MISSION STATEMENT

The Dartmouth Law Journal is an exclusively student-run publication devoted to the discussion and celebration of the Law and related subjects. We, the Editors, seek to promote interest in the field of law, to encourage undergraduate and graduate scholarly research, to provide a forum for intellectual debate, to increase the student body’s awareness and appreciation of legal issues, and to make a contribution to the intellectual life of the Dartmouth College community.

WE WELCOME SUBMISSIONS!

The Dartmouth Law Journal welcomes submissions of articles, research papers, essays and editorials related to the field of law, and, when appropriate, intersecting subjects such as philosophy, economics, sociology, history and political science. Submissions will be selected for publication by our Editorial Board in a rigorous selection process. Considerations include: quality and clarity of argumentation, depth of analysis or research, level of academic writing, variety and breadth of appeal, and timeliness of subject matter. All articles will be edited for clarity, content, and length.

We welcome submissions, letters to the editor, comments, criticism and all inquiries. Contact us electronically at law.journal@dartmouth.edu, or visit our website at: http://www.dartmouthlawjournal.org.

All articles are copyright 2015 by the author, except when otherwise expressly indicated. For permission to reprint an article or any portion thereof, please address your written request to the Dartmouth Law Journal or the author.

The author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that: (1) copies are distributed to students at or below cost; (2) the author and journal are identified on each copy; and (3) proper notice of copyright is affixed to each copy.

Special thanks to our publisher, Joe Christensen, Inc., for their skill and time.

Please contact us about our subscription rates at the address below:

The Dartmouth Law Journal
http://www.dartmouthlawjournal.org
Dartmouth College
6181 Collis Center, Suite 303
Hanover, NH 03755
law.journal@dartmouth.edu

The views expressed by individual authors in our articles are not necessarily those entertained by our staff or administrators.
ARTICLES

Comprehensive Transformative Amendments – Theory and Practice: Rethinking the Nineteenth Amendment and the Place of Women’s Rights in the Constitution
Gautam Bhatia 1

The Anti-Corruption Force of Article V’s Convention Clause
Michael Pierce 57

Giving Effect to Fourth Amendment “Effects”
Dominique Caamano 86

The Professor as Whistleblower: The Tangled World of Constitutional and Statutory Protections
Jennifer S. Bard 163

The Orwellian Surveillance of Vehicular Travels
Sam Hanna 283
This article brings together two of the most contested issues in contemporary constitutional law: how to theorize the impact of constitutional amendments upon the broader field of constitutional law and interpretation, and how to understand the place of women’s rights and sex equality in the Constitution. I propose a new typology of constitutional amendments, and then apply it to the Nineteenth Amendment. Traditionally, scholars have classified constitutional amendments into two types: declaratory and transformative. I will deepen this distinction by arguing that transformative amendments may be either political or comprehensive, and that the difference matters to constitutional adjudication. I will then argue that the comprehensive transformative nature of the Nineteenth Amendment requires synthesizing it with the Fourteenth in a manner that justifies a number of constitutional rights, in the domain of sex equality, that the Supreme Court has controversially found – or declined to find – in the last few decades.

The paper, therefore, consists of two parts, the first of which is theoretical. I begin by explaining the traditional distinction between declaratory and transformative amendments (I). I then distinguish between political transformative amendments, which are limited to changing a set of legal norms, and comprehensive transformative amendments, which repudiate not only legal norms, but also a set of cultural and other societal assumptions that underlie the pre-transformation status quo. (II) I conclude by arguing on various principled grounds (III), that Courts must take into account the repudiation of comprehensive moral or ethical systems of values as reflected by comprehensive transformative amendments (IV).

In the second part, I argue that a historical analysis of the American suffrage movement justifies treating the Nineteenth Amendment as a comprehensive transformative amendment (V). I then contend that a synthesis of the Nineteenth and the Fourteenth requires reading into the Fourteenth Amendment’s proscriptions of caste-codes and arbitrary distinctions, those differences that can be traced back to the cultural and ethical assumptions that the Nineteenth Amendment was enacted to repudiate (VI). I conclude by examining certain areas of women’s rights law – e.g., labor regulations, abortion, sex discrimination and disparate impact – and analyzing how this theory applies to actual practice (VII), before briefly concluding (VIII).

** The author thanks Professors Akhil Amar and Reva Siegel for their valuable feedback.
Part One: Theory – Comprehensive Transformative Amendments

I. The Basic Typology: Declaratory and Transformative Amendments

Traditionally, constitutional amendments may be understood to be of two types. Declaratory amendments are those that seek to codify or entrench an existing set of political institutions and structures, or existing
schemes of rights, obligations, powers or liabilities. This could be because aspects of the status quo are perceived to be under threat, insufficiently recognized, unenforced, misapplied, or for whatever other reason felt to be in need of express enactment via the constitutional text. *Transformative amendments*, on the other hand, are aimed at changing extant institutional structures or schemes of rights and obligations. Often, they are motivated by a general conviction that what is in existence is no longer suitable for a very different set of circumstances, and thus needs to be wholly or partially replaced by something new.

Although not an amendment, the 1787 Constitution is a classic example of what we mean by “transformative.” As Gordon Wood argues, the American Revolution was not just a struggle for political independence, but a program for a radically changed understanding of politics and society itself. Between the time of the Declaration of Independence and the ratification of the federal Constitution, for instance, the British idea of the “mixed Constitution,” that held in balance the interests of the people (the Commons), the aristocrats (the Lords) and the king (the Monarch), gave way to the belief that sovereignty was supreme, indivisible, and ultimately resided in the people. The basic structure of the federal Constitution – the separation of powers among Congress, the Senate, the executive and judiciary – was a concrete embodiment of this new political idea. For example, the Senate, or the Upper House, which was originally modeled on the Roman patrician Senate and the British House of Lords as a vehicle of the aristocratic and propertied classes for checking the democratic lawmaking of the lower house, came to be re-conceptualized as an mode of ensuring *double representation*, so as to moderate and prevent the ill-effects of hasty or ill-thought legislation. In Wood’s words:

“Picturing the people as partaking equally in both branches of the legislature not only destroyed the conventional theory of mixed government but it necessarily involved a major adjustment in the conception of representation; for it was now somehow possible for the people, simply through the electoral process, to have two different agents speaking for them at the same time.”

---

1 The terminology is Hohfeld’s. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).
3 Id. at 448, 598.
4 Id. at 255.
When we call the 1787 Constitution transformative, then, we mean that it created a new set of institutional structures of governance and a new way of distributing power among them, both of which were grounded in a new political philosophy of popular sovereignty, separation of powers, and representative government; new, that is, relative to the British common-law constitution that had preceded it and against whose ideas (e.g., the mixed constitution) it was, in part, reacting.\(^5\)

Now consider, in contradistinction, the Bill of Rights. Take, to start with, the American Declaration of Independence, which lists, as one of the sources of its grievances against the British Monarch, his “Invasions on the Rights of the People.”\(^6\) This presupposes a set of existing rights that have been invaded. It lists as specific grievances, in fact, the quartering of troops and the denial of trial by jury,\(^7\) both of which would go on to find their way into the Bill of Rights.\(^8\) Historians suggest as well that one of the stated reasons for the American Revolution was the denial, by George III, to the American colonies the same common law rights that were extended to his British subjects. Again, in the words of Gordon Wood:

> “Whatever the universality with which they [the revolutionary republicans] clothed their rights, those rights remained the common-law rights embedded in the English past, justified not simply by their having existed from time immemorial but by their being as well “the acknowledged rights of human nature”… [this] lent a curious conservative colour to the American revolution…. [since they were] claiming only to keep their old privileges… the traditional rights and principles of all Englishmen, sanctioned by what they thought had always been.”\(^9\)

(emphasis supplied)

Thus, many of the provisions of the Bill of Rights, such as the Third, the Fourth, the takings clause of the Fifth, the jury trial provision in the Sixth, the Seventh and the Eighth, are declaratory in the sense that they simply reaffirm that traditional common law rights apply to Americans as well,\(^10\) without significantly changing the content of those rights.\(^11\)

\(^5\) New also, of course, in relation to the various state Constitutions that preceded it, in many senses – primarily in establishing a federal structure.

\(^6\) DECLARATION OF INDEPENDENCE (1776).

\(^7\) Id.

\(^8\) U.S. CONST. amends. III and VI.

\(^9\) WOOD, supra note 2, at 10 – 13.

\(^10\) For example, Justice Bradley in his dissenting opinion in The Slaughter-House Cases observed: “the people of this country brought with them to its shores the rights of Englishmen.” He was
We must not, however, be too facile with this conclusion. As Professor Akhil Amar explains, the specific understanding of these rights must be analyzed in the context of the new form of government that was being set up in America; that is, a republican-federalist one, grounded in notions of popular sovereignty. Thus, Amar observes:

“The original Bill of Rights was webbed with structural ideas. Federalism, separation of powers, bicameralism, representation, republican government, amendment – these issues were understood as central to the preservation of liberty...[and] substantive rights... were intimately intertwined with structural considerations.”

We must therefore refrain from too easily labeling the Bill of Rights as consisting of declaratory amendments. Perhaps, more accurately, the Bill of Rights is of a hybrid transformative-declaratory nature: it reaffirms traditional common law rights, but gives them a new gloss, motivated by concerns of republican-federalism, governmental structure, and vertical distribution of power in a manner that best protects representative government. Some change, then, in the nature and content of those rights is inevitable, and serves to warn us that the declaratory-transformative distinction might be more complex than it looks at first glance.

That there is at least a declaratory element to the Bill of Rights is, however, indisputable. We’ve already discussed how soldier-quartering and denial of trial by jury closely tracked provisions in the 1689 English Bill of Rights. Now consider the drafting history of the Fourth Amendment: the framers had in mind the famous Wilkes affair, where the Englishman Wilkes had successfully challenged a general warrant as well as the seizure of his person. In *Boyd v. United States*, the Supreme Court affirmed this in very specific language, observing that:

“As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom [i.e., Entick v.
Carrington[], and considered it a the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. 16 (emphasis supplied)

Next, the Sixth Amendment’s confrontation clause presents an interesting case. According to the Supreme Court, the framers were particularly concerned by such excesses as the trial of Sir William Walter Raleigh, 17 and wished to prevent such injustice from happening on American soil. This was evidenced by the fact that in the aftermath of the Raleigh trial, English law was changed (the treason reform statute of 1696), to take into account precisely such problems, and it was this changed law that various state courts referred to, in finding the right of confrontation to be a common law right. Further, as Professor Amar points out, Madison himself, in the framing of the Sixth Amendment, appeared to borrow from Blackstone’s own enunciation of the “symmetry principle.” 18 The Sixth Amendment, therefore, was declaratory in the sense that it codified this (comparatively recent) common law guarantee of symmetry in criminal trials. 19 Lastly, the Eighth Amendment, in proscribing “excessive bail” and the imposition of “cruel and unusual punishments,” 20 largely incorporated the language of the 1689 English Bill of Rights. 21

Thus, to re-emphasize – and subject to the above caveat – these Amendments are to be understood as declaratory in the sense that they recognize existing rights, as opposed to repudiating old ones or creating new ones. The flaw with the status quo that they seek to remedy is not the non-existence or incorrect understanding of the right, but a very specific kind of deficient understanding, one that does not take the right seriously enough. Alternatively, they seek to remedy an incorrect application of it, one that arbitrarily excludes a set of people from its ambit (like the British

16 Boyd v. United States 116 U.S. 616, 626 (1886).
18 AMAR, supra note 11, at 116.
19 In a related context, see also, Justice Harlan’s dissenting opinion in Twining v New Jersey, describing the privilege against self-incrimination as one of the “essential, fundamental principles of English law.” Twining v. New Jersey, 211 U.S. 78, 118 (1908) (Harlan J., dissenting). He then quoted the jurists Taylor and Story for the proposition that: “… the first Continental Congress of 1774 claimed… that English subjects going to a new and uninhabited country carry with them, as their birthright, the laws of England existing when the colonization takes place… English law, public and private, continued in force in all the States that became sovereign in 1776, each State declaring for itself the date from which it would recognize it.” (Emphasis supplied).
20 U.S. CONST., amend. VIII.
21 AMAR, supra note 11.
Monarch excluded Americans from enjoying traditional common law rights. Thus it is but natural that they are endorsed in the language of continuity, affirmation or reaffirmation.\textsuperscript{22} We have always enjoyed these rights, it is said; by way of abundant caution, we now encode them in an authoritative text.\textsuperscript{23}

But now compare this with the First Amendment’s specific guarantee of free speech. Subject to the prohibition of prior restraint, there was no general common law right of free speech in England at the time.\textsuperscript{24} The 1689 English Bill of Rights only required proceedings within Parliament to be free.\textsuperscript{25} The First Amendment’s free speech guarantee, then, is to be understood as transformative in the sense that it transforms the legal landscape\textsuperscript{26} by creating a constitutional right where there was none. This happens because lawmakers identify a serious problem that the network of existing rights and obligations do not cover, and seek to ameliorate the situation by creating a new right.

Admittedly, in the case of the First Amendment, as Professor Rubenfeld tells us, the “paradigm case” that the Framers were concerned about was prior restraint, which was proscribed by the common law as well.\textsuperscript{27} Yet not just prior restraint, but even subsequent attacks upon political speech in America, on the other hand, seemed inconsistent with the new system of representative government that the Americans were setting up - indeed, inconsistent with the very nature in which the Constitution had been created and then ratified, with public debates accompanying ratification procedures in the states.\textsuperscript{28} Furthermore, the Sedition Act, which sought to codify common law free speech limitations,
became an election issue in the 1800 Presidential elections. Its proponents were defeated, Jefferson pardoned all persons who had been convicted under it, and the Act expired. This, then, demonstrates that the First Amendment was actually meant to protect far more than a mere prohibition upon prior-restraint. In other words, it was about protecting a core constitutional interest that was decidedly new. The situation that birthed it was comparatively recent, and the right itself wasn’t even considered a right in traditional common law. As Professor Amar puts it, it was the “deep popular-sovereignty logic... [that underlay] America’s extension of freedom of speech from Parliament to the people.”

Consider now the Reconstruction: The Fourteenth Amendment’s “privileges or immunities” clause provides another example of a declaratory amendment. The Amendment states, in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The Amendment does not seek to change what those privileges or immunities are, or to create any new ones; indeed, all it does is to prohibit States from abridging them, which presupposes their continued and continuing existence. The history of the Amendment bears this out. We have already discussed the similarly worded “privileges and immunities” clause of Article IV, and Justice Washington’s declaratory-common law gloss of that phrase in *Corfield v Coryell*. As Akhil Amar demonstrates, the *Corfield* formulation was in the minds of the Thirty-Ninth Congress, which was drafting the Fourteenth Amendment. Furthermore, let us remember the context: after the passage of the Thirteenth Amendment, which abolished slavery, a number of the Southern States were passing excessively onerous legislations that singled out blacks for particularly burdensome treatment. The Fourteenth Amendment, then, simply affirmed that citizens – among whom, after the Thirteenth Amendment blacks were now counted on parity with whites—

29 For a full account, see John C. Miller, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951).
30 AMAR, supra note 11, at 26.
31 U.S. CONST., amend. XIV, § 1.
32 It is, of course, transformative in the sense that it places a Constitutional limitation upon the action of States where there was – supposedly – none before.
33 Corfield v. Coryell, 6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. 1823: “The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”
34 AMAR, supra note 11, at 178.
had certain privileges and immunities, which the states were prohibited from abridging. Indeed, as John Bingham pointed out, “the Fourteenth Amendment takes from no state any right that ever pertained to it.”35 Thus, as Professor Balkin states, the Privileges and Immunities Clause is declaratory in the sense that it “does not specify the rights it protects but merely asserts their existence.”36 And, as he goes on to add:

“A declaratory approach... uses a common law method to identify rights, looking to past customs, practices, and laws as evidence of larger principles of freedom... [and] of pre-existing rights and as sources of maxims or principles that might be generalized to new questions and situations.”37

This, it would seem, was what the Fourteenth Amendment was trying to do. What had changed – or transformed – was the citizenship status of blacks (via the Thirteenth Amendment). The Fourteenth simply carried the logic to its conclusion by guaranteeing to free citizens the rights that had always been free citizens’. This was upheld by the Supreme Court in Minor v. Happersett, where, in rejecting an argument that the Fourteenth Amendment conferred upon women the right to vote, the Court held that: “the amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.”38

On the other hand, of course, the Fourteenth Amendment was transformative in a different way: it incorporated the Bill of Rights against the states,39 thus fundamentally transforming the legal landscape by removing – in Hohfeldian terms – states’ immunity from affecting the Bill of Rights, and placing instead a concomitant disability upon them. In other words, pre-Fourteenth Amendment, a citizen could not invoke the Bill of Rights against the state; post-Fourteenth Amendment, he could.40 And of course, the other clauses of the Fourteenth Amendment – Sections 2 and 3 – are transformative in their own way, by changing the rules of representation in congress, and the eligibility requirements for southerners.

35 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).
36 JACK BALKIN, LIVING ORIGINALISM 199, Fn 83 (2011).
37 Here, Professor Balkin echoes Senator John Sherman’s 1872 speech locating the privileges or immunities clause in all these traditional sources. Id. at 199.
39 I do not here seek to enter the debate about whether the Fourteenth Amendment incorporated the bill of rights through its privileges or immunities clause, or through its due process clause; whether the incorporation was total (Hugo Black), selective (William Brennan) or “refined” (Akhil Amar).
40 Subject, of course, to certain caveats, if one accepts Akhil Amar’s refined theory of incorporation. See, e.g., AMAR, supra note 11, at 196.
to hold office.\textsuperscript{41} It is in this way that the Fourteenth Amendment changed the extant legal structure. This shows us once again how the same amendment can be both declaratory in certain aspects, and transformative in others.

So far, our examples have followed the same pattern: the content of the rights we have examined has been declaratory, and the structural framework within which they are embedded has been transformative. But now let us examine the Nineteenth Amendment. It states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”\textsuperscript{42} Now, it may be argued that this Amendment is declaratory in the same sense that the Bill of Rights was declaratory – it simply holds that a previous right was misapplied because it excluded a number of persons from its ambit, and all that is being corrected is that misapplication. But this, I suggest, would be a mistake. Unlike the common law rights that were codified in the Bill of Rights, the right (or, as was considered at the time, the “privilege”) to vote is defined precisely by whom it includes and whom it excludes. Historically, the debates surrounding the nature of the right to vote have been framed in these terms: non-propertied persons shouldn’t vote because they have no real stake in the affairs of the polity, and because they will simply act as a multitude of proxy votes for their employers; or, more benignly, adolescents shouldn’t vote because they aren’t yet in a position where they can come to a considered judgment on the merits or demerits of political candidates;\textsuperscript{43} and, of course, that women shouldn’t vote because their interests are, after all, adequately represented by their fathers or their husbands.\textsuperscript{44} The Nineteenth Amendment, therefore, ought not to be viewed as a declaratory amendment expressing the application of a right to where it did not extend before, but transforming the right itself.

A historical analysis bears out this argument. In an extensive essay,\textsuperscript{45} Professor Reva Siegel details the arguments that led to the passage of the Amendment, concluding that the Nineteenth’s entire purpose was to repudiate the ideas of citizenship that had defined the American polity since the time of the framing. Many of the arguments had to do with coverture rules, that limited women’s ability to contract (that is, women within the family). These rules, in turn, were justified by the doctrine of virtual representation – the husband, or the head of the family, was taken to

\footnotesize{
\begin{itemize}
\item \textsuperscript{41} U.S. CONST., amend. XIV, §§ 2 & 3.
\item \textsuperscript{42} U.S. CONST., amend. XIX.
\item \textsuperscript{43} For a detailed exposition of all these arguments, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN UNITED STATES (2000).
\item \textsuperscript{44} For an account of the concept of virtual representation as understood by the framers, see WOOD, supra note 2, at 173-177.
\item \textsuperscript{45} Reva Siegel, \textit{She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family}, 115(4) HARV. L. REV. 947 (2002)
\end{itemize}
}
“virtually represent” the woman’s interests in the world, just like our elected legislators are supposed to represent our (i.e., their constituency’s) interests in the assembly. Consequently, there was no need to extend the vote to women because the fundamental point of representative democracy – that is, having one’s interests represented in the ultimate decision-making body – was being served by the status quo. Thus, we see that the denial of the right to vote to women existed within, was justified by, and indeed, only made sense in the context of a complex network or legal and political principles. Consequently, a change in the concrete manifestation of these principles (extending women the vote) can scarcely be understood – as Professor Siegel argues – without a corresponding change in the underlying principles as well.

“…the Nineteenth Amendment’s underlying logic… undermined the glib assumption that before 1920, male voters and lawmakers always properly protected the legitimate interests of nonvoting females.”

Similarly, as Professor Amar argues, the Nineteenth Amendment, by virtue of the fundamental changes it made to the representative character of American polity, “logically undercut the democratic legitimacy of the constitutional regime that preceded the amendment.” He contends that the Nineteenth Amendment not only created a new legal right (the right of women to vote), but that the very conception of popular sovereignty that underlay the pre-Amendment status quo (a status quo in which women could not vote) was itself transformed by the Amendment. And, considering that the fundamental legitimacy of law is based on the idea of popular sovereignty (the Declaration of Independence’s focus on the “consent of the governed” and the Preambular “We the People…”), Amar argues:

“Congress should enjoy broad power to protect women’s rights for the simple reason that the unwritten Constitution is a Constitution of American popular sovereignty, and popular sovereignty is perverted when more democratic, post-women-suffrage enactments championing women’s

46 Id. at 981.
47 Id.
49 Id. at 279.
50 Declaration of Independence, para. 2 (U.S. 1776).
51 U.S. Const., prmbtl.
rights are trumped by less democratic, pre-women-suffrage legal texts.\textsuperscript{52}

This argument is important for two reasons: first, it shows how to draw a connection between a change in the surface legal position and a deeper, systemic framework transformation, and secondly, it demonstrates how the two exist in a feedback loop, where changes in one correspond to changes in the other, which then brings about a further change in the former, albeit in a very different context. We shall return to this point subsequently in this paper.

Lastly, a general transformative constitutional moment is provided by Professor Ackerman. It would be impossible to do complete justice to his theory here, but to summarize: Ackerman argues that certain points in American constitutional history (characterized by a “higher form of lawmaking,” given by a more sustained, deep and extensive public participation than at ordinary times) mark a decisive break with the past, and endorse a new set of values while repudiating the old. What this entails is a revision of the “deeper principles organizing higher law,”\textsuperscript{53} or “the culminating expression of a generation’s critique of the status quo – a critique that finally gains the considered support of a mobilized majority of the American people.”\textsuperscript{54}

The Framing, the Reconstruction and the New Deal are Ackerman’s examples of constitutional moments, and the civil rights revolution of the 60s, and the Reagan revolution after that, are examples of failed constitutional moments: “failed” in the sense that they do not succeed in bringing about the sweeping value-transformations that they set out to do, measured by a particularly deep form of public endorsement. The Reconstruction Republicans, for Ackerman, repudiated the Founders’ vision insofar as, and to the extent that, they wrought a Constitution that, through “amendments abolishing slavery, guaranteeing the privileges or immunities of citizens of the United States, assuring equal protection and due process of law, safeguarding voting rights against racial discrimination... nationaliz[ed] the protection of individual rights against state abridgment.”\textsuperscript{55} Subsequently, the New Deal would “challenge the Founding notion that the national government had limited powers over economic and social development.”\textsuperscript{56} A modern Court, therefore, in adjudicating a constitutional case, is faced with the task of synthesizing the

\textsuperscript{52} AMAR, supra note 48, at 282.
\textsuperscript{54} Id. at 92.
\textsuperscript{55} Id. at 82.
\textsuperscript{56} Id. at 105.
achievements of these signal constitutional moments in order to arrive at the state of constitutional law in present day.

II. UNDERSTANDING COMPREHENSIVE TRANSFORMATIVE AMENDMENTS

The transformative examples that we have looked at in the previous section have been transformative in one distinct sense: they aim to bring about a change in the legal or political framework that predates them. The First Amendment, for instance, posits that the institution of representative democracy will be hamstrung if political speech is not free. Similarly, the Nineteenth Amendment transforms the contours of the right to vote, and along with it, repudiates the idea of virtual representation and certain coverture laws that justified withholding the right to vote from women. Professor Ackerman’s vision of transformative amendments deals with the basics of the political structure and the ideas of federalism and protection of individual rights. But, I would now like to suggest that there is another way in which amendments can be transformative. To distinguish them from the amendments that we have just discussed, I will call them comprehensive, as opposed to political, transformative amendments.

A. COMPREHENSIVE TRANSFORMATIVE AMENDMENTS: THE IDEA EXPLAINED

The philosophical grounding of the distinction that I am now drawing can be located in the work of the political philosopher John Rawls (albeit in a different context). In Justice as Fairness (and indeed, in much of his philosophical writing), Rawls’s goal is to provide a convincing idea of social justice. To this end, he argues that a public conception of justice ought to be “political, not metaphysical” – that is, it should not be dependent on “claims to universal truth or claims about the essential nature or identity of persons… the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines.” The political conception of justice applies only to the “basic structure of a modern constitutional democracy… [that is], a society's main political, social, and economic institutions, and how they fit together into

57 Indeed, Professor Amar argues that the incorporation of the bill of rights against the states via the Fourteenth Amendment involves subtle transformations in the way these rights operate, based precisely upon the change in the background higher principles of law. See AMAR, supra note 11, at 237. We shall discuss this point in greater detail subsequently.

58 As Professor Amar puts it: free speech has a “special structural role… in a representative democracy.” AMAR, supra note 11, at 25.

one unified system of social cooperation.”\[^{60}\]\footnote{Rawls, Justice as Fairness, supra note 59, at 225.} In other words, a political conception of justice – unlike the metaphysical – avoids questions that relate to disputed philosophical, moral, or religious issues, and avoids controversy over the status of moral values.

This is because Rawls’ overall project is to find the “deep bases of agreement embedded in the public political culture of a constitutional regime and acceptable to its most firmly held convictions”\[^{61}\]\footnote{Id.} – i.e., to come up with a theory of justice that only makes use of those premises that we – as citizens of a liberal democracy – can agree to as forming the structural bases of the idea of liberal democracy itself. At the deepest philosophical level, this is motivated by the idea of “liberal legitimacy” – that is, that public coercion ought to be used only upon those bases that every citizen can reasonably accept.\[^{62}\]\footnote{See, e.g., THOMAS NAGEL, THE VIEW FROM NOWHERE (1986); Bernard Williams, The Idea of Equality, PROBLEMS OF THE SELF 230 (1976).}

Because it is a non-contingent fact of open democracies that reasonable individuals will end up affirming a plurality of reasonable comprehensive doctrines, these deep bases of agreement – paradoxically enough – have to exist at a somewhat surface level. This is why Rawls’s conception of justice avoids claims about the essential nature or identity of persons, moral or religious claims, because agreement there is unachievable. On the contrary, his arguments rest upon – what he takes to be – the uncontroversial idea that democracy envisages “society as a fair system of cooperation between free and equal persons.”\[^{63}\]\footnote{RAWLS, POLITICAL LIBERALISM, supra note 54, at 4 (1993).} Political principles of justice, therefore, aim to achieve an “overlapping consensus” between the diverse plurality of reasonable\[^{64}\]\footnote{Reasonable doctrines are those that affirm society as being composed of free and equal concerns.} comprehensive doctrines. Thus, free citizens within a democracy who hold all these diverse doctrines can nonetheless come to support the political conception of justice as consistent with (and in some cases, derivable from) those very comprehensive doctrines.\[^{65}\]\footnote{RAWLS, POLITICAL LIBERALISM, supra note 59, at 12.}

A full analysis of Rawlsian political thought would take us far afield.\[^{66}\]\footnote{For a fuller exposition, see: JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, THE LAW OF PEOPLES (1999); RAWLS, POLITICAL LIBERALISM, supra note 59.} This brief survey is enough, however, for us to understand the following distinction:

“[A comprehensive doctrine] covers the major religious, philosophical and moral aspects of human life in a more or less consistent and coherent manner. It organizes and
characterizes recognized values so that they are compatible with one another and express an intelligible view of the world…. [while a political conception of justice] is a moral conception worked out for a specific subject, namely, the basic structure of a constitutional democratic regime… [it is] not formulated in terms of any comprehensive doctrine but in terms of certain fundamental ideas viewed as latent in the public political culture of a democratic society." (emphasis supplied)

We can now apply this basic Rawlsian thought to our classification of transformative amendments. The first kind of amendment that we have discussed so far tracks Rawls' political conception of justice. Political transformative amendments are those that – at least, ostensibly – proceed from the deep and embedded bases of agreement about the basic political structure of our democracy, and seek to change the legal landscape in order to render it consistent with the set of principles that form the bases of that agreement. For instance, the First Amendment seeks to bring free speech law in line with our basic intuitions about a representative democracy. Take, also, the Fifteenth Amendment – that, in extending the franchise to blacks, transformed the nature of the right to vote in order to bring it in line with the embedded constitutional and political principle of equal citizenship that the Reconstruction had brought about.

But there are other cases where there is great historical contestation over precisely the deep questions of personal identity and basic philosophical and moral values that Rawls is so anxious to avoid. And there are times when this contestation takes the form of social movements that call for the legitimacy of their views to be recognized in the Constitution. In such a case, if these movements succeed, and culminate in a Constitutional amendment, then the amendment is a comprehensive transformative amendment in the sense that it seeks to transform not only the legal and political landscape, but also to repudiate those – essentially

67 RAWLS, POLITICAL LIBERALISM, supra note 59, at 175.
68 To stress, again: my purpose here is not to apply Rawls' theory to constitutional amendments, but to make use of the analytical distinction between the political and the comprehensive – not least because my conclusions, I acknowledge, are potentially at odds with Rawls' whole project of excluding the comprehensive from the public conception of justice.
69 That is not, of course, to deny the distinction between civil equality (as embodied in the Fourteenth Amendment), and political equality/political rights (which is what the Fifteenth Amendment wrote into the Constitution).
70 Admittedly, Rawls' political conception of justice stipulates a definition of "personhood". RAWLS, POLITICAL LIBERALISM, supra note 59, at 93. On a purely Rawlsian analysis, then, a comprehensive theory that denied women the right to vote would be "unreasonable" as it would operate with a flawed conception of personhood. Again, though, the objective of the paper is different – although I believe that issues of this sort create a problem for Rawls' account, more broadly.
non-legal and non-political – ideas of personhood, identity, and interpersonal relations etc. that formed the underlying descriptive and justificatory basis for the old status quo. I will take a concrete example that I will, for the moment, only state: the Nineteenth Amendment sought not just to repudiate the old status quo that denied women the right to vote, and the associated legal framework such as the laws of coverture, but it sought to change the very manner in which society viewed men and women, or characterized, defined or otherwise essentialised their nature as (separate kinds of) persons. In essence, the Nineteenth Amendment crystallized not just a new legal and political framework, but endorsed a much deeper set of cultural, philosophical and social norms that marked a radical break with all aspects of status quo.

B. **COMPREHENSIVE TRANSFORMATIVE AMENDMENTS: THE IDEA DEFENDED**

It may, however, be contended that whether or not this is the real purpose of certain amendments, they have no place in constitutional analysis. There are two different forms that this objection may take, and I will address each in turn.

First, it may be argued that the comprehensive nature of transformative amendments should play no role in constitutional reasoning. That is, it is not for judges to investigate the deep moral, social and cultural objectives of constitutional amendments, and to decide such questions.\(^{71}\) There might be fears that the judicial role is unsuited to this sort of reasoning, or that this will allow judges to write their own moral and philosophical convictions into law. To this, however, we may respond that judges have regularly taken recourse to this form of reasoning: so much so, in fact, that Philip Bobbitt lists “ethical argument” as one of six modalities pervade American constitutional law reasoning.\(^{72}\) According to Bobbitt, ethical argument is:

> “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or ethos, of the American polity that is advanced in ethical argument as the source from which particular decisions derive.”\(^{73}\)

---

\(^{71}\) *See, e.g.,* JOHN HART ELY, DEMOCRACY AND DISTRUST 60-62 (1980).

\(^{72}\) PHILIP BOBBITT, CONSTITUTIONAL FATE 93-123 (1982).

\(^{73}\) *Id.* at 94.
Judging what core values an amendment is supposed to promote or repudiate is, no more or no less than engaging in ethical argument. Is there any essential difference between a court deciding that the role of the family has always been central to the American way of life and deciding that the Nineteenth Amendment sought to repudiate central assumptions about the role of women in society? The form of reasoning involved is very similar. Indeed, it is not too dissimilar from the substantive due process enquiry that the modern Court, for instance, framed in Moore v. City of East Cleveland:

“Appropriate limits on substantive due process come... from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society," ... the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition ... the tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.”

The lines emphasized, in particular, demonstrate that the Court is assessing comprehensive doctrines and their place in the constitutional scheme. In other words, ideas of the family are distinctly non-political in nature, belong to the domain of the personal (including, even, the moral and the religious), and yet play an integral role in the Court’s constitutional analysis. For this reason, the first objection does not hold.

However, a second and deeper objection also exists. It might be argued that it is not the law’s role to decide what cultural, social or other philosophical convictions are to attain the status of society’s norms (this is Rawls’ ultimate argument). Indeed, it would seem that there is a distinctly American tradition of mistrusting governmental overreach that indicates precisely the opposite – law should play no role in shaping, creating, modifying or rejecting cultural and ethical norms.

A number of separate responses may be made. Firstly, the argument ignores an indisputable reality that law, morality and society are

---

76 See, e.g., WOOD, supra note 2.
inextricably connected – indeed, that “law permeates social life”.\textsuperscript{77} Even the jurisprudential tradition of legal positivism, which emphasizes the separation of laws and morals, does not deny this fact. On the contrary, it \textit{affirms} it. H.L.A. Hart, the originator of twentieth-century legal positivism, was careful to say that legal positivism did not reject the truth that moral concerns played a central role in the shaping of law\textsuperscript{78}; one of his intellectual successors, Leslie Green, posits a “\textit{necessary connection}” thesis (playing on the traditional mantra (mis)attributed to legal positivists, “\textit{no necessary connection between laws and morals}”), whereby morality’s role in shaping law is one way in which laws and morals are “\textit{necessarily}” connected.\textsuperscript{79}

\textit{Secondly}, as Professor Balkin argues, constitutional law is not only fundamental law, higher law but, in a sense, our law.\textsuperscript{80} Unlike ordinary statutes, constitutional law is not only about rights, obligations, and structural constraints upon government, but also reflects deep national commitments to fundamental principles and, in a sense, constitutes national identity.\textsuperscript{81} It is not too outlandish to claim, therefore, that deep moral commitments are included within the Constitution. To Professor Balkin’s understanding, we add that in American legal tradition, the Constitution is regularly taken to be:

“…amenable to contestation by mobilized groups of citizens, acting inside and outside the formal procedures of the legal system… it is, most often, as text that the Constitution is the object of social movement struggle… text matters in our tradition because it is the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims on the Constitution's meaning.”\textsuperscript{82}

This focus on the “ordinary citizens” embodies Professor Levinson’s idea of “\textit{Constitutional Protestantism},” i.e., constitutional tradition that emphasizes “the legitimacy of individual (or at least relatively nonhierarchical communitarian) interpretation against the claims of a specific, hierarchically organized institution.”\textsuperscript{83} But, if the meaning of the Constitution is made and remade by individuals and by social movements –

\textsuperscript{77} Austin Sarat & Thomas R. Kearns, \textit{Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life}, 29 LAW IN EVERYDAY LIFE (1995).

\textsuperscript{78} \textit{See, e.g.}, H.L.A. \textsc{Hart}, \textit{The Concept of Law} (1961).


\textsuperscript{80} \textsc{Balkin}, \textit{supra} note 36, at 60.

\textsuperscript{81} \textit{Id.}


\textsuperscript{83} \textsc{Sanford Levinson}, \textit{Constitutional Faith} 28 (1988).
or, to put it more accurately, if the Constitution is the forum of choice for individuals and social movements to come together in contestation and opposition – then it can scarcely avoid embodying the deepest aspirations of those individuals and social movements. Such aspirations will, at times, inevitably involve the disputed questions that Rawls is so anxious to avoid when he posits the need for an overlapping consensus. Whatever, then, be the general objections to infusing the content of law with too much public morality or values, if Constitutional Protestantism is indeed an accurate description of American constitutional practice, then the crucial question is not whether deep questions of personhood and identity ought to feature in its constitutional interpretation, but how they are to feature, and their connection with individual and social movements.

Lastly, it is important to understand that this argument is not that transformative amendments seek to shove a new moral and philosophical vision down society’s throat. All it does is emphasize that the nation’s basic law will recognize – or not recognize – the constitutional validity of a particular vision. When we look at the issue this way, it becomes hard to imagine how constitutional law can take a neutral stand between competing visions at any point (readers will probably find this something like an offshoot of the general paradox of liberal neutrality).

So, if the argument is that the Nineteenth Amendment sought to transform through law certain assumptions about the role of women in society, then it is equally clear that the legal framework before the amendment endorsed those very assumptions (by, for example, denying women the right to vote). Thus, at any given time, the legal and constitutional framework supports one moral, philosophical and cultural set of visions for the nation. While a comprehensive transformative amendment changes the vision, it does not, in any sense, move from a pre-status quo position of neutrality to impermissibly entangling itself with one particular vision.

III. THE POSITIVE CASE FOR COMPREHENSIVE TRANSFORMATIVE AMENDMENTS

Thus, I would contend that when a Court adjudicates a case after the passage of a comprehensive transformative amendment, it must take into account not only the legal focus of the amendment, but also the broader moral and ethical vision that it replaces. In the previous section, I


85 I intentionally use language here that reflects the Lemon test, developed by the Supreme Court to determine the permissibility of governmental engagement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971).
made two defensive arguments to counter possible objections. Here are two arguments in favor of this approach:

A. THE ARGUMENT FROM PRINCIPLED CONSISTENCY

I contend, first, that consistency of principle is a basic value, both within and outside law. Rawls’ idea of reflective equilibrium, for instance, is a process by which we arrive at a moral standpoint by examining our deep moral principles (e.g., all persons are created equal) and our moral intuitions in concrete circumstances (e.g., slavery is just) and modify either one or both until they are consistent with each other. So, in the examples cited above, we must either modify our deep principled commitment to equality of persons, or our concrete intuition that slavery is just, or find a way to simultaneously hold that all persons are created equal and that slavery is just (e.g., by holding the opinion that blacks are not persons).

The basic point, is that consistency of principle is an ethical imperative that structures the set of beliefs and attitudes that we are justified in holding.

Dworkin extends the Rawlsian idea from the realm of principles of justice to legal philosophy. His doctrine of political responsibility requires politicians, in a legal system, to justify one set of political decisions within a framework of principles that justifies other political decisions that they make. For Dworkin, philosophically, it is only through principled consistency that a legal system can achieve substantive rule of law, accord to all citizens equal concern and respect, and thereby claim legitimacy. This argument has a respected lineage as well: the basic intuition that our legal system must represent a coherent vision of justice (whatever the substantive content of that vision might be), appears in the writings of Lon Fuller, Hart and Sacks, Akhil Amar, and Justice Scalia.

The imperative of coherence gives us a positive reason to support our thesis. Let us assume that at time $t_1$, there is a principled consistency between the legal framework and the underlying set of moral and ethical values that justify that legal framework. Then, at time $t_2$, the legal...
framework is transformed in the manner suggested above. There are at least two ways in which principled consistency requires judges to decide cases on the basis that the moral and ethical values in question have been transformed as well: firstly, if they do not do so, there will be an inconsistency – to use Rawlsian language – between our deep moral convictions, and the concrete moral intuitions that we hold in particular cases. Secondly, if the judges do not follow the updated moral vision, then one set of cases – the ones covered directly by the language of the amendment – will be decided on the basis of a transformed set of moral values, while another set of cases – those not so covered – will be decided on the basis of the old status quo. This would lead to principled inconsistency in the body of the law, between different areas of legal doctrine.

To understand how this works in practice, let us take two examples. Consider Akhil Amar’s justification for extending the First Amendment – which, as we have argued, is a political and not comprehensive transformative amendment - beyond mere prohibition of prior restraint, despite the text saying nothing of the sort.\footnote{AMAR, \textit{supra} note 11, at 223 – 224.} Let us break down the argument into the following logical steps:

\textit{Step One}: In England, the Parliament was sovereign.

\textit{Step Two}: In England, the general protection of free speech extended only to preventing prior restraint, \textit{but} speech within the parliament was absolutely protected.

\textit{Step Three}: The American Revolution and the original Constitution transformed the political structure by replacing sovereignty of \textit{Parliament} with sovereignty of \textit{the People}.

\textit{Step Four}: The First Amendment protects “\textit{the Freedom of Speech}” – that is, the existing right of free speech, which is the common law right.

\textit{Step Five}: But given that sovereignty has now been transferred from Parliament to People, the absolute freedom of speech that extended to \textit{Parliament} now must logically extend to \textit{the People}. 
Step Six: Ergo, the First Amendment protects a strong free speech right for the people, going much beyond mere prior-restraint prohibitions.

Notice, in particular, the transition from Step Four to Step Five. Amar’s point is that when the structural assumptions underlying a right were transformed, that right could only properly be understood in the context of the new legal and political structure.96 This is exactly the argument we are making: the overall requirement of principled consistency operates between the abstract and concrete levels of generality97, and a change in one must necessarily affect the others, in order to keep the system, as a whole, consistent.98

To take a second concrete example, which shall be developed in detail later, the Nineteenth Amendment is a comprehensive transformative amendment that changes certain assumptions about the place of women in society. However, if judges restrict the scope of the Nineteenth only to voting cases, and decide other cases as though the Nineteenth had never been passed, there would be a clear principled inconsistency between voting rights cases and other areas of legal doctrine that deal with discrimination against women. Indeed, this reasoning was actually applied by the Nevada Supreme Court in 1918.99 In that case, the question turned upon whether an indictment by a grand jury was valid, because women had served on it. The Nevada State Constitution recognized women’s right to vote, and under Nevada law, all qualified electors were jurors. Also at issue were the prior Supreme Court jury cases of Strauder v. Virginia100 and Neal...
v. Delaware, where the Court had held that equal protection rights were violated by excluding blacks from the jury pool (while at the same time observing, in *obiter*, in *Strauder*, that the jury pool could be limited to males). Before the Nevada Supreme Court, common law precedent was cited to argue that jury pools, under common law, were open only to males. The court rejected this contention, observing that:

"Blackstone tells us that the term "homo," though applicable to both sexes, was not regarded in the common law, applicable to the selection of grand jurors, as embracing the female. Woman, he says, was excluded propter defectum sexus .... When the people of this state approved and ratified the constitutional amendment making women qualified electors of the state, it is to be presumed that such ratification carried with it a declaration that the right of electorship thus conferred carried with it all of the rights, duties, privileges, and immunities belonging to electors; and one of the rights, one of the duties, and one of the privileges belonging to this class was declared by the organic law to be grand jury service. Nor can we with any degree of logical force exclude women from this class upon the basis established by Blackstone, propter defectum sexus, because we have eliminated the spirit of this term from our consideration of womankind in modern political and legal life. Woman's sphere under the common law was a circumscribed one. By modern law and custom she has demanded and taken a place in modern institutions as a factor equal to man." (Emphasis supplied)

The Court thus understood that it made little sense to view suffrage in isolation. A correct understanding would take suffrage to have

---

101Neal v. Delaware, 103 U.S. 370 (1881).
transformed not just a stand-alone legal right, but also a set of underlying principles (Blackstone’s propter defectum sexus). Thus, in order for law to achieve principled consistency, the impact of a change in suffrage law would have to be extended to other areas of law (such as, in this particular case, jury service) which had also hitherto rested on this now-repudiated deeper principle.

B. THE ARGUMENT FROM AMELIORATION

While the main argument remains the one from principled consistency, there is another point that we might wish to briefly consider. Comprehensive transformative amendments are normally not just transformative, but also ameliorative – that is, they not only seek to change the status quo, but also involve a recognition that there was something fundamentally wrong about that status quo. For example, Professor Akhil Amar argues that the raison d’être for the Nineteenth Amendment was not – and could not have been – an overnight change in the status or nature of capabilities of women that suddenly made them eligible for the vote where they had not so been eligible before (compare this with the First Amendment, whose raison d’être, as we have argued above, lay in the more abstract shift from British-style constitutional monarchy to American-style representative democracy; or, alternatively, with the prohibition amendment 103) – rather, the Nineteenth Amendment was an acknowledgment that the status quo, in denying women the right to vote, was wrong and always had been wrong.104

Yet surely, if the purpose of an amendment is ameliorative, that purpose is unfulfilled if it limits itself to rectifying one effect of what is wrong with the status quo, while leaving the cause untouched; or, in other words, if it treats the symptoms without treating the disease. So, for instance, if (as I will subsequently argue) the Nineteenth Amendment was indeed an ameliorative amendment, then by restricting its operation to the act of voting, and ignoring everything else, the basic purpose of the amelioration of an unjust situation would not be fulfilled.

IV. SUMMARY AND CONCLUSION

I have argued for a deepening of the traditional distinction between declaratory and transformative amendments, by further dividing transformative amendments into political and comprehensive transformative amendments. Comprehensive transformative amendments

103 Subsequently, we shall consider arguments that the objective of the Nineteenth Amendment was, contra Amar, a recognition of changed circumstances after all.
104 “It was an amendment to make amends.” AMAR, supra note 48, at 282.
repudiate and transform not only the existing legal and constitutional framework, but also the set of ethical, moral, philosophical and cultural attitudes that underlie and justify that framework. Possible objections to this, grounded in ideas that either limit the role of the judge, or limit the role of the law, do not succeed. I then defend the theory by referring to law’s requirement of principled consistency, and the character of ameliorative amendments. The upshot of these arguments is that judges ought to adjudicate cases by taking into account an amendment’s comprehensive nature; that is, judges should decide cases in a manner that conforms with the deep principles that underlie and justify the transformed status quo. The question of whether an amendment is a comprehensive transformative amendment will be settled only by a close examination of its history, text, and place in the broader constitutional structure.

It now falls to me to provide an example of how this might work in practice. I will do so by taking the Nineteenth Amendment, and argue that its comprehensive transformative nature, when read in synthesis with the Fourteenth Amendment, supports various controversial constitutional rights.

Part Two: Practice – the Nineteenth Amendment and Women’s Rights

The Nineteenth Amendment states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”\(^\text{105}\) I shall argue that this is a comprehensive transformative amendment that sought to transform fundamental assumptions about personhood and women’s role in society.

V. THE NINETEENTH AMENDMENT CONSIDERED

A. A TEXTUALIST OBJECTION ANSWERED

I start by making a defensive argument against a seemingly powerful objection. If the constitutional text should be the starting point of our analysis, then surely the specificity of the Nineteenth Amendment directly rebuts our claims. If the framers truly wanted to bring about the sweeping changes that we attribute to the Nineteenth Amendment, why didn’t they simply write them into the text? The fact that the Nineteenth Amendment self-consciously limits itself to voting rights means that it is designed to solve a specific, localized and concrete problem.

In order to address this question, I will utilize an analytical tool developed by Professor Jed Rubenfeld in *Revolution by Judiciary*.

\(^{105}\) U.S. CONST. amend. XIX.
Professor Rubenfeld addresses the opposite of the problem that we have before us: how to argue that a generally-worded provision that could be interpreted in many ways (the Fourteenth Amendment’s equal protection of laws guarantee) contains within it a specific prohibition (that of Black Codes). Rubenfeld argues that oftentimes, it simply makes sense to make commitments in general language, even when we have a specific instance in mind. He takes the following example: imagine that Odette and Swann are married, and Odette cheats on Swann with his friend Duke. Ashamed at what she has done after the fact, she makes a commitment never to deceive Swann again. Rubenfeld argues that, given the history of how this commitment came about, we ought to take the case of sleeping with someone else as a paradigmatic example of deception. In other words, we cannot understand how to interpret deception until we understand the central act that led to the commitment not to deceive. This makes perfect sense, what causes Odette’s shame is not the specific act of sleeping with Duke, but the wrongness entailed in betraying Swann’s trust. This is what her commitment reflects.106

But, now let us reverse the example. Imagine that, in the aftermath of what she has done, ashamed and mortified, Odette says to herself – perfectly understandable, “What have I done? I promise I’ll never do that again!” Or, to make the situation even more free of ambiguity, imagine a friend asking her, “What did you do last night?”, and Odette replies, “I slept with Duke. I’m so ashamed. I swear never to do that again.”

Now imagine, six months into the future, while Swann is away on business, Odette finds herself at a party, where she is strongly attracted to Marcel. She says to herself, “I only committed never to sleep with Duke again. Marcel is not Duke. Ergo, I never committed not to sleep with Marcel, and I can do it without breaking my commitment.” We would consider this reasoning preposterous. That is because if we are to make any sense of Odette’s commitment qua commitment, there must be an intelligible reason behind it. Odette swore never to do an act again because she saw the act as wrong; and again, the fact that the act – her sleeping with Duke – was wrong was not that it was Duke107, or for that matter, a young man in a red suit, but that she was betraying Swann. Therefore, while her commitment, being a response to a very specific situation, was understandably specific, its reach is not so. The reason for this is that we are seeking a principle. Not sleeping with Duke is not a principle; not betraying Swann is. To understand the principles at stake, and indeed what is and isn’t a principle, we need to undertake a study of the historical circumstances in which the commitment came about, and the nature of the

106 RUBENFELD, supra note 27, 116-121.
107 I ignore here the added complexity that Rubenfeld brings to his original argument by making Duke a close friend of Swann’s.
commitment itself. Crucially, I would like to emphasize – as Rubenfeld does – that Odette’s mental state at the time of her making the original commitment is relevant, but by no means constitutive. Quite possibly she had only Duke in mind, and never thought about betraying Swann in other ways or with other people. The fact remains that it is her commitment that we are interpreting, not her mental intention, and, as it seems obvious, the content of a commitment can differ from what a person believes oneself to be committing to at a given time (although, of course, the latter can serve as an indication of the former).

The specific wording of the Nineteenth Amendment, then, provides a hurdle, but not an insurmountable one. If we can show, using history – as I shall endeavor to – that the Amendment’s specific wording is due to a specific dispute at the time, but that the commitment in question is a deeper one, then it would be doing no violence to the text to read the deeper commitment into it. In fact, that would be the required reading of the text, much like the required interpretation of Odette’s commitment never to sleep with Duke again would be to treat it as a commitment of non-betrayal.

B. THE HISTORY OF THE NINETEENTH AMENDMENT

The history of the Nineteenth Amendment is the history of the American women’s suffrage movement. My objective, in what follows, is not to provide a new interpretation of the suffrage movement itself, or to challenge established social-historical accounts on the subject. I want to show how the Nineteenth Amendment and the suffrage movement are inextricably linked in American history, and the constitutional consequences that flow from that. Therefore, I will attempt to sketch out the main outlines of the movement that come to bear upon constitutional interpretation.

According to Professor Reva Siegel:

“The arguments of suffragists and their opponents tied the idea of women voting to the prospect of women’s emancipation from traditional roles in marriage and the market. Once the question of woman suffrage was infused with this social meaning – once the question of woman suffrage was known simply as the "woman question" – the nation’s debate about whether women should vote turned into a referendum on a whole range of gendered institutions and practices.”

(Emphasis supplied)

108 RUBENFELD, supra note 27, 106.
109 Siegel, supra note 82, at 340. See also, Roger M. Smith, “One United People”: Second-Class
Keeping this claim in mind, let us turn to the history. The 1848 Seneca Falls Declaration of Sentiments is commonly accepted to be the launching point of the suffrage movement. This Declaration sets the tone for locating the battle for suffrage within a much broader context of women’s rights in general. Indeed, in the words of Frederick Douglass’ North Star, writing at the time, it was a “grand movement for attaining the civil, social, political and religious rights of women.”

To understand how, consider the opening lines of the Declaration, which read: “When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied…” Clearly, then, the goal is wide-ranging, and involves an overhaul of the position of women within the family of man. Yet in what way, precisely? Among the grievances that the Declaration states, apart from a list of a whole host of marriage, property and other forms of legislation (going far beyond the right to vote) that keep women oppressed, there is also an accusation of man “claiming it as his right to assign for her a sphere of action, when that belongs to her conscience”, and attempting to “destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.”

I would like to focus specifically on the underlined phrases, because they reflect exactly what the suffragist movement was seeking to transform: a widespread social attitude that located the role of women within the home, as mother, child-bearer, and dependent upon her husband and viewed this role as being divinely-ordained and unchangeable. Both

---

Female Citizenship and the American Quest for Equality, 1 YALE J. L. & HUMAN. 229, 241 (1989), explaining how patriarchy in 19th century America was an amalgamation of “appeals to traditions, customs, the common law, the "natural order of things," and the divine ordinance.” See also S.A. Conrad, Polite Foundation: Citizenship and Common Sense in James Wilson’s Political Theory, (1984) THE SUPREME COURT REVIEW 359 (1984), for an account of the “separate spheres” argument in the political thought of James Wilson, and how it too was founded on ideas of the different characters of men and women. For descriptions of the subordinate sphere occupied by women, the justifications for it, and the growth of the cult of domesticity in post-revolutionary America, see MARY BETH NORTON, LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1980); LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980).

112 Id.
113 For an authoritative account, see E.C. DUBoIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848 - 1869 (1978). The connection between voting, citizenship and personhood is explored in JUDITH SHKLAR, AMERICAN CITIZENSHIP (1991). The point was made at the time, vividly, by the radical abolitionist preacher, Sarah Grimke. SARAH M. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE
of these ideas – that there was a specific sphere, and that it was authoritative and unchangeable – are crucial.\textsuperscript{114}

We see this at play in the aftermath of the Declaration. Responding specifically to various newspaper reports that accused the Declaration of seeking to invert the traditional spheres of male-female duty, Elizabeth Cady Stanton, one of the early leaders of the movement, wrote:

“If God has assigned a sphere to man and one to woman, we claim the right to judge ourselves of His design in reference to us, and we accord to man the same privilege... there is no such thing as a sphere for a sex. Every man has a different sphere, and one in which he may shine, and it is the same with every woman; and the same woman may have a different sphere at different times...”\textsuperscript{115} (emphasis supplied)

This is not to say that Stanton’s was the only voice. Two years later, on the eve of the Worcester Convention, John Milton Earle wrote: “To suppose that the laws and customs of the community, as they now exist, in relation to the relative and reciprocal rights, duties, and relations of the sexes, are not susceptible of improvement, is not wise or philosophical.”\textsuperscript{116} Horace Greeley, responding to a gentleman’s concerns that none of the traditional tasks of cooking dinners, washing children’s faces, and so on that women performed would get done if they were granted suffrage\textsuperscript{117}, wrote in the New York Tribune:

“We do not see how an enlargement of her liberties and duties is to make a mother neglect her children or her household. She now performs her maternal duties because she delights in so doing, and not because man requires it... our friend’s delightful picture of the home presided over

\textsuperscript{114} Indeed, this was one of the points made by Alexis de Tocqueville in the famous Democracy in America. De Tocqueville argued that Americans had recognized the fundamental truth that “nature, which created such great differences between men and women, clearly intended to give their diverse faculties a diverse employment”, and that arguing for equality amounted to “making a jumble of nature’s work.” See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 291, 590-593, 597-598, 699-603 (J.P. Meyer ed., 1969). See also Baker, The Domestication of Politics: Women and the American Political Society, 1780 – 1920, 89 AM. HIST. REV. 629 (1984); BARBARA L. EPSTEIN, THE POLITICS OF DOMESTICITY, WOMEN, EVANGELISM AND TEMPERANCE IN NINETEENTH CENTURY AMERICA (1981).

\textsuperscript{115} Elizabeth Cady Stanton, Mrs Stanton’s Reply, NATIONAL REFORMER (Rochester, N.Y.), Sept. 14, 1848.


\textsuperscript{117} Horace Greeley, A Women’s Rights and Duties, DAILY TRIBUNE, Nov. 2, 1850.
by an exemplary wife and mother we appreciate, but all women are not wives and mothers. Marriage is indeed ‘honorable in all,’ when it is marriage; but accepting a husband for the sake of a position, a home and a support, is not marriage. . . . Now one radical vice of our present system is that it morally constrains women to take husbands (not to say, fish for them) without the least impulse of genuine affection. Ninety-nine of every hundred young women are destitute of an independent income adequate to their comfortable support; they must work or marry for a living."¹¹⁸ (emphasis supplied)

Indeed, Mr. Greeley went on: “Political franchises are but means to an end, which end is the securing of social and personal rights.”¹¹⁹

However, not everyone supported the incipient movement. An anonymous response to the Seneca Falls Declaration asked, “If our ladies will insist on voting and legislating, where, gentlemen, will be our dinners and our elbows? where our domestic firesides and the holes in our stockings?”¹²⁰ Under a heading titled “The Female Department,” John Tanner wrote:

“The women who attend these meetings, no doubt at the expense of their more appropriate duties, act as committees, write resolutions and addresses, hold much correspondence, make speeches, etc. etc.…. [with the aim of] changing their relative position in society in such a way as to divide with the male sex the labors and responsibilities of active life, in every branch of arts, science, trades and professions! Now it requires no argument to prove that this is all wrong. Every true-hearted female will instantly feel that it is unwomanly, and that to be practically carried out, the males must change their position in society…. “¹²¹ (emphasis supplied)

We do not need to multiply examples.¹²² What I mean to demonstrate with this (hopefully) representative sample is that the core disagreements were grounded in a basis of agreement: suffragists, their male allies, and their opponents all agreed upon what the suffrage

¹¹⁸ Horace Greeley, Remarks to “A” DAILY TRIBUNE, Nov. 2, 1850.
¹¹⁹ Id.
¹²⁰ Anon., Bolting Among the Ladies, ONEIDA WHIG, Aug. 1, 1848.
¹²¹ John Tanner, Women Out of Their Latitude, MECHANIC’S ADVOCATE, Aug. 12 1848.
¹²² A detailed list of references may be found in AILEEN KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT: 1890 – 1920 (1981).
movement was about. They all understood that the demand for the vote was a synecdoche for challenging existing gender roles and spheres, their source and legitimacy, and the authority to determine those spheres. This makes sense if we look to the political theory underlying the denial of the vote to women: voting was considered a privilege of full republican citizenship, and full citizenship, in turn, was associated with “material self-reliance, participation in public life, and martial virtue.” The lack of material self-reliance and absence of women’s participation in public life, in turn, was linked – as we shall see – to conceptions about women’s nature, character and (ordained) social role in relation to men. Thus, the legal issues surrounding the right to vote were inextricably linked not just with the underlying political foundations, but with an entire set of ideas about identity and personhood.

Of course, it was to be a full seventy-one years from the Seneca Falls Convention before the Nineteenth Amendment was passed, and it is possible that the character of the movement changed on the way. Let us then examine the evolution. In her book, Aileen Kraditor, surveying a wealth of primary sources over the years, affirms that the excerpts we have outlined above grew to be the defining themes of the movement and its critics, at least until the turn of the century:

“Close to the heart of all anti-suffragist orators was a sentimental vision of Home and the Mother, equal in sanctity to God and the Constitution. It was the link of women to the home that underlay the entire ideology. The antis regarded each woman’s vocation as determined not by her individual capacities or wishes but by her sex. Men were expected to have a variety of ambitions and capabilities, but all women were destined from birth to be full-time wives and mothers. To dispute this eternal truth was to challenge theology, biology or sociology.” (emphasis supplied)

Theologically, Grover Cleveland cited the Bible to argue that the difference in roles was divinely ordained and denied the validity of “human reason or argument” in ascertaining those roles. Biologically, the anti-suffragists argued that women, by virtue of their sex, were mentally (since they relied on emotion rather than judgment) and physically unable to handle the travails of voting. Sociologically, it was argued that giving

123 Smith, supra note 109, at 244.
124 Id., at 14. In other words, in Rawlsian language, a challenge to a comprehensive vision.
126 KRADITOR, supra note 122, at 18.
women the vote would lead to the breakdown of the family, which was considered to be the fundamental unit of society.127 The suffragist responses focused on these issues as well, with Stanton arguing in The Solitude of the Self that the idea of a woman’s “natural sphere” was incoherent, since she had been given no opportunity to discover it.128

This, then is the argument: suffrage came down to a question of whether or not women’s traditional roles as housekeepers, wives and child bearers were God-given for the preservation of the family, or whether women had the right to determine their own spheres as they saw fit, by virtue of being autonomous individuals. Both suffragists and anti-suffragists, through their public writings, understood and proclaimed that this was the meaning and the stakes of the movement. Consequently, when the movement culminated in the victory of the suffragists by the means of a constitutional amendment, it was the suffragist vision of individual choice, autonomy, and independence that was enshrined in the Constitution via the Nineteenth Amendment at the expense of the anti-suffragist vision of family values, fixed roles, and legitimate dependence.129

This is the conclusion that I will defend, but we must first consider a powerful objection: that the vision outlined above was not the unique – or even the dominant – vision of the suffragist movement. At the turn of the century, the suffragist arguments in question began to change, and two different visions emerged. The first argued that women’s role was, actually, in the home, but that the changing social conditions now necessitated giving women the vote in order for them to effectively protect their homes.130 The second – originating from the Democrat-held deep South – argued that giving women the vote was essential to protect white Anglo-Saxons from being outnumbered by negroes and immigrants.131 With these three polarizing visions all enunciated by representatives of the suffragist movement, how do we know which – if any – of these visions is actually written into the Constitution? And, more broadly, can we ever sensibly attribute one unifying vision to social movements that are inherently fragmented, where principles and expediency are often in tension, and

---

127 Id.
128 See also Mercy B. Jackson, Sex versus Humanity, 3 WOMAN’S J. 272 (1872); Gail Hamilton, Woman’s Individuality, 8 WOMAN’S J. 163 (1877).
129 See e.g., Ellen DuBois, The Radicalism of the Woman Suffrage Movement: Notes Towards the Reconstruction of Nineteenth Century Feminism, 3 FEMINIST STUDIES 63 (1976); ELISABETH GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON 140-141 (1984); ALICE S. BLACKWELL, LUCY STONE: PIONEER OF WOMEN’S RIGHTS 216-217 (1930); DAVID MORGAN, SUFFRAGISTS AND DEMOCRATS: THE POLITICS OF WOMAN SUFRAAGE IN AMERICA 16 (1972).
which must cobbled together a diverse coalition with differing, even opposing, viewpoints – in order to appeal to as broad a base as possible and achieve ultimate success?

I argue that we must at least try, because it is the Constitution that we must interpret. Whatever problems might occur in cases where it is impossible to determine which conflicting vision an amendment finally embodies (because it might respond to all of them), I argue that in this case the problem can be resolved.

Let us first focus on the role-based argument. According to Kraditor, where the original suffragist point stressed the sameness between men and women, at the turn of the century the emphasis shifted to how men and women were different, and how therefore women needed the vote to protect themselves. These arguments focused on light punishments meted out to sex crimes, because legislators were unable to understand their seriousness;\textsuperscript{132} reform in the spheres of prohibition and prostitution\textsuperscript{133}; and most importantly, a fundamental shift in the organization of the world, in which the government was now essentially an institution for “extended housekeeping,” to which women – with their traditional skills in the home – could bring their perspectives and skills.\textsuperscript{134}

These arguments from expediency, as Kraditor labels them, find their most famous embodiment in Jane Addams’s tract, Why Women Should Vote. It begins: “For many generations it has been believed that woman’s place is within the walls of her own home, and it is indeed impossible to imagine the time when her duty there shall be ended or to forecast any social change which shall release her from that paramount obligation.”\textsuperscript{135}

We see an immediate difference in language between this tract and the arguments of the anti-suffragists. The truth of the role-based viewpoint is nowhere advocated; it is not stated that it is the natural order of things, or divinely ordained. On the other hand the argument is made pragmatically: because we see no feasible way of changing this state of things, we shall show you why the anti-suffragist argument fails on its own terms, within the framework that we both accept.\textsuperscript{136} Addams lists the many ways in which women can no longer look after the household without access to the ballot, because the sphere of the home has become interconnected with the

\textsuperscript{132} KRADITOR, supra note 122, at 54-55.
\textsuperscript{133} Id. at 55.
\textsuperscript{134} Jane Addams, Why Women Should Vote, LADIES HOME JOURNAL, 1910. For analysis, see ANDREA M. KERR, LUCY STONE: SPEAKING OUT FOR EQUALITY 167 (1992).
\textsuperscript{135} Id.
\textsuperscript{136} Indeed, Lind traces this turn directly to Minor v. Happersett. In the aftermath of Minor, it was clear that the only way open for change was by an appeal to the elite, through legislative forums – thus requiring a “strategic deviation from its original goal of reordering gender relations in society.” Lind, supra note 111, at 173.
broader sphere of government. The tone of the tract is pragmatic – only in one place does Addams use the word “natural” in conjunction with obligations, focusing instead on labeling them “traditional,” and focusing also on how the diverse experiences of men and women are important to running a truly responsive government.\textsuperscript{137}

There are a number of observations that we can make. First, at an elementary level, Addams’s argument for suffrage does not necessarily conflict with the first, principled suffragist vision. Indeed, the two can be properly framed as the precedent and antecedent parts of an even-if proposition. The principled vision attacks the premise of the anti-suffragist gendered-roles argument; the pragmatic response conditionally (as a legal arguendo) accepts the premise, and seeks to defeat the anti-suffragists on their own terms. The two can coexist.\textsuperscript{138}

Secondly and more importantly, the nature of Jane Addams’s argument makes it arguably unsuitable for finding expression in a constitutional amendment. Addams’s reasons for extending women the vote are dependent upon recent changes in society. By logical extension, it was justifiable to deny women suffrage when America was an agrarian society and the sphere of the home was narrower, and presumably, it will become justifiable again if society changes once more. But in that case it makes more sense for women’s voting to be regulated by statute, easily repealable, then by Amendment, where the purpose is to entrench certain aspects of the status quo against change by future generations absent a super-majority. Indeed, most of the amendments – with the glaring exception of the Prohibition amendments – reflect basic principles and not contingent features of society.

This leads us to our third and most important argument. While Addams’s argument is pragmatic\textsuperscript{139}, contingent upon those changes in society that now call for women’s suffrage, the Amendment itself is framed in the language of right. “The right of citizens of the United States to vote shall not be abridged…” – so says the Nineteenth. The language clearly indicates that voting is a right, available to all (and thus clearly independent

\textsuperscript{137} Id.

\textsuperscript{138} A point emphasized by Amar and Brownstein, supra note 102, at 958. Surveying the historical record, they argue that the expediency claims supplemented, but did not supplant the natural rights arguments. See further Id. at 958 – 972 for a detailed examination of various legislative and congressional debates on the separate spheres argument. The authors list eight sets of arguments made: the distinct voice of women, the generic gender difference, women as moralists and humanitarians, women as homemakers, women as guardians of children, women as workers, women’s role in the family, and the influence of the ballot. Already, we can see a fracture within these arguments – claims for women’s interests as workers, for example, already contradicted the view that the woman’s place was in the home, as Amar and Brownstein’s survey of the debates shows.

\textsuperscript{139} As Fowler characterizes this entire era of the suffrage movement: it prioritized “organization over ideology…” \textit{Robert B. Fowler, Carrie Catt: Feminist Politician} (1986).
of the shifting character of society), and prohibits the existing right from being abridged on grounds of sex. This is antithetical to Addams’s pragmatic argument, because that argument is based on the competing vision that voting is a privilege that society extends to persons as and when it deems it expedient. The language of rights, on the other hand, recognizes no such claims of expediency. Indeed, the very Amendment that was finally adopted as we know it was drafted in 1878 by Susan Anthony and Elizabeth Stanton who, as we have seen, were the progenitors of the first vision (choice and autonomy) that we have explained above. This fits well with the intuition that while Addam’s argument was framed in pragmatic terms to persuade men, as a matter of politics, to cast a favourable vote, what the Nineteenth Amendment did was to embody a principle. And at the end of the day, a Constitution is ultimately meant to embody the principles by which we live.

For these reasons, whatever important political role Addams’ argument played in achieving ultimate suffragist victory, it was not the vision that the Nineteenth Amendment wrote into the Constitution. Once we have understood this, the argument against the third and most pernicious strand of suffragist thought becomes easier. First, the Anglo-Saxon pure-blood vision was never shared by the suffragist movement as a whole, limited as it was to the South. The writings of the northern suffragists, who were the founders and the backbone of the NAWSA, reveal that they viewed their own failure to repudiate an argument so contrary to their original principles as a pragmatic move to get the South on board. Second, the departure of the principal proponents of this vision from the NAWSA a few months before the passage of the Nineteenth Amendment reveals that, as a vision, it simply did not stick and become a focal point of the movement, like the other two visions did. Third, the pure-blood argument is to be understood in its deeper context: a view of the world that – again – considered voting to be a privilege that one had to be worthy to exercise. Constantly, the supporters of the pure-blood argument also advocated imposing literacy and property-based limitations upon the vote. The fact that they were unsuccessful in writing that into the Constitution implies that the vision, as a whole, was not one that was accepted in the Constitution either. And last, to repeat – what finally

140 For the contest between these two visions of the vote throughout American history, see KEYSSAR, supra note 43.
141 E.g., Akhil Amar, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (Emphasis supplied).
142 KRADITOR, supra note 122, at 163-164.
143 Id. at 188, for specific quotations proving the point.
144 Id. at 212.
145 Id. at 199.
matters is the text of the Amendment, and the text frames voting as a right, a concept that again would be antithetical to the Southern movement.\footnote{Lind makes the point clear when she labels the shift as being one from “abstract justice to realpolitik.” Lind, supra note 111, at 166; ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 70-86 (1981).}

This, therefore, is my conclusion: admittedly, the American suffrage movement was pluralist and multi-faceted, with a diverse range of viewpoints across the political spectrum. Admittedly, it was the range of viewpoints, in competition or collaboration – not just one single argument – that contributed to suffragist victory and the passage of the Nineteenth Amendment. Nonetheless, for various textual, structural and historical reasons outlined above, I contend that the Amendment itself (as opposed to its advocates) embodied one of those complementary (or competing) visions: Elizabeth Stanton and Susan Anthony’s idea, (that the final wording of the Amendment adopted word for word) that the question of what role a woman ought to occupy in relation to men and in relation to her world, is a question that she must answer by exercising her own autonomy and choice. Consequently, the Amendment repudiated the older social vision that held women’s roles as mother, wife and housekeeper – and her consequent economic dependence – were divinely ordained and immutable, and grounded in her sex and the idea of a united family.

I began this section with a quote from Professor Siegel about the connection between the denial of the vote and a whole series of common law doctrines that legitimized the subordination of women. I would now like to bookend it with another quote, this time from a Supreme Court judgment, that demonstrates how the connections went deeper; how, in other words, law, statute, politics, custom, tradition, morality, ethics and religion were intertwined in one system of gender-based oppression. In \textit{Bradwell v. State}, a case about whether the privileges and immunities clause of the Fourteenth Amendment included the right of women to practice law, the Court observed:

“... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests
and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.\footnote{Bradwell v. State, 83 U.S. 130, 141 (1873). As Sylvia Law sums it up: “biological difference and destiny provided the prime justification for creating a separate, inferior legal status for women.” Sylvia Law, Rethinking Sex and the Constitution, 132 U. PENN. L. REV. 955, 958 (1984).}

The reference to the Fourteenth Amendment provides us with the ideal segue to move into examining the constitutional consequences of the argument we have made in this section.

VI. THE FOURTEENTH-NINETEENTH SYNTHESIS

It might be argued that whatever vision the Nineteenth Amendment intended to write into the Constitution, ultimately the Amendment itself is about voting rights, and cannot simply be extended to other issues that the text does not cover.\footnote{The reasoning of the Court for much of the 20th century.} While I do not believe this objection is insurmountable, I do not think it even necessary to engage with it: my argument shall be that the comprehensive transformative nature of the Nineteenth Amendment requires us to read the Fourteenth Amendment’s guarantee of equal protection in light of the animating vision written into the Nineteenth.

I do not here argue that the Fourteenth Amendment proscribes sex discrimination. I take it to be settled law that it does.\footnote{Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1976).} The question that we must ask is what constitutes a violation of the equal protection of law. I contend that insofar as law continues to embody the pre-Nineteenth Amendment social and cultural ideas that the Amendment repudiated, and impose burdens upon women on that basis, there is a Fourteenth Amendment violation. Here is how: according to Jack Balkin, the Fourteenth Amendment’s “commitment to equal protection of the laws includes a commitment against class legislation, caste legislation, arbitrary
and unreasonable distinctions, and special or partial laws."\(^{150}\) It is the underlined portion on which I wish to focus. Nobody denies that the Fourteenth Amendment permits classification in general. One case in which legitimate classification becomes illegitimate discrimination, however, is when the bases of that classification are constitutionally prohibited. Nobody, for instance, would – at present – argue that unisex toilets create unequal treatment between men and women. Segregated buses, on the other hand, do. My argument is that, post-Nineteenth Amendment, assumptions about women’s ordained roles as childbearers, wives and domestic careers became impermissible bases of classification, and consequently, distinctions based on those assumptions became unreasonable.\(^{151}\)

To understand the point clearly, let us adduce another Balkin observation:

“The Congress that drafted the Fourteenth Amendment believed that men and women were civil equals. Nevertheless, they accepted a wide range of laws and practices that effectively kept women in a subordinate condition and economically dependent on men. In particular, they did not expect that the new amendment would disturb common law coverture rules, under which married women surrendered most of their common law rights under the fiction that they consented upon marriage to the merger of their legal identity into their husband’s. In theory, single women should have enjoyed all the civil rights of adult males or lived in households headed by males, however, states effectively had no constitutional obligation to treat women the same as men.”\(^{152}\) (emphasis supplied)

Thus, the subordinate position and dependence of women and men was not considered a violation of equal treatment precisely because the distinctions it rested upon were considered legitimate. So, for example, if women’s economic dependency was caused by employers hiring only men,

\(^{150}\) BALKIN, supra note 36, at 266. See Plyler v. Doe, 457 U.S. 202, 213 (1982), discussing the Fourteenth Amendment’s purpose of prohibiting caste and invidious class-based legislation. See also Loving v. Virginia, where Chief Justice Warren struck down Virginia’s miscegenation law on the ground that its objective was “to maintain White supremacy.” Loving v. Virginia, 388 U.S. 1 (1967).

\(^{151}\) The basic thrust of this argument is similar to the one made by Professor Karst, in Kenneth L. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91(1) HARV. L. REV. 1, 53-59 (1977). For a philosophical version of the argument, see Alison Jaggar, On Sexual Equality, 84(4) ETHICS 275 (1994).

\(^{152}\) Id. at 224.
or paying women lower amounts of money for the same work, then that was considered legitimate because it rested upon the then legitimate belief that women’s appropriate sphere was the home, the family and children. And this was precisely what the Nineteenth Amendment repudiated.153

But once this underlying theory was rendered illegitimate, the overlying distinctions lost their foundation, and instead of being a reasonable and logical way of classifying things became unreasonable and arbitrary, and thus in violation of the Fourteenth Amendment.154 Or, in other words: if, post-Nineteenth Amendment, a state purpose designed to endorse or reinforce those cultural and social assumptions that the Nineteenth rejected, then that could no longer be a valid state purpose155; if so, bases of classification that rested upon those same assumptions lost their rational connection with any legitimate state purpose that could be defended in a court, and thus became arbitrary.156

To sharpen our philosophical understanding of the issue, let us turn once more to analytical philosophy – this time, to the works of G.A. Cohen. Cohen explores the following question: what do we mean when we say that we are not free?157 Paradigmatically, it seems clear that an enforced detention in a prison cell amounts to a violation of freedom. Equally paradigmatically, it seems absurd to call an inability to fly unaided a restriction of freedom – it is simply an incapacity. But, if both of these situations involve a limitation upon our activity, why is it that we – intuitively – consider only one of them a limitation upon our freedom? The answer is that freedom is a morally-laden idea, and what distinguishes the two situations is our intuitions of moral relevance – we take the force of gravity and our bone and body structure to be simply given, facts of nature that form the morally neutral background or framework within which we structure our activities; on the other hand, locking us up amounts to an

153 See, e.g., W. William Hodes, Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment, 25 Rutgers L. Rev. 26 (1971), comparing certain aspects of the pre-Nineteenth Amendment status of women to that of chattel slaves, the Amendment as akin to the Reconstruction Amendments for women and, consequently, arguing that the Nineteenth Amendment prohibits laws based on the “badges and indicia” of female slavery (such as compelled separate spheres role-assignment, as exemplified in Minor v. Happersett), that the Nineteenth prohibited.

154 Note, Legislative Purpose, Rationality, and Equal Protection 82 Yale L.J. 123 (1972).

155 Interestingly, in Hartmann v. Territory, rejecting an equal protection argument for suffrage, the Court struck down a suffrage statute, observing that “the Fourteenth Amendment is not yet strong enough to overcome the implied limitations of prior law and custom.” Hartmann v. Territory, 13 P. 453, 456 (Wash. Terr. 1887). This, of course, was without the benefit of the Nineteenth Amendment. The implications are evident.


interference with those activities. The former, therefore, does not infringe our freedom, but simply defines the conditions under which we can act freely, while the latter is, indeed, an infringement.

While this seems clear enough to be banal in the illustrations we have chosen, it is when we move into contested terrain that the distinctions begin to blur. Cohen, in his essay, attempts to demonstrate how economic differences amount to an infringement of freedom. He uses many different arguments to do this, but that is not of relevance here: what is important is the deeper disagreement between Cohen and his interlocutor, Friedrich Hayek. For Hayek, freedom can be infringed only when there is an intentional interference by a third party upon our scope of action. Consequently, the economic structure of our society, which is not the creation of one individual motivated by curbing another’s activity, but an organic development undertaken by multiple individuals over time, with no such invidious attention, cannot conceptually be called a violation of freedom, even though a lack of money means that a person cannot do many things that she would otherwise be able to do. On the other hand, for Cohen, it is wrong to treat the economic structure as an impersonal, organic entity when it is the result of deliberative creative efforts by individuals. What their disagreement, eventually, boils down to is this: Hayek considers the economic structure more akin to our inability to fly, while Cohen considers it to be more akin to being locked up in a room.

We can apply the Cohen-Hayek framework to the issue of equal treatment before and after the Nineteenth Amendment. Before the Nineteenth Amendment, assumptions about women’s role as childbearers, wives and domestic careers was taken to be a morally neutral fact, much like our bone and body structure in the example of flying. Women’s economic dependence upon men through rules of coverture, for example, was as simple a logical consequence of women’s domestic roles as is our inability to fly from our body structure. And just like we don’t treat the latter as an infringement of freedom but as the defining conditions within which freedom to act takes on a meaning, similarly, pre-19th Amendment, coverture rules making women economically dependent on men were not considered a violation of equal protection but the structuring framework within which claims of equality could be contested, but which wasn’t itself subject to possible violations of equality. On the other hand, after the passage of the Nineteenth, for all the reasons that we have brought forward throughout this paper, coverture rules did become a violation of equal protection because now, the idea that women had ordained and unchangeable roles within the house was no longer like bone and body

158 Id. See also G.A. Cohen, Freedom and Money, CONTEMPORARY DEBATES IN SOCIAL PHILOSOPHY 19 (Laurence Thomas ed., 2008).
structure, but like being locked up inside a prison cell – as clear a violation of equality as the latter was a violation of freedom.  

The foregoing analysis points to one very important conclusion: in applying a Fourteenth-Nineteenth synthesis, we are not limited by the concrete understandings of the drafters of the Fourteenth and Nineteenth Amendments, or the leaders of the woman suffrage movement. Whatever their definite beliefs about the equality between the sexes, and the extent to which the separate spheres doctrine remained valid (for example, even the most radical of the suffragists probably did not advocate a combat role for women in the front lines of a war), ultimately they chose to embody two principles: the principle of equality in the Fourteenth Amendment, and the principle of autonomous choice (via the right to vote) in the Nineteenth Amendment.  

We are committed to explicating those principles as best we can, even if they do conflict with the specific ideas that their originators had. Or, to put it in Rubenfeldian terms: the framers and the leaders of the social movement had paradigm cases in mind, or application intentions of the principles they were struggling for – and it is those we are bound by. To the extent, however, that they did not envisage the complete set of logical consequences of correctly applying their principles, we need not limit ourselves to their non-application understandings.  

With this crucial point in mind, let us now proceed to apply this idea to specific legal controversies that have arisen subsequent to the passage of the Nineteenth Amendment.

VII. RECONSIDERING WOMEN’S RIGHTS

A. EXAMINING ADKINS

*Adkins v Children’s Hospital of District of Columbia* is the first major case involving women’s rights to be decided after the passage of the Nineteenth Amendment – in 1923. In *Adkins*, a statute authorized a Board to recommend minimum wages for women workers such as were necessary to “maintain them in good health and to protect their morals.” Recall that this was the age of *Lochner*, when the Court was repeatedly striking down public-welfare regulatory statutes on the ground that they violated the

---

160 For an argument of this sort, pertaining to abortion, and grounded in social theory, see ROSALIND PETCHESKY, ABORTION AND WOMEN’S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM 1 – 18 (1990).

161 In legal philosophy, this distinction is known as the distinction between a concept (e.g., the concept of equality) and a conception (e.g., equality concretely prohibits school segregation); the distinction was introduced into legal theory by H.L.A. Hart in *The Concept of Law*, taken up by Rawls, and applied to constitutional reasoning by Dworkin: see, e.g., Ronald Dworkin, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 81 (1978).

162 RUBENFELD, supra note 27.

163 Adkins v. Children’s Hospital, 261 U.S. 525 (1923).
freedom of contract. To get around the Lochner line of cases, the State relied upon a pre-Nineteenth Amendment judgment, Muller v Oregon. Now, Muller prohibited the employment of women in “any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day.” In Muller, plaintiffs argued – crucially – that there was a Lochner violation here, especially in light of the fact that under Oregon law, “women, whether married or single, have equal contractual and personal rights with men.” Indeed, as Chief Justice Wolverton of the Oregon Supreme Court had observed in First Nat Bank v Leonard:

“The current runs steadily and strongly in the direction of the emancipation of the wife, and the policy, as disclosed by all recent legislation upon the subject in this state, is to place her upon the same footing as if she were a feme sole, not only with respect to her separate property, but as it affects her right to make binding contracts; and the most natural corollary to the situation is that the remedies for the enforcement of liabilities incurred are made coextensive and coequal with such enlarged conditions.”

Yet despite the contractual and civil equality of the sexes, as the Court itself was at pains to point out, it distinguished Lochner and upheld the legislation. It did so observing that: “woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.” The Court went on to make the following detailed observations, which deserve to be quoted in full:

“That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her... as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race... still again, history discloses the fact that woman has always been dependent upon man... in the struggle for subsistence she is not an equal competitor with her brother... though limitations upon personal and

167 Muller, 208 U.S. at 420.
contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights... It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him... even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him... she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions – having in view not merely her own health, but the well-being of the race justifies legislation to protect her from the greed as well as the passion of man.”168 (emphasis supplied)

Clearly, this decision is not about law, rules or statutes. It is about a perceived difference in social roles. Women, who must perform the “maternal” function (which they cannot, it would seem, opt out of), must therefore be preserved for the good of the race. The decision is justified by referring to women’s disposition, to their dependence, to their habits of life – all non-legal concepts.169

With that in mind, let us now turn back to Adkins. Expressly citing Muller, Adkins holds:

“... the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case has continued 'with diminishing intensity.' In view of the... revolutionary changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment... these differences have now come almost, if not quite, to the vanishing point... [we cannot] ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships...”170 (emphasis supplied)

168 Id. at 421.
169 Muller was upheld in Riley v. Commonwealth of Massachusetts, 232 U.S. 671 (1914); the specific quotations we have extracted were cited with approval in Miller v. Wilson, 236 U.S. 373 (1915); see also Bosley v. McLaughlin, 236 U.S. 385 (1915).
170 Adkins v. Children’s Hospital, 261 U.S. 556 (1923).
To put the seal on the argument, Justice Holmes, in his dissent, again referred directly to *Muller* when he stated: “It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account.”

I therefore join Professor Siegel when she argues that *Adkins* gave effect to the Nineteenth Amendment’s repudiation of coverture and virtual representation rules that underlay the pre-Amendment status quo. I take the argument one step further: in specifically responding to *Muller*, the *Adkins* majority and the *Adkins* dissent understood that what was at stake was even deeper than coverture and legal rules – it was, precisely, the comprehensive transformative nature of the Amendment at issue -- and its impact on those social and cultural attitudes that determined women’s roles for them as childbearers and cartakers. Indeed, the *Adkins* majority self-consciously holds that the Amendment initiated a shift from the basic unit of society being the family, to the individual. This is nothing if not a transformation of the most basic conceptions of personhood and identity that we have discussed above, and that which formed the heart of the original Stanton-Anthony vision of the Nineteenth Amendment.

*Adkins*, then, is a great example of the Court giving effect to the comprehensive transformative nature of an Amendment. Unfortunately, this was not followed up – after *Adkins*, the Court restricted the reach of the Nineteenth Amendment to voting rights-- and buried the comprehensive transformative nature of the Amendment. For the reasons explained above, I believe this was a mistake; and, in the next three sections, I will try to analyze some of the modern sex-discrimination cases from this perspective.

---

171 Id. at 570 (Holmes J., dissenting).
172 Following *Adkins*, other wage legislation statutes were struck down. For wage legislation cases, see *Murphy v. Sarrell*, 269 U.S. 530 (1925); *Donham v. West Nelson Manufacturing Co.*, 273 U.S. 657 (1926). *But see* *Radice v. New York*, 264 U.S. 292 (1923), which was a case about differential working hours, in the upholding of which the Court seemed to undercut the basic theoretical-egalitarian approach of *Adkins*.
173 As Blanche Crozier put it in 1935, the unconstitutionality of sex-discrimination was the “actuating philosophy” of the *Adkins* decision. Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 746 (1935)
174 Indeed, virtually repudiated. *See*, for instance, Justice Stone’s dissent in *Morehead v. New York*, 298 U.S. 537 (1936), that reaffirmed the separate spheres argument. The majority decided the case on other grounds. In *Breedlove v. Suttles*, 302 U.S. 277 (1937), the Court upheld differential poll tax arrangements on the ground of special considerations accorded to women because of their role in “preserving the race.” *But see also* Justice Sutherland’s more egalitarian dissent in the case that eventually overruled *Adkins*, *West Coast Parrish Hotel v. Parrish*, 300 U.S. 379 (1937). The record post-*Adkins* suggests much uncertainty and no unified approach.
B. DEFENDING ROE

Ever since Roe v Wade\textsuperscript{175} was decided in 1973, it has been subjected to near-ceaseless attack (including a judicial backlash that cut back upon – although did not overrule – it\textsuperscript{176}). Roe grounded abortion rights within a “right to privacy” located in the due process clause of the Fourteenth Amendment. It is argued that the judgment lacks constitutional foundation.\textsuperscript{177} It is not my purpose here to examine that objection; I want to consider whether the Fourteenth-Nineteenth synthesis that we discussed above can provide an alternative defense of Roe.\textsuperscript{178}

One year before Roe was decided, the New Jersey District Court heard Young Women’s Christian Association v. Kugler\textsuperscript{179}, challenging its criminal abortion statute. Plaintiffs argued – inter alia – that the effect of a criminal abortion law was to compel them to bear unwanted children, which was effectively perpetuating an inferior status that the Nineteenth Amendment was designed to eradicate. The court dismissed this part of the claim on grounds of standing, but the argument gives us an insight into how the Nineteenth Amendment is relevant to abortion cases. Recall that in People v Belous\textsuperscript{180} and Babbitz v McCann\textsuperscript{181}, the Californian and Wisconsin courts had upheld the right to abortion on the ground that, following Griswold\textsuperscript{182}, women had the right to choose whether or not to bear children as part of the interstitial right to privacy. An abortion law takes away this choice. Or, as Koppelman puts it: “when a woman is forced against her will

\textsuperscript{175}Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{178}For the application of the Fourteenth Amendment to Roe v. Wade, see, e.g., Frederick Schauer, Easy Cases, 58 CAL. L. REV. 399, 431 (1985): “only one gender bears the possibility of pregnancy,” Donald H. Regan, Rewriting Roe v. Wade, 77(7) MICH. L. REV. 1569 (1979): arguing that compulsory pregnancy requires women to be “good Samaritans.” Ruth Bader Ginsburg, Some Thoughts on Equality and Autonomy in Relation to Roe v. Wade, 63 N.C. L. REV. 375 (1985): arguing on the basis of compelled motherhood being a case of sex-discrimination; Wendy Williams, The Equality Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985): arguing that sex-classifications on the basis of cultural role assignments, inter alia, violate the equal protection of laws; “A society bent on keeping women in their traditional role would first seek to deny them reproductive choice.” Id., at 343; Karst, Equal Protection, supra note 151, at 57: arguing that Roe v. Wade is a case about woman’s “role”. Karst specifically argues – similar to what I am claiming here – that equal protection is about “a woman’s claim of the right to choose her own social roles.” Id., at 58; Laurence Tribe, Foreword: Towards a Model of Roles in the Due Process of Life and Law, 87 HARV. L. REV. 1, 38–41 (1972), making the social roles argument in the context of the father’s veto.
\textsuperscript{180}The People v. Belous, 485 P. 2d 194 – Cal: Supreme Court 1969.
\textsuperscript{181}Babbitt v. McCann, 310 F. Supp. 293 – Dist. Court, ED Wisconsin 1970.
\textsuperscript{182}Griswold v. Connecticut, 381 U.S. 479 (1965).
to carry a child to term, control over her body and its (re)productive capacities is seized from her and directed to a purpose not her own.\textsuperscript{183}

But, as we have argued above, the basic transformation that the Nineteenth Amendment wrought was precisely this: pre-Nineteenth Amendment, women’s role as mothers was taken to be ordained and in the very nature of things; the Nineteenth Amendment repudiated this notion, with the idea that the ultimate unit of society was the individual (as \textit{Adkins} explained), and that consequently, familial and social roles (including that of motherhood) were legitimate only insofar as they were voluntary. The distinctions that abortion laws draw in criminalizing abortion – that is, placing a set of physical and other burdens upon women that is not placed upon men\textsuperscript{184} – could be sustained only if we take motherhood to be a part of \textit{what it is to be a woman}. After the Nineteenth Amendment, that argument is no longer open to us. Consequently, a distinction founded on that idea now becomes – in Balkin’s words – “arbitrary” and thus \textit{prima facie}\textsuperscript{185} violates the Fourteenth Amendment’s guarantee of equal protection laws, as informed by the Nineteenth Amendment.\textsuperscript{186}

To put it in another way: in \textit{Adkins}, the impugned legislation drew upon “maternal functions” to draw a distinction. \textit{Roe}, the impugned legislation also drew upon “maternal functions” (via pregnancy) to draw a distinction (and burden women). Before the Nineteenth Amendment, such burdens were not treated as constitutionally recognized burdens at all, because they were simply taken to be part of what it is to be a woman – much like how, in \textit{Muller v. Oregon}, the differential working hours were upheld on the grounds of women’s physical fragility and maternal role. If the maternal role argument was no longer a justification for differential

\textsuperscript{183} Andrew Koppelman, \textit{Forced Labour: A Thirteenth Amendment Defense of Abortion}, 84 NW. U. L. Rev. 480, 489 (1990); he goes on to cite an amicus brief in \textit{Roe}: “The contractions of childbirth are literally labor.” “They are the most strenuous work of which the human body is capable.” \textit{Id.}

\textsuperscript{184} The language is Guido Calabresi’s. He posits that the equality issue at stake in abortion disputes is “the right of women to participate equally in sex without bearing burdens not put on men.” \textit{GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW} 106 (1985). The crucial point is that childbirth as a constitutionally cognizable “burden” is a direct result of the Fourteenth-Nineteenth synthesis. \textit{See also} Regan, \textit{supra} note 178, at 1569, for an account of the physical burdens involved with pregnancy. Again, my argument is that these burdens become constitutionally cognizable as a result of the changed conceptions of personhood, the role of women as mothers that the Nineteenth Amendment brought about.

\textsuperscript{185} I say \textit{prima facie} because I am not here considering the State’s legitimate interest in protecting the fetus, as \textit{Roe} and subsequent cases have considered. My objective here is to provide a constitutional grounding to the right. That is not to say that the right is absolute.

\textsuperscript{186} Making a parallel Thirteenth Amendment argument for abortion, Koppelman argues: “[sex] discrimination has consisted primarily of the systematic use of motherhood to define and limit women’s social, economic, and political capacities.” Koppelman, \textit{Thirteenth Amendment, supra} note 183, at 506. \textit{See also} L. Tribe, \textit{AMERICAN CONSTITUTIONAL LAW} §15-10 at 1354 (2\textsuperscript{nd} ed., 1988): “[t]he thirteenth amendment’s relevance [to the abortion question] is underscored by the historical parallel between the subjugation of women and the institution of slavery.”
treatment – as *Adkins* held – then similarly, it could no longer be used for justifying differential treatment in compelling women to assume the burden of childbearing.\(^{187}\)

Various feminist arguments for abortion directly implicate our Fourteenth-Nineteenth synthesis. As Susan Sherwin argues:

“… a woman may simply believe that bearing a child is incompatible with her life plans at this time, since continuing a pregnancy is likely to have profound repercussions throughout a woman's entire life... if the woman is young, a pregnancy will very likely reduce her chances of education and hence limit her career and life opportunities: the earlier a woman has a baby, it seems, the more likely she is to drop out of school; the less education she gets, the more likely she is to remain poorly paid, peripheral to the labour market, or unemployed... access to abortion is a necessary option for many women if they are to escape the oppressive conditions of poverty... in the face of significant feminist influence... women's freedom to choose abortion is also linked with their ability to control their own sexuality. Women's subordinate status often prevents them from refusing men sexual access to their bodies. If women cannot end the unwanted pregnancies that result from male sexual dominance, their sexual vulnerability to particular men can increase, because caring for an(other) infant involves greater financial needs and reduced economic opportunities for women. As a result, pregnancy often forces women to become dependent...”\(^{188}\) (emphasis supplied)

What we see here is precisely the linkages between motherhood, family and economic, and social dependency that was the primary concern of the suffrage movement. We have also seen how, for the anti-suffragists, these concepts interlocked with each other – the economic and social dependency of women was legitimate due to the separate-spheres argument, that held that women’s natural role was as a mother, in the home, who was financially and otherwise, supported by her husband. It was exactly *this* manner of dependency and burden – that stemmed from a view about women’s ordained roles as wife and mother – that the Nineteenth

\(^{187}\) Indeed, if the Nineteenth Amendment – as I have argued – was about women’s choice in defining their own individual and social roles, then compelled roles such as anti-abortion statutes imposed could well be understood as imposing the classic “badge of inferiority” that is prohibited under the Fourteenth Amendment.

Amendment sought to repudiate. And thus, insofar as criminal abortion laws continue to be based on allocating burdens on those—now illegitimate—ideas, they are denying women the equal protection of laws, and thus violate the Fourteenth Amendment. As Ruth Bader Ginsburg put it, quoting Professor Karst: “society expects, but nature does not command, that women… take major responsibility… for childcare.” The argument in this section has been that after the Nineteenth Amendment, legislation based on that societal expectation in placing burdens upon women no longer serves a legitimate State purpose.

C. CRITIQUING FRONTIERO AND BEYOND

In the 1970s, the Supreme Court did ground sex discrimination cases within the Fourteenth Amendment. Professor Siegel argues that in failing to synthesize the Fourteenth and the Nineteenth Amendments, the Supreme Court’s sex-discrimination law is founded in an act of “historical erasure.” While I broadly agree, my own suggestion is slightly different: Justice Brennan’s plurality opinion in Frontiero v Richardson—that Professor Siegel criticizes—was on the right track. Unfortunately, Justice Brennan failed to follow through upon his own logic, and subsequent judgments have failed utterly to understand the point that he was making. In Frontiero, Justice Brennan referred to the traditional belief that the “paramount destiny and mission of women are to fulfill the noble and divine offices of wife and mother.” He then stated:

“"As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.""

As we have been arguing all throughout this paper, Justice Brennan’s argument is a model of reasoning about comprehensive transformative amendments. He does not simply stop at the discriminatory

---

189 Ginsburg, supra note 178, at 382.
190 Siegel, supra note 45, at 1022.
192 Id., at 685.
193 Id. But see Hoyt v. Florida, 368 U.S. 57 (1961), where the Warren Court upheld the exclusion of women from jury duty on the ground that “woman is still regarded as the center of home and family life.” Id., at 63. Hoyt was overruled by Taylor v. Louisiana: “If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed.” Taylor v. Louisiana, 419 U.S. 522, 538 (1975).
laws on the statute books, but *grounds* them within basic notions of personhood, identity, familial roles and the relations between sexes. He views the Nineteenth Amendment as being fundamentally transformative in that sense. An example of this form of reasoning is the Supreme Court case of *Stanton v. Stanton*, where the question was whether a different age of majority (18 for males and 21 for females) violated the Fourteenth Amendment. The Supreme Court of Utah agreed that the legislation treated people differently, but asked whether the classification was *reasonable*. In finding it not unreasonable, the Court referred to certain “old notions” like the responsibility of men to care for the family, the later maturity of women (reword), and so on. Reversing, the Supreme Court held:

“Notwithstanding the "old notions" to which the Utah court referred, we perceive nothing rational in the distinction drawn by § 15-2-1... this imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. See *Taylor v. Louisiana*, 419 U. S. 522, 535 n. 17 (1975). Women's activities and responsibilities are increasing and expanding.”

Similarly, in *Mississippi University for Women v. Hogan*, the Court struck down MUW’s admissions policy that only allowed women admissions to nursing school, holding that:

“MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job... that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.”

---

195 *Mississippi University for Women v. Hogan*, 485 U.S. 718, 729-730 (1982). *See also* Schlessinger v. Ballard, 419 U.S. 498, 507 (referring to “archaic and overbroad generalizations” about the role of women); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), invalidating a classification that was based on the idea that men were the primary breadwinners. But *see* Califano v. Webster, 430 U.S. 313 (1977), where a sex-based classification was *upheld* because the Court found it was meant to compensate women for past discrimination that created barriers to entry in the workforce, barriers that were based on those very same archaic and overbroad
In other words, what made the distinction irrational and arbitrary – and therefore, a violation of the Fourteenth Amendment – was that it rested upon repudiated “notions” (of family, personhood, role of women) that had been repudiated. The contrast with Bradwell v. State, that we have discussed above, is striking.

Yet in other cases, subsequent to Frontiero, the Court – again – seems to have laid down a correct test, but fundamentally misinterpreted it. In Craig, the Court prohibited government actors from engaging in sex-based regulations that “fostered old notions of role typing…”, “archaic and overbroad generalizations” and “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas…’” This is precisely as it should be. Such an approach would require the Court to undertake detailed excavations of history (in particular, pre-Nineteenth Amendment social attitudes, especially as articulated by the anti-suffragists), and modern-day sociological investigations. As Professor Siegel points out, however, the Court has done the exact opposite:

“The Court has made no effort to connect the kinds of state action triggering heightened scrutiny to the history of women’s treatment in the legal system. To the contrary: Heightened scrutiny is triggered by any form of state action that employs a sex-based classification. All state action employing sex-based classifications receives the same degree of scrutiny.” (Emphasis supplied)

This is the thrust of the critique that Professor Law makes against the decision of the Court in Michael M. v. Superior Court. In that case, the California statutory rape law that made it a crime for a man to have sex with a woman under the age of 18 was upheld on the ground that it served the
generalizations about the role of women. The Court observed: “Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.” Kahn v. Shevin, 416 U. S., at 353. See generally id., at 353-354, and nn. 4-6. Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.” Id., at 318. Note how the Court rested its findings not on formal legal barriers to entry, but the pervasive social environment. Importantly, the Court refused to uphold a statute that benefited women on the ground that it wasn’t about redress for past discrimination. In Califano v. Goldfarb, 430 U.S. 199 (1977), the Court struck down a statute that allowed widows – but not widowers – to claim social security without showing dependence. Justice Brennan’s opinion, joining the plurality, was based upon the precise idea that the statute’s benefit to women was itself based upon stereotypes (of women’s presumed dependency).

197 Siegel, supra note 45, at 1026.
legitimate state interest of preventing teenage pregnancy. In particular, Justice Rehnquist held that “virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female.” As Professor Law argues, however,

“... it is not entirely nature that imposes upon women the devastating burdens of teenage pregnancy; the social and legal ethos that makes women solely responsible for nurturing the children they bear also plays a part... [such assumptions] inescapably reinforce the legitimacy of male irresponsibility in relation to their children. They also prevent us from seeing that women are people who make moral choices and from valuing the nurturing choices women make. Michael M.... accepts and reinforces the sex-based stereotypes that men are naturally, biologically aggressive in relation to sex, while women are sexually passive, and that young women need the law's protection from their own weakness. When the Court acts on the assumption that these stereotypes are natural, biological, and inalterable, it reinforces and perpetuates [them].”

The problem is that a simple classification test is both over-inclusive and under-inclusive. It is over-inclusive because not all sex-based classifications are contingent on the kind of invidious role-attribution that the Nineteenth Amendment was concerned with eradicating. But more importantly, it is under-inclusive because, very often, the pre-Nineteenth Amendment status quo can be written into statutes without a formal sex-classification.

Consider, for instance, *Geduldig v Aiello* where a statute denying employment disability insurance to pregnant women was upheld because the Court found it not to be a differentiation based on sex, since it classified the world not into men and women, but pregnant and non-pregnant...

---

199 Law, *supra* note 145, at 1000. My claim here is not that *Michael M.* is wrongly decided; only that the Court ought to have undertaken a Fourteenth-Nineteenth synthesis and questioned whether the stereotypes in question were those that the Nineteenth was meant to repudiate. It might have answered that question in the negative, but that would – as argued earlier – require an amount of historical and sociological research. See also Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS L. REP. 175, 186-187 (1982).
200 Geduldig v. Aiello, 417 U.S. 484 (1974). For a bibliography of the scholarly critique of the decision, see Law, *supra* note 147, at 983, fns. 107 – 109; noting that both opponents and supporters of the decision agree that it was wrong in refusing to treat pregnancy-based discrimination as an instance of classification on the basis of sex.
persons. To understand precisely why the judgment is flawed, we need to understand how – as many feminists have argued – employment rules and regulations are constructed around the conception of an ideal worker who is male – i.e., one who doesn’t get pregnant. For example, Joan Williams writes:

“... society is structured so that everyone one, regardless of sex, is limited to two unacceptable choices – men's traditional life patterns or economic marginality. Under the current structure of wage labor, people are limited to being ideal workers, which leaves them with inadequate time to devote to parenting, and being primary parents condemned to relative poverty (if they are single parents) or economic vulnerability (if they are currently married to an ideal worker). Wage labor does not have to be structured in this way... [the recent] massive shift in the gendered distribution of wage labor has produced intense pressures to challenge the assumption that the ideal worker has no child care responsibilities. But this pressure is being evaded by a cultural decision to resolve the conflicts between home and work where they have always been resolved: on the backs of women. In the nineteenth century, married women "chose" total economic dependence in order to fulfill family responsibilities.' Today, many women with children continue to make choices that marginalize them economically in order to fulfill those same responsibilities, through part-time work, "sequencing," the "mommy track" or "women's work." In each case, the career patterns that accommodate women's child-care responsibilities often are ones that hurt women's earning potential."

In other words, the Nineteenth Amendment was meant to change both society and the workplace and wage-labor structure still reflects the pre-Amendment idea of separate spheres and different roles. Social norms still expect that women should be the primary careers, and shoulder the bulk of parenting responsibilities. The wage-labor structure is still shaped

201 Contra with the Seventh Circuit decision in Cleveland Board of Education v. LaFleur, 465 F.2d. 1184, 1188 (1972), which did hold that the classification was on the basis of sex.
202 Joan Williams, Deconstructing Gender, 87(4) MICHIGAN LAW REVIEW 797, 833 (1989). Or, in the words of Professor Law, "exclud[ing] payments for pregnancy-related disabilities from insurance plans, reflects a stereotype of women as temporary visitors to wage labor whose contributions are insignificant and for whom job continuity is unimportant." Law, supra note 147, at 1030.
to prefer male workers over female. Consequently, for a majority of women, who adhere to these social norms, the structure of the workplace and wage-labor ends up hurting them disproportionately. In such a situation, it is at least arguable that the denial of employment-disability insurance is furthering this structure that is based on the notions that the Nineteenth Amendment was designed to repudiate – and, is thus unconstitutional. Indeed, this is made clear by the following observation made by Justice Rehnquist in relying upon Geduldig to hold that Title VII did not require pregnancy-based classifications to be treated as sex-based classifications (before Congress amended the statute); he observed that Title VII did not require “different economic benefits... be paid to one sex or the other because of their differing roles in the scheme of human existence.”

Of course, I have here only stated my argument – to prove it would require substantial sociological research; what it does show, however, is that – as Professor Siegel argues – *facially neutral* statutes could still be discriminatory if they smuggle in constructs such as these. Thus, when in *Personnel Administrator of Massachusetts v. Feeney*, the Court ruled that statutes awarding civil-service employment preferences to veterans are not sex-based, it blithely ignored the simple truth that the continuing lack of women in the armed forces is due to the same notions that pre-dated the Nineteenth Amendment, continuing in some form or the other. Once again, Professor Siegel puts the matter accurately when she argues that “the modern law of equal protection understands sex discrimination formally as involving practices of sex-based classification, and has never critically

---

203 As Wendy Williams put the issue: “A woman worker’s pregnancy was a signal (as her marriage had been decades earlier) of her impending assumption of her primary role. Workplace rules accordingly treated her as terminating her workplace participation. If she defied the presumption and sought to continue her workforce attachment, she met with numerous obstacles. If she avoided outright termination, then she faced mandatory leaves that had nothing to do with her desire or capacity to work. She was not guaranteed the right to return, she was denied sick leave or disability, she lost seniority, and she became ineligible for unemployment insurance. Moreover, her medical coverage for expenses associated with pregnancy was reduced or nonexistent. All of this underscored for her a lesson that pregnancy is not a workplace but a family issue. Employer and state would not recognize her as a worker again until the pregnancy and the infancy of her child were behind her.” Williams, *The Equality Riddle*, supra note 178, at 352-353. In other words, these laws were based on the separate-spheres worldview that I have been arguing the Nineteenth Amendment rejected. See also Frug, *Securing Job Equality for Women: Labour Market Hostility to Working Women*, 59 B.U.L. Rev. 55, 94-103 (1979).

205 General Electric Company v. Gilbert, 429 U.S. 125, 139 (1976). As Wendy Williams argues, this “made man the standard (whatever disabilities men suffer will be compensated) and measured women against that standard (as long as she is compensated for anything he is compensated for, she is treated equally).” Williams, *The Equality Riddle*, supra note 199, at 347.

206 Siegel, supra note 45, at 1025.

scrutinized the institutions and practices that have played an historic role in perpetuating women’s secondary status in the American legal system. All the arguments in this paper have been designed to demonstrate just why it is critically important, as a matter of constitutional law, that the Court ought to scrutinize institutions and practices in the manner Professor Siegel advocates.

D. QUESTIONING DAVIS

The last two examples raise a difficult question. Issues such as the impact of social norms and the structure of the wage-labor market upon women’s choices are inherently extremely difficult to adjudicate simply because the evidence is – to put matters kindly – ambiguous at the best of times. Indeed, sociological and anthropological work has been done, as cited above, but as the notorious Sears case demonstrates, the courts might not always be the best venues to interpret such material, especially when it is so easy to point both ways.

So, I would like to end with a suggestion. I cannot here develop it in full detail, so I leave it as a question and a possibility worth thinking about. Consider the famous case of Washington v Davis. In that case, the Court rejected disparate impact, holding that laws that have a racially discriminatory effect, but that were not adopted to advance a racially discriminatory purpose, do not violate the Constitution’s equal protection guarantee. I suggest that, in light of all the arguments that I have made in this paper, there is an arguable basis for reconsidering the Davis doctrine, at least in the context of sex discrimination.

The reason for this is two-pronged. First, disparate impact could well serve as the most reliable proxy for actually discovering that social or

---

208 Reva Siegel, Collective Memory and the Nineteenth Amendment 177 in HISTORY, MEMORY AND THE LAW (Sarat & Kearn's eds., 2002).
209 The criticism would also apply to the series of cases on fathers’ rights decided in the late 70s and early 80s: Parham v. Hughes, 441 U.S. 347 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 103 S. Ct. 2985 (1983); to the extent that judges in the majority and dissent held that classifications resting on “biological differences” would not be subjected to scrutiny, the approach advocated in this article would argue that those opinions are flawed. Inasmuch as biological characteristics have been used – historically – as a method of denying women equal participation in society, the workplace and so on (e.g., denial of employment benefits in cases of pregnancy), those biological characteristics as based of classification are suspect. See Law, supra note 147, at 988, pointing out how allegedly biological characteristics were, on the facts of those cases, actually stereotypes about the role of fathers in the family and their relationship with children.
213 Logically, of course, Davis ought to be reconsidered for racial discrimination claims as well, but that is not an issue I can address here.
cultural norms are responsible for certain discriminatory outcomes. In the *Feeney* case, for instance, surely the fact that an overwhelming number of beneficiaries of the program were male would suggest that there was a reason for this skewed distribution that went beyond the simple binary of choice/coercion. Of course, I fully endorse the Supreme Court’s conclusion that disparate impact cannot be the end of the analysis. There are certainly cases where that might actually be the outcome of genuine and meaningful choice (in the case of the military, which has traditionally been regarded as the male province precisely because of pre-Nineteenth century notions of role division, that might not have been the case). So, for example, a finding of widespread disparate impact might then place a burden upon the employer to demonstrate that the result was actually due to the exercise of genuine choice. What must be found is a test that acknowledges the impact of social and cultural norms upon women’s action, while also managing to respect agency and autonomy in cases where it is genuinely exercised.

Second, the manner in which social and cultural norms operate is precisely one where discriminatory motive – as required by the Supreme Court post-*Davis* will often be peripheral – because many times, actors operating under the influence of social norms do not consciously intend to discriminate. In fact, they would regard prejudice or other unfounded assumptions as not being discriminatory at all, but just the natural order of things – much like how, in the early 20th century—keeping women within the confines of the house simply wasn’t considered discriminatory.

Ultimately, such an approach would be truer to Justice Brennan’s original insight that kicked off the Supreme Court’s sex discrimination jurisprudence forty years ago, and truer to the formulation in *Craig*. The Nineteenth Amendment was a comprehensive transformative amendment, that sought to eradicate, once and for all, not only pernicious and invidious notions about women’s role and the relations between the sexes, but also their influence upon our laws, our politics and our economy. A jurisprudence that acknowledges and gives effect to this basic – yet revolutionary – idea is ultimately faithful to the text, structure, history and spirit of the Constitution.

---

214 My approach here is anticipated by Law’s proposed constitutional approach to sex equality. See Law, supra note 147, at 1008-1009: “laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom.” My point in this paper has been that in determining when a law is, indeed, perpetuating such a culturally imposed sex-role constraint is to be accomplished by a historic analysis of the social movement that culminated in the Nineteenth Amendment. This has the added benefit of bringing an amount of objectivity to the procedure, and forestalling criticisms that the judges will use such a doctrine to write their own ideas of equality and subordination into the Constitution.
VIII. CONCLUSION

In sum, I have applied the theory of comprehensive transformative amendments, identified and developed in the first part, to the Supreme Court’s sex discrimination jurisprudence. I began by examining the Adkins case, and argued that in the early years after the Nineteenth Amendment’s passage, the Court captured its fundamental transformative nature. Regrettably, this state of affairs was not to last. Nonetheless, I used the doctrine to provide an alternative grounding for Roe v Wade and the Supreme Court’s abortion cases, arguing that while the Supreme Court correctly identified choice as the fundamental organizing principle of abortion law, this idea finds a natural home in a Fourteenth-Nineteenth synthesis, which views compelled motherhood as a basic violation of the equal protection guarantee. I then examined the Supreme Court’s jurisprudence post-Frontiero, arguing that while the Court got its basic statement of principles right, it nonetheless failed to stay true to the very insights that it articulated in Frontiero and Craig; and concluded by suggesting that one way to do so would be to reconsider Davis in the context of sex-discrimination, and factor disparate impact into an analysis of sex-discrimination claims as opposed to the blanket classification test. The precise modalities of such a test are left for another day – and, hopefully, another court.
THE ANTI-CORRUPTION FORCE OF ARTICLE V’S CONVENTION CLAUSE

MICHAEL PIERCE**

Americans do not trust their elected officials, especially at the federal level. The very process of electing them might be broken, meaning electing different officials is not the answer. A potential solution lies in something Americans hold dear: their Constitution. Specifically, Article V provides for two methods of amending the Constitution, one of which is relatively unknown, but potentially useful: the so-called Convention Clause, which requires Congress to call a national convention empowered to propose amendments to the Constitution if two-thirds of the states request that it do so.

This Article considers the history of Article V and shows that two purposes motivated its final language. Article V protects federalist values by allowing constitutional amendments without congressional consent, and it fights corruption by empowering a convention of the people to propose such amendments. This convention authority is severely underappreciated (where it is even recognized) in the scholarly literature, yet has significant value in operationalizing Article V. This Article analyzes the issue of delegate selection by arguing that, contrary to conventional wisdom, electing delegates is not the best choice. Neither is appointment. Congressional appointment of delegates is antithetical to Article V’s purposes, and state appointment presents its own less serious problems. Surprisingly, random selection of delegates best effectuates both historical purposes of Article V. This Article concludes by analyzing the constitutionality of legislation providing for such procedures, both at the state and federal level.

I. CURRENT CRISSES OF TRUST AND REPRESENTATION ....................58
II. THE DUAL HISTORICAL FUNCTIONS OF ARTICLE V’S CONVENTION CLAUSE ..............................................................61
   A. The Anti-Tyranny Interest of the Convention Clause ........62
   B. The Anti-Corruption Function of the Convention Clause ....63
      1. The Evolution of Article V’s Text .............................64
      2. State Ratifying Conventions ..................................69
      3. Legal Treatise ..................................................71
III. IMPLICATIONS FOR THE MODE OF SELECTING DELEGATES TO A CONVENTION ............................................................74
   A. The Merits of Each Mode of Delegate Selection ............75
      1. Election ..........................................................76
      2. Appointment ...................................................78
      3. Random selection .............................................78
   B. The Constitutionality of State and Federal Legislation
      Providing for Random Delegate Selection .....................81
IV. CONCLUSION ......................................................................84

** The author is a 2014 graduate of Harvard Law School. He is currently completing a one-year clerkship with the Massachusetts Court of Appeals, then will begin a one-year clerkship with the U.S. District Court for the District of Massachusetts. The views set forth herein are the views of the author only.
I. CURRENT CRISSES OF TRUST AND REPRESENTATION

There is currently a crisis of trust in America.1 Americans do not trust government in general,2 and most certainly do not trust Congressional representatives.3 Related to this crisis of trust is a crisis of representation. In short, Americans do not trust Congress because they believe the very system that elects them is corrupt.4 A vast majority of Americans think that Super PACs should be illegal,5 yet under current law they are sacrosanct;6 the same disconnect occurs regarding the ability of corporations to make unlimited “independent” expenditures7 (“independent” has quotation marks around it because the designation is legalistic and empirically ridiculous).8 Even states attempting to combat a sordid history of corruption9 are

---

2 See id. at 11 (“A 2010 Pew survey revealed that trust in government in general was at the lowest level since Pew started measuring it in 1978.”).
3 See id. at 10 (reporting the results of a Gallup poll and stating that “just 12 percent of respondents expressed a ‘great deal’ of trust” in Congress).
4 See LAWRENCE LESSIG, REPUBLIC LOST 133 (2011) (reporting that seventy-five percent of Americans “believe ‘campaign contributions buy results in Congress’”).
8 See, e.g., Nicholas Confessore & Jim Rutenberg, GROUP’S ADS RIP AT GINGRICH AS ROMNEY STANDS CLEAR, N.Y. TIMES, Dec. 30, 2011 at A1 (describing “independent” Super PAC advertisements supporting Mitt Romney that nevertheless “were created and paid for by people with deep knowledge of the Romney campaign’s strategic thinking, close relationships with Mr. Romney’s most generous donors, and even research on what television viewers like and dislike most about Mr. Romney himself”; stating that “[f]omer Obama aides have also formed a super PAC”). These concerns were known to the Court. See Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 448 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing the district court’s “numerous findings about the corrupting consequences of corporate and union independent expenditures”).
9 The Montana Supreme Court aptly describes the circumstances leading to the enactment of the challenged statute in 1912:

At that time the State of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough of the corrupt practices and heavy-handed influence asserted by
powerless to regulate this campaign spending. Campaign finance is certainly not the only thing that Americans want to change about Washington. However, the tension between what the people want and the Court’s interpretation of the First Amendment is particularly striking because it dovetails with the crisis of trust in the recipients of all these campaign donations. Thus the American people are in a bind: they do not trust their Representatives, and even if they did, the Court’s interpretation of the First Amendment precludes desired results.

Despite these dire straits, there is hope. One of the only things Americans do currently trust is the Constitution. And the Constitution has a blueprint for precisely this situation: the Framers foresaw the potential for Congress to become disconnected from the people, and presciently included the ability to change our foundational text, “one of the greatest beauties of the system.” More specifically, they provided the people with an ability to circumvent Congress when Congress itself is the problem.

And most importantly, they realized that such amendment powers were useless if they were never used, therefore they consistently exhorted the people to actually use Article V. James Madison wrote that the Founders “formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate[,]” while Thomas Jefferson, more radically, wrote that “The earth belongs always to the living generation[,]” and “every constitution, then, and every law, naturally expires at the end of nineteen years.” At the very least, our early leaders expected Americans to at least consciously consider using their amendment powers: George Washington, for one, stated in his inaugural address:

the special interests controlling Montana’s political institutions. Bribery of public officials and unlimited campaign spending by the mining interests were commonplace and well known to the public.


11 Sixty-nine percent of respondents in a 2012 poll about the Constitution favored describing it as “an enduring document that remains relevant today,” as opposed to only twenty-eight percent stating that the Constitution “is an outdated document that needs to be modernized.” THE AP-NATIONAL CONSTITUTION CENTER POLL 5 (August 2012), available at http://constitutioncenter.org/media/files/data_GfK_AP-NCC_Poll_August_GfK_2012_Topline_FINAL_1st_release.pdf.


14 See U.S. CONST. Art. V (providing that Congress shall call a convention for proposing amendments on the application of two-thirds of the states).


It will remain with your judgment to decide, how far an exercise of the occasional power delegated by the fifth article of the Constitution, is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them.17

The Constitution’s amendment mechanism is Article V. Article V articulates two steps in the process: before becoming law, an amendment must first be proposed, and then it must be ratified. There are two different ways to propose amendments, but in either case, ratification requires the approval of either three-fourths of state legislators or conventions in three-fourths of the states.18 The first proposal option involves establishing a consensus among legislators: an amendment can be proposed when two-thirds of both houses of Congress agree—this has been the chosen method for all amendments to date.19 The second way to propose amendments is for two-thirds of the states to petition Congress, which must then call a national convention empowered to propose amendments.20 This method (the convention method), while untested, is critically important because it provides a way to amend the Constitution that can bypass Congress. Congress has no discretion regarding whether to call a convention if a constitutionally sufficient number of states petition it for one.

Article V’s convention method for amendment “raises a host of important questions” about the rules governing such a proceeding.21 Historical evidence relevant to these questions should be of particular interest to adherents of originalism—a theory of constitutional interpretation that “requires discovery of the Constitution’s meaning, which (originalism asserts) was fixed at the time the Constitution was adopted.”22

---

18 See U.S. CONST. Art. V (stating that proposed amendments “shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress”).
20 See U.S. CONST. Art. V (stating that Congress “on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments”).
22 STONE ET AL., CONSTITUTIONAL LAW 722 (7th ed. 2013). Most of its current adherents—including Justice Scalia—focus on ascertaining the “original public meaning” of the Constitution,
As the uncertainties regarding implementation of an Article V convention have not been addressed by the Court,\(^{23}\) even those skeptical of originalism should be receptive to the historical modality of constitutional argument.\(^{24}\) Thus Part II explores the history surrounding the adoption of the final language of Article V’s Convention Clause, and elucidates the two purposes of Article V’s convention provision. Part II-A briefly describes the anti-Federal-tyranny function of the Convention Clause; a topic already well canvassed by scholars. While widely-touted, this purpose does not fully explain the article’s reliance on the convention method, as opposed to allowing states to propose amendments themselves. Part II-B explicates the anti-corruption force of Article V through documents from the Constitutional Convention, records from state ratifying conventions, and passages from the most influential founding-era legal treatise. This purpose explains why the convention method was chosen: it empowers a convention of the people (embodying participatory values) who can then represent themselves; such effective representation is presumptively lacking if Congress fails to propose desired constitutional amendments.

Incorporating a fuller understanding of the history behind Article V’s Convention Clause—namely, that its language was motivated by the two distinct purposes of protecting states from a power-grabbing federal government, and empowering the people if the federal government became corrupt—has implications for many of the aforementioned implementation “questions” surrounding Article V, but Part III confines itself to analyzing the issue of candidate selection. Part III-A shows that only random selection of delegates effectuates both purposes of Article V, while Part III-B demonstrates that if Congress provided for random selection of delegates to a convention, the legislation could very well withstand constitutional challenge. This result is contrary to previous analyses, which have recognized only the anti-tyranny function of Article V, and thus rejected federal control over delegate selection out of hand.

II.  THE DUAL HISTORICAL FUNCTIONS OF ARTICLE V’S CONVENTION CLAUSE

\(^{23}\) See Gunther, supra note 19, at 2 (stating that commentators on Article V’s Convention Clause operate in the “refreshing realm of constitutional interpretation unguided (and unobscured) by judicial pronouncements”).

Article V’s language reflects two historical functions: protecting against federal tyranny and empowering the people to combat corruption at the federal level. This Part will aim to clarify this two-fold historical context that produced the final language of Article V.

Section A first summarizes the federalism concerns that motivated a non-Congressional path to amending the Constitution—explaining why relying on “two thirds of both houses [of Congress]” was insufficient—then highlights the shortcomings of this explanation. Section B demonstrates that, in addition to protecting against federal tyranny over the states by relying on state applications, Article V represented a participatory mechanism to combat a corrupt or unresponsive federal government by providing for a convention.

A. THE ANTI-TYRANNY INTEREST OF THE CONVENTION CLAUSE

The Convention Clause protects against federal tyranny by using state applications as a trigger and mandating state-level ratification of amendments. Framers concerned with preserving states’ rights against the new national government demanded a way to amend the Constitution that bypassed Congress. These concerns were present from the very beginning of the Constitutional Convention: Edmund Randolph’s Virginia Resolutions proposed making Congressional consent unnecessary for constitutional amendment.25 Randolph expressed a concern with exclusive Congressional control over the amending process: “they may abuse their power, and refuse their consent on that very account.”26 George Mason forcefully concurred: “[i]t would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.”27

These concerns required the creation of a non-congressional route to amendment; the Convention Clause serves that role. Upon sufficient applications, Congress “shall” call a convention, and the states—not Congress—possess ratification powers (although Congress is able to choose whether states shall ratify through convention or through their legislatures).28 Professor Van Alstyne—echoing what appears to be the

---

26 1 The Records of the Federal Convention of 1787, at 203 (Max Farrand ed., 1911) (Notes of J. Madison, June 11, 1787)
27 Id.
28 See U.S. Const. Art. V.
consensus view of Article V’s function—states that the Convention Clause provided a remedy for “Congress’ usurpations of power in derogation of states rights or of personal liberties.” This view of Article V helped Federalists mollify concerns of tyranny during the ratification debates: Alexander Hamilton relied on Article V’s mandatory provision for a constitutional convention in claiming that, “We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.”

While the anti-tyranny justification adequately explains why Congress must call a convention upon the application of state legislators, and why state ratification is necessary, it does not explain why a convention is the chosen method. If this were the sole justification for Article V, there would be no need for the people, as opposed to the states, to be involved in the amending process. The next section will review the historical record and demonstrate the presence of another interest that the Convention Clause protects, an anti-corruption interest rooted in participatory values.

B. THE ANTI-CORRUPTION FUNCTION OF THE CONVENTION CLAUSE

The Convention Clause protects against a corrupt or unresponsive federal government by empowering a national convention of the people to propose amendments. This section will explore the anti-corruption interest served by Article V’s Convention Clause, which is related to, but independent of, the anti-tyranny interest. This interest is complex, but is most accurately described as anti-corruption—corruption in the Founding-era sense of the word, not in the bribery sense of the word. This understanding of corruption operates at both the institutional and individual level, and can involve completely legal conduct; for example, Congress could be corrupt if the institution developed an improper dependence on campaign contributions as opposed to votes.

29 See, e.g., David Castro, A Constitutional Convention: Scouting Article Five’s Undiscovered Country, 134 U. PA. L. REV. 939, 949-50 (1986) (stating that the ratifiers of the Constitution viewed the convention process as “offering the states the power to protect themselves from the evils of a central government”); Robert G. Natelson, The Article V Convention Process and the Restoration of Federalism 36 HARV. J.L. & PUB. POL’y 955, 957 (2013) (stating that the purpose of Article V’s convention provision was to provide states with a mechanism to curb the Federal government’s “excesses and abuses”).
33 See id. at 7.
Within the context of Congress, this section’s use of the word corruption means *a failure of representation*. This definition fits within the historical definition of corruption described previously,34 and is influenced by John Hart Ely’s theory of representation-reinforcement.35 One way in which Congress fails to represent the people is through developing an improper dependency—as an example, Professor Lessig has documented Congress’s dependence on campaign contributions, which conflicts with its intended dependency on votes.36 That campaign contributions create a competing dependency and thus a corrupting failure of representation does not preclude the possibility of additional sources of corruption.

The history of changes to Article V’s text (prior to the final version), statements made at state ratifying conventions, and passages from the chief American legal treatise of the Founding Era demonstrate that Article V’s Convention Clause functioned to allay fears of a Congress that failed to represent the people: within the convention, the people would represent themselves.

1. The Evolution of Article V’s Text

Article V’s final language was far from inevitable. After Randolph’s initial resolution calling for a way to amend the Constitution without congressional assent, the Framers debated whether a route around Congress was necessary,37 and even whether an amendment provision of any sort was needed.38 After Elbridge Gerry and Alexander Hamilton expressed reservations about the proposed language of the amending provision (then Article XIX),39 James Madison proposed a new draft of Article V, the most persuasive interpretation of which is that it “would have permitted two-thirds of the state legislatures to propose amendments to the Constitution[.]”40

34 See generally id.
35 See infra notes 65 through 71 and accompanying text.
36 See generally LAWRENCE LESSIG, LESTERLAND (2013).
37 Lash, supra note 25, at 202-03.
39 Lash, supra note 25, at 203.
40 Dellinger, supra note 25, at 1628 (emphasis supplied). See also Gunther, supra note 19, at 16 (discussing “Madison’s proposal to make two-thirds of states co-equal with Congress in proposing amendments.”); cf. Van Sickle, supra note 38, at 25-26 (describing the draft as providing that “the states could apply to the national legislature for amendments they desired, rather than for a convention, with the national legislature then being required to actually propose the desired amendments”) (emphasis supplied).
The alternative interpretation posits that Madison’s proposal provides for “congressional monopoly of the proposing mechanism.” The proposal’s text stated that Congress shall—when two-thirds of both houses agree, or upon the application of two-thirds of states’ legislatures—propose amendments to the Constitution. Again, the alternative interpretation understands language as giving Congress control over proposals—for example over specific language in an amendment—while the interpretation this paper adopts sees Congress’s role as ministerial, merely passing on states’ proposed amendments for ratification once the two-thirds requirement is met. The alternative interpretation of Madison’s proposal would mean that it would provide no federalism check: giving Congress absolute discretion over the wording of all amendments would empower the feared “ambitious and clever people” to not only “twist” the Constitution’s language, but also to cherry pick each new word before it could be added. Madison is far too astute to have put forth such a proposal, and certainly within the context of the debate a state-empowering proposal from Madison seems much more plausible.

Properly understood, then, Madison’s proposed provision would have provided a mechanism responsive to concerns about national power encroaching on the states. The Committee of Style incorporated this proposal into a draft of Article V, but the draft was rejected. Instead, Gouverneur Morris and Elbridge Gerry’s proposal, replacing the right of states to propose amendments with the right to petition Congress for a national convention (which Congress would be obliged to call after two-thirds of states petitioned), was approved.

When confronted with this historical development, two questions present themselves: first, why was Madison’s proposal rejected? And second, why was a convention method approved instead?

The rejection must have resulted from at least some weighing of the costs and benefits of each approach, because the Framers were aware of both practices—some contemporaneous state constitutions provided for state legislatures to propose amendments, while others utilized conventions: out of the eight state constitutions with self-amending

41 Lash, supra note 25, at 204 n.50. (Van Sickle’s approach is confusing, both recognizing the mandatory nature of Congress’s duty upon state applications, but then claiming Congress would have had exclusive proposing authority. See Van Sickle, supra note 38, at 25-26.)
42 Id. at 204.
43 Natelson, supra note 29, at 956 (discussing anti-Federalist arguments against ratification).
44 Lash, supra note 25, at 205.
45 Dellinger, Recurring Question, supra note 25, at 1628. See also Gunther, supra note 19, at 16 (“The Philadelphia convention did not accept Madison’s proposal to make two-thirds of states co-equal with Congress in proposing amendments.”).
46 2 FARRAND’S RECORDS, supra note 26, at 629-30. See also Dellinger, supra note 25, at 1628-29 (describing same); Lash, supra note 25, at 205-06 (same).
provisions written in the first twelve months after the Declaration of Independence, five employed the convention method, and three relied on the legislature. Hamilton (a few days earlier) had expressed a concern about the dangers of allowing state legislatures to both propose and ratify amendments that would serve only to enhance provincial self-interest; to him, the absence of a national body was troubling. Roger Sherman then explicitly objected to The Committee of Style’s proposal (empowering the state legislatures to propose amendments) seemingly along the Hamiltonian lines that “three fourths of the states might be brought to do things fatal to particular states.” Sherman was particularly worried about the fate of the small states, and he proposed adding to Article V an explicit federalism guard: a restriction that “no State shall be affected in its internal police, or deprived of its equality in the Senate.” Sherman’s proposal was defeated, although shortly thereafter there was a successful compromise proposal which resulted in Article V’s final language with regard to prohibiting certain amendments: equal suffrage in the Senate was enshrined, but there was no reference to internal police powers. Thus Article V could have—but did not—explicitly protect substantive federalism values.

Essentially, then, Madison’s proposal was rejected because it was too state-centric; state legislatures did not necessarily serve the people’s interests. At least two scholars take this position, arguing that the change in language was responsive to objections that certain states would ban together and abolish other states, which was just the sort of provincial

---

47 Lash, supra note 25, at 199-200. Pennsylvania’s Constitution actually provided for a “Council of Censors,” elected every seven years and empowered to call a convention upon a two-thirds vote, but the Council only met twice, and each time failed to reach two-thirds.
48 Hamilton made the relevant comments during deliberations on September 10, 2 FARRAND’S RECORDS, supra note 26, at 558, and the Committee of Style’s proposed Article V language—with state legislatures empowered to propose amendments—was presented on September 15, id. at 629.
49 See id. at 558 (stating that “[the State Legislatures will not apply for alterations but with a view to increase their own powers”) (notes of J. Madison).
50 Id. at 631.
51 Id. at 630.
52 Id.
53 Id. at 631.
54 See U.S. CONST. Art. V.
55 Vikram Amar writes that, in addition to taking away the power of state legislators to propose amendments directly, the final text of Article V also “allowed Congress to cut state legislatures out of the ratification process.” Vikram David Amar, The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?, 41 WM. & MARY L. REV. 1037, 1057 (2000).
56 See Dellinger, supra note 25, at 1629; Gunther, supra note 19, at 16 (stating that the insertion of the convention language “was plainly a mechanism to still the fears of those who thought that state legislatures might have power to dictate the terms of proposed amendments on their own.”). The convention also served “to calm the anxieties of those who feared that Congress would have
state self-interest that Hamilton was worried about. The Article V convention was not susceptible to this concern because it called for a national convention, which would temper local interests. Walter Dellinger argues that the change in Article V’s text—from allowing states to propose amendments, to only permitting states to petition for a convention—shows the importance of who can propose constitutional amendments: “the power to propose amendments was lodged in two national bodies, Congress and a convention.” Dellinger describes the convention procedure as a historical compromise that “avoid[ed] both the problem of congressional obstruction of needed reforms and the problem posed by parochial state self-interest.” This analysis rings true because Article V’s convention mechanism was “free of both the possible self-interest of Congress and the potential parochialism of the state legislatures.”

Founding-era political philosophy and constitutional theory further explain the change in Article V’s language. Specifically, they help show why a national convention was Article V’s chosen means of amendment.

A “Republican view of the people[,] . . . less trusting of existing institutions,” was responsible for the inclusion of the convention clause. At the time of Article V’s drafting, conventions enjoyed a “status as [] extra-institutional, and therefore super-legitimate expression[s] of the people themselves.” Article V’s Convention Clause is meant to empower the people qua the people; it is not solely a mechanism for states to check federal government power. Not everything in the Constitution is of the ambition-checking-ambition sort: “If the view of society-as-faction was undue control over proposed amendments emerging from the state-initiated route,” Gunther, supra note 19, at 16.

57 See Dellinger, supra note 25, at 1629. Walter Dellinger argues that the change in Article V’s text—from allowing states to propose amendments, to only permitting states to petition for a convention—shows the importance of who can propose constitutional amendments: “the power to propose amendments was lodged in two national bodies, Congress and a convention.” Dellinger, supra note 25, at 1626.
58 Id. at 1630. Dellinger uses this point to argue that a state application cannot “limit” a convention to the consideration of a single amendment. See id. at 1632 (stating that “state legislatures should not be given authority to propose amendments without the involvement of some national body in the formulation of such amendments.”); but see Van Alyster, supra note 30, at 993-94 (arguing that Dellinger accords too much weight to the change in language and that “a national convention assembled as a deliberative body”—even if restricted to a particular proposal—is a sufficient check on state interests).
59 Dellinger, supra note 25, at 1626.
61 Lash, supra note 25, at 230. Lash views the Constitution more broadly as motivated by a mixture of two competing political theories.
62 Id. at 224. Lash notes that “Madisonian notions of politics-as-faction played a far greater role in the 1780’s than in 1776.” Id. at 225 n.182. This evolution is relevant because Lash uses opposition to calls for a second Constitutional convention to highlight both theoretical and practical worries at the time. See id. at 221-28.
integrated into the Constitution in its structured separation of powers, so too was the Republican ideal of a people capable of acting in the interest of all on certain great and extraordinary occasions.” The latter is expressed in the Convention Clause, which “assumes the people are just as capable as their institutions in wielding extraordinary power in the name of the common good.” (This view is especially pertinent to the candidate selection issue discussed in Part III).

Constitutional theory further supports recognizing Article V’s anti-corruption function. Article V’s Convention Clause fits comfortably within John Hart Ely’s theory of representation-reinforcement. Although it protects federalism values, there is more: the founding generation’s revolutionary philosophy about government “influenced their reading of Article V[.]” and central to this conception was the idea that “the people were the foundation of all governments, and the individual was the essential political unit.” It follows that Article V serves the representation-reinforcing value of the Constitution by providing a mechanism through which “to ensure that the federal government represents the people[.]” Article V ensures the people’s participation through the Convention Clause; it “provides the people with the ultimate voice in their government—the ability to change it.” Again, this value is distinct from the state-protecting value of Article V’s convention provision.

---

63 Id. at 230.
64 Id.
65 See generally Castro, supra note 29, at 941-47 (discussing J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)).
66 Id. at 955.
67 Id. Castro employs Gordon Wood’s work to explain how the American Revolution “gave the American people as a whole a sense of their own power.” Id. at 954-55 (discussing G. Wood, THE CREATION OF THE AMERICAN REPUBLIC 383 (1969)).
68 Id. at 947.
69 Cf. Gunther, supra note 19, at 6 n.14 (referencing Alexander Bickel’s “statement that a convention must have a real opportunity to deliberate, debate and compromise.”) (citing Federal Constitutional Convention: Hearings on S. 2307 Before the Subcomm. On Separation of Powers Comm. on the Judiciary, 90th Cong. 233 (1967)); id., at 18 (stating that “the historical background as well as the constitutional text” weigh in favor of a “convention capable of considering a broad range of issues [and] capable of determining its own agenda”). Gunther’s comments suggest an interest in the people actively participating in a deliberation about what changes to the Constitution would benefit the country.
70 Castro, supra note 29, at 957.
71 Castro ends up advocating a hybrid of state and federal control over the convention. Although Castro concludes that states initially command the conventions, he uses the fourteenth amendment to justify (federal) judicial review of “states’ article V activities[,]” and suggests that “the Court should protect the procedural and participatory values . . . to issues arising under article V[,]” Id. at 952, 957. Because article V embodies participatory values, it should “be susceptible to attack under the fourteenth amendment should it stray from the standards of
A related interpretation is that the Convention Clause serves the anti-corruption principle of the Constitution. If the federal government is not corrupt, it will propose amendments desired by the people, but if the government is corrupt, then Article V’s Convention Clause provides a safeguard, ensuring the people’s ability to participate.

Article V’s anti-corruption potential was relevant during the Philadelphia convention, motivating the final “convention” language; it also accords with the Founders’ political philosophy and modern constitutional theory. The next section will show that the ability to counteract congressional corruption was also used by proponents of the Constitution in the state ratifying debates.

2. State Ratifying Conventions

Although Article V was not an active topic of debate in all state ratifying conventions, the discussions in Massachusetts, North Carolina, and Virginia provide evidence that members of the public also valued the anti-corruption potential of the Convention Clause, to be used if Congress was failing to represent the people’s views.

During the Massachusetts ratifying convention, Article V was read aloud. The first comment after the reading, by Rufus King, celebrated its ability to “correct any abuse” of the national government, vocalizing the federalism value of the convention option. Next, Dr. Charles Jarvis also endorsed the Convention Clause, first repeating King’s reason, but then discussing Article V’s potential to cure a failure of representation: “If, in the course of its operation, this government shall appear to be too severe, if [Congress] shall become too languid in its movements, here, again, we have a method designated, by which a new portion of health and spirit may be infused into the Constitution.”

Characterizing Congress as “languid” is representative democracy. This essay takes no position of judicial review of article V procedures.

---

72 See generally Zephyr Teachout, The Anti-corruption Principle, 94 CORNELL L. REV. 341 (2009) (showing that the Framers were deeply concerned with preventing corruption, and that this concern influenced several provisions in the Constitution). Teachout does not discuss article V.
73 Again, in the broader, Founding-era sense discussed previously. See supra notes 32-34 and accompanying text.
74 Lash, supra note 25, at 211 (stating that “[t]here is no record of discussions regarding article V in the state ratification conventions of Delaware, New Jersey, Georgia, Maryland, or New Hampshire.”).
75 See 2 ELLIOT’S DEBATES, supra note 13, at 116.
76 Id.
77 Id. at 116-17.
78 The definition of languid appears to have remained unchanged in the intervening years. See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 420 (1828) (defining “languid” as “faint; weak; feeble; dull; heartless.”).
in sharp contrast to anti-Federalist worries of a voracious national
government. Further, the remedy Jarvis foresees for such a problem—
infusing “health and spirit into the Constitution”—suggests the need for a
convention that produces new, creative ideas, not merely one that re-
balances the power allocation between federal and state governments.

Rev. Samuel Niles, responding to anti-Federalist concerns about
congressional control over elections—especially over the location of House elections—employed Article V’s Convention Clause:

As to Congress fixing on an inconvenient place [for voting for
Representatives], let us suppose the worst. Suppose they fix on
the most inconvenient places for election,—it will then be
considered as an abuse, and the people will call a Convention and
amend the Constitution. What greater security can we wish for?

While Niles’s comments use the “abuse” language of the tyranny rationale, he is referring not to an incursion of state prerogatives, but to a failure of representation: if the people must travel to “the most inconvenient places” for elections, the system of elections would be corrupted. The fear of difficulty in voting—especially voting for House representatives—speaks to the people’s interest in ensuring Congress represents them, not a concern about state power.

In North Carolina, James Iredell (later to serve on the Supreme Court) portrayed Article V’s convention provision as an antidote for a Congress that was out-of-touch with the public’s wishes, stating that Article V provides a mechanism for proposing amendments that are ignored by Congress but are “generally wished for by the people.” Iredell’s purposive analysis of Article V does not depend on an improper allocation of power between the federal and state governments, or even a scheming House of Representatives, but rather merely a disconnect between Congress and its constituents: Article V provides a way for the

79 See, e.g., Natelson, supra note 29, 956 (describing the anti-Federalist worry that “clever” people would “twist” the Constitution’s language “to justify the seizure by the central government of enormous power”) (emphasis supplied).
80 See U.S. CONST. Art. I § 4 (“The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.”).
82 E.g., WILLIS P. WHATRICH, JUSTICE JAMES IREDELL 92 (2000).
83 4 ELLIOT’S DEBATES, supra note 13, at 177. Iredell has also been credited with discussing Article V as a remedy “if Congress proved unresponsive to the people’s desire to change.” Castro, supra note 29, at 953.
people to propose amendments that are important to them, but not to their elected representatives (thus Iredell’s most pressing concern with a convention would likely be that its delegates do represent the views of the people, which is relevant to Part IV).

In Virginia, Edmund Pendleton, after describing the federal government as ultimately premised on the people’s (as opposed to the states’) consent, predicted that if Congress were to frustrate potential amendments “from motives of self interest,” then “we [referring to “the people”] will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse[,]” and punish the offending representatives. It is not the states assembling in a convention, or the states’ representatives assembling, but the people. Patrick Henry—expressing a similar worry to the one to which Rev. Samuel Niles in Massachusetts responded—predicted a failure of representation resulting from federal control over elections: he inveighed against “the danger of referring the manner of election to Congress. . . .[which] will impair the popular weight in the government. . . .Congress may tell you that they have a right to make the vote of one gentleman go as far as the notes of a hundred poor men.”

Henry elucidated fears of a corruption of representation. Although it did not assuage him, Article V’s Convention Clause did provide a potential remedy for his concerns.

The Convention Clause’s anti-corruption potential informed state ratification debates. As the next section will show, it also informed a prominent Founding-era legal scholar’s views, and made it into his influential treatise.

3. Legal Treatise

While not a Framers, Saint George Tucker spoke with authority on constitutional issues to a turn-of-the-century legal audience.

---

84 Lash suggests that the discussion about article V was most illuminating in Virginia. Lash, supra note 25, at 212 (“The Virginia convention provides the sole recorded instance of sustained discussion regarding Article V.”) While the discussion at the Massachusetts convention was also informative, Virginia’s dialogue had the benefit of strong anti-Federalist views providing balance. 85 3 ELLIOT’S DEBATES, supra note 13, at 37 (emphasis supplied).

86 But see Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 TENN. L. REV. 693, 739 (2011) (stating that “[t]he view that amendments conventions were assemblies of equal states persisted after the Constitution was ratified: They were referred to as ‘federal conventions’ and ‘conventions of the states,’ rather than as conventions of the people”).

87 See supra notes 80-81 and accompanying text.

88 3 ELLIOT’S DEBATES, supra note 13, at 175.

89 And according to Robert Natelson, not technically a Founder. Natelson defines several terms common in Constitutional scholarship:
He was first an influential writer, demanding American commercial independence from Britain, and motivating Virginia’s general assembly to adopt a resolution calling for a conference among the states (the Annapolis conference).\textsuperscript{90} Virginia nominated him as one of its delegates.\textsuperscript{91} During this conference—held in Annapolis, Maryland, during September 1786—Tucker took an active role in its deliberations (although admittedly there is a “paucity of records”).\textsuperscript{92} The members of this conference unanimously signed a call for a further convention to overhaul the Articles of Confederation.\textsuperscript{93} The “communique” was written by Alexander Hamilton, and George Washington concurred with its sentiments.\textsuperscript{94} This call resulted in the Constitution-producing Philadelphia convention.\textsuperscript{95}

Tucker was also intimately connected with many drafters of the Constitution, as well as Congressmen, through personal relationships.\textsuperscript{96} He was a renowned legal scholar,\textsuperscript{97} an expert on American constitutional issues, and a law professor at a time in which formal programs of legal

The Framers were the fifty-five men who drafted the Constitution at the federal convention in Philadelphia, between May 29, 1787 and September 17, 1787. The Ratifiers were the 1,648 delegates at the thirteen state ratifying conventions held from November, 1787 through May 29, 1790. The Federalists were those participants in the public ratification debates who argued for adopting the Constitution. Their opponents were Anti-Federalists.

In this paper, the term Founders includes all who played significant roles in the constitutional process, whether Framers, Ratifiers, Federalists, or Anti-Federalists. Also among the Founders were the members of the Confederation Congress, 1781–89, and the members of the initial session of the First Federal Congress, 1789.

Natelson, Proposing Constitutional Amendments, supra note 86, at 698. Although his definitions are reasonable, I would accord more flexibility with the term “Founder”: relying on Jefferson’s reference to “the living generation” as encompassing “nineteen years,” see supra note 15, I would include prominent political-legal figures and their writings in the first nineteen years after the Constitution was drafted; as Tucker’s commentaries were published in 1803, see infra note 107, they should qualify as the legal analysis of a Founder.

\textsuperscript{90} CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804, at 49-50 (1971).

\textsuperscript{91} Id. at 50.

\textsuperscript{92} Id.

\textsuperscript{93} RON CHERNOW, WASHINGTON: A LIFE 517-18 (2010).

\textsuperscript{94} Id. at 517.

\textsuperscript{95} See AKHIL AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 254 (2005) (“The Philadelphia Convention itself had been prompted by an earlier interstate conference held in 1786 in Annapolis”).

\textsuperscript{96} See CULLEN, supra note 90, at 142-43 (describing friendships and familial relationships).

\textsuperscript{97} Id. at 118.
study were “rare and novel.” Tucker based his lectures on Blackstone’s Commentaries, supplementing his own analysis of the American legal system. Delivering three hour lectures several times a week from 1790 to 1797, he even attracted students from surrounding states—one of Kentucky’s senators sent his son to study under Tucker. He published his masterwork, annotations on Blackstone’s Commentaries, in 1803. Many lawyers utilized “Tucker’s Blackstone” as a reference work, citing it in their arguments to the Supreme Court. The Court itself cited Tucker’s Blackstone in two majority opinions, and dissenting justices have additionally cited it several times. In fact, until the rise of Joseph Story as a legal scholar in 1827, Tucker was “the most frequently cited commentator” on the Constitution.

In his annotations to Blackstone’s Commentaries, Tucker discussed the “two different modes” of Article V amendment, and noted how Congress had already employed its powers to propose amendments (the Bill of Rights). He predicted that the convention method “will probably never be resorted to, unless the federal government should betray symptoms of corruption, which may render it expedient for the states to exert themselves in order to the application of some radical and effectual remedy.” Tucker used similar language when discussing the Constitution’s Emoluments Clause, endorsing its prohibition because “Corruption is too subtle a poison to be approached, without injury. Nothing can be more dangerous to any state, than influence from without, because it must be invariably bottomed upon corruption within.”

Tucker’s comments emphasize the dual nature of Article V’s Convention Clause. The reference to “symptoms of corruption” evokes a degradation of Congress’s original function, and Tucker’s other reference to corruption—describing it as a very “subtle [] poison”—shows that his

---

98 Id. at 130.
99 Id. at 119.
100 Id. at 120-23.
101 Id. at 158-60.
102 See Lash, supra note 25, at 229 (referring to Tucker’s as a “widely used edition of Blackstone’s Commentaries).
103 See CULLEN, supra note 90 at 162-63.
104 Terrett v. Taylor, 13 U.S. 43, 47 (1815), and Buckner v. Finley, 27 U.S. 586, 591-92 (1829).
105 CULLEN, supra note 90, at 163 (citing ELIZABETH BAUER, COMMENTARIES ON THE CONSTITUTION 346 (1952)).
106 Id. at 163 (citing BAUER, supra note 105, at 347-354).
108 Id.
110 ST. GEORGE TUCKER, supra note 107, at 295.
concern is of a different kind than one solely concerned with usurpation of states’ rights. His reliance on “the states [exert[ing]] themselves” is consistent with this analysis: Article V does require action of the states before a convention can be called. Tucker did not define the convention’s desired outcome in terms of states exerting themselves to restore their proper role, enhance their own power, or reduce the federal government’s. Instead, to properly respond to a Congress that “betray[s] symptoms of corruption,” the convention must serve as a “radical and effectual remedy.” This description clarifies two expectations regarding the convention: it must be radical, because a sharp break from the status quo is necessary, and effectual, suggesting an openness to unusual means that produce the desired results, namely, an end to Congress’s corruption.

III. IMPLICATIONS FOR THE MODE OF SELECTING DELEGATES TO A CONVENTION

There are many uncertainties over how a convention would operate,\textsuperscript{111} and the two purposes of Article V should inform their resolution. For starters, the application phase (when states submit applications to Congress, attempting to reach the required supermajority) itself triggers several uncertainties for Professor Laurence Tribe:

\begin{enumerate}
  \item Must both houses of each state legislature take part in making application for a convention to Congress?
  \item By what vote in each house of a state legislature must application to Congress be made? Simple majority? Two-thirds?
  \item May a state governor veto an application to Congress?
  \item When, if ever, does a state’s application lapse?
  \item May a state insist in its application that Congress limit the Convention's mandate to a specific amendment?
  \item Must a state's application propose a specific amendment, or may a state apply to revise the Constitution generally?
  \item By what criteria are applications proposing related but slightly different subjects or amendments to be aggregated or set apart?
\end{enumerate}

\textsuperscript{111} See, e.g., Laurence H. Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention, 10 PAC. L. J. 627, 638-39 (1979); but cf. Natelson, Proposing Constitutional Amendments, supra note 86 (purporting to resolve at least some of these issues based on historical practice).
h. May a state rescind its application? If so, within what period and by what vote?

i. What role, if any, could a statewide referendum have in mandating or forbidding an application or a rescission? ¹¹²

Given that there are further stages of the Article V convention process that raise more questions,¹¹³ and especially given that each of these questions raises additional questions regarding who could authoritatively answer each question—state legislatures, state voters (through, for example, a referendum), Congress, the Supreme Court, etc.—and by what standard of voting (for example, a two-thirds majority), this Article does not attempt to address them all. Instead, Part III confines itself to the single issue of delegate selection, demonstrating the importance of including the anti-corruption interest in the analysis. It will first explain why random selection best effectuates the historical purposes of Article V, and then will discuss the constitutionality of state and federal legislation effecting such a plan.

The delegates sent to an Article V convention wield enormous power; if, for example states attempted to call a “limited” convention, the delegates might claim “that a convention is entitled to set its own agenda.”¹¹⁴ Especially if the delegates were perceived as legitimate representatives, Congress would face serious difficulties—both political and constitutional¹¹⁵—if it attempted to provide an ex-post filter on the convention’s proposals. Although election is the standard answer for how delegates would be chosen, when one considers how delegates should be chosen, random selection presents itself as a very attractive option, given America’s current problems and the historical purposes of Article V.

A. THE MERITS OF EACH MODE OF DELEGATE SELECTION

There are (at least) three possible mechanisms for delegate selection: election, appointment, and random selection, done in such a way as to ensure “regional variation . . . based on a national sample.”¹¹⁶ Election is the presumptive choice, but raises serious prudential issues that could

¹¹² Tribe, supra note 111, at 638.
¹¹³ See id. at 638-640 (describing the questions raised in the delegate selection, convention, and ratification stages).
¹¹⁴ Gunther, supra note 19, at 8-9.
¹¹⁵ See id. at 9 (describing the “substantial constitutional counterarguments and equally substantial political restraints” if Congress vetoed a convention’s proposals).
¹¹⁶ Sanford Levinson, Afterword, Do We Really Believe Any Longer in the Possibility of “Government from Reflection and Choice”? A Dour Meditation on Our Present Situation, 67 MD. L. REV. 281, 290 (2007).
very well undermine the basis for calling an Article V convention; appointment (especially congressional appointment) is also deeply problematic; and random selection presents many advantages, although undoubtedly it would be controversial.

1. Election

“Popular election of delegates has been the assumption in most modern discussions of Article V constitutional conventions.”117 Two early Senate bills from the 1970’s, one of which the Senate passed in 1971, “give each state a number of delegates equivalent to the number of its representatives and senators, with two delegates elected on a statewide basis and the others by congressional district.”118 In contrast, Senator Hatch’s proposal of 1979 “leaves the manner of selection of delegates to the states[,]” and provides each state with the same number of representatives as it has in the House and Senate combined119 (although Hatch, in introducing the bill, predicted that states would “undoubtedly” implement popular elections).120

Elections are necessarily the presumptive choice for selecting delegates: elections are as American as apple pie. Unelected delegates might be perceived as illegitimate power-holders, especially because they would be wielding power more akin to (super-powered) legislators than the acceptably unelected federal judiciary. Public debates amongst potential delegates could function as a “marketplace of ideas,”121 with voters rewarding creative thinkers. The high stakes of the matter could even bolster voter turnout.122

On the other hand, Article V delegate elections, whether national or state-by-state, would suffer from several maladies. There are (at least) two inevitabilities of elections in twenty-first century America, and they apply equally to convention elections. First, they “would turn into a circus

---

117 Gunther, supra note 19, at 8 n.20 (citing, as an example, AMERICAN BAR ASSOCIATION SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974)).
led by single-issue groups.”\textsuperscript{123} And second, due to the outsize role of money “and the justified fear that participation in the convention could in effect be bought by those who wanted to protect their private interests,” the public would not trust the results.\textsuperscript{124} This lack of trust is fatal because arguably the most pressing reason for calling an Article V convention is that the system of elections is broken.

Madison discussed,\textsuperscript{125} in a roundabout way,\textsuperscript{126} problems with electing convention delegates in \textit{The Federalist No. 49}, lamenting the structural advantage of legislators, or at least legislator-types: a convention will most likely be called in response to legislative abuses, yet the legislators would perform well in an election: “The same influence which had gained them an election into the legislature, would gain them a seat in the convention.”\textsuperscript{127} It would only take some legislators-as-delegates to ruin the whole project, because they would be the most influential members.\textsuperscript{128}

Even if no legislators were elected to the convention, Madison predicted that the elections themselves would devolve into standard party-based political gamesmanship,\textsuperscript{129} and would promote special interests.\textsuperscript{130} This state of affairs was contrary to Madison’s wishes, which were consistent with a convention of the people that engages in true deliberation.\textsuperscript{131}

Elections are the presumptive method of delegate selection, but the historical purpose of Article V coupled with prudential considerations overcomes the pro-election presumption. Thus, this Part proceeds to analyze non-election alternatives.

\textsuperscript{123} Levinson, \textit{Do We Really Believe}, supra note 116, at 290.

\textsuperscript{124} Id.

\textsuperscript{125} The Federalist No. 49 is one of several Federalist papers with disputed authorship. Although the source cited for quotations from \textit{The Federalist} references Alexander Hamilton as the author of \textit{The Federalist No. 49}, see infra note 126, empirical linguistic analysis suggests that Madison was in fact the author of the disputed papers, including \textit{The Federalist No. 49}. See D. I. Holmes & R. S. Forsyth, \textit{The Federalist Revisited: New Directions in Authorship Attribution}, 10 LITERARY AND LINGUISTIC COMPUTING 111 (1995). This paper adopts the latter conclusion.

\textsuperscript{126} Madison’s essay analyzed Thomas Jefferson’s proposal for the Virginia constitution, which would call a proposing convention when two-thirds of two branches of government called for it. \textit{The Federalist No. 49}, supra note 15, at 278 (Hamilton). Madison’s analysis applies more broadly, as none of his analytical points are unique to a state government, and he assumed delegates would be elected, see id. at 281.

\textsuperscript{127} Id.

\textsuperscript{128} See id. (stating that the election of legislators would occur “pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned”).

\textsuperscript{129} See id. (predicting that the convention question “would inevitably be connected with the spirit of parties pre-existing, or of parties springing out of the question itself”).

\textsuperscript{130} See id. (predicting that the convention question “would be connected with persons of distinguished character and extensive influence in the community”).

\textsuperscript{131} See id. at 281-82 (stating that “the reason of the public alone, ought to control and regulate the government”) (emphasis supplied).
2. Appointment

Appointment of delegates presents an alternative to elections. Delegates could be appointed either by Congress, or by state legislatures.

Congressional appointment of delegates is deeply problematic because it undermines a crucial feature of the convention procedure: the “congressional-bypass goal of the state-application-and-convention process.” Article V’s Convention Clause is something of a safety valve, necessary only if Congress is not properly representing the country. If Congress is doing its job, then it will (consistent with all constitutional amendments to date) propose whatever amendments enough Americans desire. If over thirty-four states have submitted applications calling for a constitutional convention (the lowest number that would satisfy Article V’s requirements), it very likely means that there is dissatisfaction with what Congress is doing. Having Congress nevertheless handpick the delegates to such a convention would foment unrest among the populace, who would justifiably feel that they had no constitutional outlet to change the rules of the game. While electing different Representatives is generally the solution to frustration with government in our country, when the problem relates to the election process (or implicates Congress’s power), Article V’s Convention Clause can come to the rescue. But, such is not the case with congressional appointment of delegates.

State legislative appointment is less flagrantly antithetical to Article V’s purposes. State legislatures are certainly better positioned to appoint delegates willing to seriously reform Congress, because doing so does not implicate their self-interest. However, such appointments would nonetheless sit in tension with Hamilton’s concern of state aggrandizement: surely, state legislatures would carefully select delegates “with a view to increase their [i.e., the state legislature’s] own powers.”

Appointment at either level has an incumbency bias towards the status quo: “appointing authorities will take care to name people resistant to any boat rocking that might challenge the power of those doing the appointing.” Again, this bias is particularly troubling when the convention process will only be resorted to if there is visceral frustration with the status quo.

3. Random selection

---

132 Natelson, Proposing Constitutional Amendments, supra note 86, at 740.
133 2 FARRAND’S RECORDS, supra note 26, at 558.
134 Levinson, Do We Really Believe, supra note 116, at 290.
There is a better way—one that is in fact not only consistent with the anti-tyranny and anti-corruption force of the Convention Clause, but also with the “dominant mode of thought” regarding representation in the Founding Era—that Representatives should be representative of the people, their “alter egos.” Randomization is “a powerful tool to implement this cross-sectional ideal,” meaning that it allows a representative body to look like, and have similar views to, the larger body politic. Especially in the convention context, when the premise is that Congress is not proposing amendments desired by the people, what better way to ensure the proposal of those amendments than by ensuring that the people—and not some subset of the people showered with special interest money—populate the convention?

There are several current amendment proposals that Americans desire. James Rogers discusses four hypothetical amendments that, during polling, garnered more than sixty-four percent public approval, but that would “adversely affect the power or interests of members of Congress.” I would add the changes in First Amendment campaign finance law discussed in Part I: American’s want to overturn Citizen’s United and outlaw Super PAC’s (or at least require disclosure of donors). This disconnect between the people and Congress is exactly what the Convention Clause was intended to remedy. It provides an outlet for “amendments that are perceived to be in the national interest by a significant percentage of the American population, but are detrimental to the interests of members of Congress.”

Once constituted, a convention composed of non-congressional Americans has real potential for creative, pragmatic solutions that a

---

135 Randomly selected delegates, as citizens of both their respective states and their shared country, would be perfectly positioned to mediate between federal and state power struggles.
136 See Amar, The People Made Me Do It, supra note 55, at 1053 (describing the Founding-era conception of state legislatures as “merely alter egos of the people”).
139 See supra notes 5-6 and accompanying text.
140 See supra note 138, at 1021.
141 See LARRY J. SABATO, A MORE PERFECT CONSTITUTION 11 (2007) (stating that “[a]ny fair reading of academic survey research or the news media’s opinion polling would lead one to conclude that at least two thirds, and arguably three quarters, of the American people are pragmatic, practical centrists”).
polarized Congress\textsuperscript{143} would not dream of. This advantage will almost certainly evaporate if delegates are elected instead of randomly selected.\textsuperscript{144}

Although there are elitist concerns about the capability of ordinary Americans to deliberate about constitutional issues,\textsuperscript{145} there are significant checks in the process to prevent any unwise amendments. First, to become part of the Constitution, a proposal emanating from a convention must be ratified by a supermajority of either state legislatures or state conventions.\textsuperscript{146} Second, the convention could be conducive to deliberation: in reviewing the work of James Fishkin, Levinson observes that Fishkin demonstrates that “ordinary people can reflect on important issues if treated with dignity and supplied with relevant information.”\textsuperscript{147}

Most importantly, randomness can produce trustworthy results. Random selection exemplifies notions of equality—everyone has an equal ex-ante chance of being selected.\textsuperscript{148} More than twice as many Americans would trust a jury to give them a fair verdict than would trust a judge.\textsuperscript{149} Randomization can have many beneficial effects similar to those attained when forcing people to make decisions behind a “veil of ignorance,” such as minimizing “corruption or outright bribery.”\textsuperscript{150} The Framers’ perhaps implicit decision to reject randomization for congressional elections was

\textsuperscript{143} See, e.g., Keith Poole, \textit{Graphic Picture of a Polarized Congress}, UGA RESEARCH, at 34-35 (Spring 2012), available at http://issuu.com/ugaresearch/docs/ugaresearch_sp12 (describing a statistical procedure using voting records to estimate ideological positions of members of Congress; concluding “both parties have become more ideologically polarized in the last [forty] years and “are [each] ideologically homogenous and distant from one another.”).

\textsuperscript{144} Cf., e.g., LESSIG, LESTERLAND, supra note 36, at 329-380 (discussing the relationship between campaign finance and resulting pattern of polarization); Eric Heberlig et al., \textit{The Price of Leadership: Campaign Money and the Polarization of Congressional Parties}, 68 \textit{THE J. OF POLITICS} 992 (2006) (arguing that the practice of fundraising helps explain Congress’s polarization).

\textsuperscript{145} See, e.g., Levinson, \textit{Do We Really Believe}, supra note 116, at 292 (discussing his seminar students’ view that most people are “idiots” and thus random selection is not a desirable method for an Article V convention).

\textsuperscript{146} See U.S. CONST. Art. V (requiring three-fourths of either state conventions or state legislatures to ratify a proposed amendment); but see SANFORD LEVINSON, \textit{Framed: America’s 51 Constitutions and the Crisis of Governance} 343 (2012) (discussing his agreement with Akhil Amar’s argument that a national referendum would suffice for ratifying proposals from a convention).

\textsuperscript{147} Levinson, \textit{Do We Really Believe}, supra note 116, at 293 (discussing JAMES FISHKIN, \textit{Democracy and Deliberation: New Directions for Democratic Reform} (1991)).

\textsuperscript{148} LEVINSON, supra note 146, at 125.

\textsuperscript{149} See \textit{THE HARRIS POLL} #9, at Table 6 (January 21, 2008), available at http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Just-Under-Three-in-Five-Americans-Believe-Juries-2008-01.pdf (reporting answers to the question of “who would you trust to give a fair verdict?”: twenty-three percent of respondents answered a judge, and fifty percent answered a jury).

\textsuperscript{150} Adrian Vermeule, \textit{Veil of Ignorance Rules in Constitutional Law}, 111 \textit{YALE L. J.} 399, 425 (2001). Vermeule notes that the analogy between randomizing and mechanisms that seek to attain “veil effects” is “very close.” \textit{Id.}
likely due to a desire for accountability, which motivated a system that allows voters to reward those who correctly represent them with reelection, and to replace those who do not.\textsuperscript{151} There would be no possibility, or need, for such accountability in a one-off convention—convention delegates would be more like jurors than Senators.

Although randomization might seem unrelated to the Constitution’s text,\textsuperscript{152} making rules to enforce randomization has “ancient roots in the constitutions of Greece, Rome, and European states of the pre-modern period; [and] surely at least some of the classically educated Framers were aware of at least some of these rules.”\textsuperscript{153} Currently, the government employs randomization in several capacities—many of them quite weighty—such as jury empanelment; juries in many states make decisions “of life or death”\textsuperscript{154} and sending people to fight in war.\textsuperscript{155} Additionally, randomization is used in the “selection of judicial panels within a larger circuit court, and lotteries awarding scarce administrative resources such as radio spectrum.”\textsuperscript{156}

While random selection might be an unexpected way to choose delegates, it would likely produce the most trustworthy results, and those most likely to serve the purposes of the Convention Clause: delegates would be best positioned to propose amendments helpful to America but detrimental to the interests of (the current) Congress.

\textbf{B. THE CONSTITUTIONALITY OF STATE AND FEDERAL LEGISLATION PROVIDING FOR RANDOM DELEGATE SELECTION}

The previous section argued that random delegate selection best effectuates the anti-corruption force of Article V. States should enact legislation providing for this mode of selection without raising any constitutional concerns. Absent such action by states, the question of Congress’s ability to enact such legislation becomes relevant. Here again it is imperative to consider both purposes of Article V. An exclusive focus on the anti-tyranny rationale leads to a conclusion that delegate selection must be solely a state prerogative. This section will show that when considering a congressional proposal for random delegate selection, as opposed to

\begin{footnotesize}
\begin{enumerate}
\item[151] Amar, supra note 137, at 1290.
\item[152] See Vermeule, supra note 150, at 425 (“In constitutional law, however, any randomization mechanisms must be wrung out of the existing rules through aggressive interpretation or attribution.”).
\item[153] See id. at 425 (citing Bernard Manin, The Principles of Representative Government 42-93 (1997)).
\item[154] Levinson, supra note 146, at 125.
\item[155] Levinson, Do We Really Believe, supra note 116, at 290 (stating that randomness was used in the late 1960’s Vietnam draft).
\item[156] Vermeule, supra note 150, at 424-25.
\end{enumerate}
\end{footnotesize}
congressional appointment, the historical argument is ambiguous—due to the Article’s dual nature—and thus the structural and prudential considerations discussed in the previous section counsel in favor of its constitutionality.

The very limited scholarly literature that addresses the issue of delegate selection has done so with an exclusive focus on who gets to decide the question—individual states or Congress—and has concluded that the power is lodged in the states. Natelson provides the most comprehensive historical treatment of the subject and argues that Article V delegate selection is exclusively a state power, and that congressional attempts to regulate it are unconstitutional. He bases his argument on Founding-era practices of federal conventions, in which “the states themselves were the participants.” Natelson has a state-centric view of delegate selection. However, in another section of his article, he expresses reservations about giving states too much control, because the Convention Clause is about more than state power:

One purpose of the state-application-and-convention process was to give state legislatures a role nearly co-equal to Congress as a promoter of amendments. Allowing states to dictate rules and language in their applications arguably serves that purpose. But a competing purpose was to ensure that the actual proposals come from a single deliberative body representing all, not only the applying, state legislatures. The text of the Constitution grants the convention, not the state legislatures, the ultimate power to propos[e] Amendments. The Framers could have drafted language permitting the states to propose amendments directly, but they did not.

I would add that the convention’s “single deliberative body” does not merely represent “all . . . state legislatures,” rather it represents all of the people. The fact that the Framers did not allow state legislatures to propose amendments suggests that allowing them to cherry-pick delegates might

---

157 PHILIP BOBBITT, Modalities, reprinted in MODERN CONSTITUTIONAL THEORY, supra note 24, at 2 (discussing prudential and structural Constitutional arguments as two of six accepted interpretive modalities).
158 See, e.g., Natelson, Proposing Constitutional Amendments, supra note 86, at 738-40; Rogers, supra note 138, at 1014-15 (arguing the historical purpose of article V mandates “the process for selection of delegates from each state [be] determined by the state legislatures.”).
160 Id. at 739.
161 The section discusses whether states can set explicit limits on conventions, for example by restricting the convention to an up-or-down vote. See id. at 742-47.
162 Id. at 743 (internal citations and quotation marks omitted).
also be objectionable, as would congressional appointment. However, if the mode were random selection, these concerns evaporate; while the idea of Congress appointing its favored convention delegates shocks the constitutional conscience, a congressional proposal providing for random selection is perfectly consistent with historical intent.

Robert Natelson highlights court opinions from various states invalidating voter initiatives that attempted to coerce state legislatures into petitioning Congress for a convention.163 These courts have emphasized Article V’s purpose of ensuring deliberation, specifically at the state legislature level.164 Professor Vikram Amar criticizes the reasoning of these courts, arguing that, “nothing in Article V prohibits coercive action by the people of a state against its legislators.”165 This development solidifies state legislative control over the decision to petition Congress (free from, for example, “financial penalties”166 or automatic “negative ballot language”),167 which might suggest an analogous level of control over delegate selection. Even Natelson admits that there are implementation issues that historical analyses leave unanswered and there is nothing inherently undesirable, or anomalous with the intent of the Framers in this uncertainty:

The issues that remain will be resolved as state lawmakers and other citizens invoke the process. Those issues will be resolved by mutual consultation and, perhaps in a few instances, by judicial decision. There is nothing unusual in this: As the Founders recognized, some constitutional questions can be elucidated only through practice.168

This is certainly the case with Article V conventions, as Madison himself had several important, and unanswered, questions about how such a convention would operate, which he expressed during the Philadelphia convention: after “remark[ing] on the vagueness of the terms” in the Convention Clause, Madison asked “How was a Convention to be formed? by what rule decide? what the force of its acts?”169 Natelson neglects to mention this apparent confusion on the part of Madison, which would seem

---

163 Id. at 746.
164 Id.
165 Amar, The People Made Me Do It, supra note 55, at 1041.
167 Id. (citing Gralike v. Cook, 191 F.3d 911, 925 (8th Cir. 1999), aff’d on other grounds sub nom. Cook v. Gralike, 531 U.S. 510 (2001)).
168 Id. at 750 (internal citations omitted).
169 2 FARRAND’S RECORDS, supra note 26, at 558.
to lessen the relevance of Natelson’s historical finding that “federal convention customs, practices, and protocols were fairly well standardized when Article V was written.”

Natelson’s analysis asks the right question with regard to the relevance of pre-Constitution multi-state convention practices: “was the [Article V] convention to be the same sort of entity that prior multi-government conventions had been?” His answer is yes, but the proof is unconvincing. Even if there was “a universally established model” for pre-Constitution conventions, the ratification of the Constitution of the United States created a fundamentally different world with regard to conventions because it empowered a sovereign over the states. Natelson argues that the burden of proof should be on those asserting that a convention called by Congress pursuant to Article V would be different than pre-Constitution multi-state conventions. However, after constitutional amendments further established the federal government’s direct relation to the people, and severely restricted states’ control over their citizens, a presumption in favor of state control over delegate selection is less reasonable, and analyzing the substance of Congressional legislation is more appropriate.

IV. CONCLUSION

Americans are suffering a crisis of trust. They do not trust their elected officials, believing them unrepresentative of their - as opposed to financial donors’ - interests. And their fears are justified. Fund-raising might be more common than vote-raising for Representatives. Part I illustrated this crisis, and explained that the Founders had planned for such periods of discontent by placing an amendment provision in the Constitution. Article V’s Convention Clause provides a mechanism through

---

170 Natelson, Proposing Constitutional Amendments, supra note 86, at 708. See also Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments”, 65 FLA. L. REV. 1, 67 (2013) (“The historical record on this point is nearly as clear as historical records ever are: The Founders contemplated an amendments convention fitting the universally-established model.”).

171 Natelson, Founding-Era Conventions, supra note 169, at 67.

172 Id. at 67-68.

173 Cf. Amar, The People Made Me Do It, supra note 55, at 1089 (stating that “the [Article V] proposing convention is a national entity that did not predate the Constitution”).

174 See Natelson, Founding-Era Conventions, supra note 169, at 68 (stating that nothing in the Constitution suggests that the convention procedure would deviate from accepted pre-Constitution norms).

175 See U.S. CONST. amend. XVII (providing for the direct election of senators).

176 See U.S. CONST. amend. XIV (restricting state power; providing Congress power to enforce provisions).

177 This paper takes no position on the applicability of the political question doctrine.
which non-congressional Americans can deliberate and submit petitions for constitutional amendments without Congressional assent.

As with nearly all constitutional provisions, Article V has a complicated history resulting from revisions based on arguments and counter-arguments. Part II showed that Article V was meant to protect both federalism and anti-corruption values. The latter value becomes apparent when prior drafts of Article V are considered alongside its final version.

When it comes to actually implementing the Convention Clause, the devil is in the details. After acknowledging that there are additional unanswered questions regarding the execution of such a convention, Part III considered the crucial question of delegate selection. It used the historical purposes of Article V, along with prudential considerations, to evaluate the three options for delegate selection. Overcoming the default presumption of elections, its analysis showed that a random selection of delegates would best effectuate the two historical purposes of Article V.

While state enactment of legislation providing for random selection of delegates would be most desirable—as it would clearly serve both purposes of the Convention Clause—federal legislation should also pass constitutional muster because of the strong anti-corruption and participatory values of a random process.
GIVING EFFECT TO FOURTH AMENDMENT

“EFFECTS”

DOMINIQUE CAAMANO**

The Fourth Amendment secures the people’s “persons, houses, papers, and effects” from unreasonable government intrusions. Every word of the Constitution must be given effect, but modern doctrine, in practice, strips the Fourth Amendment’s inclusion of “effects” of its intended scope and creates a precarious imbalance against the Amendment’s ability to protect individuals’ privacy interests through the ages. Although the Supreme Court has stated that the Fourth Amendment protects people, rather than places, the dominant modern interpretation of the Amendment makes it inapplicable in many contexts to persons, papers, and effects unless they are inside a house. The stripping of “effects” makes it so the Amendment only (a) protects individuals’ reasonable expectation of privacy in the contents of their personal property from unreasonable searches, and (b) protects individuals’ possessory interests in their personal property from unreasonable seizures.

This stripping of “effects” is particularly problematic in the context of the third party doctrine, which removes Fourth Amendment protection for things voluntarily conveyed to another person or business; with respect to individuals’ personal data records, including non-content information; and, because it removes the Amendment’s ability to adapt as modern society changes and technologies shift the ways in which government engages in surveillance and information gathering activities. But based on the Fourth Amendment’s text and principles, the founders and early constitutional adopters intended “effects” to protect the people’s privacy interests beyond those tethered to tangible personal property, both from unreasonable searches and unreasonable seizures.

The available evidence reveals that Fourth Amendment “effects” should be interpreted in its plain meaning—as the results of human action. The Amendment’s underlying principles do indeed require protecting individuals’ privacy and property-based interests. Construing “effects” as it was intended, therefore, restricts unreasonable government intrusions into individuals’ actions whether or not those actions result in the attainment of personal goods. As the historical interpretation of “effects” in this Article suggests, this construction also maintains the Fourth Amendment’s intended purpose as society and information technologies change.

INTRODUCTION .................................................................................................................. 87
I. GOVERNMENT INFORMATION GATHERING AND SURVEILLANCE
   PRACTICES ...................................................................................................................... 90
   A. The Information Age ............................................................................................... 91
   B. Past Government Abuses of Its Powers ................................................................. 94
   C. The Past Echoes in the Present ............................................................................... 97
II. THE FOURTH AMENDMENT ....................................................................................... 102
   A. Overview of Modern Fourth Amendment Case Law ........ 103

** Dominique Caamano is a 2014 graduate of the University of California, Berkeley, School of Law. Ms. Caamano will be clerking for the United States Court of Appeals for the District of Columbia during the 2015-2016 term. Many thanks go to several members of the Berkeley Law community, including Chris J. Hoofnagle, Professor Paul M. Schwartz, and Professor John Yoo for their guidance and encouragement.
INTRODUCTION

The drafters constructed the U.S. Constitution and the Bill of Rights—the oldest written national constitution still in effect—to survive the ages for “behind the words are postulates which limit and control.”1 Indeed, one reason We the People ordained and established the Constitution was to “secure the Blessings of Liberty [for] ourselves and our Posterity.”2 For this and other reasons, government’s law enforcement power is necessary and crucially important to ensuring individuals’ continued liberty, including the democratization of information and knowledge. But this power must also be checked, reviewed, and reassessed when it no longer serves to secure individuals’ liberty and instead controls individuals’ freedoms. Without continuously protecting the people’s inalienable and fundamental rights from unnecessary governmental

1 Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).
2 U.S. CONST. Preamble.
intrusions, we risk the people’s present liberty and that of future generations.

The Founders amended the Constitution in 1791 to include the Bill of Rights, which provided the Fourth Amendment to safeguard the people’s right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Modern law enforcement surveillance, information gathering, and data collection practices, however, risk unreasonably intruding upon the values underlying the Amendment’s protections. Although these intrusions are increasingly prevalent—such as the 2013 revelation of the National Security Administration’s collecting and sharing with other law enforcement agencies records of millions of Americans’ telephone communications, emails, texts, and other personal data—they are not new. History teaches that the executive or law enforcement power is subject to abuse, ultimately constricting individuals’ liberty.

At the same time, and just as problematically, modern Fourth Amendment case law fails to secure the “blessings of our liberty” and chips away at the Amendment’s term “effects,” instead of ensuring that the text withstands the test of time. In a number of decisions since ruling that the Fourth Amendment’s use of “effects” protects personal property, the Supreme Court has treated the Fourth Amendment as prohibiting government searches from unconstitutionally intruding upon citizens’ reasonable expectations of privacy in their personal effects. The Court has also treated Fourth Amendment “effects” as prohibiting government seizures from unconstitutionally interfering with their possessory interests in such effects.

This Article contends that, as a historical matter, the Court’s view of the Fourth Amendment is too narrow. It argues that “effects” had a broader purpose in the constitutional language and that its meaning was intended to be construed in its plain sense—that is, as the results or consequences of human actions. So construed, the Amendment’s use of “effects” secures individuals’ liberty-based interests, such as the fundamental rights of free speech, association, and the press—rather than limits it to physical items. As such, the Fourth Amendment served as a safeguard against government abuses of the powers it derived from the sovereign people for whom the government is meant to be a trustee.

This interpretation of the Fourth Amendment is not only simple, but also follows the available evidence concerning the circumstances surrounding the Amendment and its passage. This Article concludes that the framers and adopters of the Fourth Amendment intended “effects” to protect more than individuals’ interests in their tangible personal property; they intended “effects” to be plainly understood so that it could protect the

3 U.S. CONST. amend. IV.
people’s inalienable and fundamental individual interests in the results or consequences of their actions. It also concludes that the people’s right to be secure in their “effects” reflects the principle that each person has an equal right to life, liberty, and the pursuit of happiness, which encompass the “Blessings of Liberty.” Under this interpretation, the Amendment more inclusively protects these values—values that can embody personhood, liberty, and property-based interests, such as individuals’ rights in information and decisional privacy, the right to be let alone, free expression, and property.

This Article further concludes that history demonstrates a link between the First Amendment’s fundamental and inalienable rights and the Fourth Amendment, thereby securing the people’s “effects.” These conclusions may help clear away some of the presently limiting notions that the Fourth Amendment’s “effects” only secure personal property or tangible things from a seizure “when there is some meaningful interference with an individual’s possessory interest in that property.”

My historical analysis demonstrates a modern interpretative misunderstanding of the term’s use and shows that the Founders intended a broader scope of the Amendment’s protection than is now generally understood. But, as some argue, history is often told with facts twisted to serve a particular perspective. For this reason, some will find this historical interpretation based on newly examined evidence and facts related to the Fourth Amendment relevant while others will not. Although history is life’s teacher, I proceed with caution understanding that every story has multiple perspectives. It cannot predict the future, but history can help ensure that we correct past and present constrictions on individuals’ rights. Indeed, “[i]f we are to make of this a better world, we’ve got to go back and rediscover that precious value that we’ve left behind.”

This historical analysis alone does not answer questions about its relevance to life in the new millennium and the applicability to the modern Fourth Amendment, which the Supreme Court made applicable to the states in the mid-twentieth century. Therefore, this Article also suggests a way to move forward with an historical interpretation of “effects.” To provide modern context, it explores government agencies’ collection and use of individuals’ personally identifiable data to argue that the Fourth Amendment “effects” protect the people’s respective personal data records from unreasonable searches or seizures, especially when such intrusions implicate their associations, communications, or other liberty-based interests. By expanding beyond a connection to tangible property, we can

---

5 Martin Luther King, Jr., Rediscovering Lost Values, Sermon, delivered at Detroit’s Second Baptist Church (Feb. 28, 1954).
more plainly perceive the Fourth Amendment’s first principles, helping refo
focus the Amendment’s attention to protecting individuals’ inalienable and fundamental rights regardless of the physical nature of, or the technological means used for, unreasonable government surveillance and information gathering activities.

Part II of this Article provides a glimpse into the questionable use of the federal government’s law enforcement power through dragnet surveillance and information gathering practices in the twentieth and twenty-first centuries. Part III briefly summarizes the broad state of modern Fourth Amendment law, paying particular attention to the law on “effects” and the Court’s position on government access to and collection of personal information contained in private, third party records. It then discusses the methodology behind this Article’s historical interpretation. This section then analyzes the evidence supporting the conclusion that Fourth Amendment “effects” were originally intended to mean the results of human action. In so doing, this section also contends that “effects” more broadly protects the people’s fundamental and inalienable interests, which are also embodied in the Fourth Amendment and in other parts of the constitutional text. Part IV suggests the consequences that these historical conclusions might have today for modern Fourth Amendment law and uses an illustrative example to discuss an applicable analytical framework.

I. GOVERNMENT INFORMATION GATHERING AND SURVEILLANCE PRACTICES

In drafting the Bill of Rights, the Framers vehemently expressed the people’s fundamental and inalienable rights to associate, move and communicate. As the basic building blocks for innovation, individuals’ ability to freely communicate, associate and move inspire their research, advance the people’s knowledge, and help us attain gratification. Although new technologies that gather, analyze, and disseminate information have their benefits, such advancements have their siren call; these technologies lure law enforcement to encroach upon individuals’ liberty under the guise of domestic protection and national security. But the temptation to tap into newly available information gathering technologies isn’t new. History teaches us that surveillance grows as technology advances, even if such activities start in good faith. This first section of the Article attempts to demonstrate what history seeks to teach us by providing a brief overview of the current state of technology in order to discuss the breadth of government’s ability to collect, store, and analyze individuals’ personal communications data. The section then discusses the patterns of past federal government abuses of its power, and thus to conduct illegal and questionable information gathering and surveillance.
A. The Information Age

At this point, postmodern society has unequivocally entered “a world shaped by technology and fueled by information”—in other words, the Information Age. With approximately fifty-six percent of the adult population in the United States using smartphones, individuals and organizations, including the government, have better access to up-to-the-minute reports and information, business and personal associates, and varied news and services. But the current legal response to government information gathering and surveillance activity in light of these and other technological advances poses new challenges to protecting individuals’ rights to life, liberty, and the pursuit of happiness.

While law enforcement has always been able to access records from financial institutions and private telephone companies, the nature, quality, and amount of personal information contained in private, third parties’ business records is much greater. Further, given the modern realities of how we access and disseminate information, the government’s ability to collect, store, and analyze individuals’ personal information is unlike any time before. In addition to the staggering amount of information available to an individual, almost any piece of information that a private actor or law enforcement agency wants to learn about that individual is just a click away. At any given time, a person can choose to search the web to make purchases or read the news. So too can they connect with others through a myriad of communication means, including text messaging, email, live Internet text, video chats, or the call feature on their mobile devices. Individuals can also post comments online expressing their views about government, religion, science, or any other topic. They can make arrangements for many different services, including travel, doctor’s appointments or restaurant reservations. The consequences of these free commerce and information sharing activities are data trails of personally

---

7 PAUL M. SCHWARTZ & DANIEL J. SOLOVE, INFORMATION PRIVACY LAW, 3RD ED., 1 (2009).
9 See DEC. OF INDEPENDENCE.
12 See Schwartz and Solove, infra, note 13. For example, an individual employer can purchase digital dossiers from CBDs. In addition, government agencies can make requests from Google and CBDs alike, and what’s more, can do so while acting as a market participant (i.e., e.g., as an employer) or for law enforcement purposes. See 15 U.S.C. §1681f (2006) (allowing, under the Fair Credit Reporting Act (FCRA), disclosure of personal information, including “any customer . . . name, address, former addresses, places of employment, or former places of employment, to a governmental agency”).
identifiable information (PII) with private persons or entities.\textsuperscript{13} Personally identifiable information (PII) is a standard or continuum for understanding the risk or probability of re-identification of information related to a particular individual.\textsuperscript{14}

For varied reasons, including to keep records for business purposes, many companies document individuals’ PII, including mobile service providers (like AT&T and Verizon), mobile device purveyors (like Apple, Microsoft, and Samsung), internet service providers (ISPs) (Google, Facebook, and Amazon.com), doctors, and the credit cards and banking institutions we use—to name just a few of the service providers keeping such records. These service providers do not just keep these records. Often, they are disclosed to others for countless purposes, including to third parties for commercial uses such as marketing, and to federal and state law enforcement agencies.\textsuperscript{15} Indeed, internet service providers (ISPs) and commercial data brokers (CBDs) gather this vast and varied personal information into comprehensive digital dossiers.\textsuperscript{16} CBDs such as Axiom or Experian do not only keep digital dossiers in staggering amounts, but also disclose the records of our personal information.\textsuperscript{17} For example, Axiom sells the personal data it compiles and analyzes to marketers profiling consumers.\textsuperscript{18}

ISPs that provide a cornucopia of customer and business-to-business services, like Google, similarly create and disclose digital dossiers.\textsuperscript{19} Such dossiers can involve records of incoming and outgoing communications including emails, texts, web searches, and purchases, as


\textsuperscript{14} Id. There are three categories of PII: identified, identifiable, and non-identifiable. Id. Information that is identified includes, for example, a social security number. In other words, we know exactly to whom that number belongs. Id. Identifiable information is data that has a significant probability of being linked back to a particular person, such as, for instance, a mobile device’s unique identifier code. See id. This number can be traced back to one’s purchase of the phone and through that person’s cellular provider. See id.

\textsuperscript{15} See Schwartz and Solove, supra note 13, at 1 (“Private sector entities also amass gigantic databases of personal information for marketing purposes or to prepare credit histories”).

\textsuperscript{16} Chris J. Hoofnagle, Big Brother’s Little Helpers: How Choicepoint and Other Commercial Data Brokers Collect, Process, and Package Your Data for Law Enforcement, 29 N.C.J. INT’L L. & COM. REG 595 (2003) (hereinafter, Big Brother’s Little Helpers); see also Daniel J. Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, 75 S. CAL. L. REV. 1083, 1084 (2002). Consumer reports from companies such as Axiom, TransUnion, and Experian have been available to employers, current or prospective, since before the Internet. See Schwartz and Solove, Information Privacy Law at 757–58.

\textsuperscript{17} Schwartz and Solove, supra note 7, at 757–58. See also Hoofnagle, supra note 16, at 595–96.

\textsuperscript{18} See Schwartz and Solove, supra note 7, at 758.

well as contacts including family, friends, and other associates. In a global market place, this agglomeration provides benefits, such as efficient allocation of time and resources through targeted advertisements. But while individuals could benefit from these technological advancements and economic efficiencies, these changes also risk making government’s surveillance and information gathering practices more efficient.

As it becomes easier to re-identify a person through personal data left with other persons or businesses, this data could reveal the identity of anonymous speech or other seemingly anonymous or private pieces of information. This re-identified and aggregated data can implicate a person’s personal associations and beliefs including political or religious, whether public facing or otherwise.

The rule of law in a civil society seeks to ensure that individuals are protected against other public or private actors’ unjust (or unfair) practices. Our Constitution protects, for instance, our rights to privacy under the Fourth Amendment and other personhood, as well as liberty-based interests such as free speech and a substantive due process right to privacy. Although the Supreme Court had already expressed a basic definition of the “right to privacy” in its prior decisions, the Court expressly found a substantive due process right to privacy in *Griswold v. Connecticut*. Later, the Court further recognized the substantive right to information privacy in 1977. The Court noted that the substantive right to privacy included two “different kinds of interests”: (1) “the individual interest in avoiding disclosure of personal matters”; and, (2) “the interest in independence in making certain kinds of important decisions.” The first interest involves information privacy, while the second interest involves what is now considered “decisional privacy”—in other words, the personhood interest of self-determination. Information privacy is therefore said to concern the collection, use and disclosure of an individual’s personal information. But, as the Court of Appeals for the

---

20 For example, Google Analytics provides companies seeking to improve their customer reach with analytical, customer data such as customers’ habits, locations, and communication modes.
21 See Solove and Schwartz, supra note 13 (discussing how companies can now trace and re-identify an individual based on previously considered ‘anonymous’ information, such as a mobile devices unique identifier).
22 See Solove, supra note 16, at 1084. With the advent of social media, it may be easier to reveal and access our personal and business associations.
23 See, e.g., Federal Trade Commission Act, Section 5.
24 See, e.g., Whalen v. Roe, 429 U.S. 589 (1977) (substantive right to information privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (substantive due process right to privacy, which the *Whalen* Court later characterized as “decisional privacy”).
27 Id.
29 Id. at 1, 507.
Ninth Circuit has observed, the right to information privacy “has been infrequently examined; as a result, its contours remain less than clear.”

Although a significant amount of federal legislation and state laws regulate the ability to collect, use, and disclose our PII housed in private, third-party business records, no omnibus federal law regulates the privacy of our personal information. In addition, these statutory regulations often leave loopholes for access to our data, including exemptions for law enforcement. With law enforcement access to our personal information collected and retained from across sectors of industry, federal and state governments have pervasive access to, and make use of, our personal information. No reasonable person would doubt that law enforcement should be able to implement its beneficial purpose of order under the rule of law. But, unlike Google Analytics, a CBD, or a future employer, which access and collect our personal information for private, commercial purposes, the government’s wide-scale access, collection, retention, aggregation, and analysis of Americans’ personal information for other purposes, raises questions about the legality of such practices.

As the next subsection discusses, history evinces that government information gathering and surveillance practices grow with the advent of new technologies. More importantly, history cautions that with the growth of these activities government will often push and exceed the limits of its powers while simultaneously infringing individual rights.

B. PAST GOVERNMENT ABUSES OF ITS POWERS

Although the Founders sought to secure the effects of our liberty despite society’s inevitable change, secretive, wide-scale surveillance practices demonstrate the government’s abuse of individual rights even
when law enforcement efforts begin with beneficent governmental purposes. As Justice Brandeis cautioned early in the twentieth century, new technologies allow the government to engage in surveillance and information gathering activities with broad and seemingly legal purposes, executed by “men of zeal, well-meaning, but without understanding,” causing meaningless and insidious encroachments upon our liberty.36

During World War I the U.S. military, through a National Security Agency predecessor, monitored telegram communications following the advent of telegraphy technology.37 After the war, this NSA predecessor continued monitoring the nation’s telegrams passing through Western Union, then the U.S.’s largest telegram company, under the guise of cracking foreign governments’ communications codes.38 In 1929, U.S. Secretary of State Henry L. Stimson shut down this program because “[g]entlemen do not read each other’s mail.”39 But whether gentle or not, the men of our government soon returned to reading the nation’s communications.

Spanning three decades, a federal operation entitled SHAMROCK monitored millions of Americans’ telegram communications.40 After the end of World War II, the program’s original national security purpose of monitoring and censoring information leaving the U.S. quickly devolved into a dragnet surveillance program.41 Through secret arrangements with three major telecommunications companies, another NSA predecessor intercepted communications and collected data beyond its national security purpose. SHAMROCK’s scope expanded to targeting Americans exercising their First Amendment rights, including those opposing the Vietnam War and participating in the Black Power movement.42 By the time the program was terminated in 1975, NSA analysts reviewed about 150,000 telegrams per month using new computing methods.43 But this wouldn’t be the only incident where new information technologies provided the means for government surveillance activities to grow to a dragnet scale and target Americans exercising their First Amendment rights.

---

36 Olmstead, 277 U.S. at 572–73 (Brandeis, J., dissenting); See id. at 1084–85.
40 Bamford, supra note 37, at 317–22. The program was officially operational from 1947 to 1975. Id.
41 Id.
42 Id.
43 Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Supplemental Detailed Staff Reports on Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755 at 765 (1975) (“Church Book III”).
After news of the Watergate scandal rocked the nation, Congress, in checking the executive’s law enforcement power, charged Senator Frank Church to lead the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) with an oversight role. The Church Committee’s investigation into the intelligence gathering operations of three national law enforcement agencies (the CIA, NSA and FBI) found that SHAMROCK not only violated domestic surveillance laws, but also laws “protecting the privacy of the mails and forbidding the interception of communications.” The Church Committee also found that the FBI illegally spied on political groups and persons that it labeled “subversive.” Such tactics included the illegal surveillance of the Rev. Dr. Martin Luther King, Jr., including illegal wiretaps of his calls. The FBI also engaged in information gathering activities like amassing secret dossiers on civil rights activists who the Church Committee found had been exercising their First Amendment rights legally. Other targets of the executive’s law enforcement power included “individuals and groups who engaged in no criminal activity and who posed no genuine threat to national security,” such as Albert Einstein, members of Congress, White House advisers, ordinary teachers, ordinary writers, ordinary publications, and, “journalists and newsmen.” Following its investigation, Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA).

Congress passed FISA after the Church Committee reports suggested that the government needed better oversight over the Committee’s power. Through FISA and under the executive’s foreign

---

44 The Watergate scandal was a 1972 burglary attempt of the National Democratic Committee in Washington D.C. that implicated the Nixon administration’s involvement and unveiled the administration and its members’ other questionable and illegal activities.
45 The Church Committee, which Senator Frank Church led, was a precursor to the U.S. Senate (Select) Committee on Intelligence. It was formally called the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities.
47 Id.
48 Id.
49 The FBI’s first director, J. Edgar Hoover, led this covert program, known as COINTELPRO (Counter Intelligence Program). See Church Book II, supra note 46.
50 Church Book II, supra note 46, at 12.
51 See Schwartz & Solove, supra note 7.
52 Church Book II at 8–12. Disclosures regarding the NSA’s activities in the latter half of the twentieth century and early twenty-first century even point to Senator Frank Church as a target of these investigations. Peter Fenn, When the NSA was Spying on the Congress, U.S. News & World Rep. (Sept. 27, 2013), http://www.usnews.com/opinion/blogs/peter-fenn/2013/09/27/when-the-nsa-spied-on-the-congress.
53 See Foreign Intelligence Surveillance Act of 1978.
54 Church Book II, supra note 46.
affairs power, the National Security Agency is empowered to investigate terrorism and gather foreign intelligence. FISA also created the Foreign Intelligence Surveillance Court (FISC), an Article III District Court “which shall have jurisdiction to hear applications for and grant orders approving” FISA related surveillance, and the FISC Court of Review, an Article III Court “which shall have jurisdiction to review the denial of any application” in the lower FISC court under FISA.

C. THE PAST ECHOES IN THE PRESENT

Subsequent FISA amendments intimate that Congress failed to keep in mind the lessons from its Church Committee investigation. One revision, for instance, now allows the Director of the FBI, as opposed to only foreign facing executive agencies such as the CIA or the NSA, to gather records of domestic citizens’ information. Another revision allows the FBI, in addition to the NSA, to gather foreign intelligence by accessing “tangible things” including certain business records to “protect against . . . clandestine intelligence activities” or international terrorist activities. Such business records have included the telecommunications records from both AT&T and Verizon customers.

Under another FISA amendment, the NSA can request that holders of business records such as ISPs like Google turn over any data matching search terms that the FISC approved. Such approvals can occur ex parte, and the recipients of such “production orders” cannot, with limited exceptions, disclose the existence of the orders.

Like echoes of the past reverberating through the proverbial halls, press reports have revealed that, akin to the pre-FISA era, the government has engaged in activities arguably beyond its national security purpose.

---

55 See U.S. CONST. Art II § 3, cl. 4.
59 50 U.S.C. § 1861 (2006) (authorizing access to certain business records, which includes “any tangible things,” such as “books, records, papers, documents, and other items,” for foreign intelligence and international terrorism investigations). The statute also allows law enforcement to apply for the following records: “library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person.” Id. Notably, it does not define “records.”
61 FISA Amendment Act of 2008, Section 702.
since the 9/11 attacks.\textsuperscript{64} After 9/11, the U.S. government used a software program intended to gather personal data on foreign persons for these national security purposes to undertake secret, warrantless surveillance on domestic persons.\textsuperscript{65} In 2008, to house the telecommunications data that the NSA is authorized to access under FISA, it began building the Intelligence Community Comprehensive National Cybersecurity Initiative Data Center, in Bluffdale, Utah (Utah Data Center).\textsuperscript{66} But according to a former NSA analyst, this facility has the capacity to house up to 100 years of data across such private sectors as finance and communication on every American citizen.\textsuperscript{67} In other words, as early as 2012, the public was aware of the NSA’s suspected capabilities to access, collect, aggregate, and analyze varied data about a particular individual.

In 2013, the federal government confirmed the existence of a program,\textsuperscript{68} after a former private contractor and analyst for the NSA revealed classified information to journalists.\textsuperscript{69} Under this program, “the FBI obtains orders from the FISC . . . directing certain telecommunications service providers to produce to the NSA on a daily basis electronic copies of call detail records.”\textsuperscript{70} Subsequent reports revealed that the personal information gathered included more than individuals’ telephone communications data, was used for purposes unrelated to national security, and included data analysis more comprehensive and extensive than those of the SHAMROCK past.\textsuperscript{71}

In the latter half of 2013, former NSA contract-analyst Edward Snowden revealed classified documents to journalists and investigative press and media reports. Press reports regarding these classified documents, the federal government’s own acknowledgments and lower federal court

\textsuperscript{65} See Laura Poitras, Op-Doc: The Program, THE NEW YORK TIMES (Aug. 29, 2012), http://www.youtube.com/watch?v=r9-3K3rkJPRE (last visited Oct. 25, 2013); see also nsa.gov1.info/utah-data-center/. The full parameters of this surveillance program are still unknown to the public. Id. See also Jewel v. NSA, Doc. No. (alleging that government infringed individuals’ Fourth Amendment rights).
\textsuperscript{66} Poitras, supra note 65.
\textsuperscript{67} Id.
\textsuperscript{68} This program is likely related to PRISM. See NSA Whistleblower Speaks Out on Verizon, PRISM, and the Utah Data Center, LIBERTAS INSTITUTE (June 7, 2013) [NSA Whistleblower Speaks Out], http://libertasutah.org/interview/nsa-whistleblower-speaks-out-on-verizon-prism-and-the-utah-data-center/. PRISM is a program in which the U.S. government, in connection with at least Great Britain’s counterpart (the Government Communications Headquarters (GCHB)), engages in clandestine data mining of its domestic citizens’ content related Internet data records, including their emails, photographs, and videos. See also Klayman, 957 F. Supp. 2d 1.
\textsuperscript{69} See e.g., Glenn Greenwald & Ewan MacAskill, NSA Prism Program Taps in to User Data of Apple, Google, and Others, GUARDIAN (London) (June 6, 2013), available at http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data; Greenwald, supra note 60.
\textsuperscript{70} Klayman, 957 F. Supp. 2d 1.
\textsuperscript{71} See id.
decisions suggest that the federal government is capable of data analytics implicating individuals’ constitutional rights, including those under the First and Fourth Amendment. For example, the government confirmed the veracity of a publically revealed classified FISC order that allows the NSA to collect the telephone records of millions of American Verizon mobile phone and wireless data customers. This order requires Verizon, on an “ongoing daily basis” to give the NSA “telephony metadata” for both domestic and international calls. But this data does not include the contents of those American citizens’ communications. Instead, other press reports reveal that a clandestine data mining program called PRISM “allows officials to collect material including search history, the content of emails, file transfers and live chats” from ISPs such as Apple, Google and Facebook. If we consider the possibility of the government connecting and aggregating this telephony metadata and content collected through PRISM, it would be possible to use the aggregated data to learn everything about a particular citizen, including their political and religious beliefs. Armed with this kind of information, echoes of past illegal and questionable surveillance and information gathering activities during the Civil Rights movement loom.

Another example is the Nixon administration’s involvement in the Watergate scandal. One could see the possibility of using the collected, retained and aggregated data telephony metadata and PRISM content data as leverage against political adversaries or for those exercising their free speech or free press rights (or both) in ways the government wants to control. Through such information, a currently leading political party could learn who is in a particular minority group and then request that the IRS target those individuals. As other stories reveal, through the monitoring of internet related activities, the government is potentially participating in an

---

72 For an analysis of the Fourth Amendment in light of this Article’s historical analysis, see Section V.
74 Id. As the FISC states:

Telephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 U.S.C.§ 2510(8), or the name, address, or financial information of a subscriber or customer.

75 Id.
76 Greenwald & MacAskill, supra note 69.
77 See NSA Whistleblower Speaks Out supra note 68 (“Do you want to know who’s in the tea party, and then tell the IRS who to target?....Those are all possible [reasons for] using these programs”).
international program “attempting to control, infiltrate, manipulate, and warp online discourse, and in so doing, … compromising the integrity of the internet itself.”

Another report suggests that the government is aware of the questionable practices in which it is engaging. According to this report, some of the data regarding domestic citizens collected for foreign intelligence purposes is being directed to domestic law enforcement agencies investigating domestic crimes. This report further reveals that law enforcement agencies are being trained to cover up the investigative trail. That agencies are trained to cover up how or why they knew someone would be in possession of an illegal substance, for example, suggests that the information is likely being collected, connected and cross-referenced to reveal domestic citizens’ actions beyond national security threats.

The patterns of how we have uncovered the pre- and post-FISA dragnet surveillance practices are similar. Just as news reports alerted the American public to the government’s bulk collection and use of its citizens’ personal data in this millennium, investigative journalists first revealed some of the illegal surveillance tactics in which the federal government engaged that led to the eventual Church Committee investigation. But more troubling now is the executive branch’s recent perspective on “accomplices” of Edward Snowden who chose to release such information to the press, raising questions beyond the Fourth Amendment and into how to protect the First Amendment. When pressed on whether journalists are included as “accomplices”—as the administration put it, “anyone who is assisting Edward Snowden [to] further harm our nation through the

---


79 See id. (describing the investigative trail cover up, and revealing that information sharing for domestic law enforcement purposes includes the FBI and DEA).


Unauthorized disclosure of stolen documents”—the administration declined to be more specific.82 It is troubling if the administration considers journalists reporting on, and making available, classified government documents which detail the mass information gathering and dragnet surveillance practices of the NSA as unauthorized disclosures. Without the press’s freedom to report on the limits of governmental powers, how can it be known when the government fails to fulfill its function, and how can progress be made to ameliorate that failure?

The questionable programs and information gathering practices highlighted here could very well lead to the legitimate prosecution of individuals or entities committing crimes, but the legality of these programs is also a concern. Additionally, the government’s (ab)use of its law enforcement power to its limits, and beyond, is only the beginning of the issue for individual citizens whose data the government has collected. Modern Fourth Amendment case law also fails to reflect the Amendment’s first principles, leaving the people exposed to government abuse.83 It is true that the U.S. government and its agencies such as the NSA have the power to secure our nation from foreign intrusions through foreign intelligence gathering.84 But Americans also have a constitutional right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”85 Balancing the nation’s interest in national security and our citizens’ protected Fourth Amendment interests is not an easy task. As the subsequent discussion of the Fourth Amendment reveals, government practices collecting individuals’ information from private, third party business records is not likely considered a “seizure” under the Fourth Amendment.

There is a way, however, to consider government’s initial data collection as a “seizure” of privacy interests, as well as other personhood and liberty-based interests, as this Article’s historical analysis suggests. The legality or illegality of the initial collection and subsequent retention of Americans’ personal data is important because, if those activities do not implicate a “seizure” under modern Fourth Amendment case law, access of these programs may not implicate a Fourth Amendment “search.”86 For this reason, we must never allow the government to forget or misinterpret its ultimate purpose and source of power: that it is a government instituted for

85 U.S. CONST., amend. IV (emphasis added).
the people by the people. To remind the government of its intended purpose requires oversight, whether through the political process or the judiciary, which this Article also addresses in a later discussion.

II. THE FOURTH AMENDMENT

The Fourth Amendment regulates the government’s ability to obtain information and physical evidence through searches and seizures. Its full text provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

To provide context for this Article’s historical interpretation of “effects” and its implications, this section first briefly reviews modern Fourth Amendment case law. The substantive “right to be secure” is most often characterized as protecting the Fourth Amendment’s enumerated objects and their underlying values. Because it is the Supreme Court’s “province and duty . . . to say what the law is” and “must of necessity expound and interpret that rule,” it has construed the interests the Fourth Amendment protects as underlying the four enumerated objects in which we have a right to be secure.

While the Fourth Amendment makes no express mention that the substantive “right to be secure” is only from government intrusions, as a

---

87 Bill of Rights (preamble); See also Olmstead v. United States, 277 U.S. 438, 572–73 (1928) (Brandeis, J., Dissent), overruled by Katz v. United States, 389 U.S. 347 (1967) (“Men born to freedom are naturally alert to repel invasion of their liberty”).
88 See Solove, supra note 16, at 1117. The implications of the historical interpretation of this Article is primarily concerned with the federal government’s activities. Cases in which Fourth Amendment claims are made against state law enforcement are still relevant to understanding the doctrines the Court has promulgated, as well as to ensuring state compliance of the Amendment. See Wolf v. Colorado, 338 U.S. 25 (1949) (holding that the Amendment’s protection against unreasonable searches and seizures applies to the states as incorporated under the Fourteenth Amendment).
89 U.S. CONST. amend. IV.
90 See, e.g., Solove, supra note 16, at 1084.
91 Marbury v. Madison, 5 U.S. 137, 177 (1803).
92 See generally THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION (2008) (providing an analysis of the analytical structure of questions from cases involving Fourth Amendment claims); see also Orin Kerr, The Mosaic Theory of the Fourth Amendment, 111 MICH. L. REV. 311 (2012) (discussing the analytical process of the Supreme Court in Fourth Amendment cases where an unreasonable search is at issue).
procedural safeguard the Amendment is seen as controlling the government’s law enforcement power to conduct search and seizures by requiring a warrant supported by probable cause.94 Because the focus of this Article is on the substantive rights that the “effects” clause protects, the following discussion focuses on the modern Fourth Amendment case law most related to this substantive right. It first broadly describes what key interest the Court has construed that the Fourth Amendment protects, while providing an overview of what qualifies as a “search” or “seizure” of a citizen’s “effects.” Next, it analyzes the doctrines associated with protecting the people’s “effects” with those doctrines balancing in favor of the government’s interests in dragnet surveillance and information gathering.

A. OVERVIEW OF MODERN FOURTH AMENDMENT CASE LAW

Fourth Amendment jurisprudence deals with four key issues: (1) whether government activity constitutes a “search” or a “seizure” of a protected Fourth Amendment interest; (2) if government activity is a search, whether a warrantless search or seizure is “unreasonable”; (3) what is considered probable cause to undertake one of these activities; and (4) how the courts should remedy or address Fourth Amendment violations.95 The key to understanding these central questions is determining exactly what interests the Fourth Amendment protects.96 Because the Amendment secures the people’s “persons, houses, papers, and effects,” knowing which values these objects protect unlocks the door to whether a search or a seizure is an unconstitutional intrusion.

According to the Supreme Court, “[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.”97 The Court further clarified in Katz v. United States that the “Amendment protects people, not places.”98 Katz99 held that an individual using a pay phone had a reasonable expectation of privacy in the content of his communication, that the Amendment’s scope of protection is

---

94 See, e.g., Solove, supra note 16, at 1084. Thus, if an individual raises a claim that law enforcement searched or seized one (or more) of his or her things secured under the Amendment without a proper warrant, a court must engage in a two-part inquiry involving the first two key issues. See, e.g., CLANCY, supra note 92, at 3–5.
95 CLANCY, supra note 92, at 3–5. If the Amendment applies, and a constitutional violation occurred, a court must move onto an analysis of the remedies for the constitutional violation, which is not a constitutional question. Id. at 5–6.
96 Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 385 (1974) (“The key to the Amendment is the question of what interests it protects”).
99 Id. at 350 n.4.
thus not limited to tangible property, and that property interests do not control whether a government search or seizure has happened.\textsuperscript{100} As subsequent case law demonstrates, the scope of protection under the Fourth Amendment is still tethered to “constitutionally protected areas,” namely, “persons, houses, papers, and effects.”\textsuperscript{101} For this reason, the Court’s analysis of the protection afforded these key interests differs based upon which interests “persons, houses, papers, and effects” protect. For instance, under the Court’s current construction, an individual has a reasonable expectation of privacy if “first, that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation [is] one that society is prepared to recognize as ‘reasonable.’”\textsuperscript{102} But this test only applies to searches and not seizures of tangible things.\textsuperscript{103}

As the following discussion demonstrates, a seizure of things encompassed under “houses, papers, or effects” only occurs “where there is some meaningful interference with an individual’s possessory interest in that property.”\textsuperscript{104}

a) Persons.

The Court has unsurprisingly tied the following personhood interests, among others, to the Amendment protecting “persons:”\textsuperscript{105} privacy,\textsuperscript{106} security,\textsuperscript{107} liberty\textsuperscript{108} “the inviolability of the person”,\textsuperscript{109} and individual freedom of movement.\textsuperscript{110}

\textsuperscript{100}See id. at 351.
\textsuperscript{101}Olmstead v. United States, 277 U.S. 438, 438 (1928), overruled by Katz v. United States, 389 U.S. 347 (1967). See e.g., Oliver v. United States 466 U.S. 170, 183–84 (1984) (the Fourth Amendment protects personal property and not open fields); Smith v. Maryland, 442 U.S. 735 (1979) (the Fourth Amendment does not protect the numbers that a telephone subscriber dials); United States v. Miller (1974) (a person’s banking transactions and information are not protected where a banking institution records them and holds that information as business records).
\textsuperscript{102}Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Harlan’s view of the Katz holding as a two-part test determining whether a person has a reasonable expectation of privacy).
\textsuperscript{105}See infra note 110.
\textsuperscript{106}Katz, 389 U.S. at 350 n.4.
\textsuperscript{107}Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (Fourth Amendment protects privacy, security, and liberty); Berger v. New York, 388 U.S. 41, 53 (1967) (Amendment protects “privacy and security”).
\textsuperscript{108}See, e.g., Soldal v. Cook County, 506 U.S. 56, 64 n.8 (1992) (protecting the personhood interest of liberty); United States v. Ortiz, 422 U.S. 891, 895 (1975) (same).
\textsuperscript{109}Wong Sun v. United States, 371 U.S. 471, 484 (1963) (protecting this interest as a personhood interest).
\textsuperscript{110}See, e.g., Hayes v. Florida, 470 U.S. 811, 815–16 (1985) (protecting the freedom of movement as a personhood interest); Katz, 389 U.S. at 350 n.4 (protecting an individual’s expectation of privacy in the communications occurring in a public phone booth). See also Cruzan v. Director,
b) Houses.

With respect to “houses,” the Court has consistently found that the home is a “sanctuary,” and that physically entering a home is the “chief evil against which the working of the Fourth Amendment is directed.” The Court has even found that the home has “roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.” It also affords different structures such as apartments or rooming houses, which can be called dwellings, residences, or homes, similar protection to that of a house which is a home. But a home is different than a business, and a “house” loses the sanctuary-like protections afforded to a home if it is also a place of business. Nevertheless, the Court has found that businesses, offices, and commercial buildings are protected and “in which there may be legitimate expectations of privacy” partly “based upon societal expectations that have deep roots in the history of the Amendment.”

c) Papers and Effects.

Under the Court’s current construction, “effects” only protects personal property and is less expansive than real property. The Court has stated that a variety of objects are protected under “effects” but, for our purposes, “papers” and “containers” are most relevant. “Papers” include

Mo. Dep’t of Health, 497 U.S. 291, 287 (1990) (O’Connor, J., concurring) (describing the Fourth Amendment as valuing the same concerns as the Fourteenth Amendment’s Due Process clause, including the view that concepts of freedom are “inextricably entwined with our idea of physical freedom and self-determination”).

See, e.g., Welsh v. Wisconsin, 466 U.S. 740, 754 (1984); see also CLANCY, supra note 92, at 123.

See, e.g., United States v. United States District Court, 470 U.S. 297, 313 (1972); see also CLANCY, supra note 92, at 123.


See, e.g., Chapman v. United States, 365 U.S. 610 (1961) (an apartment is a home for Fourth Amendment purposes); McDonald v. United States, 335 U.S. 451, 455—57 (1948) (same for rooming house).

See, e.g., Lewis v. United States, 385 U.S. 206, 211 (1966) (“[W]hen . . . the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carrier on in a store . . . . or on the street”).


Id. at 177 n.7 (finding that “effects” do not include real property and are limited to personal property).

See, e.g., Belton v. New York, 453 U.S. 445, 460 n.4 (1981) (container); Boyd v. United States, 116 U.S. 616, 635 (1886) (finding that the owner of the private papers—and not the
such things as private papers, business records, and the contents of the mail. A container is a type of effect which “denotes any object capable of holding another object . . . [and] thus includes . . . luggage, boxes, bags, clothing, and the like.”

With respect to searches of personal property, a person has a reasonable expectation of privacy in the “contents” of their personal property because “effects” protects the contents of containers that are not in plain view. Notably, the Supreme Court has differentiated between different types of containers and stated that some containers do not “deserve the full protection of the Fourth Amendment.” But this statement was a variation of the plain view doctrine. In Robbins v. California, a plurality of the Court found that this distinction was just a “variation of the ‘plain view’” doctrine, and a majority of the Court in United States v. Ross later noted that “the central purpose of the Fourth Amendment forecloses . . . a distinction” between protecting “a traveler who carries a toothbrush and a few articles of clothing in a paper bag” and a “sophisticated executive with the locked attache case.”

B. MODERN FOURTH AMENDMENT CASE LAW AND WIDE-SCALE GOVERNMENT SURVEILLANCE & INFORMATION GATHERING

New technological means have allowed government surveillance and information practices to reach personal information in scales far greater than ever before. Although the Court has not answered directly whether “papers” or “effects” include data stored in electronic form, lower courts indicate that it does. This section discusses whether individuals have a Fourth Amendment right to be secure in their personal data stored in government seeking to obtain them—had a protected property interest in those papers under the Amendment).  

119 Boyd, 116 U.S. at 635 (finding that the owner of the private papers—and not the government seeking to obtain them—had a protected property interest in those papers under the Amendment).  


121 See in re Jackson, 96 U.S. 727 (1878) (noting that “[l]etters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by parties forwarding them in their own domiciles”).  

122 Belton, 453 U.S. at 460 n.4.  

123 Plain view doctrine holds that law enforcement can seize contraband or evidence in plain view—that is, for example, such a thing that a police officer can see in plain sight—without a warrant. See Horton v. California, 496 U.S. 128 (1990).  


127 See CLANCY, supra note 92, at 139 n.121 (citing to district court cases).
private, third party business records from unreasonable searches or seizures. It also splits the discussion between the Court’s analysis of whether a person has a Fourth Amendment interest in their personal property with respect to a search and a seizure.

1. Searches

It is an open question whether a person can claim a reasonable expectation of privacy in his or her personal information found in tangible “papers” or “effects,” such as a private third party’s business records, which the government has accessed and collected in a dragnet. That two district courts’ recent holdings opposed each other on this very issue, regarding the NSA’s collection of millions of domestic citizens’ telephony metadata through FISA, is unsurprising given the Court’s other modern Fourth Amendment doctrines such as the third party doctrine and the content/non-content distinction.

Smith v. Maryland128 is a highly relevant example of why the Court’s understanding of the term “effects,” the interests which it and “papers” protects, and why the third party doctrine is also problematic without considering a historical interpretation of effects. There, the Court held that a search within the meaning of the Fourth Amendment did not occur because no reasonable expectation of privacy exists in the numbers a person dials when the police record them with a pen register without a warrant.129 The Maryland police requested a private telephone company install the pen register and use it to provide law enforcement with those records from the defendant’s phone line.130 The Court reasoned that no reasonable expectation of privacy existed for two reasons. First, because the numbers did not involve the “content” of the communication, there was no reasonable expectation of privacy in them.131 Second, the Court reasoned that when a person conveys information to another, such as a phone company, that person must assume the risk that the third party will reveal the information to others.132 Accordingly, telephone subscribers harbor no “general expectation that the numbers they dial will remain secret.”133 Several important issues in this case require further expansion to demonstrate how this case may dangerously allow warrantless collection and retention of personal information from private, third parties, including a telephone or ISP.

Because “effects” is limited to a tangible possessory interest, a

129 Id. at 740.
130 Id.
131 Id.
132 Id.
133 Id. at 738.
search into “effects” is considered when the contents of the tangible thing are searched. In finding that numbers dialed are not content, and therefore not protected, the Court implicitly found that non-content information is not an “effect” with a possessory interest in which an individual has a reasonable expectation of privacy. But the Court excluded this non-content information from the Amendment’s protection of “papers” or “effects” based on an erroneous analogy to the outward routing information of the mail. In In re Jackson, the Court noted that mail outward facing addressing information was unlike the internal content of the mail which it had secured. However, rather than conceptualizing this routing information as “non-content,” the Court did so because the outward facing information was publicly available for the U.S. mail carriers to see. Thus, the Court likely made the distinction on what we would now consider the plain view doctrine. Moreover, unlike outward addressing information being freely available for government access or viewing, recording the numbers dialed on an individual person’s phone required law enforcement to attach a device to a private telephone company’s service line in Smith. Thus, in 1979, the Court erroneously extended the distinction between content and non-content information. Smith demonstrates that even if the Court had not developed the third party doctrine, or for some reason it did not apply, a reasonable expectation of privacy still would not exist because the mere records of the call are considered “non-content.”

Relatedly, in promulgating the third party doctrine the Court also failed to consider society’s progression of recordkeeping. If we want to engage meaningfully in modern society, we have no other option but to allow a private, third party to access our personal information. An unreasonable search into an individual’s private information only occurs where a person has a reasonable expectation of privacy in their papers or effects. In United States v. Miller and Smith v. Maryland, the Court found that a person has no reasonable expectation of privacy in information they reveal to a third party because the person runs the risk that the third party will divulge such information. Thus, while a business is constitutionally protected from the government intruding upon its business records, an individual who maintains his information with a private, third party is not protected from unwarranted governmental intrusion.

134 See, e.g., In re Jackson, 96 U.S. 727 (1878) (finding that the content of mail packages is protected but not the outside routing information).
135 See id.
138 See Smith, 442 U.S. 735; Miller, 425 U.S. 435. The Court in Smith v. Maryland specifically noted that it “consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” 442 U.S. at 738.
2. Seizures

Although the question is similarly open with respect to the seizure of an individual’s personal information from third party business records, it is less likely that a Fourth Amendment seizure has occurred. This is because when the government seizes those private “papers” or “effects” housing an individual’s information, the Court’s current construction would require that the government meaningfully interfere with personal property in which a domestic citizen has a possessory interest. First, because “papers” are “effects” or personal property, an individual must have a possessory interest in their personal information that the Court has not explicitly determined. Given the Court’s position on privacy being a personhood interest, however, information privacy is unlikely to be a property-based interest. But even if the Court would find that individuals do have a possessory interest in their personal information, this raises a subsequent question: whether the government is meaningfully interfering with the individual’s possessory interest if it collects and retains such personal information from private, third party business records.

Under the property-based analysis of impermissible and permissible seizures of effects, the Court has also held that if there is a party with a higher possessory interest in the tangible thing—that is, hierarchically—an individual cannot claim an unreasonable intrusion into their possessory interest. In *Horton v. California*, the Court found that seizing an article in plain view did not implicate an individual’s privacy interest but did invade the owner’s possessory interest. This creates uncertainties where government activities search and collect individuals’ personal data from private, third party service providers business records because those housed records are not in plain view. Moreover, if non-content information is considered a personal effect or property, one could also argue that government agencies may still intrude upon those effects. For example, if private third parties have a higher possessory interest in our personal information, including non-content data found in their business records, they are free to do anything they choose with these records. Those private third parties can disclose an individual’s personal data to law enforcement agencies without the government or the third party first notifying the individual person. Thus, when the government retains (or seizes) these documents containing personal data, it has done so without

---

140 Id. at 134.
141 For example, the government could claim that a private sector company, such as Google, which has vast amounts of information on a particular person from varied private sector domains, has a higher possessory interest in the records of a person’s activities that it retains. An individual has no recourse because those “effects,” even if considered possessory, are hierarchically those of Google and not of the individual.
necessarily implicating Fourth Amendment rights. In addition, businesses would also be free to divulge a person’s private information to a government entity without the government having to notify an individual that it is searching or seizing their private information.\textsuperscript{142}

But even if a business did not want to freely divulge information, if an entity housing that personal information and data in their business records receives a production order under FISA, they are likely to do so given that the Terms of Service and Privacy Policies of these companies often leave broadly-worded exceptions for access, collection and disclosure of such information. Just as problematic, even if a company wanted to alert its customers and the general public of concerns surrounding such production orders, they would not be able to do so because such production orders also include a gag order.

Although the Court in Smith held that portions of a communication that are not “content” do not implicate a person’s reasonable expectation of privacy or other values under the First Amendment,\textsuperscript{143} all is not lost for individual rights under the Fourth Amendment. Underlying the protection of “content information”—or “effects” protected—under the Amendment is our individual interest in secrecy or privacy. As noted, the content/non-content distinction was made based on the government’s access and non-access to the information outside vs. inside the mail. It was not made based on all individuals’ access to such information but, rather, that it was in plain view to the government. Thus, where private third parties retain records of the content and non-content of our communications, associations or other personal data, the individual interest of privacy underlying the protection of the content of the mail should also apply to both.

As this Article also contends, the historical findings detailed in the next section provide a basis for protecting personal information contained in the business records of private, third parties from dragnet surveillance and information gathering practices.

III. REDISCOVERING THE FOURTH AMENDMENT’S VALUE

The Court’s 1984 decision in Oliver v. United States announced that the architects of the Constitution likely employed “effects” to mean “personal effects,” a legal term of art.\textsuperscript{144} Based on that decision and subsequent case law, the government could arguably engage in the

\textsuperscript{142} Section IV discusses the implications of these decisions in light of congressional legislation.
\textsuperscript{143} See Smith v. Maryland, 442 U.S. 735 (1979).
warrantless access (or search) and retain (or seize) domestic citizens’ personal data from private, third parties, including the content and transmission records (such as telephony metadata) of communications without implicating those citizens’ Fourth Amendment rights.\footnote{See Sections II, IV (explaining why defining “effects” as personal property in conjunction with the third party doctrine creates issues for individual rights as society changes).}

However, the Court’s brief discussion and conclusion regarding the meaning of “effects” in \textit{Oliver} may have been due to a then-lacking and not readily available documentary history of both the Constitution’s ratification, the legislative history of the Amendment in readily available sources, as well as scholarly research on relevant legal matters such as search and seizure law.\footnote{See infra Sections V and VI (discussing the documents available after 1984 when the Court interpreted “effects”).} Although scholars have written extensively about the history of both search and seizure law and the Fourth Amendment,\footnote{See generally \textit{Clancy}, supra note 92 (providing a thorough legal perspective on the Fourth Amendment and its legal doctrines); \textit{William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning} 602–1791 (2009) (capturing an extensive historical account and analysis of search and seizure law from Great Britain to the colonies until the Fourth Amendment’s adoption); \textit{Andrew E. Taslitz, Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868}, 2 (2006) (detailing a normative account on search and seizure law and the implications of history, politics, and philosophy on the Fourth Amendment).} given the lack of readily available primary sources, in addition to the Court’s position on the term’s meaning, it seems not only appropriate but necessary to analyze the Court’s position on the original understanding of the term “effects.”

The Fourth Amendment was passed in 1791 as part of the first ten amendments known as the Bill of Rights. The Framers and founding generation adopted the Bill of Rights for fear that without written rights, the government would seek to abuse its powers and thereby infringe the people’s inalienable rights to life, liberty, and the pursuit of happiness.\footnote{See \textit{Bill of Rights} Preamble; \textit{see also Akil Amar, Bill of Rights: Creation and Reconstruction} (1998).} The prior history and context in which this amendment’s drafting took place is as important as its adoption. This section of the article attempts to put the Fourth Amendment in its historical context to conclude that “effects” secures our personhood, property, and liberty-based interests in the results or efforts associated with our human endeavors. In advance of discussing the history and meaning of “effects” at length, this Article points out the tools and method for this historical analysis. Next, it describes the history surrounding the American Revolution and subsequent adoption of the Constitution and Bill of Rights. Finally, it reviews the available evidence concerning the origin and probable original understanding of “effects” that led to its inclusion in the Fourth Amendment.
A. METHODOLOGY & BRIEF OVERVIEW OF THE HISTORICAL INTERPRETATION OF “EFFECTS”

Early in its Fourth Amendment case law, the Supreme Court announced that the Amendment protects “material things.”\(^{149}\) As recently as 1984, the Supreme Court noted that the drafters of the Fourth Amendment intended “effects” to strictly mean “personal property.”\(^{150}\) In recent years, the Court has also suggested that the original purpose of the Amendment was to secure property.\(^{151}\) But in defining “effects,” the Court did not fully reflect upon the historical papers, political motivations, and ideology surrounding the Constitution and the adoption of the Fourth Amendment and its relationship to the other Amendments in the Bill of Rights. Under these conditions, this Article commenced by trying to answer the key question in understanding the Fourth Amendment—that is, what interest it protects—by searching for historical evidence of the meaning of the term “effects.”

Because amending the Constitution starts as a legislative effort,\(^{152}\) this Article employs available interpretive tools and methods for historically understanding “effects.”\(^{153}\) This Article also uses the method of text and principle, which “requires fidelity to the original meaning of the

---

\(^{149}\) See Olmstead v. United States, 277 U.S. 438, 464 (1928), overruled by Katz, 389 U.S. 347 (noting that the Fourth Amendment “itself shows that the search is to be of material things—the person, the house, his papers, or his effects”).

\(^{150}\) Oliver v. United States, 466 U.S. 170, 177 n. 7 (1984) (suggesting that in the founding era, the Framers would have considered “effects” to mean personal property and not real property). See also Clancy, supra note 92, at 140 (providing an analysis of the analytical structure of questions from cases involving Fourth Amendment claims).

\(^{151}\) United States v. Jones, 132 S. Ct. 945, 949 (2012) (“The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to “the right of the people to be secure against unreasonable searches and seizures;” the phrase “in their persons, houses, papers, and effects” would have been superfluous”).

\(^{152}\) Congress provided twelve amendments to the American people for ratification on September 28, 1789. Legislative Histories: Amendments to the Constitution through Foreign Officers Bill [HR-1 16], in Charlene Bangs Bickford et al., eds., The Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791 4, 7 (1986) [hereinafter DHFFC], available at http://www.gwu.edu/~ffcp/exhibit/p7/documents/billof.pdf (last visited Oct. 15, 2013). Of those twelve amendments, ten amendments, including the sixth amendment (the now Fourth Amendment), and the subject of this Article, were adopted on December 15, 1791 when Virginia ratified the Bill of Rights. Id.

\(^{153}\) In interpreting the Constitution, the Supreme Court uses many methods including textualist and fundamentalist approaches. The Court has also employed many tools of interpretation. See generally J.M. Balkin and Sanford Levinson, The Canons of Constitutional Law, 111 HARVARD L. REV. 963 (1998) (undertaking a study of the relevance of canons of constitutional interpretation); see also Stephen M. Durden, Textualist Canons: Cabining Rules or Predilective Tools, 33 CAMPBELL L. REV. 115 (2010) (discussing the choice that judges and scholars make in employing particular canons of interpretation when interpreting the law).
Constitution and to the principles that underlie the text. Accordingly, based on the text and principles underlying the Fourth Amendment, this Article concludes that “effects” was intended to protect the results of human endeavors against unreasonable government intrusion that implicates personhood, liberty, and property-based interests.

The method of text and principle teaches that “constitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text.” Accordingly, this method of constitutional interpretation is consistent with (a) “the original meaning of the constitutional text” and (b) “the purposes of those who adopted it.” It also acknowledges the Constitution as a basic law that allows each future generation to interpret its words and principles, whose reach and application evolve over time. To ensure that we continue to uphold the purpose of writing, and subsequently ratifying, the Bill of Rights, that is, “in order to prevent [government] misconstruction or abuse of its power,” this Article therefore uses the method of text and principle to revisit the Court’s definition of “effects.”

154 Jack M. Balkin, Abortion and Original Meaning, 24 CONST. COMMENTARY 291, 293 (2007) (emphasis added). Fidelity “to the Constitution as law . . . . means fidelity to the text, understood in terms of their original meaning, and to the principles that underlie the text.” Id. Balkin, a Harvard professor, also provides an exemplary application of this form of constitutional interpretation to abortion rights. See generally id. Pts. III–IV (describing that the original text and underlying principles of the privileges or immunities clause would have provided protection for the right to abortions under this method of constitutional interpretation).

155 See infra Section IV.

156 Balkin, supra note 154, at 294; see also id. at 294 n. 8 (noting the scholars with differing “political perspectives have embraced the idea that constitutional interpretation should be grounded in the text’s original meaning”).

157 Id. at 294.

158 Id. at 293–294.

159 BICKFORD et. al., eds., supra note 152 at 7.

160 Yet, a strict originalist may criticize this method for not adhering to the constitutional text with fidelity because it allows for meaning outside the text and for modern perspectives to possibly outweigh the constitutional text’s meaning. However, members of the founding generation could have quite plausibly endorsed the method of text and principle. James Madison, for example, endorsed post legislative perspectives on the Constitution. In a congressional speech, he noted that despite any future respect for the thoughts of the drafters of the constitutional text, their sense “could never be regarded as the [only] oracular guide in . . . expounding the constitution.” PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788, in Introduction (2009) (citation omitted). He noted that instead, the documentary history of the ratifying states would be of value behind the text as it was where there was “life and validity were breathed into it, by the voice of the people, speaking through the several state conventions.” Id. If the voice of those who adopt an amendment or legislative act is significant, it then follows that future generations may apply the constitutional text and its principles in ways relevant to a changed society. Moreover, under the 1758 edition of Blackstone’s Commentaries, part of interpreting a law required looking into the “Will of the Maker,” which included looking at “the Effects and Consequence, or the Spirit and Reason of the Law.” BLACKSTONE, supra note 144, at n. 166. Accessing John Adams’ library also returns three works from Blackstone. See The John Adams Library at the Boston Public Library, Search the Collection, BOSTON PUBLIC LIBRARY, http://www.johnadamslibrary.org/
To understand the original meaning of “effects,” the canons of interpretation caution that if the text is clear, a term be given its plain meaning. In cases where terms are ambiguous or vague, judges must resolve the meaning of the text. And no word should be rendered superfluous or meaningless in a constitution or legislative act. Since early Fourth Amendment jurisprudence, the Supreme Court has found that the Amendment protects only tangible objects. It has also subsequently concluded without engaging in an in-depth analysis that the First Congress sought only to protect personal property when it chose to secure the people’s “effects.”

But for centuries prior to the Fourth Amendment’s use of “effects,” the term meant results or consequences in its plain dictionary meaning and as a legal term of art. It is true that the word “effects” also appears in the

---


162 See Caminetti v. United States, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise . . . .”). See also BLACK’S LAW DICTIONARY 1267 (9th ed. 2009) (defining the plain meaning rule as “if a writing, or a provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence”).

163 See McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (noting that “we must never forget it is a constitution we are expounding” and that interpretation must be just and fair where the text is unclear). Chief Justice Marshal also noted that the nature of the U.S. Constitution “requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.” Id. He further noted “[t]hat this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.” Id.


165 See Section II (citing Olmstead v. United States, 277 U.S. 438, 464 (1928) for its noting that the Fourth Amendment “itself shows that the search is to be of material things—the person, the house, his papers, or his effects”). Overruling Olmstead, Katz v. United States, 389 U.S. 347, found that the Amendment “protects people, not places.” 389 U.S. at 351. Yet, subsequent cases have made clear that the Amendment’s scope of protection is still tethered to tangible areas. See Section II.

166 The Court did not engage in an extensive discussion of the meaning of “effects;” instead, it resolved its meaning in one sentence in Oliver v. United States and a subsequent two-sentence footnote. See Oliver, 466 U.S. at 177, 177 n. 7.

167 The Oxford English Dictionary provides plausible support because it documents fourteenth century uses of the word “effects” to mean the result of human intervention. See OXFORD ENGLISH DICTIONARY (3d ed. 2008) (“Charmes for woundes . . . if they taken any effect, it may be parauenture that god suffreth it”) (quoting Chaucer Parson’s Tale l. 607, in Canterbury Tales (1940) IV. 420 (c. 1390)) (emphasis added), available at OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/
legal term “personal effects,” which meant personal property in the founding era. In addition, if the founders intended to protect only the personal property of the people, then protecting their “papers” would have been superfluous, especially since the drafters removed the word “other” from Madison’s original proposed Fourth Amendment.

With this understanding of the text’s probable meaning, the purpose of drafting and adopting the Amendment is relevant to interpreting which principles or values the founding generation intended “effects” to protect. Drawing upon the available documentary history, including pre and post-legislative sources, provides context for the Constitutional text’s meaning. For this reason, this Article focuses on the 1760s until the ratification of the Bill of Rights in 1791. Although the legislative history of the Fourth Amendment is brief, other available primary and secondary sources discussing this period prove highly informative and relevant for historically interpreting the text. In addition, other potentially influential—and possibly available to the Amendment’s drafters—primary sources from this period included dictionaries, legal treatises, and political papers like the Federalist and Anti-Federalist papers. This Article also
draws on philosophical perspectives regarding individual rights, as well as law and government, valued by the founding generation to make its contentions.  

B. THE EFFECT OF “EFFECTS”

Historically interpreting “effects” removes the Court’s assumptions that have reduced the scope the protection of individual rights. Based on the plain text and legal meaning of the term “effects,” it means the results of our human endeavors. In reviewing the available history and documentary evidence, “effects” was intended to protect our personhood, property, and liberty based interests. This interpretation not only adheres to the plain meaning of the text, but is also compatible with the Fourth Amendment’s foundational principles.

Consider that the Amendment secures “persons, houses, papers, and effects,” while remembering that the “Framers were men . . . who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.” If “persons” protects our personhood and liberty interests, “houses” protects our private property interest (and “houses” is understood to be a synonym of “contains,” e.g., housing documents), and “papers” protects our press, speech, and other interests in the liberty of communications and information, then the Framers intended “effects” in its plain and legal meaning to safeguard those interests for the ages. For example, the results or consequences of human action can indeed mean personal property, and


173 The influence of the Enlightenment thinkers made its way to the colonies. John Locke, for example, influenced the American revolutionaries, including Thomas Jefferson. See CARL LOTUS BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 27 (1922). John Adams also had John Locke’s works in his library. As he bequeathed his library to the Boston Public Library, a search of John Adam’s library returns two titles including Locke’s works: (1) THE WORKS OF JOHN LOCKE, ESQ., 3 volumes (London, 1740); and (2) A COLLECTION OF SEVERAL PIECES OF MR. JOHN LOCKE (London, 1739). See BOSTON PUBLIC LIBRARY, THE JOHN ADAMS LIBRARY AT THE BOSTON PUBLIC LIBRARY, SEARCH THE COLLECTION, http://www.johnadamslibrary.org/search/books/?author=locke. The works of other philosophers, such as Thomas Hobbes, also influenced other American revolutionaries, including James Madison, the Fourth Amendment’s first drafter. See CUDDHY, supra note 147, at 727 (“The breadth of the Fourth Amendment also reflected its author’s Hobbsian belief . . .”).

174 The Fourth Amendment guarantees “the right of the people to be secure in their houses, persons, papers, and effects.” U.S. CONST. amend. IV. But see Oliver v. United States, 466 U.S. 170, 177 (1984) (“Although Congress’ revisions of Madison’s proposal broadened the scope of the Amendment in some respects, . . . , the term “effects” is less inclusive than “property” and cannot be said to encompass open fields”).

175 See infra, Parts IV.B.1–4.

176 See infra, Parts IV.B.1–4.

also mean the data trails we leave behind in communicating and interacting in our modern world. It goes without saying that “effects” would have been superfluous if they only intended to safeguard property, especially in light of the initial draft of the Amendment. Thus, as detailed in Section V, this more expansive definition would protect domestic citizens’ personal data contained in private, third party records from unreasonable searches or seizures.

Because we must first start with the text of the Constitution in order to interpret it, this section begins with an analysis of the meaning of the term “effects,” before moving into a discussion of the principles underscoring the Amendment and its protection of “effects.” This discussion is provided in the context of the history surrounding the adoption of the Amendment, including a discussion of the broad principles underlying our Constitution and the Bill of Rights. Thereafter, this Article provides its historical interpretation of effects.

1. The Original Meaning of “Effects”

The likely available dictionaries to the First Congress—John Etnick’s New Spelling Dictionary and Thomas Dyche’s New General English Dictionary—show that “effects” had two alternative meanings. In the available dictionaries, “effects” meant, unsurprisingly, “goods; moveables [sic]” and “the goods or moveables [sic] of merchant, tradesman, gentleman.” In modern English practice, a dictionary simply places a plural definition within the definition of the singular tense. Yet,

---

178 CuDDHy, supra note 147, at 735 n. 250 (“Roger Sherman referred to it during the First Session of the First Congress.”) (quoting Sherman to John Adams, New York, July 20, 1789).
179 Id. at 734–35 n. 250 (“William Few of Georgia had perused one of Thomas Dyche’s dictionaries, most probably his New General English Dictionary”) (citing Col. William Few, 7 MAG. OF AM. HIST., in AUTOBIOGRAPHY, 345 (1881)).
181 Entick’s Dictionary, supra note 180, at 135.
183 See, e.g., MERRIAM-WEBSTER’S DICTIONARY (online ed., 2013) (defining “effects” as the plural of “effect,” which can also mean “moveable property,” that is, “personal effects”), available at http://www.merriam-webster.com/dictionary/effect. This dictionary also defines “effect” as “power to bring about a result.” Id.
Etnick and Dyche’s dictionaries separated these definitions, and both dictionaries also separately defined the term “effect.” Under Etnick’s definition, “effect” meant “a thing produced, end, issue, consequence.” Under Dyche’s definition, “effect” meant “the consequence or production that follows or comes of the acting of a cause; also the end or finishing of a thing.” In modern dictionaries, “effect” has a similar definition to its eighteenth century counterpart and includes its plural counterpart. Thus, the past and current definition can expand beyond possessory interests to include the results (or effects) of human action or accomplishment. And results of human actions may include intangibles, such as a speech, rather than a thing in our physical possession. For instance, in some situations the effects (or results) of our actions (the content put in) may require just as much protection as the actions. For example, the current product (or effect) of using a mobile device and associated services to communicate (the content) with others is multiple private, third party service providers recording an individual’s personal data. Conceiving “effects” in this way, accordingly, reflects Thomas Jefferson’s notion that we as individuals have a natural right—that is, an individual interest—in our freedom to associate.

None of this as yet disproves the Court’s contention that the founders intended “effects” to mean personal property in *Oliver v. United States*. The canon of technical meaning cautions that the word “effects” be interpreted “in accordance with some legal background . . . or in line with a judicially developed term of art.” If arguing as the Court does for “effects” to mean strictly ‘personal effects,” then “effects” means ‘personal

---

184 Notably, Entick’s *Dictionary* also signified “effects” as a “pl.,” which the author has taken to mean plural. Entick’s *Dictionary*, supra note 180, at 135. Although the dictionary has a key for signifying words, such as “s” for substantive, “v.” for verb, it did not define “pl.” See id. at B3. Dyche’s dictionary signified “effects” as a “substantive.” A substantive under Dyche’s definition seems to be a subject or a noun and can have both the singular and plural tense. Dyche’s 1768 Edition, supra note 180.

185 Dyche’s *Dictionary*, supra note 180, at 135. Effect was also signified as a “substantive.” Id.

186 See, e.g., *Merriam-Webster’s Dictionary*, supra note 183 (defining effect as “power to bring about a result,” or “something that inevitably follows an antecedent”); *Oxford English Dictionary*, supra note 166 (defining effects as “a change that is the result of a consequence or an action” and exemplifying its meaning with the sentence “the lethal effects of hard drugs”). The *Oxford English Dictionary* also defines effect as “an impression produced in the mind of a person,” and defines that “effects” is a plural of “effect” and means “personal belongings.” Id.

187 *See Thomas Jefferson, Letters, reprinted in Life and Letters of Thomas Jefferson*, 436 (A. Koch and W. Peden ed., 1944). Thomas Jefferson stated that the American colonists possessed “the free exercise of trade with all parts of the world, . . . and which no law of their own had taken away or abridged, was the next object of unjust encroachment.” Id.

188 *Oliver*, 460 U.S. at 177 n.7.

189 Nancy Staudt, et al., *supra* note 163, at 1933, n.103 (“For example, “convenience of the employer” has been construed to mean business necessity rather than convenient in the ordinary sense of helpful”).
property’ because ‘personal effects’ has been accorded a legal meaning. Yet legal dictionaries dating back to the fourteenth century also note that the term “effect” can mean “[t]he result that an instrument between parties will produce on their relative rights, or that a statute will produce on existing law, as discovered from the language used, the forms employed, or other materials for construing it.”191 This legal definition thus dispels support for the contention that the framers intended to encompass only “personal property.”

If “effects” means “the results or consequences of human action,” so too can the term encompass “personal property” and the “result that an instrument.” As the history surrounding the adoption of our Constitution and the Bill of Rights demonstrates, our founders were influenced by the political and philosophical perspectives on government and individual rights of key Enlightenment Era intellectuals.

2. The Purpose of the Fourth Amendment

The Fourth Amendment seeks to balance the government’s interest in having adequate means to enforce its powers against our fundamental and inalienable rights. Consequently, the following discussion of the Fourth Amendment’s purpose begins with a brief discussion of the principles and interests underlying our declaring independence and subsequently constituting the federal government. It then describes these governmental interests in the context of the history surrounding the revolution and likely patterns of past government abuses that lead to the adoption of the Fourth Amendment. Scholars have written extensively about the Constitution’s and the Fourth Amendment’s first principles;192 as a result, this section provides only a brief discussion for the uninitiated reader.

In declaring our independence, we the people expressed the self-evident truth, as influenced by John Locke’s writings on government and individual rights, that all individuals have inalienable rights to, among others, life, liberty, and the pursuit of happiness.193 As then understood, political commentary noted that liberty meant security to enjoy the effects of our honest industry and labor.194 In addition, the pursuit of happiness is understood to mean the pursuit of the material results of our honest industry and labor; in other words, it encompasses our right to private gains, which include property. So understood, the effects of our human

191 Black’s Dictionary at 592 (defining the noun “effect”) (emphasis added). Moreover, Blackstone noted that when interpreting the law, one should look to the “Effects or Consequences, or Spirit or Reason” of the law. BLACKSTONE, supra note 166, at 3. This provides further support for construing effects as results based.
193 DECLARATION OF INDEPENDENCE at ¶ 2.
194 See FEDERAL FARMER NO. 6 (1787).
action lead to our happiness and securing them is fundamental to our inalienable rights.\footnote{195 See generally JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (10th ed., 1690) (describing his labor theory of value to include every individual’s natural right to “Life, Health, Liberty, or Possessions”), available at http://www.gutenberg.org/ebooks/7370.}

To secure our inalienable rights, we, the popular sovereignty by ratifying the founders’ draft, established our government minding the social compact theory.\footnote{196 See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, 540–42 (1998); see also THE FEDERALIST PAPERS NO. 51, at 319–21 (Madison) (Clinton Rossiter ed., 2003).} But in our social compact lies conflict. It exists among those with the power and authority to control the government and the governed who authorized the rule of law.\footnote{197 See THE FEDERALIST PAPERS NO. 51 (Madison).} At the conflict’s core is the tension between the purpose of government (security) and the interest it is designed to protect (liberty).\footnote{198 See id. at 319 (James Madison) (Clinton Rossiter ed., 2003) (“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself”).}

But we the people did not dispense control over the entirety of our liberty in authorizing the government’s power to rule under law.\footnote{199 See id. at 320 (Madison) (Clinton Rossiter ed., 2003) (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part”).} Instead, in exchange for securing our fundamental and inalienable rights for the ages, we enabled our government to control certain of our behaviors.\footnote{200 See id.} The founding generation thought this control was necessary to ensure that licentiousness and mob rule did not ultimately deprive each individual of their unalienable liberty.\footnote{201 See id. at 320 (Madison) (Clinton Rossiter ed., 2003) (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part”).} It follows, then, that we the people gave up some of our less essential freedoms in favor of securing our inalienable liberty for the general welfare.\footnote{202 See id.} And the law’s enforcement secures our rights; if no government enforced the law, the people would have no reason to follow it. Accordingly, under our instituting theory, this form of government is the least restrictive means for securing our fundamental and inalienable liberty, and consequently the effects of our consciousness, diligence, and efforts.

But encroachments on our fundamental and inalienable liberty do not end with protecting against licentiousness and mob rule—so too do tyrannical and totalitarian rule encroach on that liberty.\footnote{203 See id.} In theory, accountability to the sovereign serves as a control to pervasive, totalitarian rule.\footnote{204 Id.} But this is in theory. Having understood past abuses in framing our
government as one of its enumerated powers, the founders employed two principles from Montesquieu’s work—the separation of powers, in addition to checks and balances—because they understood that concentrating the federal government’s power in the hands of one unchecked executive would lead to encroachments on the people’s liberty under a tyrannical or totalitarian state. For this reason, these distinct principles underpin our democratic-republic, constructed as a social contract. No one branch is said to have the sole power to create, enact, enforce, or interpret the law. At the same time, a collective action problem is inherent in the popular sovereign’s ability to exert external control if government ever misinterprets or abuses its powers. Consequently, the framers allowed for legislative and judicial oversight, or “checks,” on the executive’s law enforcement powers in order to protect the people.

The framers also understood all too well that law enforcement power in an unchecked executive had massive effects on our privacy and liberty, including in the use of general warrants to enter our private businesses and homes. For example, scholars agree that the founding generation was keenly aware of the Wilkes Affair involving King George’s dragnet general warrants against individuals expressing political speech.

As the states ratified the Constitution, many vested in the Union’s success anonymously expressed related answers in political papers; all believed that because the people remain sovereign, anything not expressly provided for in the Constitution remains with the people. Some believed that this underlying theory of sovereignty was sufficient and written declaration of rights were unnecessary. Others feared that government encroachment upon the people’s inalienable liberty and fundamental rights would occur without amendments expressing inalienable or fundamental rights of the people. A believer in the federal-republic, the Federal Farmer still noted that express amendments of the fundamental or inalienable right of the people were necessary, including their right to be secure in their persons, papers or effects.

Despite the political divide, the people ratified the Constitution in 1788, and the First Congress began its work instituting the new federal government that summer.

---

205 See McCulloch v. Maryland, 17 U.S.C. 316 (1819) (“This government is acknowledged by all, to be one of enumerated powers”).
206 See CUDDIHY, supra note 147.
207 See, e.g., THE FEDERALIST PAPERS NO. 84 (Hamilton); THE FEDERAL FARMER NO. 6.
208 See THE FEDERALIST PAPERS NO. 84 (Hamilton).
210 Id.
211 BICKFORD et. al., eds., supra note 152, at 10–11; see also MAIER, supra note 161 at 436; CUDDIHY, supra note 147, at 692. When New Hampshire ratified the Constitution on June 21, 1788 as the last of the requisite nine states necessary to constitute the new federal government, it was not as relevant as Virginia and New York subsequently ratifying the Constitution. See MAIER, supra note 161, at 436. Historians argue that without Virginia and New York
Given the political backdrop of the ratification of the Constitution, James Madison sought the introduction of the Bill of Rights in the House of Representatives. The Fourth Amendment’s clause securing the people’s “persons, houses, papers, and effects” against government intrusions necessarily created tension between government and individual interests. Reflected in this tension are the constitutional principles related to both individual rights on the one hand and, on the other, the government’s power. As the primary drafter of the Fourth Amendment, Madison did not leave “instructions on how to discern its original meaning or on how to constitutionally utilize that meaning.” But evidence from the adoption of the first ten amendments demonstrates that the founding generation intended to use the principle of checks and balances to ensure that government’s law enforcement power did not encroach upon secured Fourth Amendment values.

James Madison, the “father” of the Bill of Rights, came from a perspective that found no need for explicitly enumerating the rights of the people. According to this view, where a government is “founded up on the power of the people . . . in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations.” Nevertheless, in acknowledging that, in “framing a government which is to be administered by men over men, great difficulty lies,” Madison understood that “experience has taught mankind the necessity of auxiliary precautions.” In addition, on September 28, 1789, the first Congress subsequently ratifying the Constitution, the Union would not have stood. Id. Notably, Virginia did not provide a similar enumerated list in its search and seizure provision. See VA. DECLARATION OF RIGHTS of 1776, sec. 10, reprinted in JOHN J. DINAN, THE VIRGINIA CONSTITUTION: A REFERENCE GUIDE, 53 (2006) (“That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted”). New York, however, did not have a Fourth Amendment parallel until at least the nineteenth century. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE, 58 (1991). Nevertheless, the body of the New York Constitution did protect the right of consciousness and religious freedom, which are liberty-based interests or rights. See id. at 4.

212 BICKFORD et al., eds., supra note 152, at 10–11. See also CUDIHY, supra note 147, at 691–92. No state expressly conditioned ratification on constitutional amendments expressing individual rights as against the government. See id.

213 CUDIHY, supra note 147, at 727 n.221.

214 See id., at 691. These amendments ultimately became known as the Bill of Rights. See BICKFORD et al., eds., supra note 6, at 7 (“On December 15, 1791, the [ ] ten Amendments became part of the Constitution when they were ratified by Virginia. By then they had become known as the Bill of Rights.”), available at http://www.gwu.edu/~ffcp/exhibit/p7/p7_7.html.

215 THE FEDERALIST PAPERS No. 84 (Hamilton); see also WOOD, supra note 45, at 540–42 (suggesting that James Madison opposed writing down specific rights for several reasons, but later acquiesced as “it [was] anxiously desired by others.”) (quoting Madison to Jefferson, Oct. 17, 1788, JEFFERSON PAPERS, XIV, 18–19 (Boyd ed.).

216 THE FEDERALIST PAPERS No. 51 (Madison), Madison, in changing his position on the written declaration of rights, noted that they could serve the “double purpose of satisfying the minds of
admitted that it provided the amendments to the people for purposes of “prevent[ing] misconstruction or abuse of [the government’s] powers.”

And in drafting the Fourth Amendment, it proscribed ways to ensure that the government does not forget “the benificent [sic] ends of its institution.” Thus, the Fourth Amendment, along with the first adopted amendments, broadly embody the principle of checks and balances—the judicial branch gave the people a proper platform to air any grievances of constitutional violations. In so doing, the founding generation that adopted the Bill of Rights intended to express the requisite outside controls over those with the power to govern the sovereign people. At the same time, this remedy left the judiciary as, as some then considered, the most dangerous branch because some argued that the other two branches could not check the independent branch if it ever misconstrued or abused its power.

With respect to the principles embodied in the Fourth Amendment securing our “persons, houses, papers, and effects,” this reflects the principle that every citizen is “created equal . . . with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

3. The Amendment’s Legislative History

Although there is little legislative history, there is sufficient evidence to provide a fair understanding of the way in which the framers likely thought about the issues involved. This subsection traces the legislative history, concluding that the founders intended to secure our personhood, liberty, and property-based interests.

The available legislative history of the First Congress suggests that on May 4, 1789, James Madison announced his intention to draft what would become the Bill of Rights. On June 8, 1789, he presented a draft of those rights to the House of Representatives, including a preliminary draft of the Fourth Amendment. That draft of the Amendment reads as follows:

well meaning opponents, and of providing additional guards in favour of liberty.” See WOOD, supra note 45, at 542–43 (quoting Madison to George Eve, Jan 2, 1789, WRITING OF MADISON, V, 320 (Hunt ed.).

BICKFORD et. al., eds., supra note 152, at 7.

See CUDDIHY, supra note 147, at 691 (citing Madison’s May 4, 1789 speech in Congress for the proposition that Madison intended to write the Bill of Rights). 1 CONG. REGISTER, 190 (Lloyd ed., 1789).

DECLARATION OF INDEPENDENCE.

CUDDIHY, supra note 147, at 692. Fourth Amendment scholars and historians have found the documentary record of the preliminary drafts of the Amendment inadequate. Id. at 691. Nevertheless, this available history still provides context for historically interpreting “effects.”

Id. at 692. See also id. at 729 (noting that the Amendment originated and had all its substantive revisions in the House of Representatives) (quoting Madison’s Speech on Jun. 8, 1789, reprinted
“The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issues without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.”

After Madison presented his first draft of the Amendment, the House of Representatives ignored Madison not once, but twice, on his recommendations for a Bill of Rights. On July 21, 1789, with the help of Elbridge Gerry, Madison recommended for a third time that the whole House debate the amendments. The House, however, delegated the matter to the “Committee of Eleven.” The Committee’s July 28, 1789 report stated that it was “the rights of the people to be secure in their persons, houses, papers and effects.” By August 17, 1789, once the House began debating the amendments, the Fourth Amendment guaranteed “the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.” After debates on other parts of the provision, and on other amendments, on August 19, 1789, the Fourth Amendment was drafted as we see it in our Constitution.
4. The Original Understanding of “Effects

In looking back to the first principles underlying our federal government, it is clear that the Framers intended the term’s plain meaning to secure our Fourth Amendment interests in life, liberty, and property against unnecessary governmental intrusions. If the Fourth Amendment simply protected an individual’s possessory interests in their personal property when the Framers included “effects” in the people’s right to be secure from unreasonable governmental intrusions, then it begs asking why the Framers also included the term “papers” in the list of matters in which we have a right to be secure. The answer first depends on an analysis of the term’s meaning and use in the context of the Amendment. Second, the answer depends on the nature and extent of the values underscoring the Fourth Amendment’s “persons, houses, papers, and effects.”

Placing “effects” in a list of enumerated objects leads to the ultimate question of this Article: which individual interests does “effects” protect? But two other questions and answers must necessarily precede the question to find its answer: (a) how did “effects” enter the constitutional rhetoric in the first place, and (b) what does it mean—that is, what did the Framers intend to protect and did it include more than personal property?

The word “effects” entered the search and seizure framework through political statements in the Antifederalist papers prior to the drafting of the Bill of Rights. Its use in the Fourth Amendment is attributed to a 1787 essay from the Federal Farmer, a critic of the Constitution, in part, because it lacked an expression of certain fundamental rights. Like the Fourth Amendment, the Federal Farmer expressed the rights of the people to be secure against unreasonable governmental intrusions in an enumerated list of individual interests, including “effects.” In its sixth essay, printed in May of 1788 and available in at least New York State, the Federal Farmer wrote:

“The following, I think, will be allowed to be unalienable or fundamental rights in the United States: . . . [n]o man is

---

231 See id. at 729.
232 FEDERAL FARMER NO. 6. There is dispute as to the author behind the Federal Farmer. According to William J. Cuddihy, Richard Henry Lee is the author. CUDDIHY, supra note 147, at 692. According to Gordon Wood, however, the Federal Farmer is Melacton Smith. WOOD, supra note 45, at 530. For this reason, this Article simply refers to the Federal Farmer as the author.
233 See generally MAIER, supra note 161 (detailing the ratification process in the first thirteen states). Although the Federal Farmer’s sixth essay is dated as of December 25, 1787, published pamphlets including this essay were not available until the next spring. DHRC, supra note 161, at 14–18. This essay appeared in a second pamphlet from the Federal Farmer. Id. The availability of the Farmer’s letters in New York is significant because New York was an important state in the ratification. See MAIER, supra note 161, at 344 (noting that a New York printer was the only printer to publish all of the Federal Farmer’s letters).
held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects.”

Unlike the framers of the Amendment, the Federal Farmer, by including “effects” in its enumerated list, provided insight into the meaning of “effects.” The Federal Farmer’s sixth essay provides insight into the purpose of the Framers when they created a procedural safeguard for the people’s individual interests in the results of their endeavors. While the Federal Farmer listed “effects” as secured interests, the essay also used it three times prior: once as “effect” and twice as “effects.” The prior uses provide context for the term and further support finding that the Framers intended “effects” to mean more than personal property. The Federal Farmer’s second use of “effects” appeared prior to its expressing the right of the people in their “persons, papers or effects,” and reads:

“Liberty, in its genuine sense, is security to enjoy the effects of our honest industry and labours, in a free and mild government, and personal security from all illegal restraints.”

Under the Farmer’s first and second use of “effects,” it is a pluralized use of the word “effect,” as the available eighteenth century dictionaries

234 FEDERAL FARMER NO. 6 (emphasis added). In his argument on the unalienable rights of the people, the Federal Farmer made sure to note that the people of Delaware, Pennsylvania, and New Jersey had already ratified the Constitution without a Bill of Rights. See id.; see also 1 THE COMPLETE ANTI-FEDERALIST, 31 (Storing, Herbert J., ed., 1981) (“Three states have now adopted the constitution without amendments . . . ”). See also MAIER, supra note 161, at 120–22. The documentary history of Pennsylvania’s ratification suggests that a lack of a federal bill of rights was haughtily debated. Id. at 107. This is significant because as one of the first three ratifying states, it ratified the constitution with a 33% naysayer rate. See id. (noting that the Pennsylvania constituents ratified the Constitution by a vote of 46-23 on December 12, 1787). Moreover, the Pennsylvania Supreme Court in recent years conducted a historical analysis and found that its search and seizure provision has traditionally “provided different, and broader, protections than its federal counterpart.” Com. v. Matos, 672 A.2d 769, 772 (1996). See also Com. v. Edmunds, 586 A.2d 887, 898 (1991) (discussing how Pennsylvania’s search and seizure provision is “tied into the implicit right to privacy in this Commonwealth,” where the case law on its federal counterpart has a more police misconduct deterrent quality to it than protecting individual interests). On the other hand, the Delaware and New Jersey constituents unanimously ratified the Constitution in early December of 1787. MAIER, supra note 161, at 121–22.

235 The word “effect” in the context of the Farmer’s essay means “result” or “consequence.” FEDERAL FARMER NO. 6 (“Their attention is now awake — the discussion of the subject, which has already taken place, has had a happy effect . . . ”).

236 Id.
defined it—that is, as the results or consequences of our honest industry and labor.\textsuperscript{237}

Madison’s first draft, though missing “effects,” uses “their other property” in its stead. It is true that replacing “other property” with “effects” could mean that the Framers intended to reflect a protection of tangible property. But if this were true, the Framers would have left the word “other” in the text to ensure that it was clear that “effects” meant a particular tangible thing instead of a result or consequence of human action. This would include, for instance, “[t]he result that an instrument between parties will produce on their relative rights,”\textsuperscript{238} such as a compact to produce an anonymously written journalistic article embodying political expression for a fee.

Madison’s first draft also enumerated the list of secure individual interests. Because most of the state constitutions drafted after independence was declared in 1776 also had written declarations of rights for their citizens, known as the Bill of Rights at the federal level, this drafting style is easily attributable to the Massachusetts Constitution.\textsuperscript{239} In 1780, the people of Massachusetts accepted the constitution that John Adams heavily drafted.\textsuperscript{240} The text of that state Constitution stated, in relevant part, that “[e]very subject has a right to be secure from all unreasonable searches and

\textsuperscript{237}The first use of “effects” shows that “effects” would likely mean more than “goods” or “tangible property.” It reads:

“When the constitution was first published, there appeared to prevail a misguided zeal to prevent a fair unbiased examination of a subject of infinite importance to this people and their posterity — to the cause of liberty and the rights of mankind — and it was the duty of those who saw a restless ardor, or design, attempting to mislead the people by a parade of names and misrepresentations, to endeavour to prevent their having their intended effects.”

Id. (emphasis added).

\textsuperscript{238}Id. at 592 (defining the noun “effect”) (emphasis added). Moreover, Blackstone noted that when interpreting the law, one should look to the “Effects or Consequences, or Spirit or Reason” of the law. BLACKSTONE, supra note 19, at 3. This provides further support for construing effects as results based.

\textsuperscript{239}This is significant because most of the constitutions for the colonies discussed the procedural guard against unreasonable searches or seizures without enumerating a list. See VA. CONST. of 1776 (prohibiting general warrants of search “suspected places without evidence of fact committed” or seizure of “any person or persons not named”). Some states did not even have a similar safeguard. See, e.g., GALIE, supra note 59, at 58 (New York); PATRICK T. CONLEY, THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE (2007) (Rhode Island).

\textsuperscript{240}The people of Massachusetts voting to adopt the 1780 Constitution is significant because it legitimates the constitution as one created for the people and directly ratified by the people. It is also significant that John Adams drafted the Massachusetts Constitution because he, like many of the other key founders, was familiar with John Locke’s theories. This is relevant, as articulated below, to the addition of the term “effects” as opposed to the use of the words “other property” or “other possessions” in the original Fourth Amendment draft and the relevant provision of the Massachusetts Declaration of Rights. See MASS. CONST. of 1780, art. XIV (1780).
While the state constitutions help provide context for the use of an enumerated list, it does not end the inquiry on whether the term means more than personal property.

Although Madison’s initial draft did not employ the term “effects,” its list of protected interests from the draft’s inception is relevant because one tool of interpretation available to judges includes looking to punctuation, grammar, and syntax.\footnote{242} In considering punctuation, the first House draft included the enumerated list without separating “papers and effects,” while the final provision of the Amendment employs a serial comma in separating the individual interests. This is significant because this shows that the Framers of the text intended for “effects” not to solely modify or be connected to “papers.”\footnote{243} Moreover, this ensures that enumerating “papers” outside of “effects” is not meaningless; if “effects” solely meant personal property, why did the Framers need to list “papers,” as those too can be personal effects?\footnote{244}

The Federal Farmer’s defining liberty as “security to enjoy the effects of our honest industry and labours . . . ” captures that very definition of “effects.” And it also encapsulates the philosophical values that were so influential to the founding generation. As a Fourth Amendment scholar has previously noted, “the scope of the Fourth Amendment is wide because its author shared the philosophy it expressed and not because it was politically expedient.”\footnote{245} Rather than constraining the Fourth Amendment to

\footnote{241} MASS. \textbf{CONST.} of 1780, art. XIV. The full right against unreasonable searches and seizures read:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.

\textit{Id.}

\footnote{242} This is defined as “the act of looking to punctuation, grammar, or syntax to decide meaning of the law.” Nancy Staudt, et al., \textit{supra} note 163, at 1933. “Under this approach, a court may consider the placement of a period or comma, use of conjunctive or disjunctive, use of ‘may’ versus ‘shall,’ use of singular versus plural, or the confusion about terms such as ‘unless.’ \textit{Id.} at n.102 (citations omitted).

\footnote{243} Style manuals note that using the comma effectively requires good judgment and in formal prose, and logical considerations must come first. UNIV. OF CHICAGO, CHICAGO MANUAL OF STYLE, 311 (16th ed., 2010).

\footnote{244} See Nancy Staudt, et al., \textit{supra} note 163, at 1933 (“Avoid rendering language superfluous”).

\footnote{245} CUDIHY, \textit{supra} note 147, at 727 (“Politics explained only the motivation behind the amendment; a civil-libertarian ideology explained its content”). See also \textit{id.} at 548 (“Colonial theorists denounced the writ of assistance not only because it permitted promiscuous searches but also because those searches infringed fundamental rights not to be disturbed or to have personal
possessory interests or known, tangible objects, in using effects, the Framers expanded the list of interests to include “effects” in order to provide a more flexible procedural safeguard as an external control over those men governing men under a rule of law.

Comparing the Federal Farmer’s enumeration of the objects securing our individual interests to the final draft of the Fourth Amendment is also significant. Unlike the text of the Amendment, the Federal Farmer did not employ a serial comma in separating “papers or effects.” And in using an “and” rather than an “or,” the Framers did two things; first, they made the enumerated interests connected rather than disjunctive. In other words, by using a serial comma to list the four interests, the Framers made sure that no confusion occurred as to whether “effects” was only connected to “papers.” If they only employed “or,” one could make an argument that the Amendment would only protect each item on the list separately rather than cohesively. If “effects” means “the power to bring about a result” or “consequence,” one could see how an “or” between the interests would not make sense to the Framers. For example, the other tangible objects enumerated in the Amendment, such as our “houses” and our “papers,” also result from our actions. If we can only protect our “effects,” but not where they are housed or written, then the government can easily circumvent the Amendment’s protection.

Because an important political motivation for the American Revolution included English struggles in civil liberties, such as the Wilkes Affair, it is likely that stories from this incident underscored the drafters protecting both our “papers” and “effects.” One such struggle involved the journalist and political radical John Wilkes and his associate, John Entick. John Wilkes, a critic of then King George III, was charged with

secrets divulged”). This suggests the Fourth Amendment adopted a more expansive view than the original Massachusetts Constitution or Madison’s initial draft of the Amendment. As related to the political history, the Stamp Act was part of the political impetus for the revolution. See WOOD, supra note 45, at 182, 312 (describing the relevance of the Stamp Act to declaring independence).

An “or” disjunctive conjunction means that both items cannot be true, but both can be false. Under the Fourth Amendment, the people are ‘secure’ in each individual interest collectively, whether the interest is intruded upon at the same time as another interest. The government cannot intrude upon their homes, their papers, or effects at the same time, or individually. This is significant to the applicability of the “effects” as related to the third party doctrine and the analysis below of the implications of Smith and Miller on the people in the Information Age. See Section V.

MERRIAM-WEBSTER, supra note 93.

See Section V.

See CUDDHY, supra note 147, at 439–40, 458.

See id. at 446–47, 453–58. The founders were aware of general warrants. See id. at 538 (“Massive coverage of the Wilkes affair by the colonial press sensitized readers not only to but against general warrants”).
seditious libel against the King and Lord Halifax after an anonymously written article appeared in an opposition periodical of the time.\textsuperscript{252} In an attempt to silence Wilkes, Lord Halifax sent four king’s messengers to the houses of Wilkes’ supporters, including John Entick.\textsuperscript{253} Lord Halifax signed a general warrant commanding that the agents “make strict and diligent search for the authors, printers, and publishers of the offending publication.”\textsuperscript{254} The warrant issued without any information to guide its execution.\textsuperscript{255} Yet, without naming particular people, places, papers, or things for the agents to search, the agents inevitably connected Wilkes to the periodical after using this general warrant.\textsuperscript{256} In the 1765 case of Entick \textit{v. Carrington}, Entick charged the messengers with trespass when they took multiple issues of a periodical and other items—ostensibly to use as evidence of Entick’s connection to Wilkes or the periodical—and caused £2000 in damage.\textsuperscript{257} The warrant did not specify the periodicals that the messengers took, nor mention Entick as the relevant author.\textsuperscript{258} The English trial court ruled that the seizure constituted a trespass upon Entick’s right to individual privacy.\textsuperscript{259}

Entick’s case is also relevant for several other reasons. First, the case demonstrates the right of the people to be left alone and free from government intrusions with respect to an individual’s interests in not disclosing personal information, including with whom that individual associates.\textsuperscript{260} Underlying this right are the liberty and personhood-based interests of privacy, which is tied to the information about an individual like Entick, his political perspectives, and his associates.\textsuperscript{261} Second, the case helps explain the Amendment’s intended purpose based on its probable cause and particularized search warrant requirements. The case suggests that these requirements serve as external controls over

\begin{itemize}
\item \textsuperscript{252} See id. at 440. The forty-fifth issue of \textit{The North Briton} contained the article criticizing the King, as well as Lord Halifax, which the article called a “wretched” puppet of Lord Bute. \textit{Id.} at 440, 440 n. 2 (citations omitted).
\item \textsuperscript{253} See id. at 447. Representatives of the Crown included private citizens allowed to act as law enforcement. \textit{See id.} at 5.
\item \textsuperscript{254} \textit{Id.} at 440 (internal quotations omitted).
\item \textsuperscript{255} \textit{Id.} at 447 (citations omitted). It took three days to make the search, and only after Halifax’s agents heard second-hand information. \textit{Id.} at 441. After, an unidentified printer revealed that he had seen Wilkes—previously suspected as an author of the opposition periodical—enter an assumed guilty printer’s shop. \textit{Id.} (citations omitted).
\item \textsuperscript{256} \textit{See id.} at 441–442.
\item \textsuperscript{257} See CUDDIHY, \textit{supra} note 147, at 453–55 (citations omitted).
\item \textsuperscript{258} \textit{Id.} at 453 (citations omitted).
\item \textsuperscript{259} \textit{Id.} at 454–55 (citations omitted). This ruling suggests that the court found the search invalid because the general warrant not only failed to state probable cause, but it also did not specify the things to be seized.
\item \textsuperscript{260} \textit{See id.} at 455.
\item \textsuperscript{261} The trial court, in part, found that the king’s messengers had trespassed onto Entick’s property because of the disclosure of the secrets within the seized documents. \textit{See id.} at 454–55 (footnote omitted) (citations omitted).
\end{itemize}
government’s law enforcement power, ensuring that it remains transparent and accountable to the people.262 It also demonstrates that the people have a right to their information privacy without governmental mass control of their information.

To summarize, “effects” should be interpreted in its plain meaning—as the results of human action. The available documentary history and evidence related to the American Revolution and subsequent constitutional adoption reveals the fundamental value the Fourth Amendment protects: that all individuals have an equal right to life, liberty, and the attainment of gratification. The text and principles reveal “effects”’ broader purpose: the term more expansively protects individual’s fundamental and inalienable rights in their personhood, liberty, and property-based interests.

Constitutional interpretation cautions that a term should be interpreted in favor of the individual interests at stake. In reviewing the text and principles of the Fourth Amendment, this Article concludes that “effects” should be construed as embodying the people’s equal constitutional right to the result of their individual personhood, liberty, and property interests free from unreasonable government intrusion.

For this reason, this Article next contends that the text expressly provides the people with a right to be secure against unreasonable governmental dragnet information gathering and surveillance practices. As the next section suggests, however, limitations exist to allow federal and state governments to continue to exercise their beneficent law enforcement purposes.

IV. THE EFFECT OF HISTORICALLY INTERPRETING “EFFECTS”

Construing “effects” as it was intended allows the Fourth Amendment to protect individuals’ tangible and intangible interests, in their fundamental and inalienable rights alike, as society and information technologies change. Although the Supreme Court’s “effects” protects individuals’ interests associated with their personal property, this protection is limited; while it protects individuals’ privacy and possessory interests from unreasonable searches, it only protects individuals’ possessory interests from unreasonable seizures. In addition, this construction strips “effects” of its full scope. Current Fourth Amendment search law provides fodder for arguing either side of whether the Fourth Amendment protects individuals’ privacy interests from wide-scale government collection, retention, and use of citizens’ personal information housed in the data

262 Id. The case also suggests that allowing private, third parties to act as law enforcement agents cannot extend the executive’s power. This is so because at the time, private persons acted as king’s messengers or representatives of the Crown. See id. at 5.
records of private, third parties. Modern Fourth Amendment seizure doctrine is, however, a more troubling issue; it makes it impossible for individuals to claim privacy interests in their personal information housed in third party business records from unreasonable government collection and retention.

This section, therefore, suggests a Fourth Amendment analytical framework that provides textual support—based on construing “effects” as this Article’s historical interpretation suggests—for securing the people’s rights in their tangible and intangible interests equally from unreasonable seizures, in addition to unreasonable searches. The text and principles of the Fourth Amendment support the conclusion that “effects” protects individuals’ interests in the products of their individual actions beyond tangible things or goods; it protects an individual’s personhood, liberty, and property-based interests from all unreasonable government intrusions. Based on this understanding, in modern-terms, this Article’s analytical framework would protect individuals’ possessory and privacy interests equally from unreasonable searches and seizures.

Using an analytical framework that employs the original understanding of “effects” releases the judiciary from grappling with analyzing the latest form a governmental intrusion takes to conduct unreasonable searches and/or seizures. It also supports protecting individuals’ interests in the fundamental values motivating America’s independence and the subsequent constitutional adoption, including the Bill of Rights. Therefore, the historical interpretation in this Article also supports scholars’ previous suggestions that the Fourth Amendment has a direct link to the other amendments—including the First, Third, Seventh, and even Fourteenth Amendments—and rights embodied therein. As linked to the other amendments, the original understanding of “effects” supports releasing the chokehold of the content/non-content distinction—in

---

263 See United States v. Jones, 132 S. Ct. 949 (2012); see also infra, Parts A—C.
264 See supra Section IV.
265 One could argue that “effects” should only mean property interests of the people because of the canon ejusdem generis. Ejusdem generis provides that “where general words follow specific words, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.” Nancy Staudt, et al., supra note 163 at 1933 (footnotes omitted). “Where the opposite sequence is found (i.e., specific words following general ones) the doctrine is equally applicable and restricts application of the general term to things that are similar to those enumerated.” Id. This assumes the plain meaning of the word following specific words is unambiguous, which “effects” is not. One could also make another counterargument against expanding “effects” beyond personal property based on expressio unius, and that the framers meant to exclude real property. Understanding the underlying principles of the Amendment and its purpose as a procedural safeguard reveals that the framers intended for a more expansive definition of “effects” and did not intend to exclude real property. Expressio unius is the enumeration of certain things in a statute, suggesting that the legislators did not intend to include things not listed. Id. at 1933.
266 See Amar, Bill of Rights, 75-76; see also Solove, supra note 16, at 1084.
addition to the third party doctrine’s grip—on the Fourth Amendment’s protections. As this section soon demonstrates, the Fourth Amendment’s protection of “effects,” in addition to “papers,” should protect citizens’ information and decisional privacy interests in their individual communications records from which the government can build digital dossiers on millions of citizens with ease, by collecting and retaining such personal information housed in third party business records. In protecting these interests, the Fourth Amendment also ensures that the government does not infringe individuals’ fundamental and inalienable rights to freely communicate and associate, as embodied in the First Amendment.

Divided into four parts, Part A discusses the Court’s perspective on history’s relevance as a tool for constitutional interpretation, with special focus on the Fourth Amendment. Part B suggests the analytical framework based on this Article’s historical interpretation and juxtaposes it against modern Fourth Amendment law to demonstrate the ways in which an original understanding of “effects” restores the Fourth Amendment’s effect. Because law enforcement must effectuate its beneficent purpose, this part also briefly discusses the inherent limits on this interpretation—“effects” only secures the results of individuals’ actions from unreasonable government searches and seizures. In applying this analytical framework to recent claims regarding the Executive’s wide-scale gathering of domestic citizens’ telephony metadata, Part B also seeks to show how the Fourth Amendment can indeed protect individuals’ interests in their personal information housed in third party data records from the collection, retention, and use of individuals’ communications records. However, putting an analytical framework like the one suggested here raises several questions associated with the practical consequences of its implementation. Part C thus discusses the differences between the power of the judiciary or Congress to implement such an analytical framework that allows the Fourth Amendment to protect individuals’ interest in the tangible and intangible results of their actions equally from all unreasonable governmental intrusions.

A. HISTORY’S RELEVANCE

This section focuses on the Supreme Court’s perspective on history’s relevance in analyzing the Fourth Amendment and, more broadly, in cases of constitutional interpretation, in order to provide the background context for moving forward with this historical interpretation. The Supreme Court’s most recent decision on the merits regarding technological surveillance and information gathering in United States v. Jones267 provides some relevant insight into the Court’s willingness to re-conceptualize the

Fourth Amendment’s protection of “effects.” Because the Court currently holds that “effects” is intended to mean “personal effects,” how a court would take this historical analysis into account raises multiple issues, including questions about *stare decisis*, which are discussed in the subsequent part of this section.

Scholars have commented that the whole of the Supreme Court’s Fourth Amendment case law is “irreconcilable as to which tools are proper,” because different interpretive tools are used “[d]epending on the era and whether a conservative or liberty majority holds sway.”\(^{268}\) For example, the Court has explicitly required that history should be used, stating that:

> The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.\(^{269}\)

In other instances it has accepted longstanding practices, such as Congressional authorization of a type of search as presumptively constitutional, “especially when it turns on what is ‘reasonable.’”\(^{270}\)

Although these interpretive means would seem to demonstrate irreconcilability as to which tools to use, it does not demonstrate a whole rejection of history. Indeed, the Court has acknowledged the relevance of history in its broader constitutional cases and in interpreting the Fourth Amendment. The Court’s decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*, two recent Second Amendment cases, made it implicitly clear that history is relevant and should be a starting point.\(^{271}\) Both the majority and dissent in these cases thought that the issues involving individuals’ rights to “keep and bear arms” could be, and should be, answered by reference to the original materials.\(^{272}\) The disagreement

---

\(^{268}\) CLANCY, supra note 92, at 14.

\(^{269}\) Carroll v. United States, 267 U.S. 132, 149 (1925).

\(^{270}\) See United States v. Ri De, 332 U.S. 581, 585 (1948).

\(^{271}\) *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (holding that the Second Amendment applies to the states under the incorporation principle in the Fourteenth Amendment’s due process clause protecting an individual’s right to possess a firearm for traditionally lawful purposes); *District of Columbia v. Heller*, 553 U.S. 570 (2008) (holding that the Second Amendment applies to federal enclaves and protects individuals’ rights to possess a firearm for lawful purposes as traditionally understood).

\(^{272}\) Compare *McDonald* (Alito, J., majority) (holding that the incorporation issue was resolved in the late 19th century) with *McDonald* (Stevens, J. dissenting) (stating that the incorporation issue was not resolved as the majority concluded and that the framers of the Fourteenth Amendment “did not write the Second Amendment in order to protect a private right of armed self defense”).
was over the extent to which history matters, not whether it should matter.\textsuperscript{273}

According to the majority opinion in \textit{Heller}, for example, the people who enjoy this Second Amendment freedom are the same people who enjoy First and Fourth Amendment freedoms. The majority of the Court further noted that the constitutional “words and phrases were used in their normal and ordinary” meanings, which include “an idiomatic meaning, but . . . excludes secret or technical meanings.”\textsuperscript{274} In discussing the Framers’ intent in his dissenting opinion, Justice Stevens stated that the Framers would have made the right to bear arms express if it was so intended.

With respect to the Fourth Amendment, the Court has acknowledged that the text of the Fourth Amendment and its underlying principles are relevant in considering a particular type of search or seizure. In 1977, the same year that it acknowledged the interest in information privacy, the Court stated:

\begin{quote}
What we do know is that the Framers were men who focused on the wrongs of the day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.\textsuperscript{275}
\end{quote}

In the context of information gathering and government surveillance, the Court’s decision in \textit{United States v. Jones} provides an answer when it comes to searches. But, given the current construction of the test for a seizure of an individual’s “effects,” surveillance and information gathering activities which do not implicate a physical intrusion, \textit{Jones} is not dispositive. This decision in some way represents the problem with the Court’s interpretation of “effects;” it leads to the irreconcilability of the Court’s use of interpretive tools that scholars note.\textsuperscript{276}

Although the Court in \textit{Jones} unanimously found that a search occurred when law enforcement placed a GPS device on a vehicle owner’s car for several weeks, Justice Alito’s concurrence, in which three other justices joined, chastised the majority’s historically based reasoning.\textsuperscript{277} The majority opinion, written by Justice Scalia, rested on the historical understanding that a trespass to a person’s property was a search per se.\textsuperscript{278} Justice Alito, however, found that this reasoning “strains the language of the Fourth Amendment; it has little if any support in current Fourth

\begin{footnotes}
\item[273] See \textit{id.}.
\item[274] \textit{Heller}, 553 U.S. 570.
\item[276] See, \textit{e.g.}, \textit{CLANCY}, supra note 92; \textit{CUDHY}, supra note 147; \textit{Amar}, supra note 83.
\item[278] \textit{Id. (Alito, J., concurrence).}
\end{footnotes}
Amendment case law and is highly artificial.” Instead, Justice Alito would have rested the Court’s finding that a search occurred on Katz’s reasonable expectation of privacy test, holding that law enforcement violated that right with prolonged surveillance. Justice Sotomayor, filing her own concurrence, best stated the problem with Justice Alito’s approach as it “discounts altogether the constitutional relevance of [a] physical intrusion on [an individual’s personal property]” and, in so doing, “erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control.”

Interpreting “effects” as protecting the people’s inalienable and fundamental rights in the results (and underlying interests) of their individual actions resolves the issue that Justice Sotomayor points out. This Article’s historical interpretation of “effects” provides textual support for Justice Sotomayor’s implicit suggestion in Jones that the Supreme Court should delineate its Fourth Amendment cases based on the individual interests at issue. This would also alleviate the Court from irreconcilably interpreting the Fourth Amendment.

This Article therefore concludes that a prescription forward is simple: construing “effects” as suggested allows the Fourth Amendment to protect the people’s interests in their property and privacy rights. This analytical framework, as detailed in Part B, would remove the Court’s grappling with long-term surveillance and information gathering practices that do not physically intrude upon an individual’s reasonable expectation of privacy. For this reason, Part B also demonstrates this analytical framework in the context of wide-scale, daily on-going collection and retention of the communications records of individual domestic citizens.

**B. RESTORING THE FOURTH AMENDMENT’S “EFFECTS”**

This Article’s historical interpretation based on the text and principles of the constitutional text allows the Fourth Amendment to flexibly adapt to the changes of modern industry and labors. Modern developments require safeguarding our individual interests in ways unknown to the Founders. This is especially important with the advent of Internet technologies that provide government with easy and efficient information gathering and surveillance tools. These rapidly and continuously developing tools are capable of accessing, collecting, retaining, and supporting other uses of data records housing individuals’ personal information.

Technological advances also allow for large collections of individual’s personal data by private sector groups, which the government

---

279 Id. at 958.
280 Id. at 955.
can access (and, in fact, has). The Court’s stripping of “effects” intended scope has endangered Americans’ inalienable and fundamental rights. It has also simultaneously afforded law enforcement wide latitude in its access, collection, and retention of our personal information. The consequences of these decisions have led to the significant and continuous encroachment of individual rights and civil liberties for the illusion of national and domestic security.

Fourth Amendment “effects” would, as intended, protect individuals from unreasonable governmental intrusions upon the peoples’ communications records regardless of the means used. If we construe “effects” as this Article suggests, data records of Americans’ personal communications also would be secure from unreasonable searches and seizures regardless of whether such records include communications content. As information technologies change, the products of human action (“effects”) secure from unreasonable searches and seizures should include individuals’ (“persons’”) personal communications data records (“papers” containing individuals’ associational interests) housed (“houses”) in third-party business records. Accordingly, this section first provides an analytical framework for moving forward. The analytical framework that follows requires construing “effects” as this Article suggests the framers and adopters intended. This is because the analysis hinges on protecting traditionally understood privacy and property-based interests regardless of the means or tools for the complained-of government activity. For conceptual clarity, it leaves questions regarding Oliver and its progeny, in addition to the Katz line of cases, precedential weight and the judicial policy in favor of stare decisis especially in constitutional cases for the subsequent section.

1. Analytical Framework

This analytical framework allows the Supreme Court to retain its Fourth Amendment case law for government activities that implicate an individual’s reasonable expectation of privacy on the one hand and, on the other, their possessory interests. This analytical framework would allow the Court and practitioners to analyze whether an unreasonable search or seizure occurred based on whether the complained-of government activity infringed an individual’s traditionally understood property or privacy-based interests.

This analytical framework would allow the Court to link the Fourth Amendment case law for government activities that implicate an individual’s reasonable expectation of privacy on the one hand and, on the other, their possessory interests. This analytical framework would allow the Court and practitioners to analyze whether an unreasonable search or seizure occurred based on whether the complained-of government activity infringed an individual’s traditionally understood property or privacy-based interests.
Amendment to the other Amendments, as it expressed existed in *Heller*. This analytical framework also supports Justice Sotomayor’s and Justice Alito’s contentions that wide-scale long-term surveillance are different than a traditionally understood physical trespass, and allows the Court to distinguish cases like *Smith* as related to individual data collections versus mass-wide scale collection.

a) Presumption of Unconstitutionality

At its center, this analysis asks whether the government activity is understood as a traditional physical trespass. Thus it employs the *Jones* majority’s presumption of unconstitutionality for government activities that can be classified as traditionally understood physical intrusion into property. For example, a traditionally understood intrusion would include trespassing onto property, breaking down a door to get into a private dwelling or establishment, using a general warrant to physically gather information, or taking personal property from inside a home or office.

The burden would be on the government to prove the constitutionality of its activity. To prove constitutionality, the government would have to prove that its activity was not an unreasonable interference with or infringement of a traditionally understood possessory or privacy-based interest in that property. In other words, for property where a party complains that the government interfered with their privacy-based interests, the government would have to prove that an individual did not have a reasonable expectation of privacy in that property. For property where the complaining party states that the government interfered with their possessory interest, the government would be required to prove that it did not meaningfully interfere with that individual’s possessory interest in that property.

Thus, a court would follow the Supreme Court’s already existing case law for traditionally understood searches and seizures of physical property. For searches, a court would move into an analysis of whether the government activity complained-of interfered with or infringed a traditionally understood possessory or privacy interest. For seizures, a court would ask whether the government activity complained-of infringed a traditionally understood possessory interest. Keeping in line with the Supreme Court’s precedent, for instance, an open field in plain view without physically trespassing onto private land would not be a search of property.

Before moving onto the analysis of a non-traditional government intrusion, even if a court has not accepted that a traditionally understood physical intrusion occurred, thinking about modern government activities as traditional searches or seizures as a conceptual framework is unhelpful.
support for arguing that these orders violated their privacy rights. As mentioned, a court finding that a traditionally understood physical intrusion occurred only shifts the burden to the government to prove constitutionality.

First, consider how new technologies make it easier to conduct information gathering activities to collect personal information and data that can implicate an individual’s identity, what an individual is doing at any given moment, and where, why, how, and with whom. This requires access to private business records (i.e., here, through the production order) and then requesting copies of the information for collection and retention of private individuals’ information (i.e., the traditional meaning of seizure). Rather than first searching for the particular individual, the government gets access to all records then implements a “seed” search. Surveillance programs that collect and retain (seize) personal data records for subsequent searches or uses (search activities) implicate both types of traditionally understood search and seizures. Understanding which activities in modern programs implicate which type of government intrusion helps provide understanding to this analytical framework.

b) Non-traditional government activity

The analysis required for non-traditional government activities is fact-specific like the traditional Fourth Amendment framework, and generally follows the contours of the Supreme Court’s precedent. It also ameliorates the issues associated with the Court’s precedent where government surveillance and information gathering activities do not use physical tools or means to interfere with an individual’s protected interests.

With respect to government activities that cannot be understood as traditional physical trespasses, a court would require the complaining party to prove that the government activity interferes with or infringes a traditionally understood possessory or privacy-based interest. This would be a more difficult hurdle for the complaining party than the presumption for physical intrusions, but it would properly balance against law enforcement’s interest in ensuring domestic safety or national security.

For either searches or seizures implicating traditionally understood privacy interests in one’s “persons, houses, papers, and effects,” a court would follow the test announced in Justice Harlan’s concurrence in *Katz* that the Court subsequently adopted with a slight modification. A court following a modified “reasonable expectation of privacy” test would require a complaining party to prove: (1) whether the government activity infringed a traditionally understood reasonable expectation of privacy; and (2) whether that is an interest that modern society generally recognizes.

Where a party only claims that the government interfered with a
traditionally understood possessory interest, a court would ask a party to prove: (1) whether the government meaningfully interfered with a traditionally understood property right; and (2) whether that is an interest that modern society generally recognizes.

The discussion below provides an example of how to conceptualize the issue with respect to two recent challenges to the constitutionality of the executive’s activities under FISA. This example also considers the Supreme Court’s decision and concurrences in United States v. Jones, acknowledging the interest of information privacy in 1977, and its decisions providing the government with legal tools to endanger civil liberties. For the purposes of this example, this Article assumes that the Court has already construed “effects” as this historical analysis suggests.

2. Illustrative Example

It is the role of the judiciary to apply the appropriate constitutional limits on government surveillance and information gathering practices when Americans challenge government acquisition of their personal data, such as records of their communications. The executive branch’s wide-scale information gathering and surveillance practices under FISA have resulted in, among others, Fourth Amendment challenges to these activities in multiple district courts. Two decisions, Klayman v. Obama and ACLU v. Clapper, have resulted in disparate opinions on the constitutionality of these programs. Both courts found that the two groups of plaintiffs had standing. In Klayman, a putative class of wireless communications subscribers of Verizon, a company publicly revealed to be subject to daily on-going production orders under FISA, sued the administration, its agencies and officials, in addition to the private entities that produced records of their telephony metadata. In ACLU, plaintiffs suing the administration’s intelligence agencies and officials included “non-profit organizations that engage in public education, lobbying, and pro bono litigation upholding the civil rights and liberties guaranteed by the Constitution” whose employees are also subscribers of Verizon. In both cases, the defendants argued that the federal government did not access, collect, or retain records of the contents of individuals’ communications.

Although neither decision discussed information privacy directly, both courts disagreed as to whether the plaintiffs had a Fourth Amendment reasonable expectation of privacy in their telephony metadata, which the

282 See U.S. CONST. Art. III.
286 ACLU v. Clapper, 959 F. Supp. 2d at 735
287 See Klayman, 957 F. Supp 2d at 11; id. at 750-52.
The federal government acknowledged accessing, collecting, retaining, and subsequently searching.\textsuperscript{288} In addition, the courts implicitly agreed that no seizure occurred. Indeed, the \textit{Klayman} court, which found that the plaintiffs had a reasonable expectation of privacy, explicitly stated that the “case obviously does not involve a physical intrusion,” which is required for a seizure of property.\textsuperscript{289} In so stating, it further noted that the “[p]laintiffs have not offered any theory as to how they would have a possessory interest in their phone data held by [the private, third party service provider],” and that it was not aware of a single one.\textsuperscript{290}

The two courts differed on whether Verizon’s domestic customers had a reasonable expectation of privacy based on the application of \textit{Smith v. Maryland} to the facts of the cases. In \textit{ACLU}, the United States District Court for the Southern District of New York concluded that \textit{Smith} did control;\textsuperscript{291} in \textit{Klayman}, the United States District Court for the District of Columbia—concluded that \textit{Smith} did not control.\textsuperscript{292} Additionally, neither opinion mentions the information privacy interest embodied in the constitutional right to privacy when discussing the plaintiffs’ rights to a reasonable expectation of privacy. Yet that does not foreclose the availability of the argument because, as the Supreme Court stated, the right to privacy includes two “different individual interests.”

If the two Courts of Appeals reviewing the decisions—the Second Circuit and the D.C. Circuit—also diverge, the Supreme Court could grant certiorari to rule on the issues involved in the Fourth Amendment claims.\textsuperscript{293} Although the Second Circuit has recognized the right to information privacy,\textsuperscript{294} the United States Court of Appeals for the District of Columbia has expressed its doubts about that right, stating:

> We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information. Were we the first to confront the issue we would conclude with little difficulty that such a right does not exist, but we do not, of course,

\textsuperscript{288} Id. In \textit{Klayman}, the government acknowledged that it searched the collected metadata with human and automated analytics.  
\textsuperscript{289} \textit{Klayman}, 957 F. Supp 2d at 30.  
\textsuperscript{290} Id.  
\textsuperscript{291} \textit{ACLU}, 959 F. Supp. 2d at 750-52.  
\textsuperscript{292} \textit{Klayman}, 957 F. Supp. 2d at 11.  
\textsuperscript{293} The Second Circuit in \textit{ACLU v. Clapper}, No. 14-42-cv (2d Cir. May 7, 2015), however, recently held that the bulk metadata program exceeded the statutory authority of FISA. In so holding, the Second Circuit did not reach the merits of the Fourth Amendment issue since it noted that rules of judicial review required it to avoid unnecessary constitutional questions. Nevertheless, the decision in the appeal of \textit{Klayman} may still provide clarity as to the constitutionality of the program.  
\textsuperscript{294} Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983).
write on a blank slate. The Supreme Court has addressed the issue in recurring dicta without, we believe, resolving it.295

The question presented to the Supreme Court could be whether the Executive unconstitutionally interfered with plaintiffs’ traditionally understood property or privacy interest in their telephony metadata kept in private, third party business records. Here, the plaintiffs may choose to argue that the government’s practices unreasonably intruded upon their interests in privacy.

The Court could begin with whether requiring Verizon to produce on-going daily reports of the records of millions of domestic citizens’ non-content communications records is traditionally understood as a physical intrusion. Because the FISA production orders require Verizon to turn over their proprietary customer information, the government could argue that there was no traditionally understood physical intrusion. But, using the example of the Wilkes Affair and John Entick, plaintiffs would argue that wide-scale information gathering practices on their own was indeed a government intrusion that the framers and adopters vehemently opposed.

The traditionally understood notion of wide-scale information gathering required a general warrant. The plaintiffs would analogize these to ex parte FISA production orders that require the daily on-going delivery of millions of individuals’ private communications records, arguing that they are like the general warrants the framers and adopters opposed.

The basic means employed are exactly the same. Both information-gathering practices required agents of the Crown or to execute (Verizon in this instance) to produce and gather information. Where the Crown required its private agents to execute its general warrants, so too does the Executive here require private, third parties to produce information about private citizens without any individualized or particularized cause. It is true that some of the investigative tools and technologies differ. The Crown’s agents waved general warrants and used physical means to access, collect, and use the gathered information. No such physical means are necessary in the digital age.

Whether the Court found this argument persuasive with respect to it being a traditionally understood physical intrusion would, at this stage, only determine whether the presumption of unconstitutionality would apply. Finding that a traditionally understood physical intrusion occurred would not be unwise in light of the Framers’ struggles with the general warrant. This is especially true with an Executive branch armed with the states secrets privilege, which can cloak its surveillance and information

gathering activities even from court review. Assuming the Court did find a traditionally understood physical intrusion, then the Court would apply the presumption of unconstitutionality and the government would have the burden of proving otherwise.

If the Court determines that no traditionally understood physical intrusion occurred, then the presumption of unconstitutionality does not apply. Thus, the complaining party—in these cases, Verizon Wireless customers and non-profit organizations advocating for civil liberties and individual rights—would have to prove they had a reasonable expectation of privacy under this Article or a similar, modified “reasonable expectation of privacy” test. Under this Article’s framework, the Court would first determine whether the plaintiffs have proved that the government activity infringed a traditionally understood reasonable expectation of privacy. If they do prove that, then they must prove that it is an interest that modern society generally recognizes.

Under the first prong, the plaintiffs would assert similarities to the issues in the Wilkes Affair. This analytical framework under this historical interpretation of “effects” creates a direct link between the results of our human actions and the other interests protected under the other objects that the Amendment secures. The U.S. government is founded on the principle that each person is created equal and has a right to life, liberty and the pursuit of happiness, which are embodied in the Amendment’s protection of the objects that illustrate these interests. In including “effects,” the Founders ensured that the Amendment would last the ages, as it would help protect these interests when modern advancements would shift how society may contain them. For instance, in protecting “papers” and “effects,” the Founders ensured our right to information privacy and created a link by ensuring that we protect our fundamental and inalienable rights as embodied in the First Amendment. How could a nation, built on the backs of government dissidents, evolve and progress without the ability to have its Founders’ future posterity freely discuss their government critically and, when necessary, affect change if they could not do so privately and anonymously? Indeed, because it was so important to the Framers that government never forgets our rights to associate and communicate free from its unreasonable intrusions, they chose to embody these rights first.

296 Under the states secrets privilege, a judge-made rule of evidence, “the privilege against revealing military secrets, [is] a privilege which is well established in the law of evidence.” United States v. Reynolds, 345 U.S. 1 (1953). The privilege has subsequently developed from allowing the government to claim that introducing a piece of evidence would reveal sensitive information that could harm national security into a device with far greater power—it has been used as a tool to seek dismissal of substantive and procedural constitutional rights claims before the merits of the case are reached. See, e.g., Amnesty Int’l v. Clapper 133 S. Ct. 1138 (2013).
Consider the founding generation’s value of the liberty interests of free movement, press, and speech.297 Discussing our right to be let alone, Justice Brandeis noted that the Founders left us with this “most comprehensive of rights and the right most valued by civilized men” and to protect our right to be let alone, “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”298 Thus, the Court has recognized that privacy, as a normative value, protects our individual self-determination in a democratic society; in other words, our liberty. It also recognizes the interests of information and decisional privacy and the Amendment’s connection to fundamental values embodied in the First Amendment text.

The plaintiffs could provide an example to analogize in modern times. A group of American journalists publicly report on documents revealing classified and questionable government activity and express their political perspectives. Some authors are anonymous and some sources are also anonymous to the media and press. They are all American citizens. The content of their speech is freely accessible to the world, but the authors’ and sources’ names are not, nor where in the United States they live. The website hosting the authors’ content has no name for the authors, but has a way to contact them; it has records of an email address or records of the ISP address associated with the ‘anonymous’ contact for publishing and payment purposes. The government would thus not be interested in the content (the direct product) of the authors’ writing (their papers or personal effects), but in their power to bring about the result (effect) of publishing their works through (the effect of) their association with the ISP.299

297 More specifically, they valued their ability to freely associate and communicate with each other about many matters, including their government. The founders clearly valued their ability to think critically, write and work together and bring about their effects; that is, the result of a new government. Benjamin Franklin, for example, owned many of the presses used in printing the pseudonymously authored The Federalist Papers. Wood. These values were made clear under the First Amendment, which reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

U.S. CONST. amend. I.

The right to continue to alter the government is founded not only in the first Amendment, but is also expressed in the Declaration of Independence. See DEC. OF INDEP. (“That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . .”) (emphasis added). Moreover, as previously noted, Jefferson believed that we individually have a right to freely move our goods, and ourselves—that is, we are naturally free to engage in trade or commerce. See Wood.


299 In writing the Federalist Papers and the Antifederalist papers under pseudonyms, one can postulate the possible risks to the writers had the American Revolution not succeeded. The
The plaintiffs would argue that the lack of physical intrusion is more dangerous than the Crown’s tactics. For example, agents waving a general warrant, physically intruding upon any press publication that could be associated with Wilkes without any probable cause, and using in-person intimidation tactics to gather information, at least alerted individuals like Wilkes and his associates to the Crown’s tactics. The digital age does not even require the Executive to send its agents to intimidate or alert an individual to the fact that they are subject to information gathering and surveillance. In this way, the government engages in similarly surreptitious surveillance, as when an agent of the Crown would keep a watchful eye over an individual suspected of “subversive” political expression before even having records to prove his connection to the expression. As information technologies advance, the Executive will have the power to know the identity of journalists’ associates and even anonymous sources. As the government put it, all it needs is a “seed.”

If the Court found that the plaintiffs had a traditionally understood privacy interest in their personal communications records revealing no content, then the Court would ask whether this is a privacy interest society recognizes. Because the records are alleged to not contain content information, the Court’s recognition of the two distinct privacy interests—information privacy and decisional privacy—would provide an argument for the plaintiffs that they have an interest in the privacy of their telephony metadata. The plaintiffs could also introduce scholarly reports on Internet and data privacy as related to third-party disclosures. Studies show that Americans have a privacy interest in their personal data, but that commercial entities make it difficult to understand what it means to have their data disclosed, due to difficult to understand Terms of Services and Privacy Policies. While this issue is a wholly private concern, it could be extrinsic evidence of society’s expectation. Moreover, individuals do not expect that the records of their comings and goings would be subject to surveillance. This is certainly something that society would want to maintain.

Expressly recognizing society’s privacy interests removes the issues associated with the content/non-content distinction that created past accessibility into the telephone records of individuals like in Smith and doesn’t even deal with the wide-scale access issue that the Klayman court distinguished itself on in following Justice Sotomayor’s concurrence. It removes the Smith issues without requiring the Court to overrule Smith, because the issues there are distinguishable to the present situation. In

---

framers lived in a time where the freedom of the press was of great value, especially given the history of the Star Chambers and the use of defamation law to silence those who spoke ill of the Crown or of its religious predilections.

Smith, the telephone lines were analogized to traditional public works. Here, Verizon is not (and should not be) a traditional public work in the context of information technologies because it, and not a public works department, services its wireless cell towers and provides its customers with support when a cell line goes down. If the Court did consider Verizon and other wireless carriers to be traditional public works for purposes of the Fourth Amendment, then it would remove all privacy interests for individuals communicating through these and other privately held platforms like ISPs, given that 90% of American adults own a cellphone and 42% own a tablet computer. For example, under this reading, a privately owned email platform such as Google or AOL would be a public work. Even though there is no “plain view” to law enforcement---to view such “non-content” information, law enforcement would have to request, for instance, Google’s records housing individuals’ email records - they would nonetheless be able to access individual communications via Google’s email platform. Thus, the government would have access to and could collect such communications, with whom, when, and the routing information. Although courts have considered the routing information not secured because of other analogies to the past where packaging information was in plain view, the more we allow these data records to be considered in “plain view” despite their being in privately held records, which are only to be viewed by the individual receiver and sender (with the ISP collecting for purposes of providing a private service), the less we secure our associational freedoms including free speech and press.

This framework would allow the Court to delineate cases on whether a government information gathering and surveillance program of personal data implicates one of the two distinct interests that the right of privacy protects. On the one hand, the interests in informational and decisional privacy are intertwined in an age where data can be re-identified. But if there is only a claim for non-content records being released to the government, then the argument would be that it infringes a traditionally understood right to information and decisional privacy.

If the Court finds a Fourth Amendment interest violated, then its constitutional analysis ends there. It has distinguished Smith and found a constitutional violation. Judicial restraint cautions that “courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” For this reason, once the Court has determined that the Fourth Amendment’s “effects,” in conjunction with individuals’ interests in their “persons”

---

“houses” and “papers,” protects the people’s interests in privacy which includes both information and decisional privacy, it would open the door to protecting rights expressed in the First Amendment, such as the right to free political expression, in addition to privacy and other liberty-based values. With the Amendment protecting these rights, the Court would not need to reach other constitutional claims under the First Amendment.

In adopting this analytical framework, the Court would not need to abandon the theory that “[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.” This analysis, however, leaves open questions about Oliver and Katz’s precedential weight, in addition to legislative and executive action related to balancing their actions against individuals’ privacy interests in their communications records. The following section discusses these questions and, where possible, attempts to answer them.

V. GOVERNMENT POWERS

The current interpretation of “effects” in the context of a government information gathering and surveillance renders the Fourth Amendment devoid of protecting any intangible interest from unreasonable retentions of individuals’ personal data stored in third party business records. But if we conclude, as the historical view of the Fourth Amendment set forth in this Article, that the Fourth Amendment indeed protects individuals’ privacy interests in their ‘content’ and ‘non-content’ communications records housed by private third parties, a distinction should not exist between the power of Congress to do so by statute and the power of the judiciary to interpret by inference directly from the Constitution. Yet there may be a number of reasons under modern constitutional law why a distinction exists between whether it is Congress or the judiciary that is acting.

Because the constitutional text is self-executing, the “power to interpret the Constitution remains in the judiciary.” The Court’s power as the ultimate arbiter of constitutional provisions is important for maintaining the essential principles of separation of powers and checks and balances. Indeed, Justice Marshal cited public discourse during the constitutional ratification process for the proposition that the Court must determine whether an act of Congress or the Executive violates the Constitution. For this reason, this section discusses the judiciary’s review of: (a) its precedent, (b) Congressional action, and (c) Executive action. In discussing

305 See Shelby v. Holder, 133 S. Ct. 2612 (2013); id.
306 Marbury v. Madison, 1 Cranch 137(1803) (quoting the Federalist Papers).
judicial review of government actions this Article broadly considers the following: (1) the constitutional power that a branch believes authorizes its action; (2) the function of this power; and, (3) the purpose of this action. Part A begins with the Judiciary, Part B compares Congressional and Judicial power, and Part C focuses on the Executive power.

A. JUDICIAL POWER

The Supreme Court announced early in the nineteenth century that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”307 Since then, this statement, to which law professors indoctrinate every first-year law student, has come to be used for the Court’s position as the ultimate arbiter of constitutional interpretation.308 This is an important position to maintain the principle of separation of powers.309

Whether the judiciary or Congress chooses to define “effects” to protect individuals’ personal data, as well as to propose an analytical framework like the one here, requires discussing the Court’s perspective on modern constitutional interpretation. Determining whether the decision in United States v. Oliver, announcing that “[t]he Framers would have understood the term ‘effects’ to be limited to personal, rather than real, property,”310 or the Katz test “should be modified or abandoned, [the Supreme Court] begin[s] with the doctrine of stare decisis.”311

Stare decisis—which “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”312—it need not be “an inexorable command.”313 But according to the Court, “Congress may not legislatively supersede [its] decisions interpreting and applying the Constitution.”314 In addition, where a ‘rule is judge made and implicates an important matter involving internal Judicial Branch operations. . . . [a]ny change should come from [the] Court,

307 Id. at 177 (1803).
308 See The Supreme Court of the United States, About the Court: The Court and Constitutional Interpretation, The Supreme Court of the United States http://www.supremecourt.gov/about/constitutional.aspx (“As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution”) (last visited Mar. 17, 2014).
not Congress.” At the same time, however, holding an act of Congress unconstitutional and striking it down “is the [Court’s] gravest and most delicate duty” it must perform. This Part discusses the Court’s perspective on revisiting its precedent through judicial action.

As previously noted, the Supreme Court failed to discuss extensively the meaning of “effects” when it concluded in United States v. Oliver that “[t]he Framers would have understood the term ‘effects’ to be limited to personal, rather than real, property.” This statement is consistent with the Court’s adoption of an analytical framework based on the broader, original understanding of “effects,” as suggested. If, as this Article proposes, “effects” means the results of human action and embodies individuals’ interests in their civil liberties and fundamental rights—that is, individuals’ equal rights to their interests in their personhood, liberty, and property-based interests, it is conceivable that the Court could incorporate individuals’ privacy interests in their intangible things seized into the Fourth Amendment’s security of “effects.” But this position would also require revisiting the reasonable expectation of privacy test.

The judiciary could consider the Supreme Court’s determination from United States v. Oliver or, more likely, the Court’s reasonable expectation of privacy test to be precedential. Nevertheless, “[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . to improve the operation of the courts, and experience has pointed up the precedent’s shortcomings.” For these reasons, in Pearson v. Callahan, the Supreme Court revisited its qualified immunity two-prong test, developed in Saucier v. Katz, and modified it. But unlike qualified immunity, which is not a constitutional precedent, the Court has stated that it will only reconsider its constitutional precedent if it concludes that “its justification was ‘badly reasoned’ or that the rule has proved to be ‘unworkable.’” Thus, there are arguments that the Court’s interpretation of “effects” in Oliver is “unworkable” and, in the alternative, “badly reasoned,” in addition to concluding that the Pearson reasoning also supports modifying the reasonable expectation of privacy test. The following writing analyzes each issue in turn.

315 Pearson, 129 S. Ct. at 817.
317 See Section IV.
319 See Sections IV.
321 Id. at 818.
322 Id. at 817 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).
Although the Court in Pearson acknowledged that “[c]onsiderations in favor of stare decisis are at their acme in cases involving property . . . rights, where reliance interests are involved,”323 Oliver’s “effects” are still within the plain meaning of ‘effect’—that is, the result of human action. An expansion of “effects” beyond Oliver’s definition would not, therefore, “upset expectations” with respect to personal effects. Instead, such an expansion would secure individuals’ privacy interests in the results of their actions. On a more specific basis, results in individuals’ associations would, as the Founders intended, include personal data records of communications housed in private, third parties’ business records.

The following discussion of Oliver’s factual background demonstrates why stare decisis may not be an issue in this instance and the judiciary could actually distinguish Oliver without requiring the Supreme Court to overrule its determination. The issue in Oliver was whether the open fields doctrine should be applied to determine if the warrantless discovery (that is, a search) or seizure of an illegal substance in question was valid.324 The trial court decisions found that state law enforcement violated an individual’s reasonable expectation of privacy when law enforcement conducted a warrantless search of the individual’s open farmland (that is, his “effect”).325 After receiving information that the individual was growing marijuana, police officers went to the individual’s farmland; they were able to walk around a locked gate with a “No Trespassing” sign and found the illegal substance growing in the locked field.326 The Supreme Court held that because open fields are not governed by the Fourth Amendment protecting “houses,” and because open fields are not “effects,” that “the government’s intrusion upon the open fields [was] not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment.”327 The Court in Oliver also cited Blackstone’s dictionary and an English decision regarding devising public lands for its proposition that “the term ‘effects’ is less inclusive than ‘property’ and cannot be said to encompass open fields.”328 While overruling precedent may be a difficult task, as far as Oliver and subsequent decisions regarding personal property, stare decisis need not be an issue for the judiciary if it considers that the Court’s initial findings in Oliver only told part of the story of the Fourth Amendment’s “effects.” The judiciary would simply distinguish Oliver and related cases as discussing possessor interests. Because land is not the result of human action necessarily—that is, it is

323 Id. at 816.
325 Id.
326 Id.
327 Id.
328 Id.
without human intervention, the suggested original understanding of “effects” does not disturb the Court’s analysis regarding open fields and the plain view doctrine. In other words, the judiciary would not have to disturb the Court’s doctrines and exceptions related to law enforcement’s ability to search open fields. In so doing, the judiciary would not grapple with stare decisis. This argument, however, may be unpersuasive given that the Supreme Court did state that “effects” is meant to be “personal property,” and that the drafters did not intend to expand “effects” beyond personal property.

Because the issue in this Article is with the Court’s interpretation of “effects” in Oliver rather than with the Court creating a judge-made rule like in Pearson, the Court may reconsider this interpretation only if it concluded that the Court’s justification was “badly reasoned” or that the rule has proved to be “unworkable.” First, when the Court decided United States v. Oliver in 1984, it did not have the widely available research that is now available on the Fourth Amendment. Indeed, documents and research regarding America’s documentary history became widely available or used (and even known) as late as 2009. For example, as recently as 2009, Pauline Maier published her Pulitzer Prize winning book, Ratification: The People Debate the Constitution, 1787–1788, based on more than two decades of research tracing the history of the Constitution’s ratification, and chronologically creating a documentary history of the ratification. In addition, William J. Cuddihy’s extensive 1990 doctoral dissertation on search and seizure law was not widely published until 2009. Because: (a) the Court has used Cuddihy’s work in more recent Fourth Amendment cases, and (b) because the judiciary has discussed the shortcomings of not being able to have a theory for seizure with respect to individual’s telephony metadata, it is likely that the Court would agree that “experience has pointed . . . [to Oliver’s] shortcomings.”

The Court’s reasoning in cases like Pearson also supports modifying the reasonable expectation of privacy test. Similar to the Court’s argument regarding Saucier’s categorical approach, “[l]ike rules governing

---

330 Id.
333 See generally Cuddihy; supra note 147 (surveying search and seizure law in Great Britain until the States’ adoption of the Fourth Amendment in 1791).
334 See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 669 (1995) (discussing Cuddihy’s dissertation as “one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken”).
335 See, e.g., Klayman.
336 Pearson, 129 S. Ct. at 816.
procedures and admission of evidence in the trial courts. [Katz’s] two-step protocol does not affect the way in which parties order their affairs,” like in traditional property and contract rights cases.\(^{337}\) Second, this precedent is a judge-made rule that the Court itself has pointed to as having shortcomings as recently as 2012 in United States v. Jones.\(^{338}\) Problems with the current reasonable expectation of privacy test arise, as this Article has suggested and as the judiciary has recognized, because the subjective aspect of the first prong will always be answered in the affirmative when possible, making the second-prong—society’s recognition of the interest—always more relevant than the first.\(^{339}\) This creates a problem with respect to privacy as technologies change, especially with the Court recognizing that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”\(^{340}\) Instead of thinking that the “question [the judiciary] confront[s] . . . is what limits there are upon this power of technology to shrink the realm of guaranteed privacy,”\(^{341}\) the modified test discussed in Part V.A. renews that intended objectivity of the Fourth Amendment’s guarantee.

Following the reasoning above, the judiciary can revisit the definition of “effects.” But in order for this interpretation to have an effect, a prescription forward which modifies the reasonable expectation of privacy test is also necessary. Adopting such definition of “effects” would also help ensure that the strict textualists on the Court seek to protect individuals’ information privacy as society changes. Therefore, this Article concludes that the Supreme Court, as the ultimate arbiter of constitutional interpretation, revisiting “effects” in addition to the overall reasonable expectation of privacy calculus would have the greatest impact on preserving the Fourth Amendment.

**B. CONGRESSIONAL POWER AND JUDICIAL REVIEW**

In the case of congressional action that upends or modifies its precedent, the Supreme Court “requires a departure from precedent to be supported by some special justification” because “stare decisis carries such

\(^{337}\) See id. at 816.


\(^{339}\) The Court’s discussion of technology’s power to shrink individuals’ guaranteed privacy in Kyllo v. United States suggests that with technology, society’s reasonable expectations of privacy shift and, therefore, individual’s subjective expectations of privacy, are below society’s expectations. See Kyllo v. United States, 553 U.S. 27 (2001).


\(^{341}\) Id.
Because the judiciary could see congressional legislation that adopts this Article’s contentions as superseding the Court’s decisions interpreting and applying the Constitution, this Part uses an illustrative example to then discuss and analyze judicial review of such actions. In addition, because Congress may only abrogate the State’s sovereign immunity if such a measure is “congruent and proportional” to the ends to be achieved, this Part also discusses the problems associated with adopting legislation with this prescription forward as it relates to state law enforcement.

1. Illustrating the Difference

The federal government’s Executive agencies, in this example, are amassing, retaining, searching and otherwise using a significant amount of domestic citizens’ individual personal communications records, including both ‘content’ and ‘non-content’ information, much like the reports discussed in Section II. The information collected includes: the type of mobile devices a particular individual uses; the numbers dialed, texted, and otherwise connected to/from that individual’s mobile device; the contacts list associated with that individual’s mobile device; private texts, emails, video messages, photos, and other content related communications but which are not over the traditional phone line; GPS location data from the mobile device; information from certain mobile applications that also provide geo-location data in addition to other data, including with whom an individual connects on such applications. Government agencies act through both congressional authority and under their offices’ interpretation of the constitutional text that the Executive’s foreign affairs power authorizes these activities for the purpose of protecting national security.

After public revelation, Congress investigates this collection, retention and use, which include millions of domestic citizens using the services of the companies implicated in the program.

Just as the practices the Church Committee uncovered, Congress finds that such information gathering and surveillance activities include ordinary citizens unrelated to foreign intelligence or national security. Such ordinary citizens include journalists, bloggers, civil rights organizations,

343 See id. at 437 (“Congress may not legislatively supersede [the Court’s] decisions interpreting and applying the Constitution”); see also City of Boerne v. Flores, 521 U.S. 507, 517–521 (1997).
344 See City of Boerne, 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect”).
346 See Section II.
members of different religious communities, and attorneys. The program also includes judges and members of Congress. But the collection, retention, and searches do not stop there. Moving beyond the national security purpose, information sharing abounds within the federal government and reaches as far as the states. With joint federal-state criminal task forces, this information is shared with local state law enforcement agencies that then continue their own surveillance and search activities using the collected data.

Congress exercises its oversight role and begins investigations, much like the Church Committee, into the veracity of the press and media reports. Congress concludes its investigation and determines that the program was an unconstitutional exercise of both Executive and state law enforcement powers because the government activities at issue infringed citizens’ rights to free speech, press, and association, their reasonable expectations of privacy, and their inalienable and fundamental interests in their personal data. After finishing its report, Congress continues exercising its oversight role and seeks to create legislation to protect the people from unreasonable searches and seizures implicating these First and Fourth Amendment interests. Congress intends to use its lawmaking power to enact legislation and also use its Fourteenth Amendment § 5 power to enforce this legislation against the states in order to protect citizens’ personal data. Because it sees patterns of similar abuses from the twentieth century in the twenty-first century, it seeks to ensure that broad data collection practices cannot circumvent the Fourth Amendment interests. Congress's liberty-based interests, including their reasonable expectations of privacy and their First Amendment rights.

Members of Congress propose several bills to stop law enforcement agencies from questionable information gathering upon its citizens and for other purposes, including ensuring the protection of the people’s privacy and other liberty-based interests during governmental searches and seizures. Congress passes one piece of legislation, the “Fourth Amendment Maintenance Act of 2015,” announcing the following findings within the Act:

1. The framers and adopters of the Constitution and Bill of Rights, recognizing the value of our fundamental and inalienable property, privacy, and liberty-based interests, secured their protection from unreasonable government activity under the Fourth Amendment to the Constitution’s protection of “effects.”

2. The framers and adopters of the Constitution and Bill of Rights, recognizing the value of free exercise of speech and religion, to peaceably assemble, and to petition for a governmental redress of grievances, secured their protection in the First Amendment and in the Fourth Amendment;

3. In Oliver (1984), and in its progeny, the Supreme Court, although properly protecting the people’s personal effects, virtually
eliminated the people’s right to be secure in their inalienable liberty-based interests underlying the Fourth Amendment protection of “effects” because historical evidence suggests that “effects” were intended to protect such interests, including the people’s privacy, as well as their rights under the First Amendment;

(4) This legislation is not intended to supersede the judiciary’s precedent respecting individual’s interests in their personal property. Instead, this legislation is intended to add to the scope of the Fourth Amendment’s “effects.”

(5) After press and media reports indicated that the National Security Agency collected the phone and Internet records, among other records, of millions of American citizens, beyond its national security purposes, Congress found these allegations to be substantiated in its subsequent investigation.

(6) The program targeted American citizens exercising their First Amendment rights, and who pose no threat to national security. The initial data collection intruded upon citizens’ individual expectation of privacy because available evidence shows that one of the effects of these governmental actions is the impediment of Americans’ intellectual, philosophical, and spiritual development. This program has implicated the people’s right to be secure in their personal information, data, documents, or objects in which they have a reasonable expectation of privacy, as well as in a property or liberty-based interest. Congress found that the subsequent searches by federal and state law enforcement agencies similarly affected individual citizens’ reasonable expectation of privacy, and implicated, among other fundamental rights, their Fourth Amendment rights.

2. Congressional Power

Analyzing any legislation like the illustrative Fourth Amendment Maintenance Act of 2015 (FAMA) requires answering whether: (1) this legislation exceeds Congress’s powers, and (b) if such a construction skews the balance that our separated branches of government necessitate. The following analysis demonstrates that the Supreme Court could conclude that the judiciary alone has the sole power to define individual interests that the Fourth Amendment’s “effects” protects and the Court could also allow a congressional provision that expands individuals’ constitutional rights beyond the Court’s construction.

347 See, e.g., City of Boerne, 521 U.S. at 527–28.
348 See id.
“As a general matter, it is for Congress to determine the method by which it will reach a decision. . . .”\textsuperscript{350} to remedy or prevent government abuses of its powers.\textsuperscript{351} But since \textit{City of Boerne v. Flores}, the Supreme Court has required that there “be a congruence between the means used and the ends to be achieved,” in addition to the proportionality of such means adopted.\textsuperscript{352} Because many problems under the Fourth Amendment beyond the federal government arise based on state action,\textsuperscript{353} Congressional power to abrogate sovereign immunity is extremely important for ensuring that the Fourth Amendment is not a ceiling on the limits to federal search and seizures implicating individuals’ interests, but rather a floor for both state and federal search and seizures. Putting aside a longer discussion of the power used to effectuate congressional legislation for the time being, the Court considers whether a congressional measure is appropriate “in light of the evil presented.”\textsuperscript{354} Even if the legislative record demonstrates the need to change “effects,” like this illustrative example shows, “[j]udicial deference, in most cases, is based not on . . . the legislative record Congress compiles.”\textsuperscript{355} Instead, judicial deference is based “on due regard for the decision of the body constitutionally appointed to decide.”\textsuperscript{356}

Accordingly, “Congress [cannot] enforce a constitutional right by changing what the right is” when Congress uses its Fourteenth Amendment Section 5 enforcement powers.\textsuperscript{357} For example, in \textit{Dickerson v. United States}, the Court held that Congress could not legislatively overrule a constitutionally based decision, \textit{Miranda v. Arizona}, and its progeny.\textsuperscript{358} The Court sought to determine “whether the \textit{Miranda} Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.”\textsuperscript{359} Because the Court in \textit{Dickerson} found that \textit{Miranda}’s warning-based approach governing the admissibility of an accused’s statements during custodial interrogations was constitutionally based, it found that Congress exceeded its powers when it enacted legislation [see 18 U.S.C. § 3501] that made the admissibility of such statements turn on whether they were made voluntarily.\textsuperscript{360}

\textsuperscript{351} \textit{See id.}
\textsuperscript{352} \textit{City of Boerne}, 521 U.S. at 531.
\textsuperscript{353} CLANCY, supra note 92.
\textsuperscript{354} \textit{Id.} (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), abrogated by Shelby v. Holder, 133 S. Ct. 2612 (2013)). \textit{See also South Carolina v. Katzenbach}, 383 U.S. at 334 (“Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one”).
\textsuperscript{355} \textit{City of Boerne}, 521 U.S at 531.
\textsuperscript{356} \textit{Id.} (internal quotations and citations omitted).
\textsuperscript{357} \textit{City of Boerne}, 521 U.S. at 519.
\textsuperscript{359} \textit{Id.} at 437 (2000).
\textsuperscript{360} \textit{See generally, Id.}
Based on Dickerson-like analysis, the Court could find that Congress exceeded its powers in defining “effects.” Just like in Dickerson, the Court similarly would analyze legislation like the illustrative FAMA to determine whether the Oliver Court announced a constitutional rule or merely exercised its supervisory authority over congressional action. Because “effects” is a constitutional term, it is likely that defining “effects” is a constitutional decision. For the reasons already discussed, the Court could take a position that it would not change its construction. But while the congressional legislation in Dickerson tried to constrict individual rights, this legislation is distinguishable because it seeks to expand those rights. Even though academic rhetoric places the “federal judiciary on weak ground when it interposes its judgment . . . against the will of Congress,” the judiciary should carefully reconsider any position where the sovereign people’s civil liberties and fundamental rights are at grave risk regardless of whether congressional or judicial action begins the process. Therefore, the Court—whose duty is to adjudicate controversies for the people and also act as an independent check on the other coordinate branches of government—should review congressional acts that expand individual rights beyond its construction differently, which the Court has done in other circumstances. For example, in Katzenbach v. Morgan, the Court upheld the Voting Rights Act, even though it exceeded Congress’s constitutional Fourteenth Amendment § 5 powers. In another case regarding the Voting Rights Act, the Court upheld provisions enacted under Congress’s § 5 of the Fourteenth Amendment powers for being “rational in both practice and theory.” To determine the rational basis, the Court’s formula looked to the cause of the effect Congress sought to end with its legislation, and determined whether the remedy was rationally tailored to the issue. As far as congressional legislation applicable to the states, however, after Shelby v. Holder, which abrogated the Court’s decisions in cases like Katzenbach v. Morgan, the Court may be less inclined to allow congressional legislation that defines “effects.” In Shelby v. Holder, the Court held that legislation that burdens the states currently, which Congress enact under its Fourteenth Amendment § 5 enforcement powers, “must be

361 See Fletcher, A Historical Interpretation of the Eleventh Amendment, 35 STAN. L. REV. 1033, 1128 (1984) (discussing the federal judiciary’s position with respect to its judgment on state rights and Congress).
364 Id. at 330. There, the Court looked to Congress seeking to end state legislation that facially discriminated against individuals, causing low voter registration and turnout, and therefore looked to whether the remedy—preclearance from Congress from voting registration—exhibited both cause and effect. Id. See also Shelby v. Holder, 133 S. Ct. 2612, 2627 (2013) (describing this analysis).
justified by current needs.” As previously mentioned, due to information sharing between federal and state agencies through fusion centers, and in light of reports that state agencies are being asked to cover their investigative trails that lead back to information gathering from the collection of individuals’ personal data, legislation like FAMA may be rational. Thus, if the Court is convinced that Congress’s legislation and interpretation of Fourth Amendment “effects” is rational, it could potentially find legislation that Congress enacts against the states under Congress’s § 5 enforcement powers to be congruent and proportional to meet Congress’s needs.

Despite the issues associated with enforcement of legislation of the type like FAMA against the states, such legislation also gives due regard to judicial review even though some could consider such legislation risky. Only construing “effects” in legislation that leaves the power in the judiciary to determine its application does not fully modify the issues associated with tethering the Fourth Amendment’s reasonable expectation of privacy to the technology of the day. But if Congress sought to adopt a prescription forward similar to the one in this Article, it could risk changing matters regarding the judiciary, which “should come from [the] Court, not Congress.” Thus, FAMA or similar legislation would carry less risk of being struck down than legislation modifying a judge-made rule of analyzing an individual’s reasonable expectation of privacy test. Because FAMA or similar legislation is silent on the Court’s reasonable expectation of privacy test, Congress would not be “implicat[ing] an important matter involving internal judicial branch operations.”

Although Congress cannot abrogate sovereign immunity under its Fourteenth Amendment § 5 enforcement powers, the federal government can still strive to obey higher standards. Indeed, in City of Boerne v. Flores, the Court only struck down the Religious Freedom and Restoration Act as it related to the states—the federal government still had to obey a higher standard in the RFRA. Thus, in the case of the illustrative FAMA, Congress could enact it through the Fourth Amendment against the federal government. Congress could also use a different power to enact legislation like FAMA to abrogate sovereign immunity under the Commerce Clause or its § 5 power of the Fourteenth Amendment so long as it was congruent and proportional to the evil Congress seeks to remedy or prevent. Although

366 Id. at 2627 (internal quotations omitted).
367 See Section II.
368 See Section V.
369 Id.
370 See City of Boerne, 521 U.S. at 531.
371 City of Boerne, 521 U.S. at 527–35.
372 See id.
Congress’s § 5 enforcement power came in light of discriminatory conduct, a wide-scale information gathering and surveillance program does not necessarily implicate individuals’ privacy interests because of their race or national origin. It could implicate individuals’ privacy interests because of their associations or expressions, such as journalists exercising their rights to political expression, which need not have a basis in race, color, religion, or national origin. Congress could enact such legislation on alternate constitutional grounds against the states—for instance, it could enact the FAMA or similar legislation under the Fourth Amendment, the Ninth Amendment, and its power to enact legislation “necessary and proper” for executing the government’s powers.

Although there are limits to the necessary and proper clause, allowing Congress to use other constitutional powers for such legislation would still leave the Constitution as the “superior paramount law, unchangeable by ordinary means.” The Constitution remains unchangeable because the judiciary would have the final say on the constitutionality of such a provision. In allowing Congress to expand individual’s rights beyond the Court’s construction based on the history of the constitutional text and analysis similar to the one in this Article, the judicial branch also would recognize Congress’s ability to interpret the Constitution, especially given that citizens entrust Congress to carry out legislation for their benefit in a civil society. Given that the Court in United States v. Jones unanimously agreed that the GPS tracking was a search, following this new construction of “effects” regardless of which branch has the ultimate interpretive power, it focuses the judiciary on interpreting the Constitution for its ultimate beneficiaries: the people.

The discussions in this Part, along with Part VI.A, raise the most axiomatic problem with either congressional or judicial action: whether the Executive would follow a directive to stop the wide-scale collection, retention, and use of individuals’ personal information, such as data records of their wireless communications, without individualized or particularized suspicion. Part C, below, discusses this latter question.

374 See U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"); see also Griswold v. Connecticut, 381 U.S. 479, 488 (1965). ("The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments").

375 U.S. CONST. Art. I § 8 cl. 18.

376 Marbury v. Madison, 1 Cranch 137, 177 (1803).
This Part focuses on the Executive following a directive to stop wide-scale collection, retention, and use of individuals’ personal information housed in party, third party records. It puts aside judicial review of legislation and executive action under a statutory provision to address the one problem that this Article has yet to discuss: whether the Executive would follow legislation or a Supreme Court order limiting the government’s collection, retention, or use of domestic citizens’ personal information, including records of their communications, housed in third party records. It is true that the Executive should have the power to protect against invasions of domestic activities, for the people are due the beneficent purpose of their government’s powers both domestically and internationally. But it cannot be said that “it is clear that the Fourth Amendment would not restrict military operations within the United States” that “might cause collateral damage to United States persons;” to state that the ex parte, daily, and wide-scale data collection, retention, and use of individual domestic citizens’ telephony metadata violates the principles of not only the Fourth Amendment, but of those of the purpose of the Constitution.

As historical instances and recent events demonstrate, with technological advancements come government wide-scale information gathering and surveillance activities that put civil liberties and fundamental individual rights at stake. At the same time, not only has Congress amended statutory provisions attempting to stop such infringement in ways that places these values at risk, but the Executive branch has used the constitutional vagueness of its powers, such as the foreign affairs power in times of crisis, in ways that affect individual rights more than ever before. At the same time, it takes years, if not decades, to uncover publicly surveillance and information gathering activities under an Executive branch cloaked with secrecy and security clearances often higher than the Commander-in-chief for national security purposes within and outside U.S. soil. For this reason, among the others found throughout this Article, it may be time for citizens to call for a constitutional amendment of

---

377 See Yoo & Delahunty, supra note 345 at 2, 25.
378 Id. at 25.
379 See supra Section II.
380 See FISA Amendments 2008 and 2013.
381 See Klayman v. Obama; ACLU v. Clapper; see also Yoo & Delahunty, supra note 345.
382 For instance, requests under the Freedom of Information Act regarding the CIA surveillance activities during the Watergate era took decades for the public to see, and even then, the government still heavily redacted such documents. See The National Security Archive, The CIA’s Family Jewels, Agency Violated Charter for 25 Years, Wiretapped Journalists and Dissidents, available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/.
the Executive’s powers. This Article, however, does not contend or aim to suggest that the Executive’s foreign affairs power is not relevant, important and beneficent in a world connected more globally than ever before. Instead, it simply seeks to limit government misconstruction and abuse of the powers derived from its citizens, and re-balance government’s beneficial purposes with citizens’ interests in their individual civil liberties and fundamental rights. Possible amendments could read as follows:

The Powers vested in the Executive cannot be construed or used to circumvent Citizens’ guaranteed civil liberties and individual fundamental rights.

If in the political process such an amendment seemingly would limit unnecessarily the beneficial purpose of government, an alternative amendment could read as follows:

The Foreign Affairs Powers vested in the Executive cannot be construed or used to circumvent the people’s guaranteed interests including, but not limited to, their individual privacy interests in their rights to freely communicate, assemble, or associate.

If the concern is judicial review and interpretation of any congressional attempt to safeguard the people’s First and Fourth Amendment rights as an unconstitutional exercise of its powers, another possible amendment could include one that more directly relates to amending the Fourth Amendment and states:

The right of the people to be secure in their “effects” shall be construed to protect the fundamental and inalienable interests in either liberty or property, or both, of Citizens of the United States.

Finally, with respect to constitutional amendments, this Article proposes an amendment that defines the Article II powers more explicitly. For example, although Congress has the express power to declare war, the Executive is the commander-in-chief of the standing militia who also “receive[s] foreign ambassadors and other public ministers.” Combining these two vested vaguely defined powers in the Executive with a misconstruction of the Fourth Amendment’s intended scope, as contended here, individuals’ interests in their civil liberties and fundamental rights are

383 U.S. CONST. Art. I § 8 cl. 11.
at grave risk beyond those currently associated with the Fourth Amendment. Amending the Constitution is exceedingly difficult but, given the problems discussed throughout this Article and in particular this Section, a constitutional amendment may be the only way to continue safeguarding individuals’ civil liberties and fundamental rights.

VI. CONCLUSION

The benefits of scientific achievement have made the world a neighborhood in which individuals can connect from across cultures, diversify perspectives that ignite genius, and allow individuals to think critically and openly. Simultaneously, groups and individuals can easily lie, steal, and incise diversity while oppressing those whom they fail (and choose not) to understand. The police that patrol these neighborhoods and see injustice in plain view provide individuals with invaluable protection against a neighborhood’s maladies and, in properly enforcing their beneficent duties, provide the necessary stepping-stone to remedy such unfair cruelty and unjust enrichments. But a government that exceeds its beneficent purposes through technological advancements—and without the independent eye of free expression and journalistic integrity—puts citizens’ individual interests in their civil liberties and fundamental rights at risk. In bringing this history to the forefront, this Article is limited in its analysis of the appropriate balance between individual liberty and domestic and national security. On a broader basis, it simply seeks to reignite the dialogue about the individual liberty interests that the Fourth Amendment secures, regardless of the state of technology.

While this Article focuses on the federal government’s incisive misuse of its granted powers, where Fourth Amendment issues are raised, most cases arise from state action. Whether the states would obey such a construction is an open question. But given that the Fourth Amendment was incorporated under the Fourteenth Amendment, the judiciary is the most likely federal body able to safeguard and maintain individual information and decisional privacy rights. Once considered the potentially most dangerous branch because of its independence, the judiciary could be the only way to stop an executive power that cloaks itself in secrecy for the illusory purpose of national security, but which seeks to know everything about its citizens. Indeed, the Founders sought to protect the American people against this pointed despotism. Inevitably, Americans should always remember to ask of themselves and of their government whether it is worth chipping away at individual rights for the illusion of security.

385 See Part VI.A.
THE PROFESSOR AS WHISTLEBLOWER: THE TANGLED WORLD OF CONSTITUTIONAL AND STATUTORY PROTECTIONS

JENNIFER S. BARD**

This article reviews the limited protections against retaliation and adverse employment actions available for whistleblowers at U.S. colleges and universities. Faculty and staff who disclose matters involving their institutions that may be of public interest—but are not in the interest of the university’s administration—face many obstacles and often receive relatively few tools with which to overcome them effectively. It is difficult for faculty and staff to know which whistleblowing activities are constitutionally protected, and this article exposes the lack of consistency and clear legal guidance on the issue. Finally, it proposes recommendations for providing a clearer framework of legal protection for university whistleblowers.

INTRODUCTION ................................................................. 166
I. OVERVIEW ................................................................. 168
   A. Background .......................................................... 168
   B. Questions ............................................................ 171
   C. Significance .......................................................... 171
   D. Implications of Article ............................................ 172
II. FEDERAL CONSTITUTIONAL PROTECTION AGAINST RETALIATION FOR WHISTLEBLOWING AVAILABLE TO EMPLOYEES OF PUBLIC INSTITUTIONS OF HIGHER EDUCATION ....................................................... 173
   A. Protection Under the Fourteenth Amendment ............. 173
   B. Do Public Employees Have Greater Protection Against Adverse Employment Action? ......................... 174
   C. Is Academic Freedom Constitutionally Protected? ........ 175
   D. First Amendment Protection in Higher Education After Garcetti v. Caballos ........................................... 181
   E. Not All Speech in the Classroom Is Protected by the First Amendment ................................................. 182
   F. Faculty Speech About University Governance ............ 185
   G. Federal Statutes and Regulations Specific to IHEs ........ 186
      2. Qui Tam Actions Under Federal False Claims Act ..... 189

** Jennifer S. Bard, J.D., M.P.H., Ph.D., is the Alvin R. Allison Professor of Law at Texas Tech University School of Law, where she is also the Director of the Health Law Program and J.D./M.D. Dual Degree Program. She is also an adjunct professor at Texas Tech University School of Medicine in the Department of Psychiatry. In July 2015, she will assume the role of Dean of the University of Cincinnati’s College of Law.
3. Requirements for Bringing a Qui Tam Action .......... 194
4. Whistleblower Protection in Qui Tam Actions .......... 195
5. State Statutes and Regulations .......................... 196
6. State Whistleblower Protection Laws .................... 197
7. Qui Tam Actions Under State False Claims Acts ....... 200

H. Whistleblower Law ........................................ 200
   1. Federal Statutes That Protect Whistleblowers at Both
      Public and Private IHEs Against Retaliation ........... 206
   2. The Clery Act ........................................ 206
   3. The Family Educational Rights & Privacy Act ......... 207
   4. State Whistleblower Statutes .......................... 208
   5. Anti-Retaliation Provisions of Title IX ............... 211
   6. Discrimination and Title IX ........................... 212
   7. Title IV of the Federal Higher Education Act ........ 213
   8. American Recovery and Reinvestment Act (ARRA) .... 214
   9. The Americans with Disabilities Act ................. 216
  10. Retaliation Associated with Claims of Discrimination:
      Civil Rights Issues .................................. 217
  11. Retaliation for Activities Inconsistent with the Religious
      Mission of an IHE ................................... 217
  12. Internal Legal Protections Against Retaliation ......... 218

I. Protection Against Retaliation: Explicit Contracts .... 219
J. Protection Against Retaliation: Implicit Contracts .... 220

K. Faculty Handbooks ....................................... 220

III. METHODOLOGY OF SCENARIO DRAFTING .......... 222
   A. Weaknesses of the Scenario Method .................... 226
   B. Description of Scenarios ................................ 227
   C. Conclusion ........................................... 227

IV. SCENARIO ANALYSIS .................................... 228
   A. Introduction ........................................ 228
   B. Explicit and Implicit Contracts Revisited .......... 228
      1. Explicit Contracts ................................ 229
      2. Implicit Contracts ................................. 229
      3. Operating Procedures ............................... 230
   C. Introduction to Scenario Analysis for Understanding External
      Legal Protections for Whistleblowers ................. 230
   D. Analysis of Scenario One: The Bearer of Bad News .. 231
      1. Purpose of Scenario One ............................ 231
      2. Background to Scenario One ....................... 231
      3. Description of Scenario One ....................... 232
      4. Discussion of Scenario One ....................... 232
      5. What Federal Statutes give protections to Professor A? 243
      6. Protection Offered by Title IX ..................... 245
7. What Are the Protections Available to Professor A Under State Law? ................................................................. 252
8. Conclusion for Scenario One .......................................... 252
E. Scenario Two: Invoking State Whistleblower Protection . 254
   1. Purpose of Scenario Two ........................................... 254
   2. Background of Scenario Two ................................. 254
   3. Description of Scenario Two ............................... 255
   4. Discussion of Scenario Two ................................. 255
   5. Conclusion for Scenario Two ............................... 258
F. Scenario Three: A Qui Tam Relator .............................. 259
   1. Purpose of Scenario Three ............................... 259
   2. Background of Scenario Three ........................... 259
   3. Description of Scenario Three ........................... 259
   4. Discussion of Scenario Three ........................... 260
   5. Conclusion for Scenario Three ........................... 265
G. Scenario Four: The Mandatory Reporter ....................... 265
   1. Purpose of Scenario Four ........................................... 265
   2. Background of Scenario Four ............................... 266
   3. Disclaimer Related to Scenario Four ........................ 267
   4. Scenario Four ........................................... 268
   5. Discussion of Scenario Four ............................... 269
   6. Conclusion for Scenario Four ............................... 272
H. Gaps in Protection .......................................................... 272
   1. Gaps in Protection Depending on State Action .......... 273
   2. Gaps in Protection Depending on Nature of the Alleged Illegal Activity ................................................................. 273
   3. Gaps in Protection Are Narrowly Circumscribed and They Are Inconsistent Across the Spectrum of Federal and State Laws and Regulations ................................................................. 273
V. CONCLUSION ..................................................................... 276
   A. Purpose ................................................................. 276
   B. Problem Statement and Methodology .......................... 277
   C. Findings ................................................................. 278
   D. Recommendations for IHEs: Develop Internal Protections for Whistleblowers Based on the Interests and Needs of the Individual Institution ................................................................. 279
   E. Recommendations for Further Research ..................... 280
   F. Closing ................................................................. 282
INTRODUCTION

“You cannot bite the hand that feeds you and insist on staying on for the banquet.”

University professors are frequently shocked to find out that academic freedom does not protect them against adverse employment action, including being fired, for making factually correct statements critical of their department chair, dean, president or university. Indeed, whistleblower protection in the United States is only available in very specific factual situations and only when provided by a specific federal or state statute. There is no such general protection for anyone.

The purpose of this article is to shed light on the inconsistent and patchwork nature of whistleblower protection for faculty in the United States. It will closely consider the highly unsettled state of First Amendment law, following a dramatic split among the circuits regarding constitutional protection for expressions about issues of academic governance and administration for employees of public universities. It will also consider the tangled and inconsistent protections available through specific federal laws related to higher education, to general protections under the False Claims Act which can be claimed by any individual working for an institution that receives federal funding, and to protections from an equally inconsistent series of state laws related to public employees.

This article considers one kind of speech, whistleblowing, engaged in by one category of employees, faculty at both public and private colleges and universities in the United States. This topic is therefore broader than, but inclusive of, the circuit split over the application of the Supreme Court’s ruling in *Garcetti v. Ceballos*. It provides an overview of the legal


3 For the purposes of this article, “whistleblowers” are defined as: “[i]ndividuals who report misconduct” and “frequently face[ ] retaliation for doing so.” Leslie Griffin, *Watch Out for Whistleblowers*, 33 J.L. MED. & ETHICS 160, 160 (2005).
protection against adverse employment actions available to professors working at both public and private institutions of higher education (IHEs) in the United States who bring forward information of public concern to which they have access through their job responsibilities. This is a topic that transcends traditional doctrinal boundaries because the activity “faculty speech about a matter of public interest” can trigger a wide array of legal remedies depending on the identity of the speaker, the location, the status of the employer as public or private, and the content of the information. Rather than focus on any one source of whistleblower protection, this article takes a holistic approach by considering the range of sometimes overlapping or stand-alone protections available to faculty. It also points out the substantial gaps in coverage and the areas of uncertainty created by circuit court interpretations of the Supreme Court’s most recent case considering public employee speech.

The article’s analysis and conclusions, while focused on professors, are more broadly applicable to understanding the limits of First Amendment protection for speech by all whistleblowers employed by a municipal, state, or federal government (public employees) and the complete lack of such protection for private employees.

However, this article specifically considers professors because although colleges and universities are required to comply with the same employment laws as other employers, courts have routinely looked at cases involving professors and other employees as at least meriting special analysis, even if the results are often quite similar to similarly situated litigants in other sectors of employment.

Since whistleblowing by its nature is a form of expression, this article will consider the role that the First Amendment of the United States Constitution plays in providing protection to employees of IHEs who face adverse employment actions as a direct result of speech of public concern. In addition to direct protection from the First Amendment, this article considers applicable whistleblower protection provisions attached to individual statutes such as the Clery Act\(^4\) and Title IX\(^5\) as well as the whistleblower protection provisions of the Federal False Claims Act\(^6\) and the functionally equivalent statutes now being adopted by many states.\(^7\)

---


\(^7\) See Tax Payers Against Fraud Education Fund, States With False Claims Acts, TAF EDUCATION FUND (2012), http://www.taf.org/states-false-claims-acts (compiling states that have their own version of the False Claims Act).
also considers the state whistleblower protection statutes available in some form to many, though not all, public employees. In particular, it looks at how these statutes function in the environment of higher education. Finally, within the context of applying state and federal law to realistic scenarios, it will consider the protection offered by contractual relationships between IHEs and their employees. These include explicit contracts such as tenure and collective bargaining agreements but also implicit protections extended through policies adopted by an IHE and published in institutional handbooks or web pages.

Section One includes an introduction describing the background of the law of higher education and of whistleblowing. This includes general overviews and material focused on the specific protections offered by specific statutes. Finally, it considers the literature of whistleblowing itself, which includes studies of whistleblowers, their motivations and their experiences when their identities are known to their employers. Section Two is a detailed analysis of the specific cases, regulations, statutes, and laws. It also considers law review articles and other secondary sources relevant to the topics of whistleblowing and of the regulation of higher education. Section Three introduces the methodology of scenario analysis, and Section Four applies the law reviewed in Section Two to a series of four scenarios developed from a review of recent whistleblower cases. These scenarios provide the factual information necessary to analyze and explain the relevant legal conclusions. Each scenario considers seven questions to analyze the extent of protection available to employees of IHEs who face potential retaliation for whistleblowing. Finally, Section Five applies the findings from the analysis of research questions within the context of the four scenarios presented in Section Four. It also identifies the significant gaps in protection against adverse employment actions for good faith disclosures of information.

I. OVERVIEW

A. BACKGROUND

Working at a college or a university is not like working for a government agency or a private company of similar size. One of the significant challenges to being an administrator in an institution of higher education (IHE) is that the work environment is often perceived differently from a typical workplace. As one author explained, “[d]ue to their efforts to foster academic freedom and the free exchange of ideas, colleges and universities tolerate a wider spectrum of behavior, particularly with respect
to faculty, than many nonacademic organizations would permit.”  

Moreover:

[B]ecause administrators, especially those trained as faculty, typically have had little or no preparation to supervise employees, they may be hesitant to respond to performance or behavior problems until those problems have become dysfunctional for the unit. Thus the culture of colleges and universities may complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally.

This observation is supported by the large volume of employment-related litigation that makes its way to federal and state courts from IHEs. This article considers a subset of employment disputes in which the employee’s main claim is retaliation for whistleblowing. Specifically in these disputes, faculty members claim that adverse employment actions had been taken against them for statements in which they expressed an opinion or brought forward information that was contrary to their employers’ liking but that was intended for the general benefit of the public. These whistleblowing situations are therefore distinct from the factual situations giving rise to a claim of retaliation following an employee’s assertion of her rights under antidiscrimination laws, such as those that prohibit discrimination based on race or age. They are distinct because they involve matters of public concern rather than issues of concern only to the individual employee claiming discrimination.

The Supreme Court has devoted considerable time and effort to distinguishing between the constitutional protection for speech enjoyed by citizens as a whole versus that enjoyed by citizens employed by the government. As this article will explain, a public employee complaining about his boss or other workplace issue differs, at a point, from the same person supporting a candidate or marching in an anti-war protest outside of work hours. The dividing line has been whether the employee is speaking about a matter of public concern or one that is of private concern and therefore no different from any workplace dispute. However, in 2006 the Court decided Garcetti v. Ceballos, which significantly narrowed the definition of a “matter of public concern” by excluding any matter that was part of a public employee’s job description. That limitation could have a more drastic impact on speech in an academic setting. In response to an

---

9 Id.
10 Garcetti, 547 U.S. at 425.
impassioned dissent by Justice Souter decrying this effect the decision would have on academic freedom, Justice Kennedy, writing for the majority, noted that:

[T]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.\textsuperscript{11}

This brief statement was not enough to prevent subsequent federal courts from directly denying faculty members protection unless they claimed retaliation for ideas or views directly related to the areas of expertise about which they were hired to teach.

However, in February of 2014, the Ninth Circuit Court of Appeals took Justice Kennedy’s words as a directive to find that “expression related to academic scholarship or classroom instruction” did have additional protection and moreover, that protected academic writing is “not confined to scholarship.” As the court explained:

[M]uch academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern…\textsuperscript{12}

Although this holding was in the context of overturning a grant of summary judgment and thus not a final determination of the underlying issues, it demonstrates the unsettled extent of protection that faculty members have for expressing their views on matters of self-governance.

Faculty members often believe, mistakenly, that statements made in the course of their governance responsibilities are protected speech


under the First Amendment. However, this is not true in the case of faculty working at private institutions and, following the Supreme Court’s opinion in *Garcetti* probably not true for faculty at public institutions either.

The lack of clarity in how *Garcetti* might apply to faculty rests in the lack of a clear definition of whistleblowing. A recent decision by the Ninth Circuit expands the definition of protected speech by a faculty member beyond the boundaries of his specific area of disciplinary expertise to include writings and statements relating to how the university is, or should, be governed. Specifically, the court overturned a motion granting the university summary judgment, and therefore a pamphlet proposing the reorganization of a division of the university, was deemed of public interest and did enjoy protection. This is in direct contrast to nearly every other decision considering this issue, since *Garcetti* denied protection for employees making internal criticisms to their supervisor.

Moreover, although the Supreme Court has never clearly defined the extent to which a constitutionally recognized form of “academic freedom” protects ideas expressed by faculty members at public institutions in their writing or teaching, it has, in *Garcetti*, strongly signaled that disclosing information acquired through their employment is outside the scope constitutional protection.

### B. Questions

This article will address the following research questions:

1. What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?
2. What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?
   a) What U.S. constitutional protections are available?
   b) What federal statutes provide protections?
   c) What state laws provide protection?
3. What are the significant gaps in protection against adverse employment actions for good faith disclosures of information?

### C. Significance

The questions examined in this article are significant because they are ones that faculty employees of IHEs have to face every day. The decision about whether or not to voice a concern to a supervisor or to file a complaint is a difficult one because there is so little consistency in the law.
Moreover, while the legal framework of whistleblower protection for professors at private colleges and universities is relatively straightforward because there has never been any constitutional protection, the situation is less clear for faculty employed by public IHEs following the Supreme Court decision of *Garcetti v. Ceballos*. If it did not change it, that case certainly clarified the extent to which public employees could face adverse employment actions even if the information they disclosed did meet the public interest test.

In the years since *Garcetti* was decided, the concern expressed by the dissenting justices about the chilling effect the holding would have on speech by academics has been validated. In a 2011 article, law professors Bauries and Schach point out that “[t]he Court’s failure to explicitly say that the *Garcetti* rule does not extend to academic speech leaves an ominous alternative possible implication that the rule may apply to such speech, after all.”

This is exactly what appears to have happened in cases of speech by faculty members found to be unrelated to the content of their writings or teachings. As Professor Kerry Brian Melear writes, distinguishing a 2011 case from the Fourth Circuit, *Adams v. University of North Carolina-Wilmington*, from earlier opinions, “A critical distinction separating *Adams* from other federal circuit cases is that the speech in question involves publications, presentations, and other forms of intellectual output, although not directly related to the faculty member’s academic field.”

Given the significance of this issue, there is a pressing need for this research because there are no up-to-date comprehensive overviews of higher education law from the perspective of protections against adverse employment actions available for whistleblowers in IHEs.

**D. IMPLICATIONS OF ARTICLE**

This analysis will serve as a useful framework for IHEs, as well as for their faculty and those who administer the institution, to better understand the parameters of the available legal protection for employees against retaliation for expressions of opinion or statements of fact related to their employment by the IHE. It will also clarify the extent to which

---

13 *Garcetti*, 547 U.S. at 425.
“academic freedom” is recognized by courts in the United States as a protection for academics for statements they make both inside and outside of the classroom. This analysis will help to frame the issue of protection for speech within higher education for those responsible for making policy and legislation in those institutions.

II. FEDERAL CONSTITUTIONAL PROTECTION AGAINST RETALIATION FOR WHISTLEBLOWING AVAILABLE TO EMPLOYEES OF PUBLIC INSTITUTIONS OF HIGHER EDUCATION

The extent to which professors at public institutions of higher education have First Amendment protection against retaliation for speech depends on how the reviewing court conceptualizes the nature of the speech and the context in which it is expressed.18 On a continuum, it is fair to say that speech directly related to a professor’s area of academic expertise has the most protection, and speech that refers to matters outside of the classroom, the academic journal or conference the least. As a result, “insofar as the federal Constitution is concerned, a private university can engage in private acts of discrimination, prohibit student protests, or expel a student without affording the procedural safeguards that a public university is constitutionally required to provide.”19 This distinction applies equally to the way in which private, versus public, IHEs can treat their employees.

The two constitutional protections most frequently cited as protecting employees of IHEs against retaliation for whistleblowing are the “due process” provision of the Fifth Amendment to the U.S. Constitution as extended to the individual states by the Fourteenth Amendment, and the “freedom of expression and religion” provisions of First Amendment of the Constitution. These protections are not dependent on or associated with any act of Congress or judicial opinion. Instead, they exist independently to protect all citizens against unlawful restraints on speech.

A. PROTECTION UNDER THE FOURTEENTH AMENDMENT

All public employees have a constitutionally protected property interest in their jobs, which is not available to individuals employed by private entities.20 Although employees of private IHEs may have similar

19 Id.
protections, they are based on internal sources and are not based in the U.S. Constitution.\textsuperscript{21} The Fourteenth Amendment requires that a state may not deprive “any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Tepper and White write that this means that the state must use fair procedures and cannot act in an “arbitrary or capricious” manner. “It is important to note,” they caution, “that procedural due process does not guarantee any particular outcome, such as guaranteeing that a tenured faculty member will not be terminated.”\textsuperscript{22}

In the 2006 case of \textit{Garcetti v. Ceballos}, the U.S. Supreme Court found that public employees had no First Amendment protection against retaliation for speech directly related to their jobs, as opposed to speech related to their role as a citizen. The Court wrote:

> When a citizen enters government service, he must accept certain limitations on his freedom in order for the government to provide efficient public services. While the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance.\textsuperscript{23}

Addressing directly the situation of a state public employee who faces retaliation for reporting what would otherwise be a matter of public interest, the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”\textsuperscript{24} What this means for cases brought after 2006 is that employees of state universities can be fired, or otherwise retaliated against, for bringing unwelcome information to their supervisors so long as it is information they learned in the course of their job duties.

\textbf{B. \textit{DO PUBLIC EMPLOYEES HAVE GREATER PROTECTION AGAINST AVERSE EMPLOYMENT ACTION?}}

Employees of private IHEs can be, and often are, fired for public statements they have made.\textsuperscript{25} There is a considerable difference in the

\textsuperscript{22}Id.
\textsuperscript{23}Garcetti, 547 U.S. at 420.
\textsuperscript{24}Id. at 421.
\textsuperscript{25}Eugene Volokh, \textit{University Associate VP of Human Resources Sues Over Firing Based on Anti-Gay-Rights Newspaper Article,} VOLOKH.COM, (last visited July 18, 2012).
protection available against termination at a public university from that at a private one. A public university must provide faculty and staff due process of law, which means that they must have notice of the accusations against them and a reasonable opportunity to counter these accusations at a hearing. Moreover, the university bears the burden of providing that it is not acting in a manner that is “arbitrary or capricious.” Private universities, on the other hand, are under no such constraint. Their only obligations to faculty, staff or students are those to which they have agreed by contract. Although this contract can take the form of a code of conduct or handbook rather than an individually drafted legal document, its terms are still within the control of the institution, not that of the individual, because it is the institution which drafts the documents.

No employee of a state institution can be fired or disciplined without what the Supreme Court has described as “due process of law.” This means that the employee must receive the basics of process identified by the Court for every case in which a citizen is deprived of a benefit that he was previously granted by the government. Due process means more, however, than providing notice, opportunity for hearing and impartial review. It also has a substantive component that demands that the decision to take action was based on reasonable deliberation which was not “arbitrary and capricious” and which was essentially the same in quality provided by others in similar circumstances. Essentially, this prevents the IHE from circumventing the usual process of disciplining or firing an employee in the case of whistleblowers. It also means that the IHE has to engage in a similar review process for all whistleblowers.

C.  IS ACADEMIC FREEDOM CONSTITUTIONALLY PROTECTED?

The United States Constitution makes no mention of “academic freedom” but the Supreme Court has recognized it as “special concern of the First Amendment.” Legal scholars today believe that if there is such a thing as “academic freedom,” it belongs to the institution not the individual employee. Tepper and White argue that when federal courts defer to a university’s decisions based on “academic freedom,” it is the freedom of the institution to make its own personnel and other decisions rather than the freedom of an individual faculty member. Thus, a faculty member who suffers an adverse employment action is often mistaken in his belief that the court will find his academic freedom violated. Rather, the court is likely to uphold the action on the basis of the institution’s academic freedom.

27 Tepper & White, supra note 21, at 180.
While the Supreme Court has never retreated from its support of universities as places where free speech is important, it has very much distinguished between the role of individual professors as integral aspects of the preservation of democracy versus as employees of the university. Many of the “academic freedom” cases that come before the Court are over tenure denials and salary issues rather than free speech.28

What is often misunderstood by individual professors claiming academic freedom is that for the most part the Supreme Court views academic freedom as belonging to the IHE itself, not to individual faculty, staff or students. So long as a university is organized so that decisions are made through academic self-governance, the Supreme Court is likely to defer to the IHE’s judgment over that of the individual professors.29 This is especially true when it comes to what courses are taught.

One of the most difficult aspects of analyzing the protections available to employees of IHEs in issues that involve communications or disclosures is the complete lack of a standard legal doctrine describing the characteristics of what is generally called “academic freedom.” 30 As Professor Neil Hutchens summed up the situation, “Despite statements strongly supportive of academic freedom in several opinions, Supreme Court decisions have failed to offer clear guidance on standards that courts should follow in evaluating academic freedom claims by faculty members in public higher education.”31

Noted First Amendment scholar and former dean of the Georgetown Law School, Judith Areen, explained that, although the Supreme Court has recognized the existence of something called “academic freedom,” it “[h]as not developed a coherent theory to guide constitutional protection of academic freedom.”32 Federal courts of appeal have concluded very different things about what constitutes academic freedom and whether or not it is protected. For example, in Urofsky v. Gilmore, the Fourth Circuit Court of Appeals in 2000 stated that, “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the

28 Id. at 135, n. 58 (citing Vargas-Figueroa v. Saldaña, 826 F.2d 160, 162-63 (1st Cir. 1987) (“Courts have wisely recognized the importance of allowing universities to run their own affairs and to make their own mistakes. To do otherwise threatens the diversity of thought, speech, teaching and research both within and among universities upon which free academic life depends”). At the same time, we recognize that Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination, within educational settings as well as without. Brown v. Trustees of Boston Univ., 891 F.2d 337, 346 (1st Cir. 1989) (“Academic freedom does not embrace the freedom to discriminate”).


30 Id.

31 Id. at 149.

University, not in individual professors….” 33 Yet it did so without addressing, let alone directly disputing, the Seventh Circuit’s 1985 decision in Piarowski v. Illinois Community College District, which described academic freedom as an “equivocal” term that “is used to denote both the freedom of the academy… and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy.…” 34

One useful delineating principle is that when the Supreme Court has used the term “academic freedom” in relation to the First Amendment, it has always done so in cases involving employees and professors at public universities. Private IHEs may choose to grant their employees protections against adverse actions for activities involving their employment, but only public IHEs have had this obligation imposed upon them by a court. That said, the Supreme Court has made very strong statements linking academic freedom and the First Amendment. In striking down laws that required employees at a public university to take a loyalty oath to the United States government, Justice Frankfurter wrote that:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the “marketplace of ideas.” The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, (rather) than through any kind of authoritative selection. 35

More recently, the Court expressed the view of the importance of academic freedom to the nation, writing:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any

34 Piarowski v. Ill. Cmty. Coll. Dist., 759 F.2d 625, 629 (7th Cir. 1985).
straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.36

Surveying the Court’s history of on the topic of academic freedom, professors Robert J. Tepper and Craig G. White raise the basic unresolved question of how the Garcetti decision will apply to employees of IHEs, when they write about the core issues of academic freedom in terms of the classroom and of other speech in the university setting. They write that “[a]cademic freedom is an important component of a public university, but is it valued enough to warrant more First Amendment constitutional protection for academic personnel than for other public employees?”37

A law review article concluded that “[a]t its core, professional academic freedom for college and university teachers involves the following: (1) freedom in research and publication, (2) freedom in classroom discussion concerning the curriculum, and (3) freedom to speak or write as citizens.”38 Although this statement accurately summarizes what the Court has said in the past about these three specific activities, it does not mean that post-Garcetti courts would treat whistleblowers who happen to work for a public university any differently than a whistleblower who works for the district attorney. Indeed, federal courts that have interpreted claims by employees of public IHEs since Garcetti have not assumed any academic freedom based exemptions.39

Moreover, a university is absolutely entitled to structure its curriculum and make decisions about offering some courses rather than others.40 For example, if a university chooses to avoid the issue of Holocaust denial it can choose not to hire professors who make it their field of study and not offer courses in that area.41 While it is unlikely that a university with a college of liberal arts would choose to eliminate an entire

37Tepper & White, supra note 21, at 126 see also Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, Academic Bills of Rights: Conflict in the Classroom, 31 J.C. & U.L. 243 (2005).
38Id.
40Areen, supra note 32 at, 946.
41Tepper & White, supra note 21, at 174.
History department in order to avoid the topic, it certainly could do so. Once a university has made the larger decision not to offer a course in a specific area, its ability to prevent the topic from being raised in other courses is even greater because they are by definition not the expertise of the professors teaching other subjects. A component of a university’s right to select what courses will be offered is its right to specify the content of those courses. For example, the activities of Canadian physics Professor Denis Rancourt, who deliberately chose to change the content of a course he was required to teach, is often cited as being beyond the outer limit of academic freedom. In a blog post in the New York Times, Professor Fish told that story of Professor Rancourt who, at the University of Ottawa, taught a course required for all environmental science majors. Rather than teach actual principles of physics, he engaged in what he called “Academic Squatting, [where] you take a course that was assigned and you make it into something else, something you feel is more important, more relevant and that students will appreciate more, that they need more in their program of study.” According to Fish:

My assessment of the way in which some academics contrive to turn serial irresponsibility into a form of heroism under the banner of academic freedom has now been at once confirmed and challenged by events at the University of Ottawa, where the administration announced on Feb. 6 that it has “recommended to the Board of Governors the dismissal with cause of Professor Denis Rancourt from his faculty position.”

In Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty, Robert J. Tepper and Craig G. White consider the core issues of academic freedom in terms of the classroom and of other speech in the university setting. They write, “[a]cademic freedom is an important component of a public university, but is it valued enough to warrant more First Amendment constitutional protection for academic personnel than for other public employees?” As noted earlier in this article, they identify three main components of academic freedom: “(1) freedom in research and publication, (2) freedom

---

43 Id.
44 Id.
45 Id.
46 Id. supra note 21.
47 Id. at 126.
in classroom discussions concerning the curriculum, and (3) freedom to speak and write as citizens.”

They also identify tenure as “an employment status that protects academic employees from dismissal absent serious misconduct, incompetence or financial exigency.” In explaining how the holding in *Garcetti* has changed the protections granted by the earlier *Pickering* and *Connick* cases, they note that while those two cases created a test for protecting speech of “public concern,” *Garcetti* “added a new requirement in this area: the speech must involve the public employee speaking as a citizen and must not be pursuant to the employee’s job responsibilities.”

They note that, after *Garcetti*:

> [T]he capacity in which the employee complains becomes all-important, and those complaints made outside of one’s job responsibilities—and about which the speaker would presumably have less knowledge—are more likely to be protected than complaints by a person in a position to know about the situation by virtue of job responsibilities.

As a District Court judge applying *Garcetti* in a case involving the firing of a university librarian explained, “[i]ssues involving curriculum, scheduling, and routine academic matters are not generally considered to be matters of public concern.” Therefore, a faculty member employed by an IHE would not be able to invoke First Amendment protection for publically criticizing these activities. As a commentator in a student note points out, these activities are “core functions of the university” about which faculty should have protection to speak freely. By contrast, employees of a government agency are not expected or required to take on governance responsibilities. Therefore, they are able to avoid making statements critical of how the entity is being run in a way that is not available to faculty members.

Tepper and White looked specifically into the protections available within the academic context and identified three: tenure, academic regulation imposed by accrediting bodies or other regulatory entities, collective bargaining agreements or other contracts, state whistleblower statutes and perhaps state constitutions. However, their article points out

---

47 Id.
48 Id. at 127.
49 Id. at 171.
50 Id.
53 Id.
that none of these are as strong as a blanket First Amendment protection for public employees. Tenure, they note, is only available to some employees of an IHE. Many employees, at IHEs and elsewhere, believe that they cannot be fired for “speech.” This is a fundamental misunderstanding of the First Amendment, which has absolutely no application in a private IHE and, following the Supreme Court’s decision in Garcetti v. Ceballos, very little in a public one.

D. FIRST AMENDMENT PROTECTION IN HIGHER EDUCATION AFTER GARCETTI V. CEBALLOS

Since the Garcetti decision, the extent to which it would change the way courts review complaints of retaliation based on academic freedom has been a topic of considerable interest to authors of law review articles. The question scholars have raised since Garcetti is whether and to what extent professors at public universities have any more protection than any other public employee. If they do not, then the First Amendment does not provide protection against retaliation for exercising academic freedom. Professor Richard Peltz concludes in Penumbral Academic Freedom: Interpreting the Tenure Contract in a Time of Constitutional Impotence, that “recent legal developments have cast serious doubt on whether academic freedom has a constitutional dimension.” 54 Considering the Garcetti Court’s limitation on the protection of public employees, he notes that:

What sets the academic at a public college or university apart from other public officials is that the academic's job is free expression: expression in teaching, in research, and in the course of public service. The ideal of academic freedom, whether or not a legal concept, means to afford the academic independence from the employer in the conduct of this expression. 55

He concludes that under the public employee speech doctrine there is little or no constitutional protection, and he therefore argues that going forward these protections must be protected specifically by contract.

Although courts have always afford K-12 teachers less academic freedom than university professors, Professor Susan P. Stuart argues that the “message the Supreme Court has sent to public employees, including

55 Id.
teachers, is they can be fired even if they are doing their jobs correctly” and
she provides a clear analysis of how Garcetti could be employed in any
academic setting.56 Calling the Garcetti decision “perhaps one of the most
extraordinarily ill-considered—and short-sighted—opinions penned by the
United States Supreme Court in recent years”57 she contends that the effect
of the decision will be that “teachers who care enough about their
profession and their students believe they should speak up about those
matters as the right, the ethical, and the professional thing to do.” However,
the Court had ruled that teachers, as public employees, do not have the
same protections as ordinary citizens. Stuart continues that “[w]hen it
comes to speech and acts otherwise protected by the First Amendment,
Garcetti now forces teachers to choose between their professionalism and
their livelihood.”58

Courts adjudicating the claims of professors at public universities
that they have suffered an adverse employment action because of things
they said or wrote, have delivered very different opinions on what kinds of
speech Garcetti does and does not protect. The primary divisions have been
between speech that is directly related to the faculty member’s academic
specialty and faculty speech related to the governance of the university
itself.

E. NOT ALL SPEECH IN THE CLASSROOM IS PROTECTED BY THE FIRST
AMENDMENT

Much of the protest against efforts to make classroom activity
available for public scrutiny stems from a substantial misunderstanding
about the protection offered by the First Amendment and the scope of that
constitutional protection. It is only available as protection against
governmental actions. In practical terms, that means a private school
cannot violate a professor’s First Amendment rights because the school is
not a government actor. This can be confusing because private schools are
required to obey federal anti-discrimination laws which sometimes mirror
constitutional protections. As a result, professors who claim they have been
discriminated against on the basis of race and religion can bring their claim
to federal court, but it is not decided on constitutional grounds. For
example, the Seventh Circuit Court of Appeals upheld a private college’s
right not to renew the contract of a cosmetology professor who distributed
religious pamphlets condemning homosexuality.59 The court wrote that,
even though the professor was expressing her religious beliefs, she had no

57 Id.
58 Id.
59 Piggee v. Carl Sandburg Coll., 464 F.3d 667, 668 (7th Cir. 2006).
right to do so against the objections of the college that was hiring her to teach cosmetology.\textsuperscript{60}

Moreover, private IHEs and especially those with a religious affiliation are almost always allowed to discipline those expressing beliefs contrary to the doctrine of the institution. For example, the objection by the Bishop of Newark, New Jersey to a course on “Gay Marriage” taught by a professor at Seton Hall University generated negative publicity but was not illegal. Equally, Marquette University’s decision not to hire a professor whose field of study took a lesbian perspective was criticized, but was found to be legal.\textsuperscript{61}

Likewise, the U.S. District Court for the Southern District of Mississippi dismissed the complaint of an adjunct faculty member in the music department, whose contact was not renewed because he violated the university’s non-discrimination policy. That faculty member did not dispute a student’s complaint that he made negative comments about “working with homosexuals and how the New York musical environment is impacted by homosexuality.” The faculty member argued, rather, that these comments reflected his personal religious views and were therefore protected by the First Amendment. The Sixth Circuit upheld the lower court’s dismissal of the case. It applied the following analysis to determine whether or not the professor’s expressions of his views about homosexuality in the context of giving a music lesson to a student were entitled to First Amendment protection. Quoting \textit{Modica v. Taylor}, the appellate court wrote:

\begin{quote}
[T]o prove a retaliation claim based on the First Amendment, the plaintiff must prove: (1) he suffered an adverse employment action; (2) the speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs the University's interest in promoting efficiency; and (4) the speech motivated the adverse employment action.\textsuperscript{62}
\end{quote}

The court then noted that “[i]n 2006, the United States Supreme Court added an additional element: “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

\textsuperscript{60}Id.


communications from employer discipline. Applying those standards, the appellate court held:

[O]n one hand, Dr. Nichols's duties as a University employee included giving voice lessons, not giving moral, sexual, or religious advice to his students, so his statements were not made pursuant to his official duties. Therefore, the content of the conversations with [his student], although tangentially related to the challenges of New York City's entertainment industry, are best characterized as speech unrelated to Dr. Nichols's official duties.

On the other hand, the court noted that “the courts have consistently taken a broad view of what constitutes classroom speech that is not afforded protection under the First Amendment….” So even if not part of his job description, because:

The statements were made in the classroom setting by a professor to a student…[e]ven were this court to concede that Dr. Nichols's speech was that of a citizen on a matter of public concern [and not part of his job as a voice instructor], Dr. Nichols has failed to demonstrate that his interest in making these comments outweighs the University's interest in promoting efficiency.

The fact that the court here found the university’s interest outweighed that of Dr. Nichols, whether or not Garcetti applied, illustrates how difficult it is for a professor to claim First Amendment protection against retaliation. Here, the university’s interests were based on the student’s adverse reaction to the professors’ comments about the sexual orientation of members of the New York music world.

Looking specifically at the university classroom, Professors Richard Fossey and Joseph C. Beckham agree. They provide an overview of cases in which federal courts have repeatedly “declined the opportunity” to find that faculty at institutions of higher education have any greater constitutional protection for speech than other public employees. Fossey

---

63 Id. (quoting).
64 Id.
65 Id.
66 Id.
67 Id.
69 Richard Fossey & Joseph C. Beckham, Commentary, University Authority Over Teaching Activities: Institutional Regulation May Override a Faculty Member’s Academic Freedom, 228 ED. L. REP. 1, 21-22 (2008).
and Beckham’s analysis is important because it concludes that “in the absence of a clear delineation of the concept of academic freedom by the United States Supreme Court, lower federal courts have defined the faculty member's academic freedom rights narrowly in relationship to teaching activities.”

They elaborate that, based on their review of the case law:

On one hand, academic freedom appears to protect the rights of faculty to research, write, teach and publish without fear of retaliation based on the ideas that the faculty member conveys. On another, academic freedom gives higher education institutions the right to determine on academic grounds the four essential freedoms of the academy [which are] determining who may teach, what will be taught, how it shall be taught, and who may be admitted to study.

Other commentators reach equally negative conclusions.

F. FACULTY SPEECH ABOUT UNIVERSITY GOVERNANCE

The greatest confusion regarding the extent to which faculty members have protected speech is when the issue is neither directly relevant to their academic specialty nor of interest to the general public outside of the university. Because faculty members are required to serve on committees and engage in other self-governance activities, they often must become involved in discussions about how the university itself is run. Yet under the clear terms of Garcetti, this kind of speech is not protected for other public employees. The question, then, is whether having the status of a faculty member at a public university creates an exception to Garcetti that does not apply to other public employees. It is on this point that lower courts are split.

A federal district court judge in Texas addressed the issue squarely when she held that a faculty member at a public university did not have First Amendment protection for making “complaints to the Board of Regents regarding credentials of some faculty, faculty salaries, treatment of students, accreditation of the pharmacy program, and student dismissals”
because these “are not matters of public concern under the law.”71 She went on to explain that “Contrary to Plaintiff’s contentions, it is not the law that a speech by an employee relating to the governance of a university is public speech protected by the First Amendment unless the speech is part of the employee's official duties.” Instead, for First Amendment protection, the employee must speak “as a citizen on a matter of public concern.” Under this definition, no internal complaint would have any First Amendment protection.

G. FEDERAL STATUTES AND REGULATIONS SPECIFIC TO IHEs

The most direct source of congressional power to control private IHEs is found in Article I, § 8 of the Constitution, which allows Congress to spend federal money in order to promote the nation’s safety and welfare.72 The Supreme Court has, since 1936, consistently held that with this power to spend money comes the power to impose restrictions on those entities that accept the money. This is true even if the restriction, or condition for accepting the money, is not one that Congress could have imposed directly. As the Supreme Court has explained, “the power of Congress to authorize expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution.”73

Both a public IHE that receives some of its funding from a state and a private IHE that accepts federal funding are contractually obligated to comply with conditions the federal government imposes. Public and private IHEs are also both bound by the same federal anti-discrimination in employment laws that are applicable to all employers.74 Relying on these principles, the Supreme Court has twice in recent history authorized sweeping exercise of federal authority over the activities of IHEs. In Bob Jones University v. United States, the Supreme Court held that the university could be stripped of its tax-exempt status if it continued its religious-based policy of banning inter-racial dating.75 Writing about the decision, Professor Martha Minnow noted that the Court did not base its decision on the violation of a specific statute, so much as it “[r]easoned that the tax exemption, as a privilege, had to comport with law and public policy.”76

74 Unless otherwise specified, all charts in this article were created by the candidate.
76 Martha Minnow, Should Religious Groups Be Exempt From Civil Rights Laws?, 48 B.C. L. REV. 781, 797 (2007) (“The opinion reasoned, ‘[T]here can no longer be any doubt that racial
The result is that the Supreme Court acts as the final authority on whether an IHE is acting in accordance with public policy, even when it is not violating any specific law. The Court exercised this authority dramatically in 2006, when it held that IHEs were required to allow the military to recruit on campus even though other employers that violated the university’s anti-discrimination policies were not permitted on campus. Rumsfeld v. Forum for Academic and Institutional Rights (Solomon Amendment Decision) upheld the government’s position that failure to comply with federal policy could result in the complete elimination of eligibility for federal funding, including financial aid and research grants. The practical effect of the Bob Jones and Solomon decisions is to grant the federal government sweeping authority to withhold tax exempt status, as well as to make an IHE ineligible for any federal funding including financial aid, if in the Supreme Court’s opinion it is acting against public policy whether or not that policy is expressed by statute.

1. The Role of Federal and State Anti-Discrimination Laws in Whistleblower Retaliation Acts

There is a close relationship between the legal analysis of whistleblower claims and the legal analysis of claims of illegal discrimination, because state and federal laws providing protection against discrimination also provide protection against retaliation for bringing such a claim. As a result, federal courts faced with a “stand-alone” whistleblower case will often look to discrimination cases with a retaliation component for precedent.

The majority of federal anti-discrimination laws originate in Title VII of the Civil Rights Act of 1964 (Title VII). Federal and state anti-discrimination laws are generally applicable to all employers. As a result, all IHEs, subject to some exceptions for faith-based IHEs, are subject to the same federal and state laws prohibiting discrimination on the base of age, sex, race, religion, national origin, and disability as any other large employer. These laws are enforced by the U.S. Equal Employment Opportunity Commission. (EEOC) As the EEOC explains its role:

All of the laws we enforce make it illegal to fire, demote, harass, or otherwise “retaliate” against people (applicants

discrimination in education violates deeply and widely accepted views of elementary justice”’)
(citations omitted).
77 (Holding that private universities must allow military recruiters on campus or risk eligibility for all federal funding).
78 Id.
or employees) because they filed a charge of discrimination, because they complained to their employer or other covered entity about discrimination on the job, or because they participated in an employment discrimination proceeding (such as an investigation or lawsuit).\textsuperscript{81}

While Title VII anti-employment discrimination law applies to institutions of higher education, there are also anti-discrimination laws that apply specifically to education and extend more broadly than employment issues. The Department of Education’s Office of Civil Rights enforces five specific laws prohibiting discrimination by entities that receive federal funds.\textsuperscript{82}

The Department of Education requires compliance with Title VI and Title VII, which explicitly prohibit retaliation against those who allege discrimination:

Programs and activities that receive ED funds must operate in a non-discriminatory manner. These may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment, if it affects those who are intended to benefit from the Federal funds. Also, a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title VI. For a recipient to retaliate in any way is considered a violation of Title VI.\textsuperscript{83}

It is in the specific definition of “retaliation” that anti-discrimination cases and direct whistleblower cases, including those under the False Claims Act, overlap.\textsuperscript{84} To establish a prima-facie case of retaliation, a plaintiff in a Title VII action must show: “(i) that he [or she]
engaged in protected opposition to discrimination, (iii) that a reasonable employee would have found the challenged action materially adverse, and (iii) that a causal connection existed between the protected activity and the materially adverse action.”

The federal and state laws prohibiting discrimination do, in some cases, overlap with constitutional provisions. However, they are far more extensive both because they cover categories without constitutional protection, such as age discrimination, and apply equally to both public and private employers. Most states also have anti-discrimination employment laws that track and often exceed the protections of federal statutory law. Often claims are brought under both state and federal law, and the EEOC and state agency work together. In the states that possess their own employment discrimination legislation, the EEOC must generally “defer” to state or local remedies. As the Second Circuit explained the relationship, “[b]oth Title VII and NMHRA claims must be administratively exhausted before being brought in federal court. Title VII creates a work-sharing deferral system between the EEOC and the states that have their own employment discrimination legislation.”

2. Qui Tam Actions Brought Under the Federal False Claims Act

Congress passed the False Claims Act during the Civil War to address the fraudulent bills that some war suppliers were presenting to the Union for payment, and it has continued to serve as the government’s strongest tool to recover funds it has paid out under false pretenses. It both encourages whistleblowing, by sharing up to 30% of the government’s recovery and covering attorney’s costs when the information results in a successful recovery, and by providing whistleblower protection whether or not the claim is successful. The False Claims Act is a federal law that harshly penalizes fraud by those engaged in activities paid for with federal funds. This includes straightforward fraud such as a doctor submitting an inflated claim for payment by Medicare, but it also applies far more broadly to situations in which an entity like an IHE provides fraudulent

---

85 Proctor v. United Parcel Serv., 502 F.3d 1200, 1208 (10th Cir. 2007) (quoting Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1202 (10th Cir. 2006)).
89 Id.
information to an accrediting agency to qualify for eligibility to participate in the Title IV federal student loan program. Simply put, “[t]he qui tam provision of the False Claims Act allows private citizens, acting on behalf of the government, to recover treble damages from anyone who has committed a fraud upon the government.”

The False Claims Act extends either civil or criminal liability to any person “who knowingly presents, or causes to be presented, to an officer or employee of the United States Government…a false or fraudulent claim for payment or approval.”92 The elements of a False Claims Act action are that the defendant: (1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury.93

Recent successes in pursuing False Claims Act claims in the case of health care fraud have made promoting whistleblowing in this context a high priority for the federal government. In a warning to pharmaceutical companies, Senator Chuck Grassley stated:

The False Claims Act is a proven success in both identifying and deterring fraud and recovering fraudulently obtained taxpayer dollars. The more that can be done to create awareness of it, the more good it can do. Congress has long seen the need for providing protection to federal employees who learn of fraud, waste or abuse in government culture where those who speak up about possible fraud are rewarded rather than retaliated against is one way to fulfill that responsibility…. There can never be too many taxpayer watchdogs.94

The False Claims Act is especially powerful because, unlike most federal laws that just create a cause of action for the federal government itself, the False Claims Act extends its reach by allowing anyone who learns of a false claim against the government to, on their own, bring a claim on the government’s behalf. Like a sheriff putting together a posse to hunt a fugitive, the False Claims Act deputizes everyone who might be in a position to know about a false claim against the government, and provides them with an incentive to do so by sharing in the money recovered and attorney fees. Of particular relevance here, to further encourage potential

---

whistleblowers to come forward, the government also extends protection against retaliation.

This practice of allowing private citizens to bring actions on their government’s behalf is a very old British doctrine still called by its Latin name: A *qui tam* action. As a court recently explained in a claim against University of Georgia researchers for making false statements in an application for a research grant to the Department of Environmental Protection, “‘qui tam’ is an abbreviation for the Latin phrase ‘*qui tam pro doino rege quam pro se ipso in hac parte sequiter,*’ which means ‘who as well for the king as for himself sues in this matter.’”95 The individuals who bring the action on the government’s behalf are not called by the ordinary term of “plaintiff” but rather by a specific Latin term, “relator.”96 Relators are required to notify the government of their intent to bring the action so that the government can join the suit.

In an overview of both private and governmental whistleblowing around the globe, Professor Wim Vandekerckhove of Ghent University describes the “paradigm case” in the U.S. *qui tam* system as one where “the whistleblower transfers inside information to the U.S. Government in exchange for a reward.”97 Vandekerckhove further explains that “[t]his arrangement has even been conceptualized by courts as the government purchasing information it might not otherwise acquire.”98

Dworkin and Near point out that “motive” is an important issue in evaluating whistleblower programs. They cite differences in the evolution of the False Claims Act from an older model that “viewed whistleblowing as an act of conscience and responsibility” as opposed to a “new” model that “values information over motivation.”99 Researchers studying the whistleblowing practices in the non-profit sector, however, note that the main motivation is not money. It is to improve an organization or even a society in which the whistleblower feels a strong, personal commitment. A person like that is not directly motivated by money.

The law permits anyone with knowledge of fraud involving a wrongful claim for payment to the federal government to file their own

---

95 United States v. Walker, 738 F. Supp. 2d at 1287, n.1 (citing Black’s Law Dictionary 1368 (9th ed. 2009)). Because Latin is a dead language, Latin terms used in law often have more than one acceptable pronunciation. The most standard pronunciation of Qui Tam is “kwi tam.” See *Qui Tam Action, SPEAK ENGLISH*, (last visited May 8, 2011). But “Kee Tam” is equally appropriate (and is what I was taught). See *How is Qui Tam Pronounced?, WHISTLE LAW*, (last visited May 8, 2011); see also Dessen, Mosses & Risotto, Are Qui Tam and Whistleblower Statutes the Same? http://www.dms-lawyer.com/area/quitam.shtml (last visited May 8, 2011) (generally explaining Qui Tam claims).
96 *Id.*
98 *Id.*
claim on the government’s behalf. The relator must notify the government of its intention and give the government, through the U.S. Justice Department, the opportunity to bring the case on its own behalf. If the Justice Department chooses to do so it still pays the relator a percentage of the funds recovered. If the Justice Department declines and the relator is successful, she receives a larger percentage of the recovery and, even more importantly, attorneys’ fees. The availability of attorneys’ fees is an incentive for private attorneys to take on these cases and has resulted in an active area of practice. Both qui tam actions link the whistleblower’s recovery directly to the amount recovered by the government.

Although qui tam actions have come a long way from their original role of monitoring defense contractors and are now brought in almost every context involving federal funds which, as the current Supreme Court is interpreting the Constitution, essentially every exchange of goods and services in the country. Qui tam has come to IHEs in two major forms. The first is through the federal government’s war against health care fraud. Qui tam actions have become quite common in university settings in the areas of misspent federal grant funds and academic medical centers’ billing practices. They have also recently become common risks for for-profit IHEs, as the government investigates fraud in student financial aid practices.100

IHEs have increasingly faced actions brought through the False Claims Act as recipients of government research funds, or by billing Medicare through their affiliated hospitals. Both of these activities are especially lucrative for qui tam relators because the False Claims Act “defines “claim” as each individual “request or demand … for money or property” and amounts add up quickly. As one commentator explained:

This means, for example, that each false request for payment submitted by a doctor will be considered a separate claim, amenable to separate $5,500-$11,000 penalties. Then, any monetary damages resulting from the fraudulent claims that are inflicted on the government are trebled. Therefore, potential recoveries, especially in the medical arena, can quickly escalate into the “tens or hundreds of millions of dollars.101

Equally, an IHE that processes hundreds of student loans or recruits hundreds of students can also generate large awards. Recent

attention has shifted to violations of the Higher Education Act, which governs the practices of IHEs who enroll students receiving federal financial aid and veteran’s benefits. In November 2010, the University of Phoenix, a for-profit-corporation, settled a False Claims Act case with the Justice Department for $78.5 million. On May 2, 2011 the Department announced that it was joining a complaint first brought by a relator against Education Management Corp. (EDMC), a for-profit company, on the basis that it violated the Higher Education Act. The key limitation of the False Claims Act is that it can only be invoked when an entity makes an illegal claim for payment or makes a misstatement in seeking payment.

The Association of Private Colleges and Universities has been successful in blocking the efforts of the current U.S. Department of Education to impose regulations forming the basis of a qui tam action. On June 30, 2011 a federal district court judge in Washington, D.C. struck down several regulations that would impose limits on how much federal financial aid could go to students who, based on their “debt-to-income ratios,” were unlikely to repay. These included direct prohibitions on lending money to students above specific debt-to-income ratios, and also limited the ability of students to borrow money to attend schools where the students did not make sufficient salaries to pay back their loans. The result of the opinion was to uphold some portions of the regulation and strike down others. Yet Danny Weil, an educator, attorney, and critic of the for-profit education industry, used the decision as an example of the industry’s influence. He wrote that:

Knowing that the for-profit union, APSCU, will spend literally millions and millions of taxpayer monies to influence the courts and the coin-operated politicians aligned so closely with them, this ruling cannot be seen as anything but a victory for the APSCU and its members. It is another loss for students.

Although the Department of Education continues to monitor the for-profit education industry closely, its ability to act is limited by the provisions of the rules and regulations that govern the industry’s behavior.

103 Id.
A University of Phoenix employee who, for example, provides information of behavior will only be eligible for whistleblower protection if that behavior is illegal or if he has a good faith belief that it is illegal. Such a fine distinction may not be apparent to an employee who sees a school encouraging students to both enroll and borrow money they are unlikely to repay.

Nevertheless, the False Claims Act still plays an important role in providing statutory protection for employees of IHEs. For example, the text below is from the website of a prominent Philadelphia law firm advertising its success in representing IHEs facing qui tam actions:

Drinker Biddle’s Qui Tam team has experience counseling and defending institutions of higher education in a range of qui tam actions, including: Representing several schools in qui tam actions relating to Title IV funds; Representing a university alleged to have violated Department of Education rules by paying bonuses to its recruiters; and representing an academic medical center in a qui tam action under Medicare Fraud and Abuse laws relating to the United Network for Organ Sharing (UNOS) organ transplant program.106

3. Requirements for Bringing a Qui Tam Action

The requirements for an individual to bring a qui tam action under the False Claims Act are set out by statute. One requirement that is particularly troublesome to potential relators is a set of rules designed to protect the government against paying relators for providing information available through public sources. As written, § 3730(3)(4)(A) states:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing…or from the news media, unless the action is brought by the Attorney General or the person bringing the action is the original source of the information.

Explaining the reason for this provision, the Sixth Circuit wrote that “[w]e find it difficult to understand how one can be a ‘true

whistleblower’ unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain.”

This provision has become more restrictive since the Supreme Court’s interpretation that, not only is an employee barred from bringing a suit based on information known to the federal government, but she is also barred from bringing suit based on information known to the state government—even if the state chooses to take no action to address the fraud. This effect of this decision is to penalize an employee who first brings information to her supervisors’ attention rather than first filing a Qui Tam Act action.

4. Whistleblower Protection in Qui Tam Actions

Invoking the whistleblower protection provided by the Qui Tam Act can require complying with the complex rules associated with bringing such a claim. However, a plaintiff can receive protection as a whistleblower even if her qui tam action is dismissed. In upholding protection for an employee whose qui tam action is found to be without merit because it was based on information already available to the government, the Sixth Circuit noted that “to further encourage whistleblowers, [the False Claims Act ] provides protection for those who pursue or contribute to qui tam actions.” The court went on to cite the statute’s provision that:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

The court further wrote that “the legislative history indicates that Congress understood “that few individuals will expose fraud if they fear

---

109 Barthle II, supra note 101.
their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation.”

In order to qualify for protection, the potential qui tam relator must prove that the employer was aware of her actions. This can be difficult to prove in the case where an employee already has a poor relationship with the employer. For example, an employee who complained to his employer about fraudulent activity in relation to a government contract was found not to have whistleblower protection because “he never used the terms ‘illegal,’ ‘unlawful,’ or ‘qui tam action.’” Faced with a very real possibility of both not being able to prove a qui tam action and not qualifying for whistleblower retaliation protection, an employee still faces considerable risk.

5. State Statutes and Regulations

Introducing an essay entitled Public Colleges and Universities, Brad Cowell writes that “[i]n the modern era, each of the fifty states has a complex mix of public and private higher education institutions and a variety of governance systems.” He summarizes that given this structure, “diversity, rather than uniformity, characterizes public higher education in the United States.” He contrasts states like Texas, which have unified systems whereby a state board answerable to the legislature oversees all the public IHEs in the state, with states like Minnesota and California, which have state constitutions declaring that their universities are “autonomous” and not subject to legislative control.

Even in a state like California where universities are free of state legislative control, all states must comply with federal law. A state cannot have its own laws which conflict either with existing federal law or with when a state regulation directly conflicts with a federal one. However, while individual states cannot provide less protection from discrimination by employers than the federal government, they can provide significantly more. These protections are notable in the area of sexual orientation where many states have specific prohibitions against discrimination, while the federal Title VII has none. These differences can also be significant.

---

111 Id.
112 Robertson v. Bell Helicopter Textron, 32 F.3d. 948, 951 (5th Cir. 1994).
113 Brad Colwell, Public Colleges and Universities, CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 10 (2005).
114 Id. at 20.
115 Id.
117 Discrimination in Employment, UNIV. WIS., http://www.wisconsin.edu/gc-off/deskbook/discrm.htm (last visited July 18, 2012); For an overview of federal laws protecting
in the case of discrimination based on disabilities, with some states recognizing obesity as a protected condition while the federal law for the most part does not.\textsuperscript{118}

6. State Whistleblower Protection Laws

In his \textit{Garcetti} dissent, Justice Souter criticized the majority’s reliance on state whistleblower laws as providing sufficient protection by pointing out that they were inconsistent. He wrote that, “the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.”\textsuperscript{119} The same is true of the kind of protection offered employees of public IHEs who attempt to invoke their state’s whistleblower protection act. Both the type of protection offered and the terms for receiving it are very different depending on the IHEs’ location.

The case before the \textit{Garcetti} Court concerned the rights of public employees. Therefore, whether or not its conclusions about the adequacy of individual states’ whistleblower protection laws to protect the First Amendment rights of public employees are correct, they have no bearing on protection against retaliation for employees of private IHEs.\textsuperscript{120} For the same reason, the discussion of state whistleblower laws below also only consider employees of public IHEs and are thus unavailable as a remedy for employees of private IHEs.

The purpose of whistleblower protection laws is to protect society by extending the reach of enforcement mechanisms. As Wim Vandekerckhove explains, “whistleblowing policies…offer the possibility [for an employee] to raise concern about practices within an organization one does not have the power to alter or to prevent.”\textsuperscript{121} Whistleblowing in general has been the subject of considerable public attention as a series of highly public incidents such as Enron, 9/11 and the banking collapse. Even nuclear safety in Japan has been portrayed as avoidable had those in power

\begin{flushleft}
\textsuperscript{120} \textit{Id.}  
\end{flushleft}
listened to warnings brought by insiders. The public’s interest in whistleblowing has resulted in the U.S. Congress passing what has become a series of new laws intended to prevent financial fraud on the public by enlisting insiders to bring fraud to light. Recognizing that the fear of retaliation could discourage whistleblowing, both the federal government and almost every state has enacted laws protecting whistleblowers against retaliation.122

Most legal commentators use words like “chaos” or “patchwork” to describe the current state of legal protection for whistleblowers in the United States. This is because there is no comprehensive system of statutes that provide protection against retaliation for those who provide information in the public interest. As one lawyer seeking clients on her website explains, in all caps:

THere is not one whistleblower law protecting against retaliation. Instead, there are various laws and regulations that provide protection from retaliation in specific circumstances. Who you are, what you reported/disclosed, and to whom, is relevant in determining whether there are any legal protections from retaliation.123

In other words, whistleblower laws are intended to encourage people who know of a violation of the law or a danger to the public’s health or safety to come forward without fear of retaliation. The public endorsement of whistleblowing undermines the historical belief that an employee will be loyal to his employer. Social scientists who study the phenomena of whistleblowing consistently conclude that the experience of being “a whistleblower” has a negative effect on employees regardless of the statutory anti-retaliation, or even reward, provisions intended to protect against retaliation. As Andrade explains this is because, depending on the kind of employment, the retaliation can extend far beyond the confines of the job where the whistleblowing occurred. He writes “in many niche industries informal blacklists exist that ensure the whistleblower never works in his/her field again.”124

The field of higher education is just such a niche industry. The best examples come from the fields of academic medicine and science where acts of whistleblowing have, again and again, been documented as ending careers. The prestigious journal *Science* documented what happened to the graduate students at the University of Wisconsin who reported to officials (accurately) that they were falsifying data and thus putting the entire university’s grant funding at risk. The journal reports that “[a]lthough the university handled the case by the book, the graduate students caught in the middle have found that for all the talk about honesty’s place in science, little good has come to them.” Interviewing the six students involved they found that:

Three of the students, who had invested a combined 16 years in obtaining their Ph.D.’s, have quit school. Two others are starting over; one moving to a lab at the University of Colorado, extending the amount of time it will take them to get their doctorates by years. The five graduate students who spoke with *Science* also described discouraging encounters with other faculty members, whom they say sided with [the lab director] before all the facts became available.

An investigator at the Office of Research Integrity, which conducts fraud investigations when federal funding is involved, told the reporter that what happened to the students there did not surprise her. She told the reporter that, “[m]y feeling is it’s never a good career move to become a whistleblower.”

Alford characterizes the average whistleblower as:

[A] fifty-five year old nuclear engineer working behind the counter at Radio Shack. Divorced and in debt to his lawyers, he lives in a two-room rented apartment. He has no retirement plan and few prospects for advancement.

In the words of another researcher, whistleblowing can be “occupational suicide.”

Whistleblower laws either stand on their own as general protection for those who make known fraud, waste or abuse of government funds, or

---

126 Id.
127 Id.
they are attached to specific legislature schemes to enhance their enforcement by providing protection to those who bring violations to light.

7. Qui Tam Actions Under State False Claims Acts

Seeing the success the federal government has had in recovering large sums through the False Claims Act, many states have added or strengthened laws which would provide similar incentives for individuals, whether state employees or not, to pursue cases of fraud against state government.\textsuperscript{130} As one law firm writes in explaining its practice to potential whistleblowers:

In addition to bringing cases pursuant to the False Claims Act, we also bring claims on behalf of state governments that have been defrauded. Several states, including California, have \textit{qui tam} statutes similar to the Federal False Claims Act, and it is not uncommon for [us] to bring a false claims act case on behalf of a state when we represent a Relator whose evidence demonstrates that a state is being defrauded.\textsuperscript{131}

This trend was reflected in a case brought under both federal and state qui tam actions against Education Management Corporation (EDMC), which is a for-profit corporation that manages colleges. Although originally brought as a qui tam action, the government joined the suit and is alleging that EDMC wrongly received financial aid funds by violating regulations governing recruiter compensation and by submitting false documents to gain eligibility for state-based aid.\textsuperscript{132}

\textbf{H. Whistleblower Law}

One of the first things to understand about whistleblower protection laws is that they are uniformly poor in providing meaningful


\textsuperscript{131} Upholding the Public Trust and Obtaining Recoveries for Whistleblowers, LIEFF CABRASER, (last visited July 18, 2012).

The first reason that they do such a poor job is that, although there are many individual laws, there is no over-all regulatory scheme. If protective legislation is visualized as an umbrella, then the one provided whistleblowers is not only full of holes but usually blown completely away. Another reason, according to the leading academic expert on whistleblowing laws, is that they are highly specific. So rather than protect whistleblowing in general, each law is quite specific about who is protected, what kinds of disclosures trigger protection against retaliation, and how the whistleblower must proceed in making her complaint. Because the terms of most whistleblower protection laws are so specific, the result is that while the public may benefit from the information being brought to light, the person who did so could well find themselves without any protection against retaliation. Moreover, adding whistleblower protection to existing laws is still seen by legislatures and scholars as a successful way of extending enforcement. Congress has resisted efforts to limit the whistleblower provisions of the Sarbanes-Oxley legislation and has included them in the anti-fraud provisions of the Dodd-Frank Act. Professor Miriam Cherry has advocated extending whistleblower protection to anyone reporting a violation of federal law regardless of their employment status. No matter what the underlying basis is of the accusation that an IHE has made a false claim for payment to the federal government, the employee making it is automatically protected against retaliation. A study published in the Annals of Internal Medicine tracked the experiences of relators and found that, despite “a strict prohibition on retaliatory action against whistleblowers” under the statute, “the cases we analyzed frequently included descriptions of the considerable pressures put on whistleblowers and the many unpleasant experiences they faced after helping initiate DOJ enforcement actions.”

For example, according to the authors of the study, a physician who brought an action against his hospital “reported that his hospital employer fired him and then prevented him from informing his patients of his relocation.” This led the authors to conclude

133 See Richard Moberly, Protecting Whistleblowers by Contract, 79 U. COLO. L. REV. 975, 979 (2008) (“[a]lmost all the benefits of whistleblower disclosures go to people other than the whistleblower, while most of the costs fall on the individual whistleblower”).
136 Aaron S. Kesselheim & David M. Suddert, Whistleblower-Initiated Enforcement Actions against Health Care Fraud and Abuse in the United States, 1996 to 2004, 149 ANNALS INTERNAL MED. 342 (2008). A study of 379 cases brought by private individuals alleging violations of Medicaid and Medicare laws shows that although between 1996 and 2005 these whistleblowers received over one billion dollars as their share of the $9.3 billion recovered by the federal government.
137 Id. at 347 (citing J.S. Lubalin & J.L. Matheson, The Fallout: What Happens to Whistleblowers and Those Accused by Exonerated of Scientific Misconduct?, 5 SCI. ENG. ETHICS 229 (1999)).
that despite the potential for significant financial gain, “[t]he ongoing viability of the qui tam model depends on the willingness of whistleblowers to come forward.”

The issue of “willingness to come forward” is an important distinction between those who wish to remain at their institution or in their industry after bringing a qui tam action, and those who would be content to take the money they recover and move on to other work. Many of the cases brought recently against pharmaceutical companies come from drug representatives like the ones who claimed to be “appalled by Pfizer’s tactics in selling the pain drug Bextra,” Yet these drug reps are more likely to achieve long term satisfaction from their respective commissions on the $102 million dollars from sales of Bextra than would be a professor who could never teach or research again.

Given the regularity with which whistleblowers face retaliation, one researcher asked the question “[w]hy would anyone in [the situation of a whistleblower] choose to go to public authorities or to their superiors with observations of organizational wrongdoing?” After all, she writes:

There is no question that whistleblowers are putting themselves at risk because the person bringing the charge is of lesser authority in the hierarchy of the organization than is the person or persons being charged…. Those above the whistleblower in the organizational hierarchy…control the job performance evaluations that the employee/whistleblower will receive, they control the terms and conditions of their work and under employment-at-will circumstances, they control even the capacity of the dissenting employee to remain in their job.

Moreover, she continues, even if the whistleblower sues for retaliatory discharge, “the individual incumbents who are responsible for the firing can hire all the attorneys they want from the company (or the public coffer).”

 Allegations of retaliation are often complicated by the fact that whistleblowers often have a history of poor relations with administrators. Even whistleblowers who keep their jobs report that their careers stalled

---

138 Id. at 347.
140 Id.
afterwards, and even new employers looked at them with suspicion. Research suggests that many people who come forward with information simply do not understand the long-term consequences. Writing about the role of whistleblowers in corporate America, Professor Elizabeth Tippett notes the pervasive “social stigma” associated with whistleblowing. She writes that:

Despite the statutory protections available, however, the empirical evidence demonstrates continuing retaliation against whistleblowers. Whistleblowers suffer heavy psychological and professional costs for their disclosures. A survey of eighty-four whistleblowers found that “82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide.”

Either they believe “that their history of excellent performance in the firm will insulate them from any retaliation” or “[t]hey are generally unaware of the research literature that demonstrates the prevalence of retaliatory findings, and they may simply underestimate the probability of retaliation, until they are so far committed that they must now wage a war to retrieve their own honor.”

Of even greater concern, Tippett writes, “most whistleblowers I interviewed mistakenly believed that the extant laws and their ‘right to free speech’ would protect them.” Peter Rost quotes a study of whistleblowers at St. Elizabeth’s hospital in Washington that concludes, “[o]nly 16 percent say that they wouldn’t blow the whistle again” despite the negative consequences.

Another study found that whistleblowers and their families suffer decreased physical and emotional health. Andrade notes that “[e]ven when whistleblowers are ultimately vindicated, like the pair of NASA engineers who disclosed the technical failures that led to the Challenger disaster, they are often subject to continuing social marginalization by co-workers.”

142 Id.
143 Id. at 1.
144 Id.
145 Id.
146 Id.
147 Id.
149 Julio Anthony Andrade, From Pariah to Parrhesiastes: Reconceptualising the Whistleblower in a Complex World (unpublished Ph.D. dissertation, Stellenbosch University, 2006)
Sometimes whistleblowers receive substantial public praise: Coleen Rowley who warned the FBI before the terrorist attacks on 9/11 of suspicious activities in local flight schools, and Sherron Watkins who, it is said, brought down Enron with a single phone call. Such individuals enjoy public approbation and perhaps even lucrative careers as motivational speakers. Time Magazine voted Rowley and Watkins “Person of the Year” for 2002. Yet as Adrade puts it in his article titled *From Pariah to Parrhesiastes: Reconceptualizing the Whistleblower in A Complex World*, “whistleblowing” is often seen negatively. As he explains:

The ambivalence whistleblowing provokes stems from the central dilemma of divided loyalties at the heart of the ethics of whistleblowing. On the one side are those who argue that employees owe their allegiance, first and foremost, to the organization which provides them with a livelihood…. Whistleblowers then are rightly regarded as… a social outcast; in blowing the whistle the whistleblower is cast out from the organization in order that the organization retains its prerogative to define its actions.

Indeed, both Cooper and Rowley stated that they hated the term “whistleblower” with Cooper complaining it was too much like “tattletale.” Sherron Watkins reported that “she was made to feel like an outcast at the company.” Given this grim prognosis, most would wonder: why would anyone do it? The answer that research suggests is that people do it because they think it is right. However, whistleblowing seldom goes well for the whistleblower.

Much of the literature on whistleblowing in IHEs comes from the field of academic medicine. Describing two cases in which medical researchers faced harsh punishments, ethicists Rosalind Rhodes and J.J. Strain write:


150 Id.
151 Id.
152 Tippett, supra note 141.
153 Bjorkelo, Einarsen, Nielsen, & Mathiesen, *supra* note 139.
To effect a change in the current status quo the incentives for addressing problematic behavior have to be changed. Ethically appropriate reactions to researcher misconduct would be far more likely if whistleblowers could be seen as helpful colleagues and as valued friends of the institution instead of its enemies. We advocate this kind of transformation, not only to address the misdeeds of academic medicine but to create a moral environment for all who have to work in it and learn from it.\textsuperscript{154}

Many have suggested that the very nature of scientific research, activity taken far outside the view of the public that could cause serious threats to health and safety, imposes an obligation on scientists to be whistleblowers when they perceive danger.\textsuperscript{155} While a few scientific whistleblowers occasionally receive large monetary awards, it is likely that they will no longer be able to work in scientific research, the field to which they have devoted extensive years of training.\textsuperscript{156}

Unfortunately, a small proportion of complainants reported very serious consequences of their whistleblowing. At least ten percent of complainants reported each of the following: Eight whistleblowers (12\%) reported being fired, not being renewed, and/or being denied salary increases, 14 reported losing research support (21\%), and 7 whistleblowers (10\%) reported losing staff support and/or receiving less desirable work assignments.\textsuperscript{157}

\textsuperscript{155} See generally Thomas Alured Faunce & Susannah Jefferys, Whistleblowing and Scientific Misconduct: Renewing Legal And Virtue Ethics Foundations, 26 MED. & L. 567, 581-82 (2007); see also Michael Davis, Some Paradoxes of Whistleblowing, 15(1) BUS. & PROF. ETHICS J. 3, 7 (arguing that whistleblowing is actually a moral obligation of anyone who finds out about a potential harm to human safety); Jennifer S. Bard, What to do When You Can’t Hear the Whistleblowing: A Proposal to Protect the Public’s Health by Providing Whistleblower Protection for Medical Researchers, 9 IND. HEALTH L. REV. 1 (2012).
\textsuperscript{156} Andrew Pollack & Duff Wilson, A Pfizer Whistle-blower Is Awarded $1.4 Million, N.Y. TIMES (April 2, 2010), http://www.nytimes.com/2010/04/03/business/ 03pfizer.html?_r=0; see also THE-SCIENTIST.COM (June 23, 2010) http://www.the-scientist.com/community/posts/list/ 950.page. (Becky Maclaine is a biologist who recently recovered 1.37 million from Pfizer based on her claim that she was fired for raising concerns about research she was doing for Pfizer on genetically engineered viruses. Maclaine alleged she had been made sick from the virus.)
\textsuperscript{157} RESEARCH TRIANGLE INSTITUTE, Consequences of Whistleblowing for the Whistleblower in Misconduct in Science Cases (October 30, 1995), https://ori.hhs.gov/sites/default/files/final.pdf at 17.
1. Federal Statutes That Protect Whistleblowers at Both Public and Private IHEs Against Retaliation

Aside from the False Claims Act, there are other specific federal statutes that provide direct protection against retaliation for whistleblowing. This next section considers the protections available to employees of IHEs who allege retaliation based on information they disclosed, which would not form the basis for a qui tam action; in other words, where there has been no fraud against the government. Although the False Claims Act provides protection against retaliation, whistleblower statutes are there to provide incentives when there is no financial gain to anyone.

The differences in legal protection against retaliation enjoyed by public versus private employees are not a concern when the protection comes from a specific federal statute that is generally applicable to all colleges and universities. The statutes include those that target specific dangers to the public in areas like trucking, pipeline, railroad, or nuclear safety, which are beyond the scope of this article, but which may well arise on a large campus with a very active research program, and those directly linked to statutes affecting IHEs. There are at least seventeen federal statutes that incorporate explicit whistleblower protection for employees of private companies. These include “protecting employees who report violations of various trucking, airline, nuclear power, pipeline, environmental, rail, consumer product and securities laws” and are overseen by the Occupational Safety & Health Administration (OSHA) through its office of the Whistleblower Protection Program (OWPP).

2. The Clery Act

The most recent expansion of whistleblower protection specific to employees of IHEs is the whistleblower protection to the Clery Act. In 1986 Jeanne Clery, 19 years old, was raped and murdered in her college dorm room. Her parents discovered that there had been 38 violent crimes in the area of Jeanne’s dorm over the past three years—none of which made public by the university. Outrage over this incident led Congress to pass 20 USC § 1092(f), the Clery Act, which mandates that all colleges and

---

158 For example, following 9-11 Congress passed laws to protect public transportation employees who came forward with information about possible safety hazards. See OSHA to PATH: no retaliation against injured employee, WHISTLEBLOWERS PROTECTION BLOG (May 12, 2010).
160 Id.
universities whose students receive federal financial aid publish regular reports of crime on or near campus. The Clery Act is one of the few laws specifically applicable to IHEs with explicit whistleblower protection. Although the Clery Act now contains a whistleblower provision, it did not when first passed.

3. The Family Educational Rights & Privacy Act

Unlike the Clery Act, the Family Educational Rights and Privacy Act (FERPA) contains no independent whistleblower protection for those who make known violations. However, there are indications that it may in the future. Although law enforcement personnel are able to investigate possible crimes regardless of who brought them to their attention, until 2008 the Department of Education could only investigate FERPA violations brought to them by someone directly protected. That changed in 2008 when it was amended so as to empower the Department of Education to investigate violations even if there was no complaint from either a student or parent. Writing in FERPA CLEAR AND SIMPLE, Clifford Ramirez opines “that the [agency] may choose to launch an investigation on its own initiative is a momentous change.” He then explains that the agency’s motivation was a case titled Gonzaga University v. Doe, in which “so many administrators were involved in an unofficial investigation of the student in question, that if any one of them had raised a concern about whether FERPA or other ethical practices supported the investigation and the actions taking place, the situation might have been circumvented early on.” Although opening the door to complaints from those with knowledge of a violation is not the same as protecting complainants, it is an acknowledgement of the importance of providing opportunities for those with knowledge of illegal activity to bring their concerns forward. It will be interesting to see if, over time, complainants will experience adverse

---

162 The Act does not define “timely.” Virginia Tech University is currently appealing a finding by the Department of Education that it violated the Clery Act by not giving a timely warning about a possible shooter on campus.
166 Id.
employment action that will trigger a call for FERPA whistleblower protection.

4. State Whistleblower Statutes

One of the most serious limits is the existing state laws’ inability to address retaliation that does not take the form of an actual dismissal or demotion. The threshold question in most actions seeking the protection of a state whistleblower statute is whether the plaintiff complied with specific terms of the statute under which he seeks protection, not whether he has been retaliated against for reporting information.

Most state whistleblower protection statutes are drafted by legislatures and then interpreted by courts in a way that make it very difficult for most people seeking protection to comply with all the statutory requirements. For example, in University of Houston v. Barth a jury awarded Stephen Barth, a tenured professor at the university’s hotel management school, damages and attorney’s fees based on his claims of retaliation. In the spring of 1999, Professor Barth reported to the university’s chief financial officer and its general counsel that his direct supervisor, the dean of the College of Hotel Management, had “engaged in questionable accounting practices, mishandled university funds, and entered into an unauthorized contract for services on behalf of the college.” The dean gave Barth a “marginal” rating at his next annual review, took away his travel funds, cancelled a symposium that Barth ran every year and demoted him. In 2001 Barth filed suit under the Texas Whistleblower Act. This triggered a series of legal proceedings that, by the time the trial went to jury in 2005, had cost Barth $265,000 in attorney’s fees. Although the jury awarded him these fees as well as $40,000 in damages and $265,000 in attorney fees, Barth remained in litigation with the university through 2011, when an appellate court resolved a dispute over jurisdiction in his favor.

Professor Barth’s case is instructive not just because of the time and expense it took him to bring it, but also because of dispute over whether or not he was protected under the Whistleblower Act. The Act prohibits retaliation against public employees who report official wrongdoing and it allows them to file suit against a state or local governmental body for damages and/or reinstatement, lost wages, costs,
and legal fees.”\textsuperscript{171} There was no dispute that Barth was a public employee or that the dean, his supervisor, had engaged in official wrongdoing. However, the criteria for bringing suit specifically required that employees make “good-faith reports of a violation of law to an appropriate law-enforcement authority.”\textsuperscript{172} The university argued that Barth’s report to the chief financial officer and the chief legal counsel did not trigger the protections of the statute because they were not law-enforcement authorities. Although the courts eventually held that in the context of his workplace these were appropriate law-enforcement authorities, it provides an excellent example of how easy it is for a potential whistleblower to find himself ineligible for protection because of a failure to comply precisely with the terms of the Act.

One jurisdictional problem that state whistleblowers face is that many statutes only protect those who report conditions that do not affect them personally. This is intended to limit the use of whistleblower statutes in wrongful termination cases. For example, in \textit{Williams v. St. Ramsey Medical Center, Inc.}, a woman employed in the human resources department claimed she was fired because she made complaints about her supervisor.\textsuperscript{173} These complaints included “(1) reporting that others that worked for [the supervisor] were working off the clock, (2) reporting suspected violations of food and housing regulations, and (3) reporting suspected copyright violations.”\textsuperscript{174} However, the Minnesota Supreme Court rejected her claim without a factual hearing, holding that “[n]one of these is sufficient to establish a prima facie case” because they were “nonspecific” complaints about general practices and therefore “not actionable.”\textsuperscript{175} Justifying this requirement, the Minnesota Supreme Court held that the Act:

\begin{quote}
[C]onnotes an action by a neutral-one who is not personally and uniquely affronted by the employer’s unlawful conduct but rather one who “blows the whistle” for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower. Were it otherwise, every allegedly wrongful termination of employment could, with a bit of
\end{quote}

\begin{footnotes}
\item[172] \textit{Id}.
\item[173] \textit{Id}.
\item[175] \textit{Id}.
\item[176] \textit{Id}.
\end{footnotes}
ingenuity, be cast as a claim pursuant to [the whistleblower statute].

Because the retaliation that the whistleblower alleges is often an illegal firing, it is difficult to prove that the claim is not personal. The Minnesota court explained the “report must be made for the protection of the public or some other person, not just the employee's own rights.”

Most states have some form of whistleblower statute that protects employees reporting that their employer has violated a state or federal law. Many states also have statutes that apply to state employees, including university employees, from retaliation for bringing forward information about illegal activity or, in some statutes, waste, fraud or abuse of state funds. Some states go further than providing protection; they impose an affirmative duty to report fraud, waste or abuse on their state employees. Employees of IHEs are covered by these statutes to the same extent as any other similarly situated employee. So if a state’s whistleblower statute protects from retaliation any employee who reports a violation of a law, then employees of both public and private IHEs are covered.

Yet if, like many whistleblower statutes, a state law only provides protection to state employees, then only those working at public IHEs can invoke their protection. The scope of the protection, then, depends entirely on the wording of the statute. In a very few states, whistleblower protection extends beyond the reporting of a violation of law, or even waste, fraud or abuse. For example, in Oklahoma a public employee is protected from retaliation if he or she “discusses the operation of” his or her employing agency with someone like “the print media, governor, legislature or any others in a position to initiate corrective action or investigate the agency.”

Most state whistleblower statutes set out such specific requirements for protection that retaliation claims are dismissed on procedural grounds without a court ever considering the underlying allegations of wrongdoing. For example, an individual with knowledge of a danger to the public health or safety may find herself fired because she reported it to her direct supervisor rather than to the public entity specified by a specific statute.

---

177 Id.
Most states do provide some kind of legal protection to their employees who disclose waste, fraud, or abuse in government. Thirty-nine states have whistleblower statutes that provide general whistleblower protection to public employees, twenty-three states provide general protection for all employees, and fourteen states provide specific protection to persons reporting certain environmental misconduct. Unfortunately, most whistleblowers facing retaliation are unable to invoke the protections of these laws because they are so narrowly drafted. For example, in most states the act that triggers retaliation must be directly related to reporting a statutory violation.

In June 2012, the former assistant director of Penn State’s football program, Jerry Sandusky, was convicted of 45 counts of sexual abuse against young boys in the shower facilities of the university.182 He associated with the boys as part of a charity he founded. As horrifying as these events are, what quickly attracted the most attention were the allegations that many employees of Penn State were aware of Sandusky’s behavior and said nothing. Those facts were detailed in an extensive report commissioned by the trustees of Penn State and drafted by the former Director of the Federal Bureau of Investigation, Louis J. Freeh.183 There was particular attention paid to reports made by then-assistant coach Mike McQueary, who saw Sandusky engaged in raping a young boy and who brought his concerns directly to his boss, the now deceased head football coach Joe Paterno.184 McQueary filed a whistleblower action against the university, alleging retaliation for his complaint.185

5. Anti-Retaliation Provisions of Title IX

Title IX of the Education Amendments of 1972 (Title IX) prohibits institutions of higher education that receive federal funds to discriminate on the basis of sex.186

---

182 Kimberly Kaplan & M. Alex Johnson, Sandusky Convicted of 45 Counts, Plans to Appeal, NBCNews (June 22, 2012), http://usnews.msnbc.msn.com/news/2012/06/22/12363955-
184 Chris Hengst, McQueary Sets in Motion Whistleblower Lawsuit Against Penn State, RANTSSPORTS, http://www.rantsports.com/clubhouse/2012/05/08/mike-mcqueary-sets-in-motion-
whistleblower-lawsuit-against-penn-state/.
185 Mike Dawson, McQueary Files Notice of Intent to Sue Penn State, CENTRE DAILY.COM, http://www.centredaily.com/2012/05/08/3190060/mike-mcqueary-files-notice-of. html.
Title IX prohibits gender discrimination and therefore protects from retaliation those who claim that they have been subject to it. Unlike employment discrimination statutes, which must be brought by the individual discriminated against, Title IX provides protection for those who report gender discrimination but who do not necessarily experience it themselves. It is therefore much more directly a whistleblower protection statute than those that simply protect people making personal claims of discrimination. In other words, a coach or a faculty member who complains about the unequal treatment of female athletes is protected against retaliation even though he or she is not one of the athletes directly discriminated against. The Supreme Court recently addressed such retaliation further in Thompson v. Stainless.

One area of particular interest to IHEs is the protection against retaliation for claims of Title IX violations in athletic programs, since it has been interpreted as providing protection against retaliation in the context of such programs. The U.S. Supreme Court, in Jackson v. Birmingham, clarified what had been considerable doubt among the circuit courts by holding that it was unlawful to retaliate against an individual who brought to light a violation of Title IX. In Jackson, a high school girls’ basketball coach alleged he was unlawfully fired after complaining that the team had received fewer resources than the boys’ team. Agreeing that he had been retaliated against and finding that he had a private right of action, Justice O’Connor wrote:

188 34 C.F.R. §100.7(e) (2004) ("no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this part."); see also Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).
191 Id.
Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action. Retaliation is, by definition, an intentional act. It is a form of “discrimination” because the complainant is being subjected to differential treatment.193

7. Title IV of the Federal Higher Education Act

Many of the protections available to employees of IHEs come from the provision of specific statutory provisions binding on institutions that accept federal funding. Title IV of the Federal Higher Education Act sets out the terms of eligibility for IHEs who wish to enroll students receiving federally subsidized student loans.194

In Grove City College v. Bell, the Supreme Court held that a school would be considered a “recipient institution” for the purpose of requiring compliance with federal regulation “if any student on campus received an education loan or a grant, and that funds could be withheld from school programs that were found to be not compliant with regulations.” As a report from the U.S. Department of Education explains:

All public and private postsecondary institutions that participate in Title IV must comply with HEA. Title IV institutions have signed Program Participation Agreements (PPAs) with the U.S. Department of Education (ED) to administer these financial assistance programs. They include: Pell Grants; Federal Supplemental Educational Opportunity Grants (FSEOGs); the Federal Work Study Program; Federal Perkins Loans; the Direct Loan Program; and the Leveraging Educational Assistance Partnership (LEAP).195

The Department of Education’s 2011 annual report states that “approximately 6,300 post-secondary institutions—including the lion’s share of religiously affiliated programs, from liberal Georgetown to conservative Liberty, Oral Roberts, and Regent Universities — received federal aid last year, paving the way for more than 17 million students to enroll in

school.” 196 One of the few IHEs to refuse all federal funds is Hillsdale, which states on its website:

In 1975 the federal government said that Hillsdale had to sign a form stating that we did not discriminate on the basis of sex. Hillsdale College has never discriminated on any basis, and has never accepted federal taxpayer subsidies of any sort, so the College felt no obligation to comply, fearing that doing so would open the door to additional federal mandates and control. 197

8. American Recovery and Reinvestment Act (ARRA)

As part of the effort to combat the effects of the collapse of the banking system and the ensuing economic crash, Congress passed the American Recovery and Reinvestment Act of 2009 (ARRA) which was intended to stimulate the economy. Some of the ARRA funds went directly to institutions of higher education. 198 The ARRA is a statute of particular interest to this article because it contains its own specific whistleblower protection provisions beyond what would ordinarily be provided through the False Claims Act. 199

For the purposes of this article it is necessary to look to judicial decisions in employment discrimination for guidance because they occur more often, and therefore will usually reflect the standards for finding retaliation in that particular circuit. There is considerable, but not complete, overlap between employment discrimination actions and whistleblower actions. The reason for the rise in retaliation claims is simple: they are easier to prove and the damage awards are often higher than for claims of discrimination. Retaliation claims typically assert that an employer took some adverse action against an employee because the employee exercised a legal right, such as filing a discrimination claim. Courts often rule in favor

---

of employees in the retaliation portion of their lawsuits, even when the underlying discrimination claim has been dismissed.\textsuperscript{200}

There are many examples of this decreased tolerance for retaliation in academic settings. In \textit{Finch v. Xavier University},\textsuperscript{201} a court ruled in favor of two faculty members who had been blamed for internal dissension and then fired, explaining that:

\begin{quote}
In order to establish a prima facie case of retaliation, a plaintiff must establish that: 1) she engaged in activity protected by the discrimination statutes; 2) the exercise of her civil rights was known to the defendant; 3) thereafter, the defendant took an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action.\textsuperscript{202}
\end{quote}

Employees who allege retaliation for filing discrimination claims are actually complaining of a double harm. First, they allege that they were unlawfully treated differently from others based on a protected characteristic and, second, that they were retaliated against for complaining of the illegal discrimination. The Supreme Court has been quite sympathetic to these retaliation claims even when it, or a lower court, finds that there has been no underlying illegal discrimination. To do otherwise would be to discourage employees from seeking the protection that Congress has given them. As Justice Breyer explained in \textit{Burlington Northern}, actions by an employer which “might have dissuaded a reasonable worker” from complaining about discrimination will count as prohibited retaliation. Depending on the context, “retaliation might be found in an unfavorable annual evaluation, an unwelcome schedule change, or other action well short of losing a job.”\textsuperscript{203}

In order to succeed in bringing a claim for retaliation, an employee must prove by a preponderance of the evidence that she has suffered unlawful retaliation because she engaged in a protected activity. For the purposes of this article, that protected activity is whistleblowing. More specifically, the whistleblowing is about a matter of public concern.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{200} Cathleen Hampton, \textit{Retaliation claims take number one spot in EEOC complaints}, EXAMINER (July 27, 2010), http://www.examiner.com/article/retaliation-claims-take-number-one-spot-ecoc-complaints.
\item \textsuperscript{201} Finch v. Xavier University, 689 F. Supp. 2d 955 (S.D. Ohio 2010).
\item \textsuperscript{202} Id.
\end{itemize}
\end{footnotesize}
9. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) protects students and employees of both public and private IHEs, but it does so through different provisions of the statute. It also contains an explicit anti-retaliation clause.

An IHE cannot fail to hire or, once hired, fail to provide accommodations to, an employee with a disability any more than a private company can. Yet just because the obligations are the same, that does not mean that they are equally easy to comply with. Explaining the special challenges faced by IHEs in facing requests for accommodation from faculty with mental disabilities, Lee and Rinehart note that the legal requirement of an employer to specify the “essential functions” of a job “is not an easy task” when it comes to faculty members who “not only teach but serve on committees, advise students, conduct research, write grant proposals, mentor graduate students, consult, and perform service to their institution, community, state, nation and discipline.” They point out, for example, that while “[i]n nonacademic settings, getting along with one’s supervisor or one’s peers has been ruled an essential function of virtually every job,” this is seldom explicitly included in a faculty member’s job description.

As a result, there have been steady streams of cases in which faculty members have claimed retaliation based on their request for accommodations or on their complaint that they have suffered age or sex discrimination. These increased after a Supreme Court decision in 2006 that clarified plaintiffs’ ability to seek damages for retaliation in ADA cases and a 2009 decision making a similar ruling for Title VII discrimination cases. Describing the phenomena, one commentator wrote that: “[a]ccording to EEOC data, retaliation charges more than tripled between 1992 and 2009 and now comprise 36 percent (93,277) of the total charges filed, making it the number one complaint filed with the EEOC.”

The EEOC is the federal agency responsible for enforcing employment discrimination laws including Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), the Family and

204 Debra Leuchovius, ADA Q & A: Section 504 & Postsecondary Education, PACER CENTER, (last visited July 18, 2012).
205 Lee, supra note 8, at 374.
206 Id.
207 See Lee, supra note 8.
208 Lee, supra note 8, at 374.
Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). Another statutory scheme with anti-retaliation provisions is the Fair Labor standards Act (FLSA).

10. Retaliation Associated with Claims of Discrimination: Civil Rights Issues

As noted in the Introduction, one of the purposes of this article is to identify when claims of retaliation actually refer to legally protected acts of whistleblowing. In order to do that, it is helpful to distinguish between two equally illegal, but structurally different, employment practices: retaliation for bringing claims of individual discrimination and retaliation for bringing information forward that concerns a harm suffered by others.

11. Retaliation for Activities Inconsistent with the Religious Mission of an IHE

As discussed earlier, the Supreme Court has been quite clear that a school’s religious mission cannot serve as a pretext for unlawful discrimination. However, as a practical matter both Congress and the Court have, since Bob Jones, given sectarian schools considerable leeway in allowing employment practices that, in other contexts, would be discriminatory. An observer of these practices would be excused for wondering how it makes sense for the Court to decide that some religion-based discrimination is unreasonable, such as a ban on inter-racial dating, when others like a refusal to hire homosexuals, is not. The answer is a legalistic one. The Court looks to the current state of legal protection either evidenced by state laws or by its own opinions. Thus, in Bob Jones it pointed to its own decision in Loving v. Virginia that held restrictions on inter-racial marriage unconstitutional regardless of religious motivation. It has been less willing to reach this same conclusion with regard to discrimination against homosexuals because there is as yet no national consensus. Indeed, states have made their differences on this issue clear, with some explicitly passing legislation prohibiting discrimination based on sexual-preference and others explicitly passing legislation prohibiting practices such as same-sex marriage or adoption. Sectarian schools have won cases alleging retaliation against faculty on the basis of sexual...

216 How the Law Accepted Gays, LAMBDA LEGAL (Apr. 29, 2011).
orientation, and it will be interesting to see how the courts will view similar cases from non-sectarian schools. There is likely to be considerable regional variation.  

12. Internal Legal Protections Against Retaliation

The legal protections discussed so far have all been external to the IHE in that they come from what Kaplin and Lee define as “external sources.” These include constitutions, statutes, regulations, and judicial opinions. The other source of “law” that Kaplin and Lee identify as binding the actions of an IHE is internal. It comes from obligations that the school imposes on itself. These fall into two major categories: the policies with which it agrees to bind itself and the agreements that it enters into with its employees.

Kaplin and Lee describe “internal law” as “a keystone” of IHE’s “internal governance systems.” They explain that “higher education institutions create ‘internal law’ that delineates authority and rights, and embodies the rules and procedures, by which the institutions govern themselves.” Finally, they describe “three main sources of internal law” that are “institutional rules and regulations, institutional contracts, and academic custom and use.” By contrast, they describe external law as “constraining” internal law that is “created by the federal government and state and local governments through their own governance processes.”

All IHE’s have two options when developing internal law. They can choose to provide no more protections than are required by external law or they can develop internal law that exceeds their external legal obligations. This section considers the categories of protection and provides examples of how IHEs have created their own procedures within each category. Internal law is especially important in the case of private IHEs which, unlike public IHEs, are not required to provide U.S. constitutional provisions. Unless the subject of the whistleblowing is a violation of a federal statute that has anti-retaliation provisions attached to it, or that meets the requirements of a federal or state qui tam action, contract law offers the primary remedy for a faculty member at a private school who faces an adverse employment action after bringing forward a matter of public concern.

---


219 Id.

220 Id.
There are two main categories of internal law relevant to protecting whistleblowers from retaliation: explicit contracts and implicit contracts. While they all fall under the legal category of “contract,” there need not be a formal agreement signed by the faculty member and a representative of the IHE in order for it to be binding. As Kaplin and Lee explain, “[s]ince private institutions are not subject to…constitutional requirements, or to state procedural statutes and regulations, contract law may be the primary or sole basis for establishing and testing the scope of their procedural obligation to faculty members.” What this means is that an employee of a private IHE, who cannot claim protection under the anti-retaliation provisions of a statute binding to her IHE, must base her claim on contract law. There are two different ways that an IHE can form a contractual obligation with a faculty member. The first is a formal contract or letter agreement and the second is through the terms of a faculty handbook or other policy. Although both can be equally binding on the IHE, the first is sometimes described as an “explicit” contract and the second an “implicit contract.”

A. PROTECTION AGAINST RETALIATION: EXPLICIT CONTRACTS

An explicit contract takes the form of a document signed by both a faculty member, or his representative, and a representative of the IHE. While many employees of IHEs work without formal contracts, courts usually do find a contractual relationship between faculty and the IHE that employs them. This is based either on an actual contract signed by both parties or on an implied contract, either in the form of a letter of employment that states the terms of employment or in the form of an employee handbook or other publication by the IHE that contains statements about the terms of employment. Collective bargaining agreements between organized groups of faculty members and the IHE are also an example of an “explicit” contract, since it is reduced to writing and its terms are available to both parties at the time of its signing.

---

221 Id.
222 Id.
224 AAUP, Faculty Handbooks as Enforceable Contracts: A State Guide, at viii (2009) (In the introduction to its publication, Faculty Handbooks as Enforceable Contracts: A State Guide, the American Association of University Professors notes that faculty employees of an IHE “almost always has a contract or a letter of appointment” in contrast to employees at will who have no such document. In addition to what is essentially a direct contract between the individual faculty member and the IHE, “a majority of states have held that contractual terms can at times be implied from communications such as oral assurances, pre-employment statements, or handbooks”).
225 KAPLIN & LEE, supra note 218, at 197-198.
For an employee to link her claim of retaliation to the provisions of a specific applicable whistleblower protection provision in a federal or state statute, her only source of protection is contractual. As noted above, this can be either an actual written contract or a constructive contract formed by publication of a policy or rule by the IHE memorialized in a handbook or website. The latter situation was demonstrated in Saha v. George Washington University, where the District Court for the District of Columbia recognized the Faculty Code and Faculty Handbook as creating contractual obligations between a faculty member and the university. In that case, the court dismissed 17 of 18 claims brought, since the faculty member did not allege facts that would constitute a breach of contract under either document. However, it let stand an allegation of a “potential breach of contract” based on a provision in the Faculty Code that allowed faculty members access to evidence used in a dismissal hearing. The court found that most of the allegations, “even if true, would not constitute breaches of contract.”

B. PROTECTION AGAINST RETALIATION: IMPLICIT CONTRACTS

The term “implicit contract” refers to a binding agreement between two parties that may not take the form of a formal writing. In the context of an agreement between an IHE and a faculty member, these can take the form of an operating procedure, a faculty handbook, or even explicit representations made by the IHE on a website or in some other form of publication.

C. FACULTY HANDBOOKS

In addition to the protection offered by individual federal or state statutes, almost all IHEs have faculty handbooks that describe their own internal operating procedures. Many of these contain such specific mechanisms as protection against retaliation. In public IHEs, the anti-retaliation language of the grievance procedure often tracks that of the particular state’s whistleblower protection statute. For example, the University of Colorado operates a website that accepts anonymous reports of a long list of concerns including:

Conflicts of interest or fiscal misconduct by CSU System or employees; Violations of federal or state law or

227 KAPLIN & LEE, supra note 218, at 127-128.
regulation; Serious or recurring violations of Board of Governors policy, or applicable institutional policy, in the performance of official duties; Research or scientific misconduct; Waste of resources, funds or property; Serious or recurring abuse of official authority; Public safety issues; Animal Care and Welfare Concerns.\textsuperscript{228}

Private academic institutions have considerable flexibility in developing policies related to whistleblowing behavior. Absent any contract or other agreement in which they wish to bind themselves, they are not required to have any whistleblower protection beyond that associated with specific federal or state statutes. Yet many do. One extraordinary example is Albion College, which describes itself as “an independent, coeducational residential college…committed to the liberal arts tradition” and “historically related to the United Methodist Church,” has an unusually detailed whistleblower policy described under the heading “Whistleblower Policy” and stating that “Albion College is committed to maintaining the highest ethical standards.” It asserts that:

All members of the College community have a responsibility to report violations or suspected violations of laws, regulations, College policy or procedure, inappropriate behaviour regarding business practices, accounting or bookkeeping, or use of institutional resources.

The policy goes on to explain that, in addition to this communal responsibility to report violations or suspected violations:

The College has a responsibility to investigate and report to appropriate parties allegations of suspected improper activities and to protect those employees, who, in good faith, report these activities to the proper authority.\textsuperscript{229}

It is clear as well on its anti-retaliation policy, stating, “An employee who retaliates against someone who has reported or suspected violation in good faith is subject to discipline up to and including termination of employment.\textsuperscript{230}

\textsuperscript{230} Id.
There is tremendous variety among state laws as to how and when a faculty handbook can create an enforceable contract. For example, the American Association of University Professors notes that courts in different states have reached different conclusions on questions like: “[m]ay a faculty handbook become part of a professor’s employment contract based on the university’s established practices, even when no express reference to the handbook exists in that contract?”

A New York state court found that the terms of a faculty handbook were not incorporated into an agreement between a faculty member and the institution unless the professor could “demonstrate both reliance upon its terms and resulting detriment.” Otherwise, the words of the employment letter alone set out the terms of the relationship. By contrast, a state appellate court in New Mexico held that a handbook “govern[ed] the relationship between the faculty members and the university’s administration,” even if the professor’s individual contract “made no reference” to it. The court asked: “What is the legal effect of a disclaimer in a faculty handbook in which a college or university disavows any intent to be contractually bound by the contents?” While an employee at a private IHE may have only the provisions of the handbook to rely on, the court found that they play a role in clarifying the relationship between a public IHE and its faculty in ruling that faculty members at public institutions can have a constitutionally protected due process and property interest in continued employment based on a handbook’s provisions.

III. METHODOLOGY OF SCENARIO DRAFTING

Most sources trace the origin of creating scenarios of likely events to plan for the future to the U.S. Air Force following World War II. Although these scenarios are based on reported cases, they have been developed to identify the legal issues raised by the facts in the scenario and then engage in a legal analysis of these issues. Unlike legal analysis, the main goal of which is to predict the outcome of how a court or agency will decide a specific dispute, scenario drafting is the process of developing a tool in order to study a wide range of future events and to develop options for responding to them. The literature on how to develop scenarios is primarily descriptive. Unlike, for example, the existing literature on how to test and validate surveys and instruments, there is almost nothing written about how to validate scenarios.

233 Id.
As Professor Aceves explains, scenarios “do not offer predictions” but “[r]ather are stories that are designed to encourage reflection about the future in an organized and creative way.”

As Cairns notes, “There is no one established methodology for constructing scenarios, methods range from simple unstructured models based on intuition and reasoned judgment to highly sophisticated probabilistic algorithms and causal simulation models.” They go on to identify three main approaches to scenario planning. Aceves and Cairnes use an approach they call “Intuitive Logic.”

This method “relies on the development of scenarios from ‘disciplined intuition’ rather than ‘mathematical or computer simulation models.’” They also describe a second approach they call “Trend-Impact Analysis,” which is mainly concerned with “the effects of trends” on future events. It involves collecting data from “existing trends” and “extrapolate[ing]” them “into the future.” The third approach they describe is “Cross-Impact” analysis, which “attempt[s] to identify not only the individual probabilities of impacting events…but also the interactions between impacting events.” It is therefore a method of taking into account the “interdependencies of events.”

In providing an overview of all three methods, Cairnes concludes that “the central concept underlying scenario-planning models is that there are some elements of the future environment that can be predicted within reasonable confidence intervals, but there are other variables which, by their nature, are fundamentally unpredictable.” Given this inherent unpredictability, they note that “the central problem in scenario development, then, is the fact that aside from a limited set of tools, the task is essentially a creative one and the process is ‘more art than science.’”

In addition to the methods Cairns describes, the Central Intelligence Agency has developed several methodologies for creating scenarios that predict the result when several different events happen at

236 Id.
237 Id.
238 Id.
239 Id. at 232.
240 Id.
once. Called a method of generating “corrected probabilities,” this analysis allows the researcher to predict what would happen to military preparedness if an earthquake happened at the same time as a pandemic flu epidemic, by studying what is known about the results of each event happening alone and then “forecasting…the interdependencies of events.”

Explaining the role of scenario analysis in business organizations with respect to product development, Postma et al, write a “scenario is an internally consistent view of what the future might turn out to be, not a forecast but one possible future outcome.” The analysts studied the effects of managers developing scenarios for new products. They found that the process of developing scenarios helped managers to learn “how and to what extent the policy environment is subject to change, which changes there will be, which consequences these changes might have, how they can be anticipated, and how to act upon this.”

Presently, the majority of literature on the methodologies of developing scenarios comes from the field of future studies which Pirirainsen, et al. describe as an effort to answer the question, “what ought to be in the future for us to reach these certain goals?” Although so far no published source explicitly compares legal analysis to future studies, a comparison between the two shows their similarities. In legal analysis, the goal is to predict how a court would decide a case in the future based on judicial decisions and other information from the past. Future studies considers options for responding to future events which it models according to information about past events.

Given this similarity of goals, it should not be surprising that the law makes heavy use of scenarios both in teaching legal analysis and in presenting legal arguments to courts. A legal argument is essentially the

245 Id.
construction of a scenario for the judge to endorse. As one handbook to legal reasoning advises:

An excellent way to learn to apply precedent and to make persuasive legal argument is to start with a hypothetical issue that has not yet been decided by the Court and then to develop the arguments that could be made to the Court on both sides of the issue…. [This is]…the basic structure of many law school examinations.247

The job of the lawyer is to convince the judge that the scenario, which is a legal interpretation favorable to her client, is an accurate one based on past information. Recent research shows that even Supreme Court justices often do not know what conclusions their colleagues will reach, though the consensus of the Court will become the right answer to the legal problem brought before them.248 A guide for new law students explains that the best way to study is to create “fact examples that illustrate the coverage of each rule” because “rules are fact specific.”249 Whether called “fact examples,” “vignettes,” or “scenarios,” these constructions are the foundation for legal analysis.

This method is particularly suitable for law because, unlike fields where all conditions can be controlled, it is impossible to actually create an experiment on which to base a prediction of a future result. It is not possible to request that a court supply an advisory opinion in response to a hypothetical question.250 In a book intended to explain legal reasoning to law students, Professor William Huhn writes that “[t]he study of law is not a science. Rules of law are not immutable like laws of nature. Rules of law do not describe objective truth, they reflect subjective intentions.”251 For that reason, “[t]he lawyer’s task is not to deduce the law from an unchanging set of first principles, but rather to predict how the law will emerge from a number of sources and a welter of conflicting values.”252

More specifically, within the U.S. legal system, only a person who has suffered a legally recognized harm can bring an action in court. This is referred to as “standing,” and it is her burden to prove that the person she is

---

249 JOHN DELANEY, HOW TO DO YOUR BEST ON LAW SCHOOL EXAMS (2001).
250 VAN GEEL, supra note 247, at 41.
252 Id.
bringing it against was the direct cause of her harm. As one law review note explains:

    The Supreme Court has taught that this requirement gives life to the distinction between academic and judicial work: it tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.\(^{253}\)

Moreover, like scenarios that predict future events, before a court issues a decision there is no right answer. The “right” answer is the one announced by the court of controlling jurisdiction.\(^{254}\)

    The CIA method relies on mathematical analysis of probabilities. Lawyers generally do not engage in this kind of predictive analysis, although political scientists do. Instead, lawyers rely on more qualitative heuristics such as a general belief that Congress is likely to draft laws in the future similar to ones they have drafted in the past. For example, Congress often adds, or strengthens, whistleblower protection to existing statutes in order to increase enforcement. They do so based on the results of adding similar protections in other statutes.

A. \textit{Weaknesses of the Scenario Method}

    The weakness of the scenario method is that, rather than studying an actual set of facts, it is studying a hypothetical one. Describing these weaknesses, Olli Pitkänen of the Helsinki Institute for Information Technology writes that:

    The [scenario] method has some noteworthy threats to validity. I may make mistakes in defining the factors, choose wrong attributes, create scenarios that do not represent adequately the future situations, analyze the scenarios to insufficient depth, make erroneous conclusions, identify legal challenges incorrectly or insufficiently, and finally assess and therefore prioritize some issues erroneously.
Moreover, he writes that:

> [F]rom an interpretivist/critical perspective it is not possible to create an accurate model of reality in the first place. Instead, the reality is interpreted and reinterpreted in various social contexts, aiming at exposing relevant aspects and viewpoints of the reality for a particular discourse in a particular context. Therefore, instead of formal validity, what matters is the pragmatic and operational relevance of the results to the stakeholders and the context.\(^{255}\)

The concerns he expresses are similar to Cairnes, et al. who conclude their overview of scenario methodology with the observation that “[a]ll the procedures described in the literature rely heavily on subjective judgments…. “\(^{256}\)

### B. DESCRIPTION OF SCENARIOS

The scenarios considered here are situations in which employees of IHEs must choose between bringing forward information or not. The scenarios are set in public, private and faith-based IHEs, to allow an analysis based on the legally significant differences between the way these categories of IHEs are required by law to treat employees who disclose information they learned in the performance of their jobs.

### C. RESULT

This article uses a method of applying legal analysis to scenarios in order to assess the extent of protection available to specific categories of IHE employees. It does so based on an analysis of primary legal source materials, cases, statutes, and regulations. It also considers secondary legal sources that provide other lawyers’ analysis of the source materials. Finally, it incorporates information from research describing the characteristics of whistleblowers and their experiences. It applies standard legal tools of analysis used in the practice of law to predict how courts will apply the law. Within the field of scholarly legal research, this method is called a “Doctrinal” or “Black-Letter” methodology because its focus is on finding rules and applying them rather than on a “sociolegal” or “empirical” approach that would study their effectiveness.

\(^{255}\) Id.  
\(^{256}\) Cairns, supra note 239, at 10.
IV. SCENARIO ANALYSIS

A. INTRODUCTION

The purpose of this section is to review and analyze the legal protections available to employees of institutions of higher education (IHEs) who engaged in whistleblowing behavior. Each scenario is based on actual cases and is designed to include facts that significantly affect the legal result. The scenarios consider the following legal questions:

1. What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?
2. What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?
3. What U.S. constitutional protections are available?
4. What federal statutes provide protections?
5. What state laws provide protection?
6. What are the significant gaps in protection against adverse employment actions for good faith disclosures of information?

A. EXPLICIT AND IMPLICIT CONTRACTS REVISTED

What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

Kaplin and Lee describe external sources or, to use their words, “internal law” as “a keystone” of IHEs’ “internal governance systems.” They explain that “higher education institutions create ‘internal law’ that delineates authority and rights, and embodies the rules and procedures, by which the institutions govern themselves.” Finally, they describe “three main sources of internal law” which are “institutional rules and regulations, institutional contracts, and academic custom and use.” By contrast, they describe external law as “constraining” internal law that is “created by the federal government and state and local governments through their own governance processes.”

In addition to internal law, all IHEs face some form of external regulation. This external regulation will shape and, as Kaplin and Lee phrase it, “circumscribe” their internal procedures. However, all IHEs have

257 Kaplin & Lee, supra note 218, at 3.
258 Id.
259 Id.
two options when developing internal law. They can choose to provide no more protections than are required by external law or they can develop internal law that exceeds their external legal obligations. This article considers the categories of protection and provides examples of how IHEs have created their own procedures within each category. Internal law is especially important in the case of private IHEs which, unlike public IHEs, are not required to provide constitutional protections. Unless the subject of the whistleblowing is a violation of a federal statute that has anti-retaliation provisions attached to it, or that meets the requirements of a federal or state qui tam action, contract law offers the primary remedy for a faculty member at a private school who faces an adverse employment action after bringing forward a matter of public concern.

There are two main categories of internal law relevant to protecting whistleblowers from retaliation: explicit contracts and implicit contracts. While they all fall under the legal category of “contract,” there need not be a formal agreement signed by the faculty member and a representative of the IHE in order for it to be binding.

1. Explicit Contracts

As noted above, an explicit contract takes the form of a document signed by both a faculty member or his representative and a representative of the IHE. While many employees of IHEs work without formal contracts, courts usually do find a contractual relationship between faculty and the IHE that employs them. This is based either on an actual contract signed by both parties or on an implied contract, either in the form of a letter of employment which states the terms of employment or in the form of an employee handbook or other publication by the IHE, which contains statements about the terms of employment.260

2. Implicit Contracts

The term “implicit contract” refers to a binding agreement between two parties that may or may not take the form of a formal writing.261 In the

260 AAUP, “Faculty Handbooks as Enforceable Contracts: A State Guide,” at viii (2009) (In the introduction to its publication, Faculty Handbooks as Enforceable Contracts: A State Guide, the American Association of University Professors notes that faculty employees of an IHE “almost always has a contract or a letter of appointment” in contrast to employees at will who have no such document. In addition to what is essentially a direct contract between the individual faculty member and the IHE, “a majority of states have held that contractual terms can at times be implied from communications such as oral assurances, pre-employment statements, or handbooks”).

261 KAPLIN & LEE, supra note 218, at 128.
context of an IHE this can take the form of an operating procedure, a faculty handbook, or even representations made by the IHE on a website or in some other form of publication.

3. Operating Procedures

In addition to the protection offered by individual federal or state statutes, and as discussed earlier, almost all IHEs have their own internal operating procedures and many of these contain specific mechanisms as protection against retaliation.

C. INTRODUCTION TO SCENARIO ANALYSIS FOR UNDERSTANDING EXTERNAL LEGAL PROTECTIONS FOR WHISTLEBLOWERS

Each of the four scenarios presented below consider the question: “What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?” The analysis of each scenario is divided into three sections:

1. What U.S. constitutional protections are available?
2. What federal statutes provide protections?
3. What state laws provide protection?

After utilizing those four scenarios to identify and analyze external legal protections, this article will then consider the significant gaps in protection against adverse employment actions for good faith disclosures of information.

The discussion of available external legal sources of law applicable to the faculty member in each scenario will identify the legal requirements that must be proved in order to obtain the protection against retaliation offered by the various provisions of law.

Because the available legal protections span the entire range of state and federal, public and private, and internal and external law, not every scenario will invoke every legal issue. However, in order to thoroughly analyze each scenario, each analysis is conducted using the same organizational structure. The scenarios consider: (1) a situation where there is specific statutory protection for the content of the whistleblowing; (2) a scenario where the faculty member can seek protection under his state’s whistleblower protection act; (3) a scenario where a faculty member is eligible to bring suit under the Federal False Claims Act; and (4) a scenario where the faculty member is obligated to report under the laws of his state.
As discussed earlier, there are few if any legal definitions of the term “whistleblower.” Instead, it is an informal term used by courts, legislatures, employees and employers alike to describe an individual who risks retaliation from his employer in order to bring forward information of public interest that his employer would have preferred to keep private. The analysis will consider the major factors relevant to determining whether or not the employee is eligible to seek protection as a whistleblower. These factors include:

1. What kind of IHE is involved (public, private, faith-based)?
2. In what state is the IHE located?
3. What kind of information did the whistleblower bring forward?
4. To whom was the information given?
5. What statutes are implicated?
6. When did the incident happen?
7. What is the whistleblower’s employment status (e.g., tenured, tenure-track, contract, no contract)?

D. ANALYSIS OF SCENARIO ONE: THE BEARER OF BAD NEWS

1. Purpose of Scenario One

The purpose of this scenario is to analyze a fact situation that invokes a number of different areas of protection including a federal statute with explicit whistleblower protection. Here, the professor obtains second hand information about possible illegal activity of which he informs his supervisor.

3. Background to Scenario One

Title IX is enforced by the Department of Education’s Office of Enforcement (DOE). In its 2012 Annual Report, the DOE reported that it received “nearly 3,000 Title IX complaints” that year. While many complaints involved several different issues, the DOE identified 923 of these complaints that contained allegations of sex discrimination in athletics.262 It reported that:

Female student athletes often received inferior medical and training services from less experienced staff. In addition,

unlike the men’s teams, when the women’s teams went on “away” games, they were crowded into hotel rooms or had to make long journeys back home on the same day as their games.\textsuperscript{263}

Moreover, 483 of those 923 cases involved charges of retaliation.\textsuperscript{264}

4. Description of Scenario One

Professor A has been employed in a tenure-track position at an IHE for four years. His annual reviews have been excellent and he anticipates receiving tenure in two years when he is eligible to apply. He teaches a course every semester that is popular with student athletes. One of the students, a young woman on the soccer team, submitted a paper that complained that the trainers for the male athletes are professionals, but the female athletes are trained by graduate students. The student states that she is concerned that this situation is resulting in significant harm to female athletes. After reading the paper and unsure who to tell about the student’s concerns, Professor A seeks out his department chairperson to discuss the information. He tells the chairperson that he believes the student is accurately reporting the facts as she experiences them. His department chairperson is a strong supporter of the university’s athletic program. Shortly after meeting with his chairperson, Professor A receives a letter stating that his contract will not be renewed at the end of the year and, until then, he will not be teaching the course. The letter states no reason for the non-renewal. Professor A believes both the non-renewal and the reassignment are in direct retaliation for his report to the departmental chairperson.

5. Discussion of Scenario One

This scenario is deliberately ambiguous. It raises issues of the difference between the employment protection available to public employees and private ones. It also considers the requirements for satisfying the anti-retaliation provisions of Title IX, and the resulting discussion reviews the applicable external laws.

\textsuperscript{263} Id. at 7.
\textsuperscript{264} Id.
i. What U.S. Constitutional Protections Are Available?

Employees of public IHEs who face retaliation for whistleblowing may be able to invoke constitutional protections unavailable to employees of private IHEs. The U.S. Supreme Court has specifically recognized that professors working at public IHEs may have a property or liberty interest in continued employment. Therefore, when a professor at a public IHE is dismissed, as in the case of Professor A, he may be entitled to “procedural safeguards before the decision becomes final.” When the dismissal is based on whistleblowing behavior, there is an additional overlay of First Amendment protection.

ii. Due Process Protection

The first source of constitutional protection available to professors at public IHEs who face an adverse employment decision is the due process clause of the Fourteenth Amendment, which protects against a governmental taking of property without due process of law. In two 1972 decisions, the U.S. Supreme Court recognized that faculty members could have both property and liberty interests in their jobs, and described an IHE’s obligations to satisfy due process. Based on the facts of the scenario, Professor A was not offered any kind of hearing and may also make a claim that his chairperson was acting on behalf of the state.

If a public IHE takes action against a faculty member with an expectation of continuing employment, either through tenure or through another form of contract, it must provide a “fair hearing” before denying the same. The specific requirements of a “fair hearing” vary according to the severity of the property interest being taken away. The Supreme Court in Cleveland Board of Education v. Loudermill established the necessary components of a hearing to dismiss a public employee. First, before a decision can be made to dismiss a tenured public employee he “is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence and an opportunity to present his side of the story.” Although the termination hearing does not have to mirror a court proceeding, the employee has a right to notice of the reasons for dismissal, to know when the hearing will be scheduled, to have a “meaningful opportunity to be heard,” and to have an “impartial panel” make the decision.

---

266 KAPLIN & LEE, supra note 218, at 229.
268 Id. at 546
Professor A’s status as an untenured faculty member employed on a year-to-year contract means that he likely cannot establish an expectation of employment beyond the express terms of his contract. In both Board of Regents v. Roth\(^{269}\) and Perry v. Sindermann,\(^{270}\) the U.S. Supreme Court distinguished between faculty members who had a property interest in employment because of expectations created by the university and those who were employed on a year-to-year basis. The Court in both cases found that a faculty member working pursuant to a yearly contract has no protected interest in having it continue. Moreover, the Court in Perry found that even being on a tenure track did not create an expectation of continued employment and therefore there was no deprivation of property interest for a contract non-renewal. The Court wrote, “It stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired in one job but remains as free as before to seek another.”\(^{271}\) The Court explained that, had the university taken action which hindered the professor in finding another job, such as falsely claiming “that he had been guilty of dishonesty or immorality” or if “they take steps which would “bar the [faculty member] from all other public employment in state universities,” then a deprivation may exist.

Federal courts applying Roth and Sindermann have emphasized that a professor’s expectation in continued employment is based on policies and promises made voluntarily by the employing institution.\(^{272}\) There is no constitutional obligation to provide tenure. However, once a professor is tenured, he does have an expectation of continued employment. A professor who has a year-to-year contract has no such expectation once that contract expires.

iii. First Amendment Protection

Even if Professor A has no expectation of continued employment that would trigger protection under the due process clause, if Professor A’s employer is a public IHE he can make a First Amendment claim that the decision not to renew his contract was based on the communication with his chairperson about potential sex discrimination. This is because a public IHE acts with the authority of the state. The First Amendment states that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

\(^{269}\) Bd. of Regents v. Roth, 408 U.S. 564 (1972).
\(^{270}\) Perry v. Sindermann, 408 U.S. 593 (1972).
\(^{271}\) Id. at 573-75.
\(^{272}\) Roth, 408 U.S. at 567; Perry, 408 U.S. at 599.
right of the people peaceably to assemble, and to petition
the government for a redress of grievances.

Although professors at both public and private IHEs have the right
to be free of government infringement of their First Amendment rights,
when the alleged deprivation comes from the employing IHE as it does in
Scenario One, only professors at public IHEs can invoke constitutional
protection. As Kaplan & Lee explain, “[w]hen the restraint is internal…for
example, when a provost or dean allegedly infringes a faculty member’s
free speech, the First Amendment generally protects only faculty members
in public institutions.”

Public employees can sue their employers for violations of any of
their constitutional rights under authority of 42 U.S.C. § 1983, which is
referred to as a “Section 1983 Action.”

Section 1983 states:

Every person who, under color of any statute, ordinance,
regulation, custom, or usage, of any State or Territory or
the District of Columbia, subjects, or causes to be
subjected, any citizen of the United States or other person
within the jurisdiction thereof to the deprivation of any
rights, privileges, or immunities secured by the
Constitution.

There are several ways in which the events in Scenario One could trigger a
First Amendment claim pursuant to Section 1983. The most likely are the
ones described below. First, the IHE’s actions could be seen as a restriction
on Professor A’s right to speak as a citizen about a matter of public
concern. Second, the IHE’s actions could be characterized as suppressing
“academic scholarship or college instruction.” Third, the IHE’s actions
could be characterized as depriving Professor A of a public forum for
speaking based on its dislike for the content of his words. Each of these
will be discussed in more detail below.

In order to prevail in an action based on a violation of his First
Amendment rights, Professor A will have to prove all four elements
established by the Supreme Court. Failure to prove any one of them will
result in his case being dismissed. He must prove that:

1. His speech was protected by the First Amendment;
2. His employer was aware of the speech;
3. He suffered an adverse employment decision; and

273 KAPLIN & LEE, supra note 218, at 196.
274 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF
4. The adverse employment decision was a result of his protected speech.\footnote{\textit{Id.}}

If Professor A can prove these factors, then he makes out a prima facie case and the burden shifts to the IHE to prove a “nondiscriminatory basis” for its decision.

iv. Speech on a Matter of Public Concern

The strongest argument Professor A has that his speech was protected by the First Amendment is that he was speaking about a matter of public interest. In addition to having a property or liberty interest in continued employment, all public employees have the same protection as other citizens from government suppression of their freedom of speech. However this freedom is limited when the speech is pursuant to their official duties, as opposed to their private statements as an individual. Because whistleblowing is an activity inherently related to information acquired by an employee, but not available to the public, it receives much less protection than would speech involving matters of private concern.

As discussed earlier in this article, in 2007 the Supreme Court made that distinction clear in \textit{Ceballos v. Garcetti}, ruling that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.\footnote{Garcetti v. Ceballos, 547 U.S. 410 (2006).} Since then, federal courts have applied the \textit{Garcetti} standard many times and have developed standards for distinguishing between public employees’ private and employee-related speech.

The \textit{Garcetti} Court endorsed the test developed in two earlier cases that, in order to determine whether a public employee was discharged because he exercised his rights under the First Amendment, the employee must prove that he was speaking as a citizen rather than as an employee\footnote{Id. at 424.} and that “the speech was on a topic of public concern.” As the \textit{Garcetti} Court recognized, “conducting these inquiries sometimes has proved difficult.”\footnote{Marceau v. Lafayette City-Parish Consol. Govern., 2013 WL 395844 (2013).} As a federal district court in Louisiana explained more recently, “although the distinction between matters of public concern and matters of private concern is not always clear, matters of public concern are generally considered to be “any matter of political, social, or other concern to the community.””\footnote{\textit{Id.}}
Federal appellate courts have interpreted this provision and, for the most part, found that the speech of this nature is not made as a private citizen and, therefore, not protected. For example, the Seventh Circuit Court of Appeals has taken the position that “a public employee’s speech was not protected by the First Amendment whenever the employee’s job duties arguably included the kind of speech at issue.”

Over the past twenty-five years, the Supreme Court has decided a series of cases intended to establish the boundaries of First Amendment protection available to public employees. *Garcetti* is the most recent decision in which the Court limited the protection for public employees whose statements are directly related to their “official employment responsibilities.” The Court found that Ceballos, a deputy district attorney, was speaking on a matter of public concern but was not protected because he was doing so as part of his assigned job duties. The *Garcetti* court explained that “the [e]xpressions were made pursuant to his [job] duties…. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos’ case from those in which the First Amendment provides protection against discipline.”

Professor A’s statement that he believed the university was discriminating in its allocation of resources for women’s sports concerns a violation of federal law, Title IX. Therefore, it would meet the first requirement for protected speech by a public employee because it involved expressing an opinion about a “legitimate” matter of “public concern” as opposed to an issue that only affected him personally.

However, the Supreme Court in *Garcetti* severely limited this protection to cases where the public employee was speaking about matters of public concern other than matters he knew of because of his job duties. Therefore, it would be likely that a court reviewing Professor A’s case in light of *Garcetti* would find that the knowledge about a possible Title IX violation came directly from his employment responsibility to read student papers submitted in his class. In this case, Professor A’s speech would not be protected. By contrast, had Professor A faced retaliation after writing an op-ed piece in the local newspaper criticizing the unequal treatment of men’s and women’s sports based on publically available information, the *Garcetti* holding would likely protect him as exercising his First Amendment rights.

---

280 Sarah R. Kaplan, *Public Employee Free Speech After Garcetti: Has The Seventh Circuit Been Ignoring A Question Of Fact?*, 5 SEVENTH CIR. REV. 459, 460 (2010), (citing Davis v. Cook Cnty., 534 F.3d 650, 653–54 (7th Cir. 2008)).
281 See Tran, supra note 52 at 45.
284 See KAPLIN & LEE, supra note 218, at 197.
The *Garrett* opinion was the product of a divided Court, and one of the greatest points of contention was its meaning in the context of higher education. Responding in the majority opinion to criticism from the dissent, Justice Kennedy wrote for the Court that:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.\(^\text{285}\)

Justice Souter, in a strongly worded dissent, expressed concern that the holding of the case was “spacious enough to include even the teaching of a public university professor.”\(^\text{286}\) He went on to write that he “hop[ed] that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to…official duties.” The *Garrett* opinion, as applied to a professor, could thus be read as removing all First Amendment protection. This is because if a professor’s job is to teach and write, he has no protection in the content that he teaches. Since *Garrett*, there has been no case that directly raises the issue of protection from adverse employment under the situation that Justice Souter feared.

Applying this test more recently in 2011, the Tenth Circuit Court of Appeals found that a professor who had written letters to the newspaper and paid for an advertisement criticizing the president of the university for “conspiring to shift engineering to the University of Idaho so that Idaho State University could create a medical school” was acting as a private citizen.\(^\text{287}\) In doing so, it overturned the decision of the court below that had emphasized the fact that the professor identified himself by job title in the letters. The Court of Appeals explained that:

\[
\text{[T]he issue is not whether Plaintiff identified himself as a University professor at the time he made the statements. It is also not whether his criticisms concerned administration actions that would impact his official duties or that the statements he made were based upon information he acquired while performing those duties. The fact that the}
\]

\(^{285}\) *Garrett*, 547 U.S. at 424.

\(^{286}\) Id. at 438-39 (Souter, J., dissenting).

\(^{287}\) Sadid v. Idaho St. Univ., 265 P.3d 1144,1150 (Idaho 2011).
speech at issue concerned the subject matter of the public employee's employment is not dispositive because “[t]he First Amendment protects some expressions related to the speaker's job.” The controlling issue is whether Plaintiff's statements were made pursuant to his duties as a professor at the University.288

The Tenth Circuit Court of Appeals concluded that because there was neither evidence that the professor’s “official duties included making public statements on behalf of the University regarding the subject matter of his letters” nor that “his employment responsibilities included creating the statements that were published in the newspaper…his speech was [as] a private citizen.”289 The Court further held that even though his letters did include “personal grievances” the “issue of creating a medical school…was a matter of public concern.”290

v. First Amendment Protection for the Content of the Speech: Academic Freedom

Another way that Professor A could invoke a First Amendment protection is if he can prove that his speech is not related to his job duties, is of public interest, and is being suppressed by the university based on its desire to suppress criticism of the athletics program. This can be a subtle distinction, but in Scenario One it means is that if the IHE’s decision to reassign the class and not renew Professor A’s contract was based on his views that the IHE didn’t like, then his speech would fall into a separate category of First Amendment protection.

The Supreme Court recognizes a difference between suppression of speech based on the need of a public employee to control the flow of information, and suppression of speech based on governmental dislike of its content. Whether preventing Professor A’s contract renewal or revoking his class teaching assignment is a retaliatory action depends on whether or not the IHE attempted to prevent students from hearing what he had to say. If so, the circumstances would put the IHE’s actions into the category of the most serious restraint on speech: prior restraint based on official dislike of the speech’s content.291 A considerable body of case law exists to protect the content of a professor’s speech in class and even his or her right to teach a class.292 However, unless Professor A can prove that his

288 Id.
289 Id.
290 Id.
291 Areen, supra note 32, at 946.
292 Cameron, Meyers & Olswang, supra note 37, at 248-249.
reassignment is an attempt to keep students from hearing his views, he cannot claim any right to teach a particular class.

vi. Has Professor A Suffered Retaliation Under the First Amendment?

There are no facts in Scenario One to clarify whether the chairperson made the decision not to renew Professor A’s contract based on their exchange about possible safety issues or sex discrimination, or even if the decision was the chairperson’s to make. Even if the chairperson was the decision-maker, it can be very difficult to prove the basis on which an employment decision was made. Assuming Professor A can prove that his employment decision was based upon the content of his speech, the next difficult question is whether he has suffered legally actionable retaliation as a result of exercising a right granted by the Constitution.

vii. Is a Change of Teaching Assignment Retaliation in a First Amendment Case?

Even if Professor A succeeds in proving that the content of his speech was protected by the First Amendment, he still faces the challenge of proving that his employer was aware of the speech and that he suffered an adverse employment action as a result. Finally, even if he can prove that his employer was aware of his speech and retaliated based on that awareness, Professor A must prove that non-renewal of his contract and his removal from the classroom are, in fact, acts that qualify as prohibited retaliation.

Federal courts define retaliation narrowly as job loss, when reviewing incidents involving the First Amendment. As noted earlier, the Supreme Court has held that a decision to renew a contract is not considered termination. Judge Easterbrook of the Seventh Circuit Court of Appeals considered the issue of class re-assignment in declining to issue an injunction to prevent a schedule change. Although he acknowledged that “the loss of teaching or scholarly experience in a particular field” could be harmful to a professor, the university’s interest in making a teaching schedule outweighed the individual professor’s interest in teaching a specific course. He explained: “[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a

293 Frank S. Ravitch, Playing the Proof Game: Intelligent Design and the Law, 113 PENN ST.L.REV. 841, 845 (2009) (citing Perry Education Ass’n v. Perry Local Educators Ass’n, 460 U.S. 37 (1963)).
294 Perry v. Sindermann, 408 U.S. 593 (1972)
295 Webb v. Board of Trustees of Ball State University, 167 F.3d 1146, 1149 (1999).
296 Id. at 1150.
relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.\textsuperscript{297}

It is very therefore unlikely that a change of teaching assignment would be found to be retaliation in a First Amendment case.

vii. Are the IHE’s Actions an Impermissible Forum Closure?

Some professors who face discipline for the content of their teaching might claim a First Amendment violation based on the public forum doctrine. This has become a popular though unsuccessful argument for those who seek to teach the theory of creationism along with evolution in IHE science classes.\textsuperscript{298} Although this area of the law has yet to be clearly explained by the Supreme Court in the context of an IHE classroom or indeed in any other location, a law review article entitled, \textit{The Ongoing Mystery of the Limited Public Forum Doctrine} describes how difficult it is to apply.\textsuperscript{299} However, this is inapplicable to Professor A’s situation because the university has no obligation to provide any kind of public forum for faculty members to express their concern about possible violations of the law. As Professor Richard Ravitch explains, a classroom at an IHE is, at most, a limited public forum and “access to a limited public forum requires that one meet the terms of the forum.”\textsuperscript{300}

An IHE does not have to grant anyone a forum. However, if it does it cannot distinguish between those whose views it agrees with and those whose views it does not agree with. This is a practice recognized by the Supreme Court as an attempt to prevent speech by limiting access to those whose viewpoints it seeks to suppress.\textsuperscript{301} Nor is Professor A entitled to protection under the principles that require public universities to make available “public forums” for speech. Several federal cases have held that, because an employee’s office or classroom was located on the campus of a public IHE, this does not constitute depriving him of a “public forum” for the purposes of First Amendment protection.\textsuperscript{302} The university has no obligation to provide Professor A with a forum to express his views on the

\textsuperscript{297} Id.
\textsuperscript{299} Marc Rohr, \textit{The Ongoing Mystery of the Limited Public Forum}, 33 NOVA L. REV. 299 (2009).
\textsuperscript{300} Frank Ravitch, \textit{Playing the Proof Game: Intelligent Design and the Law}, 113 PENN ST. L.REV. 841, 845.
\textsuperscript{302} See \textit{KAPLIN & LEE}, supra note 218, at 201 (citing Cal. Dep’t of Educ., 97 F.2d 1204, 1209, 1214-15 (9th Cir. 1996)).
athletics program. However, it cannot deprive him and at the same time make space available to someone whose views the IHE endorses. The Supreme Court has recognized that the crucial question [for application of time, place and manner restrictions] is whether the manner of expression is incompatible with the normal activity of a particular place at a particular time.\textsuperscript{303}

The Supreme Court has established the following factors for determining whether or not speech is protected when it takes place in a public forum. These are “whether the speech occurred in a: (1) traditional public forum, (2) designated public forum, or (3) limited/nonpublic forum, in order to then determine the level of scrutiny that is applied to governmental regulation of speech within the forum. For a traditional public forum and a designated public forum, any regulation of speech must survive the highest level of First Amendment scrutiny. For a limited public forum or a non-public forum, a regulation of speech will be upheld so long as the regulation is “viewpoint neutral and reasonable.”\textsuperscript{304}

Courts applying this claim to public universities have consistently held that “[a university] classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there ‘in any reasonable manner.’”\textsuperscript{305} However, once a university has established rules for speech in a limited public forum, it must follow those rules without regard to whether it likes the viewpoint of the speaker and “must respect the lawful boundaries it has set for itself.”\textsuperscript{306}

This remains a topic of considerable debate in the area of content based restrictions. For example, one law student note critical of the Garcetti decision argued that “the public employee speech doctrine to academic speech is inappropriate because a public university is more akin to a forum for the dissemination of ideas than a traditional public employer, which the government created for the purposes of disseminating a coherent government message.”\textsuperscript{307} But a limited public forum is one that is not completely open to anyone who wishes to speak, but rather available within certain “time, place and manner restrictions.”\textsuperscript{308} This means that a university does not have to open its classrooms to anyone who wishes to

\textsuperscript{304} Richard Ha, \textit{The Ongoing Mystery of the Limited Public Forum}, 33 NOVA L. REV. 299, 332.
\textsuperscript{305} Id. at 328-329.
\textsuperscript{308} Id.
come in and address students, but once it has hired a professor and assigned him a course, it “cannot discipline faculty for their viewpoints.”\(^{309}\)

Although a public IHE can decide the content of a course and has discretion to assign a professor to teach it based on his qualifications, it cannot then use disagreement with that faculty member’s point of view within that content area as a criterion to discharge him. As Professor Alan Chen explains, this distinction between the ability to dictate content but not viewpoint creates a “paradox” because “by definition, curricular decisions are a form of subject matter discrimination. A university's requirement that its chemistry professors teach organic chemistry, and not political science, is content based, as is an English department's decision to offer a course in Nineteenth Century Romantic Literature rather than Postmodern Literary Criticism.”\(^{310}\) On the other hand, he argues, “the law ought not immediately treat such selectivity as suspect because it is so closely and clearly related to the university's academic mission.”\(^{311}\) He favors deference to various viewpoints, stating that “[w]e may or may not agree with the decision, but we are not usually concerned that the university is trying to prevent students' exposure to political science or postmodern thought.”\(^{312}\)

So although professors have argued for expansion of the public forum doctrine to the classroom, so far courts have declined to adopt this argument. In conclusion, even if a court were to find that Professor A’s classroom was a “limited public forum,” the university would still be within its rights to determine whether or not to renew his teaching contract. Summarizing the current state of law regarding academic freedom, Professor Chen opines that “Few would argue with the proposition that the Supreme Court would do well to establish clearer guidance about the existence and scope of a constitutional doctrine of individual academic freedom. Despite the best efforts of lower courts and academic commentators, this area of law remains enigmatic.”\(^{313}\)

5. What Federal Statutes give protections to Professor A?

Although the Constitution only protects employees of public IHEs from the actions of their employers, and not employees of private IHEs, most federal statutes are applicable to public and private IHE employees due to conditions imposed by the receipt of Title IV financial assistance or an IRS non-profit status. For example, all employers in the United States


\(^{310}\) Id. at 968.

\(^{311}\) Id. at 967.

\(^{312}\) Id.

must comply with federal laws that prohibit discrimination based on age, race or disability. Many of the federal statutes containing whistleblower protection are specific to employees in a particular industry. The Department of Labor has been designated to enforce twenty different statutes with specific whistleblower protections. These statutes are narrowly tailored to regulate behavior in three major categories: environmental and nuclear safety laws, transportation industry laws, and consumer and investor protection laws.314

The statutes most relevant to Scenario One are the two federal statutes that primarily extend whistleblower protection to activity likely to occur on an IHE: Title IX of the Education Amendments of 1972 and the Clery Act as amended in the 2008 Higher Education Act.315 Although the Clery Act imposes reporting recommendations on thousands of campuses across the country, there have been few cases in which the Department of Education has penalized an IHE for failure to comply. As Christopher Blake, associate director of the International Association of Campus Law Enforcement Administrators, explained in a 2011 newspaper interview, "a Clery investigation in and of itself is unusual…316 There have only been about 40 in the last 10 or 12 years." So far, there have been no reports of an investigation involving an individual who claimed retaliation for trying to comply with the Clery Act on their campus. The events at Penn State have attracted the Department of Education’s attention, but it remains to be seen if this investigation involves a whistleblower.317

Given the newness and scarcity of Clery Act cases, Title IX has been the primary statute referred to by IHE employees in whistleblowing cases.318 In Scenario One, the exchange between Professor A and his chairperson involved an allegation of sex discrimination in athletics. Professor A’s concerns are most likely to fall under the jurisdiction of Title IX, which states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”319

6. Protection Offered by Title IX

All IHEs are subject to federal anti-discrimination laws. The Department of Education enforces Title IX through its Office of Civil Rights (OCR). The OCR reports that “Title IX covers state and local agencies that receive ED funds. These agencies include approximately 16,000 local school districts, 3,200 colleges and universities, and 5,000 for-profit schools as well as libraries and museums.”\(^{320}\) Since no more than a handful of IHE’s in the United States have declined all federal funds, it effectively governs behavior on all campuses. Not only does Title IX prohibit discrimination, it prohibits retaliation against those who complain of it. The Office for Civil Rights (OCR) instructs that “a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX. For a recipient to retaliate in any way is considered a violation of Title IX.”\(^{321}\)

It is not necessary to file a formal complaint with the OCR to be protected from retaliation. Suffering retaliation for complaining within the institution about sex discrimination is equally protected. In *Jackson v. Birmingham Board of Education*, the leading case that established protection from retaliation for bringing a Title IX claim, Justice O’Connor wrote, “Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination [under Title IX].”\(^{322}\) She elaborated, “Retaliation...is, by definition, an intentional act.”\(^{323}\) Retaliation is discrimination because it subjects the complaining party to differential treatment, and it “is discrimination ‘on the basis of sex’ because it is an intentional response to...an allegation of sex discrimination.”\(^{324}\)

A threshold question to ask about Scenario One is whether Professor A has raised his own concern about a possible violation of Title IX or if he merely stated a concern voiced by one of his students. Is there a legal distinction between these two actions? For Title IX there is no distinction. Even though Professor A has no direct knowledge of the difference in education of the trainers provided to female and to male athletes, he is eligible to file a complaint. The OCR explains that:

\(^{320}\) Id.

\(^{321}\) *Title IX and Sex Discrimination*, Ed.GOV http://www2.ed.gov/about/offices/list/ocr/docs/tixDis.html (last visited February 22, 2013).


\(^{323}\) Id. at 169.

\(^{324}\) Id. at 168.
[A]nyone who believes there has been an act of discrimination on the basis of sex against any person or group in a program or activity which receives ED financial assistance, may file a complaint with OCR under Title IX. The person or organization filing the complaint need not be a victim of the alleged discrimination but may complain on behalf of another person or group.325

The OCR’s manual specifically instructs that:

A complaint must be filed within 180 days of the date of the alleged discrimination, unless the time for filing is extended for good cause by the Enforcement Office Director. If you have also filed a complaint under an institutional grievance process, see the time limit discussed at the end of this section.

It then specifies what a formal complaint should contain:

Complaint letters should explain who was discriminated against; in what way; by whom or by what institution or agency; when the discrimination took place; who was harmed; who can be contacted for further information; the name, address and telephone number of the complainant(s) and the alleged offending institution or agency; and as much background information as possible about the alleged discriminatory act(s).326

In order to invoke the anti-retaliation provisions of Title IX, Professor A will have to establish that he is within the class of people the statute is intended to protect from retaliation and that his communications with his chairperson qualified as a “complaint” under Title IX. As long as he is acting in good faith, the question of whether Professor A is entitled to protection under Title IX is separate from whether or not the IHE has actually violated Title IX. As part of establishing good faith, he need not prove he is familiar with the specific provisions of Title IX. Violations of Title IX are investigated by the Department of Education’s Office for Civil Rights (OCR). Title IX is unusual because although the statute itself does not contain a private right of action for individuals who either claim

326 Id.
discrimination or retaliation, the Supreme Court recognized one by holding that such protection was essential to its enforcement. 327

Professor A thus does not have to file an actual complaint with the OCR in order to qualify for protection against retaliation under Title IX. The OCR provides written enforcement guidance, which states that an IHE that is a “recipient [of federal financial assistance] may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX.” 328

It specifies, however, that while “The person or organization filing the complaint need not be a victim of the alleged discrimination but may complain on behalf of another person or group,” the complaint “should be sent to the OCR enforcement office that serves the state in which the alleged discrimination occurred. A complaint must be filed within 180 days of the date of the alleged discrimination.” The OCR offers an alternative for complainants who first proceed through their “institution’s grievance process and use that process to have the complaint resolved,” which is to extend the time for filing with the OCR “within 60 days after the last act of the institutional grievance process.” 329

i. Does Professor A Have the Obligation to Report Under Title IX?

Another question raised in Scenario One is whether Professor A was ever under an obligation to report the information he learned from the student’s paper to the OCR? Title IX does impose reporting obligations on IHEs, but the obligation does not necessarily bind everyone on the faculty.

One key distinction is between a report of discrimination and one of violence or abuse based on sex. It is a mistake to view Title IX as a law that primarily concerns athletics. Athletics is only one area in which an IHE can be found to have engaged in illegal discrimination based on sex. The Department of Education is placing increasing emphasis on the prevention of sexual abuse, harassment and violence on campus. 330 This is reflected in

---

328 See generally 34 CFR § 100.6, OFFICE FOR CIVIL RIGHTS, A Policy Interpretation: Title IX and Intercollegiate Athletes (1979), available at http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html (last visited Jan. 15, 2010).
329 Title IX and Sex Discrimination, Ed.GOV http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited February 22, 2013).
a recent “Dear Colleague Letter” that established recommended procedures for investigating claims of abuse.  

The obligation to comply with Title IX is that of the institution receiving federal funding, not any one individual faculty member. Beyond requiring that an institution designate a “Title IX Coordinator” the Department of Education does not specify how an IHE must go about the process of complying. An IHE cannot, however, avoid liability by not taking adequate steps to learn of violations. In a case involving student-on-student harassment, the Supreme Court has held that an institution is responsible for a violation of Title IX if it acts with “deliberate indifference to known acts of harassment.” It is therefore up to each IHE to develop policies that will provide information about violations to the attention of officials who can take action on behalf of the institution. Title IX identifies the obligations of “responsible employees” who can “address and remedy gender-based discrimination and harassment.” The Title IX Coordinator is, according to the Justice Department, “the responsible employee of the recipient with major responsibility for Title IX compliance efforts.” Each institution can decide how to organize the flow of information to the Title IX Coordinator. Although Title IX identifies no mandatory reporters, most IHEs have policies about who does and does not have obligations to bring information forward to the Title IX Coordinator.

Most of the examples available concern the obligation to report sexual assault, which is discrimination in its most serious form. As the Association of Title IX Administrators (ATIXA) explains in an article titled, “Does The Law Require A Faculty Member To Report Knowledge Of A Sexual Assault On Campus?” The answer is “not necessarily,” but “policy might” require it. It writes that “while an IHE can, if it wishes, impose that obligation on every employee, most encourage but do not require faculty members who are not advisors of recognized student organizations to report possible violations.” In its own model policy it addresses the issue in a section that encourages students to “seek advice from certain resources who are not...

332 See generally Paul M. Anderson, Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law, 22 MARQ. SPORTS L. REV. 325 (2012) (citing 34 C.F.R. §.135 (a)).
334 Id.
required to tell anyone else your private, personally identifiable information unless there is cause for fear for your safety, or the safety of others.”

The ATIXA policy explains that, “these are individuals who the university has not specifically designated as “responsible employees” for purposes of putting the institution on notice and for whom mandatory reporting is required, other than in the stated limited circumstances.” It explains further that these individuals are employees “without supervisory responsibility or remedial authority to address sexual misconduct, such as RAs, faculty members, advisors to student organizations, career services staff, admissions officers, student activities personnel, and many others.” Therefore, if the policy at Professor A’s institution is a typical one, and because he does not seem to have been designated a “responsible employee” for the purpose of reporting Title IX violations, it is unlikely that he faces an internal requirement to report an allegation of discrimination.

ii. Is Professor A Protected from Retaliation by Title IX?

Assuming good faith, the next question is whether Professor A has legal standing to bring a complaint under Title IX. The Supreme Court established in Jackson that Title IX’s anti-retaliation provisions are available to those who complained to their supervisors of sex discrimination in education even if they themselves were not discriminated against.

If Professor A can prove that he suffered an adverse employment action because he “opposed” his institution’s violation of Title IX, he could recover for retaliation even if the Department of Education finds no Title IX violation. As Peter Lake, director for the Center for Excellence in Higher Education Law and Policy at Stetson University, explained, “it is not uncommon to see someone lodge a discrimination claim, lose, and lodge a retaliation claim [after the discrimination claim]…. It is a little easier to prove a retaliation claim over a discrimination claim.”

---

338 Id.
iii. Is Being Re-Assigned Retaliation Under Title IX?

Like many federal anti-discrimination statutes, courts interpreting Title IX have applied interpretations in retaliation cases far more often in cases alleging sex discrimination under Title VII. The Supreme Court has defined retaliation more broadly in discrimination cases brought under Title VII than in claims brought for violations of First Amendment rights. Law Professor Richard Moberly has concluded that the Court “focuses on the notion that protecting employees from retaliation will enhance the enforcement of the nation's laws.” The Court has, so far, neither recognized nor explained this disparity between its view of retaliation in First Amendment cases and discrimination cases.

It is unlikely that being prevented from teaching a class would qualify as retaliation in a First Amendment case. However, it may be considered retaliation in a Title IX discrimination case. In determining whether job reassignment or any other activity is retaliation, the Supreme Court looks at the specific terms of the statute or, if no specific language defining retaliatory behavior exists, applies the standards it developed for allegations of retaliation following claims of discrimination under Title VII. These standards are identified by the name of the case in which they were developed—Burlington Northern. Because Title IX’s anti-retaliation provisions are broad but not detailed, “For a recipient to retaliate in any way is considered a violation of Title IX.” A court considering whether or not Professor A had faced retaliation would likely apply the Burlington Northern standards.

In Burlington Northern, the Supreme Court held directly that “reassignment” of job duties could be a form of retaliation under Title VII. Stating its standard directly, the Court wrote that:

Contrary to Burlington’s claim, a reassignment of duties can constitute retaliatory discrimination where both former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. That is why the EEOC has consistently recognized retaliatory work assignments a forbidden retaliation.

---

342 Id. at 388, n.67.
344 Id.
The Supreme Court wrote that “reassignment” to less desirable duties is frequently seen by employees as an act of retaliation even when there are no financial penalties. The Court stated that “the anti-retaliation provision [of Title VII] is not limited to actions affecting employment terms and conditions.” Identifying the purpose of the anti-retaliation provision as being a tool to prevent discrimination prohibited by statute, the Court stated that to prove retaliation a plaintiff must show that the act “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” The Court added that, to be actionable, the retaliation had to take the form of “material adversity to separate significant from trivial harms.” The Court also made clear that it would interpret anti-retaliation provisions very broadly because they were intended to “[p]revent employer interference with “unfettered access” to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter discrimination victims from complaining to the EEOC, the courts, and employers.”

The defendants in *Burlington Northern* argued that they had not retaliated against the plaintiff, but rather had exercised their discretion to assign her to another job at the same pay. The Court, however, disagreed and concluded that whether or not a “reassignment” was retaliatory was a matter of fact for the jury to decide. The jury found that reassignment from “forklift operator” to “track laborer duties” was retaliation, demotion because the “duties were more arduous and dirtier” and “the latter position was considered a better job.” It concluded that this job change was the type of action that would prevent employees from pursuing anti-discrimination claims and was, therefore, retaliation.

iv. Can Professor A Invoke the Protection of the Federal False Claims Act?

As an employee of a public state IHE, Professor A cannot bring a suit under the False Claims Act (FCA). In a recent case, a U.S. District Court judge dismissing an FCA claim explained that, “[o]ver the years, numerous FCA claims have been brought in the context of higher education. Due to Eleventh Amendment sovereign immunity, state colleges and universities are immune from qui tam liability under the FCA.”

---

345 *Id.* at 70.
346 *Id.* at 71.
347 *Id.*
348 *Id.*
7. What Are the Protections Available to Professor A Under State Law?

i. State Whistleblower Laws

If Professor A works at a public IHE he might be eligible for state whistleblower protection depending on the wording of the applicable statute in his state. These statutes are extremely varied. In some states, there must be a violation of a specific state, not federal, law. Others, more generally require an allegation of fraud, waste or abuse in addition to a violation of a specific law.

ii. State Anti-Discrimination Laws

It is often the situation in discrimination cases that a state or city has laws that either parallel or provide more protection than federal law. This is because, while no state can offer less protection against discrimination than the federal government, any state or municipality can offer more. Moreover, many of the cities that offer their own extended protections are home to a major university. Indiana, for example, does not have laws prohibiting against employment discrimination based on sexual orientation, but Indianapolis, Bloomington and South Bend do. Several states have their own disability discrimination laws that provide protection for discrimination based on obesity, which is not included in the Americans with the Disabilities Act. Although it does not appear that Professor A is claiming that he has suffered from illegal discrimination, he may be able to take advantage of the anti-retaliation provisions of a state law that parallels Title IX.

8. Conclusion for Scenario One

As stated in the First Amendment analysis of Scenario One, in order to prevail in an action based on a violation of his First Amendment rights, Professor A will have to prove the following four elements:

1. His speech was protected by the First Amendment;
2. His employer was aware of the speech;
3. He suffered an adverse employment decision; and

---


4. The adverse employment decision was a result of his protected speech.\textsuperscript{352}

Because Professor A’s speech did not take place in a classroom, it will be very hard for him to prove that his contract non-renewal is based on the university’s desire to keep students from hearing his views. Although professors have made claims that a decision not to renew their contract based on statements made outside the classroom is actionable as a deprivation of a public forum, so far this has not been successful. Moreover, Professor A faces two substantial barriers beyond the fact that his speech did not take place in the classroom. The first is the Supreme Court’s clear holdings in \textit{Perry v. Sindermann}\textsuperscript{353} that non-renewal of a contract is not, without further evidence of discrimination, a deprivation of the right to teach. A professor on a year-to-year contract has no rights beyond that contract. Professor A’s greatest challenge will be to prove a link between expressing his concerns about sex discrimination and the decision not to renew his contract. Unlike a professor with tenure, which is often viewed in legal terms as a long-term contract with an expectation of renewal, the IHE has no obligation to Professor A beyond the terms of its contract with him. Therefore, Professor A will have to prove that: (1) the IHE employee who made the decision to reassign his course and not renew his contract knew of the statements he made regarding athletic trainers and sex discrimination, and (2) that his class reassignment and contract non-renewal were based upon those statements. In legal terms, this is called proof of causation. If Professor A can prove causation, then he may be able to prove that he is entitled to protection from retaliation caused by his speech.

Public employees do not lose their rights as citizens. Public IHEs have an obligation to provide members of the public access to their campus. The Eighth Circuit Court of Appeals in \textit{Putnam v. Keller} ruled that a decision to ban a professor from campus whose contract had not been renewed was inappropriate because he had the same rights as other members of the public. So long as he was not disruptive and did not make threats, he could not be banned.\textsuperscript{354}

As discussed earlier in Scenario One, as a public employee Professor A may have First Amendment protection if he can prove that his contract was not renewed because of his statements to his chairperson. Because Professor A works at a public IHE and, therefore, has a protected property right in continued employment, he can invoke his right under the

\textsuperscript{353} Perry v. Sindermann, 408 U.S. 593 (1972).
Constitution to procedural due process before losing his job. However, Professor A will have to prove that he had a reasonable expectation of continued employment. This will require evidence of a contract that is annual in nature or has statements related to continued employment, policies and procedures that provide conditions for continued employment, or other similar documentation that constitute “contractual” obligations for the IHE. Absent a contractual relationship for continued employment, it is unlikely that Professor A will survive a motion to dismiss his complaint unless he can show that the IHE acted in a way that made it unduly difficult for him to get another job. Finally, he will have to prove that reporting the information about the possible Title IX violation was not part of his job, but rather speech of general public interest. He may be more successful on this claim since his job was to teach, not to monitor the athletic system.

A far stronger source of protection for Professor A comes from the anti-retaliation process recognized by the Supreme Court for those reporting sex discrimination in violation of Title IX. Although as a faculty member with no involvement in athletics Professor A is not a mandatory reporter, his status as someone with knowledge of the violation is sufficient for him to receive protection against retaliation. He is also entitled to protection even though he is not suffering from discrimination himself. By seeking to make a violation known and expressing his concern, he puts himself in the position of one “opposing” Title IX discrimination.

Finally, depending upon the location of the IHE and the relevant state or local statutes, Professor A may have protection under additional whistleblower or related laws.

**E. SCENARIO TWO: INVOKING STATE WHISTLEBLOWER PROTECTION**

1. Purpose of Scenario Two

The purpose of this scenario is to demonstrate the limitations of state whistleblower laws in their protection of professors at public IHEs.

2. Background of Scenario Two

This scenario is based on the actual facts of a series of decisions regarding a dispute between the University of Houston and Professor Stephen Barth, which resulted in over ten years of litigation before being resolved in the whistleblower’s favor.\(^{355}\) The arguments raised by the public IHE to deny the professor both the status of a whistleblower and to

---

\(^{355}\) Univ. of Houston v. Barth, 365 S.W.3d 438.
also deny that he was retaliated against can be applied to situations where professors are employed by public universities in other states.

3. Description of Scenario Two

Professor B is a tenured professor at a private IHE with a history of exemplary reviews by his supervisor. He has a leadership position in his department and has received considerable praise by his previous supervisors for an annual symposium he organizes. The symposium has been profitable for the university and, with the university’s full knowledge and permission, Professor B receives $25,000 annually in extra compensation for the symposium. Professor B is informed by his college’s business manager that the Dean of the college has engaged in questionable accounting practices, mishandled university funds, and entered into unauthorized contracts for services on behalf of the college. Professor B brings these concerns directly to the Dean who becomes quite angry and denies wrongdoing. The Dean immediately cuts Professor B’s travel budget and cancels the symposium. He also removes him from his position as department chairperson. Professor B brings his concerns about both the Dean’s financial transactions and the subsequent adverse employment actions to the Provost of the university and to the Chief Compliance Officer. They do not intervene. Over the next two years, Professor B receives two unsatisfactory employment ratings from the Dean in post-tenure reviews. If this continues, he will be at direct risk of having his tenure revoked based upon university policy.

4. Discussion of Scenario Two

In order to seek external protection against retaliation, Professor B will have to identify a specific constitutional provision or statute that provides such protection. There is no “general” protection for whistleblowing activity. In Scenario Two, the Dean’s behavior, which Professor B reported to the Provost and Chief Compliance Officer, is a violation of state law governing how money should be handled and how contractors should be hired. Thus, Scenario Two focuses on addressing state law as an external source of law, and does not address federal or constitutional provisions beyond their mere mention.

i. Constitutional Protections

As a faculty member at a public IHE, Professor B has the same protection under the Constitution as Professor A in Scenario One.
However, the state whistleblower law is likely to be a more effective remedy because most of these statutes allow the faculty member to recover for money damages and attorney fees.

ii. Federal Law Protections

There are no specific federal laws that protect Professor B in this situation. If some of the funds that his Dean was misusing came from federal grant money, then he might be able to file a complaint with the funding agency. However, he would not have a personal right of action. He would not have any mechanism to recover damages.

iii. State Law Protections

Professor B’s strongest claim for protection against retaliation as a whistleblower is therefore to seek the protection of his state’s whistleblower protection act. The effect of this, if he qualifies, would be to make him eligible for protection if his employer’s conduct meets the statutory definition of retaliation. This is in contrast to a violation of a specific law such as the Clery Act, which requires reporting of on-campus crime and narrowly characterizes the kind of information whose disclosure triggers protection.\(^{356}\) The Clery Act acquired anti-retaliation protection as part of the 2008 Higher Education Opportunity Act (HEOA). The addition was explained in a “Dear Colleague” letter under the heading “Whistleblower Protection and Anti-Retaliation” of HEOA section 488(e) HEA section 485(f):

The HEOA states that nothing in the law shall be construed to permit an institution to take retaliatory action against anyone with respect to the implementation of any provision of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

By contrast to the Clery Act, state whistleblower statutes vary considerably in the kinds of statements protected and the procedural requirements for making a valid claim. What they all share are threshold requirements for going forward that, if defined narrowly by courts, often limit the ability of whistleblowers to bring their case to court. The Texas

\(^{356}\) Higher Education Opportunity Act (HEOA) § 488(e); Higher Education Act (HEA) § 485(f) (The HEOA states that nothing in the law shall be construed to permit an institution to take retaliatory action against anyone with respect to the implementation of any provision of the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act”).
Whistleblower Act is a good example and “prohibits retaliation against public employees who report official wrongdoing.” That Act states:

[A] state or local governmental body may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.\(^{357}\)

However, because the Act does not define what constitutes a “violation of law,” it does not protect employees who act to prevent a law from being broken. For example, in one Texas case a whistleblower was denied protection because he tried to prevent the Department of Transportation (TxDOT) from entering into what he, in good faith, believed would be an illegal contract. He did not qualify for protection from the retaliation he suffered because the Texas Supreme Court concluded that at the time of his whistleblowing activity TxDOT had not yet broken the law. Therefore, he was not reporting a “violation of the law” as required by the whistleblower statute.

Describing the deficiencies in the Texas Whistleblower Act, a commentator wrote, “courts are dismissing whistleblower claims made in good faith before considering the merits of these claims.”\(^ {358}\) The most common reasons for rejection are that the statutes’ description of what type of information is protected can result in dismissal before the case even reaches a review of its merits. As one commentator suggested, the “legislature can achieve optimal protection for whistleblowers by amending the Texas Whistleblower Act to include more liberal reporting requirements. The best way to do this is to focus on two definitions: (1) violation of law, and (2) appropriate law enforcement authority.”\(^ {359}\)

One of the primary risks of narrowly interpreting a statute is making it difficult for potential whistleblowers to predict whether they will be protected or not. The law itself requires that “each governmental employer” must “notify employees of their rights under the Act” by “posting an appropriately worded sign in a prominent place in the workplace.”\(^ {360}\) In addition:

\(^{357}\) TEX. GOV’T CODE ANN. §554.002 (a) (Vernon 1999).
\(^{358}\) Id.
\(^{360}\) TEX. GOV’T CODE ANN. §554.009 (a) (2013).
To establish a claim for retaliation under the Act, the claimant must prove the following elements: (1) he is a public employee; (2) he acted in good faith in making a report; (3) the report involved a violation of law; (4) the report was made to an appropriate law enforcement authority; and (5) he suffered retaliation as a result of making the report.361

iv. Has Professor B Been Retaliated Against?

States differ in what they recognize as “retaliation” under their whistleblower statues. Courts in Texas apply the Title VII standard when determining whether an act is retaliatory. In 2007 the Texas Supreme Court held that "a personnel action is adverse within the meaning of the Whistleblower Act if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act.”362 In the case of job reassignment, courts look at whether or not there is a clear difference in the quality of the two assignments. In rejecting a claim that a lateral transfer was retaliatory, the Texas Second Court of Appeals wrote, “Personnel action” is defined in the Act as “an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.”

5. Conclusion for Scenario Two

Faculty members at public IHEs have the same protection as all other public employees under a state’s whistleblower statute. However, these statutes are, collectively, difficult to invoke because they have very specific criteria for the kind of illegal activity that triggers protection, and for how the report should be made. A professor might believe she has obtained the protection of her state’s whistleblower statute only to find that she has failed to comply with one of its requirements.

361 County of Bexar v. Steward, 139 S.W.3d 354, 357-58.
**Scenario Three: A Qui Tam Relator**

1. Purpose of Scenario Three

This scenario emphasizes a difference in the options available to whistleblowers at a private IHE as opposed to a public one. The False Claims Act provides not just broad protection for whistleblowers who know of fraud against the government but also provides a substantial incentive by allowing the whistleblower to recover a percentage of the damages recovered. It also reimburses attorney’s fees. However, it is also complicated law, which can leave those invoking its protection in a worse situation than they were before blowing the whistle. Scenario Three demonstrates some of the law’s complexities.

2. Background of Scenario Three

Although the False Claims Act applies to all private entities seeking payment from the government, and is therefore available to employees at any private IHE, the most recent activity has come from government actions brought against the for-profit educational sector. Both Congress and the Department of Education, through the Justice Department, have made investigating for-profit IHEs a high priority. This is because students of these institutions usually receive a very high percentage of federal financial aid and have a very low graduation rate, thus defaulting on their loans. As the *New York Times* editorialized:

> For-profit schools enroll about 12 percent of the nation’s higher-education students yet receive about a quarter of all federal student aid; their students account for almost half of all defaults. In general, these institutions get more than 80 percent of their revenues from federal student aid. ³⁶³

3. Description of Scenario Three

Professor C is a member of the psychology department in a small, for-profit college that does not offer tenure. Every year, the department certifies to the state that its students have completed sufficient hours of supervised therapy in order to take a counselor licensing exam. Professor C knows that the department’s reports are inaccurate and have inflated

---

student hours. In addition, she is angry over a series of disputes with the administration over other matters. She cannot file a lawsuit directly because Title IV of the Higher Education Act does not contain a private right of action. 364 Professor C contacts a lawyer and files a qui tam action under the False Claims Act. Her lawyer submits a request that the federal government, through the Justice Department, intervene in the suit. The federal government investigates and finds out that, although the department was filing incorrect statements of supervised therapy hours due to an increased need for counselors, the state had granted a waiver for which Professor C’s school qualified. Thus, her department was in compliance with the relevant aspect of the state law. Rightly suspecting that Professor C was the source of the complaint, Professor C’s supervisor sends her a letter firing Professor C, which states that the kind of disloyalty she displayed in filing the lawsuit was inconsistent with the school’s values.

4. Discussion of Scenario Three

Scenario Three considers events occurring at a private, for-profit IHE.

i. What Federal Statutes provide protections?

Private IHEs are particularly vulnerable to qui tam suits because they must certify compliance with the provisions of the Higher Education Act (HEA) to qualify for Title IV federal student financial aid. 365 Certifying compliance with hundreds of rules and regulations covering financial and curricular issues creates heightened scrutiny on almost all of an institution’s activities. 366 The HEA includes hundreds of provisions with which an IHE can be out of compliance. The False Claims Act extends civil and criminal liability to any person:

364 Monsi L’Grrke v. Lois Benkula, 966 F.2d 1346 (10th Cir. 1992) (“The express language of the Higher Education Act, and the regulations promulgated thereunder, does not create a private cause of action, and there is nothing in the Act's language, structure or legislative history from which a congressional intent to provide such a remedy can be implied. No provision provides for student enforcement or entitlement to civil damages”).

365 Higher Education Act (HEA) (1965), Pub.L. No. 89–329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.) (“In order to be eligible to receive Title IV funding, an educational institution must meet certain requirements and sign a “Program Participation Agreement” (PPA) with the Secretary of Education. By signing the PPA, the institution makes certain promises and certifications to the federal government.” 34 C.F.R. § 668.14).

[W]ho knowingly presents, or causes to be presented, to an officer or employee of the United States Government…a false or fraudulent claim for payment or approval.\textsuperscript{367}

The elements of a False Claims Act action are that the defendant:

(1) Made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury.\textsuperscript{368}

A common variety of False Claims Act suits are where a for-profit institution falsely certifies that it is in compliance with the program participation agreement (PPA) required by the Department of Education, in order to receive Title IV financial assistance funding. This funding enables the institution to provide its students federal financial aid in the form of loans, grants, and veteran’s benefits. While any IHE might be motivated to make a false claim, at the time of this analysis there is considerable concern in Congress and in the Justice Department that this behavior is quite prevalent in for-profit IHEs.\textsuperscript{369} As the Court in \textit{United States v. ITT Educational Services} explained:

The overarching concern is that educational entities that might be motivated by profit rather than rankings or other industry benchmarks have every incentive to maximize enrollment by recruiting unqualified students who will not be able to repay their loans, and the financial consequences of these defaults will trickle down to the detriment of the federal government and its taxpayers.\textsuperscript{370}

Recently, the federal government has joined with individual states to file complaints alleging that for-profit institutions have violated regulations prohibiting them from offering incentives to their employees for enrolling students who subsequently receive Title IV financial aid funds. A report issued in July 2012 by the U.S. Senate Committee on Health, Education, Labor, and Pensions (chaired by Senator Tom Harkin) concluded:

\textsuperscript{368} United States ex rel. Feldman v. Van Gorp, 674 F. Supp. 2d 475, 479 (S.D.N.Y. 2009) (alleging misstatements in a grant application).
\textsuperscript{369} United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1171 (9th Cir.2006).
A 2-year investigation demonstrated that Federal taxpayers are investing billions of dollars a year, $32 billion in the most recent year, in companies that operate for-profit colleges. Yet, more than half of the students who enrolled in those colleges in 2008–9 left without a degree or diploma within a median of 4 months.\footnote{Senate Committee on Health, Education, Labor, and Pensions, FOR PROFIT HIGHER EDUCATION: The Failure to Safeguard the Federal Investment and Ensure Student Success (July 30, 2012).http://www.gpo.gov/fdsys/browse/committeecong.action?collection=CPRT&committee=health&chamber=senate&congressplus=112&ycord=0 (March 24, 2013).}

In August 2011, the Justice Department announced that the “United States has intervened and filed a complaint in a whistleblower suit pending under the False Claims Act against Education Management Corporation (EDMC).”\footnote{U.S. Department of Justice Press Release, U.S. Files Complaint Against Education Management Corp. Alleging False Claims Act Violations (August 8, 2011), http://www.justice.gov/opa/pr/us-files-complaint-against-education-management-corp-alleging-false-claims-act-violations.} The press release from Senator Harkin’s office explained that “the government alleges…this provider of post-secondary education [is distributing] marketing materials [which] deceived prospective students by falsely inflating job placement statistics at its many campuses around the country.” Sobek is quoted as saying, “They manipulated the job placement rates by counting students working in a job that they did not need the degree for…. In my opinion, it’s a wretched fraud.”\footnote{Jason Sobek, quoted in: Mark Greenblatt, Whistle-Blower: For-Profit College Operator Allegedly Inflates Job Placement Rates, ABC NEWS http://abcnews.go.com/US/whistle-blower-profit-college-operator-allegedly-inflates-job/story?id=17810902.}

Although the Federal False Claims Act is binding throughout the country, federal appellate courts apply different tests and standards in interpreting what elements are necessary for a valid claim. Professor C will likely be required to prove that her employer knew of her claim and, therefore, will be able to allege facts supporting a direct connection between her filing of the lawsuit and being fired.

ii. Can Professor C Get Protection Against Retaliation Under the False Claims Act?

The False Claims Act (FCA) does extend protection against retaliation to qui tam relators who are unable to prove the allegations on which they based their claim. But the damages available for retaliation
alone are based on lost salary or other direct expenses of the plaintiff, rather than a share of the false claim. So employees may find themselves with relatively little money, in comparison to a share of the recovery in a successful qui tam action, and a damaged reputation which makes it difficult for them to obtain other similar employment.

The FCA protects employees from being “discharged, demoted…or in any other manner discriminated against in the terms and conditions of employment…because of lawful acts done by the employee…in furtherance of an [FCA] action.”

An FCA retaliation claim requires proof of three elements: (1) the employee must have been engaging in conduct protected under the Act; (2) the employer must have known that the employee was engaging in such conduct; and (3) the employer must have discriminated against the employee because of her protected conduct.

Professor C has already cleared one of the greatest barriers to protection against retaliation: she filed her action while still employed. Although she would be eligible to share in the federal government’s recovery had she filed after she left, she would not be entitled to protection against post-employment retaliation. Regardless of the specifics of the regulations violated, all qui tam actions work the same way.

iii. Limitations of the FCA for IHE Whistleblowers

Although qui tam actions against for-profit IHEs have the potential of very high payouts, there are many hurdles both to bringing a qui tam action and to getting protection from retaliation. Among them is the hurdle that, unless the government chooses to become involved, the individual whistleblower must bring the action at his or her expense. This immediately puts the plaintiff at a disadvantage against a large corporation that has substantial resources to defend itself. The plaintiff’s law firm must initially bear the costs of her litigation. Another large hurdle is that the requirements for qualifying as a qui tam relator are highly specific. Winning a share of the recovery depends on how the court interprets the various provisions of the HEA. A common situation is one in which several

different employees individually approach the federal government with a claim based on the same facts. Only the first complainant is qualified to be a qui tam relator.

Among the many barriers to filing, the employee must prove that the IHE actually made a false claim for payment, not just that it violated federal law. For example, in a qui tam suit against Corinthian Colleges, Inc. (Corinthian) alleging a system of providing incentives to recruiters, the Ninth Circuit Court of Appeals held that proof that Corinthian fired employees who did not meet recruiting quotas, was not itself a violation of the ban against incentive compensation. In other words, employees have no federal protection from being fired for a refusal to violate the law.377

Another continuing risk for qui tam relators is the requirement that the information on which they base their cases must not already be publically disclosed. A case from the Southern District of Indiana involving ITT added depth to the picture of how difficult it can be for a qui tam relator to succeed. In Halasa v. ITT Educational Services, the director of a technical institute operated by ITT filed an FCA case alleging that he was fired in “unlawful retaliation” for reporting to his supervisor serious violations of the law. But he reported to the most senior officials he dealt with on a regular basis. They were not the officials who made the decision to fire him, and Halasa could not prove a direct link between his reports to his supervisors and the decision made by senior administrators to terminate him. The court wrote, in dismissing his case and ordering him to pay ITT more than $36,000 for court expenses, “[C]ompanies are not liable under the False Claims Act for every scrap of information that someone in or outside the chain of responsibility might have.”378

Yet another difficulty faced by potential qui tam relators in higher education cases was demonstrated in Brazill v. California Northstate College of Pharmacy in which the plaintiff, who was a licensed pharmacist, claimed that he was fired in retaliation for “vocally challenging the College administration’s tuition practices as illegal and detrimental to the College’s accreditation process.” However, because the college was unaccredited and therefore not eligible for Title IV funds, it was not required to certify compliance with federal law. The court concluded by explaining that “Plaintiff’s allegations only suggest that he was attempting to get the College to comply with Federal law and meet accreditation standards, not that he was trying to recover money for the government or investigating fraud claims.”379

378 Id.
379 Id.
iv. What State Laws provide protection?

Many States are now adopting their own version of the False Claims Act to encourage whistleblowers with knowledge of attempts to defraud the state. Some of these are targeted specifically to fraud involving the Medicaid program, but others are broader. As an employee of a private IHE, Professor C cannot claim protection under her state’s whistleblower statute.

5. Conclusion for Scenario Three

This scenario considered the situation of a professor employed by a private IHE who has knowledge of a false claim for payment being made to the federal government. If successful, such a professor would be eligible for a share of the treble damages recovered by the government. However, even if the government is not successful in its action against the IHE, the professor who brought the information forward is still protected against retaliation. However, as this scenario demonstrated, even a professor acting on a good faith belief that her employer has made a false claim can be without protection if the court finds that the IHE was not under an obligation to comply with the relevant law.

G. SCENARIO FOUR: THE MANDATORY REPORTER

1. Purpose of Scenario Four

The purpose of this scenario is to highlight the difficult situation faced by employees of IHEs who have a legal obligation to report a specific kind of wrong-doing. These employees face the risk of legal penalty for not reporting, and the risk of retaliation if they do report. While all statutes with a mandatory reporting requirement provide protection against retaliation, like state whistleblower statutes there are specific eligibility requirements. Scenario Four highlights the limits of anti-retaliation provisions in an employment sector like higher education where personal relationships are an important factor in being hired and in succeeding. Moreover, unlike an admissions officer who may have skills applicable to another field, faculty members at IHEs may have very specific areas of expertise that are only marketable at their existing level of compensation and responsibility within the world of higher education.
2. Background of Scenario Four

This scenario is based on the recent events at Pennsylvania State University, in which a long-time associate coach was convicted of child molestation. The facts here come from the report commissioned by the trustees of Pennsylvania State University and drafted by former FBI director Louis G. Freeh (The Freeh Report) as news accounts, and court filings. Mr. Freeh and his team conducted “over 430 interviews of various individuals that include current and former University employees from various departments across the University, as well as current and past Trustees, former coaches, athletes and others in the community.” In addition, it “analyzed over 3.5 million emails and other documents.” According to Mr. Freeh this analysis resulted in “independent discovery of critical 1998 and 2001 emails,” which he described as “the most important evidence in this investigation” related to Michael McQueary’s witness of Sandusky’s “sexual assault” on a minor. Mr. McQueary’s contract was not renewed by the University and he has not been able to find another coaching job. He is currently suing the University for defamation based on their statements that he was not truthful in his reports of what he witnessed. Mr. Sandusky was indicted by a grand jury and found guilty by a jury of 45 counts of child sexual abuse. According to the testimony at trial, the crimes took place on campus over a period of more than twenty years. Although Mr. Sandusky’s advocacy for young boys received widespread publicity, the abuse generally took place in private. However, throughout the twenty year period there were individuals who witnessed incidents in the locker-room. One of those was Mr. McQueary, who in 2001 was a graduate assistant in the football program. He testified that, on the night of February 9, 2001, he saw Mr. Sandusky in the shower with a young boy. He brought his concerns to then-football coach, Joe Paterno. While university officials have said that Mr. McQueary was not specific that what he saw might have been criminal, recently released grand jury

testimony shows that Mr. Paterno recalls being told by Mr. McQueary that the behavior he saw was “sexual.”

Recent news reports recount the end of Mr. McQueary’s career, even as other Penn State University officials have been indicted and are facing trial. As a sports journalist described the situation, “He’s a 37-year-old whose career, the one he once poured himself into, has stalled out. When new coach Bill O’Brien replaced Paterno, every assistant got a chance to interview, the lawsuit alleges, except Mike McQueary.” Mr. McQueary has fought back. “I don’t think I’ve done anything wrong to lose that job,” McQueary testified.383 The reporter continued to describe Mr. McQueary’s situation, writing, “he’s out of work. He’s out of money. He’s out of his career. He’s out of Penn State’s support system even as the school pays for the defense of [the two top administrators who heard his accusations but did nothing].”

McQueary has claimed in a whistleblower suit filed in a Pennsylvania state court that the Penn State President’s “unconditional support” for the administrators who did not act on the information he gave them “essentially branded McQueary a liar and ruined him.” He has claimed that “his employer picked sides and killed his career and reputation. All he’s ever done, he said, was tell the truth. And now he’s paying for it.” Instead of having the lifetime career as a coach at Penn State that he expected, he is “beaten up and broken down, swinging back with just about all he has left.”384

Penn State is vigorously defending itself against his suit. Its attorney filed a brief opposing Mr. McQueary’s claims and stating that, "It is not enough that the alleged victim of a statement be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of a respectable society."385

3. Disclaimer Related to Scenario Four

The long period of time over which the events of the Penn State sex abuse scandal unfolded add a substantial layer of complication for legal analysis. Therefore, the scenario based on this situation is deliberately constructed to exclude issues of timing or statute of limitations. Rather, it assumes that only a short period of time separated Mr. McQueary witness of the crime, his report to university officials, and his eventual testimony

383 Id.
384 Id.
that led to Mr. Sandusky’s conviction. Moreover, as of the writing of this article the two senior university officials who were indicted with Mr. Sandusky had not yet been tried and therefore only accused and not convicted. The Freeh report was strongly criticized as inaccurate by both Penn State University and the Paterno family.386 Penn State moved to dismiss Mr. McQueary’s lawsuit as being too vague to satisfy the standards of the Pennsylvania whistleblower statute. Mr. Sandusky maintained that he was innocent of all charges.

In sum, Scenario Four is written based on the publically available information at the time of the research by the article’s author. That factual information may have changed by the time of this article’s publication.

4. Scenario Four

Professor D is a tenure-track assistant professor in exercise science at a large public university who works for additional compensation with a summer athletic camp for youth in the university community. During camp activities, he observes what he later describes as a “highly inappropriate” and “sexual” contact between an athletics staff member, Roy, and a young boy (a minor and not a student at the university) in the locker room showers. Professor D reports what he sees to the camp director, Bob, who reports his statements to university officials, including the Athletic Director. Professor D is called in by the Athletic Director to tell these university officials what he has seen. He does so and hears nothing more about the incident. Roy remains employed. Five years later, Professor D is now an assistant professor on a year-to-year contract. He hears about this incident again when he is asked to testify in front of a criminal grand jury investigating the athletics staff member, Roy, who he saw act inappropriately with the minor young boy as well as the university officials to whom he initially told his story. After the grand jury indicts three of those men, Professor D is called as a witness for the prosecution and testifies at their trial. By now, everyone at the university is aware of what he saw and said about it. Professor D learns at a news conference called by the new President of the university that the university believes he did not act appropriately and that he will not be allowed to work in the athletics summer camp in the future or have any other contact with the institution’s athletic programs. He has been earning more than $20,000 each year by working in the summer camps, and had submitted several grant proposals related to athletic conditioning and performance that will be placed in jeopardy by such employment action. In addition, Professor D’s academic department is closely aligned with the athletics department, the President’s

386 Id.
public statements will harm his ability to seek promotion to the rank of professor, and relationships with his colleagues and students in the program will be affected. Professor D has begun applying to faculty positions in his discipline but does not receive invitations to interview despite his apparent qualifications for them. In addition, he is now the focus of substantial public criticism after the university is heavily sanctioned by the NCAA for the conduct of its staff in failing to report or take action regarding the shower incident.

5. Discussion of Scenario Four

Scenario Four considers events at a public IHE.

i. What U.S. Constitutional protections are available?

As an employee of a public IHE, Professor D has a protected liberty and property interest in his job. Although usually contract non-renewal does not usually require due process protection because a contract employee does not have an expectation of continuing employment, Professor D’s case may qualify as an exception. This is because the IHE did not just fail to renew Professor D’s contract, it made statements critical of his honesty. The Supreme Court in *Perry v. Sinderman* held that actions by an IHE that made it more difficult for an employee to get another job may be a violation of procedural due process. Since the act that brought negative attention to Professor D included his providing information about possible criminal activity, he may also qualify for protection under the First Amendment. As a public employee, Professor D has the right to be free from state retaliation - in this case his employer - for statements he made about matters of public interest which were not part of his job duties. The question that Professor D will raise is whether it was part of his job to monitor coaches more senior than he was for possible illegal behavior.

ii. What Federal Statutes provide protections?

If Professor D had made his report today, he might be able to seek the protection of Title IX, because sexual abuse has increasingly been recognized as a violation of Title IX. However, it is unlikely to succeed since Professor D may not be able to demonstrate that the young boy was a “student” to whom his IHE had legal obligations.
iii. What State Laws provide protection?

There are two primary areas of protection under state law. The first is the protection that would be available if Professor D was a mandatory reporter of child abuse. The second would be under his state’s whistleblower statute.

In addition to statutes that provide protection for whistleblowers in order to encourage greater enforcement of the law, there are statutes that require specific reporting. The most common reporting statute is one that makes witnesses of child abuse or neglect mandatory reporters. However, there are also statutes binding on individuals in the financial industry. The laws regarding child abuse are all directly targeted at minors. However, the current reality at most IHEs is that employees, including coaches and professors, have frequent contact with minors during community engagement activities as well as summer programs. In states that mandate reporting of partner abuse, it is even more likely that employees of an IHE will face this obligation.

All but two states have statutes that require specific categories of professionals to report child abuse or neglect. This category commonly includes teachers, health-care workers, social workers, law enforcement officers, and child care workers. Some states extend the obligation to commercial film or photographic processors, substance abuse counselors, domestic violence workers, clergy members, and animal control officers. Eighteen states go further and impose obligations by “any person who suspects child abuse or neglect” whatever their profession. Four states have recently “designated as mandatory reporters faculty, administrators, athletics staff, and other employees and volunteers at institutions of higher learning, including public and private colleges and universities and vocational and technical schools.” Beyond child abuse, there is considerable variety among the states about what kinds of abuse behavior carries reporting obligations. These include elder abuse, partner abuse and,

388 Id.
390 Id.
391 Id.
392 Id.
in a growing trend, animal abuse. Because the law in this area is so varied, it is not always clear whether or not an individual who observes a form of abuse or neglect is obligated to report.

However, the federal government requires that in order to be eligible to receive funding under the Child Abuse Prevention and Treatment Act (CAPTA), “[s]tates are required to establish provisions for immunity from liability for individuals making good faith reports of suspected or known instances of child abuse or neglect.” This form of immunity protects both those who are and those who are not required to report child abuse from “civil or criminal liability.” As a result, the person who reports child abuse in good faith is protected from a suit by the abuser. This is similar to laws already in existence in most states that have general protection for those who, in good faith, report a violation of the law to appropriate law enforcement officials.

iv. What State Statutes Provide Protection?

In almost every state with a whistleblower protection statute for public employees, a report of criminal activity would be the kind of information protected. However, even when the subject matter that the employee is reporting is clearly within the bounds of the statute, he must comply with the specific terms of the statute regarding the timing of the complaint and to whom it was made. These requirements usually specify to whom the whistleblower must report. In Texas, of the law requires that the witness submit a report to a law enforcement official with the authority to address the specific type of behavior being reported. In other states, the witness must report the incident to a person of authority within the agency or institution itself or to an office of the state government that has been created to receive such complaints. For example, the Connecticut statute requires that a complaint be made to the auditors of public accounts. If Professor D hesitates or reports to the wrong person, he may find himself without protection.

Moreover, states differ in their definition of what constitutes retaliation. Although as discussed above, federal courts primarily follow the Burlington Northern standards. State laws on whether reassignment constitutes retaliation are very different. Some states track federal standards

394 Id.
by looking at adverse employment actions broadly, and others only protect against the actual termination of employment. 398

Another issue that Professor D faces is his state’s laws regarding the mandatory reporting of child abuse. In almost every state with such a statute teachers are required by law to report even the suspicion that a child is being abused or neglected to the relevant child protective services agency. 399 But whether or not Professor D’s state would view him as having the obligations of a “teacher” to a child who is not a student of the school where he works is likely to be a matter of judicial interpretation. If Professor D is a mandatory reporter, he is almost certainly entitled to protection against retaliation; however, if Professor D is not a mandatory reporter he may or may not be protected.

Both Title IX, which prohibits discrimination based on sex in education, and the overlapping protection of Title VII, which more generally prohibits discrimination based on sex in the workplace, contain exceptions for faith-based IHEs.

6. Conclusion for Scenario Four

Scenario Four considered the situation of an untenured faculty member at a public IHE who had been a witness to possible criminal activity. As a result, he may have an obligation to file a report of suspected wrong-doing. If he is a mandatory reporter, it is likely that the statute that compels reporting will also provide protection against retaliation. But if he does not qualify for protection as a mandatory reporter, he must rely on the same protection that would be available to any other faculty member in his situation. As an untenured faculty member on a year-to-year contract, he is in the least favorable situation to invoke constitutional protection. Instead, he must rely on the whistleblower protection attached to a specific federal statute or to his state’s own whistleblower protection statute.

H. GAPS IN PROTECTION

What are the significant gaps in protection against adverse employment actions for good faith disclosures of information by faculty at IHE’s? As the four scenarios analyzed in this section demonstrate, there are many gaps in protection. The gaps fall into three main categories.

1. Gaps in Protection Depending on State Action

First, there is the gap between the protection available to employees and public and private IHE’s. Because private IHE’s are not state actors, they need not provide their employees with Fourteenth Amendment due process, nor do any adverse employment actions they take raise issues of possible violations of the First Amendment. Also, only employees of public IHEs are eligible for protection under their state’s version of a whistleblower protection law. Finally, only employees of private IHEs are eligible to make a claim under the Federal False Claims Act. Employees at public IHEs cannot seek government protection for bringing forward information that their institution is deliberately defrauding the government.

2. Gaps in Protection Depending on Nature of the Alleged Illegal Activity

Second, there is a difference in the types of protection available to whistleblowers depending upon the provisions in the law that applies to the specific subject matter. Some statutes, such as those prohibiting sex discrimination or requiring the reporting of crime on campus, provide protection against retaliation, while other statutes do not. For example, a faculty member with knowledge that her institution is both failing to report crime on campus and is inappropriately making student academic records available to marketing companies, would have protection against retaliation for reporting the first violation but not the second violation. It is unlikely that the faculty member involved would know, in advance, the risk she is taking when reporting a Clery Act violation (specific campus crimes) as opposed to a violation of the Family Educational Rights and Privacy Act (FERPA or the “Buckley Amendment” which pertains to student records).

3. Gaps in Protection Are Narrowly Circumscribed and Inconsistent Across the Spectrum of Federal and State Laws and Regulations

Finally, there are substantial gaps created by the rules for qualifying for protection in all of the constitutional and statutory provisions analyzed in the scenarios above. The four scenarios analyzed above are all examples of the kinds of gaps in protection that employees at IHEs face when bringing forward information of public interest. Whether or not an employee who bears bad news is in fact a whistleblower and protected from retaliation was a key question asked, but
essentially left unanswered, in the Supreme Court’s consideration of the extent to which public employees’ speech at work was subject to First Amendment protection. “According to the National Whistleblower Center, “one of the most hotly contested issues in whistleblower law is the exact definition of protected whistleblower activity. Some states have very narrow definitions while others have definitions that are very broad.” The Center therefore, advises that “An employee or his or her attorney should thoroughly research the State law regarding the definition for his or her state.”

The general constitutional protections of due process are only available to employees at public IHEs who can prove an expectation of continued employment. At most public IHEs, only tenured faculty have a reasonable expectation of continued employment.

First Amendment protections are available to all employees at an IHE, but the 2006 U.S. Supreme Court’s decision in Garcetti and the subsequent cases interpreting it exclude whistleblower-type speech from First Amendment protection. Employees have no constitutional claim of protection if they suffer an adverse employment decision based on the communication of information gained as part of their job duties. Moreover, even though the Garcetti Court explicitly denied that it was limiting the rights of professors to speak freely in their classrooms or scholarship, the Supreme Court has consistently declined to protect public employees from adverse employment decisions other than actual termination in First Amendment cases.

There are very few federal statutes with whistleblower protection that directly regulate behavior on a college or university campus. Title IX has well-defined whistleblower protection but covers only a very specific area of conduct. The Clery Act is relatively new and its protections have yet to be tested.

State whistleblower statutes are particularly difficult to predict because invoking their protection depends on precise compliance with the form and timing of the report. The False Claims Act, which provides not just protection from retaliation but a share of the government’s recovery, is only available to employees of private IHEs and it, too, has very specific provisions for filing a valid claim. One of the features of whistleblower protection in general, which applies to IHEs as much as other employment settings, is that the many laws and provisions that provide protection against retaliation do not necessarily provide protections against retaliation to the individual employee. As Tom Devine, the legal director of the Government Accountability Project, a non-profit group based in

---

Washington, D.C. that describes itself as “nation’s leading whistleblower protection and advocacy organization” put it:

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all.\textsuperscript{401}

The analysis of these four scenarios and the discussion of the gaps in protection faced by faculty members employed by IHEs demonstrates how difficult it is for any individual faculty member to predict whether or not he would be protected from retaliation if he engaged in whistleblowing activity. Given the considerable flexibility IHEs have in developing their own internal protections, the latter are the best option for encouraging employees to come forward with information. Most public IHEs are forced to deal with both constitutional protections available to their faculty and their state’s whistleblower protection laws. Private IHEs need to be concerned with whistleblower provisions attached to specific statutes that apply to all IHEs, and to the provisions of the False Claims Act, which empower their employees to bring fraud actions on behalf of the government. For the most part, though, the relationship between the faculty and the private IHE is governed entirely by internal law such as contracts or policies to which both parties have agreed to be bound. Otherwise, a professor at a private IHE is no different from an employee-at-will in any other job.

Perhaps the core problem with the legal protections available for whistleblowers in IHEs is one that it shares with other fields where personal reputation is an important part of getting a job. Study after study, incident after incident, show that even when the whistleblower is reporting important information of public interest and even if he receives protection from retaliation, whistleblowing is a career-ending event. This is because even when the whistleblower was a mandatory reporter, the behavior violates the corporate culture of loyalty. A recent review of the National Whistleblower Center’s Handbook for potential whistleblowers reflects this

\textsuperscript{401} Testimony of Tom Devine, Legal Director, GOVERNMENT ACCOUNTABILITY PROJECT (Mar 31, 2000), http://www.oas.org/juridico/english/tom_devine.htm.
view in its headline: “The Complete Guide to Snitching.”\textsuperscript{402} The Financial Times took an equally negative view writing that, “Disappointingly, the book does not touch on the morality of whistleblowing, or elaborate on the potential conflicts of interest in the increasing body of legislation offering financial rewards for people coming forward. Rather … the romantic image of a lone worker fighting doggedly against evil capital…”\textsuperscript{403}

Reports of the experiences of whistleblowers are far from romantic. A recent profile of James Holzrichter who in 2005 recovered $6.2 million in a False Claims Act action against his employer, Northrop-Grumman, is typical of the findings of many academic surveys. The reporter recounts that Holzrichter’s “court complaint, filed in 1989, languished for years, and so did Holzrichter. He wasn’t able to find work as an auditor. He received more than 400 rejection letters from employers who weren’t interested, he believes, in hiring a snitch. Desperate to support his wife and four children, he scrubbed toilets and delivered the Chicago Tribune. At his lowest moment, he moved his family into a homeless shelter.” Asked whether or not he still felt it was “worth it” to file the qui tam action, he replied, “I don’t know if it was worth it. I have the money, but how can I give my children their childhood back?”\textsuperscript{404}

CONCLUSION

This section will review and summarize the article’s purpose, its conclusions and recommendations.

A. PURPOSE

The purpose of this article was to describe the internal and external sources of law providing protection to faculty members at IHEs who face adverse employment actions for disclosing or reporting information of public interest and of relevance to their employment. These legal protections were applied by analyzing scenarios representing factual situations in which a faculty member at an IHE might face an adverse


\textsuperscript{403} Haig Simonian, A Guide for the Would-be Whistleblower, FINANCIAL TIMES (Feb. 23, 2011), http://www.ft.com/intl/cms/s/0/b55cafaa-39a-a1e0-00144feabdc0.html#axzz3VoGGMQDS.

employment action in retaliation for disclosing information against the interests of his employer.

**B. PROBLEM STATEMENT AND METHODOLOGY**

The main problem addressed in this article is the lack of comprehensive protection available to faculty members at IHEs, which results in an inability to predict when whistleblowers will be protected from retaliation for disclosing information of public interest. The methodologies used in this study included legal research and scenario analysis.

Section One presented three primary research questions:

1. What are the internal sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?

2. What are the external sources of law that provide protection for employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment?
   a) What U.S. constitutional protections are available?
   b) What federal statutes provide protections?
   c) What state laws provide protection?

3. What are the significant gaps in protection against adverse employment actions for good faith disclosures of information?

Section Two reviewed the legal and social science literature related to whistleblower protection for faculty members at institutions of higher education. Sections Three and Four described the research procedures employed in this investigation and explained their purpose. In summary, the author developed scenarios representing some situations in which faculty members at IHEs would have access to information that was: (a) unavailable to the public, and (b) of public, as opposed to personal or private, interest. Specifically, this information concerned either the violation of rights protected under the Constitution, violations of state or federal statutes, regulations, or rules, or violations of IHE internal policies and procedures. The situations described in the scenarios were developed from real life situations that became publically known either through lawsuits, administrative proceedings, published writings by individuals with first-hand knowledge, or press reports. In addition, the scenarios were created from facts drawn from more than one event to avoid distracting or confounding issues raised by individual situations.
C. FINDINGS

The primary internal source of law providing protection to employees stems from contractual obligations entered into voluntarily between the IHE and the faculty member. The most common example of this is a typical employee handbook. Increasingly, statements of policy made on an IHE’s website are being interpreted by courts as equivalent to statements made in a faculty handbook. Other common examples are individual contracts, contracts negotiated collectively, and statements made in hiring letters. Many disputes also arise over oral statements made either at the time of hiring or during employment. The laws of individual states vary considerably regarding the extent to which employee handbooks, IHE websites, oral statements, and statements in offer letters become binding agreements. Moreover, the standards used by different federal district and appellate courts vary considerably in how they determine whether these same materials create binding agreements.

There are many external sources of law protecting employees of IHEs who face adverse employment actions for disclosing or reporting information relevant to their employment. These include federal and state constitutional provisions regarding speech, that are sometimes referred to as “academic freedom” protections. Statutes are an additional source of law that can extend protection to public but not private employees. In addition, there are specific federal, state and local statutes that are triggered by the specific content of the information being disclosed.

Employees of public IHEs have additional protection against adverse employment action under the Fifth Amendment as applied by the Fourteenth Amendment. These provisions provide professors with the right to a fair process for appealing any adverse employment action taken against them, and prevent the IHE from proceeding in a manner that is arbitrary and capricious.

Because almost all IHEs are dependent on maintaining eligibility for federal funding, both public and private employees have protection from federal statutes prohibiting discrimination by IHEs and prohibit false claims made against the government. In addition, depending on the subject matter of the disclosure, employees of both public and private IHEs may have protection from whistleblower protections attached to specific activities, such as reporting violations of the Clery Act, or of health and safety violations specific to activities in which an IHE might engage, such as nuclear safety laws.

Finally, employees of IHEs can seek protection under state law. In states in which whistleblower protection laws are available to all employees, employees of public IHEs may be protected if they follow the terms of the statute precisely. Also, employees of IHEs may have additional protection if retaliated against for alleging discrimination, which
is illegal according to the laws of the state or municipality in which the IHE is located. These protections may be more extensive than protection against discrimination under federal law. Some states extend limited whistleblower protection to employees of private IHEs, again depending on the nature of the information disclosed.

Yet despite the many legal protections for whistleblowers, there are still considerable gaps in protection against adverse employment actions. The significant gaps are in retaliation for disclosing information about activities that do not fall under the terms of specific statutes. An employee who fails to file a complaint in the precise manner required by a statute may not be entitled to protection simply because all procedures were not complied with properly, even though the statute would otherwise provide it.

This article reveals wide gaps in protection for employees at IHEs who engage in whistleblowing activities. Since no comprehensive system of protection exists, it would be difficult for any individual faculty member to know precisely what activities warrant protection. This lack of a comprehensive system of protection means that even if whistleblowers are serving an important role in enforcing an IHE’s legal and ethical obligations, the lack of consistency in protection against retaliation makes it much less likely that they can play a strong role in assuring that compliance.

D. RECOMMENDATIONS FOR IHEs: DEVELOP INTERNAL PROTECTIONS FOR WHISTLEBLOWERS BASED ON THE INTERESTS AND NEEDS OF THE INDIVIDUAL INSTITUTION.

The above discussion demonstrates that professors considering becoming whistleblowers cannot rely on existing external protections against retaliation, which are too uncertain and inconsistent as sources of protection. In anticipation of the need to whistleblow, faculties should use the mechanisms of self-governance available to them to advocate that their institutions develop own internal procedures to protect and enhance whistleblowing. Companies are now adding anti-retaliation and whistleblower protection provisions into their corporate charters. The following two recommendations are essential components to be considered in developing such institutional policies:

(1) Communicate clearly the internal and external whistleblower protections available to employees so that all are aware of the consequences of violation.

(2) Communicate clearly the behaviors that courts have identified as retaliatory, so that supervisors can avoid the consequences of costly and time-consuming retaliation lawsuits even when there is no underlying violation of the law.
E. **Recommendations for Further Research**

This article identifies many issues that would benefit from further research using different methodologies. Further research is needed to answer questions about the prevalence of whistleblowing in higher education because, if whistleblowing cases follow the same pattern as other disputes in higher education, most cases will be settled before any legal action commences and before the case reaches a final resolution in court. Using methodologies that involve direct contact with employees and administrators at IHEs could also produce information about their perceptions of the need for whistleblower protections. Many of these additional research questions should be studied in IHEs:

1. What do faculty and other employees at IHEs know about availability of whistleblower protection?
2. What attitudes do faculty have about the need for whistleblower protection?
3. What is the prevalence of whistleblowing in higher education?
4. What happens to faculty who become identified as whistleblowers?
5. What is the effect of whistleblowing at IHEs? Do incidents of whistleblowing result in greater compliance?
6. How do the views of administrators, faculty, and staff issue in regard to questions about whistleblowing?
7. What are the differences in public, private, and faith-based IHEs in regard to whistleblower policies, attitudes about whistleblowers, and prevalence of noncompliance?
8. What are the characteristics of whistleblower policies in IHEs?

One of the inherent limitations of a legal analysis is that it is a retrospective review of decided cases. In order to find out more about faculty whistleblowing at colleges and universities it will be necessary to use different methodologies. These could include quantitative, qualitative, textual analysis, mixed methods, and observational studies.

For example, surveying or interviewing IHE employees about their attitudes toward whistleblowing and their personal experiences with it would be helpful in determining if the existing structure of internal and external protections have any impact on individual behavior. In order to this it would be necessary to develop an appropriate attitude scale.\(^{405}\) Then, using the scenarios developed here, a researcher could develop a Likert scale to determine the level of agreement with a statement such as, “In this scenario, the professor would have protection against retaliation for

\(^{405}\) **Meredith D. Gall, Joyce P. Gall & Walter R. Borg, Educational Research: An Introduction** 228 (8th ed. 2007).
whistleblowing.” The information gathered could then be used to develop questionnaires and interviews “to collect data about phenomena that are not directly observable: inner experience, opinions, values, interests and the like.”\footnote{Id.} For a qualitative study, which does not seek to generalize from the results, the scenarios would become part of either an “informal-conversational interview,” an interview based on a “general interview guide,” or a “standardized open-ended interview.”\footnote{Id. at 246.} For a quantitative study, the scenarios would be part of either an “unstructured interview” or a “semi-structured” or “structured” interview in which each subject would be asked about his or her reactions after reading the same scenarios.\footnote{Id. at 346.}

A qualitative study would be better suited to finding out how employees of IHEs see the act of whistleblowing in the context of their employment. Do they see it as a positive act? An obligation? A quantitative survey would be better suited to assessing the extent of knowledge about whistleblower protection laws. It would also be helpful in better identifying how much whistleblowing actually goes on in higher education and what motivates people who do blow the whistle.\footnote{Id. at 246.} Once data is collected for a quantitative survey, the researcher could then look for factors that correlate with knowledge of whistleblower law.

In what are called “predictor studies,” the researcher could analyze the data for any evidence of associations between previously identified categories of respondents.\footnote{Id.} For example, are tenured professors more likely to be knowledgeable about whistleblower protection than untenured? Are professors in the sciences more likely to be knowledgeable about whistleblower protections than professors in the humanities? These are called “predictor studies” because the result is the ability to reliably and accurately predict the level of knowledge of a specific identified group. The results might then possibly state, “If the subject is an untenured professor in the sciences, then there is a 40% chance she will be knowledgeable about whistleblower laws.”

A correlation study might find that professors in the sciences are more likely to know about whistleblowing laws, and that professors in the sciences who report receiving training about them know more than those who do not. Or the professors with more knowledge may well be those with more interest in the subject who would have acquired the information with or without a formal training course. The only way to tell if training increased knowledge would be, again, to design an experiment in which some professors had training and some did not.

\footnote{Id. at 247 (citing I.E. SEIDMAN, INTERVIEWING AS QUALITATIVE RESEARCH: A GUIDE FOR RESEARCHERS IN EDUCATION AND THE SOCIAL SCIENCES (2d ed 1997)).}
The training example described above is only one of the many ways that the issues raised in this article could be the basis for further research. The scenarios could also be tested for validity and reliability just as an item in a test or questionnaire could be.\footnote{\textit{Id.} at 195.}

Finally, it would be useful to directly study institutions like Albion College that have strong, internal whistleblower policies. This study could take the form of qualitative research that would show the role that these policies play, if any, in the life of the individual college. In addition, research studies could compare whether colleges with strong internal policies achieve greater compliance with their goals than those that do not have strong policies. Do colleges that provide more protection have more complaints? If so, do those complaints actually result in more compliance with the law?

\section*{F. Closing}

The external legal protections available to faculty at IHEs who face retaliatory employment action for the act of disclosing information of public importance are both inconsistent and complex. This raises two problems.

First, as a practical matter, it is very difficult for either faculty or administrators to know in advance what kinds of whistleblowing activities are or are not protected. Moreover, even among statutorily protected activities, there is uncertainty over how courts will evaluate any particular whistleblower’s eligibility for the protection offered by the statute. Faculty should be aware that, although acting in good faith is a necessary component in obtaining protection from an adverse employment action, it is no guarantee of protection.

The second problem is much larger and more holistic. The goal of external whistleblower provisions is to enforce specific laws or, in the case of broad state whistleblower statutes, to prevent waste, fraud, and abuse of state funds. However, each IHE is its own community with its own interests, needs, goals, and objectives. At times, an IHE’s interests may coincide with those of the government. At other times, they may be wholly independent. Yet if IHEs are truly interested in bringing forward the kind of information that only whistleblowers are likely to know, the most effective way of ensuring that result is to develop internal policies, procedures and training programs which promote the very employee behaviors that it values.
THE ORWELLIAN SURVEILLANCE OF VEHICULAR TRAVELS

SAM HANNA**

In United States v. Jones, the U.S. Supreme Court held that the State’s installation of a tracking device on an individual’s vehicle violates the historical ‘trespassory test’ and, for that reason, amounts to a search under the Fourth Amendment. However, the shortsightedness of the Court’s opinion in Jones fails to take account of a modern surveillance method known as automatic license plate recognition (“ALPR”), which makes it possible to conduct mass surveillance of automotive travel without the need to physically plant a tracking device on a vehicle. As such, the Court’s reliance on antiquated jurisprudence in Jones essentially provides police a loophole to accomplish the same harm by using a different, more technologically advanced, means.

However, does it really make sense that the absence of a physical trespass on a vehicle should be the dividing line between whether or not the Fourth Amendment affords constitutional protection against automobile surveillance? In other words, should the means used to accomplish the same harm dictate whether or not the Constitution has been violated?

Earlier, in United States v. Katz, the Court held that the absence of a physical trespass on a phone booth could not be the determinative factor of whether or not a search occurs when police record an individual’s telephone conversation. In doing so, the Court reasoned, “the Fourth Amendment protects people, not places.” Accordingly, the Court formulated the ‘expectation of privacy’ test in order to provide constitutional protection in a scenario that factually transcends the bounds of the trespassory test. Ever since Katz, the expectation of privacy test is what courts have relied on to determine whether or not the State has conducted an unreasonable search in violation of the Fourth Amendment. As such, the Court’s reliance on an antiquated trespassory test in the more recent Jones case inexplicably regresses precedence in an area involving a twenty-first century problem that desperately needs clarification.

Accordingly, the purpose of this note is to answer a question that the Jones Court and many courts nationwide have either failed to address altogether or failed to reach a unanimous decision on: that is, do individuals possess a constitutional expectation of privacy in their automotive travel, such that the State may not indiscriminately conduct prolonged mass surveillance of those travels without first obtaining a valid search warrant?

* * *

Sam F. Hanna is a 2014 Rutgers Newark School of Law graduate and former judicial law clerk for the Honorable Barry A. Weisberg in the Criminal Division of the New Jersey Superior Court. Mr. Hanna is licensed to practice law in the states of New York and New Jersey and is interested in pursuing a career as a prosecutor or criminal defense attorney.

INTRODUCTION

“Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.”

Today, it is possible to create an indefinite database of the automotive travels of every person nationwide through the use of automatic license plate recognition technology (ALPR). ALPR consists of digital cameras that can be mounted ubiquitously onto either police vehicles or fixed positions, including signposts, traffic signals, streetlights, and virtually any other stationary position. These cameras indiscriminately photograph the license plate numbers of every vehicle within their range. Because the cameras record the date, time, and geographic coordinates of where and when a vehicle is photographed, each individual photograph can be used in conjunction with potentially hundreds, or thousands, of previous photographs to form a mosaic-like picture that reveals an individual’s entire travel history.

---

2 United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007).
Law enforcement agencies have successfully employed ALPR to investigate crimes and apprehend suspects. However, despite the crime-solving benefits associated with ALPR, a significant constitutional issue is implicated when government agencies compile information on an individual’s automotive travel without possessing reasonable suspicion of criminal activity. Moreover, with the capability to retain travel history indefinitely, a ubiquitous network of ALPR cameras can be used to facilitate mass surveillance of vehicular travel – a modern practice that threatens Fourth Amendment principles.

The purpose of this note is to analyze whether indiscriminate State surveillance of historical vehicular travel constitutes a search within the meaning of the Fourth Amendment. In doing so, this note will evaluate how federal district and appellate courts across the United States have dealt historically with government surveillance of automotive travel. This precedential history will be useful in evaluating the Supreme Court’s analysis of mass government surveillance as discussed in United States v. Jones. The purpose in addressing Jones is two-fold: (1) to point out how modern day mass surveillance of automotive travel constitutes a search within the meaning of the Fourth Amendment, and (2) to analyze each Justice’s position regarding whether or not mass governmental surveillance of automotive travel is constitutional. Finally, this note will shed light on the need for a legislative solution to address this fundamental constitutional issue.

I. BACKGROUND

The Fourth Amendment provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Katz v. United States is the seminal United States Supreme Court case that establishes the modern two-prong test for determining whether certain government action constitutes an

---


8 See infra Part III.A.


10 See infra Part IV.

11 U.S. CONST. amend. IV.
“unreasonable search” within the meaning of the Fourth Amendment. Justice Harlan, in a concurring opinion in *Katz*, delivered the settled doctrine that an “unreasonable search” occurs when the Court finds that “a person [has] exhibited an actual (subjective) expectation of privacy and … the expectation [is] one that society is prepared to recognize as [objectively] reasonable.”

In *Katz*, the Supreme Court determined that a defendant who enters a public telephone booth and shuts the door behind him exhibits a subjective and reasonable objective expectation that his conversation inside will be kept private. Therefore, when law enforcement attached a recording device in a phone booth to intercept an individual’s conversation without his knowledge or consent, the Supreme Court held that this government action constituted an “unreasonable search” under the Fourth Amendment.

II. DISCUSSION

A. WHETHER GEOLOCATION INFORMATION THAT REVEALS A VEHICLE’S PAST LOCATION AND TRAVELS IS PRIVATE INFORMATION PROTECTED BY THE FOURTH AMENDMENT

In *United States v. Knotts*, the Supreme Court considered for the first time whether the use of a locational tracking device constitutes a “search” within the meaning of the Fourth Amendment. In *Knotts*, the Supreme Court held that using a beeper to monitor the movements of a third person, which ultimately led police to the defendant’s drug lab, did not amount to a search. First, the Court applied the two-prong *Katz* test and determined that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy from one place to another.” Consequently, the Court refused to find that defendant’s Fourth Amendment right was violated by using the beeper to track his location, because the “beeper surveillance amounted principally to [nothing more than] the following of an automobile on public streets and highways.”

In *Knotts*, the defendant’s counsel argued that failing to recognize the use of a tracking device as a Fourth Amendment search would amount to “twenty-four hour surveillance of any citizen of this country … without judicial knowledge or supervision.” The Court was unmoved by this

---

13 *Id.* at 361 (internal quotations omitted).
14 *Id.*
16 *Id.* at 285.
17 *Id.*
18 *Id.*
19 *Id.* at 283.
public policy concern because the specific factual circumstances presented in the case before it “hardly suggest abuse.” In Knotts, the beeper only tracked a relatively brief trip, which was easily and equally achievable without use of the beeper through traditional law enforcement surveillance methods, such as physically following the vehicle. Therefore, the Court, with three separate concurring opinions, upheld the constitutionality of the vehicular tracking device in this case. Nonetheless, the Knotts Court, looking into the future, noted in dicta that “if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.”

Those “dragnet type law enforcement practices” were used in United States v. Maynard, where the District of Columbia Court of Appeals narrowed the applicability of Knotts when presented with a different set of facts. In Maynard, the police installed a GPS tracking device on defendant’s vehicle to track his movements twenty-four hours per day for twenty-eight days. Using the data, the state established a travel pattern consistent with drug trafficking. Applying Katz, the court explained that “[i]n considering whether something is ‘exposed’ to the public … we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do.” Consequently, the court found that the defendant had a reasonable expectation his vehicle would not be tracked over the course of a month because “the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.” In addition, the Maynard court distinguished the prolonged GPS tracking that took place here from the single and brief journey monitored in Knotts because:

[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one’s not visiting any of these places over the course of a

---

20 Id. (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978)).
21 Id. at 284.
22 Id. at 284.
23 United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).
24 Id. at 567.
25 Id.
26 Id. at 559 (emphasis added).
27 Id. at 560.
month. The sequence of a person’s movements can reveal still more; a single trip to a gynecologist’s office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.28

Accordingly, the Maynard court held that the month-long surveillance of defendant’s vehicle produced private information to which the defendant had a reasonable expectation of privacy.29

In contrast, United States v. Sparks utilized a substantially different analytical approach than Maynard.30 There, the FBI installed a GPS device on the defendant’s vehicle because they suspected he had committed three bank robberies in the preceding three months.31 Eleven days later, a bank robbery occurred and nearby police observed two men wearing dark clothing and carrying a brown bag enter defendant’s vehicle.32 After losing physical sight of the vehicle, investigators used the GPS tracking device to reacquire visual surveillance on the car and initiate a traffic stop.33 After pulling over, the occupants, still unidentified at this time, exited the car and escaped into the nearby woods.34 The agents examined the GPS tracking data and discovered that, on the day of the robbery, the vehicle traveled from the defendant’s apartment to the street where police observed the suspected robbers enter the vehicle.35 The defendant moved to suppress all the tracking evidence ascertained from the GPS device.36

Ruling on the defendant’s suppression motion, District Court Judge William Young not only rejected the Maynard analysis but also adopted completely contrary legal principles. As discussed earlier, in determining whether tracking data is private information, the Maynard court: (1) considered the probability that a stranger would observe all of one’s travels over the span of a prolonged period of time37 and (2) held the aggregate of

28 Id. at 562.
29 Id. at 564.
31 Id. at 387.
32 Id. at 386.
33 Id.
34 Id.
35 Id.
36 Id. at 387.
37 Maynard, 615 F.3d at 560.
one’s travels is more private than travels viewed in isolation. In contrast, Sparks: (1) considered “not what a random stranger would actually or likely do, but rather what he feasibly could [do]” and (2) held that “[a]lthough continuous monitoring may capture quantitatively more information than brief stints of surveillance, the type of information collected is qualitatively the same.” Accordingly, the Sparks factors are directly contrary to the Maynard factors. Judge Young criticized Maynard as being “vague and unworkable” because “conduct that is initially constitutionally sound could later be deemed impermissible if it becomes part of the aggregate.” Because of this, Judge Young continued, “[i]t is unclear when surveillance becomes so prolonged as to have crossed the threshold and created this allegedly intrusive mosaic.” Accordingly, the court held that “[defendant’s] argument, that the aggregate of his travels are entitled to more constitutional protection than his individual trips, must fail.”

Nonetheless, Judge Young conceded in dicta that “the use of the GPS device on Sparks's vehicle is more akin to the use of the beeper in Knotts than that of the GPS device in Maynard.” This is because the GPS device in Sparks, like the beeper in Knotts, was used for a brief time and for the limited purpose of conducting and ascertaining visual surveillance. In contrast, the device in Maynard was used to conduct a month-long, twenty-four hour surveillance on the defendant, intended to elucidate a picture of his life and habits. Though Judge Young, in his opinion in Sparks, initially appeared unreceptive to the distinction between short term and long term GPS tracking, the court conceded in dicta that it “is not unsympathetic to the sentiment … that there is something ‘creepy’ about continuous surveillance by the government…. [It is] easy to envision the worst-case Orwellian society, where all citizens are monitored by the Big Brother government.” However, despite these concerns, much like the escape taken in Knotts, Sparks refused to address this latter issue, because such practices “have yet to materialize, and are certainly not at issue in this case.”

Three years before Sparks, the Seventh Circuit similarly recognized the privacy implications raised by mass governmental tracking

---

38 Id. at 562.
39 Sparks, 750 F.Supp.2d at 391 (emphasis added).
40 Id. at 392.
41 Id. at 393.
42 Id. at 395.
43 Maynard, 615 F.3d at 560.
44 Sparks, 750 F.Supp.2d at 395.
45 Knotts, 460 U.S. at 284.
46 Id. at 396.
of a vehicle’s movement. In United States v. Garcia, Judge Posner envisioned how:

[o]ne can imagine the police affixing GPS tracking devices to thousands of cars at random, recovering the devices, and using digital search techniques to identify suspicious driving patterns. One can even imagine a law requiring all new cars to come equipped with the device so that the government can keep track of all vehicular movement in the United States. It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment…. Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.

The advent of ALPR technology makes learning the past and present location of thousands, or even millions, of vehicles completely possible and easily achievable by the government. As of 2009, police departments nationwide have increasingly affixed ALPR cameras to their police cruisers. In addition to the mobile ALPR devices, stationary ALPR cameras can be installed on street signs, street lights, highway overpasses, buildings, and bridges, etc. to photograph passing automobiles and, thus, keep an indefinite record of each time any vehicle travels past those stationary locations. Installing enough of these fixed cameras strategically in a community combined with the tracking information collected from mobile devices on police cruisers can facilitate mass surveillance of virtually all automotive travel across the United States. Moreover, because ALPR is capable of retaining this geolocation tracking data indefinitely for subsequent observation, police can use the device’s memory to: observe past travels, predict future travels, deduce intimate details of a person’s life

47 United States v. Garcia, 474 F.3d 994 (7th Cir. 2007).
48 Id. at 998 (emphasis added).
50 Lum, Merola, Willis, and Cave, License plate recognition technologies for law enforcement: An outcome and legitimacy evaluation. For example, a September 2009 national survey found that 37% of agencies with greater than 100 officers already use ALPR technology and that nearly one-third of the remaining agencies surveyed planned to acquire it within one year. Id.
52 Rushin, supra note 4, at 283.
and relationships, and learn many of a person’s daily routines and habits.\textsuperscript{53} The unbridled and unregulated use of this tool advances the same “draginet type [of] law enforcement practices” fictionalized by Knotts and makes the “worst-case Orwellian society” feared of by Sparks wholly feasible. Allowing the government to implement the use of ALPR in this way threatens fundamental Fourth Amendment values and dismantles historically accepted expectations of privacy.

\textbf{B. \textit{Why Use of ALPR to Conduct Mass Governmental Surveillance Should Be Held Unconstitutional by the Supreme Court}}

It is imperative that the Supreme Court finally determine the constitutionality of compiling the travel history and present locations of vehicles belonging to individuals not reasonably suspected of criminal behavior. \textit{United States v. Jones}, a companion case of \textit{Maynard},\textsuperscript{54} is the most recent Supreme Court case with the potential to provide guidance on this issue.\textsuperscript{55} In \textit{Jones}, the FBI procured a search warrant authorizing the installation of a tracking device on the defendant’s vehicle.\textsuperscript{56} However, the FBI agents installed the device on the vehicle a day after the warrant expired and outside of the issuing court’s jurisdiction, rendering it invalid.\textsuperscript{57} Nonetheless, over the next twenty-eight days the device produced over 2,000 pages of data tracking the vehicle’s movements, which connected the defendant to an alleged conspirator’s stash house that contained $850,000 in currency and 97 kilograms of cocaine.\textsuperscript{58} \textit{Jones} moved to suppress all evidence obtained in violation of the Fourth Amendment.\textsuperscript{59} As mentioned in the \textit{Maynard} discussion, the D.C Court of Appeals ruled in favor of Jones and Maynard, who were co-conspirators, finding that the nearly month-long tracking of the defendant’s vehicle was unconstitutional absent a valid search warrant.\textsuperscript{60}

The U.S. Supreme Court granted certiorari in \textit{Jones} to review that Fourth Amendment issue.\textsuperscript{61} Though the Supreme Court found that the government’s warrantless actions in \textit{Jones} amounted to a search, it did so by applying antiquated common law trespass jurisprudence, rather than the

\textsuperscript{54} Maynard, 615 F.3d 544. See notes 66-72 and accompanying text.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 948-49.
\textsuperscript{59} Id.
\textsuperscript{60} Maynard, 615 F.3d at 564.
\textsuperscript{61} Jones, 132 S.Ct. 945 (2012).
more recent *Katz* constitutional ‘expectation of privacy’ test. Justice Scalia, writing for the Court, focused on the fact that, by installing the GPS tracking device on the undercarriage of defendant’s vehicle, the government trespassed on defendant’s property. According to Justice Scalia, this conduct amounted to “physically occup[y]ing] private property for the purpose of obtaining information.” Consequently, because “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted,” Justice Scalia held that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’” By deciding the case using trespass jurisprudence, which was applicable before the *Katz* test, Justice Scalia did not overturn *Katz*, but merely wished to clarify that “the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”

In essence, instead of holding that the prolonged tracking of a vehicle’s travels is unconstitutional because it violates a reasonable expectation of privacy, Justice Scalia merely made it unlawful for the government to install a tracking device on one’s property without a valid warrant. This holding, however, provides the government a loophole with which to accomplish the same objective. For instance, what if the police did not affix a GPS tracking device on a defendant’s vehicle and were able to track automotive travel using a more sophisticated means of surveillance such as ALPR cameras? Under the majority opinion in *Jones*, this tech-savvy method of automobile surveillance would ostensibly be permissible because it does not require a physical trespass on the vehicle. This loophole renders Justice Scalia’s holding shortsighted and vulnerable to modern surveillance methods. If the same end of compiling weeks-worth of tracking data on a person’s automotive travel is achievable using a more technologically advanced means, should the mere absence of a physical trespass be the dispositive consideration?

In *Katz v. United States*, the Supreme Court explained that “once it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” Thus if *Katz* did not transcend the ‘trespassory test,’ the Court would not have found a search occurred when the government placed a recording device on the outside of a public

---

62 Id. at 949.
63 Id.
64 Id.
65 Id.
66 Id. at 952.
67 Id.
telephone booth. Because the booth did not belong to the defendant, there could not be a showing of physical trespass.\textsuperscript{68} However, the Court recognized that recording a person’s telephone conversation in a closed phone booth, even if public property, violated an expectation of privacy that most individuals expect exists. Accordingly, this expectation is what the Court believed ought to be protected by the Fourth Amendment, not the existence or absence of a physical trespass.\textsuperscript{69} This principle is precisely what led to the modern two-prong subjective and objective ‘expectation of privacy’ test.\textsuperscript{70}

Justice Scalia’s reliance on the ‘trespassory test’ to decide the surveillance issue in \textit{Jones} only backtracks precedent on a constitutional issue of growing concern with the advent of technologically advanced means of surveillance. Acknowledging these concerns, Justice Alito criticized Justice Scalia’s opinion as being “unwise” and “highly artificial” for applying “18\textsuperscript{th} century tort law” to a “21\textsuperscript{st} century surveillance technique.”\textsuperscript{71} Justice Alito recognized that:

\begin{quote}
[the Court’s reasoning largely disregards what is really important (the use of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation).\textsuperscript{72}
\end{quote}

In light of this deficiency, Justice Alito believed that the question presented in \textit{Jones} should be answered by applying the \textit{Katz} test to determine whether defendant’s reasonable expectation of privacy was violated by the four-week surveillance of his vehicle’s movements.\textsuperscript{73} Accordingly,

\begin{quote}
[u]nder this approach, relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly
\end{quote}

\textsuperscript{68} See id.
\textsuperscript{69} See id.
\textsuperscript{70} Id.
\textsuperscript{72} Id. at 961.
\textsuperscript{73} Id. at 958.
monitor and catalogue every single movement of an individual's car for a very long period.\textsuperscript{74}

Justice Sotomayor, in a separate concurring opinion, illuminated why long term government surveillance of vehicular travels violates a reasonable expectation of privacy.\textsuperscript{75} Like several lower courts,\textsuperscript{76} Justice Sotomayor noted that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."\textsuperscript{77}

For instance:

[d]isclosed in [GPS] data ... will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.\textsuperscript{78}

This information is even more intrusive when "[t]he Government can store such records and efficiently mine them for information years into the future."\textsuperscript{79} Hence, Justice Sotomayor opined that long term tracking of a person's vehicular travels breaches an expectation of privacy that the Fourth Amendment is intended to protect.\textsuperscript{80}

In sum, the concurring opinions of Justice Alito and Sotomayor provide two persuasive reasons why Justice Scalia's decision to apply the trespassory test undermines modern-day surveillance methods. First, the "trespassory test may provide little guidance" to "novel modes of surveillance that do not depend upon a physical invasion on property."\textsuperscript{81} Second, because "the Fourth Amendment protects people, not places,"\textsuperscript{82} the appropriate test should be to "ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and

\textsuperscript{74} Id. at 964.
\textsuperscript{75} Id. at 954-57.
\textsuperscript{76} See, e.g., Maynard, 615 F.3d at 562; Zahn, 812 N.W.2d at 497; Garcia, 474 F.3d at 998; and People v. Weaver, 882 N.Y.S.2d 357, 361 (N.Y. 2009).
\textsuperscript{77} Jones, 132 S.Ct. at 956.
\textsuperscript{78} Id.
\textsuperscript{79} Jones, 132 S.Ct. at 955-56.
\textsuperscript{80} Id. at 955.
\textsuperscript{81} Id.
\textsuperscript{82} Katz, 389 U.S. at 351.
religious beliefs, sexual habits, and so on." Justices Alito and Sotomayor have already answered in the negative.  

Understanding how the nine Justices voted in Jones provides insight on how each would vote with respect to whether using ALPR technology to track a vehicle’s location is lawful. Chief Justice Roberts, as well as Justices Kennedy, Thomas and Sotomayor, joined Justice Scalia’s opinion thus making it the majority. However, had Justice Sotomayor joined Alito’s concurrence instead, then Justice Alito’s opinion would have constituted the majority because Justices Ginsburg, Breyer, and Kagan all joined. Nonetheless, the concurrences of Justice Alito and Sotomayor command five votes. Consequently, a potential majority of the current members of the Supreme Court, not only advocate the Katz test, but believe that long term monitoring of one’s travels impinges on a reasonable expectation of privacy, thereby constituting a Fourth Amendment violation.

C. THE NEED FOR LEGISLATIVE INTERVENTION

Nonetheless, though at least five Supreme Court Justices appear to agree that tracking one’s automotive travel for four weeks constitutes a search, it would be imprudent to wait until the constitutional issue reaches the Court again. The Constitution sets the minimal protections against state action, but state or federal legislatures are free to expand protection to privacy and property. In several ways, the legislature is perhaps even more capable at accomplishing this goal than the judiciary when technology threatens privacy. "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."

However, for the legislation to be effective, it is essential that it balance two distinct competing interests. The legislation must be carefully crafted to: (1) permit law enforcement agencies to employ ALPR devices for its valuable crime-solving capabilities; as well as: (2) draw effective boundaries to ensure it is not used as a tool for conducting indiscriminate and ubiquitous government surveillance without a valid search warrant.

The Electronic Communications Privacy Act is a federal law that currently governs the use of wiretapping and electronic eavesdropping. Senator Patrick Leahy proposed an amendment to this Act entitled the

---

83 Jones, 132 S.Ct. at 955.
84 Id. at 955, 964.
85 Id. at 947.
86 Id. at 957.
87 Id. at 964.
88 Id.
Electronic Communications Privacy Amendments Act of 2011 (ECPAA), which provides that, unless a warrant based upon probable cause is obtained, “no governmental entity may access or use an electronic communications device to acquire geolocation information.”

In the interest of justice, however, the ECPAA provides for an exigency exception to the search warrant requirement if there are grounds to believe that a search warrant could be obtained, but the acquisition of a warrant is made impracticable due to an emergency that involves: (a) immediate danger of death or serious bodily injury to any person; (b) conspiratorial activities illustrative of organized crime; or (c) an immediate threat to national security. Nonetheless, this warrant exception is limited because, “not later than 48 hours after the activity to acquire the geolocation information has occurred,” the government must seek a warrant. If a warrant is not obtained, use of the device to acquire geolocation information must terminate immediately once the earlier of any of the following occur: (a) the information sought is obtained; (b) the application for the warrant is denied; or (c) 48 hours have elapsed since the activity to acquire the geolocation information commenced. If the government fails to comply with these provisions, no information or evidence derived from the use of a geolocation information-acquiring device may be entered into evidence or otherwise disclosed in any trial, nor may it be disclosed in any other manner, without the person’s consent.

The ECPAA makes the unwarranted use of ALPR’s geolocation memory feature unlawful. As such, it proscribes the devices’ current method of operation, which is a mindless, automatic collection and retention of the geolocation information of every vehicle the device captures on camera, regardless of due consideration to reasonable suspicion of criminal activity. Hence, this would ban ALPR’s use as a tool to conduct mass surveillance of vehicular movements. Nonetheless, the ECPAA bill’s exigency exception effectively balances law enforcement and public safety needs by permitting the device to be used without a warrant in exigent circumstances. Moreover, the exclusionary provision of the ECPAA bill will ensure that the government will not disregard the warrant requirement because any information unlawfully obtained will not be admitted into evidence, thereby giving police no incentive to capture geolocation information without authorization. Hence, the ECPAA bill successfully

---

provides the proper balance needed to level the privacy and public policy concerns associated with use of ALPR technology.

CONCLUSION

The United States Supreme Court, as well as district, circuit, and state courts around the country, have all acknowledged the potentially devastating effects that mass surveillance of vehicular travels can have on Fourth Amendment rights. Seemingly unaware that this threat can be implemented today, the judiciary has been presented with the opportunity, but refused, on several occasions to rule directly on the constitutionality of this issue. However, with the growing ubiquity of ALPR cameras, mass government surveillance of automotive travel is no longer a figment of the imagination. As such, the judicial and legislative branches of government must embark on balancing the private and public interests implicated by this technology. Failure to set suitable boundaries around the use of this and other technology may slowly, but significantly, deflate historically accepted expectations of privacy under the Fourth Amendment.