted challenged the constitutionality of Detroit's residential water shutoffs. That appeal also was dismissed. Lyda v. City of Detroit, 841 F.3d 684 (6th Cir. 2016).

219. *See* Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 795 (6th Cir. 2016). Because prior Sixth Circuit decisions had used equitable mootness only in chapter 11 cases, the Sixth Circuit was not required to follow those decisions for a municipal bankruptcy. *Id.* at 805.

220. *Id.* at 811–12 (Moore, J. dissenting).

221. Tiedel v. Nw. Mich. Coll., 865 F.2d 88, 94 (6th Cir. 1988) ("Although we render no opinion on what mediation enforcement measures may be permissible, we do hold that a district court is not empowered to enact a local rule giving itself the authority to award attorneys' fees.").

222. *See* Porter v. Chi. Bd. of Educ., 981 F. Supp. 1129, 1131–32 (N.D. Ill. 1997) (rejecting party's claim of being rushed and coerced into accepting settlement agreement); Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. ON ARB. & MED. 152, 154, 156 (2013) (reviewing failure of contract-based arguments challenging settlement agreements in a world where public policy favors settlement); Welsh, *supra* note 73, at 64 ("[I]t remains very difficult for parties who wish to rescind a settlement agreement to overcome the presumption that they exercised free will. It becomes even more difficult when a party claims that his or her free will was violated by the language or behavior of a judge in a settlement conference.").

are not necessarily operating as a check on judges' activities in a mediation.

2. Disqualification

Due process requires that judges lack bias.[223] Congress provides two statutory paths to disqualifying a federal judge from working on a particular case. The less frequently used provision, 28 U.S.C. § 144, provides that a district court case shall be transferred to another judge when a party files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party."[224]

Alternatively, 28 U.S.C. § 455, a more catch-all statutory provision, first calls for disqualification when "impartiality might reasonably be questioned."[225] Due to the difficulty of proving actual bias and the importance of perception to the legitimacy of the judiciary, an *appearance* of partiality is sufficient.[226] The standard is the perspective of a disinterested observer, an objectively reasonable layperson, knowing all relevant circumstances.[227] Section 455 also offers specific grounds for disqualification, including personal knowledge of disputed evidentiary facts.[228]

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223. *See In re* Murchison, 349 U.S. 133, 136 (1955).

224. 28 U.S.C. § 144. *See generally* GEYH, *supra* note 208, at 83–94 (analyzing both disqualification approaches and identifying reasons for section 144's lesser use). For an older and striking case applying this provision, see Occidental Petroleum Corp. v. Chandler, 303 F.2d 55, 56–57 (10th Cir. 1962) (district judge conducted closed-door hearings, meetings, and discussions where interested parties were not present, and was found to have hostility and bias against one of the key parties).

225. 28 U.S.C. § 455(a); *see also* Liteky v. United States, 510 U.S. 540, 541(1994).

226. *See* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) (appearance "saves face for the judiciary, because a judge may be removed while appellate courts continue to proclaim their confidence in her impartiality"). Appellate judges may go to great lengths to assure readers that the judge has had an illustrious career and has not committed any wrongdoing. *See, e.g.*, Haines v. Liggett Grp. Inc., 975 F.2d 81, 98 (3d Cir. 1992); *In re* Kensington Int'l Ltd., 368 F.3d 289, 317–18 (3d Cir. 2004).

227. *See, e.g.*, United States v. Carlton, 534 F.3d 97, 100 (2d Cir. 2008); *In re Kensington Int'l*, 368 F.3d at 302 (calling district judge's alternative interpretation to be without precedent).

228. Section 455(b) calls for disqualification when the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;" when the judge has previously served as a lawyer or witness concerning the same case or has expressed an opinion concern-

Although it is hard to get a reliable count, court decisions to disqualify a judge under either prong of section 455 seem rare.[229] And when the request is denied, "the moving party's fate is left in the hands of a judge whom that party not only believes may not be impartial, but who may also have become biased, subconsciously or otherwise, by the fact of having his impartiality questioned in court."[230] Asking a judge to disqualify himself for any reason, however well documented, is risky for parties and lawyers who appear in a court with any regularity.

Of course, disqualification is not supposed to be a substitute for the appellate process or a second bite at the apple for disappointed litigants,[231] or a method of judge shopping.[232] The impact of disqualification on judicial efficiency is also relevant. In rejecting a disqualification request, a district judge presiding over asbestos bankruptcies emphasized all the work he had done, including a four-week trial on which he had yet to rule, making disqualification a "consummate waste of untold proportions."[233] Given these themes, courts often emphasize that their duty *not* to disqualify is as strong as their duty to disqualify.

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ing its outcome; or when the judge or a member of his or her immediate family has a financial interest in the outcome. 28 U.S.C. § 455(b).

229. *See* Robertson, *supra* note 207, at 765 (2018) (90% of disqualification motions are denied, usually without a formal written opinion); *see also* Leubsdorf, *supra* note 226, at 245 (hypothesizing that "the most biased judges" may be "the least willing to withdraw").

230. Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 761 (2010); Deason, *supra* note 28, at 113 (in context of presiding judges seeking to settle their own cases, discussing the difficulty of pressing for a disqualification motion when one will later see that judge if their effort fails).

231. For recognition and a rare exception to this general principle, see Rsrv. Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976) (holding that the court cannot rely on the reversal process on the merits because the record demonstrates overt acts reflecting great bias and substantial disregard for prior mandate of the Eighth Circuit, raising concerns that judge has shed the robe and assumed the mantle of advocate).

232. Carter v. West Publ'g Co., No. 99–11959–EE, 1999 WL 994997, at *10 (11th Cir. Nov. 1, 1999) ("[I]t is likely that plaintiffs are seeking to avoid answering my well-known questions regarding class action certification in civil rights discrimination cases. But Congress has adamantly chosen to avoid the pitfalls of judge-shopping . . . ; parties in federal courts do not have carte blanche to disqualify a judge who is not to their liking.").

233. *In re* Owens Corning, 305 B.R. 175, 220 (D. Del. 2004), *rev'd*, *In re* Kensington Int'l Ltd., 368 F.3d 289 (3d Cir. 2004). The district judge offered an ominous statistic to combat his disqualification: fifteen asbestos victims would die every day; resolving the case would not save their lives, but presumably would bring closure to people who deserved it. *Id.*

One should not expect appellate courts to provide rigorous oversight of disqualification, even though it is technically possible for them to review on traditional appeal or mandamus.[234] Reversals of a refusal to disqualify are thought to be uncommon.[235] Appellate judges, like their trial court counterparts, may be skeptical about the motivations of those seeking disqualification.[236] Reviewing judges may ask why the motion wasn't made sooner.[237] And given the imperatives of judicial efficiency, reviewing judges may be influenced by the practical effect of disqualification, particularly in large and sprawling cases.[238]

Recently, the Sixth Circuit declined to disqualify the judge presiding over opioid multidistrict litigation who had been outspoken about the importance of settlement. The appellants emphasized the judge's public and private comments about prioritizing settlement and avoiding litigation. Stressing the extremely high standard a litigant must overcome to prevail on this issue, the Sixth Circuit declined to find that Judge Dan Polster had abused his discretion when he denied the request to step aside. Notably, for the purposes of this article, the Circuit rejected the argument that a strong push for settlement constituted bias for disqualification purposes.[239]

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234. *See* Robertson, *supra* note 207, at 766. For a high-profile, highly criticized exception, see Ligon v. City of New York, 538 F. App'x 101, 101 (2d Cir. 2013), *vacated*, 743 F.3d 362 (2014) (motions panel sua sponte removed Judge Scheindlin from stop and frisk case, citing Code of Conduct Canon 2 and Canon 3(c)(1), relating to press interviews).

235. *See* Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 Or. L. Rev. 69, 98–109 (2011) (reporting on a study of appellate court review of district court decisions not to recuse themselves).

236. *See, e.g.*, *In re Kensington Int'l*, 368 F.3d at 331 (Fuentes, J., dissenting) (characterizing request for review as a "guerrilla tactic timed to serve their own economic interests."); Omega Eng'g v. Omega S.A, 432 F.3d 437, 448 (2d Cir. 2005) (calling the delay in bringing recusal motion excessive, without explanation); Apple v. Jewish Hosp. & Med Ctr., 829 F.2d 326, 334 (2d Cir. 1987) (motion was untimely, looked strategic, and failed to explain delay).

237. *See, e.g.*, *In re Kensington Int'l*, 368 F.3d at 323; U.S. v. Yonkers Bd. of Educ., 946 F.2d 180, 183 (2d Cir. 1991) (timeliness requirement meant to prevent waste of judicial resources). *But see* Reed v. Rhodes, 179 F.3d 453, 487 (6th Cir. 1999) (Cole, J., dissenting) (noting that declining disqualification based on the timing of the request amounts to impermissible burden-shifting).

238. *In re Kensington Int'l*, 368 F.3d at 330 (Fuentes, J., dissenting) (practical effect of disqualification at this point "catastrophic" to some constituencies).

239. *In re* Nat'l Prescription Opiate Litig., No. 19-3935, 2019 WL 7482137 (6th Cir. Oct. 10, 2019) ("That Judge Polster believed that settlement was the best option does not display bias. He pushed for settlement not because he had prejudged the case, but because that was the most expedient way to conclude the dispute. . . . Judges in complex litigation are encouraged to pursue and facilitate settlement early in a variety of ways. . . . That he would recommend settlement as the best

Circuits occasionally do order disqualification. In a Third Circuit decision involving difficult asbestos bankruptcies, ex parte communications were central to the court's reasoning.[240] The presiding district judge had engaged in more than 325 hours of ex parte communication with attorneys for various parties, as well as spending many hours with advisors the court retained for substantive help.[241] The Third Circuit noted the lack of affirmative consent from parties.[242] How one might have obtained the requisite consent in such a sprawling case remains unclear.

The First Circuit disqualified a presiding district judge from a school reassignment case due to news media comments. She had written a letter to the editor and given a telephone interview after prior reporting had mischaracterized the case in her view.[243] The Circuit's reasoning focused on the high-profile and political sensitivity of the case and perceptions of partiality.[244]

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option in this case, or push its pursuit, does not evidence prejudicial attitudes on the merits that would require him to recuse himself.").

240. *In re Kensington Int'l*, 368 F.3d at 294–305.

241. *Id.* at 297. Although the court's holding was based on the more general impartiality provision, the court also thought the § 455(b) criteria were met as well. *Id.* The court declined to decide whether ex parte communications provided separate grounds for disqualification, but nonetheless expressed "disfavor" about the communications: "Whatever value the ex parte meetings may have had in moving the [cases] along or creating a settlement-friendly atmosphere was outweighed by the attendant risks and problems." *Id.* at 294–95; *see also* Edgar v. K.L., 93 F.3d 256, 260 (7th Cir. 1996) (disqualifying the trial judge who met ex parte with a panel of experts appointed to investigate health institutions and programs). For a case coming out the other way, see *Reed*, 179 F.3d at 469 (declining to disqualify the judge who had been asked to take over the Cleveland school desegregation case after the original presiding judge had died, notwithstanding extensive ex parte communication on sensitive matters).

242. *In re Kensington Int'l*, 368 F.3d at 294; *see also* Welsh, *supra* note 26, at 1007; Floyd, *supra* note 46.

243. *In re* Boston's Children First, 244 F.3d 164, 165 (1st Cir. 2001) (district judge wrote a letter to newspaper about pending case about race and public schools and was interviewed in the press by telephone).

244. *Id*. at 170; *see also* U.S. v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001) (trial judge had conducted secret interviews with members of press intended for publication at conclusion of trial; appearance that trial judge coveted favorable publicity and perhaps a place in history created an appearance of bias); U.S. v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993) (district judge should have disqualified himself after appearing on Nightline television show, unavoidably creating an appearance of becoming active participant). By contrast, the Sixth Circuit declined to disqualify a district judge who had talked to the press about an environmental case with a consent decree, including statements suggesting racial disparities in oversight capabilities. *In re* City of Detroit, 828 F.2d 1160 (6th Cir. 1987) (per curiam). The reasoning was based partially on the untimeliness of the request. *Id.* at 1165, 1168 (could have raised claims two to three years earlier). This matter also

The Sixth Circuit also has held that a district judge should have recused himself from a discrimination case against the United States Postal Service. At a pretrial hearing, the district judge called the postmaster an honorable man who would never discriminate intentionally against anybody.[245] The Sixth Circuit reasoned that the judge lauded someone closely connected with the personnel decisions at issue in the trial.[246]

As a last example, the Sixth Circuit ordered a new judge in a sex discrimination class action.[247] After the liability phase, the presiding district judge called the defendants "a bunch of villains . . . interested only in feathering their own nests at the expenses of everybody."[248] When the defendant appealed the judgment, the Sixth Circuit not only ordered a rehearing on the preliminary injunction, but ordered that the injunction motion be heard by a different judge. The Sixth Circuit noted that the district court's remarks were unsupported, suggested denial of a fair hearing and lack of impartiality, and placed in doubt the ability to conduct an unbiased proceeding.[249]

These examples reflect matters that could arise with mediating judges. The disqualification standards generally apply to mediating judges.[250] Some local rules apply the standards for judicial disqualification even to private neutrals.[251] But that doesn't mean it would

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led to a disciplinary complaint, which was dismissed over dissent. *In re* Complaints of Judicial Misconduct, Nos. 84-6-372-08 & -10 (6th Cir. Judicial Council Mar. 11, 1985). In a school desegregation case, where the district judge had engaged in extensive ex parte communication, the Sixth Circuit declined to disqualify the presiding judge, but instructed that a new judge take over the case. Bradley v. Milliken, 620 F.2d 1143, 1145 (6th Cir. 1980).

245. Roberts v. Bailar, 625 F.2d 125, 127 (6th Cir. 1980).

246. *Id.* at 129 ("[I]t is clear that a reasonable person would question the impartiality of the District Judge."). As is often the case, the court noted that its opinion was based on the appearance of partiality rather than actual partiality. *Id.* at 130.

247. Nicodemus v. Chrysler Corp., 596 F.2d 152, 157 (6th Cir. 1979).

248. *Id.*

249. *Id.*

250. *See* NIEMIC, STIENSTRA & RAVITZ, supra note 53, at 68.

251. *See, e.g.*, E.D. Mich. LR 16.3(f)(1) (2015) (unless parties agree to the rules of an arbitration tribunal, a mediator is held to the "standards for disqualification of a judicial officer under 28 U.S.C. § 455"); W.D. Tenn. LR App. D.1(e)(3) (2016) (party required to file a motion detailing the disqualifying conflict, bias or prejudice either within fourteen days from the Court's Order designating the mediator or as soon as possible if the ADR process has commenced); *see also* D. Ariz. Bankr. R. 9072-7(c)(1), (c)(3) (2009) (mediators may be disqualified for any event for which a judge would be disqualified, as well as conflict of interest); N.D.N.Y. Bankr. R. App. IV, 5.3.2 (2012) (party must first present the conflict to the media-

be easy or comfortable for a lawyer or party to seek disqualification of a mediating judge; if a mediating judge declines to disqualify himself, the party's next stop is likely the presiding judge, who sometimes hand-selects the mediating judge.[252]

The evidentiary barriers to a disqualification remedy are themselves notable. Large swaths of mediating activity generate little tangible record or evidence.[253] As discussed earlier, some courts say that statements and acts relating to an official court assignment of mediation cannot be "extrajudicial." That means access to information in a freewheeling mediation is off limits as a basis for disqualification.[254] In addition, both the mediating and presiding judges probably share a perceived need for efficiency, and thus a perception of disqualification as disruptive and distracting from the real work. Finally, if the mediating judge does not have adjudicatory responsibilities, the court might further discount the need for disqualification.

Notwithstanding the barriers for lawyers and parties bringing motions to disqualify, the relevance of the disqualification statute to mediating judges should not be written off entirely. For example, one might ask whether a mediating judge who later becomes a presiding judge is categorically distinct from, say, a lawyer who once worked on a case and later becomes a judge, warranting disqualification.[255]

3. Disciplinary system

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 created the foundation for a formal judicial disciplinary system.[256] The 1980 Act authorizes each federal circuit's judicial council to review complaints against federal judges and to

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tor; if the mediator does not withdraw, notify the court). *See generally* Trust, *supra* note 52, at 29 (citing Southern District of New York and Western District of Texas rules, and observing "mediation procedures require that a mediator not agree to serve as a neutral in any circumstances in which a judge should not serve as a judge").

252. *See* Robertson, *supra* note 207, at 765; Jeffrey Cole, *Jilting the Judge: How to Make and Survive a Motion to Disqualify*, 34 LITIG. 48, 48 (2008).

253. *See* Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, 35 LITIG. 17, 22 (Spring 2009).

254. 28 USC § 455(b)(1); *see also supra* Part I(D)(1) (Sunwest/Harder disqualification decisions).

255. *See* Williams v. Pennsylvania, 579 U.S. 1, 6–7, 14 (2016) (state supreme court justice who served as prosecutor decades earlier should have been disqualified on due process grounds).

256. Pub. L. No. 96-458, 94 Stat. 2035 (1980).

order sanctions for misconduct.[257] The 1980 Act, coupled with procedural rules revamped in 2006,[258] offers procedures concerning who can file a complaint ("any person"), what type of process should follow, and the remedies, which include restricting the cases assigned to a judge, and "censuring or reprimanding the judge" in private or public, or, in extreme cases involving bankruptcy judges, removal from office.[259] The disciplinary system does not apply to Supreme Court justices.[260] In addition, the process is terminated if the judge resigns.

The central focus of the 1980 Act is misconduct, defined as "conduct prejudicial to the effective and expeditious administration of the business of the courts."[261] At the very least, that is broad enough to cover a variety of matters, including allegations of sexual misconduct or racial bias (although the judiciary's handling of such matters remains a subject of much controversy).[262] Some other notable examples include improper ex parte communication with counsel for "one side" in a case, engaging in partisan political activity or making partisan statements, or soliciting funds for organizations.[263] Retaliation for a complaint is also cognizable misconduct, as is "treating litigants, attorneys, judicial employees or others in a demonstrably egregious and hostile manner."[264]

Cutting against the potential for expansive interpretation of cognizable misconduct are concerns about chilling judicial discretion and independence, and undermining principled decision-making.[265] The 1980 Act is not supposed to provide redress through the

257. *See* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Preface (last revised Mar. 2019).

258. *See* THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1 (2006); *see also* Hellman, *supra* note 180.

259. 28 U.S.C. § 354.

260. *See* COMM. ON JUD. CONDUCT AND DISABILITY OF THE JUD. CONF. OF THE U.S., C.C.D. NO. 19-01, at 5 (Aug. 1, 2019) ("As a Supreme Court Justice, Justice [Brett] Kavanaugh is not a judge subject to this Act.").

261. 28 U.S.C. § 351.

262. *See* COMM. ON JUD. CONDUCT AND DISABILITY OF THE JUD. CONF. OF THE U.S., C.C.D. NO. 18-02 (May 31, 2019) (investigation of racial bias in magistrate judge selection by district court).

263. *See* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 3(h) (last revised Mar. 12, 2019).

264. *Id.*

265. *See* Pierson v. Ray, 386 U.S. 547, 553–56 (1967) (explaining why judges should not be subject to civil liability for acts within judicial discretion).

ordinary appellate process.[266] The theoretical possibility of appeal may be dispositive whenever an act or behavior relates to action within a case, even if settlement activity is particularly difficult to challenge on appeal due to lack of a record (which also complicates the pursuit of a disciplinary complaint).[267]

While confidentiality of judges accused of misconduct understandably is protected, the identities of those who submit the complaints are not. The complaints cannot be filed anonymously; they must be signed and submitted under penalty of perjury.[268] Lawyers and parties face reputational risks for making public, non-anonymous complaints about sitting judges in real time absent extraordinary circumstances.[269] This suggests sample bias, of a sort, regarding filed complaints: complainants, who might be pro se, are less equipped to well-plead the facts or are unaware of the high standard necessary for a complaint to be viable.[270] Indeed, the Second Circuit and Seventh Circuit websites tell readers that "[a]lmost all complaints in recent years have been dismissed because they do not follow the law about such complaints."[271]

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266. *See* 28 U.S.C. § 352(b); RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 3 Commentary. For example, the Second Circuit instructs litigants: "If you are a litigant in a case and believe the judge made a wrong decision—even a very wrong decision—you may not use this procedure to complain about the decision." *Judicial Conduct and Judicial Disability Procedures*, U.S. CT. OF APPEALS FOR THE SECOND CIR., https://www.ca2.uscourts.gov/judges/judicial_conduct.html [https://perma.cc/YRB6-WERH] (last visited June 24, 2021).

267. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 11 (among grounds for dismissal are that allegations lack sufficient evidence to raise an inference that misconduct has occurred or is based on allegations that are incapable of being established through investigation).

268. *Id.* at Rule 6. The Commentary on Rule 4 advises that a person who wishes to remain anonymous can report something confidentially to the Office of Judicial Integrity, but that office is focused on workplace misconduct. *Id.* at Rule 4 Commentary.

269. *See* Flamm, *supra* note 230, at 761; Cole, *supra* note 252, at 48.

270. Defendants in an insurance matter filed a complaint against several judges, including a mediating magistrate judge. Among other things, the complaint identified an ex parte phone call between the magistrate judge and plaintiffs' lawyers. The panel determined that this phone call was not an improper communication. In addition, allegations that defendants were not consulted about the scheduling of mediation sessions were undercut by the district court offering a continuance. *In re* Judicial Complaints Under 28 U.S.C. § 351, Nos. 4-20-90076, 4-20-90077, 4-20-90078 (4th Cir. Oct. 6, 2020).

271. *Judicial Conduct and Judicial Disability Procedures*, *supra* note 266; *Judicial Conduct and Disability*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR., http://www.ca7.uscourts.gov/judicial-conduct/judicial-conduct.htm [https://perma.cc/WVA9-592B] (last visited June 24, 2021).

One limit to any analysis of the Disciplinary Act stems from the fact that this disciplinary system prefers informal corrective action.[272] That means we won't always see the remedy. Indeed, Congress imposed a relatively limited publicization requirement on the courts, and the judiciary has amplified it only modestly. These limitations typically are justified by confidentiality, baked into the statute itself and on which Judicial Conference rules elaborate.[273] Circuits must post final misconduct orders on their websites, and the U.S. Judicial Conference posts a sampling of final orders from its own judicial conduct committee.[274] But they are not required to, and do not, make it easy to find out what each order is about, short of opening and reading each posted file. Moreover, names are typically redacted.[275]

The disciplinary system is not a likely cure to the range of mediating judge practices seen in this article, nor was it meant to be.[276] Some complaints do arise from judicial settlement pressure.[277] Or-

272. *See, e.g.*, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rules 4 & 11; *id.* at Rule 4 Commentary (informal corrective action is encouraged, so some complaints do not result in use of full-blown procedures and detailed explanations); *id.* at Rule 5 Commentary (encourages "swift remedial action"); *id.* at Rule 11 Commentary (following Breyer Commission emphasis on "voluntary self-correction").

273. 28 U.S.C. § 360 (requiring posting only if sanction being imposed); RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 24; *id.* at Rule 24 Commentary (judicial conference urged circuits and courts to submit to West and Lexis decisions with "significant precedential value").

274. *Judicial Conduct and Disability Orders*, U.S. CTS., https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/code-conduct-judicial-employees/judicial-conduct-disability-opinions, [https://perma.cc/QFE3-VKBG] (last visited Mar. 3, 2022).

275. Only the Fourth Circuit affords searches by content (such as "mediator") on its website; the other numbered circuits do not. Circuits mostly organize orders by year, although some allow searches by case number. Circuits that upload scanned documents (First, Fifth, Eighth, Eleventh, and DC Circuits) offer no text search functionality within each order. Earlier misconduct decisions are not posted; they must be formally requested. Westlaw, Lexis, and Bloomberg Law do not offer comprehensive sets of misconduct orders; typically, they are limited to those the judiciary selects for the Federal Reporter.

276. *See In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-16-90012 (4th Cir. Feb. 17, 2016); *In re* Complaint No. 05-17-90082 (5th Cir. Aug. 9, 2017).

277. *See In re* Complaint No. 01-20-90003, at 1–2 (1st Cir. Judicial Council Apr. 14, 2021) ("Petitioner asserted that the magistrate judge 'pressure[d]' petitioner to accept a settlement offer, and 'threat[ened]' that if he did not settle, defense counsel 'would plead him to death.' Petitioner contended that, by suggesting that an allegedly retaliatory citation could be removed from petitioner's employee file, the magistrate judge advocated an unlawful 'subterfuge' and an 'unfair and deceptive practice.'").

ders disposing of such complaints illustrate how such complaints are deemed to be related to the merits of the matter and are thus outside the scope of the Act,[278] or considered an inappropriate end-run around the appellate process.[279] This is the likely consequence even when the mediating judge is also performing other key tasks, such as a magistrate judge both assigned to mediate and to weigh in on a motion to dismiss.[280] As noted earlier, the inability to show evidence of settlement pressure because there are no transcripts of mediation sessions, and because of documentation indicating that the parties are participating voluntarily, can be fatal to a complaint.[281]

This is not to say judges are immune from disciplinary consequences for all behavior relating to settlement. Some things that happen during a case are supposed to be actionable, such as conspiracy with a prosecutor or race discrimination.[282] But the conduct would have to be extreme. The D.C. Circuit upheld a misconduct finding that relied in part on a presiding judge's behavior during a settlement conference.[283] Yet, that was only one part of a longer list of trouble.[284] It is hard to see guidance in such an opinion for more

278. *See, e.g.*, *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-16-90012, at 3 (4th Cir. Feb 17, 2016).

279. *Id.*; *In re* Complaint No. 05-17-90082, at 4 (5th Cir. Aug. 9, 2017).

280. *See, e.g.*, *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 4-20-90035, at 3 (4th Cir. Aug. 12, 2020) ("Complainant has failed to present, and the records do not disclose, any evidence of improper motive, bad faith, or other misconduct. Complainant may not pursue his disagreement with the magistrate judge's report and recommendation, or with the magistrate judge's handling of the court-sponsored mediation process, through a complaint of judicial misconduct."); *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-19-90163 (4th Cir. July 9, 2020) (dismissing misconduct allegation involving mediated settlement in bankruptcy).

281. *See, e.g.*, *In re* Complaint No. 01-20-90003, at 3 (1st Cir. May 21, 2020). In this case, other aspects also rendered the complaint unlikely to succeed, including that the complainant was a lawyer and did not follow an available rescission procedure. *Id.* at 4–5.

282. Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4 Commentary.

283. *See* Hon. John H. McBryde v. Comm. to Review Disability Act Orders, 264 F.3d 52 (D.C. Cir. 2001) (upholding sanctions for racist comments, gross abuse of power, lack of empathy involving judge who also had an antagonistic relationship with other judges). The judge mistreated a lawyer who had a legitimate reason for suggesting that her client be excused from attending a settlement conference. A ten-year old plaintiff had previously been "terrorized" by the defendant who had removed his glass eye and put it in his mouth. The defendant's lawyer had been given full settlement authority, making defendant's attendance unnecessary. The judge ordered counsel to take reading comprehension courses and submit repeated affidavits about attendance. *Id.* at 67.

284. *Id.*

run-of-the-mill mediation zealousness, especially with the federal judiciary's longstanding endorsement of settlement promotion operating in the background.

Whatever one thinks of the Disciplinary Act, it is unlikely to be a particularly useful tool to improve mediating judge practices for reasons similar to discussion of other accountability measures: a disconnect due to the lack of a citable record, the interpretation of mediating judges as acting within their judicial capacities, and the judiciary's overall enthusiasm for docket management. Indeed, given that the Disciplinary Act is directed toward conduct prejudicial to the effective and *expeditious administration of the business of the courts*, mediating judges with a heavy foot on their powers and authority are likely to be seen on the right side of the law, not the wrong one.

III.
FILLING THE ACCOUNTABILITY GAP

Courts innovate in response to case-closing pressure. Well-intentioned objectives have fostered practices that turn out to be harder to reach by ordinary accountability measures than things presiding judges do.

One can make a parallel claim about mediating judges relative to private neutrals. Advocates of traditional mediation theory have lamented how private neutrals have drifted from the centrality of party consent and have become comfortable using higher pressure practices.[285] Left in the shadows have been the additional risks of those same practices undertaken by sitting judges.

In other words, problematic practices that might arise when judges handle other judges' cases come from both directions. Compared to presiding judges, mediating judges imposing high-pressure or other problematic practices are more insulated from judicial accountability. Mediating judges also can do or threaten to do things that private neutrals cannot by virtue of their court commission. When mediating judges engage in similar practices to private neutrals, judges may not be bound to the obligations imposed on certified mediators (such as confidentiality) unless they are certified mediators themselves, or by local rules of procedure that either do not apply when a judge mediates or that a specific mediation order suspended. Meanwhile, whether or not mediating judges are more assertive than private neutrals, the lawyers and parties cannot help but be aware of the mediator's sitting judge status.

285. *See supra* Part I(B).

The case-closing abilities of mediating judges may be fueled in part by a kernel of uncertainty about what it means for a judge with significant official powers to sit in a role designed either for someone without any such powers, or to be accountable as the presiding judge.

Standard court oversight tools were created largely with traditional adversarial judging in mind, coupled with judges as delegators to others. They are difficult to apply when an Article III judge is a delegat*ee* and yet, by design, there is little record of what transpired. For scholars of case management, this conclusion should come as no surprise.[286] The practical implications are nonetheless startling when one considers the powers and authority that some sitting judges believe comes with a mediation appointment.

In addition, when circuit and trial judges equate extrajudicial activity with extra-professional activity rather than simply activity outside of a case over which a judge presides, it becomes harder to disqualify a non-presiding judge who derives significant information from informal channels. Lawyers and parties may be disinclined to use disqualification tools early in a case. If they wait until later in the case when the consequences are clearer, they risk being told, "too late."

The federal judiciary has both the power and the obligation to fill the gap and provide better guidance and accountability when judges work on other judges' cases. This project may encourage judges within specific districts to have fruitful conversations and consider amending local rules. On a national level, the Judicial Conference of the United States is the appropriate body to pursue such projects, particularly through its committees on Codes of Conduct and those responsible for rules of procedure. Judicial discussion of these issues might need to be behind closed doors, but should be informed by commentary from lawyers and parties, with protected identities, to ensure that judges can understand how things look from the outside.

Here is an agenda for judges to consider:

- Selection: Under what circumstances is it prudent for a sitting judge to select another sitting judge as a mediator? What processes should be implemented to ensure that parties are able to provide input on the selection without risking their reputations in the case or in general? If a government actor is going to choose the mediator, under what circumstances should that actor be someone other

286. *See, e.g.*, Peterson, *supra* note 12.

than the presiding judge, and possibly even from a different branch of government?

- Leakiness of information between judges: What level of communication is acceptable between presiding and mediating judges? Who is entitled to know about it?
- Discussion of the case with the public: To what extent do confidentiality restrictions on parties and lawyers apply to mediating judges? Should different rules apply when the case has broader political interest or a public institution as a major party?
- Exercise of formal judicial power: Under what circumstances should a mediating judge be able to exercise formal judicial powers of any kind? Is the term "mediation" compatible with the role executed by an actor with coercive public powers?
- Documenting basic activity of mediating judges: While mediation traditionally is premised on the lack of a usable record of negotiations, judicial accountability depends on the existence of a record. Is there a type of documentation of a judge's role that could straddle this divide? Are some confidentiality agreements too broad to warrant enforcement such that they overprotect mediating judges?[287]
- Number of parties and consent: Should there be different guidance for mediating judge activity in multilateral disputes as opposed to binary litigation, given the implications for obtaining consent?
- Implied or express duty to mediate in good faith: To the extent the judiciary assumes parties have a duty to mediate in good faith, what is the origin of that duty? How might it be clarified?[288]

These questions should be approached with bigger picture issues in mind, such as:

- Separation of powers: How should separation of powers inform guidance to mediating judges? Even if the appoint-

287. For refusal to enforce a broad confidentiality stipulation in a different context, see *In re* Halvorson, 581 B.R. 610 (Bankr. C.D. Cal. 2017), *rev'd on other grounds*, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018) (court refused to enforce parties' overbroad confidentiality stipulation, which parties failed to lodge for presiding judge consideration).

288. *See* Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 658 (7th Cir. 1989) (Posner, J., dissenting from en banc opinion) (litigants have no duty to bargain in good faith over settlement before trial, but lawyers rarely feel free to resist judges' requests).

ment arises in the judge's official capacity, to what extent, if at all, should the work of the mediating judge be deemed "judicial" activity?[289] How should these considerations affect the scope of formal judicial activity a mediating judge undertakes? Do politically sensitive federal cases require more extensive precautions and guidance?

- Role of Code of Conduct for United States Judges and Commentaries: To what extent does this centerpiece of judicial ethics apply differently to judges when mediating versus presiding? What additional examples should commentaries address? Should the commentaries address the perception that judges might seek out mediation opportunities to burnish credentials for post-retirement alternative dispute resolution careers?
- Statistics: Why *not* collect and publicize statistics on mediating judges by type of case, demography of presiding and mediating judges, and the like? What are the downsides, and do they outweigh the benefits?

CONCLUSION

Mediating judges have largely slipped through the cracks of widespread academic discussion. It is not hard to see why given the difficulty of even tracking the practices. There are compelling explanations, including access to justice, for the mediating judge. Yet, some practices create the perception or the reality of judicial overreach in ways that elude standard judicial accountability measures, with costs to parties and the system on several levels.

Judges probably will not stop working on other judges' cases. This reality makes it even more important that the judiciary expressly recognize that it cannot rely on the traditional accountability tools to manage the risks. With meaningful input from others,

289. *Mistretta* informs the analysis by its use of the term "extrajudicial." The majority decision recognized a distinction between exercising judicial power and other activities that "share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the judiciary." Mistretta v. United States, 488 U.S. 361, 389 (1988). "The Constitution does not preclude judges from assuming extrajudicial duties in their individual capacities." *Id.* at 402. Case law suggested that "Congress may authorize a federal judge, in an individual capacity, to perform an executive function without violating separation of powers." *Id.* at 403. That suggests support for the view that some professional activities judges undertake in cases over which they do not preside should be construed as extrajudicial. *See generally* Liteky v. United States, 510 U.S. 540, 541 (1994) (exploring "extrajudicial" in disqualification statutes).

the federal judiciary can and must chart a better path—starting not tomorrow, not next week, but today.

THE INVISIBLE, YET OMNIPRESENT EAR: THE INSUFFICIENCIES OF THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

SUZANNE KAUFMAN

I. INTRODUCTION

Speaking aloud when no one else is near is no longer considered strange when a smart speaker or device is around. These devices have incorporated themselves into homes where they are available to, and used by, children and adults.[1] While these speakers may appear to make one's life easier, their constant collection and storage of information poses dangers and threats, especially to children.[2] Children's submission of personal information to smart speakers mirrors the finding that children are entering personal information to websites in many ways when going online without their parents knowing or approving.[3] Given the current environment of the ever-expanding integration of technology into our lives, issues with children's information privacy continue to increase.

The Children's Online Privacy Protection Rule, COPPA ("the Act"), was intended to protect children's personal information from first parties, companies that directly collect the information from the individual. But the pervasive yet unanticipated role of

1. Greg Sterling, *Roughly 1 in 4 U.S. Adults Now Owns a Smart Speaker*, MARTECH (Jan. 9, 2020, 2:09 PM), https://marketingland.com/roughly-1-in-4-u-s-adults-now-owns-a-smart-speaker-according-to-new-report-273994 [https://perma.cc/FR8E-PVE9] (stating that about 60 million U.S. adults own at least one smart speaker).

2. *See* Sonia Livingstone, John Carr, & Jasmina Byrne, *One in Three: Internet Governance and Children's Rights*, UNICEF INNOCENTI DISCUSSION PAPERS No. 2016-01, 23 (2016) (listing both the risks and opportunities that the internet, including smart speakers, present); Anita L. Allen, *Minor Distractions: Children, Privacy and E-Commerce*, 38 HOUSTON L. REV. 751, 755 (2009) ("No one can deny, though, that Internet use *is* something of a threat to young families.").

3. Lauren A. Matecki, *Update: COPPA Is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J. OF L. AND SOC. POL'Y 369, 373 (2010) ("The FTC found that children who went online were submitting personal information to websites in a wide range of capacities without the knowledge or approval of their parents.").

third parties, companies that receive aggregated data that was previously collected from individuals, has increased the difficulty of COPPA application, threatening the security of children's personal information. There is a distinction to be drawn between third parties who collect a child's information solely to perform a function requested, such as processing payments, and third parties who collect a child's information for the purpose of exploiting it.[4]

COPPA was designed to heighten security measures for children under the age of 13 by giving parents more control of their children's personal information. Yet, the role of third parties in data collection and sharing subverts the missions of both stricter protection of children as well as greater parental control. Even when the first party collects personal information of children in compliance with COPPA, the third parties with whom that information can eventually be shared do not all comply with the regulation. The child's personal information that was protected becomes no more regulated than any other adult's personal information. This Note will look at the ability of first parties, specifically Google and Amazon, to undermine COPPA by sharing children's information with third parties who do not comply with the Act. It will analyze whether COPPA is sufficient in protecting children's privacy by looking at whether first parties comply with the regulation, and, even if they do, whether their compliance achieves the goals of COPPA based on third-party sharing. This question gets to the central issue of whether COPPA is sufficiently protecting children's information. The effectiveness of COPPA can guide further amendments and reforms to the Act in order to reach the socially optimal outcome so that it can better serve its purpose without imposing useless or unhelpful requirements on companies.

A. Internet History

The risks to children, as users of the internet, are connected to the history of the use of the internet. In the 1990s, the internet became a place of marketing, sales, and distribution of products and services.[5] As the internet increasingly attracted children, abuses of their personal information rose, demonstrating just how much personally identifiable information (PII) can be collected from a

4. As used in this paper, the term "third party" will refer only to the latter where the information is less secure and unprotected.

5. Corey A. Ciocchetti, *E-Commerce and Information Privacy: Privacy Policies as Personal Information Protectors*, 44 AM. BUS. L.J. 55 (2007).

seemingly innocuous product or service.[6] For example, Mattel's Hello Barbie records conversations and sends to a server not only those of the child who consented but also those of any other children who interact with the doll.[7] To illustrate the severity of these abuses, in July 1998, Senators Richard Bryan and John McCain introduced a bill, some of which was later incorporated into COPPA.[8]

B. The Problem

The problems created by children's use of the internet are similar, but not identical, to the problems created by children's use of smart speakers and devices. There are five main problems created by children's use of the internet. First, the internet competes with activities that are better for children's growth and development—such as physical exercise, homework, and face-to-face communication—showing the failure of reaching the socially optimal outcome.[9] These activities are especially important to children, who are still developing and learning at rapid rates as compared to adults. The socially optimal outcome in this situation would not only be for children's privacy to be protected but also for children to be able to use the internet in ways that enhance their growth rather than compete with it. The goal of regulations such as COPPA should be to better incentivize behavior that leads to that socially optimal outcome. Second, the internet inappropriately exposes children to sex, violence, hate, and advertising and marketing content because of children's vulnerability and lack of awareness of certain warning signs that adults have grown accustomed to looking for.[10] Not only does the internet therefore undermine parental val-

6. OECD, *Chapter 2. Children and Digital Technologies: Trends and Outcomes*, *in* EDUCATING 21ST CENTURY CHILDREN (Tracey Burns & Francesca Gottschalk eds., 2019) (ebook), https://www.oecd-ilibrary.org//sites/71b7058a-en/index.html?itemId=/content/component/71b7058a-en#section-d1e2428 [https://perma.cc/38E4-7BQD].

7. Alex B. Lipton, Note, *Privacy Protections for Secondary Users of Communications-Capturing Technologies*, 91 N.Y.U. L. REV. 396, 406 (2016) (quoting Mattel's Hello Barbie's privacy policy: "By allowing other people to use the Service via your account, you are confirming that you have the right to consent on their behalf to ToyTalk's collection, use and disclosure of their personal information as described below.").

8. *Children's Online Privacy Protection Act*, TECH LAW JOURNAL, http://www.techlawjournal.com/congress/privacy/Default.htm [https://perma.cc/PKH9-LZ5A].

9. Allen, *supra* note 2, at 755–56 (comparing the harms of internet use to those of television viewing or comic book reading).

10. As used here, "vulnerability" refers to children's lesser ability than adults to identify bad actors and foresee the consequences of their actions. *See id.* at 756

ues and authority, but it, third, compromises child welfare by introducing and facilitating criminality such as juvenile hackers, identity thieves, and viral agents.[11] Fourth, the risk to children extends to their families through the child's participation in e-commerce, releasing not only their own PII but also family financial information without fully comprehending the effects of sharing financial information over the internet.[12] Fifth, the internet accounts for a substantial amount of bullying (i.e., cyberbullying) and harassment of which children are common targets.[13]

When looking at the release of personal information in particular, the risks to children are heightened. Once information is disclosed, unauthorized users are enabled to access and misuse personal information.[14] This further increases the vulnerabilities that could be used to compromise personal information.[15] Each compromised network facilitates attacks on other connected systems.[16] Overall, collection of children's personal information creates risks to their personal and physical safety.[17]

Children are especially at risk from the dangers posed by the internet and collection of personal information because of their vulnerabilities in not recognizing the dangers of others having access to their personally identifiable information and in being less able to identify bad actors.[18] For example, information can be col-

("Neither filtering practices nor rating systems have become pervasive or effective enough to reduce the threat of inappropriate exposure to children.").

11. *Id.* at 757 (explaining this problem through the example of Jonathan Lebed: "This New Jersey youth capitalized on the anonymity of the Internet and the gullibility of greedy adults to earn $800,000 by trading stocks.").

12. *Id.* ("Children are often indifferent to the forms of informational privacy and data protection of concern to adults.").

13. Livingstone et al., *supra* note 2, at 23 ("[S]ome [children] are vulnerable, resulting in mental distress, self-harm or even suicide . . . . [T]hese risks undermine children's rights regarding identity, reputation, privacy and play as well as safety.").

14. F.T.C., Internet of Things: Privacy & Security in a Connected World 10 (2015), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf [https://perma.cc/6XPU-3YLN].

15. *Id.* at 11.

16. *Id.* at 11–12. ("For example, a compromised IoT device could be used to launch a denial of service attack. Denial of service attacks are more effective the more devices the attacker has under his or her control; as IoT devices proliferate, vulnerabilities could enable these attackers to assemble large numbers of devices to use in such attacks.").

17. *Id.* at 10–14.

18. Matecki, *supra* note 3, at 374 ("[A] child would be likely to disclose information to websites, but lack the developmental capacity to fully understand the

lected from children more immediately and with less difficulty than from adults because of "the ability of the online medium to circumvent the traditional gatekeeping role of the parent."[19]

To exemplify the dangers posed to children in particular, one can look to the creation and motivation behind the Infancy Law Doctrine.[20] The idea behind the Infancy Law Doctrine is that children's inexperience and inattention causes them to be targeted by sellers, so children should have more protection when entering agreements online.[21] Some believe that children and teenagers have become "the epicenter of American consumer culture."[22] A child who is over-confident in their technological expertise needs more protection; "[t]oday, a new generation of computer-savvy minors sits confidently in front of their computer screens fearlessly and effortlessly initiating a multitude of contracts in cyberspace."[23]

Children are also at risk of those dangers that all users face. There are three main risks identified for all users. First is the lack of participation in decisions about one's own information, and second, the lack of control since the data is being stored for unknown future purposes.[24] The third risk is that when one's information is released, the release can lead to one being watched and one's behaviors being constrained.[25] As Daniel Solove describes, "the secrecy paradigm" also contributes to the risks internet users face in that individuals want to keep their information secret from certain people.[26]

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consequences of such disclosure, such as widespread dissemination to third party advertisers.").

19. *Id.* As will be explained later, COPPA was designed to alleviate some of the risks to children. *See infra* Part II(A). But as this Note will explore and explain, COPPA has been unsuccessful with regards to that goal. *See infra* Part III.

20. Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 U. SEATTLE L. REV. 613, 613 (2011) (describing how children and teenagers have become the "epicenter of American consumer culture" and how that leads to consequences not only for their own futures but also for the future of "our culture").

21. *Id.* at 619 ("Many areas of law recognize that minors do not have the same capacity for decision making as adults.").

22. *Id.* at 613.

23. *Id.* at 623 n.64.

24. DANIEL J. SOLOVE, THE DIGITAL PERSON 42 (Jack M. Balkin & Beth Simone Noveck eds., 2004).

25. *Id.*

26. *Id.* at 8 (defining "secrecy paradigm" as the way in which "privacy is invaded by uncovering one's hidden world, by surveillance, and by the disclosure of concealed information").

The effects of information being released, especially for children, are long-lasting. Given that there are few opportunities to challenge the inferences made by algorithmic calculations, information about oneself, even from a young age, may stick with that person for their lifetime.[27] That information can impact one's access to opportunities.[28]

This Note argues that COPPA does not sufficiently achieve its goal of protecting children. Part II of this paper will explain the background and history of COPPA to provide some context for the regulation. Part III will dive into two smart speakers, the Amazon Alexa and the Google Assistant to analyze whether, and to what extent, they directly comply with COPPA as first parties. Part IV will discuss how, even if Amazon and Google do comply as first parties, they share the information they collect via the smart speakers with third parties who might not comply with COPPA. Part V will provide some suggestions on how to proceed, with a focus on law and economics theory, where the reasoning for the suggestions centers around the benefits to the economy overall. Finally, Part VI will conclude.

II.
BACKGROUND AND HISTORY OF COPPA

A. COPPA's Purpose

COPPA was the first federal privacy law directly addressing the online and electronic realm.[29] The creation of the Act was driven by privacy concerns and potential online safety risks such as online predators getting power over children's PII and the other threats and risks discussed above.[30] COPPA forces parents to get involved with their child's use of the internet and disclosure of information. As children increasingly used the internet, marketing companies

27. Deborah Lupton & Ben Williamson, *The Datafied Child: The Dataveillance of Children and Implications for Their Rights*, 19 NEW MEDIA & SOC'Y 780, 786 (2017) ("[People] often have little knowledge about how corporations are exploiting their personal details and using them to construct detailed profiles on people.").

28. *Id.* (explaining how the profiles corporations create on people can be "used for decisions about their access to employment, insurance, social welfare, special offers and credit").

29. SOLOVE, *supra* note 24, at 70 (listing various statutes that pertain to privacy).

30. Simone van der Hof, *I Agree. . .or Do I? A Rights-Based Analysis of the Law on Children's Consent in the Digital World*, 34 WIS. INT'L L.J. 409, 422 (2017) ("[P]otential online safety risks, such as (online) predators getting their hands on children's personal data, were also perceived as very worrisome."); *see supra* Part I(B).

compiled lists of their PII and behavioral data that was subsequently sold to third parties, furthering the release and lack of control over one's own information.[31]

The collection of PII from children online presented concerns about the "vulnerability of children," "the immediacy and ease with which information can be collected from them," and "the ability of the online medium to circumvent the traditional gatekeeping role of the parent."[32] The objectives of the law, as summarized by COPPA's co-sponsor Senator Richard Bryan, were to: (1) increase a parent or guardian's involvement in their child's online activities to protect the child's privacy in the online environment; (2) protect a child's safety when using services in which a child could publicly post their PII; (3) maintain security of children's PII collected online; and (4) limit the overall collection of children's PII, especially that collected without parental consent.[33]

One of the goals of COPPA was to reduce the increased risk to children that came with the increase of online marketing and advertising.[34] Those risks included predatory marketing, stalking or kidnapping, and other threats described above.[35] The idea was that parents should be a part of the decisions made by children since parents are ultimately responsible for their children's well-being and safety.[36] The goal of COPPA was not to add burdensome requirements on online operators; in fact, legislators believed that COPPA would not introduce significant obstacles that would inhibit innovation, economic growth, or children's access to learning opportunities online.[37]

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31. van der Hof, *supra* note 30, at 422 ("[I]nvestigative reports demonstrated the ease with which mailing lists consisting of children's personal information could be obtained from marketing companies.").

32. Matecki, *supra* note 3, at 374.

33. *Id.* at 375–76 (describing how, overall, the Act "sought to address the FTC's concerns and requests in the Privacy Online report").

34. Allen, *supra* note 2, at 752 ("Supporters believed COPPA would reduce the risk of one class of harms posed by the new economy to children who use computers, namely, imprudent disclosures of personal information by children.").

35. Danah Boyd et al., *Why Parents Help Their Children Lie to Facebook About Age: Unintended Consequences of the 'Children's Online Privacy Protection Act'*, 16 FIRST MONDAY (Nov. 7, 2011), https://journals.uic.edu/ojs/index.php/fm/article/view/3850/3075 [https://perma.cc/A8XG-B7TQ].

36. Allen, *supra* note 2, at 773 (explaining how the Supreme Court and Congress often side with parents who want to restrict their child's access to information and services).

37. Boyd et al., *supra* note 35, at 3.

B. COPPA's Requirements

1. 1998 Version

The Children's Online Privacy Protection Act (COPPA) was enacted by Congress and signed by President Clinton on October 21, 1998.[38] It became effective on April 21, 2000.[39] COPPA is codified in the U.S. Code in Title 15, Chapter 91.[40] Generally, COPPA requires notice, transparency, security, confidentiality safeguards, parental choice, and parental consent for data collection.[41]

The Act applies to websites and services targeted at children, defined as people under the age of thirteen, or general-audience operations when there is "actual knowledge" that it is collecting personal information from a child.[42] Whether something is "directed" at children depends on the operator's intent, as well as the language, images, and overall design.[43]

There are several requirements under the regulation aimed at protecting children's privacy and the collection of their PII. COPPA's main requirements are: (1) a clear and comprehensive privacy policy; (2) obtaining "verifiable parental consent" before collecting, using, or disclosing a child's PII; and (3) obtaining "verifiable parental consent" after the data processing practices have been changed in a material way.[44] To get consent, the operator must provide the parent with "a description of the specific types of personal information collected from the child by [the] operator,"

38. Elizabeth R. Purdy, *Child Online Protection Act of 1998 (1998)*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1066/child-online-protection-act-of-1998 [https://perma.cc/SPU3-TTP7].

39. *Children's Online Privacy Protection Act COPPA*, NATIONAL CREDIT UNION ADMINISTRATION (July 2001), https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/childrens-online-privacy-protection-act-coppa [https://perma.cc/NM88-9YV4].

40. Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–06 (2000).

41. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 646–47 (2014) ("COPPA is broad, encompassing meaningful notice, transparency, and parental choice and consent requirements, as well as security and confidentiality safeguards.").

42. SOLOVE, *supra* note 24, at 70 (referencing language from the Act that specifies that the Act only applies to websites that know they are collecting information from children). General-audience operations are defined as sites and services directed at people aged 13 or older. *See* Claire Quinn, *Know Your Audience or Pay the Price*, PRIVO (Mar. 31, 2020), https://www.privo.com/blog/know-your-audience-or-pay-the-price [https://perma.cc/M4X5-MVRA].

43. Allen, *supra* note 2, at 760 ("The determination of whether a Web site is directed to children under thirteen is based not only on the intent of the Web site operator, but on the language, images, and overall design of the site as well.").

44. van der Hof, *supra* note 30, at 422-23.

"the opportunity at any time to refuse to permit the operator's further use or maintenance . . . of personal information from that child," and "a means that is reasonable . . . for the parent to obtain any personal information collected from that child."[45] Parents are given a substantial amount of power under COPPA, extending to the right to veto the ways in which their child's PII is collected, used by both first and third parties, and maintained.[46] Many of these requirements are more difficult to achieve.

While the language of COPPA did not explicitly include reference to recording of a child's voice within the original version of the regulation from 1998, the 2013 amendment to the legislation clarified that such information is also protected.[47] There is an exception to the protection of audio files containing children's voices when the audio is collected only to replace written words, such as using the dictation tool instead of typing out a word, so long as the audio is only stored for a short period of time and is used solely for that purpose.[48] That exception does not excuse the operator from providing clear notice of collection and use of audio files in its privacy policy.[49] Once the audio file collected contains any PII, then the exception no longer applies, and the regulations of COPPA must be adhered to.[50] It should be noted that the exception does not change anything else about the operator's compliance with COPPA.[51]

Some argue that COPPA does not apply to smart speakers because smart speakers are not "directed to children" as defined in

45. 15 U.S.C. § 6502(b)(1)(A)(i) (1998); *see also* Allen, *supra* note 2, at 763.

46. Allen, *supra* note 2, at 763 ("Under COPPA, parents are ascribed a powerful right to veto primary collection, primary use, secondary use, and even maintenance of data.").

47. *FTC Provides Additional Guidance on COPPA and Voice Recordings*, FED. TRADE COMM'N (Oct. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/10/ftc-provides-additional-guidance-coppa-voice-recordings [https://perma.cc/DLD9-G4RF] (adding "video or audio file that contains a child's image or voice" to the definition of personal information); *see infra* Part II(B)(2).

48. *FTC Provides Additional Guidance on COPPA and Voice Recordings*, *supra* note 47 ("The FTC will not take an enforcement action against an operator for not obtaining parental consent before collecting the audio file with a child's voice when it is collected solely as a replacement of written words. . . .").

49. *Id.* ("The Commission noted that there are important limitations to this policy.").

50. *Id.*

51. *Id.* As will be described later, this exception does not apply to the entirety of children's use of smart speakers, as the purpose of the communication is more than a replacement of written words. Additionally, the audio file will likely contain the child's PII. *See infra* Part III.

the legislation.[52] Because the COPPA requirements are burdensome on the operators, smart speakers were thought to be excluded from the legislation.[53] Yet, smart speakers have been found to fall within COPPA despite the burdensome requirements.[54] And according to the Federal Trade Commission's own guidance, general home devices most likely qualify for the COPPA requirements under "actual knowledge" of having collected children's PII.[55] Given that the latter interpretation is from the Federal Trade Commission (FTC) itself, that is more likely to be the rule that governs with regard to smart speakers since the FTC is the main governing body of COPPA.

COPPA's main focus is on the requirements of the first party operator, but it does mention how third parties play a role in the protection.[56] Based on a law and economics analysis, COPPA, therefore, does not adequately incentivize first parties to comply or first parties to get third parties with whom they share information to comply. And without an incentive to protect the children's information, corporations often "exploit the consumer's behavioral biases."[57] In other words, the regulation is not economically efficient. When the PII that the first party collects will be shared with a third party, the privacy policy must identify that third party, describe what line of business the third party is in, explain how the third party will be using the information, and include whether or not the

52. *See, e.g.*, *Kids & the Connected Home: Privacy in the Age of Connected Dolls, Talking Dinosaurs, and Battling Robots*, FUTURE OF PRIVACY F. & FAM. ONLINE SAFETY INST. 11 (Dec. 2016), https://fpf.org/wp-content/uploads/2016/11/Kids-The-Connected-Home-Privacy-in-the-Age-of-Connected-Dolls-Talking-Dinosaurs-and-Battling-Robots.pdf [https://perma.cc/JVB6-ANXY] ("The market for connected smart home devices is growing rapidly, but most general purpose home devices are not – and should not be – covered by COPPA.").

53. *Id.* ("[I]t does not make sense for either operators or all users of a general market device to be burdened with the extra requirements of COPPA because of the possibility that a child might use that device.").

54. *Id.* (using the example of Smarty by Silicone Home, Inc., which is a smart speaker designed to be used by children that would likely be considered "directed to" children and therefore fall within COPPA).

55. *Children's Online Privacy Protection Rule: Not Just for Kids' Sites*, FED. TRADE COMM'N (Apr. 2013), https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-not-just-kids-sites [https://perma.cc/MY4Y-U4NG] ("[T]he FTC has said that an operator has actual knowledge of a user's age if the site or service asks for – and receives – information from the user that allows it to determine the person's age.").

56. Ciocchetti, *supra* note 5, at 75–76 (explaining how one of the requirements of COPPA is for the sites' privacy policies to say whether the information will be disseminated to third parties); 15 U.S.C. § 6502(b)(1)(A)(i) (1998).

57. Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1373 (2004).

third party has agreed to maintain the same protections of the PII, including confidentiality, security, and integrity.[58] The FTC said that the first party is largely responsible for making sure that the third party with which they share a child's PII protects the "confidentiality and security" of that information through the contracts between the two parties.[59] The FTC also said that making sure the third party actually does maintain the confidentiality and security of the PII is up to the first party.[60] Additionally, there has to be an element of choice when sharing PII with third parties.[61]

2. 2013 Amendments

In 2013, the FTC amended COPPA.[62] The main effects of the amendments were to: (1) expand the definition of "operator" to include services which integrate third parties that collect a child's PII as part of the first party service; (2) increase the acceptable forms of acquiring parental consent; (3) provide new exceptions to the notice and consent requirements; (4) require more data security protections; and (5) require adoption of reasonable data retention and deletion procedures.[63] Additionally, the amendment expanded the definition of "personal information" to include geolocation information, screen or username, persistent identifiers such as cookies that track a child's activity online, and photos or videos containing the image of a child or audio files containing a child's voice, the focus of this paper.[64] The amendment also changed the definition of "collects" or "collection" to "requesting, prompting, or encouraging a child to submit personal information

58. Ciocchetti, *supra* note 5, at 82 (listing the requirements of the privacy policies).

59. *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions [https://perma.cc/YEL9-YEJA].

60. *Id.*

61. 16 C.F.R. § 312.5(a)(2) (2013).

62. *Revised Children's Online Privacy Protection Rule Goes into Effect Today*, FED. TRADE COMM'N (July 1, 2013), https://www.ftc.gov/news-events/press-releases/2013/07/revised-childrens-online-privacy-protection-rule-goes-effect [https://perma.cc/3DFL-CPCB] ("The Federal Trade Commission's revised Children's Online Privacy Protection Act Rule took effect today, giving parents greater control over the online collection of their children's personal information.").

63. Phil Nicolosi, *What Will COPPA Changes Mean for Your Business?*, PHIL NICOLOSI L., P.C., https://www.internetlegalattorney.com/coppa-changes-businesses/ [https://perma.cc/XU7E-WAUN] (explaining the changes to COPPA in the new version of the Act).

64. *Revised Children's Online Privacy Protection Rule Goes into Effect Today*, *supra* note 62.

online."[65] The final revision on the definition of "collects" or "collection" results in an implication that becomes central to the argument of this Note: operators cannot evade COPPA by relying on third parties to collect children's PII.[66] Logically, that makes sense since having a third party collect the information is, in essence, no different than direct collection of information by the first party itself.

C. Global Regulatory Framework

This section explores the regulatory backdrop against which COPPA operates. Since many services are used across the globe rather than just within the sphere of one regulation, tech companies must design products for a global marketplace and, as a result, have to follow multiple privacy and data protection laws. Thus, the gaps in COPPA may not be gaps when compared to the entire group of privacy regulations. Similarly, while some of the gaps in COPPA are filled by other regulations, other gaps in COPPA may not currently be filled but should be filled by other regulations as opposed to further amendments to COPPA itself.

1. The General Data Protection Regulation (GDPR)

COPPA is comparable to the General Data Protection Regulation (GDPR), which applies to the European Union, in that both directly address children's privacy online.[67] The GDPR and COPPA fulfill largely the same purpose—children's privacy protections—in two different geographical areas (the European Union and the United States, respectively). The GDPR, though, also covers privacy protections of adults. The GDPR provides lessons with regards to the need for a privacy protection statute with enhanced protections for children. Under the GDPR, online operators are required to obtain parental consent before collecting or using information from children under 16, but member states are allowed to change that age as long as it is not below 13.[68] Furthermore, Articles 13 and 14 of the GDPR state that when a data controller knows that children use its service, the privacy information and communication to

65. Phil Nicolosi, *Can You Avoid COPPA When Third-Parties Collect Data?*, PHIL NICOLOSI L., P.C., https://www.internetlegalattorney.com/avoid-coppa-third-parties-collect-data/ [https://perma.cc/TU2V-UK7G].

66. *Id.*

67. General Data Protection Regulation, 2016 O.J. (L 119) 1.

68. van der Hof, *supra* note 30, at 425 (explaining how the provision allowing for member states to change the age in the definition of "children" was likely a compromise between EU Parliament and Council).

that user should be tailored so that the child can understand their rights and what is happening with their PII.[69] The Amazon Alexa and Google Assistant violate the GDPR's requirements on collecting, using, and storing children's PII in that no privacy notices tailored specifically to children are available, the information about the processing of the child's information by third parties is confusing, and there is a lack of transparency with regard to profiling.[70] Under European data protection law, consent is one of the most important grounds for the processing of personal data to be done in a lawful manner.[71] The GDPR has been found to be insufficient, and, because of the heavy parental involvement in the child's use of the internet, may exacerbate trust issues in that relationship.[72] Overall, the GDPR has seven principles: lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality, and accountability.[73] Since the US has no comparable national privacy law, those principles of the GDPR are not reflected in a similar regulation in the US.

2. The California Consumer Privacy Act (CCPA)

Another regulation which acts in tandem with COPPA is the California Consumer Privacy Act (CCPA).[74] The CCPA has a much smaller scope than COPPA, as the CCPA only applies to California. Furthermore, while COPPA focuses solely on children, the CCPA applies to people of all ages, with only certain sections focusing on children in particular. Under the CCPA, a child is defined as any-

69. Anna Morgan, *The Transparency Challenge: Making Children Aware of Their Data Protection Rights and the Risks Online*, 23 J. OF COMPUT., MEDIA & TELECOMMS. L. 44, 46 (2018).

70. Sophie-Charlotte Lemmer, *Alexa, Are You Friends with My Kid? Smart Speakers and Children's Privacy Under the GDPR*, KING'S COLL. LONDON L. SCH. GRADUATE STUDENT RSCH. PAPER NO. 2018/9_6, 13 (June 25, 2020) (violating the requirements of Article 12(1) and 13 in conjunction with Recital 58, guidance of the WP29, and ICO guidance).

71. van der Hof, *supra* note 30, at 420 ("[C]onsent is a fundamental legal instrument for *transforming unlawful conduct into lawful conduct*.").

72. *See, e.g.*, Esther Keymolen & Simone Van der Hof, *Can I Still Trust You, My Dear Doll? A Philosophical and Legal Exploration of Smart Toys and Trust*, 4 J. CYBER POL'Y 143, 154 (2019) ("Giving parents the ability to check their children's conversations with smart toys, potentially even behind their backs, raises new trust issues in their relationship.").

73. *See, e.g.*, Matt Burgess, *What Is GDPR? The Summary Guide to GDPR Compliance in the UK*, WIRED (Mar. 24, 2020, 4:30 PM), https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018 [https://perma.cc/PT49-98X2].

74. California Consumer Privacy Act, CAL. CIV. CODE §§ 1798.100–1798.199.100 (West 2018).

one under the age of 16.[75] The CCPA further requires the consent of parents in order for an operator to sell a child's information if that child is under the age of 13.[76] The CCPA requires businesses to disclose what information they have about a user and how they are using or plan to use that information, to delete PII, and not to sell the PII, including to third parties, when a user so requests.[77] Those rights also apply before providing one's PII, or at the time the business is collecting one's PII.[78] The business is not allowed to discriminate against a user for exercising their rights under the CCPA.[79] Similarly, a business cannot require a user to waive their rights under the CCPA, making any contractual provision of such requirement unenforceable.[80] While the CCPA includes many details about what practices are allowed or prohibited in the state, one example of something that is required in California by the CCPA but not required in other states is a "Do Not Sell My Personal Information" home page link.[81] Furthermore, the CCPA covers many more entities, raises the age of "children" from 13 to 16, and expands the definition of "personal information," amongst other changes.[82]

3. The United Nation's Convention on the Rights of the Child (UN-CRC)

Children's online rights have increasingly intersected with children's rights instruments, such as the UN's Convention on the Rights of the Child (UN-CRC).[83] Though the UN-CRC is not a regulation, it provides more context to COPPA and the rationales be-

75. *See, e.g.*, Amelia Vance et al., *Child Privacy Protections Compared: California Consumer Privacy Act v. Proposed Washington Privacy Act*, FUTURE OF PRIV. F. (Jan. 27, 2020), https://fpf.org/2020/01/27/child-privacy-protections-compared-california-consumer-privacy-act-v-proposed-washington-privacy-act/ [https://perma.cc/58FU-JEZ4].

76. *See id.*

77. *Cal. Consumer Priv. Act (CCPA)*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/privacy/ccpa [https://perma.cc/MYN5-YYLM].

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g.*, Spencer Persson et al., *California Passes Major Legislation, Expanding Consumer Privacy Rights and Legal Exposure for US and Global Companies*, DATA PROTECTION REPORT (June 29, 2018), https://www.dataprotectionreport.com/2018/06/california-passes-major-privacy-legislation-expanding-consumer-privacy-rights/ [https://perma.cc/9FYB-F9E7].

82. *See id.*

83. *See, e.g.*, Sonia Livingstone, *Reframing Media Effects in Terms of Children's Rights in the Digital Age*, 10 J. OF CHILD. & MEDIA 4, 5 (2016) (explaining how the coincidence of the 25th anniversary of the UN-CRC and the 25th anniversary of the World Wide Web being in the same year led to researchers and policymakers

hind it. Many ideas and values discussed at the UN-CRC are incorporated into statutes and regulations such as the GDPR, CCPA, and COPPA. The UN-CRC describes the "3Ps" every child has as the rights to the provision of basic needs, protection against neglect, and participation in families and communities.[84] Those "3Ps" are helpful in navigating children's rights not only offline, but online as well.[85]

D. How the FTC Has Dealt with Enforcement

The FTC has primary enforcement authority of COPPA. The harm from COPPA violations falls directly on the children who are the users of the service through the release of their PII. The FTC's first enforcement action was against Toysmart.com on July 10, 2000 to block it from selling confidential information about its consumers.[86] About a month before the suit was filed, the company filed for bankruptcy.[87] In doing so, Toysmart.com purchased a newspaper advertisement announcing the sale of its assets, including its customer information, despite promising customers that information would never be shared.[88] The FTC also found that Toysmart.com collected PII of children under 13 including names, email addresses, and ages without notifying parents or obtaining parental consent.[89]

As of 2019, the FTC had brought close to 30 COPPA cases and had collected hundreds of millions of dollars in civil penalties.[90] Some of those actions included suits brought by the FTC against

looking into the "connections between internet governance and children's well-being").

84. *See id.*

85. *See* Sonia Livingstone & Brian O'Neill, *Children's Rights Online: Challenges, Dilemmas, and Emerging Directions*, MINDING MINORS WANDERING THE WEB 19, 19 (Simone van der Hof et al. eds., Mar. 2014) ("[T]he UN Convention on the Rights of the Child is helpful in mapping children's rights to provision, protection and participation as they apply online as well as offline.").

86. *See* Stephanie Stoughton, *FTC Seeks to Stop Waltham, Mass.-Based e-Retailer from Selling Consumer Data*, BOS. GLOBE (July 11, 2000).

87. *See id.*

88. *See FTC Announces Settlement with Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Policy Violations*, FED. TRADE COMM'N (July 21, 2000), https://www.ftc.gov/news-events/press-releases/2000/07/ftc-announces-settlement-bankrupt-website-toysmartcom-regarding [https://perma.cc/JW2U-YPR6].

89. FTC v. Toysmart.com, No. 00-CV-11341-RGS, 2000 U.S. Dist. LEXIS 21963, at *1 (D. Mass. Aug. 21, 2000).

90. F.T.C., PRIVACY & DATA SECURITY UPDATE: 2019 (2019), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2019/2019-privacy-data-security-report-508.pdf [https://perma.cc/Q8CC-HS3H].

Vtech,[91] Hello Barbie,[92] Google and YouTube,[93] TikTok,[94] and HyperBeard.[95] In 2015, Vtech announced that 5 million users' data, including that of children, was compromised as part of a cyberattack.[96] The data compromised was sufficient to link children back to their family's last name and home address.[97] The settlement with Google and its subsidiary, YouTube, required YouTube to "modify its technology platform to allow greater monitoring of third parties' COPPA compliance - beyond that required by law."[98] On February 27, 2019, the FTC obtained a settlement from TikTok for $5.7 million, the largest COPPA penalty so far, over allegations that the company collected personal information from children without parental consent as required by COPPA.[99] Finally, on June 4, 2020, HyperBeard, Inc. agreed to settle for $150,000 and to delete the PII it had illegally collected from children.[100] HyperBeard, Inc. also allegedly violated COPPA by allowing third parties to collect persistent identifiers, included in the definition of PII as of the 2013

91. *See* Andrea Peterson, *Toymakers Are Tracking More Data About Kids – Leaving Them Exposed to Hackers*, WASH. POST (Nov. 30, 2015, 12:40 PM), https://www.washingtonpost.com/news/the-switch/wp/2015/11/30/toymakers-are-tracking-more-data-about-kids-leaving-them-exposed-to-hackers/ [https://perma.cc/UQZ8-XF9Y] (detailing the hacking of Vtech).

92. *See* Donnell Holloway & Lelia Green, *The Internet of Toys*, COMMC'N RSCH. AND PRAC. (2016).

93. *See* PRIVACY & DATA SECURITY UPDATE: 2019, *supra* note 90, at 9 ("The FTC's settlement with Google and its subsidiary YouTube – brought in conjunction with the New York Attorney General – alleges that the company collected kids' personal data without parental consent, in violation of the COPPA Rule.").

94. *See Children's Online Privacy Protection Act*, *supra* note 8.

95. *See Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids' Data Without Parental Consent*, FED. TRADE COMM'N (June 4, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it [https://perma.cc/5PQS-HF9B] ("In a complaint filed by the Department of Justice on behalf of the FTC, the Commission alleges that HyperBeard, Inc. violated the Children's Online Privacy Protection Act Rule (COPPA Rule) by allowing third-party ad networks to collect personal information in the form of persistent identifiers to track users of the company's child-directed apps, without notifying parents or obtaining verifiable parental consent.").

96. Peterson, *supra* note 91.

97. *Id.*

98. Duane C. Pozza, *FTC Pushing to Hold Companies Liable for Third Parties' Activities*, WILEY CONNECT (Oct. 21, 2019), https://www.wiley.law/newsletter-2019-Oct-PIF_FTC_Pushing_to_Hold_Companies_Liable_for_Third_Parties_Activities [https://perma.cc/7MAA-LMTB].

99. *Children's Online Privacy Protection Act*, *supra* note 8.

100. *Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids' Data Without Parental Consent*, *supra* note 95.

amendments, which allowed the company to track the users of apps, including apps directed at children, without notifying parents or obtaining parental consent.[101] The settlement amounts in the above lawsuits are very small compared to the size and net worth of the firms.[102] The real harm to the companies comes from the reputational damage of being seen as a dangerous service for children to use. Compliance with COPPA would not only help firms avoid minor monetary damages but also frame them as willing to do what is necessary to keep children safe.

III.
AMAZON ALEXA AND GOOGLE ASSISTANT

In order for the FTC to enforce the regulation, they first have to identify companies that are not in compliance. The first place to look to determine whether Amazon Alexa and Google Assistant comply with COPPA is their own privacy policies, to see whether the first parties themselves facially comply. For products made by companies as large as Google and Amazon, looking at their privacy policies is not as easy as following one link to a single document with all the information one is looking for. Rather, finding a specific piece of information requires searching through multiple different privacy policies, each privacy policy tailored to a particular type of user or product.[103]

Smart speakers and devices pose especially great dangers to children in terms of collecting, storing, using, and sharing children's PII because of the nature of the interactions with these devices. The speakers encourage the user to disclose large amounts of personal data about their lives, and since children are not as critical as adults in disclosing such information, the devices pose an even greater danger.[104] Children might also not understand the extent

101. *Id.*

102. *See, e.g.*, Sam Shead, *TikTok Owner Bytedance Reportedly Made a Profit of $3 Billion on $17 Billion of Revenue Last Year*, CNBC (May 27, 2020, 9:08 AM), https://www.cnbc.com/2020/05/27/tiktok-bytedance-profit.html [https://perma.cc/GN76-LQA4] (stating that TikTok's revenue in 2019 was $17 billion).

103. Yet, as will be shown, some of the privacy policies contradict each other, leaving a user confused and lacking in knowledge as to what information is being collected, used, and disclosed, and for what purposes.

104. *See Internet Safety for Kids: How to Protect Your Child from the Top 7 Dangers They Face Online*, KASPERSKY, https://usa.kaspersky.com/resource-center/threats/top-seven-dangers-children-face-online [https://perma.cc/8UF8-CG3B] (last visited Mar. 22, 2022) ("Children do not yet understand social boundaries. They may post personally identifiable information (PII) online, for example in their social media profiles, that should not be out in public.").

to which their voices and conversations can be recorded through a device which has no screen and requires no physical interaction to use.[105] The lack of screen and lack of physical interaction to use the Amazon Alexa and Google Home also provide greater obstacles for complying with COPPA, as there is not as easy of a way to require parental consent or verification before the child begins using the device. There is also the problem of recognizing when a child is using the smart speaker as opposed to an adult.[106] Another challenge is that the device can be accessed accidentally, simply by speaking aloud and the speaker hearing what was said, rather than something like an app which is intentionally opened or setting up an account and clicking "I agree" to access a service.[107]

Both Amazon and Google neglect to address what is referred to as "The Playdate Problem."[108] Regardless of whether Amazon and Google set up separate children's accounts or protect the children of the family in some other way, they do not describe how they obtain parental consent from the parent or guardian of a child using the service who does not live with the owner of the device. The failure to obtain parental consent, in itself, is a violation of COPPA that the privacy policies and notices do not mention. Similarly, the smart speakers do not distinguish between a child's voice and an adult's voice, opening up a search to include potentially inappropriate responses when a child is interacting with the device.

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105. *See, e.g.*, *The Dangers of Smart Speakers and Essential Safety Tips*, NEXUS (Aug. 7, 2019), https://nexusconsultancy.co.uk/blog/the-dangers-of-smart-speakers-and-essential-safety-tips/ ("In order to be useful to their owners, smart speakers and other connected devices are always listening.").

106. *See* Martyn Farrows, *Let's Talk Voice Tech, Data Privacy, and Kids*, VOICEBOT.AI (Mar. 28, 2020, 1:00 PM), https://voicebot.ai/2020/03/28/lets-talk-voice-tech-data-privacy-and-kids/ [https://perma.cc/JL3G-4WFT] ("Once consent was given, a kid's data was treated just like the data of an adult.").

107. *See, e.g.*, Tove Marks, *The Privacy Risks of Your Smart Speaker*, VPNOVERVIEW (Dec. 18, 2020), https://vpnoverview.com/privacy/devices/privacy-risks-smart-speaker/ [https://perma.cc/Q7P4-GT2U] ("Your smart speaker may think it heard the keyword but simply misinterpreted a snippet of conversation. This can have the smart speaker listening for your instructions and possibly taking actions based on what it thinks it hears.").

108. *See*, *e.g.*, *Echo Dot Kids Edition Violates COPPA*, ECHO KIDS PRIV., https://www.echokidsprivacy.com/ [https://perma.cc/UW9T-7GXL] (last visited Jan. 11, 2022) (defining the Playdate Problem as Amazon not giving notice or obtaining parental consent "before recording the voices of children that do not live in the home (visiting friends, family, etc.) with the owner of the device. They advertise having the technology to create voice profiles for customized user experiences but fail to use it to stop information collection from unrecognized children.").

A. How Smart Speakers Operate

Before looking into the specifics of the privacy policies, it is essential to understand how the smart speakers work. The speaker is triggered to activate when it hears its "wake word."[109] The device then records the communication and sends it to a Cloud where the communication is transcribed to text and analyzed with natural language processing before sending back to the smart speaker the information to complete the request or task.[110] In terms of terminology, the Google Home and Google Nest are the hardware connected to Google Assistant, the software, and the Amazon Echo is the hardware supported by Amazon Alexa, the software.[111]

B. Amazon Alexa

On its face, Amazon complies with COPPA. Yet, when looking into the details of their policies, one can see how they do not comply with the requirements in ways that an average consumer might not understand. The general Amazon privacy policy states, "[w]e do not knowingly collect personal information from children under the age of 13 without the consent of the child's parent or guardian. For more information, please see our Children's Privacy Disclosure."[112] Following the provided link leads to the Children's Privacy Disclosure, which specifies that some of Amazon's services are directed to children and that Amazon has "actual knowledge" that some of its services are used by children.[113] That recognition is important because it signifies that Amazon must be in compliance with COPPA.[114] Amazon follows that recognition by saying, "[i]n these situations, children may share and we may collect personal information that requires verifiable parental consent under the Children's Online Privacy Protection Act."[115] According to those statements, one would reasonably believe that Amazon is in compliance, as they even go so far as to name the specific Act they are

109. *See* Matthew B. Hoy, *Alexa, Siri, Cortana, and More: An Introduction to Voice Assistants*, 37 MED. REFERENCE SERVS. Q. 81, 82 (2018) ("The software constantly listens for a key word to wake it up.").

110. *Id.*

111. Lemmer, *supra* note 70, at 2.

112. *Amazon.com Privacy Notice*, AMAZON (last updated June 29, 2022), https://www.amazon.com/gp/help/customer/display.html?nodeId=468496 [https://perma.cc/J9R9-WP5V].

113. *See Children's Privacy Disclosure*, AMAZON (last updated July 8, 2020), https://www.amazon.com/gp/help/customer/display.html?nodeId=202185560 [https://perma.cc/8NDD-UHKZ].

114. *See supra* Part II(B).

115. *Children's Privacy Disclosure*, *supra* note 113.

subject to. Amazon continues in describing the use of the PII they collect from children: "to provide and improve our products and services, including personalizing offerings and recommendations for children, communicating information, enforcing parental controls, and giving parents visibility into how their children use our products and services."[116]

The Children's Privacy Disclosure continues with more of what appears to be compliance with COPPA. The Disclosure states:

> You choose whether to give us permission to collect Child Personal Information from your child. If you have not given us permission to collect Child Personal Information, we may make available certain voice services intended for children (e.g., certain Alexa features), and we may process your child's voice recordings to provide these services, but we will not store those voice recordings. We do not knowingly collect, use, or disclose Child Personal Information without this permission.[117]

This information is contradictory and misleading. Processing a child's information may be sufficient for the PII to then be disclosed to third parties.[118] And, as explicitly stated in the notice, "[t]his disclosure does not apply to the practices of any third-party services (including apps, skills, and websites) that may be accessed through an Amazon product or service."[119] So any information that is shared or transferred from Amazon to a third party is not necessarily protected in the same, if any, way at all.

The first issue in Amazon's compliance arises when they try to distinguish Amazon's sharing of a child's PII with the child sharing their own PII: "[y]our child may be able to share information publicly and with others depending on the products and services used."[120] Despite Amazon's attempt to distinguish the ways in which information is shared to protect themselves from liability, COPPA covers all information collected by a service from a child regardless of whether the child or the company is the one sharing the information. Though this speaks to breach of regulation directly in the privacy policy rather than breach of regulation due to a lack of a requirement in the privacy policy, it demonstrates that Amazon does not comply, even facially.

A complaint to the FTC on May 9, 2019 regarding the Echo Dot Kids Edition, a smart speaker specifically targeted for children,

116. *Id.*
117. *Id.*
118. *See infra* Part IV.
119. *Children's Privacy Disclosure*, *supra* note 113.
120. *Id.*

illustrates the ways in which Amazon does not comply with COPPA, even on its face.[121] The Echo Dot comes with a one-year subscription to Amazon's FreeTime Unlimited, a service that provides access to entertainment including books, music, and "Kid Skills."[122] The complaint alleges that the product is subject to COPPA, yet the notice to parents and online Children's Privacy Disclosure are lacking in satisfying the requirements of COPPA.[123] In addition to making claims that the privacy policies are confusing and contradictory, the complaint argues that the system for obtaining consent is inadequate because it does not verify that the person consenting is actually the parent, or even an adult at all.[124] Furthermore, Amazon keeps the audio recordings until they are deleted by a parent, which is in violation of the COPPA requirement that the information be stored only as long as necessary. Even when a parent tries to delete the audio recordings, the voice transcriptions of those audio recordings are still saved.[125] Furthermore, deleting recordings is burdensome on the parent who would have to open the Alexa app on their phone, go to "Settings," select "History," and then listen to each individual recording to figure out which ones they want to be deleted.[126] While the complaint concerns the Echo Dot Kids Edition, the deficiencies in compliance with COPPA apply in the same way to Amazon Alexa more generally, especially since the main difference between the Echo Dot Kids Edition and the Echo Dot is that the Echo Dot Kids Edition includes a one-year subscription to Amazon's FreeTime Unlimited service and a two-year warranty that covers intentional damage to the device caused by a child.[127]

121. Complaint at 25, 30, *In re* Request for Investigation of Amazon, Inc.'s Echo Dot Kids Edition for Violating the Children's Online Privacy Protection Act (F.T.C. May 9, 2019) [hereinafter Amazon Complaint] (listing some of the failures of compliance, such as the burdensome nature of reviewing information, not checking that the parental consent is from a parent of the child, storing the child's PII forever, and more).

122. *Id.* at iii.

123. *Id.* at iv ("Neither [Amazon's direct notice to parents nor its online Children's Privacy Disclosure] provides parents with the information they need to make an informed decision about whether to give consent.").

124. *Id.* at v ("[Amazon's system] does not verify that the person 'consenting' is the child's parent as required by COPPA. Nor does Amazon verify that the person consenting is even an adult because it allows the use of debit gift card and does not require a financial transaction for verification.").

125. *Id.* ("[U]nless a parent deletes the recording of a child's voice, Amazon will retain those recordings indefinitely.").

126. Candid Wueest, *A Guide to the Security of Voice-Activated Smart Speakers*, SYMANTEC 18 (Nov. 2017), https://docs.broadcom.com/doc/istr-security-voice-activated-smart-speakers-en [https://perma.cc/AE3G-CZ7X].

127. Amazon Complaint, *supra* note 121, at 4.

C. Google Assistant

Mirroring the confusing and contradictory nature of Amazon's many privacy policies and notices regarding the collection, storage, use, and sharing of children's PII, Google has multiple documents describing the privacy of one's information. The Google Nest has its own privacy policy, which, contrasting Amazon's acknowledgement that they collect information from children, states that "[o]ur Site does not knowingly collect or store any personal information about children under the age of 13."[128] That statement implies that COPPA does not apply at all, so there are no enhanced protections for children's information. Yet denying that a service is used by anyone under the age of 13 is exactly what has been argued that Facebook should be found liable for, in violation of COPPA due to the "actual knowledge" that children were using the product and service.[129] The incorporation of children's features into Google Home and Google Nest, as well as the encouragement of placing the device in a "family room" is sufficient for Google to have "actual knowledge" that a child under the age of 13 would be using the service, so their information and communications would be collected and stored.[130]

Searching through the Google Privacy & Terms site and navigating through multiple links, Google provides a privacy notice that directly applies to the collection of voice and audio information from "Children's Features" on Google Assistant.[131] If one is able to find that particular privacy notice, one would know that Google's main privacy policy does not state all of the privacy terms: "[i]n addition to the information provided in the Google Privacy Policy

128. *Privacy Policy for Nest Web Sites*, NEST (Jan. 31, 2020), https://nest.com/legal/privacy-policy-for-nest-web-sites/ [https://perma.cc/7ZK8-768K].

129. *See* Shannon Finnegan, *How Facebook Beat the Children's Online Privacy Protection Act: A Look into the Continued Ineffectiveness of COPPA and How to Hold Social Media Sites Accountable in the Future*, 50 SETON HALL L. REV. 827, 828 (2020) ("Since COPPA's enactment in 1998, Instagram and Facebook (collectively 'Facebook, Inc.') have effectively managed to circumvent the requirements imposed on websites under COPPA by simply banning users under the age of thirteen from their websites. This restriction does not adequately prevent children from accessing these websites.").

130. GOOGLE NEST MINI, (last visited Jan. 12. 2022), https://store.google.com/us/product/google_nest_mini?hl=EN-US [https://perma.cc/5UZX-S5CV].

131. *Privacy Notice for Voice and Audio Collection from Children's Features on Google Assistant*, HEY GOOGLE (Aug. 5, 2020), https://assistant.google.com/privacy-notice-childrens-features/ [https://perma.cc/A6D8-9266] (signaling that the privacy notice applies to collection of children's data through smart speakers in the title of the privacy notice, "Privacy Notice for Audio Collection from Children's Features on Google Assistant").

this Privacy Notice also applies to the use of these features on Google Assistant."[132] That notice directly violates COPPA, stating, "[i]f you interact with children's features-like Assistant for Families Actions or YouTube Kids videos-on Google Assistant, we briefly collect voice and audio recordings of those interactions. This information is processed to allow for use of the audio feature, so we can fulfill the interaction, and immediately deleted."[133] While the immediate deletion may appear sufficient, the violation comes from the fact that there is no parental consent obtained before collecting the child's information. Regardless of how long the information is stored for, parental consent is required for any information to be collected at all.[134] While Google may argue that its process falls under § 6502(b)(2)(A), where parental consent is not required, Google's privacy policy does not state that it applies only to online contact information.[135]

Google also has a privacy notice for Google accounts managed with Family Link, specifically for children under 13.[136] As with the previous notice, this one was also difficult to find, not being readily apparent, yet it controls over the main privacy notice: "[t]o the extent there are privacy practices specific to your child's account or profile, such as with respect to limitations on personalized advertising, those differences are outlined in this Privacy Notice."[137] Not only is Google recognizing that there are contradictory terms in the privacy policies, but it is also stating that the somewhat hidden notice is the one that controls. Just like Amazon, the notice states, "[t]his Privacy Notice does not apply to the practices of any third party (non-Google) apps, actions or websites that your child may use."[138] As a result, any information shared with third parties is under different protections, if it is under any protections at all.

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132. *Id.*

133. *Id.*

134. 15 U.S.C. § 6502(b)(1)(A)(ii) (1998).

135. 15 U.S.C. § 6502(b)(2)(A) (1998); *Google Privacy Policy*, GOOGLE, https://policies.google.com/privacy?hl=EN-US [https://perma.cc/9PDF-52MU] (last visited Aug. 8, 2022).

136. *Privacy Notice for Google Accounts Managed with Family Link, for Children Under 13*, GOOGLE, https://families.google.com/familylink/privacy/child-policy/ [https://perma.cc/E23W-XQS3] (last visited Aug. 8, 2022) (signaling that the privacy notice applies to children under 13 in the title of the privacy notice, "Privacy Notice for Google Accounts and Profiles Managed with Family Link, for Children under 13 (or applicable age in your country)").

137. *Id.*

138. *Id.*

The children's policy is in direct violation of COPPA for storing voice and audio information from children under the age of 13 without any mention of many of the requirements in COPPA: "[w]e automatically collect and store certain information about the services your child uses and how your child uses them. . . ."[139] Among the various information collected is the child's activity, location information, and voice and audio information, which falls within the category of PII, covered by COPPA.[140] Google does describe the uses of the information collected as to "provide, maintain, and improve our services; to develop new services; to customize our services for your child; to measure performance and understand how our services are used; to communicate directly with your child in relation to our services; and to help improve the safety and reliability of our services,"[141] but it does not require parental consent, one of the main requirements of COPPA.

Google's policy also demonstrates the problems of data sharing across different companies. The policy states, "we may combine the information we collect among our services and across your child's devices for the purposes described above. Depending on your child's account or profile settings, their activity on other sites and apps may be associated with their personal information in order to improve Google's services."[142] Not only is Google aggregating a child's PII, creating a database of their information, but it is combining the information it directly collects about a child with information it gathers from other sources, increasing the size of the child's database of PII and increasing the risks and dangers of that child due to the exposure of their information.

Overall, the Google Assistant does not comply with COPPA, even on its face. Beyond the contradictions and direct violations mentioned previously, Google Assistant allows a parent to set up an account for a child, but if the parent chooses not to, or if the child uses the device when not linked to their own account, the Google Assistant collects, uses, stores, and shares the information in the same way it does for adults, despite the COPPA requirements.[143]

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139. *Id.*

140. *Id.* (listing information the service collects: "Information you and your child create or provide to us; Information we get from your child's use of our services [which includes] Your child's apps, browsers & devices, Your child's activity, your child's location information, [and] your child's voice & audio information").

141. *Id.*

142. *Id.*

143. Lemmer, *supra* note 70, at 5 ("If the kid's Google Account is not linked to the device, it will operate for it like for adults.").

The process for deleting specific recordings is taxing on the parent due to the necessity of searching through all of the individual recordings to find the ones that the parent would like to delete, just as that of Amazon.[144] For Google, the list of recordings includes not only audio files but search history, among other data, making the list of files the parent must look through even longer.[145]

IV.
INSUFFICIENCY OF FIRST PARTY COMPLIANCE

Direct compliance with COPPA, contrasted with compliance with the spirit of the law, would still be insufficient when it comes to protecting children's information because of the increased role of third-party data collection and sharing.

A. Overview of the Role of Third Parties

Most of the Kid Skills on the Amazon Alexa and the Family Actions on the Google Assistant are provided by third parties.[146] When children use those apps, Amazon and Google collect voice data that is sent to the third party; this data may be the audio file itself or a transcription of the communication.[147] Whether or not the third parties actually process the data is irrelevant in the safety and protection of children's PII and in complying with COPPA.[148]

Furthermore, the processing and use of the children's data by third parties should be readily available information to a parent in the first party's privacy policy rather than the parent having to identify when their child leaves the first party to go to a third-party app, locating the privacy policy of that third party, and figuring out whether the third party is in compliance with COPPA and protects their child's information to the degree desired. The Statement of Basis and Purpose of COPPA highlights how "it cannot be the responsibility of parents to try to pierce the complex infrastructure of

144. Wueest, *supra* note 126, at 18 (explaining the process for deleting recordings).

145. *Id.*

146. Lemmer, *supra* note 70, at 12 ("[Kid Skills or Family Actions] are mostly provided by third parties and not directly by Amazon or Google.").

147. *Id.* ("Amazon and Google collect the voice data during the use of the skill, and send the transcripts to the third party to enable them to deliver their service.").

148. *Id.* at 13 ("Amazon and Google must address children with tailored privacy notices before their data are processed during their use of kid features. However, Amazon and Google decide not to provide children at all with information about their privacy.").

entities that may be collecting their children's personal information through any one site."[149] The Act continues, "[f]or child-directed properties, one entity, at least, must be strictly responsible for providing parents notice and obtaining consent when personal information is collected through that site. The Commission believes that the primary-content site or service is in the best position to know which plug-ins it integrates into its site, and is also in the best position to give notice and obtain consent from parents."[150]

According to that recommendation by the Commission, Amazon and Google should be held responsible not only for their own compliance with COPPA, but also for notifying parents of compliance of third parties that a child might access through the first party. Home devices, as they relate to third parties within the regulations of COPPA, are very similar to any other service that is regulated by COPPA. This Note looks at smart speakers and devices in particular because of the difficulties they present in complying with COPPA, which are then exacerbated by third-party sharing, creating a system in which greater information is at risk than with devices other than smart speakers which do not face the same initial challenges with compliance. To summarize, smart speakers and third-party sharing release much greater quantities, in much greater quality, of information and specifically of children's information.

B. Amazon

Kid Skills are apps run by their own privacy policies but accessed through the Alexa device.[151] Amazon represents that these skills are safe for children.[152] In setting up the FreeTime Unlimited account—through which the Kid Skills are accessed on the Alexa—a parent can add a child's profile and will be prompted to give "permission to collect personal information including voice recordings."[153] The notice states that the "permission will apply to all Alexa devices, skills, and other Amazon kid services."[154] Not only is

149. Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3977 (Jan. 17, 2013) (to be codified at 16 C.F.R. pt. 312).

150. *Id.*

151. Kid Skills are a feature of the Amazon Alexa directed at children. *See supra* Part III(B); *see also* Amazon Complaint, s*upra* note 121, at iv ("Amazon states that its Children's Privacy Disclosure does not apply to third-party services, including skills, and that before using a third-party service, parents should review the skill's policies concerning data collection and use.").

152. Amazon Complaint, *supra* note 121, at 7.

153. *Id.* at 8 (internal quotation marks omitted).

154. *Id.* (internal quotation marks omitted).

that statement vague as to whether the Kid Skills, which are on third-party apps, are included in "other Amazon kid services," but it directly contradicts an earlier rule that Amazon has for Kid Skills in which they cannot collect PII.[155] To finish setting up a child's FreeTime Unlimited profile, someone has to enter the Amazon password and verify that they are an adult by providing the security code for a credit card.[156] Disposable gift cards are acceptable in verifying that one is an adult with a security code.[157] Ultimately, the parent is asked to agree to "Parental Consent."[158]

Third parties play a larger role in the Amazon Alexa realm than just with Kid Skills. The emphasis on Kid Skills shows the direct need for COPPA compliance because the services are targeted at children, but the use of the Amazon Alexa device in the broader home by children is enough to require compliance with the regulation through "actual knowledge." Amazon mentions the collection and sharing of PII from interacting with Alexa to third parties in its privacy notice: "[w]e employ other companies and individuals to perform functions on our behalf. . . . These third-party service providers have access to personal information needed to perform their functions, but may not use it for other purposes."[159] By sharing PII, whether it be that of an adult or child, with third parties, Amazon is releasing that information out to other companies who, as stated in Amazon's privacy notice, do not follow the same privacy protection measures that Amazon does. This leads to a domino effect where one third party may then share the PII with others, increasing the spread and transmission of the data. Due to the enhanced risks and threats of the disclosure and spread of children's PII, as mentioned earlier,[160] this domino effect is especially problematic for children whose information is supposed to be given heightened protection under COPPA.

Amazon's disclaimer about the practices of third parties, including those of Kid Skills which are directly targeted to children, does not satisfy the COPPA requirements. The privacy notice implies that some third parties will collect children's PII, but the no-

155. *Id.*

156. *Id.* at 9.

157. *Id.* ("This interface accepts any type of payment card, including disposable gift debit cards which are frequently given to children.").

158. *Id.* I will not dwell on the issue here, as it again is not the focus of this Note, but it is important to highlight that Amazon itself is not in compliance with COPPA by allowing for a parental consent and verification process that is easily satisfied by a child, thereby avoiding parental knowledge or consent at all.

159. *Amazon.com Privacy Notice*, *supra* note 112.

160. *See supra* Part I(B).

tice does not list which ones will, nor does it list the types of PII collected or their uses.[161] As of June 25, 2020, 84.6% of Kid Skills did not provide a third-party privacy notice, so there was no way for a parent to know whether or not their child's information was being collected, stored, used, or disclosed with even more companies.[162] For example, LEGO Duplo stories, one of Amazon's offered Kid Skills, provides a link to a generic privacy policy, not specifically related to the Kid Skills, Amazon, or Alexa.[163] The example of LEGO Duplo stories also highlights the contradictory nature of third-parties' privacy policies with first-parties'; while Amazon's developer guidelines state that PII will not be collected, the LEGO privacy policy says that it collects personal data.[164] Those Kid Skills that did include a link led to a general privacy policy without any information on the Amazon Alexa or the Kid Skill in particular.[165] Furthermore, Amazon fails to give notice and obtain parental consent for information that the third parties collect.[166] The 2013 COPPA amendment clarified that the operator of an online service that is directed to children is responsible for not only disclosing and obtaining parental consent for its own collection of children's PII but also for disclosing and obtaining parental consent for the information that third parties collect through the online service.[167]

C. Google

Comparable to Amazon's Kid Skills, Google offers "Family Actions," which are also directly targeted at children. Family Actions provide content specifically for children which is mostly provided

161. *Echo Dot Kids Edition Violates COPPA*, *supra* note 108 ("Amazon does not disclose which kid skills (developed by 3rd parties) collect child personal information or what they collect. It tells parents to read the privacy policy of each kid skill (impermissible under COPPA).").

162. Lemmer, *supra* note 70, at 14.

163. *Id.* at 15.

164. *Id.*

165. *See* Amazon Complaint, *supra* note 121, at 24–25 ("We also examined several of those privacy policies, and found that they typically link to the developer's general children's privacy policies, which generally contain lots of extraneous information and provide no specific information about the data collected using the Echo Dot Kids Edition.").

166. *See id.*

167. *See Amended COPPA Rule Comes into Effect*, PRIV. & INFO. SEC. L. BLOG (July 1, 2013), https://www.huntonprivacyblog.com/2013/07/01/amended-coppa-rule-comes-into-effect/ [https://perma.cc/RD33-6Y5B] ("The revised Rule requires apps and websites directed at children to give parental notice and obtain consent before permitting third parties to collect children's personal information through plug-ins.").

by third parties.[168] A child can open the Family Actions with a voice command where no parental consent is obtained, and no privacy warning or notice is provided.[169] This is directly in violation with COPPA. Yet, the direct violation is not the only way in which Google fails to comply with the regulation. Just like Amazon, Google is responsible for the protection of children's information once that information is transferred or shared to third parties. Google's Privacy Notice for Google Accounts Managed with Family Link for Children Under 13 states, "[i]nformation we collect may be shared outside of Google in limited circumstances. We do not share personal information with companies, organizations, and individuals outside of Google except in the following cases[.]"[170] The notice goes on to list when PII will be shared with consent, with your family group, for external processing, and for legal reasons.[171] The inclusion of "with consent" as its own category suggests that the times children's PII is shared through the other listed categories do not require parental consent, as required by COPPA.

In the same way as Kid Skills, only some Family Actions provide links to privacy policies.[172] Those that do link to their general privacy notice, not anything particular to the Family Action, Google, or Google Assistant.[173] For example, Disney's "Wreck it Ralph Adventure," a Family Action through Google Assistant, provides a link to its Privacy Policy, but that link brings you to the company's general privacy policy.[174] Even when third parties include a privacy policy, regardless of whether or not it is particular to Family Actions or just the company's general privacy policy, that link is difficult to locate through Google Assistant.[175] In order for a parent to find the privacy policy, they would have to actively seek it out on the Google Assistant's webpage rather than being provided with it when opening the Family Action.[176]

Many studies and much research has been done on COPPA as it relates to first parties, but if those first parties are sharing the children's personal information with third parties who do not follow the principles or requirements outlined in COPPA, the infor-

168. Lemmer, *supra* note 70, at 5.
169. *Id.* at 19.
170. *Privacy Notice for Google Accounts Managed with Family Link, for Children Under 13*, *supra* note 136.
171. *Id.*
172. Lemmer, *supra* note 70, at 15.
173. *Id.*
174. *Id.* at 46.
175. *Id.* at 14.
176. *Id.*

mation is essentially just as available and unprotected as if COPPA did not exist at all. The third parties that receive the children's PII could then share with others creating the domino effect described above. The increased sharing of information to third parties and integration of third-party services into first parties leads to a questioning of the effectiveness of COPPA in protecting children's PII.

V.
SUGGESTIONS

The issue is not only in the statutory language and design but also in the FTC's enforcement. Given the overall lack of compliance, COPPA fails at its goal of protecting children's PII. The Global Privacy Enforcement Network Privacy Sweep of 2015 found that while 67% of websites and apps collected children's PII, only 22% tailored their data protection communications to children in compliance with COPPA.[177] While 59% of apps for kids were found to share personal information, only 11% told the user so.[178] Furthermore, as of 2015, 45% of the 364 kids' apps in Google Play or the Apple App Store had privacy policies that could be accessed through a direct link from the app store page.[179] All of these examples demonstrate how the current regulations are not doing enough to protect children's information to the fullest extent. Not only could the FTC file suit against companies for violating COPPA, but they could also treat those violations as unfair or deceptive acts under the Federal Trade Commission Act.[180] Yet, even if there were compliance, given the current state of data collection and devices such as Amazon Alexa and Google Assistant, COPPA is not sufficient in protecting children's information. The trends of datafication, hyperconnectivity, and commercialization have decreased COPPA's value.[181] COPPA is also no longer relevant given that peo-

177. Morgan, *supra* note 69, at 45.

178. Jim Kreidler, *Are the Apps Your Children Use Illegally Marketing to Them?*, FED. TRADE COMM'N (June 4, 2020), https://www.consumer.ftc.gov/blog/2020/06/are-apps-your-children-use-illegally-marketing-them [https://perma.cc/2G9Q-KYP9].

179. Kristin Cohen & Christina Yeung, *Kids' Apps Disclosures Revisited*, FED. TRADE COMM'N (Sept. 3, 2015, 11:04 AM), https://imperialvalleynews.com/index.php/news/national-news/5104-kids-apps-disclosures-revisited.html [https://perma.cc/JL2M-WENF].

180. Ciocchetti, *supra* note 5, at 77 ("Concerning enforcement, violations of COPPA may be treated as unfair or deceptive acts and/or practices prohibited under the Federal Trade Commission Act (FTC Act) and enforced by the FTC.").

181. Datafication is the trend in which aspects of our lives are turned into a data format. Hyperconnectivity describes the way in which people are constantly

ple do not read privacy policies regardless of how accessible they are.[182] And even when people do read them, they do not understand what is being said.[183] Furthermore, COPPA has become increasingly irrelevant since parents will help their children lie.[184]

With a law and economics perspective in mind,[185] first parties should be held responsible for the ways in which third parties use the information shared with them, regardless of whether or not they are actually being held responsible for that by the FTC. Based on economic efficiency, the first party is in the best position to monitor the third party's compliance without having to establish an entirely separate agency charged with doing so, thereby efficiently allocating resources to where they need to be. Otherwise, the first party's efforts to comply and protect children's information would be meaningless given the expansive use and necessity of third parties, as is evidenced in the Amazon Alexa and Google Assistant. Similarly, under the cheapest cost avoider theory, the first party is best suited to be responsible for the third party since they have the knowledge of which third parties they are going to share with. Arguably, parents should have some of the burden of protecting their children from third parties, as exemplified by the requirements placed on parents through COPPA, but, given that not all first parties disclose who they share information with, the transaction costs of parents holding that responsibility would be great and could be

connected to social networks and sources of information through multiple means of communication. Commercialization is the practice by which something is run mainly for financial gain. *See* van der Hof, *supra* note 30, at 412–18.

182. *See* Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"*, 78 U. CHI. L. REV. 165, 182 (2011) ("The general conclusion is clear: no matter how prominently EULAs are disclosed, they are almost always ignored."); *see also* Florencia Marotta-Wurgler, *Does Disclosure Matter?* 1 (NYU Ctr. for L., Econ. and Org., Working Paper No. 10-54, 2010) (following the clickstream of 47,399 households to 81 internet software retailers to see whether disclosure leads to more people reading contracts and finding that "making contracts more prominently available does not increase readership in any significant way").

183. *See* Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 711 (2011) ("Now suppose disclosees locate information, recognize its relevance and importance, and try to understand it. Many will fail.").

184. Boyd et al., *supra* note 35 ("Parents are clearly concerned about the risks and dangers that their children may face online even if they are simultaneously allowing them to lie about their age to get access.").

185. *See generally* Lewis Kornhauser, *Methods of Law and Economics*, *in* ENCYCLOPEDIA OF THE PHIL. OF L. AND SOC. PHIL. (M. Sellers & S. Kirste eds., 2020); Lewis Kornhauser, *The Economic Analysis of Law*, *in* STAN. ENCYCLOPEDIA OF PHIL. (Jan. 7, 2022), https://plato.stanford.edu/entries/legal-econanalysis/ [https://perma.cc/HP47-466S].

diminished, if not entirely eliminated, by shifting that burden to the first parties.

Since the current regulation is ineffective, something must be changed in order to protect children's information to the extent desired. This change must be statutory rather than a change in interpretation of the existing regulations in order to mandate compliance.[186] COPPA's insufficiencies can be rectified in six ways.

My first suggestion for how to better protect children's information given the expansive use of third parties is privacy by default. The idea of privacy by default is that companies would be required to implement the privacy protections required by COPPA but that there would be no additional steps for parents to take in setting up those protections; they would be implemented automatically, or "by default." Companies would be required to have the settings automatically at the most protective when first signing onto or using a service or device. A user could then opt into any sort of information sharing with third parties at their own desire.[187]

Given that privacy by default has already been suggested and has made little strides towards better protecting privacy, I would amend the suggestion to include a technology that distinguishes a child's voice from that of an adult. When the system picks up that a child is the one using the device, the greatest possible privacy protections would automatically kick in.

Privacy by default would avoid the burdensome requirements of parental consent because the greatest privacy protections possible would already be in place. This would also avoid the hurdle of trying to have children select the privacy settings they want when unsupervised by an adult. Given that children might not fully understand the need to protect their privacy or the consequences that come with using certain services, they are in heightened need for privacy by default. Such a solution is better than COPPA because COPPA only works toward its goal when children are closely supervised by adults and requires those adults to consent, and even then,

186. *See* ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS 8 (Basic Books 1995) (advocating for a statutory change instead of changing the interpretation of the existing privacy laws).

187. Matecki, *supra* note 3, at 398 ("Websites with an 'opt-out' mechanism require users to take an affirmative step to protect personal information; for example, checking 'accept' to a statement allowing for the disclosure of private information to third parties. Opt-in policies, on the contrary, mandate that as a default option, personal information cannot be shared or disseminated with third parties *unless* a user affirmatively grants permission.").

not all sites are covered by the Act.[188] Privacy by default also avoids the assumption that COPPA requires that parents are more capable of making decisions.[189] As discussed above,[190] that is a poor assumption given that parents are unlikely to be fully informed about the details of data processing practices.[191]

Privacy by default can be implemented and enforced through legislation replacing or reinforcing COPPA. The suggestion takes into account the fact that parents are unlikely to read or become informed about their own transactions by putting the burden of privacy on the service itself. That way, by the time the parent is put in a place where they have to consent or make decisions about their child's information, they will know that their child is already being protected to the greatest extent possible. While privacy by default might have previously been proposed, it can be tailored to the protection of children's information in new ways, better supporting the aims of COPPA.

Second, under the cheapest cost avoider rationale, the FTC and COPPA should also be more diligent at enforcing privacy by design.[192] Privacy by design means that companies should build the privacy into the design of the service through anonymization and encryption of information and be punished when they either do not do so or do so inadequately.[193] Some other ways to incorporate privacy by design are through risk assessments of privacy or security, minimizing the amount of data collected and the length of time it

188. Allen, *supra* note 2, at 772 ("Now, as before COPPA's enactment, direct and constant parental supervision is needed to keep children from adult content, since most Web sites that do not collect personal information, and many that do, can be visited in part or in full by children of any age.").

189. van der Hof, *supra* note 30, at 434 (analyzing whether "the assumption that parents are more capable of making decisions than their children" is a fair one).

190. *See supra* Part V.

191. van der Hof, *supra* note 30, at 437–38 (reaching the conclusion that parents are not the best parties to make decisions about releasing their children's personal information online since parents most likely do not have information about the details of data processing practices).

192. *See* Forbrukerradet, Toyfail An Analysis of Consumer and Privacy Issues in Three Internet-Connected Toys 36 (2016), https://fil.forbrukerradet.no/wp-content/uploads/2016/12/toyfail-report-desember2016.pdf [https://perma.cc/WNG4-ZYNY] ("[T]he NCC [(Norwegian Consumer Council)] suggests that manufacturers of connected toys adopt a design-philosophy of privacy and security by design. . . . This is also the way forward according to the European Commission and the Article 29 Working Party, and is codified in the new GDPR.").

193. Internet of Things: Privacy & Security in a Connected World, *supra* note 14, at iii ("[C]ompanies should build security into their devices at the outset, rather than as an afterthought.").

is retained for, and testing security and privacy measures before launching a product.[194] Privacy by design is distinguished from privacy by default because privacy by design works security practices into the system while privacy by default automatically has a user set at the highest level of possible privacy and security protection. While certain aspects of privacy by default can be specifically tailored towards children, privacy by design is a broader privacy protection that would be implemented for all users. Since children are subjected to greater dangers and risks from the leaking of their PII, as mentioned earlier,[195] they would inversely benefit from privacy by design protections more than adults who do not originally face such great risks. Security and privacy protections should be built into devices at the outset to prevent issues from arising instead of after an issue has already arisen.[196]

Not only would these protection measures prevent the compliance issues with COPPA, but they would also resolve the problems of third-party sharing since the third-party companies would also have privacy by default and an effective privacy by design system as part of their models. By the third party adopting the same level of privacy protection as the first party, children and their parents know exactly how the information will be used and stored without having to spend extensive amounts of time searching for and reading privacy policies. The economic cost of first parties monitoring third parties for compliance would also decrease, as the first parties could be ensured that the third parties are implementing the required precautions. Because of the decrease in costs, companies would likely support the new regulations, making them easier to implement and enforce. In thinking of a users' PII as a fundamental right and property interest, these policies should be adopted not only for children, but for adults as well.[197] Avoiding rules based on age or other demographic traits evades the unintended consequences such as the uncomfortable position parents are put in when having to choose "between curtailing their children's access and condoning lying."[198] It also evades the costs of requiring certain programs for only some companies by instating them across the board.

194. *Id.*

195. *See supra* Part I(B).

196. INTERNET OF THINGS: PRIVACY & SECURITY IN A CONNECTED WORLD, *supra* note 14, at iii.

197. Ciocchetti, *supra* note 5, at 100 (showing how other proposed regulations treat PII as both a fundamental right and a property interest).

198. Boyd et al., *supra* note 35.

Third, the regulation could also have incentives built in to increase participation and compliance, if needed. Since rational businesses, under the law and economics theory, respond to incentives, that would increase and ease compliance with the law. Such incentives would result in furthering the goals of protecting children's information. For example, there could be monetary incentives for increased protections, above those required by the law or certifications displayed on a company's website or online platform demonstrating that they have exceeded the required security measures. In whatever way it takes to change the current frameworks, something must be done to prevent the lack of COPPA compliance from undermining the effectiveness of future regulations in the same realm.

Further suggestions include, fourth, data minimization, fifth, purpose limitations, and sixth, immediate deletion of a child's data. If regulators were to adopt data minimization, companies would only collect and store as much data as is absolutely required.[199] A purpose limitation would restrict the ways in which a company can use the data once they collect it so that parents can easily determine exactly how their child's data is being used without the burdensome searching.[200] Finally, companies should be required to delete children's data as soon as it is no longer needed.[201] The latter suggestion, though already included in COPPA, needs to be further highlighted to reach its full potential for protection since it does not seem to be happening in practice under COPPA.[202] Furthermore, first-party firms should be responsible for ensuring that all third-party services that are connected and accessible through the device provide complete and tailored privacy notices before use. Those notices, in addition to the privacy policies of the smart speakers themselves, can be audio clips that play before use. If the service

199. INTERNET OF THINGS: PRIVACY & SECURITY IN A CONNECTED WORLD, *supra* note 14, at iv (defining data minimization as "the concept that companies should limit the data they collect and retain, and dispose of it once they no longer need it").

200. *See* FORBRUKERRADET, *supra* note 192, at 18–25 (arguing that there should be a purpose limitation for three different actions: (1) sharing data with third parties, (2) advertising toward children, and (3) further use of voice data).

201. *See* Emily McReynolds et al., *Toys that Listen: A Study of Parents, Children, and Internet-Connected Toys*, PROCS. OF THE 2017 CHI CONF. ON HUM. FACTORS IN COMPUTING SYS. (2017).

202. *Complying With COPPA: Frequently Asked Questions*, *supra* note 59 ("[T]he Rule specifically states that operators should retain personal information collected online from a child for only as long as is reasonably necessary to fulfill the purpose for which the information was collected.").

being accessed is one that is directed to children, the audio clips can be specifically tailored to a child's comprehension level.

VI.
CONCLUSION

Many companies are not complying with COPPA requirements on their face. Those breaches are taken even further when children's personal information is shared with third parties who do not comply with the regulation. COPPA is not useful when the children's information is not being protected by the first-party firm which originally collects it. The analyses of Amazon's Alexa and the Google Home show how first parties who purportedly comply with COPPA share children's personal information with third parties. Those third parties who receive that information do not even attempt to comply, demonstrating the dangers that come with COPPA's failure to adequately address the relationships between first and third parties. There is a blind spot in COPPA when it comes to third parties that will threaten children's data in products and services far beyond just smart speakers and devices. To address this problem of unsecure child's data, policymakers and regulators should push for and adopt privacy by default in addition to privacy by design. Not only would such requirements restrict third-parties' access to the child's data which could then no longer be protected by COPPA, but they would reinforce the COPPA requirements on the first-party and third-party companies as well. Overall, privacy by default supports not only the protection of children's information but the business models of first parties who should otherwise be responsible for ensuring compliance, therefore minimizing costs for first parties.

MANDATORY ABSTENTION IN THE CLASS ACTION FAIRNESS ACT: A SUA SPONTE JUDICIAL POWER OR DUTY?

MARTIN SIGALOW

The Class Action Fairness Act of 2005 ("CAFA") changed the landscape of class action litigation in the United States by providing a reliable federal forum for minimally diverse, expensive, and broadly interstate class actions.[1] But while CAFA straightforwardly empowers federally-inclined plaintiffs and defendants to escape local courts, it also circumscribes the power of the districts courts to exercise that jurisdiction. Two such limitations arise under CAFA's "mandatory home state" and "local controversy" exceptions (hereinafter the "proximity exceptions"), which provide, generally, that a court shall decline to exercise jurisdiction if enough defendants and plaintiffs are forum state citizens.[2]

Curiously, the prevailing view among the circuits is that the proximity exceptions are not jurisdictional bars but rather are abstention doctrines.[3] The proximity exceptions are at the rare intersection of two different kinds of abstention. First, the proximity exceptions have an uncommon source of authority. While many of the most trafficked abstention doctrines are judicially created constructions that survive by way of stare decisis, the proximity exceptions have a statutory basis. Second, the proximity exceptions have an uncommon effect. The proximity exceptions *require* abstention instead of merely permitting it. This so-called "mandatory abstention" is quite different from the more common "permissive abstention."

It is strange for a form of abstention to be both statutory and mandatory. This has sometimes made application confusing. One odd scenario arising occasionally is that a court may want to raise the proximity exceptions sua sponte *after* the parties have relinquished any opportunity to raise the exceptions themselves. Does CAFA provide a court with either the *discretion* or the *obligation* to raise the mandatory proximity exceptions sua sponte? The several

1. *See generally* 28 U.S.C. § 1332(d).
2. *See id.* § 1332(d)(3)–(4).
3. *See infra* notes 55–66 (cataloguing the circuit approaches).

district courts that have confronted this question have split on its resolution.[4]

This question can have expensive consequences. Courts have generally discovered proximity-exception difficulties in a more advanced stage of litigation because plaintiff class composition may not be clear until after a motion to dismiss or discovery with respect to the certification motion. In *Bey v. SolarWorld Industries America*, the District of Oregon discovered the applicability of the proximity exceptions about a year into litigation; in *Barfield v. Sho-Me Power Electric Co-op.*, the Western District of Missouri discovered that applicability after two years.[5] The potential cost for late-breaking sua sponte use of the exceptions is enormous since that could kick the parties back into state court to start over. In *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, the Southern District of California dismissed an action 18 months after the filing of the complaint after the parties failed to adequately respond to its Order to Show Cause in which it raised the proximity exceptions sua sponte.[6] In both *Vitale v. D.R. Horton, Inc.*, a case out of the District of Hawaii, and *Bey*, dismissal followed about a year of litigation.[7] The fastest sua

4. *Compare* Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1106–07 (D. Or. 2012) (finding that courts have the power to raise the proximity exceptions sua sponte where the parties stipulated that the factual predicates for the exceptions applied, but neither party invoked them to preclude jurisdiction), *and* Lautemann v. Bird Rides, Inc., No. CV 18-10049 PA (RAOx), 2019 WL 1670814, at *1–2 (C.D. Cal. Mar. 28, 2019) (invoking the proximity exceptions sua sponte where defendants, plaintiff class members, and injuries were localized to California, over the objections of the parties who never raised the issue), *with* Barfield v. Sho-Me Power Elec. Coop., No. 2:11–cv–04321–NKL, 2014 WL 1343092, at *4 (W.D. Mo. Apr. 4, 2014) (determining that plaintiffs' untimeliness waived their proximity exception arguments in a litigation over two years in length and foreclosing sua sponte review), *and* Edwards v. N. Am. Power & Gas, LLC, No. 3:14-cv-1714 (VAB), 2016 WL 2851544, at *4 n.8 (D. Conn. May 13, 2016) (concluding that because CAFA exceptions are "not jurisdictional," "for the [c]ourt to consider the applicability of either of [the CAFA] exceptions, they must be raised by the parties").

5. *See Bey*, 904 F. Supp. 2d at 1109 n.3 (issuing an Order to Show Cause after almost a year when, on motion for partial summary judgment, "the purely local nature of this dispute under Oregon law became apparent"); *Barfield*, 2014 WL 1343092, at *4 (rejecting sua sponte application while considering a litigation greater in length than two years, which it characterized as at an "advanced stage").

6. Dugas v. Starwood Hotels & Resorts Worldwide, Inc., No.: 3:16-cv-00014-GPC-BLM, 2017 WL 2813712, at *1 (S.D. Cal. June 28, 2017) (raising the proximity exceptions sua sponte and dismissing a suit after 18 months of district court litigation).

7. *See* Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *1 (D. Haw. Aug. 9, 2016) ("Defendants removed this action on August 10, 2015."); *Bey*, 904 F. Supp. 2d at 1109 (dismissing the action in December

sponte dismissal time of only five months was achieved in *Lautemann v. Bird Rides, Inc.* of the Central District of California.[8] Of course, late-breaking dismissals are tolerated in cases with genuine subject matter jurisdiction deficiencies. Must late-breaking CAFA remands or dismissals also be tolerated?

Courts always have an obligation to raise a jurisdictional defect sua sponte, even on appeal. This piece argues that the proximity exceptions are not jurisdictional conditions. Nevertheless, the statute affords the district and appellate courts discretion to consider the existence of these exceptions sua sponte. If a court discovers that the proximity exceptions apply, the court's discretion disappears, and it must dispose of the case via the exceptions. Part I briefly sketches abstention and its varieties, including the mandatory abstention at issue here. Part II integrates CAFA and its exceptions into the mandatory abstention discussion and lays out a vision of mandatory abstention's role that does not require sua sponte action. Part III analytically grounds the permissibility of sua sponte abstention, arguing that the proximity exceptions may be raised sua sponte.

I.
THE DIFFERENT SHADES OF ABSTENTION

Abstention refers to a limited number of doctrines and statutes authorizing federal courts to decline to continue to exercise jurisdiction over a case if certain predicates are satisfied. The doctrines thrived in the common law for some time and were explained by the Supreme Court to be components of the equity powers of a court in line with remedial authority.[9] Abstention itself is not a neutral idea. While abstention is an entrenched and encoded practice,

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2012); *see also* Complaint, Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103 (D. Or. Dec. 28, 2011) (No. CV 11-1555-SI), 2011 WL 6841346 (initiating the action).

8. *See Lautemann*, 2019 WL 1670814 (dismissing an action filed in November 2018 in March 2019).

9. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717–18 (1996) (situating judicial "longstanding application" of the abstention doctrines within "the common-law background against which the statutes conferring jurisdiction were enacted" and determining that they reside within the "historic powers [of] a court of equity" and, while not "a technical rule of equity procedure," empower courts to use their discretion to make equity determinations (first quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989); then quoting Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100, 120 (1981) (Brennan, J., concurring); and then quoting La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959))).

caution at its exercise is repeatedly stressed.[10] This is because abstention constitutes, in effect, a refusal to hear a case that a court is permitted to hear.[11] Put another way, a court, stuck with jurisdiction placed upon it by Congress, and availed of by the parties, should not refuse to exercise that jurisdiction on a whim; doing so frustrates both party will and systemic design.[12]

Abstention's crucial virtue is that it recognizes that there are, in many litigations, values at stake in the decision to hear a case beyond those implicating the parties. Abstention contemplates the power that federal jurisdiction could have to divest state courts of the power to define their own laws and settle their own disputes according to the whims of their legislatures to help parties of their states.[13] Abstention is a tool of federalism[14] and seems to exist most prominently where general grants of federal jurisdiction empty states of important authority.

Most doctrines of abstention were judicially created in response to a particular court's refusal to hear a case. These doctrines, which this piece will call "judicial abstention" doctrines, were justified as an effort by the federal courts to be respectful of local issues and an entailment of attempts to stay out of local issues. The

10. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013) (cautioning against a district court invoking abstention as a way of deferring to any state proceeding by warning that "[i]n the main, federal courts are obliged to decide cases within the scope of federal jurisdiction").

11. *See, e.g.*, Kade N. Olsen, Note, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 765 (2013) ("The consequences of leaving courts with so much leeway is significant, as . . . all abstention doctrines . . . strongly implicate[ ] an individual's interest in being heard in a federal forum.").

12. *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing that discretion to not take upon or exercise jurisdiction is baked into law in many places). Although Shapiro's position has been very influential, it seems that the Supreme Court has been hostile to it. *See* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1892, 1896–1901 (2004) (describing the widespread influence of Shapiro's article and the Supreme Court's shift to the opposite view, culminating with *Quackenbush*, 517 U.S. 706 (1996)).

13. *See* Jessica O'Brien, *To Abstain, or Not to Abstain, That is the Question: The Seventh and Ninth Circuits' Divergent Approaches to* Younger *Abstention*, 98 N.C. L. REV. 191, 191–92 (2019) ("The doctrine's importance is rooted in its aim to preserve the balance between state and federal sovereignty . . . . Without the ability to abstain, federal courts would be required to act as a quasi-foreign power, interfering in state-law issues and likely causing unnecessary tension between the state and federal governments." (internal quotation marks omitted)).

14. *Id.* at 194 ("Federalism—the sharing of authority over one geographical area by multiple, coequal, governmental units—serves as the primary justification for all variations of abstention . . . .").

judicial abstention doctrines were laid out by the Supreme Court as follows:

> We have . . . held that federal courts have the power to refrain from hearing cases that would interfere with a pending state criminal proceeding, *see Younger v. Harris*, 401 U.S. 37 (1971), or with certain types of state civil proceedings, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); . . . cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law, *see Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); cases raising issues "intimately involved with [the States'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law, *see Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); . . . cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes, *see Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); and cases which are duplicative of a pending state proceeding, *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).[15]

The judicial abstention doctrines differ structurally from "statutory abstention" doctrines. Congress from time to time expands federal jurisdiction to cover additional areas.[16] The major statutory forms of abstention are essentially provisions with a jurisdiction-expanding statute that limit the expansion. They do so by authorizing abstention from the authority granted in other parts of the statute under certain conditions. Statutory abstention is found in the abstention provisions of the bankruptcy code,[17] the Multiparty, Mul-

15. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–17 (1996) (cleaned up).

16. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 541 & n.195 (2017) (explaining that since CAFA's passing, "Congress has enacted several modest amendments to the jurisdictional statutes, almost entirely in an expansionary direction," including: "Leahy-Smith America Invents Act, (expanding original jurisdiction and removal jurisdiction in certain intellectual-property cases); Removal Clarification Act of 2011, (expanding federal-officer removal); SPEECH Act, (providing jurisdiction over suits involving enforcement of foreign defamation judgments)").

17. *See* 28 U.S.C. § 1334(c)(2) ("Upon timely motion of a party . . . the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.").

tiforum Trial Jurisdiction Act,[18] and several other places throughout the United States Code.[19]

Statutory and judicial abstention interact with court authority very differently. Because statutory abstention provisions are contained in the same statute that they authorize declining jurisdiction about, no argument can be made that a court's refusal to exercise jurisdiction contravenes the will of Congress.[20] This is true both because there is no question that Congress authorized an abstention of this kind full stop, and also because there is no question that the doctrine of abstention applies to the particular statute at issue.[21] There is much greater potential for mischief with judicial abstention. Since those doctrines evolved organically in the courts, are only tacitly acknowledged by Congress, and apply to a host of very different grants of jurisdiction, judicial abstention carries with it the risk that a court applying an abstention doctrine is contravening the will of Congress rather than acting upon it. Perhaps for this reason, the Supreme Court in recent years has been cautious about expanding judicial abstention.[22]

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18. *See id.* § 1369(b) ("The district court shall abstain from hearing any civil action described in subsection (a) in which— (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State.").

19. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 81 (1984) ("Since the nation's beginning, Congress has statutorily dictated federal court abstention whenever it has found federal judicial action to present a danger to the federal system. The Anti-Injunction Act, the Three-Judge Court Act, the statutory branch of the habeas corpus exhaustion requirement, the Tax Injunction Act, and the Johnson Act constitute a statutory network of legislatively directed limitations on the exercise of federal court power to disrupt state proceedings or interfere unduly with state policies.").

20. *See* Mason v. Lockwood, Andrews & Newnam, P.C., 842 F.3d 383, 394 (6th Cir. 2016) (refusing to extend the common-law doctrines surrounding "*judge-made* exceptions to the powerful default rule that Congress alone has the constitutional authority to define the contours of federal jurisdiction" and which demand "a deep sense of prudence, if not constitutional obedience, to listen when Congress directs federal courts to assume jurisdiction over particular controversies" to statutory directives, which "have no place here because Congress has expressly directed courts to decline jurisdiction over local controversies").

21. *See id.* (noting that although it has "a 'virtually unflagging obligation' to not decline jurisdiction when Congress's only word on the matter is to exercise jurisdiction," in the case where "Congress directs something different, our obligation remains with the Constitution and the text of the statute enacted by Congress").

22. *See, e.g.*, Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77–82 (2013) (limiting the doctrine of *Younger* abstention, which had grown from one case into a

It is no wonder, then, that most forms of judicial abstention are quintessentially "permissive." That is, they allow a court to abstain under certain conditions, but do not force it to, even given a finding that those conditions are met. "Mandatory" abstention, on the other hand, obligates a court to refuse to exercise its discretion if the abstention conditions are met. It is easy to see why mandatory abstention provisions are rare, and judicially created ones vanishingly so. Mandatory judicial abstention, at even its most basic level, would functionally be the judicial branch taking itself to be exactly negating an area of jurisdiction that a political branch had foisted upon it.

There is not a unified concept of mandatory abstention. As such, mandatory abstention has subsequently become an unsettled concept. And, because most forms of abstention are permissive and judicial, there is essentially no generalized literature on statutory, mandatory abstention as such to clarify that concept. This concept will be explored in detail below.

II.
CAFA AND SUA SPONTE OBLIGATIONS

A. CAFA's Structure

Generally, actions may be filed in federal court, or removed to federal court, on the basis of diversity of citizenship if there is not any plaintiff from the same state as any defendant.[23] CAFA gives class action plaintiffs and their defendants[24] the additional right to be heard in federal court for class actions worth more than $5,000,000 if "any member of a class of plaintiffs is a citizen of a State different from any defendant"[25] and if there are at least 100 plaintiff class members[26] and no "primary"[27] state defendants.[28]

multitude of different permissible abstention scenarios, to only the scenarios identified by the Supreme Court previously).

23. 28 U.S.C. § 1332 provides the diversity jurisdiction requirements for the filing of original actions in federal courts. 28 U.S.C. § 1446 allows defendants to remove on the basis of jurisdiction that would be conferred by Section 1332.

24. CAFA's expansion of jurisdiction for original actions is found in 28 U.S.C. § 1332(d), and its expansion of removal jurisdiction in those circumstances is found in 28 U.S.C. § 1453.

25. 28 U.S.C. § 1332(d)(2)(A).

26. *Id.* § 1332(d)(5)(B).

27. CAFA itself does not define this term. The Senate committee report notes that "the Committee intends that 'primary defendents [sic]' be interpreted to reach those defendants who are the real 'targets' of the lawsuit—i.e., the defendants that would be expected to incur most of the loss if liability is found" and so "should include any person who has substantial exposure to significant portions of

Since removal in a non-class suit would normally be unavailable on diversity grounds if a single plaintiff and defendant shared citizenship, CAFA's promise that federal jurisdiction could be available even under a large citizenship overlap is a clear expansion of federal authority over class actions.

The pre-CAFA general removal statute ended up testing only the named representative of a class action for diversity. This allowed enterprising plaintiffs' attorneys to carefully construct suits that either evaded or guaranteed federal jurisdiction, regardless of class size and composition, by strategically naming non-diverse or exactly diverse representatives while filling the rest of the class with members who might themselves doom or support diversity.[29] Plaintiffs could then shop for the best state forums and bind the defendants of other states to their own state's laws.[30]

CAFA was designed to prevent this maneuvering.[31] By explicitly considering the citizenship of *members*, CAFA made a federal forum available for sufficiently big class actions.[32] It allowed both plain-

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the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members)." S. REP. NO. 109-14, at 43 (2005).

28. 28 U.S.C. § 1332(d)(5)(A).

29. *See* Jacob R. Karabell, *The Implementation of "Balanced Diversity" Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 303 (2009) (noting that, historically, since "only the citizenship of the named plaintiffs determined whether the action met . . . complete diversity," plaintiffs could "manufacture federal jurisdiction by strategically selecting certain plaintiffs to serve as class representatives").

30. *But see* Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1104 (2008) (arguing that the label of certain jurisdictions as supposedly extremely favorable to plaintiffs is overstated because "empirical research tends to debunk the industry complaints," noting in particular that "a study of actual data from top hellholes Madison and St. Clair Counties in Illinois concluded that there was 'no support for the "hellhole" label'").

31. This is confirmed by the Senate committee report. *See* S. REP. NO. 109-14, at 10 (2005) ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court. . . . Although the Supreme Court has held that only the named plaintiffs' citizenship should be considered for purposes of determining if the parties to a class action are diverse, the 'complete' diversity rule still mandates that all named plaintiffs must be citizens of different states from all the defendants. In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity.").

32. *See* Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 927 (2008) ("Empirical evidence shows CAFA has successfully brought more state-law diversity class actions into the federal courts.").

tiffs' filing of original actions and defendants' removal of actions where diversity would normally present a barrier.[33]

CAFA pointedly does not give every minimally-diverse class action federal status and does not contemplate the elevation of truly local conflicts to the federal system. CAFA has in mind the promotion of "national" class actions to the federal stage. Its flat refusal to cover cases with less than $5,000,000 in damages clearly has this in mind. So, too, do the provisions immediately following CAFA's grant of jurisdiction, the so-called "exceptions." While these provisions have been termed "exceptions," that word does not appear in the statute.[34] The effect of these provisions is to mandate dismissal of original actions filed pursuant to CAFA and remand of removed actions back to the states.[35]

The first of these exceptions is not the subject of this Note but helps to frame the proximity exceptions. 28 U.S.C. § 1332(d)(3), styled the "discretionary home state exception," indicates that a judge "*may*, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction"[36] over cases involving a class where one-third to two-thirds of both putative class members and "primary defendants"[37] are citizens of the forum state. This provision also specifies the considerations a judge takes

33. *See supra* note 24.

34. It is quite plausible that the pervasive use of the term "exception" to describe these provisions is at least part of the reason for some of the confusion surrounding their effect. To claim that a judge's "jurisdiction" has an exception seems to carry the connotation that its jurisdiction extends up to and against the walls of an area (the exception). As this piece will explore shortly, the proximity exceptions do not work this way. Nevertheless, this piece will still refer to these provisions as "exceptions," consistent with almost universal usage. *Cf.* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1456 n.63 (2008) ("'Exceptions' is a loaded word in this context, because labeling a statutory provision as such, rather than, for instance, as an 'exclusion,' may have unjustified influence in determining the location of the burden of persuasion concerning the existence of subject matter jurisdiction. I use 'exceptions' here only as a concession to the shortness of life." (citations omitted)).

35. *See, e.g.*, Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *1 (D. Haw. Aug. 9, 2016) (remanding a removed action to state court); *see also* Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1105 (D. Or. 2012) (dismissing original action).

36. 28 U.S.C. § 1332(d)(3) (emphasis added).

37. This term is not defined in the statute, and there is disagreement about what it means. *See* Cameron Fredman, *Plaintiffs' Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1025, 1042–44 (2006) (describing potential approaches that consider different combinations of net-worth or conduct relevance).

into account as part of the totality of the circumstances.[38] Since a judge "may" decline jurisdiction if the numerical predicates are met, the abstention is quintessentially permissive.

The proximity exceptions are contained in CAFA in § 1332(d)(4), immediately after the discretionary home state exception in § 1332(d)(3).[39] Neither of the proximity exceptions uses the word "may" to describe what a federal court must do. The first of the proximity exceptions, the "local controversy exception," provides that "a district court *shall* decline to exercise jurisdiction" if (I) more than two-thirds of the putative plaintiff class are citizens of the forum state, (II) at least one defendant is a defendant who (1) is a citizen of the forum state, (2) is alleged to have done conduct which is a significant basis for the claim, and (3) from whom significant relief is sought, and (III) the injuries were sustained in the forum state.[40] The second proximity exception, the "mandatory home state exception," provides that "a district court *shall* decline to exercise jurisdiction" if more than two-thirds of both the plaintiff's putative class and the defendants are citizens of the forum state.[41] As is apparent, these may be quite fact-based inquiries.[42]

The proximity exceptions are roughly designed to ensure that genuinely local problems are resolved in the forum state. They conform the availability of CAFA removal more closely to the general removal statute, which likewise gives home-state defendants a removal option. And, most importantly, they counterbalance the rest of CAFA's dramatic federal jurisdiction expansion.[43] The rulings that courts make about the proximity exceptions inevitably affect CAFA as a unified federal scheme for placing actions in federal court; so, the breadth of the exceptions may be a referendum on

38. 28 U.S.C. § 1332(d)(3)(A)–(F).

39. *Id.* § 1332(d)(4).

40. *Id.* § 1332(d)(4)(A)(i)(I)–(III) (emphasis added).

41. *Id.* § 1332(d)(4)(B) (emphasis added).

42. Disagreement surrounding these factors can take many forms and include matters of law as well. *See, e.g.*, Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144, 152 (3d Cir. 2009) (determining that the district court improperly applied the significant basis requirement by including in its determination harms suffered by defendants named as parties in the complaint but subsequently dismissed from the action).

43. *See* Brook v. UnitedHealth Grp. Inc., No. 06 CV 12954(GBD), 2007 WL 2827808, at *3 (S.D.N.Y. Sept. 27, 2007) ("The home state and local controversy exceptions are designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state." (internal quotation marks omitted)).

CAFA as a whole.[44] Although a great deal of litigation concerns the exceptions,[45] they are granted mostly for "purely intrastate actions"[46] and, due to their fairly stringent requirements, sparingly.[47]

The direction of large but local class actions into state fora serves primarily a federalism function. The proximity exceptions reflect a forum state's interests in its citizens, as plaintiff class members and as defendants.[48] The proximity exceptions target "purely local matters and issues of particular state concern in the state courts."[49] In those local and concerning matters, a state can choose to make its processes matter. States' procedural requirements governing class actions and underlying actions may differ. The diversity among these requirements is an important part of federalism that preserves the role of states as laboratories for ideas that, if successful, could be replicated horizontally across other states and vertically at the federal level.[50] A state has valid interests in having *its* citizens bound by the rules *it* thinks are best.

So, CAFA provides, through the proximity exceptions, a specific, congressionally-defined line at which a federal court must ac-

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44. *See* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1562 n.23 (2008) ("A court might take a narrow view of CAFA by construing rigorously its requirements or construing expansively its exceptions.").

45. *See* Linda S. Mullenix, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 B.Y.U. L. REV. 1551, 1585–86 (2019) (describing the "raft of appellate litigation" generated by the myriad issues with the exceptions).

46. Michael D. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 241 (2011).

47. *See id.* at 240 ("Exceptions to federal jurisdiction are rare, because very few national class actions satisfy CAFA's stringent exception requirements.").

48. *See, e.g.*, Karabell, *supra* note 29, at 326 ("[A] conception of federalism that removes every high-value class action to federal court hardly preserves a federal-state balance. Thus, while courts should ensure that manipulative pleading does not stand in the way of federal jurisdiction over significant, interstate class actions, they must also take care to effectively enforce the congressional directive that situates 'local' controversies in state fora."). *But see* Burbank, *supra* note 34, at 1527–28, 1542 (arguing that CAFA's exceptions are designed deliberately narrowly so as to exclude local but corporate actions, revealing "CAFA's exceedingly narrow exceptions . . . as another depressing example of legislative overreaching by those who invoke the virtues of federalism when it is convenient to do so").

49. Lowery v. Ala. Power Co., 483 F.3d 1184, 1194 (11th Cir. 2007).

50. *See* Feit, *supra* note 32, at 962–63 (articulating the underlying message of CAFA as "state courts are abusing the class action vehicle" and arguing that "[i]t is fortunate for the nation that each state has the freedom to adopt its own standards and procedures for handling class and complex litigation" because states "can act as a mini-laboratory, experimenting with different amounts of tort reform, consumer protection, and due process considerations").

quiesce to those state interests.[51] When a federal court acts on a proximity exception, it is functionally heeding a direct determination of where the federal and state interests intersect.[52] The federal court must take this federalism balance seriously because the state whose interests are at issue cannot be a "primary" party to the litigation,[53] and so will be absent; so, any federal court holding concerning the reach and effect of the proximity exceptions is uniquely tied to structural interests beyond the parties.[54] Thus, given the late stage of litigation at which the proximity exceptions might arise, the invocation of the proximity exceptions against two parties who do not want to leave federal court pits the private interests of two parties against a congressionally-defined idea of institutional interests.

B. The Proximity Exceptions as Requiring Mandatory Abstention

It is widely established, but not universally so, that the proximity exceptions are forms of abstention, rather than subject-matter jurisdiction elements. While the Supreme Court has not had occasion to interpret the proximity exceptions, almost every circuit court of appeals to consider the proximity exceptions has held that they are forms of abstention. This includes the Second,[55] Fourth,[56] Fifth,[57] Sixth,[58] Seventh,[59] Eighth,[60] Ninth,[61] Tenth,[62] and Elev-

51. *See* Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1108 (D. Or. 2012) (arguing that by applying the proximity exceptions the court would not be "applying a judge-made doctrine to limit a statutory grant of jurisdiction" but instead respecting an "express determination of where to draw the line in balancing state and federal interests" by Congress).

52. *Id.*

53. 28 U.S.C. § 1332(d)(5)(A) (excluding from the CAFA jurisdictional grant "any class action in which . . . the primary defendants are States").

54. *See Bey*, 904 F. Supp. 2d at 1108 (arguing that "important institutional concerns" are implicated by the proximity exceptions because "there is . . . a greater need for vigilance by the courts in such cases to ensure that the preferences of private parties do not run roughshod over the structural interests of states").

55. *See* Gold v. N.Y. Life Ins. Co., 730 F.3d 137, 141–42 (2d Cir. 2013) (agreeing with the underlying district court that "the home state exception was not jurisdictional because the decline to exercise language inherently recognizes [that] the district court has subject matter jurisdiction but must actively decline to exercise it if the exception's requirements are met" (internal quotation marks omitted)).

56. *See* Scott v. Cricket Commc'ns, LLC, 865 F.3d 189, 196 n.6 (4th Cir. 2017) (noting that "[i]n CAFA-exception cases, the court has necessarily determined that jurisdiction exists and is only considering whether the exceptions impose a limit" on the exercise of that jurisdiction).

57. *See* Watson v. City of Allen, 821 F.3d 634, 639 (5th Cir. 2016) (recognizing that "the local controversy and home state exceptions require abstention from the *exercise* of jurisdiction and are not truly jurisdictional in nature," which follows

enth[63] Circuit Courts of Appeals. The First, Third, and District of Columbia Courts of Appeals have not taken up this issue. Relatively recently, however, district courts in all three circuits have held that the proximity exceptions are not jurisdictional requirements.[64]

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from CAFA's text which "directs district courts to decline to exercise CAFA jurisdiction where specific conditions exist" and so "does not deprive federal courts of subject matter jurisdiction" (internal quotation marks omitted)).

58. *See* Mason v. Lockwood, Andrews & Newnam, P.C., 842 F.3d 383, 386–87 (6th Cir. 2016) (noting that if the proximity exceptions are met "the district court must abstain from hearing the case, despite having jurisdiction").

59. *See* Morrison v. YTB Int'l, Inc., 649 F.3d 533, 536 (7th Cir. 2011) (recognizing that the proximity exceptions do not themselves "diminish federal jurisdiction" because their decline to exercise language "is akin to abstention").

60. *See* Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp., 636 F.3d 971, 973–74 (8th Cir. 2011) (holding that CAFA's "plain text demonstrates the district court has broad subject matter jurisdiction in CAFA actions" if the amount in controversy and minimal diversity requirements are met and so proximity exceptions "operate[ ] as an abstention doctrine").

61. *See* Adams v. W. Marine Prods., 958 F.3d 1216, 1223 (9th Cir. 2020) ("The local controversy and home state exceptions are not jurisdictional. Rather . . . we treat the local controversy and home state exceptions as a form of abstention.")

62. *See* Dutcher v. Matheson, 840 F.3d 1183, 1190 (10th Cir. 2016) ("Rather than divesting a court of jurisdiction, the local controversy exception 'operates as an abstention doctrine.'"); *see also* Reece v. AES Corp., 638 F. App'x 755, 767 (10th Cir. 2016) (same).

63. *See* Hunter v. City of Montgomery, 859 F.3d 1329, 1334 (11th Cir. 2017) (holding that CAFA's proximity exceptions' "text recognizes that the court has jurisdiction but prevents the court from exercising it if either exception applies" (citing Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1022 (9th Cir. 2007))); *see also* Hill v. Nat'l Ins. Underwriters, Inc., 641 F. App'x. 899, 905 (11th Cir. 2016) ("[T]he local-controversy exception is akin to an abstention doctrine because § 1332(d)(4) 'inherently recognizes the district court has subject matter jurisdiction by directing the court to "decline to exercise" such jurisdiction when certain requirements are met.'" (quoting *Graphic Commc'ns*, 636 F.3d at 973)).

64. *See* Saunders v. Sappi N. Am., Inc., No. 1:21-cv-002450NT, 2021 WL 5984996, at *7 (D. Me. Dec. 16, 2021) (holding that the proximity exceptions operate as mandatory abstention doctrines); Banks v. E.I. du Pont de Nemours & Co., C.A. No. 19-1672-MN-JLH, 2021 WL 7209361, at *8–9 (D. Del. Dec. 2, 2021) ("The Third Circuit Court of Appeals has not squarely confronted the issue, but other Circuit Courts have concluded that the CAFA exceptions are not jurisdictional . . . . I agree.[ ] The CAFA exceptions are not jurisdictional." (footnote omitted)); *see also* Castro v. Linder Bulk Transp. LLC, Civil Action No. 19-20442 (SDW) (LDW), 2020 U.S. Dist. LEXIS 90113, at *12–13 (D.N.J. Apr. 20, 2020) (viewing the proximity exceptions "as constituting neither a 'defect' nor 'lack of subject matter jurisdiction'" and instead "as being in an altogether different category, similar to abstention doctrines" (citations omitted)); McMullen v. Synchrony Bank, 82 F. Supp. 3d 133, 138 (D.D.C. 2015) (saying of the proximity exceptions that "[e]ven if a court otherwise has jurisdiction under CAFA, however, the statute provides mandatory abstention provisions for actions that involve matters of principally local or state concern").

Courts that have found that proximity exceptions operate as abstention doctrines generally reason from the almost facially indisputable textual argument that a court cannot decline to exercise a jurisdiction it does not originally possess.[65] The most complete and often-cited explanation is given by the Eighth Circuit in *Graphic Communications Local 1B Health & Welfare Fund "A"* (hereinafter "*Graphic Communications*"), which also recognized that CAFA does explicitly delineate jurisdictional requirements, such as the amount in controversy requirement, in one section while placing the proximity exceptions in a different section.[66] While this seems to suggest an independent, structural statutory construction argument for the abstention view, it is a stretch based on the language of *Graphic Communications* to argue that the Eighth Circuit argued this explicitly.

When the proximity exceptions' statutory conditions are raised by party motion, the exceptions' mandatory status does not present problems. There, a federal court must only decide the question brought to its attention correctly. That court could err by mistakenly holding that the proximity exceptions require abstention when they actually do not,[67] or that the proximity exceptions don't require abstention when they actually do.[68]

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65. *See, e.g.*, *Graphic Commc'ns*, 636 F.3d at 973 (arguing that a proximity exception "inherently recognizes the district court has subject matter jurisdiction by directing the court to 'decline to exercise' such jurisdiction when certain requirements are met"); *cf.* Redish, *supra* note 19, at 112 n.185 (noting of the phrase "shall have . . . jurisdiction" in the original jurisdiction context that "[t]hough one might suggest that this language is not inherently mandatory, the use of the term 'shall' tends to undermine such an argument").

66. *See Graphic Commc'ns*, 636 F.3d at 973 (noting in its explanation that the proximity exceptions operate as abstention provisions that the exceptions are "set apart from the above jurisdictional requirements in the statute").

67. *See, e.g.*, Arbuckle Mt. Ranch of Tex., Inc. v. Chesapeake Energy Corp., 810 F.3d 335, 342–43 (5th Cir. 2016) (reversing a district court's finding that the local controversy exception applied, determining there was no basis to find that plaintiff's class consisted of more than two-thirds residents of the forum state). This same error could result in permissive abstention via the discretionary home state exception as well. *See, e.g.*, Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 793, 803–04 (5th Cir. 2007) (reversing a district court that applied the discretionary home state exception and holding that its sole evidence of putative class member citizenship, medical records, could not "form an adequate basis for the district court to make a credible estimate that two-thirds of the proposed class were citizens").

68. If a court must abstain under a proximity exception, then the failure to do so is grounds for reversal. *See, e.g.*, Bridewell-Sledge v. Blue Cross, 798 F.3d 923, 925 (9th Cir. 2015) (reversing on appeal a district court's failure to remand a case under the local controversy exception when raised by the parties).

A court dealing with the proximity exceptions sua sponte would not have the benefit of initial party movement on the issue. A court therefore typically would issue an Order to Show Cause that it should not abstain under the exceptions, and then, after considering the issue, may dismiss or remand if so required.[69] Courts evaluating the proximity exceptions in this posture have generally not conducted full evidentiary proceedings but instead have made common-sense inferences from the data in possession of the courts.[70] Courts would then make findings about the factual and non-factual predicates of CAFA including, inter alia, the citizenships of defendants and plaintiffs, the significance of defendant activity, and the similarity of other suits against the defendants.[71]

Some argue that the proximity exceptions are more plausibly characterized as jurisdictional provisions.[72] Several arguments have been made. First, other statutory provisions do not use the "shall decline" language found in the proximity exceptions, instead opting to explicitly use the word "abstain."[73] By way of statutory interpretation, it could be argued that Congress' use of a different term where another would have signaled that the concept of abstention is at play indicates that the proximity exceptions should not be understood to be abstention doctrines.

This argument is deficient in several respects. First, there is no reason to read a legal difference into the meanings of two phrases,

69. *See, e.g.*, Reddick v. Glob. Contact Sols., LLC, No. 03:15–CV–00425–PK, 2015 WL 5056186, at *1 (D. Or. Aug. 26, 2015) (remanding after issuing an Order to Show Cause).

70. *See, e.g.*, Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1096, 1102 (D. Or. 2012) (declaring it permissible "for a court to apply common sense and reasonable inferences" to determine proximity exception relevance); *see also* Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *3 n.6 (D. Haw. Aug. 9, 2016) (agreeing with *Bey*). It is beyond this piece whether that method is appropriate.

71. 28 U.S.C. § 1332(d)(4)(A).

72. This debate is perhaps academic given the large court of appeals consensus, especially since these arguments were advanced before the courts of appeals really took up the issue in earnest. But since the Supreme Court has not passed on the issue, it is worth exploring.

73. *See* Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 439, 443 n.179 (2008) (comparing the statutory language and noting of the proposition that the proximity exceptions differ from the discretionary home state exception in legal effect that "had this been the legislative intent, one expects it would have been addressed more directly"). *But see* Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 985 n.150 (2008) (comparing CAFA's proximity exceptions with the Multiparty, Multiforum Trial Jurisdiction Act's abstention provision, which uses the word abstain, to conclude that both provisions require abstention).

one of which is merely the longform explanation of the other; if one statute contained a reference to bachelors, and another a reference to unmarried men, it would be suspect to read the latter provision differently than its text would suggest.

Second, the proximity exceptions are set aside from the statute's list of jurisdictional predicates for CAFA jurisdiction. The placement of the proximity exceptions in the same place as the jurisdictional predicates would have been trivial. Failure to do so does signal at least some difference in intended effect.[74] The Supreme Court has indicated that the separation of a provision from a jurisdictional section to another system cuts against its jurisdictional character.[75]

Finally, at the end of the day, "courts must presume that a legislature says in a statute what it means and means in a statute what it says."[76] Congress may label its statutes' provisions as jurisdictional predicates.[77] This is especially true for the supposed jurisdictional quality of statutory provisions where the Supreme Court has allied a "clear statement rule"[78] as a "readily administrable bright line"[79] for jurisdictional quality. Congress can clearly indicate that a provision is jurisdictional; "absent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.'"[80] Here, the legislature has said that a court must *decline to exercise* its jurisdiction. One can only decline to exercise the option to accept an invitation to a Thanksgiving dinner, after all, if one has been first invited.

Second, the Senate committee report seems to regard the proximity exceptions as jurisdictional limitations. The report indicates that if the requirements of the mandatory home state exception are met, then "the case would not be subject to federal

74. *Graphic Communications* does not go so far as to endorse this view. *See supra* note 66. But I do.

75. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). It is true that *Arbaugh* concerned distinguishing between jurisdictional predicates and elements of a cause of action and that it was helpful to the Court's reasoning there that the provision in question did not mention jurisdiction at all. *Id.* But the Court's reasoning applies in this context as well.

76. Carr v. United States, 560 U.S. 438, 458 (2010).

77. *See* Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("Congress is free to attach the conditions that go with the jurisdictional label to a rule . . . .").

78. Hamer v. Neighborhood Hous. Servs., 138 S. Ct. 13, 20 n.9 (2017).

79. *Arbaugh*, 546 U.S. at 515.

80. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013) (quoting *Arbaugh*, 546 U.S. at 515–16).

jurisdiction,"[81] and notes that "jurisdiction will not be extended" to those situations.[82] The report also seems to characterize the effect of the local controversy exception this way, noting that if its "criteria are satisfied, the case will not be subject to federal jurisdiction under the bill."[83] Only the permissive provision is described in the committee report with the "decline to exercise" language.[84] Immediately after this section of the report, the report groups the proximity exceptions' limitations in with the other jurisdictional limitations, such as the 100 minimum class members limitation.[85]

This argument is not fully conclusive for a few reasons. First, it is difficult to say whether the Senate report itself intended the words to express the distinction that this Note has drawn. Indeed, it is possible that phrases like "subject to jurisdiction" still express an abstention-soluble idea. Second, the inferences in the report may cut in favor of the abstention interpretation. This is because the report does make it clear that the "decline to exercise" language is not strictly jurisdictional when it is used (namely, for the permissive abstention provision). The fact that the final version of the legislation extended this language to cover the other provisions could indicate an intent to expand an abstention-soluble view to the other provisions. The report makes clear that the drafters could have used explicit jurisdiction-stripping language if they had wanted to. So, the fact that the final text of these provisions was produced before the Senate committee report was published[86] may be meaningful. Finally, and most importantly, the use of committee reports to interpret legislative history, and the use of legislative history writ large for that matter, has become increasingly controversial.[87] Even when these uses are clear, their authority to speak for what Congress intended is questionable. Interpretation of an otherwise clear provision should not be displaced by "less than a quarter-page" of the report, "a minuscule portion of the total number of reports that

81. S. REP. NO. 109-14, at 28 (2005).

82. *Id.* at 36.

83. *Id.* at 29.

84. *Id.* at 28.

85. *Id.* at 29.

86. The Senate committee report was published on February 28, 2005, 10 days after the final text of these provisions was produced. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2.

87. *Compare* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (arguing against the use of committee reports and legislative history broadly), *with* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863–64 (1992) (arguing for the use of committee reports and legislative history broadly).

the Members of Congress were receiving (and presumably even writing) during the period in question" and so "we should try to give the text its fair meaning, whatever various committees might have had to say."[88]

Third, and most seriously, some argue that the concept of abstention itself has a discretionary component, and therefore that these provisions, which purport to remove a court's discretion and force them to mechanically withdraw jurisdiction, do not make sense as abstention doctrines.[89] The strangeness surrounding CAFA's mandatory status lends this argument some force. CAFA's exceptions, in the context of CAFA as a whole, seem to be trying to be both non-authorizing and a constraint on a grant of authority. To claim that a court always has an unambiguous power to hear a case that it unambiguously cannot entertain under certain conditions is sticky business. When a statutory, mandatory abstention doctrine is at play, in what sense is it even true that a federal court has power to hear the action? By way of an analogy, if John signs title of his house to Mary under a deed that purports to grant complete ownership of the house to Mary but in a separate provision provides that Mary cannot exercise her ownership on Wednesdays, in what sense does Mary really have complete ownership of the house?

This argument fails because it is too abstract and too extreme. If a court is wrong to say that it is has jurisdiction and sometimes cannot use it, then the phrase "mandatory abstention" could never apply to anything it did pursuant to a statute. But, in practice, courts claim to apply something called mandatory abstention pursuant to statutes all the time. Courts have unambiguously held that mandatory abstention exists in these contexts; the question is only what mandatory abstention means.

These theoretical worries should be put to a different purpose. They should be taken as a challenge to articulate a version of mandatory abstention that is itself not obviously a jurisdictional limit on a court's authority. If a court must conduct a mandatory abstention analysis itself in every CAFA case, regardless of party action, it is hard to see that provision as anything more than a jurisdictional predicate, making the current judicial practice of

88. Wis. Pub. Intervenor v. Mortimer, 501 U.S. 597, 620–21 (1991) (Scalia, J., concurring).

89. *See* Hoffman, *supra* note 73, at 429 (arguing that because the concept of abstention implies a discretionary component, the proximity exceptions are not properly viewed as forms of abstention at all).

distinguishing them on the basis of, inter alia, burdens of proof,[90] inappropriate.

The "mandatory" aspect of mandatory abstention cannot just replace all the gaps between subject matter jurisdiction and permissive abstention. There are, roughly speaking, two such gaps. First, subject matter jurisdiction gives courts an *inquiry obligation*. A federal court must ask whether it has subject matter jurisdiction continually, even if the parties do not put that question before it. Second, subject matter jurisdiction gives courts a *dispositional obligation*. A federal court that has found its subject matter jurisdiction wanting cannot maintain the case. If "mandatory abstention" gives courts both an inquiry obligation and a dispositional obligation, it is the functional equivalent of a subject matter jurisdiction predicate.

I believe "mandatory abstention" and the cases that apply it are best understood to give federal courts a dispositional obligation, but not an inquiry obligation. So, the "mandatory" aspect of the proximity exceptions simply reflects the effect that a court is required to give its finding, should it make one. An analogy to permissive abstention is illuminating. If the local controversy exception were permissive, a court could find that two-thirds of plaintiff class members and defendants were citizens of the forum state and nevertheless *choose* not to abstain on a provided ground. Thus, the "permissive" aspect of permissive abstention is that a court may make a finding that could justify abstention but need not abstain; indeed, under such circumstance it "*may* . . . decline to exercise jurisdiction."[91]

Mandatory abstention is sensibly understood not to give federal courts an inquiry obligation. A court need not inquire about the predicates for mandatory abstention in each case. Rather, a court is required to dismiss or remand any action where it finds, by argument of the parties or by its own analysis, that the elements of a proximity exception are satisfied. In this way, if indeed courts *can* raise the proximity exceptions sua sponte,[92] doing so preserves the discretionary element unique to abstention because a court can choose whether to inquire into, or make a finding based upon, an exception. A court cannot, however, find the proximity exception requirements fulfilled and nevertheless maintain its hold over a

90. *See, e.g.*, Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 680 (7th Cir. 2006) (finding that once the defendant satisfies CAFA's general requirements the burden shifts to the plaintiffs to show that exceptions apply).

91. 28 U.S.C. § 1332(d)(3) (emphasis added).

92. *See infra* Part III.

case. All this is to say: federal courts have no *obligation*, under mandatory abstention qua mandatory abstention, to raise the proximity exceptions sua sponte. Indeed, some courts have held that this is so, although their analysis and reasoning have been sparse.[93]

One possible counterargument to this interpretation of "mandatory" abstention in the CAFA context is that an inquiry obligation is especially appropriate where subject matter jurisdiction is implicated, at least circuitously. It is a bit strange, the argument goes, to let courts choose to let class actions nest in federal court when there are explicit rules about which class actions need not be in federal court.

There are two major problems with this argument. First, the "most widely applied" abstention doctrine,[94] the mandatory judicial abstention doctrine articulated in *Younger v. Harris*,[95] is best read to work exactly this way. The *Younger* doctrine generally provides that federal courts must "refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts."[96] In *Younger* itself, the Supreme Court invalidated a district court injunction enjoining an ongoing state criminal proceeding because that injunction would flout and disrespect the importance of prosecutions to the states.[97] The doctrine has been held to require abstention[98] from involvement

93. *See, e.g.*, Kuxhausen v. BMW Fin. Servs. NA LLC, 707 F.3d 1136, 1139 n.1 (9th Cir. 2013) (noting that "the obligation to raise and prove" that the proximity exceptions apply "rests on the party seeking remand," which left the court "no charge to consider those possibilities sua sponte").

94. O'Brien, *supra* note 13, at 195.

95. 401 U.S. 37 (1971).

96. Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us – Get over It!!*, 36 CREIGHTON L. REV. 375, 381 (2003).

97. 401 U.S. at 43–45, 54. ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

98. This Note is in accord with the vast majority of sources that describe the doctrine of *Younger v. Harris* as one of abstention. *See, e.g.*, 17B CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. § 4251 (3d ed. 2022) (noting of the doctrine of *Younger v. Harris* that it "seems to be a special application of the abstention doctrines, and has repeatedly been so characterized by the Supreme Court"); Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 477 (1997) ("There are, of course, two primary types of federal abstention . . . . The second type is

where the forum state contains ongoing criminal proceedings, certain civil enforcement proceedings, and civil orders importantly connected to the forum state court's ability to fulfill its function.[99]

The view of the proximity exceptions described above predicts this outcome for the "mandatory" aspect of *Younger* abstention. A court cannot choose to accept a legitimately argued *Younger* challenge and nevertheless retain the case. It need not spur a resting court to action, and there is no requirement that the court undertake its own investigation to determine the existence of a state court proceeding since the entire question is whether what that court has been asked to do by plaintiffs would be proper.[100] Applying this doctrine, courts may issue Orders to Show Cause once the predicates of the action clearly become enough of an issue to warrant it,[101] just as with the proximity exceptions.

Second, an inquiry obligation is less necessary than usual in the context of the proximity exceptions because courts still do have inquiry obligations in the class actions context, even into similar factual predicates, as a result of their continuing obligations under Federal Rule of Civil Procedure 23. Rule 23 provides the requirements for a class action to pass federal muster, including numerosity, adequacy, commonality, and typicality.[102] A court may grant or deny the certification of a class attempted by the parties.[103] This

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Younger abstention . . . ."). It is worth noting that the influential Hart and Wechsler's Federal Courts and the Federal System casebook, however, distinguishes them, identifying the *Younger* doctrine instead as one of "equitable restraint." *See* RICHARD H. FALLON ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1127–44 (7th ed. 2015); *see also* WRIGHT & MILLER, *supra* (noting that an earlier edition of the Hart and Weschler's Federal Courts textbook broke from the convention of labeling the *Younger* doctrine an abstention doctrine).

99. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013).

100. While courts of appeals may find that the *Younger* criteria are satisfied and accordingly reverse lower court decisions, the reversals can be viewed as either corrections of a finding the lower court did make, or applications of sua sponte power in itself to consider the interests at stake. The latter view better explains the relevant cases. There, the judgement of the lower court is held to be wrong because the case should have been dismissed or remanded, and, in that sense, the lower court produces the wrong result. But this result is not wrong because a district court that omitted to consider *Younger* issues should have done so sua sponte. *See, e.g.*, Morrow v. Winslow, 94 F.3d 1386, 1398 (10th Cir. 1996) (applying *Younger* sua sponte on appeal and reversing the district court without chastising the district court for failing to raise the issue sua sponte itself).

101. *See, e.g.*, Fund v. City of New York, No. 14 Civ. 2958KPF, 2014 WL 2048204, at *4 (S.D.N.Y. May 19, 2014) (issuing an Order to Show Cause).

102. FED. R. CIV. P. 23(a).

103. FED. R. CIV. P. 23(b).

order "may be altered or amended before final judgment."[104] This is because the facts as they are, or as they are known to the parties, might change between the certification dispute and a later point in the litigation.[105] This is established practice and may even be taken after a jury has rendered a verdict.[106] A court need not actually change its certification order even in light of new facts; the decision to change is discretionary.[107] But several courts have also held that Rule 23 vests courts with an inquiry obligation into the factual predicates of certification or decertification.[108]

These obligations, in short, appear to be the mirror image of the obligations for the proximity exceptions: in Rule 23, it seems that courts have an inquiry obligation but no dispositional obliga-

104. FED. R. CIV. P. 23(c)(1)(C).

105. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation. For such an order . . . 'is inherently tentative.' This flexibility enhances the usefulness of the class-action device; actual, not presumed, conformance with Rule 23(a) remains, however, indispensable." (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978))); *see also* Jin v. Shanghai Original, Inc., 990 F.3d 251, 262 (2d Cir. 2021) (decertifying class on the grounds that "class counsel was no longer adequately representing the class").

106. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 23.87 & n.6.1 (2022); *see also* Mazzei v. Money Store, 829 F.3d 260, 266–67 (2d Cir. 2016) (decertifying after jury verdict a class on, inter alia, typicality grounds).

107. 7AA CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. CIV. § 1785.4 (3d ed. 2022) ("[I]t must be noted that there is no requirement that the court alter its class-action order when the circumstances surrounding its initial determination change. The decision to amend a class-certification order is discretionary.").

108. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 23.87 (2022) ("Some of the Courts of Appeals have indicated that the district courts have an affirmative duty to reassess their class certification rulings as the case develops, and to decertify a class or otherwise alter a certification decision as appropriate in light of developments in the case."); *see also* Sciaroni v. Consumer (*In re* Target Corp. Customer Data Sec. Breach Litig.), 847 F.3d 608, 612 (8th Cir. 2017) ("Consistent with the Supreme Court's premise that 'actual, not presumed, conformance with Rule 23(a) remains . . . indispensable,' after initial certification, the duty remains with the district court to assure that the class continues to be certifiable throughout the litigation . . . ." (first quoting *Falcon*, 457 U.S. at 160; and then citing Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1145 (8th Cir. 1999))); Amara v. CIGNA Corp., 775 F.3d 510, 520 (2d Cir. 2014) ("Rule 23(c)(1)(C) requires courts to 'reassess . . . class rulings as the case develops,' and to ensure continued compliance with Rule 23's requirements." (quoting Boucher v. Syracuse, 164 F.3d 113, 118 (2d Cir. 1999))); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983) ("Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts.").

tion. For this reason, the idea that federal class actions would be broadly unmonitored without an inquiry obligation is unfounded. Federal courts' obligation to look into facts such as, inter alia, numerosity and typicality, may reveal class information that may go to factors like domicile which could potentially implicate the proximity exceptions. Information problematic and severe enough to get onto a court's radar with respect to the proximity exceptions may be enough to make sure that truly egregious actions may not need to have their own inquiry obligation to get detected.

It could be argued that the way the continuing Rule 23 obligations work should be imparted as well to the proximity exceptions; that is, that the "mandatory" aspect of mandatory abstention should give courts an inquiry obligation but no dispositional obligations. That would not be an appropriate inference for three reasons. First, it is not obvious why courts should be read to require two inquiry obligations into potentially similar facts. A more natural reading might be that the provisions fill in gaps in each other, rather than operating similarly to reach out at redundant data. Second, the lack of dispositional obligation makes sense in the Rule 23 context, because Rule 23 is not related at all to whether an action could be in federal court. The decertification of a class does not boot the litigant from federal court; they may still maintain their action as an individual action. On the other hand, the proximity exceptions and CAFA as a whole directly implicate the ability to be in federal court, albeit in a slightly circuitous way. Finally, the positive analogy to *Younger*, an actual abstention doctrine, is worth more than a negative analogy to a distinct doctrine, though in the class actions space.[109]

It seems, therefore, that the proximity exceptions' mandatory status does not *force* a court to consider them sua sponte. Still, *may* a court do so, even if its parties object that they have waived their arguments? Some courts that have addressed this issue have determined that a finding of *waiver* precludes a sua sponte analysis.[110] It is clear, then, that a holistic understanding of the effect of waiver is important to unravel the proximity exceptions' sua sponte permissibility.

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109. There is no argument that Rule 23's continuing obligations erode the findings in Part III, *infra*, because the thesis of the Rule 23 obligation is that a judge should (indeed must) act sua sponte. It is also of no help in Part III because the reason for the sua sponte power under Rule 23 is an inquiry obligation I have just argued the proximity exceptions lack.

110. *See generally* Barfield v. Sho-Me Power Elec. Coop., No. 2:11–cv–04321–NKL, 2014 WL 1343092 (W.D. Mo. Apr. 4, 2014).

III.
WAIVER AND SUA SPONTE PERMISSIBILITY

A. Waiver, Generally

Cases come before judges on the motions of litigants. Much of the time, courts decide those motions with reference to the arguments contained in those motions and made by those litigants. At other times, courts might deviate, deciding issues a party never raised, sometimes further up in the appeals process, namely, sua sponte. Some very famous Supreme Court cases have been decided this way.[111] A great many other cases have been decided this way, too. But the power of a court to consider an issue sua sponte is a bit "confused,"[112] and a very brief exegesis of the area, starting with what it means for a party to lose or "waive" an argument, should be helpful.

The concept of waiver is a little "undertheorized,"[113] but this piece will attempt a rough synthesis. Parties in a litigation are subject to many rules that constrain the nature and timing of the introduction of their arguments and claims. If a party fails to abide by the rules with respect to various arguments and claims, a party may lose the power to have its arguments heard by a court, even if that party wishes it be heard.[114] A party may also lose access to its right to be heard on an argument by consent or by agreeing to the idea that it may no longer raise it.[115] Arguments are lost in all sorts of

111. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 151–52 (1908) ("Two questions of law . . . were brought here by appeal, and have been argued before us . . . . We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause."); Erie R.R. v. Tompkins, 304 U.S. 64, 83 (1938) (Butler, J., dissenting) (reprimanding the majority for not deciding "either of the questions presented but, changing the rule of decision in force since the foundation of the government").

112. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1262–63 (2002) (suggesting that "[c]ourts are confused about the power to raise and decide issues sua sponte because our appellate system embraces two conflicting historical ideas about adjudication": the adversarial process and the desire to do justice, a conflict which is "a byproduct of the merger of law and equity").

113. Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 5–6 (2014).

114. *See id.* at 10 n.35 (collecting federal rules of civil procedure that go beyond the whims of the parties).

115. *See id.* at 40 (distinguishing between three ways a party may lose access to a claim: waiver (by consent), stipulation (by agreement), and forfeiture (by lack of right)).

ways for all sorts of reasons.[116] Although there are subtle distinctions between the ways of losing access to the capacity to make an argument, this Note will refer generally to what happens, as do many pieces in this area, as the "waiver" of the argument.[117]

It is clear that a party that waives an argument loses the right to object if a judge does not raise a waived argument in deciding a controversy. It is also clear that many judicial opinions do not fixate on issues not raised by the parties, and courts operate with a broad presumption that the actions of parties control the issues considered by the judge.[118] Still, courts do, in a number of contexts, raise issues that are waived by the parties. In so doing, the court "override[s]" the waiver of the parties and may consider the issue itself—that is, sua sponte.[119] The court does so most famously in the area of subject matter jurisdiction, which is frequently described as "unwaivable."[120] The idea is that federal courts have the obligation to ensure their subject matter jurisdiction over a dispute, even if neither party disputes subject matter jurisdiction at all.[121] Federal courts may override the waiver of a party in a number of other contexts, especially "quasi-jurisdictional" ones, including, inter alia,

116. *See* Miller, *supra* note 112, at 1268 ("Courts now treat as waived even issues that were raised in the briefs, because they were not briefed with sufficient detail. Arguments in footnotes, of just one page or less, without citation of authority, incorporating briefs presented below, or presented for the first time in reply briefs or oral argument have been rejected. Even claims of waiver have been deemed waived because they were not raised at the first possible time." (footnotes omitted)).

117. *See* Dodson, *supra* note 113, at 40–41 (noting that while "the Supreme Court has fixated on these subtle distinctions and elevated their significance for resolving conflicts between party choice and judicial authority," the distinctions "can be subtle and difficult to glean in practice" and "legal nomenclature tends to sweep various party choices into a single concept of 'waiver'").

118. *See id.* at 11–12.

119. *Id.* at 9.

120. *See, e.g.*, Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 McGeorge L. Rev. 635, 639 (2014) ("While other defects may be waived, subject-matter jurisdiction stands alone as the single unwaivable defect.").

121. *See* Katherine A. Macfarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 Or. L. Rev. 177, 190 (2012) ("Once a defense is branded as one that affects a court's subject matter jurisdiction, a court must raise the defense sua sponte. Because jurisdictional defenses are never waived, they may be raised at any moment throughout litigation, sua sponte or otherwise - even after a district court has held a trial and reached a decision on the merits." (footnote omitted)).

ripeness, state sovereign immunity, forum non conveniens, and, very generally, abstention.[122]

Even though courts have a broad array of specified scenarios in which their sua sponte power is called upon, it is less clear that courts have the broad authority to raise any issue sua sponte that they please. But it seems three things may be concluded from the analysis above. First, the strict waiver of an issue does not prevent a court from considering that issue sua sponte; the number of times sua sponte consideration is encouraged indicates that waiver is not necessarily binding, although it might be with additional context. Second, for non-jurisdictional issues, there is still a broad understanding that waiver constrains a court.[123] Third, matters of jurisdictional analogy or import, especially to subject matter jurisdiction, have a likelihood of being considerable sua sponte.[124]

All this bears on the question of the *ability* of a court to raise a concern sua sponte, and less on any *obligation* the court might have to do so. A court's power to raise an issue does not necessitate that it do so, and grants of sua sponte power may be accompanied by provisos that clarify the power's non-obligatory status.[125] This comes with an important corollary. Since ability does not establish obligation, the lack of an obligation does not prove the lack of ability. While the *capacity* to raise issues sua sponte is prevalent, although not common, the *obligation* to raise issues sua sponte is vanishingly rare, seemingly confined to subject matter jurisdiction.[126] Therefore, it seems that it is possible in some circumstances that a court *can* override the waiver of the parties but often *need not*.

122. *See* Dodson, *supra* note 113, at 9–10 & nn.32–35 (collecting cases, rules, and statutes); *see also* Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (noting that "it would appear that abstention may be raised by the court sua sponte").

123. *See* Dodson, *supra* note 113, at 3 (noting that waiver is understood to "cabin the scope of the court's nonjurisdictional adjudicatory authority").

124. *See supra* note 122.

125. *See, e.g.*, Wood v. Milyard, 566 U.S. 463, 472 (2012) (finding that a district court or court of appeals could raise a habeus corpus petition's timeliness sua sponte but does not have the obligation to do so).

126. *See, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999))); *see also* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

B. Abstention and Waiver

Abstention, generally, is an area in which this distinction manifests. The Supreme Court has indicated in a brisk footnote that abstention may be raised sua sponte.[127] This footnote has been broadly interpreted by many courts as a general invitation to consider abstention doctrines sua sponte.[128] This generates no corresponding obligation for a court to consider abstention sua sponte,[129] at least qua abstention. The analysis in Part II[130] indicates that the mandatory nature of abstention does not change this. And, consistently, courts have held that the waiver of the proximity exceptions may be effective.[131] Instead, the capacity to raise the proximity exceptions sua sponte should be analyzed itself and is not foreclosed by some technical determinant.

Thus, abstention is a subject matter jurisdiction-relevant doctrine in which waiver could be ineffective if values beyond those of the parties are implicated. An analogy to *Younger* abstention is useful. Many courts have extended the Supreme Court's seemingly general invitation to abstain sua sponte to *Younger*,[132] and the

127. *See Bellotti*, 428 U.S. at 143 n.10.

128. *See, e.g.*, Jiménez v. Rodríguez-Pagán, 597 F.3d 18, 27 n.4 (1st Cir. 2010) ("As with other forms of abstention, our decision to decline jurisdiction under *Colorado River* may be sua sponte. We therefore have discretion to review the matter on appeal even if it was not raised in the court below." (citing, inter alia, *Bellotti*, 428 U.S. at 143 n.10)); Slyman v. City of Willoughby, No. 96-4028, 1998 U.S. App. LEXIS 955, at *6 n.1 (6th Cir. Jan. 16, 1998) ("The City did not argue on brief that *Thibodaux* abstention was appropriate. Regardless, the Supreme Court has indicated that abstention 'may be raised by the court sua sponte.'" (citing *Bellotti*, 428 U.S. at 143 n.10)). *But see* E. Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying* Younger *Abstention to Claims for Monetary Damages and Raising* Younger *Abstention Sua Sponte on Appeal*, 81 N.D. L. Rev. 475, 490–94 (2005) (articulating the view that the *Bellotti* footnote is likely dictum, properly confined to the *Pullman* context in which the case arose, and subject to a flexibility via sensitivity to policy considerations that militated against its broad applicability).

129. *See* 17A James Wm. Moore et al., Moore's Federal Practice – Civil § 122.05 (3d ed. 2009) ("Although federal courts may raise the issue of abstention sua sponte, they are not required to do so, because abstention does not implicate subject matter jurisdiction." (collecting cases)).

130. *See supra* Part II.

131. *See, e.g.*, Gold v. N.Y. Life Ins. Co., 730 F.3d 137, 142 (2d Cir. 2013) (holding that waiver of the mandatory home state exception could be effective); Kuxhausen v. BMW Fin. Servs. NA LLC, 707 F.3d 1136, 1139 n.1 (9th Cir. 2013).

132. *See, e.g.*, Citizens for Free Speech, LLC v. Cnty. of Alameda, 953 F.3d 655, 658 (9th Cir. 2020) ("[The Plaintiff] complains that the sua sponte nature of the district court's *Younger* analysis was both untimely and prejudicial, but we find this contention unpersuasive; the court may raise abstention of its own accord at any stage of the litigation." (citing *Bellotti*, 428 U.S. at 143 n.10)).

Younger doctrine well illustrates the tension between mandatory abstention requirements and waiver. There seems to be a general directive for courts to raise *Younger* abstention when they see its predicates, and a sua sponte power to address *Younger* even when the parties are not enthusiastic about it.[133] Despite this, the special nature of *Younger* abstention also seems to make deliberate waiver of that argument nevertheless binding on a court. In particular, *Younger*'s mandatory status is complicated by the identity of the party that would seek abstention: the state or state official that would be the subject of the injunction. The Supreme Court has held, therefore, that a district court or court of appeals is not wrong to let a *state* waive its abstention arguments in certain situations. Since a state is the party whose interests the court would ostensibly be respecting by abstaining, application of abstention *against* the desire of a state is wholly against the interests served by abstention writ large (i.e., comity and federalism). Thus, the Court in *Ohio Bureau of Employment Services v. Hodory* said:

> Younger and these cited cases express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal. It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances Younger principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.[134]

This underscores that the values implicated by the applicable variety of abstention are very much at stake on these issues at the edge of federal jurisdiction. *Hodory* shows that waiver in a

133. *See, e.g.*, Marcus & Millichap Real Estate Inv. Servs. of Nev., Inc. v. Chandra, 822 F. App'x 597, 599–600 (9th Cir. 2020) (finding in a non-precedential order that sua sponte raising of *Younger* abstention was appropriate, that the district court had erred by not granting that abstention, and that a functional state defendant did not waive the objection despite not spending a great deal of time arguing for it).

134. Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 479–80 (1977).

mandatory context is flexible and should respect the holistic interests of those implicated by the determination. It is no surprise, then, that when one of the parties is the exact subject of those values (i.e., the state itself) the reasons for a sua sponte application evaporate; if a doctrine exists to respect the hypothetical, absent will of a state, it certainly seems inappropriate to override the actual desire of that state in the name of a hypothetical interest.

C. Arguments for the Power to Raise the Proximity Exceptions Sua Sponte

Part III(b) only establishes that the general concept of waiver should not be found to bar a court from considering the proximity exceptions sua sponte; that is to say, it moves the needle back to the middle. But the middle is a good place to start. Without the baggage of waiver obviously getting in the way, the proximity exceptions are best understood to be raisable sua sponte. There are three good reasons for this understanding.

First, the power to raise the proximity exceptions sua sponte is vital to the federalism function the proximity exceptions are organized to serve. Federalism is "central to the constitutional design" of the United States.[135] The proximity exceptions primarily involve the will of absent parties.[136] These are the exact structural considerations that give the proximity exceptions their very force: the pure interests of the parties involved could be averse to a healthy balance between the states and the federal government.[137] Even if the attorneys of a class action and the defendants would rather receive fed-

135. Arizona v. United States, 567 U.S. 387, 398 (2012). Federalism not only preserves the sovereign power of states to do as they wish but also independently protects persons from the exercise of the arbitrary power that could be available if only one government authority exerted exclusive and unbalanced influence over all persons. *See* Bond v. United States, 564 U.S. 211, 221–22 (2011) ("Federalism . . . preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right. But that is not its exclusive sphere of operation. . . . Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

136. *See* 28 U.S.C. § 1332(d)(5)(A) (exempting class actions from federal jurisdiction when "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief").

137. *See supra* Part II(a).

eral treatment, the exceptions are designed to ensure exactly that those considerations cannot always permit federal jurisdiction.[138]

A court should think carefully before using this power. Even those courts that have permitted sua sponte application of the proximity exceptions noted their raising of the issue "relatively early in the case."[139] The interests of the parties are an important part of the federal design. Nevertheless, parties cannot agree[140] to upset the balance of federal and state power simply because the alternative is costly. This is especially true for the proximity exceptions. The bare requirements of jurisdiction under CAFA are quite light, and the mandatory nature of these exceptions reflects precisely the weight placed on the courts that use them to allow states to hear at least some of the class actions that involve their citizens.[141] The court in *Bey* got it right when it indicated that federalism is an integral part of CAFA's design and should be treated as such; thus, courts should be allowed to be the caretakers that the system envisioned them as, party interests aside.[142]

Second, abstention in general is raisable sua sponte. So, it should stay that way absent a good reason.[143] There are no good reasons to deviate from this broad presumption where the proximity exceptions are concerned. The *Edwards* court rejected sua sponte application solely on the grounds that the proximity exceptions were non-jurisdictional;[144] as has been shown, mandatory ab-

138. *See supra* Part II(a).

139. Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1109 (D. Or. 2012).

140. Or collude.

141. *See Bey*, 904 F. Supp. 2d at 1108 ("Congress extended federal jurisdiction to some cases that lacked complete diversity. But to prevent the pendulum from swinging too far in the other direction, it included the exceptions to jurisdiction set out in § 1332(d)(4) to make clear that truly local disputes still do not belong in federal court.").

142. *See id.* (arguing that institutional concerns about federalism apply especially strongly in favor of the sua sponte application of the proximity exceptions because the state is an absent party and cannot defend its interests and because the presence of these exceptions reflects a bona fide congressional judgment about federalism that must be respected).

143. *See supra* notes 127–28 and accompanying text.

144. Edwards v. N. Am. Power & Gas, LLC, No. 3:14-cv-1714 (VAB), 2016 WL 2851544, at *4 n.8 (D. Conn. May 13, 2016) (concluding that because CAFA exceptions are "not jurisdictional," "for the [c]ourt to consider the applicability of either of [the CAFA] exceptions, they must be raised by the parties"). It is worth noting that the opposite conclusion reached by the *Vitale* court—that sua sponte determination is required because a court has a jurisdictional obligation to ensure its subject matter jurisdiction—is also incorrect because it does not appreciate that the proximity exceptions are forms of abstention rather than jurisdictional predicates.

stention itself has a sua sponte valence. The *Barfield* court interpreted the party waiver of the applicability of the exceptions as precluding its power to raise them.[145] It is now clear that the mere presence of waiver, without more, cannot prevent sua sponte permissibility—the waiver might be overridable, or ineffective. Such an analysis presumes an independent reason for waiver effectiveness not provided by that court.[146]

There is one countervailing presumption that deserves attention. Many courts have noted that conflicts in the meaning of the proximity exceptions should favor federal jurisdiction.[147] There are two reasons this presumption is inapplicable here. First, the proximity exceptions' sua sponte status has no effect on the meaning of the exceptions. It only affects when a court may consider the exceptions, *whatever they mean*. So, a presumption favoring federal-jurisdiction-friendly interpretations of the proximity exceptions should not affect the prior question of when it would be appropriate to consider the exceptions. Second, the proximity exceptions' sua sponte status has no logical connection to a decrease in federal jurisdiction. It is true that, as a practical matter, the initiation of an inquiry into whether normally present federal jurisdiction should be withheld almost certainly decreases the chances of federal control in an action; after all, the only possible change as a result of the inquiry is a denial of federal jurisdiction. Nonetheless, as a logical matter, there is absolutely no relationship between a desire for federal control and an allowance to consider exceptions to federal control.[148] Furthermore, a more aggressive view of the reach of the proximity exceptions may expand CAFA in other contexts as courts try to balance the overall reach of CAFA through ruling on its various provisions.[149]

See Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *1 (D. Haw. Aug. 9, 2016).

145. *See generally* Barfield v. Sho-Me Power Elec. Coop., No. 2:11–cv–04321–NKL, 2014 WL 1343092 (W.D. Mo. Apr. 4, 2014).

146. *See generally id.*

147. *See, e.g.*, Evans v. Walter Indus., 449 F.3d 1159, 1163–64 (11th Cir. 2006) (quoting legislative history to argue that Congress' intentions that the proximity exceptions have narrow applicability should determine the meaning of the proximity exceptions).

148. Imagine, for instance, that a federal court raises the matter of the proximity exceptions sua sponte 100 times and holds each time that the exceptions do not apply. In this scenario, the strength of the presumption of federal control is not impaired in the slightest.

149. *See* Clermont & Eisenberg, *supra* note 44 and accompanying text.

Third, the best reading of CAFA in comparison to other abstention statutes supports the proximity exceptions' sua sponte waivability. The structure of other statutes meaningfully suggests the proximity exceptions may be raised sua sponte. Other statutes can be a helpful guide in statutory interpretation.[150] The bankruptcy code, a significant mandatory abstention statute, specifies that it cannot apply sua sponte.[151] The failure to do so in the proximity exceptions, on this view, indicates that Congress intended at least to keep sua sponte activity permissible for the courts, if not to passively condone it.[152] There exists a plausible counterargument: a closely analogous statutory, mandatory abstention doctrine not applying sua sponte indicates congressional design that its other statutory, mandatory abstention doctrines not get the sua sponte treatment. On this view, Congress' connection of mandatory abstention directly with party motion would indicate that abstention is closely connected with, and should be implied to require, a party motion to initiate. But statutes that are close in form and function are precisely those where textual differences stand out the most as indicators of Congressional design. Furthermore, the bankruptcy code's permissive abstention provision can be raised sua sponte, although its text is silent on that issue.[153] This illustrates the sense in which the absence of a sua sponte rider for the proximity exceptions is meaningful.

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150. *See, e.g.*, Brown v. Gardner, 513 U.S. 115, 118–19 (1994) (comparing "analogous" statutes dealing with similar questions to support a reading of a federal statute).

151. 28 U.S.C. § 1334(c)(2) (requiring that "[*u*]*pon timely motion of a party* in a proceeding based upon a State law claim . . . the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction" (emphasis added)). Bankruptcy also includes a permissive abstention provision. *Id.* § 1334(c)(1) (permitting abstention "in the interest of justice, or in the interest of comity with State courts or respect for State law").

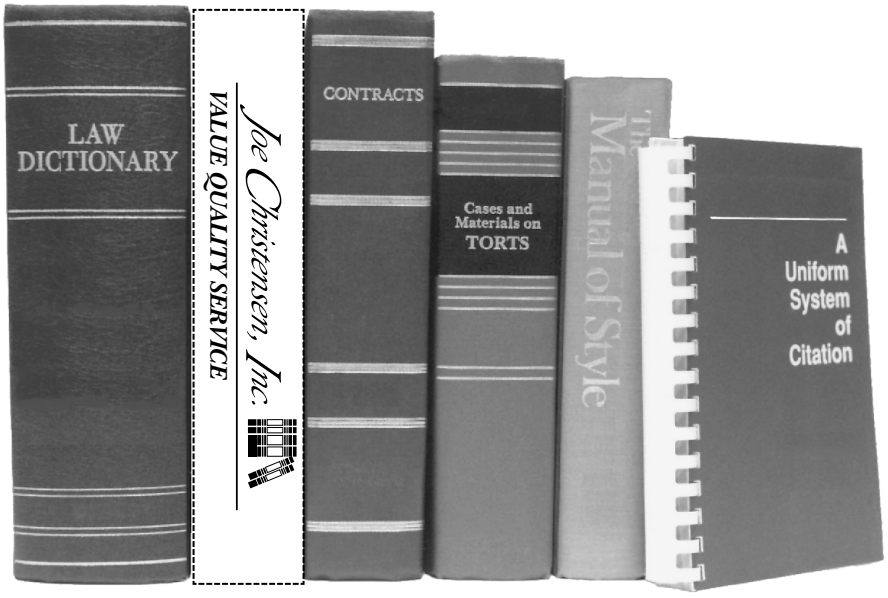
152. *Cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) ("No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law. Or it could have written 'primarily because of' to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. But none of this is the law we have." (citing 11 U.S.C. § 525; 16 U.S.C. § 511; 22 U.S.C. § 2688)).

153. *See* Jack Zarin-Rosenfeld, Note, *Designing Related-to Bankruptcy Jurisdiction*, 89 N.Y.U. L. Rev. 390, 404 & n.67 (2014) (collecting cases for the proposition that "courts still claim the power to raise permissive abstention sua sponte").

IV.
CONCLUSION

CAFA is relatively young, and our understanding of it has room to grow. The current understanding on the matter seems to be this: federal courts have the power to raise the proximity exceptions sua sponte (and even against party wishes). Those courts do not have to do so, but they may. If a court *does* look into the size and composition of the defendants and plaintiff class members and determines that CAFA's proximity exceptions apply, at its own behest or of that of the parties to the suit, it must dismiss the action or remand it to state court, whichever makes sense. This organization of federal court power preserves the intentions of Congress, the associated balance of federal power, and the statutory design. Hopefully this piece will grow our understanding of CAFA's provisions in a productive and practical way such that, perhaps, even thornier issues can emerge.[154]

154. *Cf.* Marjan Laal & Peyman Salamati, *Lifelong Learning; Why Do We Need It?*, 31 PROCEDIA SOC. & BEHAV. SCI. 399, 403 (2011).



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