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TRIBUTE TO THE 50TH VOLUME OF THE CREIGHTON LAW REVIEW

My experiences on the *Creighton Law Review* can best be described as *life-changing*. However, to fully grasp such a concept, one has to first understand that I was an accounting and finance undergraduate. I thrived with numbers and T-charts but never words. I had only taken two rudimentary English classes as an undergraduate because, after all, that was all that was required. As one should presume, my written composition and analysis skills were less than refined when I enrolled in Creighton's School of Law.

Although lacking a background in formal writing, I found myself in a fortunate position clerking for a well-respected law firm during my 1L summer. That firm demanded, and rightfully so, that each of its clerks research legal issues to exhaustion prior to providing a written memorandum of how the applicable law would affect a client's case or business objective. Honestly, I treaded water early on in meeting the firm's expectations because I could not create concise and persuasive written work product—something that is paramount in the legal profession. I simply had never been taught how to do so.

As fate would have it, after spending the day clerking, I spent most nights researching my student note's topic with the methodical assistance of Mr. P. Brian Bartels who was my Student Note Editor. In congruence with my clerkship, Mr. Bartels insisted that I research the applicable legal doctrines to exhaustion before I even wrote a single sentence for the note. Thereafter, to my genuine surprise, Mr. Bartels diligently began teaching me the intricacies of legal writing when he noticed that my written composition and analysis skills lacked refinement. Until that point in time, I truly believed that everything associated with law school was based upon a "survival of the fittest" mentality given that everyone was graded on the dreaded bell curve and assigned a class rank. However, Mr. Bartels was someone who wanted to invest the time to teach a fellow student the complexities of legal writing. Not only did the techniques Mr. Bartels taught help me in crafting a student note that would later be published but, after I applied the same to the memorandums I composed daily for my clerkship, I was able to parlay those refined memorandums into a clerkship my 2L summer and ultimately into an associate position which launched my legal career. Only later in life would I recognize that Mr. Bartels, like many other *Law Review* editors over the years, was simply fulfilling one of the *Law Review's* cornerstone missions of

assisting in the development of the "academic, research, analytical, and scholarly writing skills among law students."

I am hopeful that the 2008-2009 Law Review's Board of Editors and Staff are remembered in much the same light. From my perspective, we strived to be teachers and mentors more than publishers. We were friends trying to help each other succeed not only in those specific moments, but in the lives we were preparing to start. After all, at the end of the day, that is the true mission of the *Law Review* in my humble opinion.

Although it has been years since I passed on the proverbial Editor in Chief baton, it seems like just yesterday that I turned off the lights and I walked out of the Law Review office for the last time. I will be forever grateful for all the memories and friendships that I made while a member of the *Law Review*.

Darin L. Whitmer,
Creighton Law Review Editor in Chief
Volume 42: 2008-2009

TRIBUTE TO THE 50TH VOLUME OF THE CREIGHTON LAW REVIEW

Being a part of *Creighton Law Review* is an experience that I will never forget. After interviewing to be Editor in Chief, I was not convinced they would choose me. When they did, it was the happiest moment of my law school career. Of course, I must add that I do not count getting married between my second and third year as being a part of my law school career.

There were certainly challenges and stressful moments, but we were able to put together four editions and a successful symposium as a team. It is this kind of teamwork that has made the *Law Review* successful for fifty volumes. I am especially grateful for all the work that John Dunn did as Executive Editor. I could not have done the job without his help.

While we had some great times in the Law Review Suite, we also got out of the suite to socialize and have some fun as well. We hosted Publication Parties for students being published in the *Law Review* and held receptions at the beginning and end of the year. Not to mention the many food runs and various shenanigans we got into to get away from our books and editing. Laughing with friends can really be the best medicine to keep you motivated during long hours.

I also feel lucky to have been able to work with Professor Ronald R. Volkmer in his last year as faculty advisor to the *Creighton Law Review*. He was the first Editor in Chief of the *Creighton Law Review* and was able to see it through to its fiftieth volume. It is only fitting that in his last edition as faculty advisor he has two dedications in his honor. In working with Judge Robert W. Pratt and Walter J. Smith in drafting those dedications, along with the time I spent with Professor Volkmer, it is clear that he is not only an accomplished professor and faculty advisor, but a true friend and a man for others.

One of my finest accomplishments in my year as Editor in Chief had nothing to do with editing. I had the opportunity to pick out a "new" set of shelves for the Law Review Suite as the library was transferring some books into the suite. There were many options at Creighton's storage warehouse that stores old desks and shelves from various generations waiting to be re-used or thrown away. When I was there, something in particular caught my eye and I was able to convince the warehouse manager that we could really use a couch in the suite.

In the time between picking out the couch and the day it was finally delivered, I think the Board of Editors thought I was nuts when

I kept saying we were getting a couch soon. They also seriously questioned the condition it was going to be in when it arrived. I am pretty sure my descriptions of the warehouse made them think we were getting a heavily used couch from a dorm room. I was overjoyed when they delivered the couch; and while it was not new, it was in great condition. Some future Editor in Chief will likely get the idea to complete the ensemble with a TV screen.

After hosting the Spring Write-on-Competition and turning over the *Law Review* to a new Board of Editors, I knew that the *Law Review* would always be in good hands. It was in those moments that we worked best because we saw how important it was to pass the torch. I have already subscribed to receive the new editions as they come out, and look forward to seeing where *Creighton Law Review* goes in the years to come!

Spencer R. Murphy,
Creighton Law Review Editor in Chief
Volume 49: 2015-2016

"MIRROR, MIRROR, ON THE WALL . . .":[1] REFLECTIONS ON FAIRNESS AND HOUSING IN THE OMAHA-COUNCIL BLUFFS REGION

PALMA JOY STRAND†

"It wasn't African Americans moving in that caused housing values to go down in . . . neighborhoods, it was whites leaving."
–Race: The Power of an Illusion[2]

"In some cities, kids living just blocks apart lead incredibly different lives. They go to different schools, play in different parks, shop in different stores, and walk down different streets. And often, the quality of those schools and the safety of those parks and streets are far from equal – which means those kids aren't getting an equal shot in life.

That runs against the values we hold dear as Americans. In this country, of all countries, a person's zip code shouldn't decide their destiny. We don't guarantee equal outcomes, but we do strive to guarantee an equal shot at opportunity – in every neighborhood, for every American."
—Barack Obama[3]

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1. JACOB GRIMM & WILHELM GRIMM, *Snow White*, *in* GRIMM'S FAIRY TALES (Stephanie Hedlund & Rochelle Baltzer eds., Magic Wagon 2011) (1812).

† Professor of Law, Creighton University School of Law. B.S. Stanford University (1978); J.D. Stanford Law School (1984); LL.M. Georgetown University Law Center (2006). This article arose as a result of a series of conversations over a period of more than a year with individuals in the Omaha-Council Bluffs region who are in one way or another part of the region's housing ecosystem. A full list is attached in Appendix A to this article. To a person, these individuals were generous with their time, thoughtful in their comments, and genuine in their commitment to the region and the people who live here. I thank them for sharing their experiences and perspectives. All mistakes and conclusions are mine alone. I also wish to thank a number of people who read an earlier draft of this article: Brenda Council, Marianne Culhane, Gary Fischer, Bernie Mayer, Adam Price, Mark Stursma, Ron Volkmer, John Wiechmann, and Patty Zieg. Finally, I appreciate the support of a Creighton summer research grant as well as Law School support for the 2040 Initiative.

2. *Race-The Power of an Illusion, The House We Live In* (California Newsreel transcript April 29, 2003). Transcript of episode available on the California Newsreel website: http://newsreel.org/transcripts/race3.htm.

3. Press Release, Barack Obama, The White House Office of the Press Secretary, Making Our Communities Stronger through Fair Housing (July 11, 2015), https://www.whitehouse.gov/the-press-office/2015/07/11/weekly-address-making-our-communities-stronger-through-fair-housing.

"'When things aren't working the way they should be . . . you have the makings of a great design project.'"
—Bruce Mau[4]

I. INTRODUCTION

This article is about fair housing in the Omaha, Nebraska-Council Bluffs, Iowa metropolitan region. I focus on this region because I teach at the Creighton University School of Law and have lived in Omaha for almost ten years. I am enough of an insider to have heard a lot of stories about how things work here; I am enough of an outsider that I hear those stories with a sense of how things are done elsewhere.

In 2015, the United States Department of Housing and Urban Development ("HUD") promulgated a regulatory requirement that cities receiving HUD funds ratchet up efforts to Affirmatively Further Fair Housing ("AFFH") as required by the Fair Housing Act of 1968.[5] Inspired by that mandate, I began to look past current inequities in housing to the institutional structures that facilitated White[6] suburban growth after World War II, a time during which federal law and local practice together prevented Black citizens from purchasing homes outside of limited geographical areas.

Discrimination in housing has been against the law since 1968, yet the institutions of development that created neighborhoods of unequal opportunity and channeled people into those neighborhoods remain largely in place today. The effects of those institutions today are more indirect than direct, but they continue to do their work—work that is more structural than individual.

The particular institutional arrangements that I describe in this article, arrangements that constitute what I have termed the "SID+annexation development regime," are specific to this region. In fact, they are limited to the Nebraska side of the region, and this article's examination of them is thus specific to this part of this region. My approach here, however, is relevant beyond Omaha. Other cities and metro areas have their own variations on the theme of structural racism in housing and development. Understanding how those structures are constructed is an important step toward dismantling them.

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4. WARREN BERGER, GLIMMER: HOW DESIGN CAN TRANSFORM YOUR LIFE, AND MAYBE EVEN THE WORLD 185 (2009).

5. 42 U.S.C. §§ 3601-3619, 3631 (2012).

6. In this article, except when quoting others, the racial and ethnic descriptors I use are Black, White, and Hispanic. *See* Palma Joy Strand, *Is* Brown *Holding Us Back? Moving Forward, Six Decades Later: Visionary States, Civic Locals, and Trusted Schools and Teachers*, 23 KAN. J.L. & PUB. POL'Y 283, 285 n.15 (2014).

This practice recognizes the path dependence of the status quo—we are where we are because of where we have been.[7] History provides important context for understanding the institutional arrangements of today. Institutional forensics—using history, sociology, and law to dissect current structures of inequity—allows us to understand how structural racism works.

A. Looking Back – "The Map"

I am sitting at a desk in the reading room at the National Archives in College Park, Maryland. It is a hot July day outside; inside, it is cool but also bright and sunny. Around me, researchers peruse genealogical and military records and other historical documents. I have in front of me the Home Owners' Loan Corporation ("HOLC") file for Omaha. I turn to the envelope attached to the back of the file, remove the Security Map that the HOLC drew in late 1935/early 1936, and unfold it.[8]

I know about redlining, of course. The lines drawn by the federal government in maps during the New Deal resulted in the denial of loans for mortgages on homes in Black and integrated neighborhoods for decades.[9] But when I unfold the map, I am not prepared. The map looks amateurish. It has handwritten numbers and shading that is textured like the crayon coloring of a child, and when I touch the blue lightly with my finger, a little color rubs off.

Yet this map has power—I can feel it. This "Security Map" transcribed the residential patterns of the Omaha of the Great Migration, the Omaha of the Great Depression, into policy, into action, into law. This map put the federal imprimatur on locally created patterns of racial segregation in housing. This map—this very map that I am holding—discerned, coalesced, and then perpetuated the predominantly Black neighborhoods north of Cuming Street and south of Binney Street and (mostly) between 20th and 30th Streets, neighborhoods that are still predominantly Black today. And, just as surely as it solidified Black neighborhoods, this map revealed and then grounded burgeoning White neighborhoods, especially White development spreading to the west. This westward development remains predominantly White today.

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7. *See id*. at 293 & *infra* note 74 and accompanying text.

8. *See infra* Appendix B.

9. Sheryll Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream 111-12 (2004). For a more detailed description of redlining, see Alexis Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, The Atlantic (May 22, 2014), http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/.

On this map, green does not touch red. Looking at the entire city, which extends west only as far as 72nd Street, I can see clearly how the green all-White neighborhoods labeled "Best" in the map's legend are separated from the red (actually pinkish) mostly-Black neighborhoods labeled "Hazardous" by the map's legend. Cautious, protective swathes of blue ("Still Desirable") and yellow ("Definitely Declining") neighborhoods insulate and *quarantine* the green from the red. This map, created in consultation with mortgage lenders and bankers from the Omaha community, reflected the 1935 status quo of where people lived. This map also reflects the 2016 status quo of where people live: On the Racial Dot Map for Omaha, Black residents are concentrated north of the city center and Hispanics to the south; White residents spread to the west.[10]

B. Taking Stock

Race and housing, housing and race. These two strands of the social double helix recombined in the twentieth-century United States to create a new form of inequality—housing segregation by race. The Security Map drawn by the federal HOLC during the New Deal distributed private funds and guarantees along racial lines. Though the Fair Housing Act of 1968[11] outlawed this type of racial discrimination in 1968, the results of decades of discriminatory policies and practices are not easily undone. A racialized status quo perpetuates itself even without additional discrimination.[12] Throughout the nation, almost fifty years later, housing segregation is prevalent,[13] as are racial wealth disparities[14] and differential access to opportunity based on geography of residence.[15]

Housing is fundamental, foundational, and financial. Housing is fundamental because having a place to live is, as the head of Omaha's

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10. *See* Dustin Cable, *The Racial Dot Map*, Weldon Cooper Center for Public Service (July 2013), http://www.coopercenter.org/demographics/Racial-Dot-Map. Across the Missouri River to the east, Council Bluffs, Iowa, is also predominantly White. *Id. See also* Center for Public Affairs Research, University of Nebraska at Omaha, Selected Characteristics for Census Tracts in Douglas, Sarpy, Lancaster and Hall Counties, Nebraska, from the 2009-2013 American Community Survey 13 (March 2015), http://nebraskalegislature.gov/pdf/reports/committee/select_special/lpc/lpc2015selcharco.pdf.

11. 42 U.S.C. §§ 3601-3619 (2012).

12. *See, e.g.*, Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Law of Succession*, 89 Or. L. Rev. 453, 464-68 (2010) (discussing how facially race-neutral law governing succession reproduces existing racial advantage and disadvantage).

13. Cashin, *supra* note 9, at 83-124; Kyle Crowder et al., *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, 77 Am. Soc. Rev. 325, 325 (2012).

14. Strand, *supra* note 12, at 461-63.

15. *See* Gregor Aisch et al., *The Best and Worst Places to Grow Up: How Your Area Compares*, NY Times (May 4, 2015), http://www.nytimes.com/interactive/2015/05/03/upshot/the-best-and-worst-places-to-grow-up-how-your-area-compares.html.

U.S. HUD office, Earl Redrick, observes, the basis for everything else: If you do not have a safe and reliable place to live, the rest of life becomes precarious. Housing is foundational because so much of our lives is centered on and profoundly affected by where we live: the safety of our streets, the schools we attend, our neighborhood connections, even our access to grocery stores. Housing is also financial because most families in the U.S., especially middle class families, hold most of their wealth in the form of home equity.[16]

President Barack Obama's conviction that "a person's zip code shouldn't decide their destiny"[17] responds to recent research documenting that where children grow up within the U.S. in fact does matter. A team of economists led by Raj Chetty, working with income statistics from millions of individuals in the cohort of children born between 1980 and 1982, concluded "there is substantial variation in intergenerational mobility across areas within the U.S."[18] Compared to the national average, for example, poor children growing up in some counties had a much better chance of upward mobility, while poor children growing up in other counties had significantly poorer prospects.[19] The Chetty team identified five factors correlated with social mobility: segregation and inequality (negative correlations with upward mobility) as well as K-12 school quality, social capital, and fewer single-parent families (positive correlations).[20]

In July 2015, HUD issued final regulations containing a revised and reinvigorated interpretation of its obligations under the provision of the 1968 Fair Housing Act that requires HUD to Affirmatively Further Fair Housing.[21] The Fair Housing Act, acknowledging the historical role of the federal government in promoting discrimination in housing, placed on HUD the responsibility for not simply enforcing a cessation of discrimination, but also overcoming the effects of past discrimination—the AFFH duty.[22] The charge in the original 1968 Fair

16. Strand, *supra* note 12, at 460 ("[F]or the three middle quintiles of Americans . . . the principal residence is between one-half and two-thirds of total net worth.").

17. *See supra* note 3 and accompanying text.

18. Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the U.S.*, 129 Q.J. OF ECON., 1553, 1554 (Nov. 2014).

19. *The Causal Effects on Household Income in Adulthood by County*, THE EQUALITY OF OPPORTUNITY PROJECT, http://www.equality-of-opportunity.org/ (last visited Oct. 26, 2016).

20. Chetty et al., *supra* note 18, at 1557-58.

21. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter *AFFH I*].

22. With this requirement, the Fair Housing Act went beyond the approach of the Civil Rights Act of 1964, which simply prohibited discrimination on the basis of race and other prohibited characteristics. The AFFH duty puts an affirmative duty on HUD, again going beyond the review function of the federal government provided by Voting Rights Act of 1965, which both prohibited discrimination in voting and gave additional protection in the form of a requirement that forbade local jurisdictions from changing

Housing Act to "all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing[ ]" had languished.[23] As HUD itself acknowledged regarding pre-2015 enforcement efforts, "the . . . approach was not as effective as originally envisioned."[24] The 2015 regulations signaled a new approach and a new level of commitment.

The 2015 AFFH regulations move beyond current acts of discrimination in housing by identifiable actors to the group-based disparities that characterize the race-housing nexus today.[25] In line with this focus, the 2015 AFFH regulations specify the use of "big data" generated by HUD from census information. With these data, the regulations provide context for localities, which are the primary decisionmakers in land use and housing decisions, to engage in an informed and serious assessment of housing and race as well as other group indicia that are of concern in providing or accessing housing.

HUD General Counsel Helen Kanovsky, speaking to my Emerging Perspectives on Governance class in Washington, D.C. in the fall of 2015, characterized the AFFH regulations as inviting local communities to look at themselves in a mirror. This "Mirror, Mirror, on the Wall" exercise calls for localities, and the people and organizations within those localities, to look honestly at themselves, their neighborhoods, and their historical and current patterns of development. For all of us in our own localities, when we look at our reflection in the AFFH Mirror, what do we see?

This article responds to that question for one mid-sized metropolitan area, the Omaha-Council Bluffs region (metro area population 915,312 in 2010) that straddles the Missouri River across the Nebraska-Iowa state line. Evident to even the casual observer, the Omaha-Council Bluffs region exhibits strong patterns of racial/ethnic and socioeconomic segregation. Though the region has its own unique history and characteristics, residential segregation in Omaha-Council Bluffs echoes residential segregation in most other metro areas in the United States. In terms of opportunity, Douglas County is "pretty bad for income mobility for children in poor families. It is better than

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their voting structures without preclearance from the U.S. Department of Justice. *But see* Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (invalidating preclearance provisions of Voting Rights Act).

23. *AFFH I*, 80 Fed. Reg. at 42272.

24. *Id. See also* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law.

25. Joe Feagin, *Excluding Blacks and Others From Housing: The Foundation of White Racism*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 79 (1999).

about 36 percent of counties."[26] Pottawattamie County, on the other hand, is "pretty good . . . better than about 73 percent of counties."[27] And Sarpy County is "very good . . . better than about 84 percent of counties."[28]

Part II of this article provides an overview of the AFFH regulations,[29] followed by a metro-wide, birds-eye survey of housing patterns and related characteristics in Part III.[30] Part IV presents the dominant story of the region's development—the steady westward march of the Omaha city limits through annexation.[31] Part V identifies the predominant legal vehicle for that growth, Sanitary and Improvement Districts ("SIDs"), and a set of interlocking legal structures that has served as the engine for post-WWII westerly suburbanization in the region, what I refer to in the article as the SID+annexation development regime.[32] Part VI describes how the SID+annexation development regime has contributed, and continues to contribute, to the concentrations of racial and ethnic poverty in the region.[33] Finally, Part VII offers questions and proposed actions for neutralizing the current development regime and for initiating new development strategies to Affirmatively Further Fair Housing.[34]

II. THE MIRROR: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

The Fair Housing Act of 1968 enacted two distinct strategies to combat discrimination in housing. Similar to the Civil Rights Act of 1964[35] and the Voting Rights Act of 1965,[36] the Fair Housing Act prohibits discrimination in the provision of housing on the basis of race, national origin, and other protected characteristics.[37] This prohibition is enforceable by direct legal action, and it encompasses acts that

26. *See* Aisch et al., *supra* note 15.
27. *Id.* (Select "Pottawattamie").
28. *Id.* (Select "Sarpy"). The outlying counties in the Heartland region, except for Cass to the south of Sarpy (better than 83% of counties), are overall better still. *Id.* (Select "Cass"). Harrison: better than 94% of counties. *Id.* (Select "Harrison"). Mills: better than 89% of counties. *Id.* (Select "Mills"). Washington: better than 91% of counties. *Id.* (Select "Washington"). Saunders: "among the best counties in the U.S." *Id.* (Select "Saunders").
29. *See infra* notes 41-82 and accompanying text.
30. *See infra* notes 83-143 and accompanying text.
31. *See infra* notes 144-200 and accompanying text.
32. *See infra* notes 201-248 and accompanying text.
33. *See infra* notes 249-278 and accompanying text.
34. *See infra* notes 279-293 and accompanying text.
35. 42 U.S.C. §§ 2000e-2000e-17 (2012).
36. 42 U.S.C. §§ 1973-1973aa-6 (2012).
37. *Programs Administered by Fair Housing an Equal Opportunity* ("*FHEO*"), UNITED STATES DEP'T OF HOUSING AND URBAN DEV. (Sept. 25, 2007), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8.

have "disparate impact" as well as those with direct effect and invidious intent.[38] The Fair Housing Act also directed the United States Department of Housing and Urban Development ("HUD") to administer its programs in a manner that affirmatively furthers fair housing.[39] According to HUD itself, "This is not only a mandate to refrain from discrimination but a mandate to take the type of actions that undo historic patterns of segregation and other types of discrimination and afford access to opportunity that has long been denied."[40]

A. Racial Discrimination in U.S. Housing – A Brief Summary

The history of housing discrimination impeding access to opportunity is both a national and a local history. As a result of the Great Migration of Black citizens out of the South to the north and west in the early decades of the twentieth century, cities that did not previously have significant numbers of Black residents saw their Black populations rise. This population influx, labor competition, racial tensions, and racial violence led to White animosity and the rise of racially restrictive covenants in housing, which limited the ability of Black citizens to live and purchase homes in many areas. In 1948, the United States Supreme Court declared these covenants unconstitutional in *Shelley v. Kraemer*,[41] but federal redlining policy, which arose with the New Deal, continued in effect. Redlining, taking its name from the red- or pink-colored areas on Home Ownership Loan Corporation ("HOLC") maps prepared for cities throughout the nation in the 1930's, channeled federal and private mortgage subsidies and funds to all-White neighborhoods and to the White citizens who were able to purchase homes in those neighborhoods. Though the Fair Housing Act made redlining illegal in 1968,[42] redlining practices continued.[43] Moreover, decades of legalized housing segregation based on

> Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin. Title VIII was amended in 1988 . . . by the Fair Housing Amendments Act, which . . . expanded coverage . . . to prohibit discrimination based on disability or on familial status (presence of child under age of 18, and pregnant women)[.]

Id. (citing 42 U.S.C. §§ 3601-3619 (2012); 24 CFR Parts 100, 103 (2016)).

38. Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

39. 42 U.S.C. § 3608.

40. *AFFH I*, 80 Fed. Reg. at 42274.

41. 334 U.S. 1 (1948).

42. Federal Reserve, Federal Fair Lending Regulations and Statutes: Fair Housing Act, Consumer Compliance Handbook (2006), https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf.

43. *See, e.g.*, Jonathan Brown & Charles Bennington, Racial Redlining: A Study of Racial Discrimination by Banks and Mortgage Companies in the United States 4 (1993) ("Focussing [*sic*] on 16 large metropolitan areas, this study identified 49

race created racially separate neighborhoods that became part of the geographical fabric of the majority of cities around the nation, baked into the nation's housing DNA through racialized patterns of post-WWII suburbanization.

Redlining led directly to housing segregation and indirectly to racialized wealth. White households, with access to federally insured and standardized credit, bought into suburban neighborhoods that saw rising demand, increasing property values, tax-supported schools, and wealth in the form of home equity. Black households, without access to credit and without the ability to buy into non-redlined neighborhoods, were relegated to areas within central cities that saw falling property values, underfunded schools, and little home equity wealth.[44]

The contemporary fallout of twentieth-century housing segregation thus goes beyond continuing patterns of racially segregated housing to disparities between White and Black wealth on the order of twenty to one.[45] Fallout today also includes predatory lending to would-be minority home buyers, which has been documented as an important contributing cause of the housing crisis in the late 2000s.[46] Overall, the centuries-old historical link between race and economics[47] has been re-enacted from the mid-twentieth century to the pre-

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major mortgage lenders whose geographic lending patterns in 62 separate instances substantially excluded or underserved minority neighborhoods . . . . This study also found that even though racial redlining has been prohibited by federal civil rights laws for many years, federal authorities have failed to adopt effective regulations and enforcement procedures thereby condoning both the serious and subtle injuries to minority neighborhoods. This is a systemic failure, not a matter of occasional lapses.").

44. In fact, Black citizens who sought to participate in the wealth-building homeownership market were prime targets for predatory schemes, which further enriched those (usually Whites) in a position to exploit them. In *Family Properties: How the Struggle Over Race and Real Estate Transformed Chicago and Urban America*, for example, historian Beryl Satter details the use of the contract for deed as a vehicle for White landlords in the Chicago region to make money off of would-be Black home buyers. Black citizens lost out by virtue of being excluded from federal home-buying loan assistance programs; they lost out again to unscrupulous profiteers. BERYL SATTER, FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA (2009).

45. Palma Joy Strand, *Education-as-Inheritance Crowds Out Education-as-Opportunity*, 59 ST. LOUIS L.J. 283, 290 n.45 (2015).

46. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629 (2010). *See also* City of Miami v. Citigroup, 801 F.3d 1268, 1276 (11th Cir. 2015) (reasoning that City of Miami was an "aggrieved person" under the Fair Housing Act and consequently able to state a claim that banks' decades-long practice of discriminatory predatory lending practices—"redlining"—constituted a violation of the Act's anti-discrimination provisions), *cert. granted sub nom.* Wells Fargo & Co. v. City of Miami, 136 S. Ct. 2545 (2016), *argued*, Nov. 8, 2016.

47. *See* Strand, *supra* note 12, at 473-77.

sent through housing discrimination and unequal access to housing wealth.[48]

Federally supported White suburbanization and the redlining of minority and mixed neighborhoods provided the social and political context for the Fair Housing Act's passage in 1968. Unlike Jim Crow segregation and unlike widespread voter suppression, which were centered in the South and implemented by states, racial discrimination in housing was a national phenomenon that the federal government spearheaded and that enjoyed broad political support.[49] This context explains the Fair Housing Act's charge to HUD to go beyond ending housing discrimination and to take positive action to undo the effects of past discrimination through "affirmatively furthering fair housing" ("AFFH"). This context also explains the substantial political controversy that accompanied the passage of the Fair Housing Act.[50]

Despite containing anti-discrimination provisions underscored by the AFFH imperative, the Fair Housing Act did not turn housing policy and practice on a dime. Though a few states and localities moved toward greater inclusivity in housing,[51] they were the exception. More typical was the laissez-faire constitutional approach that the United States Supreme Court adopted in response to thinly disguised local housing decisions that had patently racial effects. In 1977, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[52] the Court upheld a city's zoning decision disallowing the construction of multi-family low- and moderate-income housing against an Equal Protection challenge. Although the "impact of the Village's decision [did] arguably bear more heavily on racial minorities," "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[53] On this legal terrain, even a generous "disparate impact" interpretation of the statute's anti-discrimination provisions would be insufficient to undo the status quo.[54]

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48. *Id.* at 462.

49. KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203-18 (1985).

50. *See* Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 254-55 (2016).

51. *See, e.g.*, S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975); MICHAEL FADEN ET AL., STRENGTHENING THE MODERATELY PRICED DWELLING UNIT PROGRAM: A 30 YEAR REVIEW: A REP. TO MONTGOMERY CTY. COUNCIL ON FUTURE PROGRAM AND POL'Y OPTIONS (2004).

52. 429 U.S. 252 (1977).

53. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269, 265 (1977) (citing Washington v. Davis, 426 U.S. 229 (1976)).

54. For example, the United States Supreme Court held in *Inclusive Communities* that an anti-discrimination claim can be brought under the Fair Housing Act based on disparate impact. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,

These political realities also hobbled early AFFH efforts.[55] Moreover, HUD's AFFH initiatives are indirect and incentive-based rather than command-and-control regulations. To date, the primary strategy through which HUD meets its AFFH duty is disbursing grant funds to local entities only when "program participants certify, as a condition of receiving Federal funds, that they will affirmatively further fair housing."[56] Private enforcement of this mandate exists only in the form of legal action against HUD to perform its statutory duty or for sanctions for its failure to do so.[57]

For decades, HUD implemented its AFFH duty through a process in which grantees or their consultants prepared an Analysis of Impediments ("AI") to fair housing and committed to designated steps to affirmatively further fair housing as a condition for receiving HUD grants. This process applied to all HUD grantees throughout the nation including states, local governments, and public housing authorities. When HUD certified these commitments, its AFFH duty was deemed fulfilled and grant funds were released.[58]

In the mid-2000s, a lawsuit ruptured this status quo. The Anti-Discrimination Center of Metropolitan New York successfully asserted a *qui tam* action against Westchester County, New York.[59] A *qui tam* action enables a private party to bring an enforcement action claiming fraud against the government; the private party sues on the government's behalf.[60] In this case, the Anti-Discrimination Center alleged that the County was perpetrating a fraud against HUD by misrepresenting its AFFH actions in its Analysis of Impediments.[61] Essentially, the charge was that the County had obtained federal grant funds under false pretenses. A 2009 settlement between the County, the Anti-Discrimination Center, and the United States Department of Justice "obligated [Westchester] County to pay $30 million to the United States . . . and pay $2.5 million to the [Center,] . . . [Westchester] County also made various commitments to affirma-

135 S. Ct. 2507 (2015). On remand the United States District Court for the Northern District of Texas held that Inclusive Communities did not prove a prima facie case and dismissed its disparate impact claim challenging the allocation of Low Income Housing Tax Credits to further concentrate affordable housing with prejudice. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-0546-D, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

55. Hannah-Jones, *supra* note 24.

56. *AFFH I*, 80 Fed. Reg. at 42274.

57. Matthew J. Termine, Note, *Promoting Residential Integration Through the Fair Housing Act: Are* Qui Tam *Actions a Viable Method of Enforcing "Affirmatively Furthering Fair Housing" Violations?* 79 FORDHAM L. REV. 1367, 1384-87 (2010).

58. *Id.* at 1391.

59. *Id.* at 1369-71.

60. *Id.* at 1393.

61. *Id.* at 1396.

tively further fair housing and to eliminate discrimination in housing opportunities."[62]

Following the Westchester County settlement, the United States Government Accountability Office issued a report entitled "HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans."[63] New proposed AFFH regulations in 2013 described a revised process.[64] Final AFFH regulations appeared in July 2015, accompanied by the understated observation from HUD that "the [Analysis of Impediments] approach was not as effective as originally envisioned."[65]

B. The 2015 Affirmatively Furthering Fair Housing Regulations

In the 2015 AFFH regulations, the general parameters of HUD's AFFH mandate went unchanged. The primary mode of implementation still requires grantees to meet conditions attached to HUD funds. Enforcement by third parties remains tenuous.

The specifics, however, have changed substantially. The 2015 AFFH regulations replace the Analysis of Impediments with a more rigorous Assessment of Fair Housing based on HUD-provided

> local and regional data on integrated and segregated living patterns, racially concentrated areas of poverty [("RCAP")] or ethnically concentrated areas of poverty [("ECAP")], the location of certain publicly supported housing, access to opportunity afforded by key community assets, and disproportionate housing needs based on classes protected by the Fair Housing Act.[66]

Based on these standardized data, HUD grantees are required to "identify the contributing factors for segregation, racially or ethnically concentrated areas of poverty [and] disparities in access to opportunity," establish goals for overcoming these factors, and "identify the metrics and milestones for determining what fair housing results will

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62. United States *ex rel*. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., N.Y., 712 F.3d 761, 765 (2d Cir. 2013) (involving County non-compliance with consent decree). Absent the consent decree, "[t]he County's exposure under the False Claims Act would have been $156 million—treble damages based on $52 million in false claims." *U.S. ex rel. Anti-Discrimination Ctr.*, 712 F.3d at 765. Westchester County put HUD in an awkward position: Had HUD actually been defrauded, or had it been at least partially complicit in, or aware of, the languid AFFH efforts of Westchester County—and perhaps other grantees?

63. *AFFH I*, 80 Fed. Reg. at 42275.

64. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter *AFFH II*].

65. *AFFH I*, 80 Fed. Reg. at 42272.

66. *Id.* at 42272.

be achieved."[67] HUD, in turn, commits to a new, more robust review process of local commitments.[68]

The 2015 rules make clear that access to fair housing goes beyond ensuring an affordable place to live and removing impediments to that goal:

> Because housing units are part of a community and do not exist in a vacuum, an important component of fair housing planning is to assess why families and individuals favor specific neighborhoods in which to reside and whether there is a lack of opportunity to live in such neighborhoods for groups of persons based on race, color, national origin, disability, and other characteristics protected by the Fair Housing Act.[69]

The new Assessment of Fair Housing thus calls for consideration of "access to public transportation, quality schools and jobs, exposure to poverty, environmental health hazards, and the location of deteriorated or abandoned properties when identifying where fair housing issues may exist."[70]

As reflected in the statement by President Obama at the beginning of this article, the new AFFH regulations manifest a conviction that fair housing is about access to opportunity. Moreover, the mandate for access to opportunity reflects a textured understanding of the nature of choice. In response to a comment about some housing segregation being self-imposed, for example, HUD articulates the goal of ensuring a "full range of housing options and choices" to all individuals and groups.[71] Full choice is not to be presumed from a status quo in which some housing options come with less access to opportunity than others. For example, if people choose housing in areas with lesser opportunity because that housing is affordable, the presumption does not arise that they are freely choosing less opportunity.

In this view, fair housing options and choices mean that "access to high-performing schools is a critical neighborhood component that should be considered in efforts to affirmatively further fair housing."[72] Further, "A [RCAP/ECAP] is not an area of opportunity simply because it is served by a public transportation system or any single indicator of opportunity."[73] With this nuanced view of choice and clear understanding of the link between housing and opportunity, the 2015 rules recognize the foundational nature of housing. Fair housing pro-

67. *Id.* at 42355 § 5.154.
68. *Id*. at 42358 § 5.162.
69. *Id.* at 42282.
70. *Id.*
71. *Id.* at 42280.
72. *Id.* at 42337.
73. *Id*. (noting the acronym stands for Racially Concentrated Area of Poverty/Ethnically Concentrated Area of Poverty).

vides access to opportunity for everyone, because everyone is a member of the community.

C. Three Key Aspects of the 2015 AFFH Rules

Three aspects of the 2015 AFFH rules are noteworthy from a structural point of view. First, the rules call for localities to expand the scale of their consideration of fair housing—looking at groups rather than individuals and looking at regions rather than specific localities. The rules respond to a "legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."[74] The harm is institutional and structural, evidenced in statistical disparities[75] in housing patterns based on race, ethnicity, and socioeconomic status. The rules' reliance on "big data" affirms the group-based scope of both past injury and present effect.

At the same time, the rule gently yet unmistakably pushes legally distinct local entities toward regional collaboration. In addition to HUD providing regional as well as local data, the rule explicitly encourages regional consultation in the course of the Assessment of Fair Housing.[76] Further, regions that have prepared Fair Housing Equity Assessments ("FHEAs") under the recent Sustainable Communities grant program jointly administered by HUD, the Environmental Protection Agency, and the Department of Transportation[77] are allowed a "bye" in meeting the first deadline for submitting the new Assessment of Fair Housing.[78] This reward for past regional collaboration postpones additional effort to meet new AFFH requirements by virtue of prior regional cooperation, and it may nudge cooperating local entities further in the direction of regional collaboration.

Second, notwithstanding the pull toward a regionalist perspective, the 2015 rules are grounded in a recognition of local variation in both obstacles to fair housing and strategies for overcoming those ob-

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74. *Id.* at 42272.

75. *See* Palma Joy Strand, *Racism 4.0, Civity, and Re-Constitution*, 42 Hastings Const. L.Q. 763, 765-71 (2015).

76. *AFFH I*, 80 Fed. Reg. at 42360 § 91.100.

77. *See The Fair Housing and Equity Assessment (FHEA)*, United States Dep't of Housing and Urban Dev., https://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_development/regional_fairhsg_equityassesmt (last visited Nov. 6, 2016) (describing FHEA as essentially a regional Analysis of Impediments); *see also Sustainable Communities Regional Planning Grants*, United States Dep't of Housing and Urban Dev., https://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_development/sustainable_communities_regional_planning_grants (last visited Nov. 6, 2016) (supporting "locally-led collaborative efforts that bring together diverse interests from the many municipalities in a region to determine how best to target housing, economic and workforce development, and infrastructure investments to create more jobs and regional economic activity.").

78. *AFFH I*, 80 Fed. Reg. at 42357 § 5.160(a)(2); *see also id*. at 42324.

stacles.[79] Local variation stems in part from local entities holding primary responsibility for land use decisions, from legal landscapes that vary by state and locality, and from varying local histories, demographies, and cultures. The new AFFH rules seek to influence, channel, and affect the direction of local decisions; they do not make specific findings, set definitive standards, or direct particular strategies. "The duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law."[80] This approach provides space for local variation, local creativity, and local adaptations of the fair housing wheel to best meet local needs, thrive in local conditions, and enjoy local buy-in.[81]

The 2015 rules are thus quite circumspect from a federalism point of view. HUD specifies a policy direction and relevant parameters while assigning to local entities the responsibility to craft specific tailored goals and actions within those parameters to move in that direction. To some degree, this federal modesty may reflect the fact that the rule's posture is attaching conditions to HUD disbursements rather than outright regulation, reflecting the fact that the AFFH language directs itself to HUD rather than to states and localities. Yet the rules read also as federal articulation of a necessary partnership between a central government with its broad-based, long-term vision and decentralized entities with local knowledge and the capacity to innovate. Such a partnership makes sense from a practical as well as legal point of view.

Third, and most fundamental, going beyond even the expansive "disparate impact" anti-discrimination mandate, the AFFH rules play offense rather than defense. "HUD has the statutory authority to ensure that participants in HUD-funded programs not only refrain from discrimination, but also take meaningful actions to increase fair housing choice and access to opportunity and combat discrimination."[82]

The rules explicitly decline to designate what those meaningful actions should be. Instead, the regulatory posture is creative and divergent. The rules seek to elicit from local entities entrepreneurship rather than compliance. There are indeed specifics to the AFFH rules. Program participants must prepare an Assessment of Fair Housing

79. *Id.* at 42288-89. "Overcome" is the word used in the regulations, substituted for "mitigate and address" in the proposed regulations. *Id.*

80. *Id.* at 42279.

81. *Cf.* Strand, *supra* note 6, at 334 ("For educational initiatives to truly 'take,' they must be homegrown. Districts can certainly learn from one another, but buy-in ultimately takes root through the process of identifying issues and opportunities and developing responses internally.").

82. *AFFH I*, 80 Fed. Reg. at 42282; *see also id*. at 42279 § 5.152 (defining the term meaningful action to include acts "reasonably expected to achieve a material positive change").

using the data provided by HUD on patterns of segregation, concentrated areas of poverty, and differential access to opportunity. The Assessment of Fair Housing must include specified meaningful actions—goals with benchmarks and timelines.

Within these parameters, local entities have discretion to generate and design their own AFFH meaningful actions. With additional discretion and freedom to maneuver, however, comes responsibility for initiative and innovation. Playing offense requires marshaling resources, developing strategies, and adopting a can-do (rather than a have-to-do) mindset.

The aptness of the Mirror analogy for the 2015 AFFH regulations is apparent. HUD generates data on housing and related characteristics of a local grantee. These data provide a comprehensive portrait of housing, not only of the locality but also of its region. HUD essentially holds up this AFFH Mirror and requires localities to look at their fair housing reflection, to describe what they see, and to take ameliorative actions if the reflection reveals unfairness in the form of lack of widespread access to neighborhoods of opportunity.

III. WHY WE NEED A MIRROR: SEGREGATION IN THE CITY

When localities look into the Affirmatively Further Fair Housing ("AFFH") Mirror, the reflection they see is of overall patterns of housing and opportunity. Familiar statutory prohibitions against discrimination operate against specific acts with identifiable effects, even when those effects ripple out to groups. The statutory mandate to AFFH, in contrast, operates to reverse the effects of decades of interlocking institutional and structural policies that led to actions throughout financial, real estate, political, and legal systems that advantaged an entire group of citizens while disadvantaging another. The line between advantage and disadvantage was race, and that line directed more Whites to affluence and more Blacks to a lack of wealth and opportunity.

The reflection of systemic racism and disadvantage appears in disparate statistics, in regional maps that show trends, in indicia and indices that capture what the statistics and maps show us. This Part of the article summarizes the reflection of the Omaha-Council Bluffs region in the AFFH Mirror. Dismantling systemic differential access to housing and opportunity requires first understanding the results of the existing systems.

A. Statistics and Maps

Whites, Blacks, and Hispanics in Omaha-Council Bluffs live in racial and ethnic clusters, and the region falls toward the "more segre-

gated" end of the national spectrum as compared to other metropolitan areas in the United States. Using 2010 United States Census data, the Institute for Child, Youth, and Family Policy of the Heller School at Brandeis University ranks the largest 100 metropolitan regions in the United States on the basis of segregation of Blacks, Hispanics, and non-Hispanic Whites. The Institute measures segregation using a dissimilarity index with a value of 0% denoting total integration and 100% total segregation.[83] Omaha, with a Black-White dissimilarity index of 61.3%, is the 38th most segregated metropolitan area in the United States.[84] In terms of Hispanic/non-Hispanic White segregation, Omaha is the 30th most segregated area nationally, with a dissimilarity index of 48.8%.[85]

These racial and ethnic clusters correspond to socioeconomic separation. According to 2000 United States Census data, approximately 6.9% of Omaha non-Hispanic Whites, 14.3% of Omaha Hispanics, and 21.4% of Omaha Blacks live in high-poverty neighborhoods.[86] In terms of exposure to neighborhood poverty, Omaha ranks 81st out of the top 100 metro areas for Whites,[87] 58th for Hispanics,[88] and 34th for Blacks.[89] Whites in Omaha are less exposed to poverty in their neighborhoods than Hispanics, who are in turn less exposed to poverty in their neighborhoods than Blacks. Relative to the 100 largest metropolitan areas nationally, Omaha is doing well in terms of Whites not experiencing neighborhood poverty, a little better than average in terms of Hispanics, and below average for Blacks.

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83. *Segregation of the Population: Dissimilarity with Non-Hispanic Whites by Race/Ethnicity*, HELLER SCHOOL FOR SOCIAL POLICY AND MANAGEMENT, http://www.diversitydata.org/Data/Rankings/Show.aspx?ind=163&ch=6&tf=38&sortby=Value&sortChs=6&sort=HighToLow&notes=True&rt=MetroArea&rgn=ShowLargest100 (last visited Jan.13, 2017). The dissimilarity index is defined as representing "the proportion of one racial group that would need to relocate to another neighborhood (census tract) for that racial group to be distributed across the metro area like a second (reference) racial group." *Id.*

84. *Id.* The range is significant: the most integrated Black-White city is Provo-Orem, UT, at 21.9% (Provo-Orem, UT); the most segregated is Milwaukee-Waukesha-West Allis, WI, at 81.5%. *Id*. Almost two-thirds (62) of all 100 metro areas fall in the 50-60% range. *Id.*

85. *Id.* (select "Hispanic," followed by "UPDATE THIS REPORT"). The most integrated city is Palm Bay-Melbourne-Titusville, FL at 25.0%; the most segregated is Springfield, MA, at 63.4%. Two-fifths (40) of all 100 metro areas fall in the 40-50% range.

86. *Exposure to Neighborhood Poverty by Race/Ethnicity*, HELLER SCHOOL FOR SOCIAL POLICY AND MANAGEMENT, http://www.diversitydata.org/Data/Rankings/Show.aspx?ind=59&tf=7&sortby=Name&sort=HighToLow&notes=True&rt=MetroArea&rgn=ShowLargest100 (last visited Jan. 13, 2017).

87. *Id.* (Select "All," followed by "UPDATE THIS REPORT").

88. *Id.* (Select "Hispanic," followed by "UPDATE THIS REPORT").

89. *Id.* (Select "Non-Hispanic Black" followed by "UPDATE THIS REPORT").

The effects of residential segregation—people living in separate racial or ethnic and socioeconomic clusters—extend far beyond housing. Where you live affects your physical and mental well-being: housing is connected to health. Where you go to school depends on where you live: education is connected to housing. Your health also contributes to success in school: education is connected to health. Your academic preparation affects work qualifications: employment, as well as wealth and income, are connected to education. Where you live also affects who you know: housing affects your social networks. Who you know affects whether you can find a job: social networks affect employment and income. The old jingle that starts with the hipbone being connected to the thighbone captures the reality of links between different parts of a system, whether it is the health of a human body or the well-being of a social community. The jingle, in fact, oversimplifies reality. More or less directly, all bones and all social indicators are connected to all others: advantage and disadvantage, the effects of residential segregation, are systemic.

These interconnections are starkly visible in maps of the Omaha-Council Bluffs region that show well-being according to a wide range of measurable attributes. Educational levels measured by high school graduation or General Educational Development ("GED") equivalent and having a bachelor's degree are higher to the west (predominantly White), lower in eastern Omaha to the immediate north (predominantly Black) and south (predominantly Hispanic) of the city center.[90] More people live in poverty in eastern Omaha; fewer to the west.[91] Household incomes are higher to the west and lower to the east.[92] Homeownership is higher to the west, lower in the east,[93] and homes are more valuable to the west, less valuable to the east.[94] Unemployment is lowest to the west, higher elsewhere.[95] In east Omaha, many residents lack health insurance; in west Omaha, most residents are insured.[96] Areas of high well-being according to various measures align, as do areas of relatively less well-being. In Omaha, west is better off than east, especially those areas in the east that abut the city center to the north and south.

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90. CENTER FOR PUBLIC AFFAIRS RESEARCH UNIVERSITY OF NEBRASKA OMAHA, *supra* note 10, at 19 (examining a high school graduation/GED). *Id.* at 22 (examining a bachelor's degree).

91. *See id.* at 25.

92. *See id.* at 31.

93. *See id.* at 43.

94. *See id.* at 46.

95. *See id.* at 37.

96. *See id*. at 52.

B. The (Racialized) History of Suburbia

These patterns did not just happen. Before World War II, Omaha extended west only as far as about 72nd Street.[97] Pre-war housing was relatively modest, on small lots, and accessible to central industrial and downtown areas by streetcar. Following the war, suburbanization came to the region.

Nationally, four factors fueled the explosion in suburban development.[98] First, federal subsidies for roads shifted the primary transportation mode to the automobile and opened up areas farther from traditional city cores for development.[99] Second, federally backed mortgages brought home-buying within the reach of many. Third, local policies and practices provided tracts of land capable of being subdivided for low-density residential development. Fourth and finally, the post-war baby boom led to a surge in demand for homes to accommodate families with children. All but the last of these factors were the direct products of government policy and action. These four factors explain the suburban growth of the Omaha-Council Bluffs region, and they explain why housing built farther from the city center is larger, less dense, and less accessible. They do not explain why this development proceeded predominantly westward. Nor do they explain the racialized character of suburban development.

As to the "why west?" question, former Omaha City Planner Steve Jensen suggests that part of the reason was the historical westward focus of the city. The city, as the eastern terminus of Union Pacific, was from the beginning oriented in the direction of the construction of the Transcontinental Railroad. This orientation contributed to close ties between city founders and the State of Nebraska, closer than their ties with the City of Council Bluffs or the State of Iowa. Another part of the reason, according to Jensen, is the large Papio River watershed that extends west from the Missouri River and encompasses most of Douglas County, which facilitates connecting development into a single sewer network.

As to the racialized pattern of suburban development, the Federal Housing Administration, the agency responsible for determining the parameters for underwriting home-buying mortgages, explicitly disfa-

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97. Numbered streets on the Nebraska side run north-south, start at the Missouri River in the east, and march westward. To the west, the Omaha city limits currently reach well past 200th Street.

98. Peter Hall, Cities of Tomorrow 291-94 (4th ed. 2014).

99. Interstate 80, which links New York City and San Francisco east-west, comes into Council Bluffs from the northeast, passes south of the Omaha city center, and heads west and south toward Lincoln. Interstate 29, running north-south between North Dakota and Kansas City, passes through Council Bluffs on the Iowa side of the river.

vored neighborhoods with Black residents.[100] The Home Ownership Loan Corporation ("HOLC") prepared Security Maps for all 259 cities in the United States with more than 40,000 residents as of 1930.[101] In all of those cities, maps with green ("best"), blue ("still desirable"), yellow ("definitely declining"), and red ("hazardous") zones both affirmed residential segregation by race and made race the primary determinant of where and for whom federal funds would subsidize home-buying and wealth creation—and where and for whom they would not.[102] The federal maps, originally informed by local practices and judgment, in turn affirmed and channeled the actions of those same local officials and local lending institutions in allocating financial support for development and home-buying going forward.[103] Whites enjoyed broad suburban horizons and access to federally backed mortgages; Blacks did not.

In Omaha, three areas were redlined on the 1936 HOLC map—an area north of the central city that was predominantly Black, a large area south of the stockyards to the south of the central city where workers from the stockyards lived, and a small area to the north of the stockyards that was occupied by a brewery. A single large area, hermetically sealed off and protected by the blue and yellow from the red, was given the green light. This green area begins with a small rectangle in the east at 36th Street between Cuming and Leavenworth Streets and widens out around 42nd Street to a large block between Center and Blondo Streets that extends all the way to 72nd Street.[104] When one looks at the map, the momentum of this green block toward the west and away from the neighborhoods to the east is palpable.

Geography and founding history may have set the stage for Omaha's westward orientation, and local practices of racial discrimination in housing may have provided the scenery and the props. It was the federal government acting through the HOLC, however, that wrote the script and produced the play. The green light for federally subsidized mortgages beckoned White residents west, and they responded.

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100. JACKSON, *supra* note 49, at 203-18.

101. Charles M. Torrance & Flora B. Hudson, *HOLC City Survey Program* (Dec. 31 1957), National Archives Building, Washington, DC (certified copy on file with author).

102. JACKSON, *supra* note 49, at 203-04 (describing HOLC defining process and criteria); *see also* MAPPING INEQUALITY: REDLINING IN NEW DEAL AMERICA, http://dsl.richmond.edu/panorama/redlining/#opacity=0.8&loc=10/42.7258/-87.8089&city=176 (last visited Nov. 11, 2016).

103. JACKSON, *supra* note 49, at 214. "[A]s urban analyst Jane Jacobs has said, 'Credit blacklisting maps are accurate prophecies because they are self-fulfilling prophecies.'" *Id.*

104. And a skinny green pipestem north along Fontenelle Boulevard (46th Street) reaching up to the golf course bounded by Ames Avenue on the north.

C. The Heartland 2050 Fair Housing Equity Assessment

A Fair Housing Equity Assessment ("FHEA") prepared in Spring 2015 as part of the Heartland 2050 Sustainable Communities grant administered by Omaha's Metropolitan Area Planning Authority ("MAPA") previews what we might see in the Omaha-Council Bluffs AFFH Mirror.[105] The FHEA covers five counties in eastern Nebraska and three counties in western Iowa. This eight-county area, the "Heartland Region," is centered on the Omaha-Council Bluffs metro area, which consists of Douglas and Sarpy Counties in Nebraska and the City of Council Bluffs and an area around its perimeter in Pottawattamie County in Iowa.

The cities of Omaha in Douglas County (2010 city population of 408,958) and Council Bluffs in Pottawattamie County (2010 city population of 62,230) form the urban core of the region. Sarpy County, to the immediate south of Douglas County in Nebraska, is the fastest-growing county in the Heartland region with 30% population growth between 2000 and 2010, though Douglas County gained more residents in that period.[106] Of the population growth in Douglas County, only about a third was inside the Omaha city limits.[107] Overall, the FHEA concluded, "the majority of population growth is in suburban and exurban areas."[108]

Demographically, the Heartland Region is aging.[109] It is also becoming less White, racially and ethnically, though even Douglas County, which is home to 90% of the region's Black population and 75% of its Hispanic population, remained 72% non-Hispanic White in 2010.[110] Hispanics are the fastest-growing group.[111] By 2040, the year around which the United States Census Bureau projects that the United States will become minority non-Hispanic White, Douglas County is projected to be over 50% people of color, while Sarpy and Pottawattamie Counties are projected to be in the 30-49% range.[112]

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105. *See About Us*, Partnership for Sustainable Communities, www.sustainablecommunities.gov/mission/about-us (March 2, 2015) (providing description of Sustainable Communities, an interagency HUD-DOT-EPA partnership).

106. Beth Goodman & Bob Parker, *Fair Housing and Equity Assessment: Heartland 2050*, Spring 2015, at 16. [hereinafter *FHEA*]. Douglas County added 53,525 additional residents compared to 36,245 for Sarpy County. *Id.*

107. *Id.* at 16 (highlighting the population growth of 18,951 inside Omaha and population growth of 53,525 outside of Omaha for Douglas County).

108. *Id.*

109. *Id.* at 17 (explaining much of this shift is due to the aging of the baby boomer generation, which started turning 65 in 2011).

110. *Id.* at 18.

111. *Id.*

112. PolicyLink & Program for Environmental and Regional Equity, Equitable Growth Profile of the Omaha-Council Bluffs Region, 12 (2014), http://nationalequityatlas.org/sites/default/files/Omaha_Council_Buffs_Profile_Final.pdf.

Minority populations in the region are concentrated in Douglas County, and they are further "concentrated in Omaha, with the highest concentrations on the east side of Omaha."[113] The FHEA describes how the region's Black population is concentrated in one small area in northeast Omaha: "In 2010, 68% of people who lived in the North Omaha cluster were Black. One-quarter of the region's Black population lived in these [eleven] census tracts in 2010."[114] In contrast, the five rural counties in the Heartland Region are all at least 95% non-Hispanic White; Pottawattamie County is 90% non-Hispanic White (Council Bluffs is 87%), and Sarpy County is 84% non-Hispanic White.[115]

Further, all counties in the Heartland Region except Douglas County are more White than income alone would predict. The FHEA's Race and Income Index, which gauges "non-economic drivers of segregation . . . indicates that non-economic factors play a stronger role in the housing choices of Black households than for other minority groups."[116] The history of residential segregation by race and redlining in Omaha affirms the presence of these "non-economic factors." In short, housing segregation in the region is not just about economics—it is about race.

The FHEA assesses not only concentrations of minority populations generally, but also concentrations of minority residents who are poor. The FHEA thus identifies Racially Concentrated Areas of Poverty ("RCAP") and Ethnically Concentrated Areas of Poverty ("ECAP") in the region.[117] Reflecting historical Black-White housing segregation and differential access to housing wealth, the largest RCAP in the region is the predominantly Black "North Omaha RCAP Cluster," centered in the area formerly known as the "Near North Side." The nucleus of this RCAP is the northernmost redlined area on the 1936 HOLC Security Map. A smaller RCAP/ECAP cluster in east central Omaha is racially mixed, and another even smaller ECAP in east southern Omaha is majority Hispanic and lies within the southernmost redlined area on the 1936 HOLC Security Map. The FHEA observes that recent demographic shifts in these two tracts "suggest

113. *FHEA*, *supra* note 106, at 19.

114. *Id.* at 78. The North Omaha cluster is the largest of the region's Racially Concentrated Areas of Poverty ("RCAP"). *Id.*

115. *Id.* at 18. The five rural counties in the Heartland Region are: Harrison, Mills, Cass, Saunders, and Washington. *Id.*

116. *Id.* at 61, 63.

117. *Id.* at 72. Defined as more than 50% minority and more than three times the average family poverty rate for the metro area (3 times 9.1% = 27.3% in 2010).

White flight."[118] Whites are moving out, which increases minority concentrations.

The FHEA connects housing patterns with access to opportunity by analyzing the areas of concentrated poverty in terms of the stressors of poverty and environmental health hazard exposure and the assets of labor market engagement, job access, neighborhood school proficiency, and transit.[119] Overall, "[p]oor White people live in neighborhoods of higher opportunity than poor Black or Hispanic or Latino residents of the Heartland Region."[120] Focusing on children, the FHEA concludes that "for all major racial/ethnic groups, children in poverty live in neighborhoods of lower opportunity than the average Heartland resident."[121] Comparing the situations of poor children in the region on the basis of race and ethnicity, "White children are more likely to live in neighborhoods of similar opportunity access as the average for all Heartland residents."[122]

The FHEA also highlights concentrations of affordable and HUD-supported housing in Omaha, located primarily in eastern Omaha;[123] the lack of multi-family housing outside of Omaha and Council Bluffs;[124] and the overall scarcity of affordable housing: "[f]or every 100 residents that qualify for housing assistance, only [twenty-three] units are available."[125] Impediments[126] to "deconcentrating poverty and segregation" include barriers to lending: "Blacks and Hispanics are denied loans about twice as often as non-Hispanic White loan applicants."[127] In addition, the FHEA observes that "[s]ome people living in eastern Omaha may prefer to continue living in their existing neighborhood, where they are close to family and friends."[128] Interviews and surveys with Omaha Housing Authority residents, however, suggest that this comment may overstate the preference: 40.96% and 34.94% responded "Somewhat Agree" or "Neither Agree or Disa-

118. *Id.* at 82, 85 (explaining these areas include Park East and Southside Highland).
119. *Id.* at 91.
120. *Id.* at 116.
121. *Id.* at 117.
122. *Id.* at 116.
123. *Id.* at 37, 40, 130-31.
124. *Id.* at 27.
125. *Id.* at 128. Data from 2011-2013 actually indicate that there are only 19 units available for every 100 qualified residents—4,205 adequate, affordable, and available units for 21,902 extremely low income ("ELI") renter households (down from 37 per 100 in 2005-2007). *Mapping America's Rental Housing Crisis,* THE URBAN INSTITUTE, http://apps.urban.org/features/rental-housing-crisis-map/ (last visited Jan. 13, 2017) (suggesting to enlarge the map to the state of Nebraska and select Douglas County).
126. The FHEA was prepared under the AFFH Analysis of Impediments framework, prior to promulgation of the 2015 AFFH regulations.
127. *FHEA*, *supra* note 106 at 132.
128. *Id.*

gree" that it was their choice to live near a family or support system as opposed to seeking a desirable neighborhood; only 7.23% responded "Strongly Agree."[129]

Overall, the current picture painted by the FHEA accords with a history of institutional and social discrimination in housing. That discrimination literally confined Omaha's Black population to neighborhoods defined by underinvestment and a lack of wealth-building opportunities. More recently, Hispanic newcomers to the metro area have clustered in older, previously White ethnic neighborhoods in eastern Omaha, to the south of the city center.

D. White Insulation

Rubin's vase is a well-known visual in black and white: Depending on the color the observer focuses on, he or she discerns either a vase in the middle or two faces in profile oriented toward each other. Racially segregated housing offers a similar duality. One perspective, the more familiar focus adopted by the FHEA, highlights Black concentration and disadvantage. Another perspective, however, focuses on White insulation and advantage.

Over the same decades that Black residents of Omaha were shut out of the suburban housing market spreading to the west, White residents of Omaha moved to suburbia, bought houses, and built wealth in the form of home equity. White citizens of Omaha, like White citizens nationally, have accumulated advantage, while Black citizens of Omaha, like Black citizens nationally, have accumulated disadvantage. The flip side of the RCAP and ECAP identified in the FHEA is wealthy, predominantly White suburbs in western Omaha.

Accompanying the tangible relative racial and ethnic advantage and disadvantage of housing discrimination historically is physical, social separation: Racially segregated housing has isolated people of different races and ethnicities from one another.[130] The predominance of Whites in the Omaha-Council Bluffs region has led to Whites in particular being racially insulated. An Index of Exposure, not contained in the FHEA,[131] measures the percentage of people of various racial and ethnic groups that an average person of any racial or ethnic group is likely to encounter as neighbors.[132] The Index of Exposure at the census tract level for Whites in Omaha-Council Bluffs in 2000 was

129. *Id.* at 127.
130. *Id.* at 60-61.
131. *See id.* (explaining the isolation index, calculated only for non-White racial/ethnic groups).
132. *Racial Residential Segregation Measurement Project*, Population Studies Center, http://enceladus.isr.umich.edu/race/seg.html (last visited Jan. 13, 2017).

87.8, meaning that the average White person in the metro area was living in a census tract that was 87.8% White, 4.8% Black, and 4.6% Hispanic.[133] The average Black person in Omaha-Council Bluffs in 2000, in contrast, lived in a census tract that was 42.5% Black, 48.5% White, and 5.8% Hispanic.[134] The average Hispanic's census tract in 2000 was 19% Hispanic, 69% White, and 8.6% Black.[135] *Even though the Black and Hispanic populations are concentrated, Black and Hispanic metropolitan area residents are significantly more likely to encounter people of different races as neighbors than are White residents.*

The racial insulation of Whites in Omaha that resulted from racial segregation and housing discrimination was not imposed by outside institutions on unwilling White residents. The area in North Omaha that was redlined on the 1936 HOLC Security Map had been created as a concentration of Black citizens by local actions before the HOLC map-drawer came to town. The map "was compiled with the advice of the best real estate men in the city and [was] their composite opinion of security gradings."[136] An Appendix to the HOLC Omaha report lists the bankers and realtors interviewed.[137] The federal government transmuted pre-existing local practice into binding national policy.

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133. *Id.* (suggesting to select "Get Segregation Indexes," followed by "U.S. Metropolitan Areas," then "Proceed with query," then "Midwest," and "Proceed with query." Lastly, select "Omaha, NE-IA MSA" and "Proceed with query."). Other metro areas in the middle of the country considered as comparators in the FHEA had generally comparable or lower Index of Exposure values for White/White insulation, with only Des Moines having a higher value: Des Moines: 90.7%; Grand Rapids: 86.4%; Salt Lake City: 86.2%; Wichita: 84.6%; Little Rock: 83.1%; Tulsa: 78.5%; and Oklahoma City: 78.1%. *See id.* (suggesting to follow the same directions, replacing only city names). *See also*, *Omaha-Council Bluffs, NE-IA Metropolitan Statistical Area*, DIVERSITY AND DISPARITY, http://www.s4.brown.edu/us2010/segregation2010/msa.aspx?metroid=36540 (last visited Nov. 11, 2016). According to this more recent source, White exposure to Blacks and Hispanics rose between 2000 and 2010, from 4.8% to 5.8% and from 4.3% to 6.9% respectively. *Id.* For even smaller neighborhood areas, block groups and blocks, the isolation is higher for all races. For example, the average Omaha-Council Bluffs Black resident in 2000 lived in a census tract that was 42.5% Black, in a block group that was 45.4% Black, and on a block that was 51.2% Black. Similarly, the average Hispanic resident in the metro area lived in a census tract that was 19% Hispanic, in a block group that was 21% Hispanic, and on a block that was 28.5% Hispanic. *Id.*

134. *Id.* According to a more recent source, Black exposure to Whites and Black exposure to Hispanics rose between 2000 and 2010, from 49.2% to 51.7% and from 5.8% to 9.7%, respectively. *Id.*

135. *Id.* According to a more recent source, Hispanic exposure to Whites fell between 2000 and 2010, from 69% to 60.4%, while Hispanic exposure to Blacks rose slightly in the same period, from 9.2% to 9.5%. *Id.*

136. Summary: Survey of Omaha, Nebraska, Mortgage Rehabilitation Division 7, Mar. 25, 1936, National Archives Building, Washington, DC. (certified copy on file with author).

137. Appendix: Survey of Omaha, Nebraska, Mortgage Rehabilitation Division 7, Mar. 25, 1936, National Archives Building, Washington, DC. (certified copy on file with author).

Forty years later, in *United States v. School District of Omaha*,[138] the 1975 decision ordering the desegregation of the Omaha Public Schools despite the absence of *de jure* school segregation, the United States Court of Appeals for the Eighth Circuit explicitly found that "the segregated housing patterns in the city . . . were the result of discriminatory state *and private* actions."[139] The brief history of housing discrimination in Omaha sketched by the Eighth Circuit extended from before World War II to "at least from 1965 through 1968."[140] In the latter period, "[a]pproximately one-third to one-half of multiple listing cards"[141] indicated that sellers did not want to sell homes to minorities, and "[i]n the late 1960's sellers were given an option by the realtors to cross out a sentence banning discrimination in listing agreements."[142]

Further, the Eighth Circuit's 1975 description of an increase in Black residents in neighborhoods surrounding the historically Black neighborhoods in northeast Omaha as an "'encroachment pattern'"[143]—in quotation marks in the court's opinion with no source cited—highlights the aversion of Omaha Whites to integrated neighborhoods historically. The implication by the Eighth Circuit accords with the nonverbal message of voluntary separation of Whites contained in the 1936 HOLC Security Map. Decades of actions taken by many White citizens of Omaha to avoid living near Black citizens created the foundation for racial and ethnic residential insulation of White citizens today.

IV. THE FULL-LENGTH OMAHA REFLECTION: ANNEXATION – WESTWARD HO!

A former colleague here at Creighton University School of Law who lives in an upscale yet close-in area of Omaha,[144] used to jokingly refer to visiting friends in western Omaha as "going to Wyoming." Though there is a difference of a few hundred miles between going to "West O" and traveling to Wyoming, both entail getting on Interstate-

138. 521 F.2d 530 (8th Cir. 1975).

139. United States v. Sch. Dist. of Omaha, 521 F.2d 530, 534 (8th Cir. 1975) (emphasis added).

140. *Sch. Dist. of Omaha*, 521 F.2d at 534.

141. *Id.* at 534-35.

142. *Id.* at 534.

143. *Id.*

144. This area, the Dundee area, is shaded green on the 1936 HOLC Security Map. Today, Warren Buffett's Omaha home is in this part of the City.

80 and driving west. Both journeys also land you in a place that is Whiter than where you started.[145]

This section explores how the legal structure of annexation has both propelled and contained the centrifugal and centripetal forces of Omaha's westward suburbanization. After a brief survey of the broader debate between localist and regionalist perspectives on central cities and their regions, the section examines the specific history and practice of annexation in Omaha. This background sets the stage for the discussion of the fair housing implications of specific development arrangements that follows.

A. Localism versus Regionalism

Two conflicting perspectives exist in the legal, public policy world as to the desirability of metropolitan regions being divided into separate local jurisdictions. Each perspective highlights certain aspects of the political and fiscal dynamics that occur among jurisdictions within metropolitan areas. Each perspective is grounded in the laws of various states that provide for municipal incorporation of new cities on the one hand and annexation of land by existing cities on the other.

A localist perspective emphasizes the self-determination, citizen participation, and community-building function of local political life. In this view, local jurisdictions are the valuable cornerstone of democracy because they provide a range of opportunities for citizens to develop and practice participatory skills and to deepen civic commitment through action. At the local level, residents are drawn into active citizenship by engaging with their local governing bodies.[146]

In addition to these political benefits, the localist view asserts that numerous jurisdictions promote efficiency by enabling a broad range of packages of goods and services among which consumer-residents can choose by moving to one or another local jurisdiction. Some prospective residents may choose good schools and higher tax rates while others will opt for few services and a low financial commitment. This economic view, first articulated by Charles Tiebout in 1956, assumes full information about the local entity "products" as well as full information and mobility on the part of residents.[147] Sher-

145. *QuickFacts: Wyoming*, United States Census Bureau, http://www.census.gov/quickfacts/table/PST045215/56 (last visited Nov. 11, 2016). Wyoming's Non-Hispanic White population was 84% in 2015. *Id.*

146. *See, e.g.*, Jerry Frug, *Decentering Decentralization*, 60 U. Chi. L. Rev. 253, 273-79 (1993). *See also, e.g.*, Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing Barriers to the New Regionalism*, 88 Geo. L.J. 1985, 1996 n.44 (2000).

147. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, 418-20 (1956).

yll Cashin summarizes Tiebout's idea: "In other words, local autonomy increases the likelihood that public goods are tailored to local tastes and demands."[148] Though Tiebout's assumptions do not match real life—he assumes, for example, that all consumers live on dividend income and thus have no need of employment—his work does capture the competition and variation that exist between neighboring jurisdictions within a region.

The regionalist perspective, in contrast, highlights the harms that unfettered localism inflict on a region as a whole.[149] At the regional scale, jurisdictional fragmentation encourages local governments to engage in self-interested actions that have negative externalities. This is one effect of interlocal competition, another unfortunate reality that Tiebout's thesis assumes away. Exclusionary zoning by one locality, for example, may leave few options for citizens deemed less desirable or more costly. These excluded citizens may end up able to access only a few of the region's localities, which both restricts their choice and results in uneven distribution of needs and resources within the region. Moreover, community building at a very localized level may occur at the expense of community building at a metropolitan level—localism can thus interfere with collective action to address regional challenges.[150] In the regionalist's view, though there may be benefits to localism, they are outweighed by its distributive fallout and negative consequences at the regional level.

Generous municipal incorporation provisions in state law embody the localist perspective. Such provisions facilitate creation of a multiplicity of cities in a region, including suburbs that can surround and landlock a central city. Wielding their municipal taxing and land use authority, suburban cities can attract relatively wealthy and mobile residents needing relatively few services and make themselves unavailable to other residents.

Unchecked localism can result in concentrations of wealth and poverty in disparate jurisdictions within a metropolitan area. Cashin concludes that "localism benefits only the relatively affluent suburbs that are not constrained by service burden and declining tax bases."[151] As a result of unequal and inequitable development in metropolitan areas, so-called "favored quarters" emerge, and these areas,

148. Cashin, *supra* note 146, at 1996 n.45.

149. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 451 (1990). *See also, e.g.*, Cashin, *supra* note 146, at 1996, 2002-07.

150. *See* Richard Briffault, *Local Government Boundary Problems in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1156 (1996).

151. Cashin, *supra* note 146, at 2003.

"through disproportionate political influence, receive massive, disproportionate infrastructure investments that fuel their growth . . . ."[152]

Alternatively, expansive annexation powers grant central cities the quality of elasticity.[153] Central cities that have the ability to expand their reach by annexing unincorporated land in the path of development and even previously incorporated but smaller cities benefit both economically and politically.[154] Economically, annexation allows central cities to capture the tax base associated with upscale suburban growth. The suburbs of elastic central cities lie within city limits and contribute to city coffers rather than existing as separate incorporated municipalities with discrete budgets. Politically, a central city's ability to expand keeps different socioeconomic and racial or ethnic groups in one local polity. Though wealthier residents in newer outlying parts of the city and poorer residents in older inner-city neighborhoods may manifest different interests, they remain in political relationship and conversation in determining city policies and action.

David Rusk summarizes the cons of localism and the pros of elasticity:

> In general, the more highly fragmented a metro area is, the more segregated it is racially and economically. Smaller jurisdictions are typically organized to promote and protect uniformity rather than diversity. Conversely, areas characterized by geographically large, multi-powered governments and more unified school systems tend to promote more racial and economic integration and achieve greater social mobility.[155]

Elastic central cities, according to Rusk, are more likely to remain on an even economic keel and to be integrated and equitable along racial and socioeconomic lines.[156] Further, the fates of central cities and their suburbs are linked, with wealth disparities impeding progress for the region overall.[157]

Building on an understanding that "[i]ntra-regional fragmentation both originates from and exacerbates existing social stratification and weak economic growth profiles[,]"[158] Christopher Tyson empha-

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152. *Id.*

153. DAVID RUSK, CITIES WITHOUT SUBURBS 20-22 (1993).

154. *Id.* at 5-49 (enumerating ways in which elasticity benefits cities and metropolitan regions).

155. *Id.* at 34.

156. *Id.* at 29-38, 41-43.

157. *Id.* at 31-33, 40-41. *See also* CHRIS BENNER & MANUEL PASTOR, EQUITY, GROWTH, AND COMMUNITY: WHAT THE NATION CAN LEARN FROM AMERICA'S METRO AREAS 30-31 (2015); MANUEL PASTOR ET AL., REGIONS THAT WORK: HOW CITIES AND SUBURBS CAN GROW TOGETHER 2-4 (2000).

158. Christopher Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 518 (2012).

sizes the importance of annexation to mid-size metropolitan areas with regional populations between one-half and two million.[159] For these metropolitan areas in particular, annexation has the "potential to both strengthen regional economic development efforts and curb the continued growth in race and class stratification."[160]

According to Tyson, mid-size metropolitan areas face the challenges associated with global economic competition without some of the assets of larger regions, assets such as international visibility and "symbolic scale–the scale of history and cultural narrative."[161] Development patterns also differ: mid-size regions, which mostly developed in the twentieth century,[162] "generally follow low-density, decentralized, automobile-oriented land use patterns."[163] Consistent with this overall low density, mid-size regions exhibit a "relative lack of activity in the central city core."[164]

Yet mid-size cities are similar to larger cities in being metropolitanized. "Metropolitanization is the process by which a central city evolves to become a component of a larger regional entity that includes outside environs—suburbs, exurbs, and surrounding rural areas—that are tied to the central city by employment, commerce, mass communications, economic interdependence, and cultural and identity ties."[165] In a global world, metropolitanization means that economic development occurs at the regional level rather than at the level of individual localities. Mid-size regions are also like large metropolitan areas in that the central city "must be healthy, vibrant, and ripe for economic possibility if the region is to prosper."[166] Without the advantages enjoyed by large central cities, Tyson concludes, mid-size metropolitan regions especially benefit from the intra-regional economic cooperation that is facilitated by an elastic central city fueled by annexation.[167]

159. *Id.* at 523. Tyson's conclusions are based on case studies in three states, which correlate better central-city annexation prospects with more thriving mid-size metro areas: Mississippi (poor annexation prospects); Tennessee (judicially supported annexation recognizing the importance of annexation to urban well-being); and North Carolina (statute giving strong annexation prerogatives to central cities). *Id.* at 541-60.

160. *Id.* at 520.

161. *Id.* at 522.

162. *Id.* at 525.

163. *Id.* at 524.

164. *Id.* at 525.

165. *Id.* at 527.

166. *Id.* at 529.

167. *Id.* at 560.

With a population between 900,000 and one million,[168] the Omaha-Council Bluffs region fits squarely within Tyson's mid-size metropolitan region range. The region developed in the second half of the twentieth century and reflects "low-density, decentralized, automobile-oriented land use."[169] The City of Omaha is part of a larger metropolitan region, and Omaha's health affects regional health. In this view, annexation is highly important to the well-being and resilience of both the City of Omaha and the region overall.

B. Bringing Omaha Into Focus

For almost a century, the City of Omaha has been an elastic central city by virtue of its extensive annexation authority. In 1985, the Omaha Planning Department reported that

> [s]ince 1854 [when it was founded], the City has grown from a town of [twenty] homes to a city of over 100 square miles with [an extra-territorial] jurisdictional area of an additional 100 square miles.[170] Much of this expansion occurred since World War II, as the city more than doubled in size after 1950.[171]

In the three decades since 1985, the City has continued to annex at a robust rate: through five annexations since 2010 alone, for example, Omaha gained over 40,000 residents.[172]

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168. *Omaha-Council Bluffs-Fremont, NE-IA CSA*, Census Reporter, https://censusreporter.org/profiles/33000US420-omahacouncil-bluffsfremont-neia-csa/ (last visited Nov. 12, 2016). The 2015 population of the region was 952,263. *Id.*

169. Tyson, *supra* note 158, at 524.

170. Bruce McKendry, *The Evolution and Interpretation of the Annexation Authority of the City of Omaha—A Statutory Search for Legislative Intent*, 19 Creighton L. Rev. 311, 313 n.11 (1986) (citing Omaha City Planning document). The City of Omaha's extraterritorial jurisdiction ("ETJ") extends out to "three miles of the corporate limits of any city of the metropolitan class." Neb. Rev. Stat. § 14-116 (2012). Within this extraterritorial jurisdiction, Omaha has the power to regulate development by setting infrastructure requirements and to "prescribe standards for laying out subdivisions in harmony with a comprehensive plan." *Id.*

171. McKendry, *supra* note 170, at 313 n.11.

172. In 2011 and 2012, Omaha annexations brought in about 7,000 and 6,500 people respectively. Christopher Burbach, *Omaha Mayor Stothert proposes largest annexation since 2007, when city took over Elkhorn*, Omaha World-Herald (July 10, 2014), http://www.omaha.com/news/metro/omaha-mayor-stothert-proposes-largest-annexation-since-when-city-took/article_4af052c2-840f-5a70-979d-7a85de785214.html. In 2014, Omaha annexed 18 areas containing 8,700 residents. Christopher Burbach, *Omaha City Council OKs 18 of Stothert's 19 proposed annexations, continuing growth west and south*, Omaha World-Herald (Aug. 20, 2014), http://www.omaha.com/news/metro/omaha-city-council-oks-of-stothert-s-proposed-annexations-continuing/article_eed56b62-27c9-11e4-a000-0017a43b2370.html. In 2015, Omaha annexed 16 areas with almost 12,000 residents. Christopher Burbach, *Omaha growing: Council OKs plan to add 16 areas, nearly 12,000 people,* Omaha World-Herald (Aug. 12, 2015), http://www.omaha.com/news/metro/omaha-growing-council-oks-plan-to-add-areas-nearly-people/article_441d7122-bb55-5a36-828a-d539026c4eff.html. In 2016, Omaha annexed seven areas containing about 6,000 residents. Roseann Moring, *Council OKs Stothert's annexation plan; 6,000 people will become Omaha residents*, Omaha World-Herald (Aug. 10,

Omaha's remarkable and continuing elasticity results directly from the unusually generous annexation powers granted to the city under Nebraska law. Several aspects of these powers contribute to their expansive nature. The first sentence of the applicable state annexation statute, Nebraska Code Section 14-117, declares: "The corporate limits of any city of the metropolitan class shall be fixed and determined by ordinance by the council of such city."[173] Omaha is a "city of the metropolitan class,"[174] and this procedural provision of the annexation statute thus authorizes the Omaha City Council to unilaterally annex qualifying areas. The statutory process makes no mention of a procedural requirement, common to annexation statutes, for approval by voter referendum.[175]

The provision takes at its word the 1907 seminal United States Supreme Court opinion in *Hunter v. Pittsburgh*,[176] in which the Court upheld the City of Pittsburgh's annexation of the City of Allegheny against a Due Process challenge.[177] The *Hunter* Court described the state's power to adjust municipal boundaries in absolute terms:

> The number, nature, and duration of the powers conferred upon [municipal corporations] and the territory over which they shall be exercised rests in the absolute discretion of the state . . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.[178]

2016), http://www.omaha.com/news/metro/council-oks-stothert-s-annexation-plan-people-will-become-omaha/article_0b835061-9cc7-5f46-810e-6a0e7bc3479c.html.

173. NEB. REV. STAT. § 14-117 (2012).

174. *See* NEB. REV. STAT. § 14-101 (2012) (defining cities of the metropolitan class as "cities in this state which have attained a population of three hundred thousand inhabitants or more"). Omaha has over 400,000 residents. *FHEA*, *supra* note 106, at 16 (using 2010 census data). Though Omaha is the only "city of the metropolitan class" in the state, the general language of the statute avoids legal prohibitions against special legislation, laws passed by a state legislature that apply to only one locality. Article III, Section 18 of the Nebraska State Constitution prohibits "local or special laws," including laws "Incorporating Cities, Towns and Villages, or changing or amending the charter of any Town, City, or Village." NEB. CONST. art. III, § 18. The special legislation prohibition, under Nebraska law, "aims to prevent legislation that arbitrarily benefits a special class." J.M. v. Hobbs, 849 N.W.2d 480, 489 (Neb. 2014). *See also* City of Millard v. City of Omaha, 177 N.W.2d 576, 580 (Neb. 1970) (applying special legislation prohibition to annexation of city regardless of whether it had home rule charter).

175. Referendum requirements themselves, however, can be weighted in favor of either the annexor or the potential annexee. *See* GERALD FRUG, RICHARD FORD & DAVID BARRON, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 410-11 (6th ed. 2015) (describing voting variations for annexation).

176. 207 U.S. 161 (1907).

177. Hunter v. City of Pittsburgh, 207 U.S. 161, 180 (1907).

178. *Hunter*, 207 U.S. at 178-79. The full passage reads as follows:

The Nebraska State Legislature has delegated that power for the City of Omaha entirely to the City itself[179] and, more specifically, to the City Council alone.[180] The City Council votes, and annexation is a *fait accompli*.

Having described the annexation process by the City of Omaha, section 14-117 turns to the substantive contours of the power:

> The city council of any city of the metropolitan class may at any time extend the corporate limits of such city over any contiguous or adjacent lands, lots, tracts, streets, or highways, such distance as may be deemed proper in any direction, and may include, annex, merge, or consolidate with such city of the metropolitan class, by such extension of its limits, any adjoining city of the first class having less than ten thousand population or any adjoining city of the second class or village.[181]

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Id. The Supreme Court has not overruled *Hunter*, though subsequent decisions are less extreme in their language. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) ("While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases . . . we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that states have in creating various types of political subdivisions and conferring authority upon them.").

179. By delegating decision-making authority over annexations to the Omaha City Council, the state legislature avoids potential special legislation prohibitions that might arise were it to itself determine city boundaries and decide annexation matters. The state may have absolute control as a matter of federal law under *Hunter* over the configuration of local jurisdictions and at the same time be constrained under state special legislation law in terms of the legislature adjusting boundaries in specific situations. Creating processes involving local referenda or delegating power to local bodies that are largely immune from legal challenge by affected residents emerge from the interaction of these two legal imperatives.

180. NEB. REV. STAT. § 14-117.

181. *Id.*

The language is sweeping: "at any time," "such distance as may be deemed proper," and "in any direction" describe plenary power as well as multiple and unlimited horizons. In keeping with this expansiveness, Omaha as a "city of the metropolitan class" may annex adjoining cities or villages that are already distinct incorporated entities. Neither a referendum nor vote is required. Any city with a population of less than ten thousand is fair game.[182]

One limitation to Omaha's expansive annexation power is its inability to annex across county lines. The Nebraska Supreme Court imposed this boundary judicially in the 1966 decision *Barton v. City of Omaha*,[183] though the precise statutory basis for the Court's ruling is unclear.[184] In fact, when the state legislature adopted the "in any direction" language in 1917, the Omaha city limits already reached to the Sarpy County line to the south by virtue of the City's muscular and high-profile annexation of the City of South Omaha two years before.[185] And the concluding sentence of section 14-117, then and now, asserts: "Any other laws and limitations defining the boundaries of cities or villages or the increase of area or extension of limits thereof shall not apply to lots, lands, cities, or villages annexed, consolidated, or merged under this section."[186] By its plain language, section 14-117 takes precedence over all other boundary provisions, including the drawing of county lines.[187] The Nebraska Supreme Court, however, determined otherwise.[188]

Under the authority of section 14-117, the City of Omaha has annexed a series of former towns and incorporated cities: Beechwood, South Omaha, Dundee, Benson, Florence, Hayes, Millard, and Saratoga. Most recently, in 2005, Omaha annexed the City of Elkhorn on

182. NEB. REV. STAT. § 17-101 (2012) identifies cities of the second class as cities with populations over eight hundred and less than five thousand. NEB. REV. STAT. § 16-101 (2012) identifies cities of the first class as cities with populations between five and one hundred thousand. Between cities of the first class and cities of the metropolitan class are cities of the primary class (e.g. Lincoln) with populations between one and three hundred thousand. NEB. REV. STAT. § 15-101. Omaha's annexation power extends to all cities of the second class and those cities of the first class with populations less than ten thousand.

183. 145 N.W.2d 444 (Neb. 1966).

184. Barton v. City of Omaha, 145 N.W.2d 444, 446-47 (Neb. 1966) (denying the City of Omaha power to annex territory outside of Douglas County). *See also* McKendry, *supra* note 170, at 340-41.

185. McKendry, *supra* note 170, at 356 (detailing the map of annexations by City of Omaha); Emmett Hoctor, *Tom Hoctor and the Magic City: The South Omaha Annexation Fight: 1890-1915*, 64 NEBRASKA HISTORY 256 (1983) (describing quarter-century attempts by Omaha to annex and efforts by the then-separate city of South Omaha to resist annexation, which ended in annexation in 1915).

186. NEB. REV. STAT. § 14-117.

187. *See* McKendry, *supra* note 170, at 348.

188. *Barton*, 145 N.W.2d at 447.

its western frontier by annexing unincorporated area between the two cities and then capturing Elkhorn itself.[189] The account of the events surrounding that annexation given by the Nebraska Supreme Court in its opinion dismissing Elkhorn's legal objections reads like a cross between a melodrama and a horse race: The City of Omaha had its annexor eye on the City of Elkhorn, a city of the first class with a population of 7,623. Elkhorn secretly set in motion a process to itself annex land to grow over the magic, unannexable ten thousand population threshold. Omaha found out about the Elkhorn plan, and the Omaha mayor called a special annexation meeting of the City Council. Though neck in neck, Omaha managed to pass its annexation ordinance first, nosing out Elkhorn at the finish line!

How did Omaha achieve this annexation victory? The Nebraska Supreme Court summarized the trial court's findings as follows: "[T]he Legislature [gave] Omaha statutory priority over Elkhorn by requiring first class cities to fulfill more statutory requirements than metropolitan class cities and limiting first class cities' annexing authority to only urban and suburban land."[190] Therefore, according to the court, "Elkhorn ceased to exist as a separate municipality on March 24, 2005, the date that Omaha's annexation ordinance became effective."[191] The horse with the head start and smoother course wins the race.

More frequently than incorporated cities or villages, Omaha annexes unincorporated areas already developed and primed to be folded into the city. In 2014, for example, Omaha Mayor Jean Stothert proposed eighteen unincorporated areas for annexation, of which the City Council approved seventeen: "[thirteen] residential neighborhoods, four business parks, and a piece of farm ground."[192] In 2015, the mayor proposed seventeen unincorporated areas for annexation, of

189. City of Elkhorn v. City of Omaha, 725 N.W.2d 792, 798 (Neb. 2007).

190. *City of Elkhorn*, 725 N.W.2d at 801.

191. *Id.* at 811.

192. The Miracle Hill golf course was proposed but not approved. Burbach, *supra* note 172 (Aug. 20, 2014). There is a discrepancy between the headline of the Omaha World-Herald article announcing that the City Council had OK'd eighteen of nineteen proposed annexations and the text of the article, which indicates that 17 of 18 proposed were annexed. *See also* Burbach, *supra* note 172 (July 10, 2014) (listing 18 areas proposed for annexation).

which the City Council approved sixteen.[193] The 2016 annexation included seven unincorporated areas.[194]

Most of these unincorporated areas were residential neighborhoods developed through Sanitary and Improvement Districts ("SIDs"), a form of special district that has predominated in the westward expansion of Omaha suburban development.[195] Described in greater detail in the next Part, SIDs are public entities that give private developers access to municipal bond financing to subsidize infrastructure for developing areas outside the city limits.[196] Operating to a significant degree as privatized governments, SIDs are governed by boards of directors that over time can transition from members chosen by the SID developer to residents of the neighborhood. Purchasing a home in an SID entails paying fees and property taxes to the SID to cover payments on the debt incurred for development. Upon annexation, property taxes may well decrease as the city assumes the SID's debt,[197] which contributes to widespread acquiescence to annexation on the part of SID residents.[198]

In recent annexations, service provision issues have been the primary focus of opposition. Residents of the areas to be annexed may object on the grounds that their existing privatized services are superior to those to be provided by the City of Omaha.[199] At the same time, City Council members representing older and less prosperous parts of Omaha have been concerned that the City is stretching services too thin and that their constituents will suffer.[200]

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193. *See* Roseann Moring, *Proposal targeting 17 areas for annexation is a money-maker for Omaha, Mayor Stothert says*, OMAHA WORLD-HERALD (June 22, 2015), http://www.omaha.com/news/metro/proposal-targeting-areas-for-annexation-is-a-money-maker-for/article_1cf305aa-168e-11e5-b3d9-dffc46d82c2c.html (listing seventeen proposed areas); Roseann Moring & Emily Nohr, *Some think Omaha's annexation would be a drain on city services*, OMAHA WORLD-HERALD (July 20, 2015), http://www.omaha.com/news/metro/some-think-omaha-s-annexation-would-be-a-drain-on/article_b8fc31d8-8013-5668-be59-c97f3c8e5c09.html (reporting that Mayor Stothert has "removed one area, Cinnamon Creek, saying that area would cost too much"); Burbach, *supra* note 172 (Aug. 12, 2015).

194. Moring, *supra* note 172.

195. *See, e.g.*, Burbach, *supra* note 172 (July 10, 2014) (referring to SIDs in areas to be annexed); Burbach, *supra* note 172 (Aug. 12, 2015) (stating that fifteen of sixteen annexed areas in 2015 were SIDs).

196. *See infra* notes 201-226 and accompanying text.

197. *See* Burbach, *supra* note 172 (July 10, 2014) (explaining that Omaha would take on remaining debt and "[p]roperty taxes would go down in most of the annexed areas . . . because the City of Omaha tax levy is lower than the levy for most of the affected SIDs"). *See also* Moring & Nohr, *supra* note 193. "Almost all the areas would see a property tax decrease . . . ." *Id.*

198. There may also be an expectation on the part of SID residents outside the city limits that "SIDs are intended to become part of the city eventually, and that it's just a matter of when." Moring & Nohr, *supra* note 193.

199. *Id.*

200. *Id.*

Notwithstanding these concerns, Omaha has benefited and continues to benefit from annexation. Unlike central cities that are trapped by incorporated suburbs, which can lead to wealthy enclaves that avoid fair-share economic contribution to regional well-being, Omaha has been able to capture revenues associated with the sprawling suburban areas within Douglas County to the west of the city center. With these fiscal benefits comes the political advantage of substantial parts of the region being connected in a single local government entity. Passed in 1917, the Omaha annexation statute has enabled the central city to protect its keystone role in the region for over a century.

V. A CLOSER LOOK—THE CURIOUS ROLE OF THE SID

Omaha's extensive annexation powers have enabled the City to capture much of the tax base associated with suburban development to the west. At the same time, public and affordable housing as well as poor and non-White residents remain clustered in eastern Omaha. At a macro scale, the City is similar to an "integrated" school in which poor and minority students are tracked into classes with less experienced teachers and less challenging curricula.[201]

As discussed above in Part III, concentrations of racial and ethnic minorities in low-income housing are a principal focus of the Fair Housing Equity Assessment ("FHEA").[202] The Affirmatively Furthering Fair Housing ("AFFH") mandate, however, goes beyond eradicating discrimination—beyond potentially invalidating increased concentrations of low-income and affordable housing. AFFH review considers also whether all people have the opportunity to live in all neighborhoods, including those favored with quality amenities such as good schools and jobs. AFFH thus looks also to measures not taken, to the creation of preserves of neighborhoods of opportunity in which affordable housing is the rare exception. The AFFH posture is to ask why, in such areas of opportunity, there exists insignificant stock of low-income housing, which renders these neighborhoods inaccessible to low- and moderate-income residents.

The concentration of more affordable housing in eastern Omaha results partly from more modest housing stock in older parts of the city. This concentration has been intensified by the more recent placement of low- and moderate-income housing in these same older parts of the city. This concentration also results, however, from a *lack* of

201. *See, e.g.*, JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (2d. ed. 1985) (documenting how tracking within racially desegregated schools channels lower-income and minority students to less challenging academic classes).

202. *See supra* notes 105-129 and accompanying text.

such housing being built in the newer, more westerly parts of the city. Actions that suppress affordable housing in one part of the city increase the housing differential just as effectively as actions that concentrate affordable housing in another part of the same city. Advantage and disadvantage are inseparable.[203]

The FHEA ascribes some of Omaha's concentration of affordable housing in the east to the resistance of existing residents in the west to the placement in their midst of low- and moderate-income housing and the people who would live in that housing—the Not In My Back Yard ("NIMBY") phenomenon.[204] Yet the status quo of little affordable housing in western Omaha did not come into existence by virtue of hostile neighbors. Current suburban developments in the western part of the metropolitan area were built without affordable housing when there were no existing neighbors: The cornfields that existed when these neighborhoods were originally built did not object to any housing, affordable or otherwise.

Rather than being a response to NIMBY opposition, the prevailing status quo of little affordable housing in western Omaha emerged out of the operation of the institutional structures of development. Predominant among these structures is the SID, which is the primary legal vehicle for suburban development and eventual annexation in Douglas and Sarpy Counties.[205] The lack of affordable housing that exists in western Omaha is a direct result of an SID+annexation development regime that remains largely in place today. Part of Omaha's reflection in the AFFH Mirror, in fact, reveals that legal structures that appear to be neutral actually have played a key role in creating the housing disparities that exist. This Part of the article describes the SID+annexation development regime in greater detail and examines its negative effects on fair housing.

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203. *See* Strand, *supra* note 12, at 485-502 (describing both White advantage and Black disadvantage aspects of racial wealth disparities); Strand, *supra* note 75, at 771-79 (identifying implicit bias and structural racism as Black disadvantage and White Privilege and government wealth-building programs that benefitted predominantly Whites as White advantage).

204. *See FHEA*, *supra* note 106, at 133.

205. The SID legal structure is not available in Iowa, so development in Council Bluffs proceeds via other institutional arrangements. RALPH TODD ET AL., THE SANITARY IMPROVEMENT DISTRICT AS A MECHANISM FOR URBAN DEVELOPMENT 49 (1975), http://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1005&context=cparpubarchives [hereinafter *UNO Report*]. *See also* Deena Winter, *Nebraska is King of Chapter 9 bankruptcies – how'd that happen?*, NEBRASKA WATCHDOG.ORG (July 26, 2013), http://watchdog.org/97793/nebraska-king-of-chapter-9-bankruptcies-howd-that-happen/ (noting that the City of Lincoln does not use SIDs as a vehicle for development). Winter quoted Melvin Krout, Lincoln's planning director, referring to SIDs as a "'Ponzi scheme'": "While SIDs may be 'terrific' for developers, attorneys, engineers and bonds people, Krout said, he doesn't think they're a good deal for homeowners. 'The homeowners get stuck with a pretty high bill, comparatively, for infrastructure,' he said." *Id.*

A. SIDs

Though Omaha's annexation of other, smaller cities such as Elkhorn makes the headlines, the fine print reads differently. As with the 2014, 2015, and 2016 annexations, most of the land that Omaha has annexed has been unincorporated.[206] Sort of.

In fact, most developed areas annexed by Omaha have lain within special districts known as SIDs. A 1975 report prepared by the Center for Applied Urban Research of the University of Nebraska at Omaha ("UNO") for the Nebraska State Legislature offers a concise summary of the origins of Omaha's SIDs:

> The history of the Sanitary Improvement District (SID) in Nebraska is closely tied to the history of urban development in the Omaha Metropolitan Area. The end of World War II freed the pent-up demand for new dwelling units in Nebraska as well as in the rest of the nation. Omaha's stock of platted lots was rapidly used up in the late 40's and pressures were great for opening up new areas. To meet the demand, new dwellings began to spring up on the fringes of the City, but altogether too many of these were served only by wells and septic tanks. As the housing boom developed it became clear that such utilities could not satisfactorily accommodate large concentrations of suburban populations. Yet the City found it difficult to extend water, sewer and other utilities to the new areas, partly because many existing areas of the City were not provided with such services and political necessity demanded that these needs be met first. Consequently, neither the developers nor the City had the organizational capacities or the financial resources to urbanize these fringe areas properly.[207]

State legislation passed in 1949[208] laid the legal foundation for the suburban SID-based expansion of Omaha and the extensive post-World War II annexation described in Part IV. The crux of the SID approach was the provision of "capital to developers through tax-exempt government financing devices (warrants and bonds) so develop-

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206. *See* John Minahan, Comment, *Nebraska Sanitary and Improvement Legislation*, 5 CREIGHTON L. REV. 269, 289 (1972) ("it is estimated that some 90% of new residential development outside the city limits are through [the SID] vehicle."). To the present, since the Elkhorn annexation in the mid-2000s, all Omaha annexations have been of unincorporated areas, though many of them are SIDs. *See supra* notes 171-173 and accompanying text.

207. *UNO Report*, *supra* note 205, at vii.

208. Minahan, *supra* note 206, at 269, 271-74. Enabling legislation for Sanitary and Improvement Districts was passed in 1947, and began to gain widespread acceptance after a second SID Act was passed in 1949. Amendments were made in the 1960s. *Id.*; *UNO Report*, *supra* note 205, at vii.

ers could install standard-quality improvements in their developments."[209]

Though the SID private control/public financing approach to development has been modified to allow for greater oversight by the City since the 1950s and 1960s, private initiative in development through SIDs remains the norm in Omaha today.[210] Approximately 158 unannexed SIDs exist currently in Douglas County alone.[211] Further, SIDs perform the same development function in Sarpy County.[212]

Public financing of improvements through SIDs occurs in two stages.[213] SIDs issue warrants in the initial stages of development to cover costs as they are incurred.[214] Then, once improvements are completed, SIDs levy both general taxes and special assessments on the parcels within district boundaries that benefit from improvements.[215]

In practice, providing developers with public financing "did not automatically lead to the installation of standard-quality improvements in new developments."[216] It took the exercise of the City of Omaha's regulatory authority within its extraterritorial (three-mile)

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209. *UNO Report*, *supra* note 205, at vii.

210. *See, e.g.*, *Sanitary and Improvement District (SIDs)*, NEBRASKA DOUGLAS COUNTY CLERK/COMPTROLLER, http://www.douglascountyclerk.org/sidinfo (last visited Nov. 14, 2016).

211. Telephone Interview with Cassie Paben, Deputy Chief of Staff – Economic Development, City of Omaha (July 13, 2016); *see also Sanitary and Improvement District (SIDs)*, *supra* note 210.

212. *UNO Report*, *supra* note 205, at viii (beginning in 1960s); *Sanitary and Improvement Districts (SIDs)*, SARPY COUNTY NEBRASKA, http://www.sarpy.com/clerk/sids.html (last visited Nov. 14, 2016). In contrast, SIDs have not been the preferred mode of development in Lincoln, the second-largest metropolitan area in the state. *See UNO Report*, *supra* note 205, at 15-16. Lincoln historically has guided development by annexing land and taking the lead in financing infrastructure improvements. *Id.* at 19 ("the City of Lincoln . . . is a prime example of the . . . development approach [of] public decisions on improvements and public financing . . . ."). At the time of the 1975 UNO Report, public control of infrastructure with private financing was "the prevailing mode of development throughout the rest of the nation." *Id.* at 16. The UNO Report noted, "Although the SID is credited with spurring the development of urban areas in Nebraska (particularly Omaha), urban development has taken place both in Nebraska and nationally without the SID mechanism." *Id.* at 19. The report concluded that robust growth in cities not using the SID approach "questions the purported superiority of the SID to other . . . development concepts." *Id.*

213. For more complete descriptions of SID formation and operation, see *UNO Report*, *supra* note 205, at 1-48; Minahan, *supra* note 206, at 274-89.

214. *See* Minahan, *supra* note 206, at 279-80; *UNO Report*, *supra* note 205, at 5 n.2; *Explanation of a SID – Sanitary and improvement District*, CBS HOME BLOG, (Aug. 24, 2010), http://blog.cbshome.com/explanation-of-a-sid-sanitary-and-improvement-district.htm#.V_z4cBYlOUo.

215. *See UNO Report*, *supra* note 205, at 37-48 (discussing SID financing, including apportionment of debt repayment to special assessments and general obligation financing).

216. *Id.* at 15.

zoning jurisdiction to accomplish that shift.[217] And, in addition to standard improvements such as roads, sewers, and other essential infrastructure, "[d]evelopers soon learned . . . that the SID mechanism permitted them to transfer much of the cost of sometimes very plush improvements such as private clubs to the public financing mechanism provided by the SID."[218]

Though SIDs are vehicles for development of land by private entities,[219] they are public districts authorized by state statute.[220] SIDs have the power of eminent domain.[221] SIDs have the fiscal authority to impose special assessments and to issue general obligation bonds that enjoy the tax-exempt status of municipal bonds.[222] When SIDs go bankrupt, as they do during downturns in the housing market, they reorganize as municipalities under Chapter 9 of the United States Bankruptcy Code.[223]

The SID governance structure provides for a board of trustees comprised of owners of property within the SID geographical limits or the designees of those owners.[224] These provisions historically led to concentration of control by principal developers on SID boards.[225]

> The consequence of this situation is that the SID becomes simply an extension of the developer and, in effect, invests him with certain governmental powers. Specifically, he is able to make public expenditures and, more important, to incur public debts for which others eventually have to assume responsibility: home buyers in the SID or city taxpayers, if the SID is annexed.[226]

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217. *Id.* at 15, 21.

218. *Id.* at 15.

219. *Id.* at 4-5 (highlighting the private developer role).

220. NEB. REV. STAT. § 31-727 (2008). *See also* Rexroad, Inc. v. Sanitary Improvement Dist. No. 66, 386 N.W.2d 433, 435 (Neb. 1986) (stating SID is a political subdivision of the State of Nebraska); Neb. Att'y Gen., Opinion Letter on Application of the Preliminary Property Tax Rate Provisions of Section of LB 1085 for Political Subdivisions (Aug. 28, 1996). In addition to development, SIDs are granted certain regulatory powers, such as the regulation of dogs and other animals, regulation and provision for streets and sidewalks, regulation of parking, and provision of snow removal. NEB. REV. STAT. § 31-727(6)(b).

221. NEB. REV. STAT. §§ 31-736, 31-737, 31-738 (2008).

222. NEB. REV. STAT. § 31-739 (2008) (highlighting general obligation bonds); NEB. REV. STAT. § 31-751 (2012) (explaining special assessments).

223. *See Thanks to SIDs, Nebraska has the most Chapter 9 bankruptcies*, LINCOLN JOURNAL STAR (July 16, 2012), http://journalstar.com/ap/business/thanks-to-sids-nebraska-has-the-most-chapter-bankruptcies/article_523813c8-c544-5982-8833-cb5f0bf2671d.html; 11 U.S.C. §§ 901-904, 921-930, 941-946 (2012).

224. NEB. REV. STAT. § 31-727(3).

225. *UNO Report*, *supra* note 205, at 11-12.

226. *Id.* at 17-18.

B. SID+ANNEXATION

The denouement of the SID process in Douglas County is annexation by the City of Omaha. Upon annexation, special assessments continue in effect. The general obligation bond debt, however, is assumed by the City of Omaha. This eventual transfer of debt obligations to the City creates incentives for developers to minimize special assessments, paid first by the developer and then by those who purchase SID properties, and to maximize general obligation bond debt, serviced by the SID until annexation and then transferred to all city residents.[227]

Between 1960 and 1975, SID debt accounted for the majority of general obligation debt of the City of Omaha: "Over this period, Omaha's assessed value increased by 115 percent . . . while the bonded debt increased by 533 percent . . . ."[228] Moreover, "[o]f even greater significance is the fact that nearly all of the increase in Omaha's debt ratio (debt as a percent of assessed value) can be attributed to debt assumed by the annexation of SID's."[229] The City's debt ratio rose from 2.3 in 1960 to 6.8 in 1975.[230] Between 1968 and 1973, Omaha's debt increased by 141 percent compared to "an average debt growth of 33.1 percent for the 42 largest cities in the United States."[231] This debt could have been lowered by higher pre-annexation mill levies on SIDs,[232] and in fact oversight of both improvements and financing has increased in the past four decades.[233]

This debt "impose[d] a major burden on residents of the City."[234] The UNO Report concluded that the historical debt data "calls into question the wisdom of past annexation decisions."[235] In the mid-1970s, in fact, Omaha Mayor Edward Zorinsky shifted away from aggressive annexation.

> The key reason for this change was the increase in the city's bonded indebtedness as a result of assuming the debts of annexed areas. Between 1969 and 1971 annexations added $34.7 million to the city's debt, necessitating an increase in

227. *Id.* at 18-19.
228. *Id.* at 25.
229. *Id.* (emphasis removed).
230. *Id.*
231. *Id.* at 28.
232. *See id.* at 79 (noting that "there is a tendency for SID Board of Trustees . . . to keep mill levies unrealistically low in the early stages of the SID's development.").
233. *See, e.g.*, City of Omaha Planning Department, Application Subdivision Plat and Guidelines on the Source and Use of Funds (Reviewed in July 2014) (delineating permissible sources—general obligation, special, and private—for specified expenditures) (on file with author).
234. *UNO Report*, *supra* note 205, at 28.
235. *Id.* at 46-47.

> the debt levy in 1973. Zorinsky believed that annexing sanitary improvement districts discriminated against Omaha taxpayers and led to unsavory relations between realtors and politicians.[236]

Approximately 278 SIDs had been created in Douglas County up to the time of the UNO Report in 1975.[237] By 2011, of 843 SIDs created overall, 550 had been annexed "by Omaha or a surrounding city."[238] At that time, about 300 unannexed SIDs existed in Douglas and Sarpy Counties.[239] The City of Omaha annexed some three dozen SIDs in 2014, 2015, and 2016.[240]

Between 1975 and today, two housing downturns—the first in the 1980s and the second in the late 2000s—led to a spate of SID bankruptcies. By 2012, SIDs in Nebraska, concentrated in the Omaha-Council Bluffs region, accounted for "almost one-fifth of the more than 220 [municipal] bankruptcies filed in the U.S. since 1981."[241] The legal power to file a Chapter 9 municipal rather than Chapter 11 corporate bankruptcy comes from the state, and it gives municipalities—and SIDs—"an advantage over companies . . . . Unlike a company, municipalities don't need to ask the bankruptcy court for permission to pay any bills they ran up before filing for court protection . . . . That means creditors can't put as much pressure on . . . ."[242]

Jean Stothert, Omaha's current mayor, has pursued an aggressive annexation policy vis-à-vis SIDs. Criteria for assessing SIDs and other unincorporated areas for annexation include the city's ability to provide police and fire protection, a focus on eliminating islands of

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236. LAWRENCE H. LARSEN ET AL., UPSTREAM METROPOLIS: AN URBAN BIOGRAPHY OF OMAHA & COUNCIL BLUFFS 327 (2007). A series of articles published in the *Omaha World-Herald* in 1970 "pointed to abuses under the law. There [were] allegations of irregularities in financing, excessive interest rates, and irregularities in connection with the issuance of bonds. Criticism has also focused upon the nature of improvements made in the districts . . . as well as excessive assumption of SID debts upon annexation." Minahan, *supra* note 206, at 270-71. The preparation of the UNO Report in 1975 appears in line with the shift at that time toward a more critical assessment of the role of SIDs.

237. *See UNO Report*, *supra* note 205, at vii-viii.

238. Caitlin Devitt, *Some Omaha-Area Improvement Districts Don't Recoil from Chap. 9*, THE BOND BUYER (Sept. 6, 2011), http://www.bondbuyer.com/issues/120_172/omaha-chapter-9-bankruptcy-1030784-1.html.

239. *Id.*

240. *See supra* note 172 and accompanying text.

241. Steven Church, *Nebraska, Not California, is King of Municipal Collapse*, BLOOMBERG NEWS (July 15, 2012), http://www.bloomberg.com/news/articles/2012-07-16/nebraska-not-california-is-king-of-municipal-collapse.

242. *Id*. "In Nebraska, Chapter 9 [SID] bankruptcies are more like prepackaged Chapter 11 cases because the district owners and creditors most often work out an agreement beforehand . . . . Those deals almost always guarantee full repayment of bondholders' principal, stretched over a longer period of time and at a lower interest rate." *Id.*

land that are already surrounded by the city, and a revenue-positive effect for the city.[243] Concurrent with these annexations, the Nebraska State Legislature continues to tinker with the provisions governing SIDs. In 2015, for example, Senator Sue Crawford from Bellevue in Sarpy County introduced a successful bill that required disclosure of SID status to homebuyers: not all purchasers of homes in SIDs were aware that their properties lay within SIDs and not within city limits.[244] In 2016, Omaha Senator Joni Craighead's bill to "[restrict] asset expenditures by sanitary and improvement districts (SIDs) that have received notice of annexation" became law by a unanimous vote.[245] Some SIDs with cash on hand had been responding to annexation notification by spending down their accounts.[246]

As infrastructure requirements have risen and the financial resources of local governments have fallen in recent decades, the use of special tax districts similar to SIDs to fund infrastructure in private developments at municipal-bond interest rates has increased across the nation. In these districts,

> [l]and-secured bonds generally are not rated by the rating agencies because they are considered riskier than other municipal bonds and are unlikely to receive investment-grade ratings . . . . As home builders have come to understand, however, as long as all goes according to plan, the risks lessen over time.[247]

In a standard scenario, homeowners in the development over time assume the cost of repaying the funds borrowed for infrastructure devel-

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243. *Property Taxes Will Decline in SIDs to be Annexed*, MAYOR JEAN STOTHERT CITY OF OMAHA (June 20, 2016), http://mayors-office.cityofomaha.org/city-news/245-property-taxes-will-decline-in-sids-to-be-annexed; Telephone Interview with Cassie Paben, *supra* note 211. Though the author submitted several requests, she was unable to obtain a written policy from the City of Omaha containing the official criteria or internal process it follows in making annexation decisions.

244. *See* L.B. 420, 104th Legislature, 1st Sess. (Neb. 2015). The League of Nebraska Municipalities supported legislation to require acknowledgements from purchasers of real estate in SIDs. *Legislative Bulletin*, LEAGUE OF NEBRASKA MUNICIPALITIES, at 6 (Feb. 13, 2015) http://www.lonm.org/attachments/Bulletins/2015/2015_Bulletin_6.pdf. Legislative Bill ("L.B.") 420 was passed into law on a vote of 44-3 as part of L.B. 324 in April 2015. *Urban Affairs Committee*, NEBRASKA LEGISLATURE (Apr. 24, 2015), http://news.legislature.ne.gov/urb/page/3/.

245. *Annexation restrictions approved*, UNICAMERAL UPDATE (Feb. 18, 2016), http://update.legislature.ne.gov/?p=18541 (stating L.B. 131 passed on a vote of 46-0).

246. Telephone Interview with Cassie Paben, *supra* note 211.

247. Steve Heaney & Ken Powell, *Tax District Financing: A Guide to Funding Infrastructure through Land-Secured Bonds*, NATIONAL ASSOCIATION OF HOMEBUILDERS: LAND DEVELOPMENT, Spring 2007, at 38, https://www.awcnet.org/portals/0/documents/legislative/InfraNAHBFundInfraLandSecuredBonds.pdf. "Risks are highest as development begins and the project is still 'dirt'; risk then declines as the project reaches its full potential, builds out, and establishes a diversified tax base with a record of special tax or assessment payments." *Id.*

opment: "The annual tax or assessment levy is generally part of the owner's property tax bill . . . ."[248] The primary public subsidy is the lower interest rates on money borrowed that results from tax-exempt status. In the historical development pattern in Omaha, however, the public has also subsidized SIDs by assuming SID debt upon annexation.

There was, further, a racial skew to these subsidies. In the 1950s and 1960s, the period during which Omaha's SID+annexation development regime took root, racial discrimination in housing was the norm in the city. While Black residents were channeled to the "Near North Side," White residents who could afford larger, newer, more expensive homes and the expense of maintaining a private automobile availed themselves of new suburban homes in SIDs west of the Omaha city limits that eventually, through annexation, became western Omaha. When SID debt was assumed by City of Omaha taxpayers at large, Black taxpayers contributed to paying off that debt. Black taxpayers in Omaha thus helped to subsidize western SID development from which they were excluded.

VI. FAIR HOUSING EFFECTS OF THE SID+ANNEXATION DEVELOPMENT REGIME

The SID+annexation development regime captured for the City of Omaha the valuable tax base associated with suburban development. The regime also kept within Omaha's governmental structure a broad geographical range of political interests and voices. Yet, beneath the surface neutrality of Omaha's SID+annexation development system lie deep structural biases that tilt suburban development in the region away from Affirmatively Furthering Fair Housing ("AFFH"). Because these biases lie in the intrinsic definition and operation of the Sanitary Improvement Districts ("SIDs") as institutions and their interaction with potentially annexing cities, these biases manifest themselves even in the absence of discriminatory intent or an awareness of race or other protected classes.

A. Development Risks and Costs

The first set of biases relates to the risks and costs of the development of housing. A primary rationale given for SIDs is that they take the risks associated with development away from the City.[249] The

248. *Id.*

249. *See, e.g.*, *UNO Report*, *supra* note 205, at 54 (stating bond house representatives cited advantage of SIDs as "allow[ing] the City to see beforehand what it would be annexing and, thus, be better able to decide whether or not it want[s] to annex specific developments"); *Id.* at 65 (explaining Omaha city officials described SIDs as "a painless

SIDs bear the risk associated with development; the City assumes financial exposure only later, upon annexation when the success of any given SID development is more readily discerned. Yet the financial incentives of these developers are private rather than public: Developers are called to profit by maximizing net revenues. Eventually, the City pays for the privilege of avoiding development risk.

Part of maximizing profit is offering a product that is likely to sell and that will sell for as high a price as possible. SID developers minimize their risk of unsold inventory by providing non-innovative housing likely to be broadly acceptable to suburban home buyers of means. Detached single-family homes near predictable commercial centers are the result. Mixed-income and multi-family developments that would provide housing affordable by households of more modest means, as well as mixed-use developments, are perceived as riskier investments; therefore, they are not constructed.

Concurrently, SID imperatives push developers to provide homes that are as upscale as the real estate market will allow. In fact, in the early decades of the SIDs, developers sometimes used the public funding to which they had access to provide "plush improvements such as private clubs . . . ."[250] The argument arose that "since upon annexation the cost thereof would burden the entire city, it was unfair to those taxpayers of the annexing city who did not have access to similar facilities in their part of town."[251] A countervailing view held that "to advocate that a new development should be curtailed to anything less than optimal because of deficiencies in the developments of older parts of the city is to argue for the compounding of deficiency."[252]

SID developers also minimize risk by passing expenses through to eventual buyers of the homes developed. The homes built by SIDs tend to be more expensive than older and closer-in homes because they are new, large, and detached. SID homes are also more expensive because purchasers are on the hook for repayment of the SID warrants and bonds—at least until annexation—as well as for special assessments, which are unchanged by annexation. Property taxes on SID homes consequently tend to be higher than property taxes on non-

way of getting adequate public improvements in new developments without having to go through City Council every time. Under the SID procedure, by the time these capital expenditure matters get to the City Council they have been transformed into an annexation question and have lost their identity as capital expenditures for areas outside the City.").

250. *Id.* at 15.

251. Minahan, *supra* note 206, at 278.

252. *Id.* at 279.

SID homes.[253] This tax differential may result in a perception of high property taxes generally, in particular by those who have the means to purchase an SID home. It also has the effect of softening resistance by SID residents to annexation if taxes actually decrease when SIDs are annexed.[254]

SID property taxes are high in part because the cost of the development is initially borne only by the SID's residents. In part, however, SID property taxes are high because the SID process entails administrative costs via the involvement of bond houses and bond counsel above and beyond the standard fees associated with municipal bonds issued by cities, which have ratings set by non-specialized bond houses.[255] The SID property taxes also include developer profit: When a private developer assumes a risk that the city has chosen to avoid, the developer charges for doing so[256]—and that cost is eventually passed on to SID homeowners and, ultimately, city taxpayers.

The reassurance that SIDs lessen the risk of development for the annexing city loses its luster when examined closely. The SID approach relieves the city of the immediate financial, and, thus, political, risk associated with suburban development. Just as with purchasing

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253. Deena Winter, *Special districts – with power to tax – grow like corn in Nebraska*, NEBRASKA WATCHDOG.ORG (Sept. 13, 2013), http://watchdog.org/105554/special-districts-with-power-to-tax-grow-like-corn-in-nebraska/.

> [T]he property tax rates in . . . SIDs are much higher than in most cities – about 25 percent to 35 percent higher, according to [Bill Lock, research analyst for the Legislature's Revenue Committee]. Property taxes are higher in SIDs because the cost of infrastructure is borne by such a small tax base, rather than spreading it out to a large tax base, like Omaha's. Cities assume the debt of an SID upon annexation, so Omaha doesn't usually annex SIDs until their debt is low or paid off.

Id.

254. *See, e.g.*, Burbach, *supra* note 172 (July 10, 2014); Moring, *supra* note 193. *Compare* Christopher Curry, *City's annexation effort meets organized opposition*, THE GAINESVILLE SUN (Oct. 3, 2012), http://www.gainesville.com/news/20121003/citys-annexation-effort-meets-organized-opposition (noting "annexation . . . would increase property tax rates – with the current difference being 1.07 mills – or an additional $1.07 in taxes for every $1,000 of taxable property value."), *with* Jimmy Nesbitt, *Deputies, residents rise to challenge West Side annexation*, EVANSVILLE COURIER & PRESS (Mar. 14, 2009), http://archive.courierpress.com/news/local/deputies-residents-rise-to-challenge-west-side-annexation-ep-447661406-326965701.html (stating annexation opponents estimate "property taxes will increase 30 to 50 percent if the area is annexed into the city.").

255. *See UNO Report*, *supra* note 205, at 47.

256. *See* MURRAY FROST, A FRAMEWORK FOR DISCUSSING SID-RELATED PROBLEMS 3 (1985), http://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1247&context=cparpubarchives. (identifying, explicitly, the interest of "profits to developers and others in the SID industry."). *Cf.* Mun. Bldg. Auth. of Iron Cty. v. Lowder, 711 P.2d 273, 280 (Utah 1985) (noting special district was created to finance a new jail to avoid limits on general obligation debt of county and "[the county] almost certainly will pay more, since general obligation bonds probably would have carried a lower interest rate than the somewhat riskier bonds being issued by the Authority.").

insurance, however, avoiding risk does not come for free. Up front, SID home-buyers pay more for homes in the form of special assessments and higher property taxes because they pay the profit and increased costs incurred when the developer takes the risk off the city's hands. In the long run, upon annexation, the city—and all of its taxpayers, including those who benefit only very indirectly from the city's expanded tax base—assumes the debt incurred by the developer, long since passed along to the SID property-owners.

B. Exclusionary Development

The second set of biases in the SID+annexation regime relates to the city's ceding control and influence over development to developers operating as SIDs. Throughout much of the period that SIDs have been building market-rate and upscale housing to the west of Omaha, the City of Omaha has been working to respond to an unmet need for public housing and for low-income housing in general. Though the 2015 AFFH regulations are new, the City has for years been filing Analysis of Impediments reports in conjunction with receiving grants from the United States Department of Housing and Urban Development ("HUD"). Low-income housing tax credits have been deployed. The result, as the Fair Housing Equity Assessments ("FHEA") documents, is a concentration of low- and moderate-income housing in eastern Omaha with very little such housing west of 72nd Street—the very areas of Omaha developed through the SID+annexation regime.

Nowhere in this regime has there been consideration of the public priority of providing housing for all members of the Omaha region. Increased oversight of SIDs by city planning departments beginning several decades ago has changed neither the essential structure nor the underlying incentives of the regime. City review focuses on SID compliance with design and engineering requirements and provision of the public amenities designated by the SID authorizing statute, but the SID statute does not even mention affordable housing. The SID+annexation development regime, a regime that is operated through public districts with public financing controlled by private for-profit entities, is silent on the provision of housing for community members with low or moderate incomes and results in the lack of inclusion—effectively the exclusion—of affordable housing in SID developments.

Incentives for affordable housing make a cameo appearance in the City's Master Plan, prepared under Mayor Mike Fahey, who held office between 2001 and 2009. The Housing Element asserts: "To reduce the cost of construction and provide incentives for the development of affordable housing, the City should reduce develop-

ment fees for construction of new affordable single-family and multi-family housing."[257] Similarly, the Urban Development Element includes, among program objectives for suburban development, to "[c]reate healthy and diverse neighborhoods throughout the city by . . . promoting the development of affordable housing through the use of incentives in the form of reduced development fees for such housing."[258]

Throughout the nation, cities have undertaken a wide variety of approaches to creating incentives, both carrots and sticks, for market-rate developers to incorporate affordable housing into their projects. Hundreds of cities have passed inclusionary zoning ordinances.[259] Other jurisdictions have supported affordable housing by assessing impact or linkage fees on new development, with some programs offering actual construction of affordable housing in mixed-use developments as an alternative.[260] Still others have negotiated site plan packages for developments that include affordable housing units.[261]

The Nebraska SID authorizing statute, in contrast, does not require that SID developments include housing for a range of residents, including those with low and moderate incomes. Nor does the City mandate low- and moderate-income or affordable housing in these developments. Without public requirements, SIDs are free to maximize profit and minimize risk by building as homogeneously and as upscale as the market will allow. Compared to the robust approaches to providing affordable housing in new developments in other localities, the reduced application fees mentioned in the Master Plan are timid indeed.

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257. MIKE FAHEY, OMAHA MASTER PLAN: HOUSING ELEMENT 29 (n.d.), http://urbanplanning.cityofomaha.org/images/stories/Master%20Plan%20Elements/Housing%20Element.pdf.

258. MIKE FAHEY, OMAHA MASTER PLAN: URBAN DEVELOPMENT ELEMENT 11 (n.d.), http://urbanplanning.cityofomaha.org/images/stories/Master%20Plan%20Elements/UrbanDevelopment02-16.pdf.

259. "More than 400 cities, towns, and counties now implement inclusionary zoning programs." The Urban Institute, *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*, THE OFFICE OF POLICY DEVELOPMENT AND RESEARCH (Dec. 2012), https://www.huduser.gov/portal/publications/affhsg/HUD_496.html (explaining the case study of effects of inclusionary zoning policies in place in two counties, Montgomery County, Maryland, and Fairfax County, Virginia for more than 30 years each).

260. Cornerstone Partnership & The National Municipal Policy Network, *Affordable Housing Impact Fee Programs*, POLICY BRIEF, Sept. 2013, at 28-29, http://localprogress.org/wp-content/uploads/2013/09/Affordable-Housing-Impact-Fee-Programs.pdf.

261. *See, e.g.*, Fatimah Waseem, *Howard planning board tackles Downtown Columbia affordable housing plan*, THE BALTIMORE SUN (April 15, 2016), http://www.baltimoresun.com/news/maryland/howard/columbia/ph-ho-cf-planning-board-downtown-housing-0421-20160415-story.html.

C. Lack of Accountability for Ensuring Development of Affordable Housing

The third set of biases inherent in the SID+annexation development regime arise from the ways in which the regime operates to blur causation and diffuse accountability. The reflection in the AFFH Mirror is obscured by smoke. In most local jurisdictions, development projects are reviewed by and subject to the up-or-down approval of local public bodies responsible for zoning and land use. Affordable housing advocates find voice when inadequate housing exists. Developers seeking to build market-rate housing subdivisions and mixed-use projects may find approval conditioned on providing affordable housing—an important public good.

In contrast, it is not clear where in the SID+annexation process such an issue might be raised. Can the issue of affordable housing be raised when an SID is formed? Is there a process to ensure that the question is addressed when SID plans are reviewed by city planning staff? When land subdivision is complete, is there a process for approving actual design of housing that folds in affordable housing considerations? Once buildings are built, is it too late to ensure affordable housing in any SID development? Does an annexing city factor AFFH imperatives into its decision-making?

The response to all of these questions is that at *none* of these points is there a clear opening or process space provided for considering fair and affordable housing concerns.[262] Though every SID is legally a public district, governance is well insulated from public oversight and influence in the early days when fundamental decisions are being made and the interest of the developers at the helm is primarily to make a profit rather than to promote overall community well-being.[263] The interests of residents enter into decision-making only insofar as they affect a developer's bottom line.

With respect to SID governance, in fact, the 1975 UNO Report flagged a potential constitutional defect. The United States Supreme Court has held that the Equal Protection Clause mandates inclusion of all eligible voters in elections within not only general-purpose mu-

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262. *Cf.* Alan Gless & Peter Longo, *An Overview of Nebraska Water Law*, *in* The History of Nebraska Law 105 (Alan G. Gless ed. 2008) ("[The] duties and powers [of Nebraska's multiplicity of resource-related special-purpose districts are] spread across an organizational grid so complex that points of accountability [are] hard to find.")

263. Neb. Rev. Stat. § 31-727(3) provides that the governing board of the SID be comprised of owners of land within the district or their designees. In the early days of the SID, a developer and the developer's designees will constitute the entirety of the SIDs board of trustees. Neb. Rev. Stat. § 31-727(3). *See UNO Report*, *supra* note 205, at 10-12 (stating the predominance of developers on SID boards of trustees). Only as SID properties are purchased by other persons will membership on the board open up.

nicipalities[264] but also within special districts.[265] Where a special district, such as an SID, has significant governmental powers, the statutory restriction of voting to property-owners rather than residents overall has been held unconstitutional.[266] In the early stages of an SID, where there are only property-owners and no residents, the current arrangement may pass constitutional muster. A legal challenge by a non-property-owning resident once an SID is developed and populated, however, would pose a serious constitutional issue.

The governance of the City of Omaha, conversely, *does* meet constitutional requirements and *does* represent the interests of all its residents. All eligible residents may vote for city council and mayor; districts are of approximately equal population. And the City of Omaha has important public interests at stake—witness the three-mile extraterritorial jurisdiction provision that allows the City to regulate areas of future annexation. Yet the City's involvement and power to influence not simply physical infrastructure but SIDs' effects on the social infrastructure are minimal. Omaha is peripheral to SID decisions until after the fact. Avoiding risk, it turns out, entails relinquishing control as well as paying a cost premium.

Overall, the structure and dynamics of the SID+annexation development regime are the vehicle for Omaha's growth to the west. They explain how western Omaha became the favored quarter of the region. They explain the dearth of affordable housing in SID-developed western Omaha that, along with the placement of low- and moderate-income housing in east and central Omaha, has resulted in a

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264. Avery v. Midland Cty., 390 U.S. 474, 478-79 (1968) (extending the Fourteenth Amendment's one-person, one-vote requirement to general purpose local government elected body).

265. *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50, 58 (1970) (stating all citizens residing in the community college district must be able to vote equally for trustees of district). *But see, e.g.*, Ball v. James, 451 U.S. 355, 371 (1981) (explaining that allocation to landowners for directors of water reclamation district and exclusion of other residents is allowable under Equal Protection Clause).

266. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 213 (1970) (opining that exclusion of those not owning real property from ability to vote in bond election is a violation of Equal Protection Clause); Cipriano v. City of Houma, 395 U.S. 701, 702 (1969) (determining restriction to "property taxpayers" of right to vote in elections on issuance of revenue bonds by municipal utility was successfully challenged as violation of Equal Protection by "nonproperty taxpayers"); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969) (stating that restriction in school districts of franchise to parents or guardians of children in public schools and owners or lessees of taxable realty was unconstitutional). *See also UNO Report*, *supra* note 205, at 21-22 ("The laws concerning voting for SID boards of trustees may conflict with the constitutional principle of one-person one-vote . . . . It should be noted that the rarely used 1947 SID Act extended the right to vote in SID elections to *legal voter residents* whether or not they were property owners in the SID, and did not count votes on the basis of the amount of property owned." (emphasis in original) (citing *Avery*, 390 U.S. at 478-79; *Hadley*, 397 U.S. at 58; *Kramer*, 395 U.S. at 622; *Kolodziejski*, 399 U.S. at 213).

concentration of such housing in the eastern and central parts of the City.

Perhaps most importantly, the structure and dynamics of the SID+annexation development regime explain why robust community discussions of inclusionary zoning and affordable housing do not inform the development process. As I interviewed housing advocates and interested parties in the region for this article, I asked over and over why there is no movement for inclusionary zoning in Omaha. Many people I asked seemed puzzled by the question. No one had a response that made sense. The privatization of decisions regarding the pattern of development provides an answer: Exclusionary decisions are made by SIDs that are not accountable to the public. The city, which is accountable to the public, has ceded authority and avoids responsibility.

D. The Role of School Districts

A significant indicator of a neighborhood of opportunity is good public schools. In fact, school ratings may have become the current form of redlining, with high test scores signifying areas that are more affluent and White and lower test scores signifying poorer areas with larger minority populations.[267] As Omaha has expanded its city boundaries through the SID+annexation development regime, formerly separate rural school districts such as Millard and more recently Elkhorn have remained separate. Even earlier, Westside District 66 was created defensively in 1947 just outside the Omaha city limits at that time. The student populations of the various districts reflect the concentrations of poorer and minority members of the community in eastern Omaha described in the FHEA. The Omaha Public Schools ("OPS") are 29% White, and 74.24% of its students receive free or reduced lunch. In contrast, the Westside Schools are 74% White with 30.9% free-and-reduced-lunch students; the Millard Schools are 80% White with 18.11% free-and-reduced-lunch students; and the Elkhorn Schools are 88% White with 6.33% free-and-reduced-lunch students.[268] Westside, Millard, and Elkhorn, moreover, were

267. Kendra Yoshinaga & Anya Kamenetz, *Race, School Ratings and Real Estate: A 'Legal Gray Area*,' National Public Radio (Oct. 10, 2016), http://www.npr.org/sections/ed/2016/10/10/495944682/race-school-ratings-and-real-estate-a-legal-gray-area ("[S]chools have become a proxy for the racial or ethnic composition of neighborhoods.").

268. Nebraska Department of Education, *2015-2016 Membership by Grade, Race, and Gender* (Nov. 24, 2015), http://drs.education.ne.gov/quickfacts/Student%20Characteristics/Membership/Membership%20by%20Grade%20Race%20and%20Gender%20Reports/PDF%20Documents/2015-16%20Membership%20by%20Grade,%20Race%20and%20Gender.pdf.

not involved in the court-ordered desegregation of OPS in the 1970s and 1980s.[269]

Until the mid-2000s, there was an 1891 state statute on the books requiring "that each incorporated metropolitan city in the state of Nebraska . . . shall constitute one school district."[270] In 2005, OPS announced a plan to take over several schools in suburban school districts lying within city boundaries as expanded through annexation over the years.[271] Strong political reaction against the OPS "One City, One School District" Plan[272] resulted in the amendment of the statute[273] and the creation by the Nebraska State Legislature of the Learning Community of Douglas and Sarpy Counties in 2007.[274] Leaving all school districts intact, an authorized common levy gestured toward a sharing of regional educational resources to meet regional educational needs. The Nebraska legislature's deauthorization of the common levy in 2016,[275] the result of its deep unpopularity with some of the more suburban/exurban parts of the counties, leaves the school status quo undisturbed.

While the City of Omaha has achieved elasticity through annexation, the SID+annexation development regime has concentrated affluent White citizens to the west and less-well-off and minority residents in the eastern part of the city. School district boundaries have facilitated separation of the areas internal to the City of Omaha in terms of provision of the essential public social service of education. The com-

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269. Margaret Reist, *OPS' vision: One city, one school*, LINCOLN JOURNAL STAR (Sept. 23, 2007), http://journalstar.com/special-section/news/ops-vision-one-city-one-school/article_fabab7bb-23e5-5911-8e1a-21f5065a997a.html. ("During [the 1970s], OPS was being forced to integrate through busing but the suburban school districts were not.").

270. NEB. REV. STAT. § 79-409 (2013).

271. *Critics Blast OPS Plan*, WOWT NEWS (June 7, 2005), http://www.wowt.com/news/headlines/1608961.html; *"One District" Fight*, WOWT NEWS (July 28, 2005), http://www.wowt.com/news/headlines/1746637.html; Meredith Grunke, *Citizens testify on OPS "One City, One School District" debate*, THE DAILY NEBRASKAN (Jan. 31, 2006), http://www.dailynebraskan.com/citizens-testify-on-ops-one-city-one-school-district-debate/article_7a3201b2-2dc2-5a98-ba90-5bc8996ec69a.html; Reist, *supra* note 269. The Westside schools were not involved in the controversy because of a separate state statute from 1947, which exempted that district from the 1891 statutory provision. *Id.*

272. Rhea Borja, *Neb. Governor, Districts Oppose Omaha School Annexation Plan*, EDUCATION WEEK (Aug. 30, 2005).

273. NEB. REV. STAT. § 79-409 ("Each incorporated city of the metropolitan class in the State of Nebraska shall *contain at least* one . . . school district.") (emphasis on new language added).

274. *Learning Community timeline: Twists and turns since 2005*, OMAHA WORLD-HERALD (Apr. 19, 2016), http://www.omaha.com/news/legislature/learning-community-timeline-twists-and-turns-since/article_2d4a9614-c750-583d-bae6-edfe2e10d348.html.

275. *Id. See also* Martha Stoddard et al., *Lawmakers approve bill to revamp Learning Community, end controversial common levy*, OMAHA WORLD-HERALD (Apr. 15, 2016), http://www.omaha.com/news/legislature/lawmakers-approve-bill-to-revamp-learning-community-end-controversial-common/article_8acfdc6a-0189-11e6-870c-0344a1c1556d.html.

bination of SIDs and school district boundaries within Omaha's city limits has led to an elastic city with highly effective internal segregation of minorities and those who are less affluent—and a regional geography with differentials in the level of opportunity.

The essential impermeability of the boundaries of suburban school districts is not peculiar to Omaha. Forty years ago in *Milliken v. Bradley*,[276] the United States Supreme Court confined urban school desegregation to central city school districts: "[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country."[277] Preventing desegregation of the almost entirely Black Detroit public schools across district boundaries with the surrounding predominantly White suburban schools, the Court heralded the value of localism: "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."[278] Given the legal sanctity of school district boundaries—in Omaha and nationally—fair housing and residential access to various neighborhoods is all the more essential in ensuring fairness of opportunity for all.

The reflection in the Omaha-Council Bluffs AFFH Mirror is, it turns out, not fair at all. The facially neutral provisions of the SID and annexation statutes cloak decisions that concentrate low- and moderate-income housing in eastern Omaha in significant part by funneling that housing away from new developments in the western part of the region. School district boundaries protect predominantly White suburban areas within the city limits from racial and ethnic mixing in public schools with students currently attending predominantly minority OPS schools. And lack of accountability for exclusionary development clouds the entire scene.

VII. AFFIRMATIVELY FURTHERING FAIR HOUSING IN THE OMAHA-COUNCIL BLUFFS REGION

The reflection in the Omaha-Council Bluffs Affirmatively Furthering Fair Housing ("AFFH") Mirror reveals public and low-income housing as well as racial and ethnic minorities clustered in eastern Omaha. Suburban development stretches to the west. Most of the region's western suburbia was originally built outside of city limits in

276. 418 U.S. 717 (1974).

277. Milliken v. Bradley, 418 U.S. 717, 741 (1974).

278. *Milliken*, 418 U.S. at 741. *See also* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters."); Strand, *supra* note 6, at 294-96 (noting celebration of local control over public education in *Milliken* and *Rodriguez*, supported by hesitancy on part of federal courts to interfere with state-local relationship).

Sanitary and Improvement Districts ("SIDs"); much has now been annexed by the City of Omaha. Most of this development has been single-family housing affordable primarily by more affluent households with access to reliable private transportation. And, though racial discrimination in housing was outlawed almost five decades ago, most of the residents of this part of the region are White and have very limited exposure to Blacks and Hispanics as neighbors.

A similar, though smaller-scale and somewhat diluted, pattern of development toward the south and west is currently underway in Sarpy County, the county immediately to the south of Omaha and Douglas County;[279] Sarpy County currently houses 133 SIDs.[280] Meanwhile, the City of Bellevue in the eastern part of Sarpy County is home to a higher proportion of the county's racial minorities.[281]

Overall, the SID+annexation development regime has been the primary institutional engine for a pattern of bifurcated housing on the Nebraska side of the Omaha-Council Bluffs region. Affirmatively, the regime has provided market-rate single-family suburban homes to the west. Negatively, the regime has operated to exclude low- and moderate-income multi-family housing from new development, contributing substantially to the concentration of affordable housing in the eastern part of the City of Omaha.

This development regime has, in the decades since World War II, created opportunity for some and not for others. Exclusionary development—economically and racially exclusionary development—has been the norm. The SID+annexation development regime has, moreover, enriched SID developers and the professionals who support their work, with lower-opportunity taxpayers of the City of Omaha historically helping to foot the bill. The regime has been institutionally structured to defuse criticism of exclusionary development and to diffuse initiatives for inclusionary and equitable development.

The AFFH mandate calls localities to reflect on the degree to which all households in their region—whether those households are low-, moderate-, or high-income; Black, Latino, or White—have access to neighborhoods of opportunity. The AFFH goal is thus an Omaha-Council Bluffs metro area that is more integrated and more equitable,

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279. Emily Nohr, *What should Sarpy County look like in the future? Officials meeting to map it out*, OMAHA WORLD-HERALD (Jan. 10, 2014), http://www.omaha.com/money/what-should-sarpy-county-look-like-in-the-future-officials/article_8e954692-0901-5b9a-b3ec-2ce0f3f76d3d.html.

280. SID REPORT, SARPY COUNTY (Nov. 1, 2016), http://www.sarpy.com/clerk/documents/ALLSIDSReport.pdf.

281. *QuickFacts Sarpy County, Nebraska*, UNITED STATES CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/31153,3103950,31 (last visited Nov. 11, 2016). In 2015, non-Hispanic Whites were 76.3% of the population in Bellevue and 83.8% in Sarpy County. *Id.*

with access to neighborhoods of opportunity for all. In terms of AFFH, unchanged continuation of the SID+annexation development regime perpetuates and extends the status quo. This status quo does not Affirmatively Further Fair Housing. In this Part, I consider how—given the regional reflection in the AFFH Mirror—to stop the anti-AFFH momentum of the existing development regime and to infuse new pro-AFFH energy in development in the region.

A. Overhaul the SID+annexation Development Regime

The AFFH project is an undertaking of no small magnitude. The SID+annexation development regime has been the preeminent mode of metropolitan growth in the Omaha-Council Bluffs region for over half a century. It has become "the way things are done here." Just as the system was created and implemented, however, it can be dismantled and replaced. This will not be quick, and it will not be easy. But if we truly seek different and more equitable patterns of residential demography, if we truly seek to Affirmatively Further Fair Housing for all, then a fundamental shift of direction is imperative. This section includes four concrete actions to challenge the region's development status quo.

1. Amend the Nebraska SID Authorizing Statute to Include the Provision of Affordable Housing as a Public Priority and to Increase Cities' Role in Planning Development

The Nebraska State Legislature should amend the state statute authorizing SIDs to state explicitly that one of the standard-quality improvements associated with any residential subdivision development is the provision of affordable housing and to shift initiative and responsibility from private developers to nearby cities exercising extraterritorial jurisdiction and poised to annex at a later date. In 1987, the State of Texas passed legislation authorizing municipalities to create Public Improvement Districts ("PIDs") within city limits or their extraterritorial jurisdiction.[282] These PIDs, similar to SIDs in a number of ways, differ from SIDs in that public improvements include "the development, rehabilitation, or expansion of affordable housing" along with other infrastructure investments.[283] PIDs are also created by the governing body of the municipality or county, though private entities may initiate the process through petition.[284]

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282. Tex. Loc. Gov't Code Ann. § 372 (West 2016) (The Public Improvement District Assessment Act).

283. Tex. Loc. Gov't Code Ann. § 372.003(b)(15) (West 2016).

284. Tex. Loc. Gov't Code Ann. §§ 372.002, 372.005 (West 2016).

Though the special district may be a useful approach to development,[285] the SID structure reflects the public concerns that prevailed in past decades, public reticence about asserting important community values, and undue deference to and faith in private developers' capacity and motivation to promote regional well-being. At present, the strongest requirement that new development address regional needs such as affordable housing is a mild and indirect provision in the extraterritorial jurisdiction statute: "[A] city shall have authority within [its three-mile extraterritorial jurisdictional area] . . . to prescribe standards for laying out subdivisions in harmony with a comprehensive plan . . . ."[286] More specificity and more muscle are imperative. A major overhaul of the statute is long past due.

2. Undertake an SID Accounting

The benefits of elasticity that the SID+annexation development system has provided to the City of Omaha and, thus, to the region may well have been and continue to be substantial. The costs associated with attaining that elasticity may also be substantial. The 1975 UNO Report detailed some of the financial costs associated with the operation of the system in its earlier decades, such as debt for the annexing city and high administrative costs for SID development. Costs also include the profit realized by developers.

More deeply, an analysis of the distributive financial effects of the system would reveal not just overall benefits and costs, but also who has gained and who has not. For the second half of the twentieth century, housing has not been just housing; housing has been wealth. On the one hand, redlining and other modes of housing discrimination erected a documented barrier between Black citizens and opportunities to create housing wealth. On the other hand, did the SID+annexation development regime support White citizens in creating such wealth? And, of the utmost importance, what does this balance sheet look like today?

3. Clarify the Legal Status of SIDs as Public Special Districts

SID governance must meet applicable constitutional standards. Undertaken by public special districts, SID decisions and actions are "state action." SIDs must comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in their voting and governance structures. Equal Protection jurisprudence suggests that governance bodies for which non-landowning residents

285. Carter T. Froelich & Lucy Gallo, *An Overview of Special Purpose Taxing Districts*, NAT'L ASSOC. HOME BUILDERS (Sept. 2014).

286. NEB. REV. STAT. § 14-116.

cannot vote are unconstitutional. As public bodies, SIDs are also subject to Due Process and other requirements of the Bill of Rights incorporated to the States via the Fourteenth Amendment.

Further, SIDs have legal responsibility for actions they take that have a disparate impact on the availability and distribution of housing. Does provision of new development that contributes to disparate concentrations of upscale and affordable housing violate the anti-discrimination provisions of the Fair Housing Act? Are cities that participate in SID development complicit? Alternatively, may cities hold SIDs responsible for violating the Fair Housing Act?[287]

4. Demand Transparency and Accountability in Development Decisions

A major aspect of the SID+annexation development regime is lack of transparency and accountability for development decisions. In an odd way, the regime's success is also its weakness. In other metropolitan regions, incorporated suburban cities landlock inelastic central cities. Many of these suburbs have historically sought to limit multiple-family dwellings (and those who would live in them) through exclusionary zoning. Their success results in affluent White jurisdictions capturing attractive suburban tax bases, leaving concentrations of poverty and minorities in central cities with impoverished tax bases. This success, however, also draws legal and political challenges and awareness of the dynamic leading to unequal outcomes. Though the United States Supreme Court declined to hold exclusionary zoning an Equal Protection violation in the landmark case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[288] in 1977, the issue was at least named and joined.

Just like an inelastic central city, Omaha's concentrations of poverty and minorities lie in the pre-1950 central city. White affluent suburban development lies elsewhere. Elasticity has not enabled the region to address this issue; it may even have hidden it and therefore contributed to its continuation. No separate cities in the western part of the metropolitan area can be identified as exclusionary, and Omaha's tax base remains robust. What is lost is a way to identify who precisely is responsible for the specific decisions that underlie the segregation that exists and how to hold the people and entities making those decisions accountable. Omaha has succeeded perhaps in part because of the "smoke," which has obscured policies that are unfair and predatory in outcome, if not in intent.

287. *See supra* note 46 (City of Miami).
288. 429 U.S. 252 (1977).

B. Design a Development System That Affirmatively Furthers Fair Housing

It is daunting to even contemplate uprooting a financial-legal-political system comprised of interlocking institutions and practices such as the SID+annexation development regime. Shifting regional gears on development and the way Omaha—or any city—provides housing calls for the creativity that results when everyone involved agrees that the way things are is not the way we want them to be. This creativity may be tapped by viewing the AFFH imperative as a design challenge. As the quote at the beginning of this article observes:

> "When things aren't working the way they should be . . . you have the makings of a great design project." And the bigger the problem, the more it challenges designers to question and rethink, to go deep in the investigation of the problem, to come up with original ideas and smart recombinations, to draw and build those ideas in order to make new possibilities visible and tangible.[289]

In a design innovation mode, what steps can the Omaha-Council Bluffs metropolitan area take to change directions and start moving along a different path? A design approach challenges us to be open, imaginative, and hopeful.

1. "Why does it have to be that way?"

The starting point for design is to ask what may seem, especially to people steeped in a status quo, a stupid question: "Why does it have to be that way?"[290] Asking this question about development practices and patterns gets immediately at the underlying values of whether we are all in this region together—our collective well-being as well as our physical residence. Asking this question surfaces fears about poor and non-White neighbors, property values, and effects on essential public services, such as schools. Asking this question also exposes those who have other agendas. Not asking this question signals acceptance of a region that is divided internally, weakening the whole. Not asking this question does not Affirmatively Further Fair Housing.

2. The Importance of Difficult Conversations

In asking this "stupid question," the Omaha-Council Bluffs metro area will be called to put on the table issues of race, ethnicity, and economic equity that people often find difficult to talk about, issues that many people—especially affluent White people—are unpracticed

289. Berger, supra note 4, at 185.
290. *Id.* at 27.

in discussing. The "Midwestern nice" culture of the region contributes to this difficulty. So, too, does the very system that needs to change: When issues are deflected rather than joined, they go underground. Not discussing them does not resolve them; it just makes future discussion even more difficult. Race. Ethnicity. Poverty. Inequality. Lack of exposure and practice compounds both the difficulty of confronting these issues and the need to confront them.

3. Make Unexpected Connections

If development and housing patterns do not need to be the way they are, then how should they be? How *can* they be? Design advice is to "jump fences"—to go sideways and connect with insights from other fields. Are there other regions that are taking exciting leaps in addressing this challenge? Should Omaha-Council Bluffs think big—looking beyond Texas's PIDs to Montgomery County, Maryland's Moderately Priced Dwelling Unit ("MPDU") policy? For decades, Montgomery County has dispersed moderate-income housing throughout the county with an overarching mandate: "Between 12.5 and 15 percent of the total number of units in every subdivision . . . be moderately priced."[291] Montgomery County's MPDU program has resulted in an estimated more than 12,000 moderately priced homes in thirty years.[292] What can Omaha-Council Bluffs learn from Montgomery County? Exciting things can happen when government brings private developers and public priorities together in non-zero-sum interactions.

4. Face the Way Things Are and Imagine the Way They Could Be

The FHEA for the Omaha-Council Bluffs metropolitan area was prepared in the context of the Heartland 2050 Sustainable Communities work led by the Metropolitan Area Planning Authority ("MAPA"). I spoke to Beth Goodman, the project manager with ECONorthwest, the consultant that prepared the FHEA. She recounted how she, a White woman from out-of-state Oregon coming to a local group with substantial minority representation, had some apprehension when presenting the draft report. What struck her during her presentation, however, was how powerful the maps contained in the FHEA were at reflecting back to the group what they already knew: where the areas of concentrated racial and ethnic poverty are, where the jobs in the

291. *Moderately Priced Dwelling Unit Program (MPDU) Overview*, MONTGOMERY CTY., MD MONTGOMERY PLANNING, http://www.montgomeryplanning.org/research/analysis/housing/affordable/mpdu.shtm (last visited Nov. 16, 2016).

292. MONTGOMERY PLANNING (Dec. 2004), http://www.montgomeryplanning.org/community/housing/documents/MPDUProductiontthrough202004.pdf.

region are, where the housing is affordable, and where it is not.[293] Seeing the visual representation of what community members already knew brought it home, telling the story in a way that was concrete, meaningful, and irrefutable. The FHEA maps confirmed and named their lived experience of their own community.

Just as the FHEA makes division, inequity, and lack of access to neighborhoods of opportunity visible—we can draw new maps. These maps need to go deeper than transporting people from where they currently live. These maps need to envision pathways that lead to people living where they choose—without constraints of income or other barriers to accessibility. Creating these pathways is what the AFFH Mirror exercise is all about.

VIII. LOOKING FORWARD

One of my favorite places in Omaha is the Bob Kerrey Pedestrian Bridge over the Missouri River, which links Omaha on the west/Nebraska side with Council Bluffs on the east/Iowa side. The state line is embedded in metal in the concrete walkway, and people often pose for photos with one foot in each state. The bridge has a graceful, sinuous curve to it, and the "linking two states" conceit is both fun and a reminder of the often-arbitrary nature of jurisdictional lines.

Almost always on the bridge I see a happy mixture of people from different racial and ethnic groups—all enjoying the bridge with friends and family. Since its completion in 2008, the bridge has become a public space for all. It invites a kind of mingling that is not all that frequent in the Omaha-Council Bluffs region.

This mingling is a sign of fairness of access and of a sense of belonging by many different types of residents. The easy flow of different people also lets us see that those "other" folks are also out to have a good time and enjoy the nice weather—just like us. Increasingly, businesses and schools are mindful and explicit about diversity and inclusion of people from different backgrounds—not only because it is the right thing to do, but also because it is the smart thing to do. Likewise, difference is valuable for creativity and resilience in cities and communities.

Revisiting my trip to the National Archives with which I began this article, what strikes me about the Security Map of Omaha was the power of the federal government. This power was not the power to impose racial segregation through redlining on a resistant Omaha.

293. Telephone Interview with Beth Goodman, Project Manager, ECONorthwest (July 2016).

This power, rather, was to affirm and entrench the racial segregation that Omaha—like other cities across the nation—had already created.

Decades after the federal government declared a reversal of direction, repudiating racial segregation in housing, Omaha-Council Bluffs has not revisited a development regime that took root during the era of redlining. The message of the Affirmatively Furthering Fair Housing ("AFFH") regulations is that it is time.

The AFFH Mirror invites Omaha-Council Bluffs, and other regions, to look deep. If the reflection is not fair, just as Omaha took the local initiative to segregate housing by race almost a century ago, the regulations invite the region to take the local initiative to expand access to housing in neighborhoods of opportunity. We are all part of the solution, and the local level is where it starts.[294]

Author's Note: I wrote this article in the summer and early fall of 2016, during the final year of the administration of President Obama. The election in November calls into question the long-term status of the 2015 regulations promulgated by that administration to implement the Affirmatively Furthering Fair Housing mandate of the Fair Housing Act.[295] Yet the history of local and federal action that created the racially segregated neighborhoods of the 1930's and of today reveals that the federal government's role was to "second," to endorse and solidify discriminatory decisions and policies that were already underway at the local level. Whatever happens to the 2015 regulations, localities that have looked in the AFFH Mirror have seen what they have seen; they know what they know. Localities have the responsibility to protect the interests and further the well-being of all of their residents. Localities can, almost a century later, again lead the way in housing policy and practice—this time toward equity and justice.

294. Lisa Alexander, Address at Creighton University School of Law: Bringing Home the Right to Housing (March 2016). *Cf.* David Brooks, *Are We on the Path to National Ruin?* NY TIMES (July 12, 2016), https://www.nytimes.com/2016/07/12/opinion/are-we-on-the-path-to-national-ruin.html ("America still has great resources at the local and social level.").

295. Emily Badger, *How Ben Carson at Housing Could Undo A Desegregation Effort*, NY Times (Nov. 23, 2016), https://www.nytimes.com/2016/11/23/upshot/how-ben-carson-at-housing-could-undo-a-desegregation-effort.html.

APPENDIX A: OMAHA HOUSING – CONVERSATIONS IN THE OMAHA-COUNCIL BLUFFS REGION

Kitty Amaya – Fair Housing and Equal Opportunity, Omaha Field Office, U.S. Department of HUD

Jamie Berglund – Senior Director, Community Initiatives, Greater Omaha Chamber of Commerce

Amanda Brewer – Executive Director/President, Habitat for Humanity of Omaha

Charles Coley – Executive Director, Metro Area Continuum of Care for the Homeless

Bob Dean – President, Seldin Company

Oscar Duran – Program Director, Habitat for Humanity of Omaha

Patricia Evans – Planning Department, City of Omaha, NE

Gary Fischer – General Counsel, Family Housing Advisory Services, Inc.

Joe Garcia – Fair Housing Center Director, Family Housing Advisory Services, Inc.

Beth Goodman – Project Manager, ECONorthwest

Alec Gorynski – Senior Director, Community Development and Corporate Social Responsibility, First National Bank of Omaha

Christian Gray – Director, inCOMMON Community Development

Don Gross – Directory of Community Development, City of Council Bluffs, IA

Tim Hemsath – Associate Professor, College of Architecture, University of Nebraska – Lincoln

Matthew Henke – Director of Grants Programs, Iowa West Foundation

Teresa Hunter – Executive Director, Family Housing Advisory Services, Inc.

Shaun Ilahi – General Counsel, Habitat for Humanity of Omaha

Steven Jensen – Principal, Steven Jensen Consulting and Former Planning Director, City of Omaha, NE

Michael Maroney – President, Omaha Economic Development Corp.

Othello Meadows – Executive Director, Seventy-Five North Revitalization Corp.

Scott Moore – Partner, Baird Holm LLP

Emily Nguyen – Director of Research and Evaluation, Omaha Community Foundation

Cassie Paben – Deputy Chief of Staff – Economic Development, City of Omaha, NE

Earl Redrick – Director, Omaha Field Office, U.S. Department of HUD

Ken Reed-Bouley – Director, Schlegel Center for Service and Justice, Creighton University

Sister Marilyn Ross – Former Executive Director, Holy Names Housing

Jeff Spiehs – Community Engagement Coordinator, Metropolitan Area Planning Agency

Mark Stursma – Planning Director, City of Papillion, NE

James Thele – Planning Director, City of Omaha, NE

Franchell Watson-Abdalla – Former Grants and Programs Coordinator, Homeownership Program Manager, Omaha Housing Authority

Chad Weaver – Planning Department, City of Omaha, NE

John Wiechmann – President & CEO, Midwest Housing Equity Group

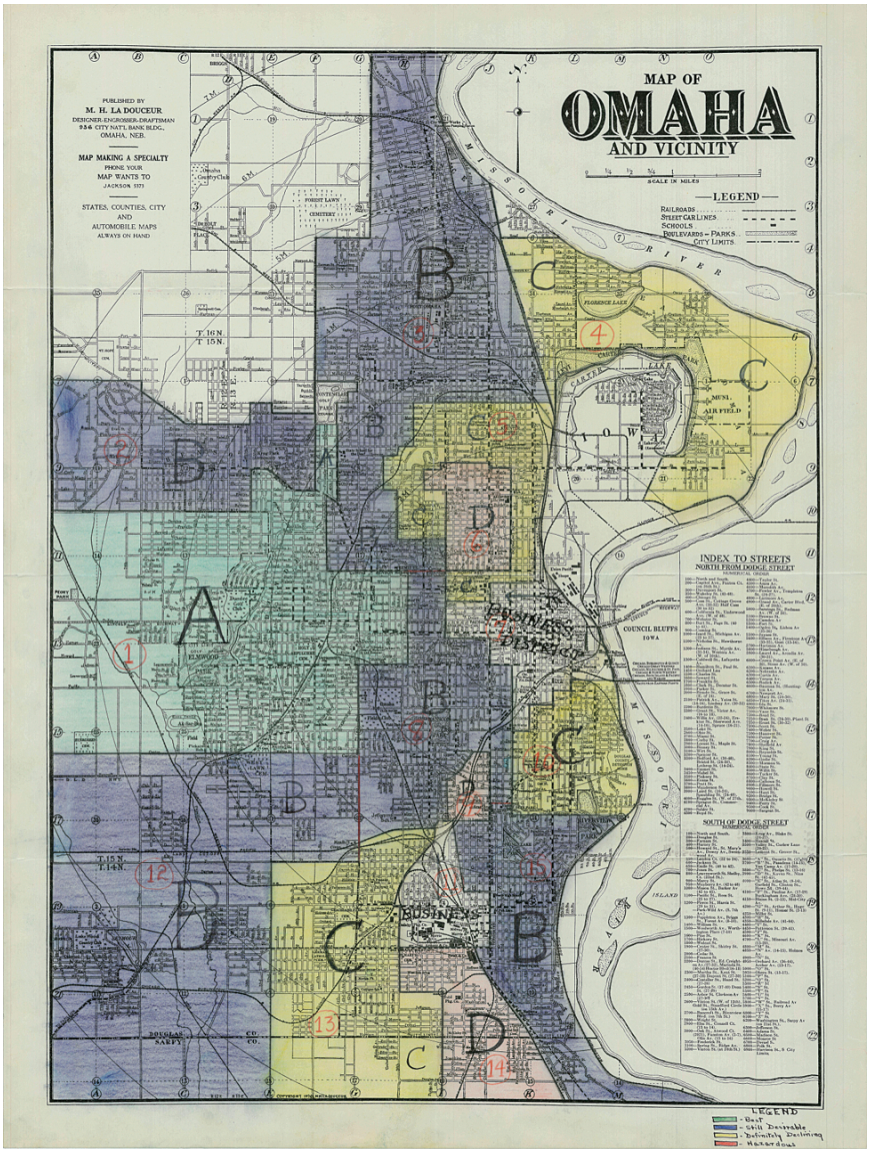
Greg Youell – Executive Director, Metropolitan Area Planning Agency

APPENDIX B: MAP OF OMAHA AND VICINITY

The U.S. government Home Owners' Loan Corporation ("HOLC") prepared this "Security Map" for Omaha in 1935/1936. The Map's Legend designates the following meaning for the four colors:

Green = Best
Blue = Still Desirable
Yellow = Definitely Declining
Red = Hazardous

A jpg of the original map, which is located at the National Archives in College Park, MD, is available at http://hdl.handle.net/10504/109008.



A CASE FOR THE DUE PROCESS RIGHT TO A SPEEDY EXTRADITION

ARTEMIO RIVERA†

ABSTRACT

Some lower courts have held that there is no due process right to a speedy extradition. Courts ground this conclusion on categorical and formalistic arguments that ignore the current realities of extradition proceedings and the modern jurisprudence on procedural due process. These arguments are also similar to doctrines in immigration and national security law that have fallen out of favor with the Court.

This Article argues that the categorical distinctions used to consider due process challenges in extradition proceedings are inconsistent with current developments in the law of due process. It also argues that courts should apply the balancing test of Mathews v. Eldridge *when considering procedural safeguards in international extradition just as the Court has done in recent immigration and national security cases. Applying* Mathews *to issues of extradition delay shows that procedural safeguards similar to those the Court has adopted for criminal cases in* Barker v. Wingo *and* United States v. Lovasco *are appropriate in international extradition.*

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Delay is the deadliest form of denial.

—C. Northcote Parkinson

I. INTRODUCTION

In *Martinez v. United States*,[1] the United States Court of Appeals for the Sixth Circuit held that treaty language in the United States-Mexico Extradition Treaty does not provide for a speedy extradition. The debate in *Martinez* focused mainly on the interpretation of a "lapse of time" provision in that treaty, and on whether that provision incorporates by reference the Speedy Trial Clause of the Sixth Amendment. Similar to the Sixth Circuit in *Martinez*, this Article discusses the right to a speedy proceeding in extradition, but not through the interpretation of treaty language. This Article argues that the Due Process Clause of the Fifth Amendment confers that right directly.

1. 828 F.3d 451 (6th Cir. 2016).

Courts acknowledge that relators, or those subject to extradition proceedings,[2] have due process rights.[3] These same courts, however, refuse to extend such rights to protect relators from the prejudices of government delay. When faced with due process issues, extradition courts generally avoid applying balancing tests, such as the one from *Mathews v. Eldrige,*[4] and instead make formalistic or categorical distinctions to reach their conclusions.[5] These categorical distinctions have led courts to hold that certain procedural safeguards demanded by relators are not required by due process. Thus, courts have refused to consider evidence of torture brought up by relators, have held that the government may establish its case partially or totally on hearsay evidence, and have refused to protect relators from pre-accusation delay.[6]

In contexts other than international extradition, however, courts regularly consider liberty interests by applying *Mathews* and similar balancing tests.[7] This Article argues that balancing is the best alternative to consider due process issues in international extradition and that its application to issues of government delay leads to the adoption of procedural safeguards similar to those adopted by the Court in *Barker v. Wingo*[8] and *United States v. Lovasco*[9] for criminal cases.

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2. The term "relator" is often used to refer to those subject to an international extradition proceeding. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (6th ed. 2014). I exclude from the scope of this Article individuals who are either illegally or temporarily in the United States because these individuals do not have the same liberty interests of citizens and permanent residents to remain in the United States, and thus the Due Process Clause should not protect them with equal force. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation . . . ."). For an in-depth explanation of the differing rights of citizens and aliens in the United States see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 1-82 (1st ed. 2003) and David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002). *See also* Zaydivas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

3. *See infra* note 123.

4. 424 U.S. 319 (1976).

5. *See infra* note 135 and accompanying text.

6. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (holding that extradition magistrates have no duty to consider evidence of torture at the requesting country); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984) (concluding that due process does not protect relators from pre-accusation delay); United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) (concluding that there is no due process right against the admissibility of hearsay evidence in international extradition).

7. Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 890-91 (2015).

8. 407 U.S. 514 (1972).

9. 431 U.S. 783 (1977).

After briefly introducing the field of international extradition in Part II, this Article discusses in Part III the tests devised by the Court in *Barker* and *Lovasco* to consider the constitutionality of government delay in criminal proceedings. *Barker*'s test is further discussed in Part IV, but this time as part of this Article's argument that a similar test must be adopted as a procedural safeguard against the prejudices of post-accusation delay in extradition proceedings. This part argues that *Mathews v. Eldridge* should be applied to consider due process issues in international extradition, and that the application of *Mathews* to the issue of post-accusation delay suggests a *Barker*-type test as the appropriate safeguard.

Finally, Part V discusses the issue of pre-accusation delay in international extradition and argues that a *Lovasco*-type test should be adopted. Applying *Mathews* to the issue of pre-accusation delay suggests that a balancing of the government's and the relator's interests requires the application of a procedural safeguard such as *Lovasco*'s, which provides criminal defendants with some minimal protection against the harms of delayed charges.

The issue of pre-accusation delay confronts the courts with substantial conflicts of interests between the government and the relator. Of particular importance is the government interest that courts do not inquire into the legal processes of requesting countries. Non-inquiry is a legitimate legal concern, but it should not be used as the basis for a categorical denial of due process protection against pre-accusation delay. Instead, the interest in non-inquiry should be balanced against the relator's interest not to be surrendered to a foreign country for criminal prosecution and imprisonment without due process.

II. INTERNATIONAL EXTRADITION IN BRIEF

Extradition proceedings are *sui generis*.[10] They are neither civil nor criminal,[11] and thus the Federal Rules of Criminal Procedure and the Federal Rules of Evidence are not directly applicable.[12] Requests for extradition are regularly presented by the Department of Justice for the benefit of requesting countries,[13] whereas extradition hearings are normally presided over by federal magistrates or district court judges, acting on behalf of the Executive.[14] The magistrate's main du-

10. *See* BASSIOUNI, *supra* note 2, at 880 ("The hearing, though *sui generis* in nature, is similar to a probable cause hearing in federal criminal cases . . . .").

11. BASSIOUNI, *supra* note 2, at 880.

12. United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997); Martin v. Warden, Atlanta Pen, 993 F.2d 824, 828 (11th Cir. 1993).

13. BASSIOUNI, *supra* note 2, at 823-24.

14. Patterson v. Wagner, 785 F.3d 1277, 1279 (9th Cir. 2015); Hilton v. Kerry, 754 F.3d 79, 83 (1st Cir. 2014); Harshbarger v. Regan, 599 F.3d 290, 292 (3d Cir. 2010)

ties are to ensure that the requesting country has complied with all treaty requirements and that no valid defenses or exceptions should stop the extradition request.

As part of the extradition process, the government must at least establish: (1) probable cause that the relator committed the alleged offense at the requesting country;[15] (2) the offense upon which extradition is requested is extraditable according to the applicable treaty;[16] (3) the offense in question constitutes a crime at both the requesting country and the United States ("dual criminality");[17] (4) an enforceable extradition treaty exists between the United States and the requesting country;[18] and (5) the arrested individual is the person sought by the requesting country.[19]

If the government meets its burden, then the magistrate must consider any valid defenses raised by the relator. Several affirmative defenses or grounds to deny extradition have been recognized by the courts as stemming from United States extradition treaties, such as statutes of limitations,[20] double jeopardy,[21] and political offense.[22] The right to a speedy extradition has been asserted as a defense in different forms by relators, but so far unsuccessfully.[23]

Affecting the relator's chances to validly raise the speedy extradition defense is the so called rule or doctrine of "non-inquiry." Non-

("Extradition is an executive rather than a judicial function."); *Martin*, 993 F.2d at 828 ("The power to extradite derives from the President's power to conduct foreign affairs," and thus, in extradition the magistrate judge provides "an independent review function delegated to it by the Executive . . . and defined by statute.").

15. Eain v. Wilkes, 641 F.2d 504, 507-08 (7th Cir. 1981).

16. Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005).

17. *Kin-Hong*, 110 F.3d at 114 ("The purpose of the dual criminality requirement is simply to ensure that extradition is granted only for crimes that are regarded as serious in both countries.").

18. *Id.* at 111.

19. Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976) ("The purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws."). *See also* Linda Friedman Ramirez, *Evolving Extradition*, THE CHAMPION, Sept.-Oct. 2009, at 44.

20. *See* Patterson v. Wagner, 785 F.3d 1277, 1280-83 (9th Cir. 2015); Jhirad v. Ferrandina, 536 F.2d 478, 480 (2d Cir. 1976); Nezirovic v. Holt, 990 F. Supp. 2d 606, 613-19 (W.D. Va. 2014).

21. *See* Sindona v. Grant, 619 F.2d 167, 177-78 (2d Cir. 1980); Galanis v. Pallanck, 568 F.2d 234, 238-39 (2d Cir. 1977).

22. *See* Meza v. United States, 693 F.3d 1350, 1358-60 (11th Cir. 2012); Barapind v. Enomoto, 400 F.3d 744, 750-53 (9th Cir. 2005); Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980); *Nezirovic*, 990 F. Supp. 2d at 619-21; Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) ("Whether an extraditee is accused of an offense of a political nature is an issue for judicial determination.").

23. *See infra* note 122.

inquiry prohibits the requested court from questioning the fairness of the requesting state's legal system[24] by "preclud[ing] extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request."[25] By applying this doctrine, courts have avoided consideration of the legal systems of requesting countries, even in cases where relators have claimed that they are likely to be tortured if extradited,[26] and where relators have been convicted *in absentia* at the requesting country previous to their extradition requests.[27]

Once an extradition magistrate decides that the government has complied with all statutory and treaty requirements, and that no grounds exist to deny extradition, the magistrate must certify to the Secretary of State that the relator is extraditable.[28] The Secretary of State, in turn, must use its discretion to decide whether to extradite the relator or not.[29]

One ground sometimes argued by relators is that a delay from the requesting country in filing criminal charges, or in requesting extradition, affects their right to a speedy extradition. So far this argument has been unsuccessfully underpinned on treaty rights,[30] as well as on the Fifth Amendment's Due Process Clause.[31] This Article focuses on the due process argument. To explain why the Due Process Clause should protect relators from government delay, this Article will begin discussing how delay is considered in criminal proceedings.

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24. *Martin*, 993 F.2d at 829 (stating the rule of non-inquiry "precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request"); United States v. Howard, 996 F.2d 1320, 1329 (1st Cir. 1993) (explaining that the rule of non-inquiry requires courts to refrain from "investigating the fairness of a requesting nation's justice system").

25. *Martin*, 993 F.2d at 829-30 n.10 (stating that factors such as foreign relations or humanitarian concerns may only be considered by the Secretary of State after the court certifies the relator's extraditability).

26. Mironescu v. Costner, 480 F.3d 664, 672-73 (4th Cir. 2007).

27. *See* Gallina v. Fraser, 278 F.2d 77, 78-79 (2d Cir. 1960); Haxhiaj v. Hackman, 528 F.3d 282, 291 (4th Cir. 2008).

28. *See* 18 U.S.C. § 3184 (2012); Cornejo Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000).

29. *Martin*, 993 F.2d at 829.

30. *See* Yapp v. Reno, 26 F.3d 1562, 1566 (11th Cir. 1994); *but see* Martinez v. United States, 793 F.3d 533, 548 (6th Cir. 2015) (holding that lapse of time protections in U.S. law are incorporated by a provision of the United States-Mexico Extradition treaty, and that the same protects relators from post-accusation prosecutorial delay), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016).

31. *See In re* Extradition of Drayer, 190 F.3d 410, 415 (6th Cir. 1999); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984).

III. CONSTITUTIONAL PROTECTIONS AGAINST GOVERNMENT DELAY IN CRIMINAL PROCEEDINGS

Federal law provides due process protection from government delay in various sources, including the Constitution, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and statutes of limitations. These protections work in tandem to create the proper effect.[32] Because these constitutional and statutory protections are specifically meant to provide criminal defendants with due process, the Fifth Amendment's Due Process Clause only protects criminal defendants in limited fashion to compliment those specific protections.[33] Thus, the Due Process Clause's protection against pre-accusation delay is very limited.[34] The Speedy Trial Clause of the Sixth Amendment, on the other hand, offers protection for delay occurring after the accusation or arrest[35] that is more generous than the one afforded by the Due Process Clause for pre-accusation delay.

Statutes of limitations form part of the mix of safeguards that shield the public from the harms of delayed prosecutions. They are legislative devices meant to protect the innocent from being charged at a time when they no longer have access to exculpatory evidence,[36] and to shield the public from untimely and ineffective prosecutions.[37] Statutes of limitations, however, are not the only means criminal defendants have to protect themselves from prejudicial delay. As the United States Court of Appeals for Eleventh Circuit explains in *Stoner v. Graddick*:[38]

> The statute of limitations is the principal device, created by the people of a state through their legislature, to protect against prejudice arising from a lapse of time between the commission of a crime and an indictment or arrest. Statutes of limitation represent legislative assessment of relative interest of the state and the defendant in administering and receiving justice. Limitations statutes, however, are not the only available protection against prejudice. The particular provisions of the Speedy Trial Clause of the Sixth Amendment are available with respect to prejudicial delay after formal indictment or information, or actual arrest.[39]

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32. *See* Medina v. California, 505 U.S. 437, 443-44 (1992).

33. *Medina*, 505 U.S. at 443-44.

34. United States v. Lovasco, 431 U.S. 783, 789 (1977) ("[T]he Due Process Clause has a limited role to play in protecting against oppressive delay.").

35. United States v. McDonald, 456 U.S. 1, 6-7 (1982); United States v. Marion, 404 U.S. 307, 320 (1971); Stoner v. Graddick, 751 F.2d 1535, 1540-41 (11th Cir. 1985).

36. *Marion*, 404 U.S. at 322.

37. *Id.*

38. 751 F.2d 1535 (11th Cir. 1985).

39. *Stoner*, 751 F.2d at 1540-41 (citations omitted) (quotations omitted).

In a case where no statute of limitations applies, or when the applicable statute of limitations has not lapsed, the Fifth Amendment's Due Process Clause protects the accused from government delay occurring from the commission of the crime to the time of the arrest or charge.[40] Due process protection, however, depends upon compliance with an onerous test first announced in *United States v. Lovasco*[41] by the United States Supreme Court.[42] Next, this Article discusses the guarantees provided by the Speedy Trial Clause for post-accusation delay and the protection afforded by the Due Process Clause when pre-accusation delay occurs. These discussions should provide a better understanding of the nature of these rights, which in turn must help in considering how government delay must be treated in international extradition.

A. Speedy Trial Rights in Criminal Proceedings

The Speedy Trial Clause of the Sixth Amendment requires that criminal defendants be promptly tried of the charges against them.[43] Federal statutes, such as the Speedy Trial Act,[44] provide further protection against delay in criminal proceedings after the arrest or the filing of charges. To determine when the Sixth Amendment demands the dismissal of charges for post-accusation delay, the Court adopted a test in *Barker v. Wingo*[45] that requires a balancing of the interests of criminal defendants and the government.[46] The test has been widely adopted by the lower courts.[47]

The constitutional right to a speedy criminal trial—a fundamental right—is based on broad due process concerns.[48] The Sixth Amendment provides in its relevant part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[49] The expediency required runs from the time of "arrest, indictment, or other official accusation"[50] up to the start of trial.[51] It serves as "an important safeguard to prevent undue and oppressive incarceration

40. *Marion*, 404 U.S. at 324.
41. 431 U.S. 783 (1977).
42. *See Lovasco*, 431 U.S. at 789, 795-97.
43. U.S. Const. amend. VI.
44. 18 U.S.C. § 3161 (2012).
45. 407 U.S. 514 (1972).
46. Barker v. Wingo, 407 U.S. 514, 531-33 (1972).
47. *See* United States v. Souza, 749 F.3d 74, 81-82 (1st Cir. 2014); United States v. Battis, 589 F.3d 673, 678-83 (3d Cir. 2009); United States v. Oriedo, 498 F.3d 593, 596-601 (7th Cir. 2007); United States v. Sandoval, 990 F.2d 481, 482-84 (9th Cir. 1993).
48. *See Barker*, 407 U.S. at 515 ("[T]he right to a speedy trial is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.").
49. U.S. Const. amend. VI.
50. Doggett v. United States, 505 U.S. 647, 655 (1992).
51. United States v. Marion, 404 U.S. 307, 313 (1971); *Battis*, 589 F.3d at 678.

prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[52] Of these prejudices, impairment to the defense is considered the most important.[53]

But, not all types of delay give rise to a speedy trial defense. Delay resulting from the defendant's own actions, such as when the defendant is a fugitive or avoiding justice, is normally not counted.[54] Delay that may be attributed to reasonable efforts by the government to prosecute the defendant, or by the court to manage the case, is not counted either.[55] Ultimately, the speedy trial inquiry must be done on an *ad hoc* or case-by-case basis,[56] keeping in mind that the primary burden for providing a speedy trial is on the prosecution and the courts, not the defendant.[57]

In *Barker v. Wingo*, the Supreme Court adopted a four-factor test to evaluate speedy trial claims under the Sixth Amendment.[58] The four factors are: "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[59] These four factors are not exclusive of other potential considerations, and none of them are either necessary or sufficient to establish a speedy trial defense.[60] Courts must consider all factors, and all other relevant circumstances, on a case-by-case basis.[61]

The first *Barker* factor, "length of the delay," is generally measured from the time of the indictment or arrest to the time the trial begins.[62] It may be the most important factor because it acts as a "triggering mechanism."[63] "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[64] Delays as short as one year have

52. United States v. Ewell, 383 U.S. 116, 120 (1966).
53. *Doggett*, 505 U.S. at 654.
54. *Barker*, 407 U.S. at 529 ("[I]f delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine . . . ."); *Sandoval*, 990 F.2d at 484; United States v. Blanco, 861 F.2d 773, 778-81 (2d Cir. 1988) (holding that a ten-year delay is not a cause for a speedy trial violation when the defendant remained in Colombia under an assumed name and the government diligently attempted to bring him to trial).
55. *Barker*, 407 U.S. at 531 ("[A] valid reason, such as a missing witness, should serve to justify appropriate delay.").
56. *Id.* at 530.
57. *Id.* at 529.
58. *Id.* at 529-30.
59. *Id.* at 530.
60. *Id.* at 533.
61. *Doggett*, 505 U.S. at 657-58 n.9.
62. United States v. Mendoza, 530 F.3d 758, 762 (9th Cir. 2008) ("We find that this ten-year delay creates a presumption of prejudice that triggers an inquiry into the other three factors.").
63. *Barker*, 407 U.S. at 530.
64. *Id.*

been considered presumptively prejudicial,[65] but what constitutes prejudicial delay depends on the factual context.[66] The longer delay is attributable to the government, the more weight this factor will carry for the defendant.[67] In evaluating this factor, the court must subtract the amount of delay caused by the defendant from the delay caused by the government.[68]

The second *Barker* factor considers the reasons asserted by the government to justify the delay. Different weights must be given to different types of delay. If the delay is based on a valid reason, such as that the government has been looking for a missing witness, or if the delay is attributable to the defendant, the delay will likely be justified and not considered against the government.[69] At the other extreme, delay deliberately caused by the government to hinder the defense must be weighed heavily against it.[70] In the middle of these extremes lie:

> more neutral reason[s] such as negligence or overcrowded courts[, which] should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.[71]

Government negligence is thus a sufficient basis for a speedy trial defense, but as it is less reprehensible than intentional delay, delay caused by negligence must be longer to trigger a dismissal of charges.[72] As explained by the Court in *Doggett v. United States*:[73]

> *Barker* made it clear that "different weights [are to be] assigned to different reasons for delay." Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And

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65. *See Mendoza*, 530 F.3d at 762 ("Generally, a delay of more than one year is presumptively prejudicial."); United States v. Oriedo, 498 F.3d 593, 597 (7th Cir. 2007) ("We have considered delays that approach one year presumptively prejudicial"); *Doggett*, 505 U.S. at 652 n.1. For a list of cases finding different lengths of delay sufficient to trigger the *Barker* inquiry, see Joseph Wylie, *Preliminary Proceeding: Speedy Trial*, 86 GEO. L.J. 1493, 1497 n.1272 (1998).

66. *Barker*, 407 U.S. at 522, 530-31.

67. *Doggett*, 505 U.S. at 657; *Oriedo*, 498 F.3d at 597 ("In determining the weight to give the length of the delay, we must look to the extent to which it exceeds the minimum necessary to trigger the analysis.").

68. *Doggett*, 505 U.S. at 657-58.

69. *Barker*, 407 U.S. at 531.

70. *Doggett*, 505 U.S. at 656.

71. *Barker*, 407 U.S. at 531. *See also Battis*, 589 F.3d at 679; *Doggett*, 505 U.S. at 656-57.

72. *Doggett*, 505 U.S. at 656-57.

73. 505 U.S. 647 (1992).

> such is the nature of the prejudice presumed that the weight that we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial.[74]

The third *Barker* factor weighs the defendant's assertion of speedy trial rights.[75] Demands by defendants to have their trials, or to have their charges dismissed on speedy trial grounds, weigh in their favor.[76] The defendant is expected to request trial if the delay is truly prejudicial.[77] The more insistent the defendant is on requesting a speedy trial, the more likely prejudice is to be found.[78] Failure to assert this right will weigh heavily against finding a Sixth Amendment violation, but the failure alone does not preclude constitutional protection.[79]

Finally, the fourth *Barker* factor considers whether the defendant has suffered any "prejudice" because of the delay.[80] Prejudice can take various forms, including oppressive pre-trial incarceration, anxiety and concern suffered by the accused while awaiting trial, and impairment to the defense due to dimming memories and the loss of exculpatory evidence.[81] Of these prejudices, impairment to the defense is the most harmful to a defendant, and thus important to the speedy trial analysis.[82] Under *Barker*, the defendant is not necessarily required to establish actual prejudice by proving a specific harm; prejudice may be presumed if the prosecution has been delayed for a significant period of time.[83] For instance, delay causing one year of incarceration has been presumed prejudicial.[84]

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74. *Doggett*, 505 U.S. at 657 (citation omitted).

75. *Barker*, 407 U.S. at 531-32.

76. *Id.*

77. *Id.* at 531.

78. *See* Roberto Iraola, *Due Process, the Sixth Amendment, and International Extradition*, 90 NEB. L. REV. 752, 769 (2012).

79. *Battis*, 589 F.3d at 681.

80. *Barker*, 407 U.S. at 532-33.

81. *Doggett*, 505 U.S. at 654; *Barker*, 407 U.S. at 532.

82. *Doggett*, 505 U.S. at 654 ("Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" (quoting *Barker*, 407 U.S. at 532)).

83. *Barker*, 407 U.S. at 530-31; *Doggett*, 505 U.S. at 651-52 ("[T]o trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay . . . ."); United States v. Pomeroy, 822 F.2d 718 (8th Cir. 1987) (citing Smith v. Hooey, 393 U.S. 374, 378-79 (1969)).

84. *Mendoza*, 530 F.3d at 762; United States v. Oriedo, 498 F.3d at 597. *See Doggett*, 505 U.S. at 652 n.1.

When the case for speedy trial protection is strong on other factors, there may be no need to prove specific instances of prejudice.[85] This is particularly important because the "impairment of one's defense is the most difficult form of speedy trial prejudice to prove as time's erosion of exculpatory evidence and testimony 'can rarely be shown.'"[86] As the Court explained in *Doggett*:

> Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.[87]

The *Barker* test is a high bar for criminal defendants, but at least it provides a balancing scheme that allows some protection against unfair trials. Protection against the harms of pre-accusation delay, however, is much more limited.

B. Due Process Rights Against Pre-Accusation Delay in Criminal Cases

The Court has recognized due process protection against some forms of pre-accusation delay in two cases, *United States v. Lovasco*[88] and *United States v. Marion*.[89] The test that has emerged from these two cases, though, is a high bar. In *Lovasco*, the Court held that a due process defense for pre-accusation delay required proof of actual prejudice by the defendant, reasoning that it was in society's best interest not to force prosecutors to file charges as soon as they have gathered enough evidence to establish probable cause.[90] Recognizing the contextual nature of pre-accusation delay, the Court left it to the lower courts to develop a due process doctrine for considering different types of delay according to its ruling.[91] After *Lovasco*, most lower courts have applied a demanding test for pre-accusation delay that

85. *Doggett*, 505 U.S. at 655 ("[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim.").

86. *Id.* (citing *Barker*, 407 U.S. at 532).

87. *Id.* at 655-56 (citations omitted).

88. 431 U.S. 783 (1977).

89. 404 U.S. 307 (1971).

90. United States v. Lovasco, 431 U.S. 783, 789-90 (1977); United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992). *See* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 Wm. & Mary L. Rev. 607, 619 (1990).

91. *Lovasco*, 431 U.S. at 796-97.

requires proof of actual prejudice suffered by the defendant, and evidence that the government delayed the case intentionally.[92]

The Court first discussed the availability of due process protection against pre-accusation delay in *United States v. Marion*. In *Marion*, the Court held that the Sixth Amendment's Speedy Trial Clause is not applicable to pre-accusation delay, or delay accruing from the time of the offense to the time of the arrest or accusation.[93] The Court reversed the judgment of the district court, which had dismissed the charges upon motion by the defendants on due process and Sixth Amendment grounds. The defendants argued that a delay of approximately three years from the commission of the crime to the return of the indictment was unconstitutionally prejudicial, but the Court disagreed. It reasoned that because the defendants had not presented evidence of actual prejudice to the district court, they had not complied with the initial requirement to establish a due process violation.[94]

When there is only evidence of potential prejudice by the defendant, the applicable statute of limitations operates to protect the accused from charges that "may have become obscured by the passage of time . . . ."[95] Because the defendants in *Marion* failed to introduce evidence of actual prejudice, the Court ruled that they did not trigger a due process inquiry, and it refrained from adopting a due process test for pre-accusation delay. In the course of its reasoning, it did note the defendants failed to establish that "the Government intentionally delayed to gain some tactical advantage" over the defendants or "to harass them."[96] Based on this language, various lower courts have developed tests for pre-accusation delay which consist mainly of two prongs: first, proving actual prejudice by the defendant; and second, proving that the government intentionally delayed the prosecution to gain a tactical advantage over the defendant.[97] The way courts have construed actual prejudice under *Marion* requires defendants not only to show that they lost the opportunity to present witnesses or evidence, but also that the lost testimony or evidence would have benefitted them.[98] This is a very high bar.

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92. *See* United States v. Bater, 594 F.3d 51, 54 (1st Cir. 2010). *See also* 3B CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 805 (4th ed. 2013); Goldfarb, *supra* note 90, at 622.

93. United States v. Marion, 404 U.S. 307, 313 (1971).

94. *Marion*, 404 U.S. at 323-24.

95. *Id.* at 323.

96. *Id.* at 325.

97. Eli Dubosar, *Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 FLA. ST. U. L. REV. 659, 668-69 (2013).

98. *See* United States v. Corona-Verbera, 509 F.3d 1105, 1113 (9th Cir. 2007) ("Corona-Verbera's arguments are based on generalized speculation as to what lost or de-

Following *Marion*, in *Lovasco* the Court had the opportunity to clarify what exactly the due process test for pre-accusation delay should be, but it did not. The Court reaffirmed *Marion*'s holding that evidence of actual prejudice is required to establish a due process violation,[99] but failed again to define the second prong, the reason for the delay.[100] It limited its analysis to the particular facts by concluding that delay resulting from reasonable investigatory efforts by the government does not suffice to make out a due process defense.[101] The Court did cite the dictum in *Marion* regarding the value of evidence of intentional delay by the government in assessing potential due process violations for pre-accusation delay,[102] but held that the scarcity of judicial decisions on this issue disallowed it to establish a fixed test.[103] The Court thus left it to the lower courts to make that determination on a case-by-case basis.[104]

Most lower courts have construed *Marion* and *Lovasco* to require a two-prong test.[105] This test requires the defendant to prove actual prejudice, and then demands evidence that the government intentionally delayed the prosecution to gain a tactical advantage.[106] Some circuits,[107] and some state courts,[108] however, have different requirements.[109] The United States Courts of Appeals for the Fourth and Ninth Circuits have opted to balance the defendant's evidence of prejudice with the government's proffered reasons for the delay.[110] For instance, a case with strong evidence of prejudice would demand

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ceased witnesses would have said."); United States v. Wallace, 848 F.2d 1464, 1470 (9th Cir. 1988) (explaining defendant failed to establish what potential witness would have testified for the defense).

99. *Lovasco*, 431 U.S. at 789.

100. *Id.* at 796-97.

101. *Id.* ("We simply hold that in this case the lower courts erred in dismissing the indictment.").

102. *Id.* at 795. *See* United States v. Moran, 759 F.2d 777, 781 (9th Cir. 1985); Dubosar, *supra* note 97, at 670-71.

103. *Lovasco*, 431 U.S. at 796-97.

104. *Id. See Moran*, 759 F.2d at 781; Dubosar, *supra* note 97, at 670-71, 676-82.

105. *See* Dubosar, *supra* note 97, at 668-71; Goldfarb, *supra* note 90, at 623 (providing a list of circuit court decisions adopting *Marion*'s second prong).

106. Dubosar, *supra* note 97, at 668-71.

107. *Id.* at 670-71 (highlighting federal courts such as the United States Courts of Appeals for the Fourth and Ninth Circuits).

108. *Id.* at 676-77 (referring to state courts such as Alaska, California, Florida, Hawaii, Illinois, Louisiana, Maine, Montana, New Hampshire, North Dakota, Ohio, Oregon, South Carolina, Washington, and West Virginia).

109. *See id.*

110. *See* United States v. Uribe-Rios, 558 F.3d 347, 358 (4th Cir. 2009) ("First, we ask whether the defendant has satisfied his burden of proving 'actual prejudice.' Second, if that threshold requirement is met, we consider the government's reasons for the delay, 'balancing the prejudice to the defendant with the Government's justification for the delay.'") (citations omitted). *See also* Dubosar, *supra* note 97, at 670-71.

less of a showing of culpability or negligence from the government.[111] It must be remembered that neither *Marion* nor *Lovasco* held that a defendant must prove bad faith or recklessness by the government to establish a due process violation for pre-accusation delay.[112]

The government does not violate the Fifth Amendment, even if it harms the defendant, when it reasonably protracts the investigation to obtain evidence of guilt beyond reasonable doubt or to investigate other suspects.[113] The Court supports this conclusion on policy arguments that the public must be protected from unwarranted charges, and that the government has the right to prosecute those suspected of crimes.[114] Forcing the government to file charges as soon as it obtains enough evidence to prove probable cause is likely to "increase the likelihood of unwarranted charges," "would add to the time during which defendants stand accused but untried[,]"[115] and would cause "potentially fruitful sources of information to evaporate before they are fully exploited" by the government.[116] Additionally, requiring the government to file charges immediately "would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts."[117]

Unlike the *Barker* safeguard for post-accusation delay, the due process test for pre-accusation delay is yet to be settled. Most lower courts in the federal system apply the rigid two-prong test originally suggested in *Marion*, but the same is not consistently applied by all federal circuits and state courts.[118]

Issues of delay in international extradition should be informed by the relevant doctrines of criminal law as extradition is a quasi-criminal procedure,[119] but distinguished by the particular context of extradition proceedings. Ultimately, principles of due process should control the treatment of government delay in international extradition because of the substantial deprivation of liberty interests involved.

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111. *See* Dubosar, *supra* note 97, at 670-71.
112. *Moran*, 759 F.2d at 781.
113. *Lovasco*, 431 U.S. at 790-92.
114. Goldfarb, *supra* note 90, at 655-56 (arguing that the *Lovasco* test violates the principles of due process adopted and explained in *Mathews*).
115. *Lovasco*, 431 U.S. at 791.
116. *Id.* at 792.
117. *Id.*
118. Dubosar, *supra* note 97, at 668-71.
119. *See* BASSIOUNI, *supra* note 2, at 780.

IV. DUE PROCESS REQUIRES PROTECTION AGAINST POST-ACCUSATION DELAY IN INTERNATIONAL EXTRADITION

Constitutional clauses addressing criminal defendants do not protect relators because extradition is not a criminal procedure.[120] More specifically, lower courts have held that the Sixth Amendment's right to a speedy trial, and *United States v. Lovasco*'s[121] due process right against pre-accusation delay, are limited to criminal proceedings and do not apply to international extradition.[122] Most courts, however, have held that relators enjoy due process rights.[123] Relators must be afforded due process protection against pre-accusation and post-accusation delay mainly because of the heavy liberty interests involved in international extradition,[124] and because passage of time affects the

120. Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993); Sabatier v. Dabrowski, 586 F.2d 866, 869 (1st Cir. 1978); Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d Cir. 1976).

121. 431 U.S. 783 (1977).

122. *In re* Extradition of Drayer, 190 F.3d 410, 415 (6th Cir. 1999) (regarding post-accusation delay); McMaster v. United States, 9 F.3d 47, 49 (8th Cir. 1993) (concerning post-accusation delay); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984) (regarding pre-accusation delay); *Jhirad*, 536 F.2d at 485 n.9; *In re* Ortiz, No. 10-MJ-2016, 2011 U.S. Dist. LEXIS 87426, at *17 (S.D. Cal. Feb. 9, 2011). *But see In re* Mylonas, 187 F. Supp. 716, 721 (N.D. Ala. 1960) ("[L]apse of time" provision in extradition treaty incorporates "speedy trial as spelled out in the Sixth Amendment"); Martinez v. United States, 793 F.3d 533, 555 (6th Cir. 2015) (holding that extradition treaty with Mexico incorporates the speedy trial protection of the Sixth Amendment), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016); BASSIOUNI, *supra* note 2, at 780 ("Extradition is *sui generis*, but partakes of a criminal nature and, therefore, [speedy trial rights] should apply.").

123. *Martinez*, 793 F.3d at 556 ("Courts have unanimously held that the government is bound by principles of due process in its conduct of extradition proceedings."), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016); Valenzuela v. United States, 286 F.3d 1223, 1229 (11th Cir. 2002) ("[T]he judiciary must ensure that the constitutional rights of individuals subject to extradition are observed."); United States v. Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997) ("[E]xtradition proceedings before United States courts [must] comport with the Due Process Clause of the Constitution."); *Martin*, 993 F.2d at 829; Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969); *In re* Gonzalez, 52 F. Supp. 2d 725, 740 (W.D. La. 1999); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1342 (S.D. Fla. 1998); *In re* Koskotas, 127 F.R.D. 13, 27 (D. Mass. 1989) ("Koskotas is certainly entitled to a hearing prior to extradition under the Due Process Clause . . . ."); *In re* Singh, 123 F.R.D. 108, 125 (D.N.J. 1987) ("*Sayne* and *Escobedo* confirm that a defendant in an extradition proceeding has a due process right to a hearing before being extradited."). *See* Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 147 (2017); Jacques Semmelman, *The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT'L L.J. 1295, 1300 (2000) ("The extradition magistrate is charged with protecting the accused's due process rights, and the extradition hearing is the primary vehicle through which the accused is accorded due process."). *But see McMaster*, 9 F.3d at 48-49 (disclaiming due process rights in extradition unless government requests extradition on the basis of race, sex, creed, or other exceptional constitutional limitation); Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir. 1984).

124. Demjanjuk v. Petrovski, 10 F.3d 338, 353 (6th Cir. 1993).

opportunity of relators to defend against an extradition request. When considering the propriety of any procedural safeguard against extradition delay, courts must assess it through the balancing test of *Mathews v. Eldridge*[125] as it is the generally accepted means to assess procedural due process challenges.

Just as in criminal proceedings, extradition delay may be divided into two main types: the one that occurs in the requesting country prior to the filing of criminal charges, or pre-accusation delay, and the one that takes place afterwards, or post-accusation delay. Relators have argued for protection against post-accusation and pre-accusation delay based on the Fifth Amendment's Due Process Clause[126] and on treaty language.[127] So far, the lower courts have denied protection against extradition delay regardless of the basis for relief, and the Supreme Court has yet to rule on the issue. Recently, the United States Court of Appeals for the Sixth Circuit considered whether the "lapse of time" clause of the United States-Mexico Extradition Treaty incorporates speedy extradition rights from the Sixth Amendment.[128] After one of its panels construed the clause to provide such rights,[129] the circuit court, sitting *en banc*, vacated[130] the panel decision and later construed the treaty's lapse-of-time clause not to provide relief for post-accusation delay.[131] Both opinions engage in lengthy discussions on treaty construction to base their conflicting decisions.

When considering issues of due process and extradition delay, however, courts have engaged in little or no analysis, applied formalistic distinctions, and avoided balancing the conflicting interests of government and relator.[132] Next, this Article argues that safeguards similar to those adopted in *Barker v. Wingo*[133] and *Lovasco* for delay in criminal cases must also be implemented in international extradition.

A. Courts Should Apply *Mathews*'s Balancing Test in International Extradition

Balancing is the appropriate method to assess the constitutionality of procedural safeguards in extradition proceedings because it con-

125. 424 U.S. 319 (1976).
126. *See In re Drayer*, 190 F.3d at 415 (citing *Martin*, 993 F.2d at 830); *McMaster*, 9 F.3d at 48-49; *In re Burt*, 737 F.2d at 1487.
127. Martinez v. United States, 828 F.3d 451 (6th Cir. 2016) (en banc); *In re Burt*, 737 F.2d at 1485-86.
128. *Martinez*, 793 F.3d at 548.
129. *Id.*
130. *See id.*
131. *Martinez*, 828 F.3d at 458.
132. *See infra* note 135 and accompanying text.
133. 407 U.S. 514 (1972).

siders the constitutionally protected liberty interests of relators and allows courts to evaluate if a proposed procedural safeguard impinges excessively on the government's interests. Past are the days when courts deferred blindly to the executive in all matters touching on national security, mostly when the issue is procedural.[134]

As lower courts have done in international extradition,[135] the Court has addressed issues of procedural due process in immigration and national security cases by applying formalistic and categorical distinctions, rather than balancing conflicting interests.[136] While this has been true for over a century, recently the Court has adopted the balancing test of *Mathews v. Eldridge*[137] in various immigration and national security cases.[138] International extradition, however, remains to benefit from such developments.

While extradition proceedings afford very little process,[139] relators face tremendous limitations to their liberty.[140] In this context, protection from the consequences of stale charges is an imperative of due process.[141] The balancing test adopted in *Mathews* has been ap-

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134. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 528-29 (2004) (applying *Mathews* to consider whether military detainee was afforded sufficient process through habeas corpus); Landon v. Plasencia, 459 U.S. 21, 34 (1982) (stating *Mathews* applied in exclusion proceeding to assess sufficiency of procedure).

135. Trinidad y Garcia v. Thomas, 683 F.3d 952, 983 (9th Cir. 2012) ("The process due here is that prescribed by the statute and implementing regulation . . . .") (internal quotations omitted); United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) (holding that relators are afforded due process because their "liberty interests are protected by the very existence of 'an unbiased hearing before an independent judiciary'" (citing *In re* Kaine, 55 U.S. (14 How.) 103, 113 (1852))); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984) (holding that no due process right exists in extradition against prejudice from pre-accusation delay because roles of the executive in extradition and criminal proceedings are different); Schmeer v. Warden of the Santa Rosa County Jail, No. 3:14cv285, 2014 U.S. Dist. LEXIS 150726, at *11-12 (N.D. Fla. Aug. 25, 2014) (denying relator's due process claim by asserting doctrine that relators are not allowed to contradict the government's case, without any discussion of constitutional law); Hidalgo v. Holder, No. 2:11-CV-308, 2011 U.S. Dist. LEXIS 123777, at *11 (D. Utah Oct. 25, 2011). The court in *Hidalgo* stated:

> Petitioner's due process claim fails because . . . the Supreme Court has held that petitioners do not have a right to introduce evidence at an extradition proceeding because, if this were recognized as the legal right of the accused in extradition proceedings, it would give petitioners the option of insisting upon a full hearing and trial of their case in the United States.

Hidalgo, 2011 U.S. Dist. LEXIS 123777, at *11; Gill v. Imundi, 747 F. Supp. 1028, 1039-41 (S.D.N.Y. 1990) (denying due process claim without any constitutional analysis).

136. *See* Landau, *supra* note 7, at 885 ("The Supreme Court's application of *Mathews* and subsequent developments have undermined much of the exceptionalism that defined more than a century of prior immigration and national security rulings.").

137. 424 U.S. 319 (1976).

138. *See* Landau, *supra* note 7, at 885.

139. *See infra* notes 215-220 and accompanying text.

140. *See infra* note 209 and accompanying text.

141. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 536 (2009) (arguing that the Court's construction of the Sixth Amend-

plied by the Court to a variety of procedures where liberty interests are at stake,[142] including criminal procedure,[143] the involuntary confinement of mental patients,[144] prison discipline,[145] deportations,[146] and national security.[147] Additionally, the military and the Department of Justice ("DOJ") have recently adopted *Mathews* to decide issues of "targeted killing."[148] The decision to attack an individual suspected of being an enemy of the state depends less now on whether the individual belongs to a certain enemy group, such as the Islamic State of Iraq and Syria ("ISIS"), and more on the weight of the evidence pointing to the target's individual guilt.[149] *Mathews*'s wide adoption by the Court, the military, and the DOJ, shows its reliability as a due process test to assess liberty interests, and suggests its propriety in international extradition.

1. The Trend from Categorical Approaches to Balancing in Immigration and National Security Cases

The Court has used categorical approaches to consider due process claims in immigration cases[150] similar to the ones regularly used in extradition. Instead of balancing interests, immigration's "plenary power doctrine" defers to Congress the procedural rights of aliens.

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ment is protective of the accuracy of the criminal judicial system and concerned with prejudice for the defendant, rather than just intent on providing a right to a speedy trial; and that such construction has entangled the Speedy Trial Clause of the Sixth Amendment with the Due Process Clause of the Fifth Amendment).

142. *See* Landau, *supra* note 7, at 890-91.

143. Ake v. Oklahoma, 470 U.S. 68, 70 (1985) (deciding whether due process requires the government to provide legal assistance and access to a psychiatric examination to an indigent defendant who seeks to use the insanity defense at trial).

144. Zinermon v. Burch, 494 U.S. 113, 129 (1990); Addington v. Texas, 441 U.S. 418, 425 (1979).

145. Wilkinson v. Austin, 545 U.S. 209, 211 (2005).

146. *See Plasencia*, 459 U.S. at 34 ("In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures, rather than additional or different procedures." (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976))); Khouzan v. Chertof, 549 F.3d 235, 257 (3d Cir. 2008) ("First, an alien facing removal 'is entitled to factfinding based on a record produced before the decisionmaker and disclosed to him or her.' This includes a 'reasonable opportunity to present evidence on [his or her] behalf.'") (citations omitted). *See also* Landau, *supra* note 7, at 890-91; Rivera, *supra* note 123, at 152.

147. *See Hamdi*, at 537; Boumediene v. Bush, 553 U.S. 723, 734 (2008).

148. *See* Landau *supra* note 7, at 927-28 (citing DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2, 5-6 (Nov. 8, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf.).

149. *Id.*

150. *Id.* at 894-95 ("Court rulings emphasized categorical questions of territoriality, citizenship, and sovereignty to resolve whether non-citizens could claim the law's protection.").

This approach has much to do with the expertise of the political branches in matters of immigration, and the Court's interest not to interfere with their political judgments.[151] In *United States ex rel Knauff v. Shaughnessy*,[152] for example, the United States Supreme Court approved of the process afforded to an immigrant by declaring that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien . . . is concerned."[153] The plenary power doctrine has been applied by the courts for more than a century based on the premise that Congress has almost unlimited power to decide over the well-being of immigrants,[154] and on the national security and foreign relations foundations of immigration law.[155] Despite these considerations, the Court has recognized the weight of immigrants' liberty interests and is moving away from categorical distinctions in the consideration of their due process rights.[156]

In *Landon v. Plasencia*,[157] the United States Supreme Court considered whether the Immigration and Naturalization Service ("INS") afforded due process to an alien at an exclusion hearing.[158] Plasencia, a permanent resident alien, travelled from the United States to Mexico for two days.[159] During her brief stay in Mexico, Plasencia met with several Mexican and Salvadoran nationals and agreed to assist them in entering illegally to the United States.[160] When Plasencia attempted to cross the international border into the United States, the INS found six non-resident aliens inside her car. At Plasencia's exclusion hearing, the immigration law judge placed the burden of proof on her to establish that she was not excludable.[161] The hearing was held

151. *Id.* at 894-95. *See generally* Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507 (2011) (supporting deference to the executive in matters of foreign relations law); Derek Jinks & Neal Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007) (criticizing "increased judicial deference to the executive in the foreign relations domain . . . .").

152. 338 U.S. 537 (1950).

153. United States *ex rel.* Knauff v. Shaughnessey, 338 U.S. 537, 544 (1950).

154. *See* Landau, *supra* note 7, at 890-91.

155. *Id.* at 892-93 (citing Fong Yue Ting v. United States, 149 U.S. 698, 705-06 (1893)).

156. *Id.* ("A decade after *Goldberg*, however, the Supreme Court transplanted *Mathews*'s core balancing test to cases of removal and, two decades after that, to the question of habeas access for Guantanamo detainees and the judicial review of their status hearings.").

157. 459 U.S. 21 (1982).

158. Landon v. Plasencia, 459 U.S. at 25 ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

159. *Plasencia*, 459 U.S. at 23.

160. *Id.*

161. *Id.* at 24.

the same day that she was detained at the international border,[162] and even though she was told by the judge of her right to legal representation, the judge did not inform her that there was free legal counsel available.[163]

In holding that Plasencia enjoyed due process rights at her exclusion hearing, the Court considered the conflicting interests of the parties.[164] Citing *Mathews v. Eldridge*, it recognized the weight of the government's "interest in efficient administration of the immigration laws at the border" and concluded that the United States's sovereign prerogative, "largely within the control of the Executive and the Legislature[,]" must weigh heavily in the government's favor.[165]

Balancing conflicting interests must not be cause to displace congressional choices of policy, the Court concluded.[166] "The role of the judiciary is limited to determining whether the *procedures* meet the essential standard of fairness under the Due Process Clause . . . ."[167] In *Plasencia,* the Court did not establish the precise contours of the procedure that the INS owed Plasencia, or whether the process she was afforded complied with due process. It did make clear, however, that *Mathews* is a proper method to assess liberty interests in the context of an exclusion hearing.[168] The categorical doctrine of plenary power was recognized as a heavy weight in the balancing analysis, but was reduced to a factor rather than the only consideration.[169] *Plasencia* is a good example of how courts may balance government and liberty interests without recurring to archaic-categorical doctrines.

In the military detention context, one case that applies *Mathews* to circumstances somewhat similar to those of international extradition is *Hamdi v. Rumsfeld*.[170] *Hamdi* deals with a request for habeas relief by an individual charged as an "enemy combatant" by the military. As relators in international extradition, detainees in military

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162. *Id.* at 39.
163. *Id.* at 36.
164. *Id.* at 34 ("In evaluating the procedures in any case, the court must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.").
165. *Id*. at 34.
166. *Id.* at 35.
167. *Id.* at 34-35 (emphasis added).
168. *Id.* at 34.
169. *Id.*
170. 542 U.S. 507 (2004). *See also* Boumediene v. Bush, 553 U.S. 723, 781 (2008) ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.").

detention are initially processed by the executive, face considerable constraints on their liberty, and are afforded very little process.[171] The Court's plurality in *Hamdi* applied *Mathews* to the habeas review of military detention proceedings and held that the military owed the detainees a meaningful opportunity to contest the government evidence.[172] In the opinion, authored by Justice O'Connor, she concluded:

> The *ordinary* mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law" . . . is the test that we articulated in *Mathews v. Eldridge* . . . .[173]

In addition to the Court's opinions in *Hamdi* and *Plasencia*, the armed forces and the DOJ have adopted *Mathews* to determine when to use lethal force on individual targets.[174] For example, one DOJ report recognizes that when the government targets a United States citizen in a lethal operation, *Mathews* is the proper standard to assess the interests of individuals on their life against the government interest "in forestalling the threat of violence and death to other Americans . . . ."[175] The DOJ's use of *Mathews* to consider use-of-lethal-force issues shows one more time the propriety of balancing to assess the liberty interests of individuals against the national security interests of the government.

2. Mathews *in Criminal Procedure*

While courts have applied *Mathews* to a wide variety of contexts, criminal procedure remains an exception. In criminal proceedings, *Mathews* has been adopted,[176] but in limited fashion.[177] The Court has taken the position that the Due Process Clause should not be directly applied to criminal proceedings because criminal defendants are already protected by those clauses in the Bill of Rights specifically

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171. Note that both military detention and international extradition are executive proceedings. For a discussion of habeas corpus in international extradition and *Hamdi*'s implications on extradition habeas see Artemio Rivera, *The Consideration of Factual Issues in Extradition Habeas*, 83 U. CIN. L. REV. 809 (2015).

172. *Hamdi*, 542 U.S. at 537.

173. *Id.* at 528-29 (emphasis added) (quoting U.S. CONST. amend. V).

174. *See* Landau, *supra* note 7, at 928-29.

175. *Id.* at 927-28 (citing DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2, 5-6 (Nov. 8, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf.).

176. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985); United States v. Raddatz, 447 U.S. 667, 677 (1980).

177. *See* Medina v. California, 505 U.S. 437, 443-44 (1992).

addressed at them.[178] The Constitution protects only procedural infractions that violate "fundamental fairness," and those procedural infractions are addressed by clauses in the Bill of Rights specifically concerned with criminal procedure.[179] As the United States Supreme Court explained in *Medina v. California*:[180]

> In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process . . . .
>
> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S. Ct. 648, 653, 17 L. Ed. 2d 606 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."
>
> *Mathews* itself involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits, and the *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law. Although we have since characterized the *Mathews* balancing test as "a general approach for testing challenged state procedures under a due process claim," and applied it in a variety of contexts . . . [,] we have invoked *Mathews* in resolving due process claims in criminal law cases on only two occasions.[181]

Medina shows that the Court's reluctance to apply *Mathews* to criminal procedure is based on its idea that courts should avoid tinkering with the balance struck in the Constitution between protecting the liberty interests of criminal defendants and allowing the government to enforce criminal laws. The limitations imposed in *Medina*,

178. *See Medina*, 505 U.S. at 443 ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." (citing Dowling v. United States, 493 U.S. 342, 352 (1990))).

179. *Id.*

180. 505 U.S. 437 (1992).

181. *Medina*, 505 U.S. at 443-44 (internal citations omitted).

however, are not applicable to international extradition. Because extradition is not a criminal procedure, the only provision of the Bill of Rights directly applicable is the Due Process Clause. [182] Thus, unlike in criminal proceedings, applying *Mathews* and the Due Process Clause in international extradition creates no conflict with other provisions of the Bill of Rights. [183]

3. Extradition Courts Should Adopt Mathews*'s Balancing Scheme When Considering Due Process Claims*

A few courts have considered whether due process demands protection from extradition delay.[184] These courts have generally applied categorical distinctions, rather than interest balancing, to deny relators' requests for procedural protection.[185] The distinctions drawn are based either on premises that ignore the current realities of international extradition, or on analyses that improperly focus on the criminal proceeding at the requesting country. Proper consideration of the realities of extradition procedure and an adequate focus on the extradition proceeding in the United States suggest that a *Mathews*-type balancing scheme should be used to consider any proposed procedural safeguard.

One means used by courts to deny due process claims is by distinguishing extradition from criminal cases and concluding that constitutional provisions specifically addressed at criminal defendants do not protect relators.[186] Because international extradition is not a criminal proceeding, courts have concluded that relators should not be provided through the Fifth Amendment what the Sixth Amendment cannot provide directly.[187] This argument is partially correct; international extradition is not a criminal procedure. But precisely because extradition is not a criminal procedure, the argument is misplaced. By expanding the reach of the Sixth Amendment through the Fifth Amendment in a criminal proceeding, a court may disrupt the balance established by the Constitution,[188] but applying the Fifth Amendment in extradition to protect relators from government delay would disrupt nothing about the Sixth Amendment as the Sixth Amendment is not applicable to extradition in the first place. Another

182. *See supra* note 123 and accompanying text.
183. The dissenters' opinions in *Hamdi*, however, criticized the adoption of *Mathews* in the national security setting. *See Hamdi*, 542 U.S. at 575-76 (Scalia, J., dissenting); *see id*. at 579, 594 n.5 (Thomas, J., dissenting).
184. *See infra* notes 231, 286-287, and accompanying text.
185. *Id.*
186. Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993).
187. *Martin*, 993 F.2d at 829.
188. *See* Medina v. California, 505 U.S. at 443-44.

means to deny due process requests is the misguided-categorical rule that adding any procedural safeguard to the extradition process would turn international extradition into a trial-like process.[189] While the interest of not turning the extradition process into a criminal trial is legitimate, requesting countries are afforded vast procedural advantages in international extradition. Thus, requesting countries are allowed to present their cases totally or partially through hearsay evidence; the evidence of criminality introduced by the parties is assessed through a low level standard of proof—probable cause; relators are not allowed to contradict the government's evidence; compliance with the Federal Rules of Criminal Procedure and the Federal Rules of Evidence is not required; and if the extradition request is denied, the government may refile its request because the doctrines of double jeopardy and *res judicata* are not applicable.[190] These tremendous advantages ease the extradition process for the requesting country. Their existence would normally deny the argument that adding a simple safeguard would turn the extradition proceeding into a trial-like procedure.

Government-delay issues are not a particularity of extradition proceedings. Courts deal with these regularly in criminal cases.[191] Thus, any objection that a court would be unduly interfering with foreign relations by applying a procedural safeguard against extradition delay should be viewed with skepticism. Because courts are properly equipped to handle procedural issues, and extradition magistrates have wide discretion in conducting their proceedings,[192] it should not be a concern that the courts' application of a test similar to those of *Barker v. Wingo*[193] or *United States v. Lovasco*[194] would constitute interference with matters in which the executive branch has more expertise.

Due process rights accrue whenever the government intends to deprive people of substantial liberty or property interests. Even though no court to date has categorically applied *Mathews* to assess due process compliance in international extradition, the nature of ex-

189. *See infra* note 221.

190. *See infra* notes 215-220.

191. *See supra* notes 43-47, 88-89, 97 and accompanying text.

192. *See* Santos v. Thomas, 830 F.3d 987, 992 (9th Cir. 2016) (en banc) ("The '[a]dmission of evidence proffered by the fugitive at an extradition proceeding is left to the sound discretion of the court, guided of course by the principle' that a fugitive's right to introduce evidence rebutting probable cause is limited to introducing evidence that is 'explanatory,' but not 'contradictory.'" (quoting Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978))).

193. 407 U.S. 514 (1972).

194. 431 U.S. 783 (1977).

tradition proceedings demands its application.[195] *Mathews* is generally applied to consider procedural legitimacy when liberty interests are at issue,[196] and the strong liberty interests of relators, who face imprisonment and criminal prosecution at the requesting country,[197] suggest its applicability. Unlike criminal procedure, which is guided and constrained by various constitutional provisions,[198] constitutional protection in the extradition process is, so far, only afforded by the Fifth Amendment's Due Process Clause.[199] Applying the Due Process Clause in international extradition creates no conflict with other constitutional provisions, and thus there is no reason to deny its protections in matters of government delay.

By balancing the parties' conflicting interests, a court may assess the pros and cons of a proposed safeguard and whether adding it to the already-available process would convert an extradition process into a trial-like procedure. A categorical approach that simply rejects a proposed-procedural safeguard on the grounds that extradition is not a criminal procedure, or that extradition proceedings must not be converted into trial-like processes, is inadequate to protect the strong liberty interests of relators and is based on the false assumption that relators already receive substantial procedural protections.

B. Due Process Requires Applying a *Barker*-Type Safeguard Against Post-Accusation Delay

"The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[200] In practice, the question of whether the process afforded provides the individual the required opportunity to contest the government's case arises when the individual requests some procedural safeguard, such as the application of a higher standard of proof or the opportunity to endeavor in some sort of discovery. To determine whether the process afforded provides the required op-

195. *But see* Parretti v. United States, 122 F.3d 758, 778 (9th Cir. 1997) (balancing governmental and individual interests to conclude that relators enjoy a due process right to bail under the Fifth Amendment and stating, "[s]uch carefully limited exceptions [to liberty, which is the norm,] are permitted only when the government's interest is 'sufficiently weighty' to subordinate 'the individual's strong interest in liberty' to 'the greater needs of society.'"), *withdrawn, and dismissed on other grounds*, 143 F.3d 508 (9th Cir. 1998). For additional discussion on the applicability of *Mathews* to international extradition, see Rivera, *supra* note 123.

196. *See supra* notes 141-146.

197. *See infra* note 209 and accompanying text.

198. *See supra* notes 178-181 and accompanying text.

199. *See supra* note 123.

200. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976) (citing Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

portunity, the *Mathews v. Eldridge*[201] test balances the interests of government and individual, and assesses the costs and benefits of adopting the proposed safeguard.[202] Applying *Mathews* to international extradition suggests that the heavy liberty interests of relators, combined with the little procedural protections they are afforded, requires courts to apply a test similar to *Barker v. Wingo*'s[203] to protect relators from the prejudices of post-accusation delay.

Mathews first requires that the court weigh the type of loss that the individual would suffer because of the intended governmental action and the likely permanence of that loss.[204] Second, the court must consider the risk of erroneously depriving the individual's private interests through the currently available procedures and the probable value, if any, of the proposed procedural safeguard.[205] Finally, *Mathews* requires consideration of the government's interest in depriving the individual's liberty or property.[206] This final factor includes an assessment of the governmental function involved and the fiscal and administrative burdens that would be required to provide the proposed procedural safeguard.[207]

Applying the first *Mathews* factor to international extradition shows that relators have extraordinary liberty interests at risk.[208] Relators normally suffer hardships similar to those experienced by criminal defendants, but additionally they suffer the anxiety, stigma, and difficulties that come from losing their jobs or means of income, being separated from family members and friends in the United States, and being forcefully transferred to a foreign country.[209] Because these hardships—including being forced out of the country for criminal prosecution and imprisonment—are not mere inconveniences, but substantial losses of liberty, the first factor clearly weighs in favor of applying *Barker*.

Consideration of *Mathews*'s second factor[210]—the risk of erroneously depriving the individual's private interests through the currently available procedures and the probable value, if any, of the

201. 424 U.S. 319 (1976).
202. *Mathews*, 424 U.S. at 328-33.
203. 407 U.S. 514 (1972).
204. *Mathews*, 424 U.S. at 335; Santosky v. Kramer, 455 U.S. 745, 758 (1982).
205. *Mathews*, 424 U.S. at 335.
206. *Id*.
207. *Mathews*, 424 U.S. at 335.
208. *See* Demjanjuk v. Petrovski, 10 F.3d 338, 353 (6th Cir. 1993). *See also* United States v. Marion, 404 U.S. 307, 320 (1971) (explaining that a formal accusation may "interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.").
209. *Id.*
210. *Mathews*, 424 U.S. at 335.

proposed procedural safeguard—also lends support to the conclusion that a *Barker*-type test is the right fit to consider post-accusation delay in extradition. Courts have consistently held that government delay can affect the reliability of criminal proceedings and may cause wrongful convictions.[211] Government delay can have a similar effect to the reliability of an extradition proceeding by diminishing the relator's ability to introduce treaty-based defenses,[212] or to confront the government's evidence of probable cause.[213] Requiring the Executive and the requesting country to speed up their extradition procedures reduces the risk of both fading memories and lost documents and witnesses, thus increasing the reliability of the whole extradition process.

Courts should apply *Barker* in international extradition because the current process is insufficient for the tremendous liberty interests at stake, and the dearth of process promotes unreliability. A quick view at extradition procedure shows the unusual advantages afforded to requesting countries while relators receive little process.[214] For example, extradition case law allows the government to prove its case through a low standard of proof, "probable cause";[215] the case may be proven, in whole or in part, through hearsay evidence;[216] relators are not allowed to contradict the government's evidence;[217] the government may refile its case if it is denied certification because the doctrines of double jeopardy and *res judicata* are not applicable;[218] and

211. *See* Barker v. Wingo, 407 U.S. 514, 532 (1972) (explaining that among the harms produced by unreasonable delay between formal accusation and trial is "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence); Doggett v. United States, 505 U.S. 647, 654 (1992) (concluding that the most serious form of prejudice arises when the accused's defense is impaired by unreasonable government delay).

212. *In re* Mylonas, 187 F. Supp. 716, 721 (N.D. Ala. 1960).

213. *See generally* Rivera, *supra* note 123.

214. Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969) ("[T]he procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation.") (internal quotations omitted).

215. I add the quotation marks because the standard actually used by extradition magistrates is lower than the probable cause standard used in the preliminary hearings of criminal cases in federal courts, which itself is a low standard of proof. *See* Rivera, *supra* note 123, at 166-67.

216. Collins v. Loisel, 259 U.S. 309, 317 (1922) (stating evidence at an extradition hearing may consist entirely of hearsay).

217. Santos v. Thomas, 779 F.3d 1021, 1024 (9th Cir. 2015) ("A person facing extradition may present evidence that 'explains away or completely obliterates probable cause . . . whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible.'") (citation omitted); *see* Semmelman, *supra* note 123; Rivera, *supra* note 123 (arguing the unconstitutionality of the doctrine of non-contradiction).

218. Collins v. Loisel, 262 U.S. 426, 429 (1923) (concluding that doctrine of double jeopardy is not applicable to international extradition); Brown v. Allen, 344 U.S. 443, 458 (1953) (concluding that doctrine of *res judicata* is not applicable to habeas proceedings).

the Federal Rules of Criminal Procedure and of Evidence are not mandatory.[219] Applying a *Barker*-type test would lower the risk of erroneous extraditions by disallowing it where there is evidence of substantial government delay and of bad faith or negligence by the requesting or requested governments.

Finally, the third *Mathews* factor requires the court to weigh the nature of the government's interest in extraditing the relator and the fiscal and administrative burdens that applying *Barker* to international extradition would entail. In international extradition the government's main interest is to fulfill its treaty duties, which include not forcing the requesting country into a trial-like procedure in the United States.[220] Facilitating the extradition of those accused or convicted of crimes in requesting countries is without question a valid interest. That interest, however, is more than served by the current process, which provides the requesting country substantial procedural advantages and allows relators very little process.[221]

Barker would require the requesting country to answer why it delayed in requesting extradition and would demand that it be reasonably expeditious. This is not a burden substantial enough to counter the strong liberty interests of relators and the added reliability that *Barker* adds to the proceedings. The requesting country can always excuse its delay on reasonable grounds. What is a reasonable delay for a particular case should be decided on a case-by-case basis as is the case in American criminal law.[222] A delay of three years to request an extradition, for example, may be reasonable in one case but not in another. All the requesting country has to do is to explain its reasons. If the requesting country has no justified reasons, then that factor will

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219. *See supra* note 12 and accompanying text.

220. *See Collins*, 259 U.S. at 316-17 (citing *In re* Wadge, 15 F. 864, 866 (C.C.S.D.N.Y. 1883)); *In re* Oteiza y Cortes, 136 U.S. 330, 334 (1890) (stating that extradition proceedings are not "in the nature of a final trial."); *Santos*, 779 F.3d at 1024; Jhirad v. Ferrandina, 536 F.2d 478, 484 (2d Cir. 1976) ("Appellant does not dispute the well-entrenched rule that extradition proceedings are not to be converted into a dress rehearsal trial."); *In re* Bonilla, No. 1:13-MJ-62, 2014 U.S. Dist. LEXIS 27904, at *27-28 (E.D. Tex. Mar. 4, 2014) ("[E]vidence that merely contradicts the government's evidence, such as competing stories, is not admissible . . . . The underlying rationale is that an extradition hearing is neither a criminal trial nor an adjudication of the charges.") (internal citations omitted); *In re* Singh, 123 F.R.D. 108, 115 (D.N.J. 1987); *see* Semmelman, *supra* note 123, at 1298 ("The Rule of Non-Contradiction stems from the premise that an extradition hearing is not a trial on the merits."); Rivera, *supra* note 123, at 152-60 (discussing application of *Mathews* to the doctrine of non-contradiction). This interest mirrors the United States Government's interest in not having to try its cases in foreign countries when it seeks to extradite an individual to the United States.

221. *See supra* notes 215-220 and accompanying text.

222. *Doggett*, 505 U.S. at 657-58 n.9.

be assessed against it, but the extradition request does not have to be denied for that reason alone.[223]

The issue of post-accusation delay in international extradition is a matter of American transnational or national law, and not one of foreign law or policy. This means that the doctrine of non-inquiry[224] is inapplicable to issues of post-accusation delay. American courts have no reason to shy away from inquiring why a requesting country delayed in requesting extradition under a treaty. Unlike digging into the reasons why a requesting country delayed in charging a relator, the delay that accrues between the time the relator is charged and the moment the request for extradition is made is totally fair game for American courts as the inquiry delves exclusively on the extradition process. In the case of an extradition request made to the United States, the post-accusation delay issue is covered by the applicable extradition treaty, the extradition statute, and the United States Constitution.[225] There is no need for American courts to intrude into foreign laws or policies to determine whether the due process rights of relators are violated by delays in requesting extradition.

The *Barker* test, initially adopted for criminal cases, already has been used in civil proceedings.[226] In *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850)*,[227] the United States Supreme Court applied the *Barker* test to consider whether an eighteen-month delay incurred by the government in filing a civil suit for forfeiture violated the claimant's due process rights.[228] The constitutional right to a speedy proceeding has also been acknowledged in the administrative context.[229] Such adoptions of *Barker* in civil and administrative contexts pave the way for applying a similar test in international extradition.

When a foreign country delays in making an extradition request, it often diminishes the relator's chances to oppose it. Passage of time may affect a relator's opportunity to oppose an extradition request because time erases and confuses memories, witnesses may die or become unavailable, and probative documents may be lost.

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223. *See Barker*, 407 U.S. at 533.

224. *See supra* notes 24-27 and accompanying text.

225. *See* BASSIOUNI, *supra* note 2, at 70-71.

226. United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850), 461 U.S. 555, 556 (1983).

227. 461 U.S. 555 (1983).

228. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850)*, 461 U.S. at 555.

229. *See* Barry v. Barchy, 443 U.S. 55, 66 (1979) (holding suspension of horse-trainer license unconstitutional under the Due Process Clause of the Fourteenth Amendment because of delay in holding a final hearing). *See also* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 547 (1985) ("At some point, a delay in the post-termination hearing would become a constitutional violation.").

Constitutional due process should prohibit extradition in some cases where the passage of time is substantial. Applying *Mathews* to extradition proceedings shows that the test adopted by the Court in *Barker* is an adequate safeguard against the prejudices of post-accusation delay.

C. The Jurisprudence on Post-Accusation Delay is Based on Misconceptions of the International Extradition Process and a Failure to Apply Due Process Principles

A few courts have considered the issue of whether relators have a constitutional right against unreasonable post-accusation delay.[230] While these courts have concluded that no such right exists,[231] their decisions are based on incorrect assumptions about the nature of international extradition proceedings and on over-simplistic categorical distinctions. None of these courts have applied the test in *Mathews v. Eldridge*[232] or any other balancing test to reach their conclusions.[233]

In *Martin v. Warden,*[234] the United States Court of Appeals for the Eleventh Circuit discussed the issue of due process rights in post-accusation delay.[235] Thomas Martin, the relator, fled the United States to Canada in 1969 to avoid the Vietnam draft. In December 1974, while in Canada, he was involved in a car accident in which he hit and killed a seven-year-old boy named Joey Bellanie. At the scene of the accident, Martin stopped when he heard a noise as if he had hit something. Two girls and a gentleman who were eyewitnesses allegedly shouted at Martin that there was a boy underneath his car, and declared that Martin must have heard them, but Martin retook to the road, kept driving, and dragged the body of the boy for approximately six hundred feet before leaving the scene.[236] A few days after the accident, Canadian authorities charged Martin with "criminal negligence causing death and leaving the scene of an accident."[237] Martin immediately fled from Canada to the United States.

The circuit court did not explain whether Canada attempted to extradite Martin at the time, but it did state that the then existing

230. *See In re* Extradition of Drayer, 190 F.3d 410, 415 (6th Cir. 1999) (citing Martin v. Warden, Atlanta Pen, 993 F.2d 824, 830 (11th Cir. 1993)); McMaster v. United States, 9 F.3d 47, 48-49 (8th Cir. 1993); *Martin*, 993 F.2d at 830; *In re* Burt, 737 F.2d 1477, 1485-86 (7th Cir. 1984).

231. *Id.*

232. 424 U.S. 319 (1976).

233. *See In re Drayer*, 190 F.3d at 415 (citing *Martin*, 993 F.2d at 830); *McMaster*, 9 F.3d at 48-49; *Martin*, 993 F.2d at 830; *In re Burt*, 737 F.2d at 1485-86.

234. 993 F.2d 824 (11th Cir. 1993).

235. *Martin*, 993 F.2d at 826.

236. *Id.*

237. *Id.*

treaty between Canada and the United States did not allow extradition for the offense with which Martin was charged.[238] In 1988, however, the extradition treaty between the two countries was amended, entering into effect in 1991. The newly amended treaty did allow for the extradition of Martin, and in 1992, Canada formally requested his extradition from the United States.

Martin opposed his extradition, arguing that he had a due process right to a speedy extradition that was infringed by Canada's seventeen-year delay in requesting it. The Eleventh Circuit disagreed. In its opinion, the circuit court recognized that the Executive is subject to the constraints of the Constitution when engaged in extradition proceedings, and the due process rights of individuals are superior to treaty obligations.[239] The court, however, distinguished between constitutional rights, such as the Speedy Trial Clause of the Sixth Amendment, which are meant to protect only criminal defendants, and other constitutional rights. It concluded that because the Speedy Trial Clause is addressed specifically at criminal defendants, it does not apply to international extradition, and thus, the Due Process Clause should not do indirectly what the Speedy Trial Clause cannot do directly.[240] The circuit court additionally concluded that the delay in requesting Martin's extradition was not a proper issue for its consideration because American courts had no right to meddle in the proceedings of foreign courts or to decide on the due process to be afforded to those accused in Canada's courts.[241]

The Eleventh Circuit is partially right. The court properly concluded that the Sixth Amendment does not protect relators directly,[242] but it does not follow that the Fifth Amendment's Due Process Clause cannot provide similar protections in international extradition.

The circuit court erred in its due process analysis by assessing the issue of post-accusation delay as one of *speedy trial at the requesting country* instead of one of *speedy proceeding or extradition in the United States*.[243] Instead of focusing its due process analysis on the sufficiency of process in the United States, the court focused on the crimi-

238. *Id.* at 827.

239. *Id.* at 829.

240. *Id.* ("It would make little sense to provide an extradition defendant indirectly with a right to a speedy trial under the Fifth Amendment when he enjoys no such right directly under the Sixth Amendment.").

241. *Id.* at 830.

242. *Id.* at 829.

243. *See id.* at 830 ("Recognizing a right to a speedy extradition would simply be an oblique method of forcing treaty partners to adhere to the speedy trial guarantee contained in the United States Constitution.").

nal proceedings in Canada,[244] arguing that the United States should not inquire into Canada's criminal processes.[245] Arguing that the United States should not inquire into Canada's legal proceedings[246] has some merit,[247] but the argument is misplaced. Whether the relator will be properly prosecuted at the requesting country, and whether the extradition process complies with American due process, are different issues that should not be mixed.[248] While the issue of whether the individual will be afforded a due process of law in Canada is one of foreign law, any issues of delay in the extradition request or in prosecuting the extradition case in the United States are issues of United States national or transnational law.

In cases of pre-accusation delay, where the delay accrues from the moment of the alleged crime to the filing of criminal charges at the requesting country, it may be unavoidable for the court to inquire into the requesting country's legal processes and criminal investigations.[249] But, the legality of post-accusation delay, including any delay in extradition proceedings in the United States, are clearly matters of American national or transnational law that ought to conform with the Fifth Amendment's Due Process Clause. By failing to require due process in the timeliness with which requesting countries demand extradition, the courts are abdicating their duty to apply the Constitution and to protect its people from erroneous or arbitrary deprivations of their liberty by the Executive.

Additionally, the argument made by the court in *Martin* that the Due Process Clause cannot do indirectly what the Speedy Trial Clause cannot do directly,[250] might be correct in the context of a criminal proceeding,[251] but not in the context of extradition. While it could be argued that in criminal proceedings the Fifth Amendment should not intrude into matters covered by the Sixth Amendment, because that would disrupt the balance crafted by the Constitution and the applicable federal statutes,[252] extradition is not a criminal proceeding, and thus the Sixth Amendment does not apply directly.

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244. *Id.* at 830 ("There is no due process violation if Martin is tried in Canada according to Canadian law and procedure for his actions while in Canada.").

245. *Id.* at 829 ("[R]ecognizing a Fifth Amendment right to a speedy extradition would conflict directly with the rule of non-inquiry which precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request.").

246. *Id.*

247. *See supra* notes 24-27 and accompanying text.

248. *Id.*

249. *Martin*, 993 F.2d at 829-30.

250. *See id.*

251. *See supra* notes 178-181 and accompanying text.

252. *See supra* notes 178-181 and accompanying text.

In *Martin*, the true issue before the court was whether post-accusation delay affected Martin's due process rights in the United States, but the court failed to confront it. Relators' strong liberty interests are clearly protected by the Due Process Clause, as the court correctly recognized. Once the court recognized this, the next step was to consider whether the procedural safeguard proposed by the relator, a speedy extradition, was required by due process. To assess it the court should have balanced the interests of the relator and the governments. This analysis was neither prevented by nor relevant to the Sixth Amendment, as the court made it to be, because the Sixth Amendment is concededly inapplicable to international extradition. Providing speedy extradition protection under the Due Process Clause would not have been anomalous. Courts already provide speedy proceeding protection in contexts other than criminal procedure.[253]

Another extradition case dealing with issues of post-accusation delay is *McMaster v. United States*.[254] In *McMaster* the United States Court of Appeals for the Eighth Circuit considered the constitutionality of an extradition request made by Canada thirteen years after the relator was originally accused in that country. The court concluded that no due process right analogous to that in *United States v. Lovasco*[255] exists in international extradition.

Canada wanted to extradite relator McMaster for his alleged involvement in three first-degree murders that occurred in Canada between 1978 and 1979. At the time of the extradition request, in 1979, McMaster was serving a life sentence in the United States for the unrelated murder of a police officer in Minnesota. McMaster pled guilty to the murder of the Minnesota policeman in 1978, and the next year Canada requested his extradition. Because McMaster was at the time imprisoned in Minnesota, the United States denied Canada's extradition request and both countries engaged in negotiations to determine the appropriate time to extradite him.[256] Thirteen years passed until Canada submitted an "updated extradition request." A year later, a U.S. magistrate held an extradition hearing and certified McMaster's extraditability.[257]

McMaster argued that the "United States violated his Fifth Amendment due process rights by refusing to facilitate his extradition . . . ."[258] He analogized the due process rights of relators to those afforded to criminal defendants by *Lovasco*, but the circuit court dis-

253. *See supra* notes 227-230 and accompanying text.
254. 9 F.3d 47 (8th Cir. 1993).
255. 431 U.S. 783 (1977).
256. *McMaster*, 9 F.3d at 48.
257. *Id.*
258. *Id.*

agreed. Relying on *In re Burt*,[259] the court concluded that the roles of the United States as prosecutor in criminal cases, and as extraditer in international extradition, are distinguishable and thus the *Lovasco* test is inapplicable to relators.[260] The court reasoned that it is not the duty of American courts to consider the difficulties the relator will face when confronting the requesting country's criminal system.[261]

Just as the Eleventh Circuit in *Martin*, the *McMaster* court erred by focusing the due process analysis on the criminal proceeding at the requesting country rather than at the extradition process in the United States. The court's exclusive focus on the question of whose duty it is to ensure a fair procedure at the requesting country, which arguably belongs only to the requesting country,[262] is at least incomplete. The focus of the analysis should have been on the extradition proceeding in the United States, and on whether the procedural safeguard proposed by the relator, *Lovasco*'s in this case, was required by due process to protect him from Canada's thirteen-year delay in requesting his extradition.

V. DUE PROCESS DEMANDS THE APPLICATION OF A *LOVASCO*-TYPE TEST TO PROTECT RELATORS FROM PRE-ACCUSATION DELAY

Pre-accusation delay is substantially different from post-accusation delay. Pre-accusation delay occurs prior to charging the relator at the requesting country, and thus the matter is more likely to be affected by considerations of law and policy of the requesting country. Those considerations add complexity to any due process analysis of the extradition process, but should not lead to the categorical conclusion that relators have no due process right to challenge the pre-accusation stage of their proceedings. Relators do have that right because pre-accusation delay affects their ability to confront the extradition request. Just as pre-accusation delay can have a devastating effect on a defendant's ability to defend from criminal charges,[263] it can also seriously affect a relator's opportunity to defend at an extradition hearing.

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259. 737 F.2d 1477 (7th Cir. 1984).

260. *McMaster*, 9 F.3d at 48-49.

261. *Id.*

262. The Convention Against Torture and its implementing statutes, however, require requested countries to assess whether the relator is likely to be tortured at the requesting country. *See generally* Trinidad y García v. Thomas, 683 F.3d 952 (9th Cir. 2012).

263. *See* Goldfarb, *supra* note 90, at 617 ("Delay at the pre-accusation phase represents the sharpest threat to the fact-finding integrity of the criminal process because the opportunity to preserve sources of evidence never arises.").

A. Applying *Mathews* to International Extradition Suggests *Lovasco* as a Proper Safeguard to Consider Pre-Accusation Delay

As with post-accusation delay, the extradition court must focus the pre-accusation inquiry on the extradition process in the United States, rather than on the criminal proceedings of the requesting country. Applying *Mathews v. Eldridge*[264] to the interests of government and relators shows that the test adopted by the Court in *United States v. Lovasco*[265] is an adequate procedural safeguard to consider pre-accusation delay in international extradition.

The considerations for applying *Mathews*'s first factor[266] to issues of pre-accusation delay are the same as those of post-accusation delay.[267] Relators have a strong liberty interest not to be surrendered to a foreign country for criminal prosecution and imprisonment. Through an extradition process relators are regularly incarcerated in the United States and the requesting country. Relators lose their liberty to engage in their professions, jobs, and hobbies, and lose their liberty to relate with family and friends in the United States. Thus the first factor is heavily weighed in relators' favor.

The second *Mathews* factor[268] applies differently in pre-accusation delay, however. For instance, the risk of erroneously extraditing the relator is higher. People who ignore that they are being accused of a crime are less likely to prepare for their defense by gathering and preserving evidence.[269] Just as criminal defendants benefit from preserving documents and witnesses that may help them to establish their innocence, relators need to preserve evidence to explain away or rebut the government's evidence for probable cause, and to raise affirmative defenses available by the extradition treaty.[270] These added opportunities make for a more reliable extradition proceeding.

The second part of the second *Mathews* factor considers the probable value of the proposed procedural safeguards. The probable value of applying *Lovasco* to international extradition is very high because

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264. 424 U.S. 318 (1976).

265. 431 U.S. 783 (1977).

266. *Mathews*'s first factor considers the type of loss that the individual would suffer because of the intended governmental action, and the likely permanence of that loss.

267. *See supra* notes 209-210 and accompanying text.

268. The second *Mathews* factor considers the risk of erroneously depriving the individual's private interests through the currently available procedures, and the probable value, if any, of the proposed procedural safeguard.

269. *See* Goldfarb, *supra* note 90, at 617.

270. Some of the affirmative defenses regularly available through treaty are: that the charged offense is a political offense, statutes of limitations, double jeopardy, and that the charged conduct must constitute a crime in the requesting as well as the requested country (double criminality). *See* Rivera, *supra* note 123, at 176-78.

its requirements—that the individual proves actual prejudice from the delay and that the cause of the delay be at least gross negligence or bad faith by the government[271]—ensure that the relator has been severely affected in its opportunity to contest the extradition case and that the requesting country was at fault for the delay. Applying *Lovasco* to cases of pre-accusation delay would protect relators only from extreme injustices, since the main protection for pre-accusation delay comes from statutes of limitations, if there is one applicable.[272] Not all extradition treaties, however, afford the protection of statutes of limitations.[273] In those cases, a *Lovasco*-type test, or a more liberal one, is more important to safeguard due process rights.

Finally, *Mathews*'s third factor considers the government's interest in depriving the individual's liberty or property.[274] This includes evaluating the governmental function involved, and assessing the fiscal and administrative burdens that providing the requested procedural safeguard would require.[275] In international extradition the government's main interest is to avoid forcing the requesting country into a trial-like procedure in the United States.[276] This is more than accomplished by extradition procedure, however, which grants requesting countries vast procedural advantages, and provides relators very little process.[277] Affording relators the opportunity to challenge their extradition by applying *Lovasco* would not significantly change the heavy tilt of extradition procedure in favor of requesting countries.

It is also an interest of the government that courts not inquire into the legal processes and policies of the requesting country.[278] This interest may be affected by *Lovasco*'s requirement that the government explain its reasons for delaying in the filing of criminal charges. Any consideration by an American court of the appropriateness of a measure by a requesting country that results in pre-accusation delay would normally require an inquiry into the requesting country's laws, policies, or conduct. And that is precisely what the doctrine of non-inquiry tries to avoid.[279]

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271. *See supra* notes 100-112 and accompanying text.

272. *See supra* notes 36-40 and accompanying text.

273. *See* Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland art. 6, Mar. 31, 2003, 35 U.S.T. 3197, TIAS 10850 ("The decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State.").

274. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

275. *Mathews*, 424 U.S. at 335.

276. *See supra* note 221.

277. *Id.*

278. *See supra* notes 24-27 and accompanying text.

279. *Id.*

Acknowledging that the doctrine of non-inquiry is a legitimate and settled doctrine, however, should not stop courts from protecting individuals' liberty interests.[280] Not inquiring into the legal processes of the requesting country must be assessed as one of the many important factors at stake, and not as the only factor. *Mathews* and the principles of procedural due process require that individuals be afforded a meaningful opportunity to contest the government's case before they are deprived of their liberty, and that such meaningfulness be assessed by considering a variety of factors, and not just the government's. There is no reason, other than practice, to apply a rigid categorical approach that fails to consider relators' strong liberty interests.

The second part of the third *Mathews* factor requires consideration of the fiscal and administrative burdens that providing the additional procedural safeguard would require. The main fiscal or administrative burden imposed by the application of *Lovasco* would be forcing the requesting country to explain its reasons for delaying the filing of criminal charges. As an administrative or fiscal burden, this should not be significant because all the requesting country would have to do is have one of its officers explain the factual, legal, or policy reasons for the delay.[281] An extradition request may be completely supported on hearsay, and thus the filing of a sworn statement by an officer of the requesting country could fulfill this burden.[282]

A balancing of the three *Mathews* factors in international extradition suggests that applying a *Lovasco*-type safeguard to issues of preaccusation delay strikes a fair balance between the interests of relators and the government. Relators' strong liberty interests, and the high probability that applying *Lovasco* would improve the reliability of the extradition process, overcome the government's interest to avoid inquiries into the requesting country's legal procedures. Additionally, the fiscal and administrative burdens of applying *Lovasco* are insignificant.

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280. *See infra* note 314.

281. *See In re* Extradition of Jarosz, 800 F. Supp. 2d 935, 945-48 (N.D. Ill. 2011) (allowing evidence of witnesses' testimonies, submitted through summaries prepared by foreign prosecutors); *In re* Lanzani, No. CV 09-07166, 2010 U.S. Dist. LEXIS 14044, at *18-19 (C.D. Cal. Feb. 18, 2010); Bovio v. United States, 989 F.2d 255, 259-61 (7th Cir. 1993) (allowing a statement by an investigator).

282. *Id.*

B. The Case Law on Pre-Accusation Delay Misconstrues Principles of International Extradition And Fails to Consider all Relevant Interests

As with cases of post-accusation delay, extradition courts have denied process in cases of pre-accusation delay by misconceiving the law of international extradition and by failing to recognize relators' liberty interests. *In re Burt*[283] and *Kamrin v. United States*[284] exemplify these problems.

In *In re Burt*, the United States Court of Appeals for the Seventh Circuit considered whether the charging of a relator in West Germany, fifteen years after the commission of a crime, violated the relator's due process rights.[285] In 1980, West Germany requested the United States to extradite two American citizens, John Burt and Moyer Plaster, for the murder of Kurt Pfeuffer in 1965. Pfeuffer was murdered in West Germany while Burt and Plaster were stationed as service men at an American military base in that country. Soon after the murder, Burt and Plaster left West Germany without authorization and traveled to Madison, Wisconsin. In Madison, they were arrested and later convicted of committing armed robbery and another murder. While under state custody in Wisconsin, Burt and Plaster were questioned by military investigators about the Pfeuffer murder. Burt signed a written confession admitting to shooting Pfeuffer and Plaster signed another accepting his role as an accessory-after-the-facts.

The United States assured West Germany that it would prosecute Burt and Plaster for Pfeuffer's murder. Based on such assurances, West Germany waived its right under the parties' Status of Force Agreement[286] to obtain jurisdiction over the men and prosecute them. The Army eventually charged Burt and Plaster for Pfeuffer's murder, but the prosecution was halted after the United States Supreme Court decided *Miranda v. Arizona*.[287] Because Burt and Plaster's admissions were made without the previous warnings required in *Miranda*, the Army believed it was impeded from continuing with its prosecution.

When Germany learned about the Army's halting of Burt's and Plaster's cases, it sought to recall its previous waiver of jurisdiction under the Status of Force Agreement to prosecute them. The United

283. 737 F.2d 1477 (7th Cir. 1984).
284. 725 F.2d 1225 (9th Cir. 1984).
285. *In re* Burt, 737 F.2d 1477, 1482 (7th Cir. 1984).
286. A Status of Force Agreement (SOFA) is a treaty between a host nation and a foreign country to maintain military forces of the foreign country in the host country.
287. 384 U.S. 436 (1966).

States, however, denied the request to avoid establishing the precedent of allowing Germany to recall its waiver after such a long period. To complicate matters, Burt and Plaster could not be extradited to Germany because the then-existing extradition treaty between West Germany and the United States was construed not to allow the United States to surrender its own citizens.[288] So, after serving twelve years in a Wisconsin prison, Burt was paroled in 1977. Burt's freedom did not last, though. In 1978, West Germany and the United States agreed on a new extradition treaty, which did allow the parties to extradite their own citizens. This set the stage for West Germany to charge both men and request their extradition for Pfeuffer's murder.

In opposing extradition, Burt argued that extradition to West Germany violated his due process rights because of the fifteen-year gap between the crime and the filing of charges in Germany.[289] The Seventh Circuit disagreed. In assessing Burt's claim, the court considered whether relators enjoy a due process right analogous to the one recognized in *United States v. Lovasco*[290] for criminal defendants.[291] The court flatly held that there was no such analogous right,[292] even though it conceded that relators enjoy due process rights in extradition.[293]

The circuit court reached this conclusion by categorically distinguishing extradition from criminal proceedings. *Lovasco* does not apply to international extradition because it only protects criminal defendants, according to the court.[294] As explained by the Seventh Circuit:

> [T]he role of the executive branch as prosecutor and as extraditer . . . implicat[e] different standards of conduct vis-a-vis a criminal accused. While it may be fundamentally unfair for the government as enforcer of its criminal statutes to compel an accused to respond to and stand trial for charges when the government's delay in bringing the charges has resulted in actual prejudice to the accused, . . . we do not believe that the government necessarily acts unfairly when as extraditer it makes decisions responsive to diplomatic concerns that

288. *See In re Burt*, 737 F.2d at 1480-81 n.7.

289. *Id.* at 1486.

290. 431 U.S. 783 (1977).

291. *In re Burt*, 737 F.2d at 1486.

292. *Id.*

293. *Id.* at 1484 ("It is well settled . . . that the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct.").

294. *Id.* at 1486.

> may secondarily affect the accused's ability to respond to criminal charges brought by a foreign state.[295]

The court's reasoning was mainly that the United States should not be concerned with the process afforded to a relator by a requesting country prior to the filing of criminal charges. Accordingly, all the harm that delay in the requesting country may cause to an extradition proceeding in the United States should be irrelevant to any due process analysis by an extradition court in the United States. The problem with such reasoning is that it avoids the real issue: whether preaccusation delay affects a relator's opportunity to meaningfully and timely defend against an extradition request in the United States.[296] As in *Martin v. Warden*,[297] and *McMaster v. United States*,[298] *Burt* focused its due process analysis incorrectly on the criminal proceedings at the requesting country rather than on the extradition process in the United States.[299] This perspective creates the illusion that there are no liberty interests at stake at the extradition hearing that may be affected by the delay, and thus no due process need be afforded.

Other arguments made by the Seventh Circuit in *Burt* are equally unfounded. The circuit court incorrectly concluded that the government could extradite Burt according to "the discretion in foreign affairs vested in the executive branch."[300] The Executive is indeed afforded discretion in the extradition process,[301] but only after the relator has been duly certified as extraditable by a magistrate.[302] An extradition magistrate possesses no discretion to extradite.[303] The magistrate's duty in international extradition is to apply the mandates of the extradition treaty and United States statutes to the facts to determine whether the relator is extraditable.[304] The Executive's

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295. *Id.* (internal citation omitted).

296. We note that the circuit court initially committed to address that issue, but it failed to do so. *See id.* ("As we see it, therefore, the real issue is whether there exists a due process right analogous to the one articulated in *Lovasco* that makes it fundamentally unfair for the United States to decide not to return a serviceman pursuant to a status of forces agreement and then subsequently decide to extradite him pursuant to a separate extradition request after considerable time has transpired.").

297. 993 F.2d 824 (11th Cir. 1993).

298. 9 F.3d 47 (8th Cir. 1993).

299. *See supra* notes 244-247, 250, 264 and accompanying text.

300. *Burt*, 737 F.2d at 1486.

301. Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997).

302. *Lopez-Smith*, 121 F.3d at 1326.

303. Martinez v. United States, 793 F.3d 533, 552 (6th Cir. 2015), *rev'd on other grounds*, 828 F.3d 451 (6th Cir. 2016).

304. *Martinez*, 793 F.3d at 552.

> Although courts do not inquire into the fairness of criminal procedure or punishment under the laws of the country seeking extradition, it is plainly a court's role to determine whether extradition is permissible under the terms of the governing treaty. Similarly, the executive's discretion to grant or deny extradi-

discretionary powers that the Seventh Circuit referred to in *Burt* come into play only *when* the case gets to the Department of State, and *after* the extradition magistrate exercises the non-discretionary duty to apply the treaty and the extradition statute at the hearing.[305] Thus, extradition magistrates lack the discretion upon which the Seventh Circuit, at least partially, based its decision.

Burt is an example of a good case making bad law. Surely, finding a balance between the interests of the government and the relator in matters of pre-accusation delay is challenging as both sides have substantial interests in conflict, but the analysis should not be one-sided. The categorical conclusion that there is no due process right against pre-accusation delay because the liberty interests of relators must be the exclusive concern of requesting countries is untenable. This conclusion is the result of the wrongful assumption that relators only have their liberty interests affected when they face the requesting country's criminal system. In other words, *Burt*'s due process analysis incorrectly assumes that delay in the filing of criminal charges at the requesting country does not affect the reliability or fairness of the extradition hearing.[306]

Another extradition case that discusses the issue of pre-accusation delay is *Kamrin v. United States*. In *Kamrin* the relator did not claim to be directly protected by the Constitution, but by a statute of limitations and a clause in the extradition treaty between the United

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> tion arises only after a person has been certified as extraditable under the governing treaty.

Id. (internal citations omitted).

> The statute says that if the magistrate judge "deems the evidence sufficient to sustain the charge," then the magistrate judge "shall" certify that to the Secretary of State, and "shall" issue a warrant for the commitment of the accused. The magistrate judge has no discretionary decision to make . . . . The procedure established by statute requires the magistrate judge to issue a certificate, if extradition is permissible. The Secretary of State may not extradite unless and until the certificate is issued.

Lopez-Smith, 121 F.3d at 1326 (internal citations omitted).

> In the United States, the procedures for extradition are governed by statute. The statute establishes a two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State . . . . This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly suited for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch.

United States v. Kin-Hong, 110 F.3d 103, 109-10 (1st Cir. 1997) (internal citation omitted).

305. Extradition magistrates enjoy discretion in the manner that they conduct the hearing, but such discretion must not be confused with their non-discretionary duty in determining the extraditability of the relator by applying the extradition treaty and applicable United States law to the facts.

306. *See supra* notes 245, 248-253 and accompanying text for a similar analysis in *Martin*.

States and Australia. After ruling that relator Kamrin did not enjoy the direct protection of any statute of limitations, the United States Court of Appeals for the Ninth Circuit considered Kamrin's second argument: because the treaty affords him the "remedies and recourses" of United States law, the Due Process Clause protects him from pre-accusation delay.[307] Disagreeing with Kamrin, the court held that "due process rights cannot be extended extraterritorially" to protect relators from the delay incurred by foreign governments in charging them,[308] and then opted not to inquire into the investigation of the alleged crime in Australia.

The court's analysis is consistent with the long-standing doctrine of non-inquiry, which establishes that courts should avoid inquiring into the legal processes and policies of requesting countries,[309] but the analysis is incomplete as it fails to consider the relator's interests. Non-inquiry prohibits a requested country from questioning the fairness of the requesting state's legal system.[310] It "precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request."[311] Because non-inquiry is settled law, it must be afforded substantial weight under any constitutional assessment—but it cannot trump the Constitution.[312]

To make out a *Lovasco*-type defense in international extradition the relator would have to first prove actual—not just potential—prejudice suffered by the relator, and that the requesting country delayed in charging the crime in gross negligence or intentionally to affect the relator's chances to fight extradition. Such a high bar would exempt extradition only in extreme cases. Applying *Lovasco* would properly balance the government's interests in applying non-inquiry and in avoiding a trial-like litigation with the relator's strong liberty interests. Even though the extradition magistrate would have to in-

307. Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir. 1984).

308. *Kamrin*, 725 F.2d at 1228 (citing Neely v. Henkel, 180 U.S. 109 (1901)).

309. Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993) (stating the rule of non-inquiry "precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request"); United States v. Howard, 996 F.2d 1320, 1329 (1st Cir. 1993) (stating the rule of non-inquiry requires that courts refrain from "investigating the fairness of a requesting nation's justice system").

310. *Martin*, 993 F.3d at 829.

311. *See id.* at 829-30 n.10 (explaining factors such as the implications of the extradition on foreign relations or humanitarian concerns may only be considered by the Secretary of State after the court certifies the relator's extraditability).

312. *See Martin*, 993 F.2d at 829 ("The United States' actions in reviewing a request for extradition are, of course, subject to the constraints of the Constitution. The constitutional rights of individuals, including the right to due process, are superior to the government's treaty obligations.").

quire somewhat into the endeavors of the foreign country in investigating the case, this burden or inconvenience would be balanced against the benefit of increasing the reliability of the extradition process, reducing the probability of an erroneous extradition, and recognizing the strong liberty interests of the people.

VI. CONCLUSION

International extradition is not a criminal procedure; it is *sui generis*. Because it is not a criminal procedure, courts have held that relators are not directly protected by the Speedy Trial Clause of the Sixth Amendment and by other constitutional provisions specifically addressed at criminal defendants. These same courts, however, have consistently held that relators have due process rights. Due process should protect relators from the prejudices of government delay because of the strong liberty interests involved in international extradition and because the passage of time may deprive relators of evidence necessary to fend off an extradition request.

Due process mainly requires that people be afforded a meaningful and timely opportunity to oppose the government when the government intends to deprive them of their life, liberty, or property. A meaningful opportunity to confront the government's evidence may be missed when exculpatory evidence is lost with the passage of time. To ensure due process in criminal proceedings, the Sixth Amendment's Speedy Trial Clause and the Fifth Amendment's Due Process Clause protect defendants from certain instances of government delay in the investigation and prosecution of criminal charges. Similar safeguards are needed in international extradition to ensure that relators' strong liberty interests are protected.

Relators face tremendous liberty losses. Through extradition, the government attempts to surrender them to the jurisdiction of foreign countries for imprisonment and criminal prosecution. Such strong limitations on liberty demand the application of *Mathews v. Eldridge*[313] so that courts may properly evaluate whether procedural safeguards proposed by relators are required by due process. The categorical analyses adopted by the courts to deny relators procedural safeguards—because the United States should not force the requesting country into a trial-like procedure—are unsupported by the realities of extradition procedure, which allow requesting countries a plethora of procedural advantages. Requesting countries are afforded so many procedural advantages in international extradition, that any given proposed procedural safeguard should be evaluated separately

313. 424 U.S. 319 (1976).

through *Mathews* to assess whether its adoption would singlehandedly convert the extradition proceeding into a trial-like procedure.

Also unsupported is the categorical approach that denies relators protection against government delay because extradition is not a criminal procedure, and thus the Speedy Trial Clause is not applicable. Even though relators are not directly protected by the Speedy Trial Clause, courts should recognize that relators have a due process right to defend against the damaging effects of government delay. Government delay may cause the loss of exculpatory evidence, which in turn affects the reliability of extradition proceedings. Courts already acknowledge that relators have due process rights, and thus it follows that extradition proceedings should not be unfairly delayed.

Mathews's balancing test is generally applied to assess the constitutionality of procedural safeguards in cases of liberty interests. *Mathews* should be applied in international extradition, as it is applied in so many other contexts, because it is an effective means to balance relators' strong liberty interests with the legitimate interests of the government not to convert the extradition process into a trial-like procedure and not to inquire into the requesting country's legal procedures. Courts should follow the lead of the Supreme Court in immigration and national security cases where the Court has applied *Mathews* to balance the conflicting interests of government and individuals.

Applying *Mathews* to issues of post-accusation and pre-accusation delay suggests that the procedural safeguards adopted by the Court in *Barker v. Wingo*[314] and *United States v. Lovasco*[315] are appropriate to consider specific instances of delay in extradition. Both safeguards add some fairness to the procedure without converting it into a trial-like process or intruding excessively into the requesting country's discretion to investigate and prosecute. The current categorical analyses that courts are applying to issues of government delay fail to consider the liberty interests of relators. By balancing, courts could consider these interests, and only through balancing may courts properly assess whether a proposed procedural safeguard tilts the balance too much toward the individual.

314. 407 U.S. 514 (1972).
315. 431 U.S. 783 (1977).

BATMAN AND TWO VERY LARGE JARS OF MAYONNAISE: THE LOOMING CLASH OF DAILY FANTASY SPORTS AND TRIBAL GAMING

BRETT WESSELS†

I. INTRODUCTION

On April 18, 2016, the Connecticut Attorney General, George Jepsen ("Jepsen"), released a letter regarding the potential impact of daily fantasy sports ("DFS") legislation on Connecticut's revenue sharing agreement with two different Native American tribes. Ultimately, Jepsen concluded "there is a substantial risk that the passage of such [DFS] legislation could jeopardize the State's revenue-sharing arrangements with the Tribes."[1] Based on the revenue that is generated from tribal gaming in the state of Connecticut, such caution is likely prudent. The Mashantucket Pequots' Foxwoods Casino and Resort and the Mohegan Sun in Connecticut are among the most lucrative tribal casinos in the nation and gross in excess of one billion dollars. In the quarter that ended December 31, 2015, the Mashantucket Pequot Tribal Nation casino generated $229.3 million in net revenue.[2] If Connecticut passed DFS legislation and the legislation infringed on the state's revenue sharing agreement with the tribes, the tribal gaming revenue might be lost altogether. The concern of DFS implicating a revenue sharing agreement is not limited to Connecticut. In California, two influential Southern California tribes sent letters to state senators expressing concerns about DFS legislation;[3] in Oklahoma, in-

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† This Article is dedicated to Terry Moore, Jr. who unexpectedly passed away during the drafting of this Article. Terry was a friend and iconic member of the Omaha legal community. His enthusiastic personality and congeniality to everyone he encountered will forever be missed. The author serves as Deputy General Counsel at EHPV Management and can be contacted at bwessels@ehpv.com.

1. Letter from George Jepsen, Attorney General, State of Connecticut, to Senate President Martin Looney and Senate Majority Leader Bob Duff, Senators, State of Connecticut (Apr. 18, 2016), http://www.ct.gov/ag/lib/ag/opinions/2016/2016-03_fantasy_sports_contests.pdf.

2. *Mashtucket Pequot Tribal Nation reports gains in gaming revenue*, INDIANZ.COM (Feb. 12, 2016), http://www.indianz.com/IndianGaming/2016/02/12/mashantucket-pequot-tribal-nat-2.asp.

3. Jim Miller, *Powerful casino tribes raise concerns with California fantasy sports bill*, THE SACRAMENTO BEE (Feb. 10, 2016), http://www.sacbee.com/news/politics-government/capitol-alert/article59647811.html.

fluential tribes successfully opposed a bill that would have legalized DFS.[4]

As mentioned above, Jepsen was far from confident with his conclusion that DFS legislation would infringe on the state's arrangement with the tribes. In the opening paragraph of the letter, Jepsen stated that there is a "high degree of uncertainty" if DFS legislation would infringe on the revenue sharing agreement.[5] In the last paragraph, Jepsen again hammered home this point, reiterating, "Nonetheless, no one can predict with any level of certainty how a court, if faced with these issues, would rule."[6] Jepsen stated his uncertainty in both the introduction and conclusion of his letter, clearly wanting to underscore that his analysis was not definitive. Irrespective of the categorical legal questions, which are plentiful, there are a lot of reasons to *not* be confident when making predictions about DFS and tribal gaming.[7] This Article will highlight some reasons for such hesitancy; however, even briefly examining DFS and tribal gaming in the abstract shows why confident rhetoric is unwise. DFS is the product of unpredictable technology,[8] irrationality, fear, politics, and little jurisprudential analysis covering the subject.[9] Throw in the decentralized nature of the internet, legalization being determined in a patchwork fashion by the states, historic levels of advertising, grandstanding politicians,[10] competing interests of state lotteries, and a sports obsessed culture, and you have succinctly described the circus-like atmosphere surrounding DFS. Meanwhile, tribal gaming relies heavily on political actors, is the product of shifting public policy debates, is often the subject of sweeping misconceptions, implicitly involves racial tension, is

4. Lenzy Krehbiel-Burton, *CN, OIGA officials currently oppose fantasy sports gaming*, CHEROKEE PHOENIX (July 26, 2016), http://www.cherokeephoenix.org/Article/index/10483.

5. *See* Jepson, *supra* note 1.

6. The Connecticut Attorney General was not even overly confident that it would be a federal court that would review it. The Connecticut Attorney General stated that it was "likely" that a federal court would review it. *Id.*

7. ROBERT NERSESIAN, THE LAW FOR GAMBLERS 9 (2016).

8. I. NELSON ROSE & MARTIN D. OWENS, INTERNET GAMING LAW 68 (2005). The authors state, "although it is possible to see the general trends and cycles in gambling, it is impossible to predict how exactly it will develop, because the games are dependent on so much technology." *Id.*

9. Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY'S L.J. 821, 829 (2016).

10. *See* Mark Cuban, *Mark Cuban to politicians: Good luck killing fantasy sports*, USA TODAY: OPINION (Feb. 23, 2016), http://www.usatoday.com/story/opinion/2016/02/22/fantasy-sports-industry-regulation-popularity-mark-cuban-column/80707312/. Mark Cuban noted that two politicians, Eric Schneiderman and California Assemblyman Marc Levine have "sought to make a name for themselves by promoting efforts to ban daily fantasy sports in their respective states." *Id.*

uniquely rooted in the principles of tribal sovereignty,[11] and is governed by a nuanced and controversial regulatory scheme.[12] Furthermore, both DFS and tribal gaming are relatively recent phenomena and both heavily rely on politics. These factors contribute to this overall uncertainty, and likely, to Jepsen's reluctance to unequivocally conclude whether DFS legislation would infringe on Connecticut's tribal compact agreement.

Based on the variables above, it is no surprise that Wikipedia labels gaming law as "enormously complex."[13] This label is found elsewhere too, as the term "complex" has been used to describe gaming law and the various niches within the industry.[14] As an aside, it has been mused that the terms "complex" and "complicated" are erroneously defined synonymously, when they are in fact much different.[15] Complicated issues can be explained by examining their individual parts, while complex matters cannot be compartmentalized because they are always greater than the sum of their parts.[16] For example, a jet engine would be complicated, while mayonnaise would be complex.[17] Examining the potential impact that DFS will have on tribal gaming is, metaphorically speaking, a lot of mayonnaise. As highlighted above, the looming collision of DFS and tribal gaming presents enough dynamic judicial, political, and social intangibles to likely humble even the most prominent of scholars.[18] Whether or not DFS

11. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 265 (2004).

12. *Id.* at 264.

13. *Gaming law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gaming_law (last visited Jan. 15, 2017) ("Gaming law is enormously complex.").

14. Alan E. Brown, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 160 (2005) ("Along with impressive numbers, Indian gaming presents complex legal, social, and economic questions to tribes, states, and the federal government."); K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U. S.F. L. REV. 1033, 1045 (2002) ("Tribal gaming law represents an intricate web of federal and state law, made even more complex by tribal government sovereignty."); Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 527 (2014) ("One will see that an industry as large and complex as Internet gambling demands an overarching federal regulatory system, especially in light of developing state regulation and the resulting regulatory inconsistencies."); Jeffrey S. Moad, *The Pot's Right: It's Time for Congress to Go "All in" for Online Poker*, 102 KY. L.J. 757, 759 (2014) ("The federal criminal law governing the Internet gambling industry in the United States consists of a complex web of ill-equipped statutes passed over several decades.").

15. ERIC WEINER, THE GEOGRAPHY OF GENIUS 201-02 (2016).

16. *Id.*

17. *Id.*

18. *See* Michael Shapiro, *2016 could be decisive year for daily fantasy betting*, SFGATE (Jan. 5, 2016), http://www.sfgate.com/entertainment/article/2016-could-be-decisive-year-for-daily-fantasy-6738124.php. In this article, Professor I. Nelson Rose states,

will implicate tribal gaming revenue sharing agreements, as Jepsen's hedged analysis implies, is fraught with uncertainty. Beyond a declaration that there indeed will be some sort of interplay between DFS and tribal gaming, confident rhetoric with such high stakes should be kept to a minimum.[19]

II. DAILY FANTASY SPORTS

Part II of this Article establishes a backdrop for daily fantasy sports ("DFS") and is broken into three sections. The first section discusses the historical background and eventual rise of traditional fantasy sports. The second section details the creation of DFS and the plethora of controversies surrounding the DFS industry and the major DFS operators. The third and final section is more argumentative, positing that DFS will continue to see legalization for three reasons. While the Introduction cautioned against making predictions because of the complexity of the topics, it is an essential premise that DFS move toward legalization in order for DFS and tribal gaming to clash.

A. The Rise of Traditional Fantasy Sports

Recently, our society has become crazy for fantasy sports.[20] Although the popularity of fantasy sports has seen recent explosive growth, traditional fantasy sports have been around since at least the 1960's. The first fantasy sports league was played in New York and began thriving when the New York Times ran an article on the league.[21] From there, fantasy sports' popularity grew, more rules were developed, and other sports were added.[22] In 2006, traditional fantasy sports received some legitimacy when Congress passed the

"[m]aking predictions is always dangerous," but that the daily fantasy sports' powerful allies will lobby New York State Legislature to legalize their operations within the state. *Id.* As the foremost authority on gaming law, I. Nelson Rose's hesitance on making a prediction is noteworthy.

19. *See* Dan Primack, *Sorry ESPN, But DraftKings and FanDuel Didn't Implode*, Fortune: Finance (Aug. 24, 2016), http://fortune.com/2016/08/24/sorry-espn-but-draftkings-and-fanduel-didnt-implode/ (criticizing Outside the Lines's predictions regarding the DFS industry, noting that DFS operators are continuing to see growth); *see also* Don Van Natta Jr., *Welcome to the Big Time*, ESPN: Outside the Lines (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

20. See John Affleck, *What's behind fantasy football's surprising popularity*, Fortune (Sept. 12, 2015) http://fortune.com/2015/09/12/fantasy-football-growth/; Gregory Bresiger, *Nearly 75M people will play fantasy football this year*, New York Post (Sept. 5, 2015), http://nypost.com/2015/09/05/nearly-75m-people-will-play-fantasy-football-this-year/.

21. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 8-9 (2012).

22. *Id.* at 10-11.

Unlawful Internet Gambling Enforcement Act[23] ("UIGEA") and exempted fantasy sports as a game of skill. In the present day, traditional fantasy sports are so widespread that they have impacted the massive gambling industry.[24] In 2008, nearly thirty million Americans and Canadians were playing fantasy sports, and forty-one million were playing by 2014.[25]

The rise of fantasy sports has coincided with two developments. First, which requires a quick history lesson on gambling, is the massive shift in state government policy toward gambling. The federal government has traditionally left gambling to the states.[26] Twice in American history, gambling has been legalized by the states.[27] Invariably, widespread scandal occurs and the states then entirely outlaw gambling.[28] Each time gambling becomes legalized, it is labeled a "wave,"[29] and the historical prism through which these "waves" are viewed is commonly referred to as the Three Waves Theory.[30] Currently, the United States is in the third wave of legalized gambling. In the third wave, state governments are actively sponsoring gambling and using it to generate revenue.[31] The second development that has helped spurn the growth of traditional fantasy sports is technology. The developments in technology continue to have a major impact on the fantasy sports industry. For example, the mobile phone has given the masses access to fantasy sports and the ability to calculate fantasy team scores in real time. Colorful updates and highlights deliver a fantasy owner statistics, data, and projections. The number crunching, which was so despised in the early stages of fantasy sports, has been all but eradicated.[32] While this has helped the popularity of fantasy sports, technology has also created problems with enforcing anti-gambling laws, as preventing gambling over the Internet is proving to be increasingly difficult.

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23. 31 U.S.C. §§ 5361-5366 (2012).

24. Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY'S L.J. 821, 825 (2016).

25. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1 (2012).

26. Jamisen Etzel, *The House of Cards Is Falling: Why States Should Cooperate on Legal Gambling*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 199, 210 (2012).

27. I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361 (2010).

28. *Id.*

29. *Id.*

30. ROSE & OWENS, *supra* note 8, at 101.

31. *Id.*

32. Edelman, *supra* note 25, at 10. Fantasy sports users no longer need calculators, increasing its widespread appeal.

One unexpected reason why traditional fantasy sports have experienced recent growth is their inherent social value. According to the Fantasy Sports Trade Association, women represent the fastest growing demographic of fantasy sports, at least in part due to the social component.[33] There is anecdotal evidence showing fantasy leagues are comprised of friends, where keeping in touch creates an incentive to play in the league.[34] There are also stories of fantasy sports bringing social value at the very highest levels of competition. For example, Shane Battier, a former professional basketball player, said he organized the Miami Heat's fantasy sports league while playing for the team. Battier believed having such a league helped created a type of intangible, unquantifiable value.[35]

B. The Creation of Daily Fantasy Sports and Subsequent Controversy

In a quintessential example of American innovation, traditional fantasy sports spawned the birth of DFS. This created an important dichotomy in the availability and type of fantasy sports: daily fantasy sports and traditional fantasy sports. Traditional fantasy sports correlate in length with the sports season, requiring a fantasy manager to make a sustained series of strategic and calculated decisions over a longer course of time in order to have a greater chance at winning. The required long-term strategic planning has generally led to the conclusion that traditional fantasy sports are a skill game. Conversely, DFS is played during a much shorter window of time, with most of the contests lasting less than a day.[36] The emergence of DFS was a confluence of market forces and impatience. There was a desire on the part of gamblers to win money in a shorter time, and the ban of online poker fortuitously aligned with the creation of DFS.[37] The meteoric rise of DFS now arguably threatens to swallow the fantasy

33. Edelman, *supra* note 25, at 18.

34. Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, 29 Loy. L.A. Ent. L. Rev. 53, 68 (2009).

35. The Nantucket Project, Shane Battier: The Art of the Intangible, Youtube (Oct. 16, 2014), https://www.youtube.com/watch?v=wOgNqSi17oQ.

36. Jon Bales, *Here's What It Takes To Make a Living Playing Fantasy Sports*, Bus. Insider: Sports (Nov. 6, 2013), http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11#ixzz2kU0ZUwd1; *see also* I. Nelson Rose, *Gambling and the Law: Casinos at the End of the World*, 42 N. Ky. L. Rev. 475, 492 (2015) (stating that gamblers now have shorter attention spans and strive for convenience).

37. Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 St. Mary's L.J. 821, 827-28 (2016).

sports industry itself,[38] the topic being among the most discussed at gaming conferences.[39] In 2014, the Fantasy Sports Trade Association President stated that there was more investment in DFS over the past two and half years than the entire history of fantasy sports.[40]

The emergence of DFS has not been without controversy.[41] One mainstream controversy has been whether DFS is a game of skill or a game of chance.[42] When gambling is on the Internet, the easiest way to run a game of skill is to have chance equalize out over time.[43] With DFS, the window of time is much shorter than traditional fantasy sports, arguably making DFS more closely resemble a game of chance. The time component is a strong reason why DFS operators might eventually have to limit the scoring to events taking place over the course of two days.[44] Another controversy is whether the UIGEA[45] covers DFS. The UIGEA exempted traditional fantasy sports, but there is still lingering controversy over whether that exemption includes DFS. Therefore, whether DFS is actually entitled to federal protection from the UIGEA has been a topic of discussion. There is no evidence that legislators considered DFS when drafting the UIGEA, but that has not prevented DFS operators from claiming the legislation legalizes DFS.[46]

The most public DFS controversy occurred in 2015, which involved the two major DFS operators, DraftKings and FanDuel. An employee of DraftKings accidentally released DraftKings's data showing information regarding which players were chosen in NFL lineups, something normally released after fantasy lineups are finalized.[47] That same week, the same DraftKings's employee who accidentally

38. Patrick Cannon, *Daily Fantasy Sports are taking over the world*, CBS DC (Sept. 9, 2015), http://washington.cbslocal.com/2015/09/09/daily-fantasy-sports-are-taking-over-the-world/.

39. I. Nelson Rose, *Law, Politics, and Daily Fantasy Sports*, 58-MAR ORANGE COUNTY LAW. 38, 39-40 (2016).

40. Noah Davis, *The Daily Fantasy Sports Takeover*, VICE: SPORTS (Oct. 29, 2014), https://sports.vice.com/en_us/article/the-daily-fantasy-sports-takeover.

41. *See* Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states (stating that "the setbacks have been headline-grabbing").

42. Zachary Shapiro, Comment, *Regulation, Prohibition, and Fantasy: The Case of Fanduel, Draftkings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289, 297-301 (2016).

43. ROSE & OWENS, *supra* note 8, at 21.

44. Rose, *supra* note 39, at 40-41.

45. Prohibition on Funding of Unlawful Internet Gambling, 31 U.S.C. §§ 5361-5367 (2012).

46. Shapiro, *supra* note 42, at 297.

47. Susanna Kim, *FanDuel, DraftKings 'Insider Trading' Allegations: An Explainer*, ABC NEWS (Oct. 6, 2015), http://abcnews.go.com/Business/fanduel-draftkings-insider-trading-allegations-explainer/story?id=34286629.

released the data won $350,000 on FanDuel.[48] The issue is if the DraftKings's employee had access to ownership information prior to lineups being locked, this information could be wielded advantageously on FanDuel.[49] Although the employee was never formally charged with wrongdoing, the DraftKings's employee was villainized and even received death threats on social media.[50] In an Entertainment and Sports Programming Network ("ESPN") article examining the deep-seated hatred for DFS, the DraftKings's employee was mentioned by name ten times.[51] Whether or not there was wrongdoing involved in that particular incident, the optics alone are problematic: DraftKings is an operator of a top-heavy duopoly in an industry where integrity is paramount, with their business already operating under a metaphorical microscope, and their employees can play on each other's platform.[52] The incident received national headlines and it was even stated that the scandal "almost pushed Donald Trump off the front page . . . ."[53] There is even rumored to be a book written on the incident, with the apparent movie rights already being optioned off.[54]

C. The (Likely) Legalization of DFS

"Today we have sent a clear message: [n]ot in New York, and not on my watch."

—Eric Schneiderman, November 11, 2015.[55]

48. *Id.*

49. See Daniel Roberts, *Everything you need to know about the DraftKings and FanDuel data scandal*, Fortune: Tech (Oct. 5, 2015), http://fortune.com/2015/10/05/draftkings-fanduel-data-scandal/.

50. David Purdum, *Public's biggest issues with the DFS industry*, ESPN (Aug. 24, 2016), http://www.espn.com/chalk/story/_/id/14791813/daily-fantasy-origin-hatred-daily-fantasy-sports.

51. *Id.*

52. *Id.* DraftKings employees could play on FanDuel, and FanDuel employees could play on DraftKings. *Id.*

53. Rose, *supra* note 39, at 38.

54. Anita Busch, *TriStar Bets On DraftKings-FanDuel Saga As A Movie*, Deadline: Hollywood (Aug. 25, 2016), http://deadline.com/2016/08/draftkings-fanduel-movie-daily-fantasy-sports-scandal-tristar-1201808481/.

55. Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, New York Times: Pro Football (Nov. 10, 2015), http://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html?_r=0.

"I'm thrilled. Now if you'll excuse me, I have to go work on my lineup."

—New York Assemblyman Dean Murray, upon the passing of the New York Daily Fantasy Sports Bill.[56]

There has been no shortage of opposition to DFS. The vehement hostility toward DFS led ESPN to write an article titled, *Public's Biggest Issues With the DFS Industry*, outlining the reasons for the extreme vitriol toward the industry.[57] In the ESPN article, Washington state Representative Christopher Hurst compared the Chief Executive Officers ("CEOs") of DraftKings and FanDuel to the drug lord El Chapo advertising heroin.[58] Although less contentious, there has also been scholarly work analyzing the legal status of DFS.[59] In order for DFS and tribal gaming to interact, DFS would need to be legalized. Therefore, as a preliminary matter, this Article will establish why DFS will likely be legalized. The reasons examined in this Article are threefold: psychological, practical, and financial.

1. The Psychological Forces

As the first reason that DFS will likely be legalized, psychological forces have almost no basis in legal doctrine: unfamiliarity manifests itself in fear, particularly in older generations. A relevant cinematic reference argues this proposition. In the award winning film *Batman Begins*, a naïve Bruce Wayne goes to a local Gotham City mobster hangout to confront a particularly powerful mobster and his henchmen. The mobster, appalled that the young and spoiled Bruce Wayne would come on his turf and threaten him, angrily yells at Bruce that Bruce's elite position in life has shielded Bruce from a different world that he is incapable of understanding. Before his henchmen remove Bruce, the mobster sums this up by saying, "[t]his is a world you don't understand, and you always fear what you don't understand."[60] While lifted from a fictitious movie where a man dresses up in a cos-

56. David Purdum, *FanDuel, DraftKings get OK to operate again in New York*, ABC NEWS (Aug. 3, 2016), http://abcnews.go.com/Sports/fanduel-draftkings-operate-york/story?id=41103498.

57. David Purdum, *Public's biggest issues with the DFS industry*, ESPN (Aug. 24, 2016), http://www.espn.com/chalk/story/_/id/14791813/daily-fantasy-origin-hatred-daily-fantasy-sports.

58. *Id.*

59. Richard Pandorf, *A Billion Dollar Industry's Billion Dollar Question: Are Fantasy Sports Actually Legal?*, 42 N. KY. L. REV. 519 (2015); Erica M. Boos, *Fraudduel and Draftkrooks: Chance or Skill?*, 12 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 83 (2016); Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 1 U. ILL. L. REV. 117 (2016).

60. BATMAN BEGINS (Warner Bros. Pictures 2005).

tume as a bat, this proposition rings true in our society, particularly when technology is involved. For example, social media experienced a similar arc, with older generations initially showing resistance, but they are now wholeheartedly embracing it.[61]

DFS, despite all of the publicity and popularity, is likely not understood by a large number of people.[62] Scholarly work on DFS invariably takes the time to establish what DFS even is.[63] DFS is new, targets younger audiences, is predicated on the use of technology, and involves numbers. It will likely take time for state and federal legislatures to fully understand what DFS is. For example, the average age of the members of the House of Representatives of the 113th Congress is 57 years old and the average age of the Senators is 62 years old.[64] Given this demographic, unsurprisingly the first Congressional hearing on DFS was a display of incoherent questioning and unfamiliarity.[65] The rise of DFS was abrupt and sudden, which forced state officials into a defensive position when examining DFS.[66] The unfamiliarity will subside and, ultimately, legislators will likely embrace the popularity of daily fantasy sports.

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61. Eugene Kim, *Old people are finally going crazy for social media*, BUSINESS INSIDER: TECH INSIDER (Nov. 8, 2015), http://www.businessinsider.com/social-media-usage-among-people-over-65-has-tripled-2015-11.

62. *See* Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE: SPORTS (May 11, 2016), http://fortune.com/2016/05/11/fantasy-sports-hearing/ (noting that representatives' questions during the Congressional hearing showed a lack of understanding of DFS).

63. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 1 U. ILL. L. REV. 117 (2016) (explaining the different formats of what daily fantasy sports are); Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of Fanduel, Draftkings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289 (2016) (devoting an entire section to, "What is DFS?"); Jonathan Bass, *Flushed from the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 SMU L. REV. 501 (2016) (juxtaposing traditional fantasy sports with daily fantasy sports); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201 (2014) (allocating a section to explain, "How to Play Daily Fantasy Sports").

64. JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE 2 (2014), http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL%2BR%5CC%3F%0A.

65. *See* Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE: SPORTS (May 11, 2016), http://fortune.com/2016/05/11/fantasy-sports-hearing/. At one point, an Oklahoma representative asked if there was a regulatory body for the industry, with the lack of such a regulatory body being the reason for the hearing itself. *Id.*

66. This sort of reaction is likely one of the reasons so many state attorneys general decried DFS as illegal gambling within their state. Letter from George Jepsen, Attorney General, State of Connecticut, to Senate President Martin Looney and Senate Majority Leader Bob Duff, Senators, State of Connecticut (Apr. 18, 2016), http://www.ct.gov/ag/lib/ag/opinions/2016/2016-03_fantasy_sports_contests.pdf.

2. The Practical Forces

Generally speaking, problems abound when attempting to enforce anti-gambling laws, and DFS is no exception. As I. Nelson Rose stated, "Ban it as you will, people are just plain going to gamble, at either social games or underground commercial lotteries, race books, and casinos."[67] Given the millions of people playing DFS and the widespread access to technology, effectively preventing people from playing DFS is difficult.[68] This is why sports gambling, which is for the most part legally restricted, is not only rampant but a "widespread" and "thriving" business.[69] Outlawing DFS would immediately create a black market for the game, and enforcing criminalization would be prosecutorially irresponsible,[70] if not a practical impossibility, given the required resources for such a feat.[71]

Furthermore, since DFS permeated so quickly and penetrated the market so deeply, trying to effectively outlaw DFS is seemingly becoming more unrealistic, if not comical in certain locations. For example, DFS prohibition in New York would have created a highly peculiar set of circumstances. DraftKings, as well as FanDuel, has a massive satellite office in Manhattan.[72] DraftKings has a deal with

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67. ROSE & OWENS, *supra* note 8, at 54.

68. Even NBA Commissioner Adam Silver has acknowledged that despite being illegal, "sports betting is widespread." Silver even went so far to call it a "thriving underground business that operates free from regulation or oversight." Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0.

69. *Id.* It should be noted that Adam Silver does not directly attribute technology to the reason that sports gambling is widespread and a thriving underground business. However, Silver specifically states that, "Times have changed since PASPA was enacted." *Id.* The implication here is that technology has come a long way since 1992, when PASPA was enacted. Additionally, Silver also goes on to point to how technology is used in England: "In England, for example, a sports bet can be placed on a smartphone, at a stadium kiosk[,] or even using a television remote control." *Id.*

70. *See* Anthony Cabot, *The Absence of A Comprehensive Federal Policy Toward Internet and Sports Wagering and A Proposal for Change*, 17 VILL. SPORTS & ENT. L.J. 271, 273 (2010) (stating that prosecutorial policies and federal laws are confusing and contradictory).

71. *See* ROSE & OWENS, *supra* note 8, at 54 (stating that people are going to gamble, regardless of the legality, and that in light of the tens of millions who play DFS, there inevitably will be gambling whether or not legalization exists). To make a statement that it would be irresponsible for a prosecutor to vehemently enforce gambling laws is not a facetious comment, deliberate overstatement for attention, or meaning to be disrespectful to prosecutors. Anti-gambling laws are very difficult to enforce as a practical matter. The arrests resulting from a gambling game that is illegal make "poor use of police resources generally." The result is corruption of police, corruption of the judiciary, and, therefore, disrespect for the legal system. *Id.*

72. Darren Revell & David Purdum, *New York Supreme Court judge rules against DraftKings, FanDuel*, ESPN (Dec. 11, 2015), http://www.espn.com/chalk/story/_/id/14342458/new-york-supreme-court-judge-bars-draftkings-fanduel-operating-state ("Fan Duel, which has its main headquarters in New York, and DraftKings, which has a satel-

Madison Square Garden, which means DraftKings has marketing interests in the New York Knicks, New York Rangers, and on the jerseys of the New York Liberty.[73] DraftKings also has marketing deals with the New York Giants and New York Yankees, and FanDuel with the New York Jets and Brooklyn Nets.[74] This makes for an amusing, yet realistic, visual that could have taken place if New York had hypothetically outlawed DFS: a sports fan could have been sipping a cocktail in the Madison Square Garden DraftKings Fantasy Lounge,[75] watching the New York Liberty play with a "DraftKings" advertisement on the players' jerseys,[76] with a DraftKings office physically located a mere two miles away from where the patron is sitting, yet DraftKings would not have been allowed to do business with anyone in the state of New York.[77] The irony in this hypothetical illustrates the prevalence and entrenchment of DFS.

3. The Financial Support Behind Daily Fantasy Sports

The last and perhaps most persuasive factor supporting DFS legalization is the financial component. The economics of DFS are advantageous and "the laws of economics are as real as the laws of nature."[78] The financial contributors of DFS include professional sports leagues, which represent an economy in and of themselves.[79]

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lite office in New York but is based in Boston, can still operate their national businesses out of those Manhattan offices but cannot do businesses with anyone in the state.").

73. David Prudum & Darren Rovell, *N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy*, ESPN: CHALK (Nov. 11, 2015), http://www.espn.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling.

74. *Id.*

75. Scott Soshnick & Mason Levinson, *MSG Signs Marketing Partnership With Fantasy Site DraftKings*, BLOOMBERG (June 4, 2015), https://www.bloomberg.com/news/articles/2015-06-04/madison-square-garden-inks-marketing-partnership-with-draftkings. As a part of the DraftKings's marketing agreement with Madison Square Garden Co., DraftKings became a title partner of the DraftKings Fantasy Lounge inside of Madison Square Garden. DraftKings also announced its intentions of opening up a Fantasy Lounge. *Id.*

76. *Draft Kings Becomes Marquee Partner of the New York Liberty*, WNBA (June 4, 2015), http://liberty.wnba.com/news/draftkings-becomes-marquee-partner-of-the-new-york-liberty/. Since DraftKings became a sponsor of the New York Liberty, the DraftKings logo will appear on the team's home and away uniform. *Id.*

77. Darren Revell & David Purdum, *New York Supreme Court judge rules against DraftKings, FanDuel*, ESPN (Dec. 11, 2015), http://www.espn.com/chalk/story/_/id/14342458/new-york-supreme-court-judge-bars-draftkings-fanduel-operating-state ("FanDuel, which has its main headquarters in New York, and DraftKings, which has a satellite office in New York but is based in Boston, can still operate their national businesses out of those Manhattan offices but cannot do businesses with anyone in the state.").

78. I. NELSON ROSE & ROBERT A. LOEB, BLACKJACK AND THE LAW 219 (1998).

79. *See* Symposium, *A Changing Game: Challenging the Status Quo in Sports Law*, 23 JEFFREY S. MOORAD SPORTS L.J. 363, 385-86 (2016) (discussing the NFL's licensing deals with FanDuel and DraftKings).

While the leagues clearly have a financial interest in DFS, they have traditionally remained an arms length away from gambling.[80] Sports leagues have traditionally distanced themselves from anything gambling related.[81] Not long ago, the commissioners of the major professional sports leagues were railing against sports gambling, resulting in the passage of the Professional Amateur Sports Protection Act[82] ("PASPA"), a federal statute outlawing most states from sponsoring sports gambling.[83]

But to be sure, the professional sports leagues and DFS operations have consummated a very peculiar relationship. The professional sports leagues appear to embrace and support DFS. This newfound support has been labeled as hypocrisy,[84] but likely just illustrates the peculiar role that gambling has played throughout history. History has shown that people view some of the effects of gambling as bad, but weigh them against pleasure and revenue. Futhermore, since its inception, gambling has seemingly epitomized cognitive dissonance.[85] George Washington labeled gambling the "father of mischief" and said "few gain from this abominable practice, while thousands are injured."[86] Yet Washington purchased the first lottery ticket and signed the country's first lottery documents, and from 1772 to 1775, Washington kept meticulous records of his card

80. *See* Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE: SPORTS (May 11, 2016), http://fortune.com/2016/05/11/fantasy-sports-hearing/ (stating that the professional sports leagues did not show up for the U.S. House committee meeting on DFS). *See also* A.J. Perez, *Congressional hearing on daily fantasy sports focuses on sports gambling*, USA TODAY: SPORTS (May 12, 2016), http://www.usatoday.com/story/sports/fantasy/2016/05/11/daily-fantasy-sports-congress-sports-gambling/84234696/ (noting how the professional sports leagues traditionally opposed gambling but now find themselves supporting DFS).

81. Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0 (noting, "[f]or more than two decades, the National Basketball Association has opposed the expansion of legal sports betting, as have the other professional sports leagues in the United States.").

82. 26 U.S.C. §§ 3701-3704 (2012).

83. Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 574-76 (2013).

84. *See* Green, *supra* note 80 (stating a Congressional representative called sports leagues hypocrites for partnering with DFS operators but also condemning sports wagering). Also, in Senator Grassley's dissent of the legislation that eventually became PASPA, he stated, "The hypocrisy of the professional sports leagues in seeking this legislation is also troubling. The leagues claim they are concerned about the integrity of their games . . . ." S. REP. 102-248, at 14 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3564.

85. *See* I. Nelson Rose, *Gambling and the Law: The Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L.J. 29, 44 (2000) (calling gambling a morally suspect industry, along with alcohol, drugs, and abortion).

86. CHARLES DUHIGG, THE POWER OF HABIT 247 (2014).

playing.[87] The Puritan settlers, notorious for their high moral standards, had a penchant for cards.[88] Circling back to the issue at hand, the professional sports leagues know the inherent evils of intertwining sports and gambling, but they also know there are a lot of reasons why they will benefit from DFS expanding.

The professional sports leagues' new position also reflects the importance of televised sports. The television product of sports is a highly valuable asset, one which professional sports leagues treasure.[89] This is not a recent development; as far back as the early 1990's, the billion dollar product of televised sports was at least noted as a factor in sports gambling.[90] The beauty of fantasy sports, at least in the eyes of the professional sports leagues, is that fantasy sports give fans incentives to watch televised games to the end, even if the game is not close.[91] As a USA Today article on daily fantasy sports so pointedly stated, "[i]f the deals work the way the leagues hope, daily fantasy sports consumption will have a steroid effect on television revenue, because nobody watches live sports on television quite as intensely as fans with money at stake."[92] This is perhaps why major media outlets are interested in DFS, with Fox Sports investing around $150 million for an estimated eleven percent ownership in DraftKings[93] and reports of ESPN investing $250 million.[94] Mark Cuban

87. DAVID G. SCHWARTZ, ROLL THE BONES: THE HISTORY OF GAMBLING: CASINO EDITION 118-19 (2013) (explaining that George Washington publicly stated that gambling was not good, yet he apparently was a gambler himself, as he kept records of how he did).

88. *Id.* at 114. The Puritans did not categorically believe that gambling was bad. They believed that gambling was bad only because there were other productive things one could be doing, like preparing to enter heaven's kingdom. *Id.*

89. Richard Sandomir, *NBC Retains Rights to Premier League in Six-Year Deal*, THE NEW YORK TIMES: SOCCER (Aug. 10, 2015), http://www.nytimes.com/2015/08/11/sports/soccer/nbc-retains-rights-to-premier-league-in-six-year-deal.html?_r=0. For example, the Premier League and NBC recently signed a six-year agreement for television rights, which was valued at one billion dollars, doubling their previous contract for three years at $250 million. *Id.*

90. S. REP. 102-248, at 14 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3564. Senator Grassley stated, "It has been suggested by the professional sports leagues that this is an insignificant and unreliable source of new revenue" and goes on to state the importance of the television sports deal. *Id.*

91. Rose, *supra* note 39, at 38.

92. Brent Schrotenboer, *Leagues see real benefits in daily fantasy sports*, USA TODAY (Jan. 1, 2015), http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/.

93. Richard Sandomir, *Fantasy Sports Website DraftKings Adds $300 Million in New Investment*, THE NEW YORK TIMES (July 26, 2015), http://www.nytimes.com/2015/07/27/sports/fantasy-sports-website-draftkings-adds-dollar300-million-in-new-investment.html?_r=2.

94. Matthew Rocco, *MLB, ESPN Bank on Daily Fantasy Sports*, FOX BUS. (Apr. 16, 2015), http://www.foxbusiness.com/industries/2015/04/16/mlb-espn-bank-on-daily-fantasy-sports/.

echoed this statement. Cuban, billionaire businessman and owner of the Dallas Mavericks National Basketball Association ("NBA") franchise, wrote a pro-fantasy sports editorial and highlighted the value of DFS by pointing out that the stronger relationship between the fans and the game translates to a more valuable television product.[95]

The specific reasons that the major professional sports leagues support DFS are worth examining. The National Football League ("NFL"), which is the revenue goliath of the sports world, is a great sport to start with because of its enormous influence and since the league has been labeled as "fanatically anti-gambling."[96] NFL Commissioner Roger Goodell, who is paid $34.1 million dollars to run the NFL like a business,[97] does not view DFS as gambling,[98] and he allows franchise owners to invest in DFS.[99] Incredibly, twenty-eight out of the thirty-two teams in the NFL have or had some type of relationship with fantasy sports sites.[100] The future of the NFL seems oriented toward gambling too, as the NFL is now considering putting a team in gambling havens Las Vegas[101] and London.[102] The NFL's support also comes from recent public perception problems due to the possible harmful effects of concussions. The legitimate health concerns aside, the concussion controversy has been a historically bad public perception problem for the NFL, one which the long-term financial ramifications on the league are still unclear. The NFL wants to

95. *See* Mark Cuban, *Mark Cuban to politicians: Good luck killing fantasy sports*, USA TODAY: OPINION (Feb. 23, 2016), http://www.usatoday.com/story/opinion/2016/02/22/fantasy-sports-industry-regulation-popularity-mark-cuban-column/80707312/.

96. Rose, *supra* note 39, at 41.

97. Mina Kimes, *Why on earth does Roger Goodell make so much money?*, ESPN: NFL (Jan. 12, 2016), http://www.espn.com/nfl/story/_/id/14802447/roger-goodell-high-salary-explained.

98. Paul Gutierrez, *Las Vegas Raiders? Owner Mark Davis Serious About Move to Sin City*, ESPN: NFL (May 5, 2016), http://espn.go.com/blog/oakland-raiders/post/_/id/14572/las-vegas-raiders-owner-mark-davis-serious-about-move-to-sin-city. NFL Commissioner Roger Goodell said:

> I think all of us have evolved a little bit on the gambling . . . . To me, where I cross the line is anything that can impact the integrity of the game. If people feel like it's going to have an influence on the outcome of the game, we are absolutely opposed to that. And that's why we're opposed to team-sports gambling.

Id.

99. Rose, *supra* note 39, at 41.

100. Gutierrez, *supra* note 98.

101. Gutierrez, *supra* note 98.

102. *See* Mike Coppinger, *Goodell: London Team 'Could be Five or 10 Years Away'*, NFL (July 18, 2014, 2:46 PM), http://www.nfl.com/news/story/0ap2000000366012/article/goodell-london-team-could-be-five-or-10-years-away/; *see* Frank Koegh & Gary Rose, *Football betting - the global gambling industry worth billions*, BBC SPORT (Oct. 3, 2013), http://www.bbc.com/sport/football/24354124 (estimating the entire global market for sports betting valued between $700 billion and $1 trillion).

avoid the public asking themselves what a Washington Post columnist stated: "Should we still be playing football? Should we still be *watching* football?"[103]

The NBA, which has opposed the expansion of legal sports betting for over two decades,[104] is also a big financial supporter of DFS. The new NBA Commissioner Adam Silver, a former attorney, wrote an editorial supporting the legalization of gambling[105] around the same time the NBA invested in FanDuel. The NBA is now equity partners in FanDuel and DraftKings and partnered with a tech company that offers sophisticated analysis for DFS and sports wagering.[106] Similar to the NFL concussion issues, the NBA has dealt with public attacks on its product. In particular, there has been criticism of teams "tanking" to get a higher draft pick,[107] as well as player image problems.[108] The NBA, similar to the NFL, has plenty of reasons to concern itself with remaining connected to its fans through fantasy sports.

Major League Baseball ("MLB") also stands to profit from DFS expansion, perhaps even more than the other professional sports leagues. Recently, attention has focused on how the MLB can attract younger audiences. Some of the ideas on how to bridge the generation gap that exists border on the radical,[109] but the more realistic strat-

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103. Norman Chad, *The NFL's concussion problem deserves another look*, WASHINGTON POST (Jan. 17, 2016), https://www.washingtonpost.com/sports/redskins/the-nfls-concussion-problem-deserves-another-look/2016/01/17/f4ddc304-bd39-11e5-bcda-62a36b394160_story.html?utm_term=.c3833ca6166c; Andrew Brand, *The NFL's Concussion conundrum*, ESPN (Oct. 17, 2012), http://www.espn.com/nfl/story/_/id/8513300/the-issue-concussions-nfl-not-going-away; Gary Mihoces, *Documentary: For years, NFL ignored concussion evidence*, USA TODAY (Oct. 7, 2013), http://www.usatoday.com/story/sports/nfl/2013/10/07/frontline-documentary-nfl-concussions/2939747/.

104. Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0.

105. *Id.*

106. Steve Fainaru, Paula Lavigne & David Purdum, *Betting on the Come: Leagues Strike Deals with Gambling Related Firms*, ESPN (Jan. 28, 2016), http://espn.go.com/espn/otl/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms.

107. Kelly Dwyer, *The NBA has a tanking problem because the NBA used to employ a lot of problems*, YAHOO SPORTS (Mar. 31, 2015), http://sports.yahoo.com/blogs/nba-ball-dont-lie/the-nba-has-a-tanking-problem-because-the-nba-used-to-employ-a-lot-of-problems-202819470.html; Chris Ballard, *After the Process: Meet Sam Hinkie 2.0*, SPORTS ILLUSTRATED (Nov. 30, 2016), http://www.si.com/nba/2016/11/30/sam-hinkie-after-the-process-philadelphia-76ers.

108. Michael Lee, *NBA Fights to Regain Image*, WASHINGTON POST (Nov. 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/18/AR2005111802752.html; Kelly Dwyer, *The NBA has a tanking problem because the NBA used to employ a lot of problems*, YAHOO SPORTS (Mar. 31, 2015), http://sports.yahoo.com/blogs/nba-ball-dont-lie/the-nba-has-a-tanking-problem-because-the-nba-used-to-employ-a-lot-of-problems-202819470.html.

109. Bob Nightengale, *MLB won't fear going extreme to attract a new generation*, USA TODAY SPORTS (Feb. 16, 2016), http://www.usatoday.com/story/sports/mlb/2016/02/

egy is likely using technology.[110] The MLB is desperate to find ways to attract younger audiences[111] and develop a connection with younger fans.[112] While the revenue generated by the sport seems to suffice for now, the average television viewer for baseball is over 55 years old[113] and the statistical data show that younger people are less enamored with baseball.[114] While the popularity of televised baseball is an ongoing debate,[115] televised baseball appears more reliant on regional, rather than national, viewership.[116] While the traditionalist mindset of the MLB seems diametrically opposed with DFS,[117] the generational disconnect and fragmented market base is a cause for concern. A technology-oriented product like DFS may just be what the MLB needs to regain a foothold on younger audiences.

16/mlb-youth-outreach-play-ball-cal-ripken-jr-rob-manfred/80468196/. The article floated several ideas, including starting every inning with a runner on first base, starting every inning with a different count, replacing the three out rule with a five batter rule, and requiring runners to steal. *Id.*

110. Tim Baysinger, *Can Social Media Help Major League Baseball Get Younger*, ADWEEK (Mar. 27, 2016), http://www.adweek.com/news/technology/can-social-media-help-major-league-baseball-get-younger-170432.

111. *See* Marc Fischer, *Baseball is struggling to hook kids – and risks losing fans to other sports*, WASHINGTON POST: MLB (Apr. 5, 2015), https://www.washingtonpost.com/sports/nationals/baseballs-trouble-with-the-youth-curve—and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d_story.html. (noting that the MLB is losing young audiences).

112. *Id.* (stating that the sport of baseball must address the lack of connection it has with younger fans).

113. Treng Gillies, *Baseball thrives, but struggles to overcome its age*, CNBC (July 12, 2015), http://www.cnbc.com/2015/07/12/baseballs-advertising-worries-linger.html (citing the statistic of the average age of a viewer being over 55).

114. Marc Fisher, *Baseball is struggling to hook kids – and risks losing fans to other sports*, WASHINGTON POST (Apr. 5, 2015), https://www.washingtonpost.com/sports/nationals/baseballs-trouble-with-the-youth-curve—and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d_story.html?utm_term=.2a12d13926e1 (citing the ESPN Sports Poll annual survey of young Americans, which states that the 30 favorite sports figures has no baseball players, and that adults 55 and older are 11% more likely than the overall population to say they have a strong interest in baseball).

115. *But see* Maury Brown, *Baseball Is Dying? Don't be Stupid*, FORBES (Oct. 8, 2014), http://www.forbes.com/sites/maurybrown/2014/10/08/baseball-is-dying-dont-be-stupid/#57344f283076.

116. Maury Brown, *With 2016 Season Half Over, TV Ratings For MLB Shows RSN's Ruling In Prime Time*, FORBES (July 19, 2016), http://www.forbes.com/sites/maurybrown/2016/07/19/with-2016-season-half-over-tv-ratings-for-mlb-shows-rsns-ruling-in-prime-time/#7a46d9da46a2 (explaining that games on regional sports networks do really well in the rankings system, with the ratings of the regional sports games outperforming ESPN).

117. Bob Nightengale, *MLB won't fear going extreme to attract a new generation*, USA TODAY SPORTS (Feb. 16, 2016), http://www.usatoday.com/story/sports/mlb/2016/02/16/mlb-youth-outreach-play-ball-cal-ripken-jr-rob-manfred/80468196/ (noting a statement by legendary baseball player Cal Ripken Jr. that baseball needs to "forget the traditional mindset.").

However, much like Connecticut Attorney General Jepsen hedged his analysis, this author will do the same: the legalization and profitability of DFS in the long term is not a home run. In a critical and controversial *Outside the Lines* article, the DFS model was vehemently attacked.[118] Indeed, the profitability of DFS remains in question. It remains to be seen whether DFS can continue to attract small stakes players, maintain a wide enough demographic, sustain public interest, and bring the same social value as traditional fantasy sports. However, while it is uncertain whether the industry can continue to generate large amounts of revenue, DFS will likely find legalization among a majority of the states. There is tremendous financial value for the professional sports leagues and there are many practical problems with enforcement. Additionally, it appears unlikely that the demand and interest in DFS will vanish.[119] Consequently, this means that DFS will likely move forward and impact another burgeoning area of legal gambling: tribal gaming.

III. TRIBAL GAMING

Part III lays a foundation for tribal gaming by establishing the environment and legislative developments of tribal gaming with two sections. First, Part III examines *California v. Cabazon Band of Mission Indians*[120] and the environment prior to the Indian Gaming Regulatory Act ("IGRA"). Second, Part III will analyze the IGRA and the negative impact that *Seminole Tribe of Florida v. Florida*[121] had on the IGRA.

A. THE *CABAZON* DECISION AND THE PRE-IGRA ENVIRONMENT

"[The tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."[122]

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118. *See* Don Van Natta Jr., *Welcome to the Big Time*, ESPN: OUTSIDE THE LINES (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel (stating that as quickly as the industry boomed, it somewhat busted). *See also* Dan Primack, *Sorry ESPN, But DraftKings and FanDuel Didn't Implode*, FORTUNE: FINANCE (Aug. 24, 2016), http://fortune.com/2016/08/24/sorry-espn-but-draftkings-and-fanduel-didnt-implode/ (criticizing Outside the Lines's predictions regarding the DFS industry and noting that DFS operators are continuing to see growth).

119. I. Nelson Rose, *Gambling and the Law; Casinos at the End of the World*, 42 N. KY. L. REV. 475, 490 (2015). Once demand has been created, technology will find ways around those legal barriers. "Technology creates its own demand." *Id.* at 490-92; NERSESIAN, *supra* note 7, at 10.

120. 480 U.S. 202 (1987).

121. 517 U.S. 44 (1996).

122. United States v. Kagama, 118 U.S. 375, 384 (1886).

While DraftKings and FanDuel occasionally did not have the best relationship, this pales in comparison to the historically rocky relationship between the United States and Native American tribes. There is, and perhaps always will be, a contingency of United States citizens that rebukes the idea of existing parallel nations.[123] The United States has tried to figure out how to accommodate Native American tribes as sovereign nations. Early on, the solution was through armed conflict, treaties, and forced relocation of tribal members to reservations.[124] This solved little, as extreme poverty and high unemployment rates continued.[125] The insufferable poverty caused the tribes to eventually turn to a centuries old activity to generate revenue—gambling.[126] Surprisingly, gambling proved somewhat economically beneficial, particularly to tribes near large cities.[127] Although tribal gaming has garnered a lot of attention, like DFS, tribal gaming is still a relatively new concept. It started in the early 1980s as a way to generate revenue, with Indian tribes in mostly Florida and California opening up high stakes bingo halls.[128] High stakes bingo developed as a potentially sound investment with a low initial investment, the potential for high returns, and a clear market advantage over the state run system.[129] Additionally, the tribes could offer games with higher stakes, longer hours, and larger payouts.[130]

As tribal political and judicial structures have become more progressive, states are becoming more confrontational about tribal jurisdiction.[131] The success of tribal gaming, however overstated at

123. Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, NEW YORK TIMES: U.S. (Mar. 9, 1998), http://www.nytimes.com/1998/03/09/us/backlash-growing-as-indians-make-a-stand-for-sovereignty.html?pagewanted=all.

124. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 20 (1st ed. 2006).

125. *Id.*

126. *See* Nicholas S. Goldin, Comment, *Casting A New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 810 (1999) (stating "as the 1980s approached, both the federal government and the tribes still needed to identify a viable means of tribal economic development. The answer was Indian gaming.").

127. *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND, http://www.narf.org/indian-gaming/ (last visited Jan. 21, 2017) (noting that while not all tribes have experienced success, "[a]s small tribes located near major urban areas, these successful gaming operations have benefited the most from the gaming boom generating 40% of all Indian gaming revenue.").

128. STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 39 (2005).

129. RAND & LIGHT, *supra* note 124, at 21.

130. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294-95 (2004).

131. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 32-33 (1997).

times,[132] has created some public apprehension. As tribal bingo halls popped up, the states wanted to regulate these bingo halls and attempted to shut them down for violations of state law.[133] The first jurisdictional conflict between the tribes and states occurred in Florida, when a sheriff tried to enforce the state's bingo laws on a tribal reservation.[134] Ultimately, the court determined that Florida's bingo laws were regulatory and, thus, unenforceable against the tribe. This, along with another favorable pro-Indian ruling, led a number of tribes to explore tribal gaming more seriously.[135]

The pro-tribal rulings played an important role in starting the animosity between the states and tribes in the field of gaming.[136] This resentment ultimately culminated in *California v. Cabazon Band of Mission Indians.*[137] In *Cabazon*, two tribes in California operated high stakes bingo halls and a card club on their reservation.[138] California law permitted charitable bingo games, but restricted the jackpot amount and the use of gaming profits to charitable purposes.[139] Violations of this law were punishable by state misdemeanors.[140] The tribes challenged the enforcement of these regulations in federal court to try to prevent the county from applying ordinances inside the reservation.[141] The United States District Court for the Central District of California granted the tribe's motion for summary judgment and the United States Court of Appeals for the Ninth Circuit affirmed.[142] The State appealed to the United States Supreme Court.[143]

Cabazon was significant because of the establishment and analytical reliance on the federal policy toward tribes. For the first time, the Supreme Court labeled Native American sovereignty and economic

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132. *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND, http://www.narf.org/indian-gaming/ (last visited Jan. 21, 2017). On the Native American Rights Fund, there is a section titled "Dispelling The Myths About Indian Gaming." In it, there is a statement that it is a mythical perception that tribal gaming has been a spectacular success. It even specifically mentions the tribes in Connecticut for a reason why people think tribal gaming has been very successful for the tribes. The reality is that there are only a number of small tribes that have experienced this type of success.

133. RAND & LIGHT, *supra* note 124, at 21.

134. Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981).

135. RAND & LIGHT, *supra* note 124, at 23. *See also* Barona Grp. v. Duffy, 694 F.2d 1185 (9th Cir. 1982) (stating that state laws governing bingo were regulatory and did not apply to the tribes).

136. Brian P. Dimmer, Comment, *How Tribe and State Cooperative Agreements Can Save the Adam Walsh Act from Encroaching Upon Tribal Sovereignty*, 92 MARQ. L. REV. 385, 405-06 (2008).

137. 480 U.S. 202 (1987).

138. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 205 (1987).

139. *Cabazon*, 480 U.S. at 208-09.

140. *Id.* at 209.

141. *Id.* at 206.

142. *Id.*

143. *Id.*

development as important federal interests.[144] The Supreme Court noted that California did not prohibit all forms of gambling and that the state encouraged its citizens to participate in the state lottery.[145] Therefore, California did not prohibit gambling, but merely regulated it.[146] This proved to be a critical question. Since Congress had not so expressly provided, California could not enforce certain anti-gambling laws against an Indian tribe.[147] This was an unexpected judicial victory for the tribes and had a number of important effects.[148] The *Cabazon* decision formalized the conflict between the states and the tribes, solidified the sovereignty of the tribes, and created a palpable power gap.[149]

Historically speaking, the tribes' advantages do not last long.[150] Predictably, the judicial success in *Cabazon* was followed by legislative backlash, as both sides heavily lobbied Congress.[151] The states wanted to curtail tribal gaming, fearing uncontrolled gambling would increase organized crime.[152] The tribes contended state regulation would infringe their tribal sovereignty and wanted Congress to codify exclusive tribal regulation to protect Indian gaming as an economic development strategy.[153] The tribes categorically opposed state regulation, but concerned that if regulation was necessary, the regulation should come from the federal government.[154] Congress was put in the

144. *Id.* at 216-17. *See also* Amy Head, Comment, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 389 (2003) (explaining that the goal of *Cabazon* was to establish federal policy regarding Indian gaming).

145. *Cabazon*, 480 U.S. at 210.

146. *Id.* at 211.

147. *Id.* at 214.

148. *See* William Bennett Cooper, III, Comment, *What's in the Cards for the Future of Indian Gaming Law?*, 5 VILL. SPORTS & ENT. L.J. 129, 141 (1998) ("Following the Seminole decision, Indian tribes filed numerous suits attempting to increase their ability to participate in gaming. As evidenced in the following cases, the result has been virtually a unanimous move, at both the district and circuit court levels, to further limit the ability of tribes to engage in gambling or expand existing casinos."). *See also* Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 271 (2004).

149. *See* Head, *supra* note 144 (detailing the several reasons that *Cabazon* was a landmark decision). *See also* Matthew A. King, Comment, *Indian Gaming and Native Identity*, 30 CHICANA/O-LATINA/O L. REV. 1, 5 (2011).

150. Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 17-18 (2010).

151. RAND & LIGHT, *supra* note 124, at 29. *See also* Egan, *supra* note 123.

152. RAND & LIGHT, *supra* note 124, at 30. *See also* Egan, *supra* note 123.

153. *Id. See also Cabazon*, 480 U.S. at 207 (noting that tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States . . . .").

154. RAND & LIGHT, *supra* note 124, at 31.

precarious position of reconciling these differences and finding a balance.[155] Legislative compromise, however contrived, was looming.

B. THE IGRA AND *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*

The legislative compromise between the states and tribes arrived with the Indian Gaming Regulatory Act[156] ("IGRA"), a complex and comprehensive federal statutory scheme designed to govern tribal regulation.[157] The unrealistic goal, however admirable, was to strike a balance between tribal and state interests.[158]

The IGRA created three jurisdictional categories: Classes I, II, and III. Class I includes social or traditional tribal games and is within the exclusive jurisdiction of the Indian tribes.[159] Class II is more explicitly defined to include bingo, cards, and lottery games.[160] However, Class III is the most important and controversial because it encompasses casino style gambling.[161] Class III gaming can only be offered on Indian lands if a state permits that particular game.[162] If a state does not permit that type of gaming, then the state has no obligation to negotiate in good faith.[163] Therefore, the interpretation of the IGRA language "permits such gaming" is an essential judicial determination. Courts have interpreted the phrase both restrictively and expansively.[164] In the thoroughly researched *Indian Gaming Law and Policy,* Professor Kathyrn Rand and Steven Andrew Light examine the "permits such gaming" language on a spectrum.[165] The dichotomy of the expansive and restrictive interpretations are described as such:

> Under an expansive interpretation, a tribe operating Class II games in a state that allows some bingo likely will be entitled to operate all Class II games, regardless of whether state law, for example, allows pull-tabs. A state that permits some Class III games will have to negotiate at least all games simi-

155. *Id.*
156. 25 U.S.C. §§ 2701-2721 (2012).
157. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 264 (2004).
158. *See* S. REP. NO. 100-446, at 3084 (1988). "This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming." *Id.*
159. *See* 25 U.S.C. § 2703(6) (2012) (defining Class I gaming). *See also* 25 U.S.C. § 2710(a)(1) (2012) (requiring tribes to have exclusive jurisdiction over Class I gaming).
160. 25 U.S.C. § 2703(7)(A).
161. RAND & LIGHT, *supra* note 124, at 53.
162. 25 U.S.C. § 2710(d)(1)(B).
163. RAND & LIGHT, *supra* note 124, at 76.
164. *Id.* at 70.
165. *Id.*

> lar to those permitted under state law and perhaps all Class III games. The expansive interpretation envisions the games allowed under state law as a "floor" for compact negotiations; a state may agree to games that are not specifically allowed under state law.[166]

There must be a tribal compact for Class III gaming to take place within a state, a mechanism that has been labeled as the centerpiece of the IGRA.[167] A tribal compact details the games that the state will permit and the conditions under which the games may be played.[168] The tribal compact requirement was implemented to create a cooperative role for the states to help determine how gambling would occur within their state. Per the IGRA, a state must "permit . . . such gaming" in order for a Class III tribal compact to be implemented. If the state "permits such gaming" and the tribe formally requests a tribal compact, the state must enter into good faith negotiations to enter into a tribal compact.[169] The good faith requirement was designed to give the tribes some much needed leverage when negotiating the tribal compact.[170] The parameters of this requirement have never been well defined, but the rationale was to encourage states to deal fairly with tribes as sovereign governments.[171] If the good faith requirement was breached, the tribes could sue in federal court, with the burden of proof on the state to prove the compact was negotiated in good faith.[172] If lack of good faith was proven, the statute instructed the court to order a tribal compact be reached within sixty days.[173] If no tribal compact was reached within sixty days, the parties must submit their offers to a mediator, who then selected the compact.[174] The good faith requirement was a critical part of creating accountability for the states to negotiate with the tribes reasonably and fairly.

The IGRA did not pacify the tribes and the states.[175] The tension between the states and tribes remained and instead of resolving disputes, the IGRA created new rules governing them.[176] In 1991, the

166. *Id.* at 77.

167. *See, e.g.*, Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031 (2d Cir. 1990); Courtney J. A. DaCosta, *When "Turnabout" Is Not "Fair Play": Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 GEO. L.J. 515 (2009).

168. 25 U.S.C. § 2710(d)(3)(A).

169. RAND & LIGHT, *supra* note 124, at 55.

170. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299-1300 (9th Cir. 1998).

171. S. REP. NO. 100-446, at 3084 (1988).

172. 25 U.S.C. § 2710(d)(3)(A)(i)-(d)(7)(B)(ii).

173. 25 U.S.C. § 2710(d)(7)(B)(iii).

174. 25 U.S.C. § 2710(d)(7)(B)(iv).

175. RAND & LIGHT, *supra* note 124, at 69.

176. Mark H. Reeves, *A Rejection of State Efforts to Enforce Gaming Laws on Indian Lands in the Absence of A Tribal-State Compact*, 9 FIU L. REV. 331, 337-38 (2014).

animosity boiled over and resulted in the *Seminole Tribe of Florida v. Florida*[177] case.[178] The Seminole Tribe of Florida sued the state of Florida and its Governor, alleging that Florida refused to enter into a tribal-state compact.[179] The United States Court of Appeals for the Eleventh Circuit held that an Indian tribe cannot force good-faith negotiations by suing the Governor of the State.[180] The United States Supreme Court granted certiorari to address whether Congress could abrogate state sovereign authority by giving tribes a cause of action against the states.[181] The Supreme Court held that Congress cannot create a cause of action against the states under the Indian Commerce Clause[182] and stated that Congress did not have the power to abrogate this immunity.[183] The practical result was that the states could now avoid dealing with the tribes in good faith. Given that the tribal compact was the central component of the legislative compromise, some have labeled *Seminole Tribe* as the "death knell for the IGRA."[184] Given some states' reluctance to negotiate, this was a major victory for the states.[185] Consequently, no tribe was able to finalize a compact for over two years immediately following the *Seminole Tribe* decision.[186]

The federal government tried again to manufacture a cooperative environment through the Secretary of Interior's promulgation of "Secretarial Procedures."[187] Under the Secretarial Procedures, an eligible tribe could submit a Class III gaming proposal to the Secretary of Interior.[188] The only way the Secretarial Procedures would not result in a compact was if the Secretary of Interior did not accept the tribe's Class III gaming proposal.[189] However, the Secretarial Procedures

177. 517 U.S. 44 (1996).

178. William Bennett Cooper, III, *What's in the Cards for the Future of Indian Gaming Law?*, 5 VILL. SPORTS & ENT. L.J. 129, 130 (1998).

179. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 52 (1996).

180. *Seminole Tribe*, 517 U.S. at 52.

181. *Id.* at 53.

182. RAND & LIGHT, *supra* note 124, at 94.

183. *See* Cooper, *supra* note 178. "Thus, despite Congress' specific intent under IGRA to subject state Indian suits to federal court, Congress simply lacked the authority to abrogate the states' immunity." *Id.* at 139-40.

184. Amy Head, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 395 (2003).

185. G. William Rice, *Some Thoughts on the Future of Indian Gaming*, 42 ARIZ. ST. L.J. 219, 237-38 (2010).

186. RAND & LIGHT, *supra* note 124, at 50.

187. When may an Indian tribe ask the Secretary to issue Class III gaming procedures?, 25 C.F.R. § 291.3 (2016).

188. What must the Secretary do if it has been determined that the Indian tribe is eligible to request Class III gaming procedures?, 25 C.F.R. § 291.7(a) (2016).

189. What must the Secretary do at the expiration of the 60-day comment period if the State has not submitted an alternate proposal?, 25 C.F.R. § 291.8 (2016); *see also* Texas v. United States, 497 F.3d 491, 495 (5th Cir. 2007).

have rarely been employed and were even judicially rebuked in the *Texas v. United States*[190] case. In the United States Court of Appeals for the Fifth Circuit ruling, the court invalidated the Secretarial Procedures, deciding that the plain language of the IGRA foreclosed the Secretary's interpretation to allow the workaround mechanism.[191] Once again, another potential avenue for the tribes to pursue tribal gaming was shut down.

One last important effect of *Seminole Tribe* was that the case gave significant traction to revenue sharing agreements within tribal compacts.[192] Revenue sharing, which first emerged in Connecticut in 1992,[193] requires a tribe to give a portion of its gaming revenues to the state for the right to conduct Class III gaming within the state.[194] Such an agreement can come in various forms, including payments based on percentage, fixed amounts, and specific contributions to a community fund.[195] Revenue sharing agreements have become so popular that their existence is sometimes even presumed in tribal compact negotiations.[196] Wisconsin, New Mexico, New York, and California have pursued revenue sharing of tribal casino profits.[197] Furthermore, tribes in Arizona, California, Louisiana, Michigan, and Washington have payments going to local governments.[198] The revenue sharing mechanism has been employed so frequently because it is a very profitable feature for the states and local governments.[199]

The origins and trajectory of tribal gaming is illustrated above by highlighting some of the key events and cases. *California v. Cabazon Band of Mission Indians*[200] formalized the conflict between the states and tribes, the IGRA has set in place the rules, and *Seminole Tribe* has seemingly undermined the spirit of the IGRA's tribal compact. The IGRA had a melting pot of tasks, which included balancing state interests, tribal sovereignty, and federal policy. However, the attempted legislative juggling act of the IGRA did not, and could not, have anticipated the game changing industry that has emerged: DFS.

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190. 497 F.3d 491 (5th Cir. 2007).
191. *Texas*, 497 F.3d at 511.
192. RAND & LIGHT, *supra* note 124, at 109.
193. Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act*, 57 DRAKE L. REV. 413, 434 (2009).
194. Steven Andrew Light et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 665 (2004).
195. RAND & LIGHT, *supra* note 124, at 152.
196. Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419, 422-23 (2009).
197. Light et al., *supra* note 194, at 665.
198. *Id.* at 668.
199. RAND & LIGHT, *supra* note 124, at 152.
200. 480 U.S. 202 (1987).

IV. THE CLASH OF DAILY FANTASY SPORTS AND TRIBAL GAMING

Part II established the rise of Daily Fantasy Sports ("DFS") and Part III outlined the origin and subsequent rise of tribal gaming. While this Article has stated how difficult predictions about DFS and tribal gaming are to make, the final section of this Article will conclude by doing just that. The final section will examine three potential ramifications of DFS and tribal gaming coexisting. First, the political process for both DFS and tribal gaming will become more important. Second, politics will likely work against tribal gaming interests. Lastly, exclusivity provisions that are found in the Indian Gaming Regulation Act's ("IGRA") revenue sharing agreements might be implicated by DFS legislation.

A. The Importance of the Political Process in Tribal Gaming and DFS Will be Magnified

The politics involved in tribal gaming is becoming more important.[201] The idea of "playing politics" is not a novel concept to the tribes, who have lived in a world where agendas often overshadow sound legal doctrine.[202] Consequently, even before tribal gaming existed, the tribes understood the necessity of aggressively campaigning.[203] Unsurprisingly, tribes continually work on improving their governmental relations, employing professional lobbying firms, working with members of Congress, and formalizing relationships with governments.[204]

The emergence of tribal gaming as an important source of revenue has made tribal gaming more political, both at the state and local levels. One reason for this is because the revenue from tribal gaming, which continues to show growth,[205] has increased states' reliance in order to avoid politically unpopular strategies, such as raising property taxes.[206] As Delaware state representative Wayne A. Smith somewhat facetiously stated, "[w]e're drunk on gambling revenue."[207]

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201. Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 Marq. L. Rev. 971, 982 (2007).

202. Rand & Light, *supra* note 124, at 9.

203. Mary Beth Maloney, *Native American Federal Campaign Contributions: Rules, Risks, and Remedies*, 16 S. Cal. Interdisc. L.J. 523, 527-28 (2007).

204. Charles Wilkinson, *"Peoples Distinct from Others": The Making of Modern Indian Law*, 2006 Utah L. Rev. 379 (2006).

205. Rand, *supra* note 201, at 973.

206. Rand & Light, *supra* note 124, at 164.

207. Fox Butterfield, *As Gambling Grows, States Depend on Their Cut*, New York Times (Mar. 31, 2005), http://www.nytimes.com/2005/03/31/us/as-gambling-grows-states-depend-on-their-cut.html.

Despite tribal gaming being largely exempt from state and local gambling laws,[208] state legislatures and state courts have become increasingly influential over state policy toward Indian gaming.[209] Local politics, which inherently impact statewide politics,[210] do not play a direct role under the IGRA, but can still indirectly shape the terms of the tribal compact.[211] Local politicians will angle for more state revenue by arguing such revenue is necessary to offset the potential negative consequences associated with increased gambling.[212] Local officials may even apply pressure on state officials to have the tribal compact explicitly address such costs.[213]

The pressure for politicians to acquire more revenue from tribes, particularly in the post-*Seminole Tribe of Florida v. Florida*[214] environment,[215] continues to grow. While the IGRA does not explicitly state which branch of state government is in charge of tribal compact negotiations, it is often the governor doing the negotiating.[216] Since the IGRA's good faith requirement has been invalidated, practically speaking, the standard of "good faith" might simply be whatever the governor decides it to be.[217] An unenforceable good faith standard is problematic for tribal interests, as a governor may feel pressure from legislators to renegotiate existing compacts or from lawmakers using tribal gaming as a political platform.[218] Such political pressure is possibly why governors have encouraged tribes to pursue the acquisition of trust land on which to open casinos.[219] Additionally, the fact that the IGRA requires both a tribal compact and Class III gaming to be legal in that state makes state politics a critical element.[220] Last, *Seminole Tribe* created legal uncertainty surrounding the good faith mechanism and the secretarial procedures, which increases the likelihood that disputes will be resolved politically.[221]

DFS also relies heavily on state politics. Traditionally, gambling is subject to the police power of state governments.[222] Since gambling is considered a vice, it has been left up to the states on how to handle

208. RAND & LIGHT, *supra* note 124, at 13.
209. *Id.* at 120.
210. *Id.* at 124.
211. *Id.*
212. *Id.*
213. *Id.*
214. 517 U.S. 44 (1996).
215. RAND & LIGHT, *supra* note 124, at 121.
216. Rand, *supra* note 201.
217. RAND & LIGHT, *supra* note 124, at 121.
218. *Id.* at 122.
219. *Id.* at 164.
220. Light & Rand, *supra* note 193, at 421.
221. RAND & LIGHT, *supra* note 124, at 103.
222. ROSE & OWENS, *supra* note 8, at 87.

it.[223] Currently, the federal government's hands-off approach remains the status quo. This means, at least for the time being, DFS operators find themselves fighting a political battle in each individual state.[224] The status of these legal battles have been so dynamic that Entertainment and Sports Programming Networks ("ESPN") has been tracking each state using a map eerily resembling a national presidential election.[225] In stark contrast to the flying-under-the-radar approach by the tribes, DFS operators employed a historic lobbying blitz across the United States in 2016, utilizing at least seventy-eight lobbyists in thirty-four states.[226] The ability for DFS operators and supporters to cover such an impressive amount of terrain, both physically and politically, is largely thanks to the professional sports leagues, which have a multi-layered financial war chest and experience in political gaming.[227]

B. Politics Will Work Against Tribal Gaming

The heavy-handed role of politics in tribal gaming and DFS is not difficult to establish. The nature of democracy dictates that any group impacted by legislation must participate in politics.[228] There is underlying legislation in each area, as tribal gaming is controlled by the IGRA and DFS relies on state legislation. In some ways, the collision of DFS and tribal gaming represents the essence of politics: two businesses occupying the same competitive space that are going after the same type of consumer.[229] Another modern day example of this is Uber and the cab companies squaring off over legislation within the transportation industry. The reliance on politics pits one against the other, meaning tribal gaming and DFS are two titans of industry playing in the same political sandbox.

Simply identifying the underlying politics of DFS and tribal gaming is straightforward; the more difficult task is figuring out how the politics will impact the tribes. One major, albeit unlikely, scenario is

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223. *Id.* at 87-88.

224. Rose, *supra* note 39, at 41.

225. Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states.

226. Alexandra Berzon, *Fantasy Sports Industry Mounts Lobbying Blitz*, Wall Street Journal (Feb. 15, 2016), http://www.wsj.com/articles/fantasy-sports-industry-mounts-lobbying-blitz-1455585446.

227. Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports L.J. 79, 93 (2015).

228. Charles Wilkinson, *"Peoples Distinct from Others": The Making of Modern Indian Law*, 2006 Utah L. Rev. 379, 392 (2006).

229. Steven Walters, *Steven Walters: Future Capitol cage match: Fantasy sports firms vs. tribes*, GazetteXtra (Nov. 7, 2016), http://www.gazettextra.com/20151221/steven_walters_future_capitol_cage_match_fantasy_sports_firms_vs_tribes.

that a state might entirely rethink whether the state should even offer tribal gaming. Instead of playing hardball when negotiating, a state may simply decide not to negotiate at all and assert its immunity pursuant to *Seminole Tribe of Florida v. Florida*.[230] The politicians most likely to support this course of action are local politicians, who arguably experience more of the soft costs of increased gambling.[231] For a state offering tribal gaming, this would be a complete reversal in policy. While such a dramatic shift in policy is probably unrealistic, it is worth noting that historically, the United States has been whimsical when it comes to gambling policy.[232]

A state might also reconsider its position on gambling if a state starts to perceive that gambling has become too prevalent within its borders. In other words, the appearance of too much gambling could be problematic. As one Arizona columnist wrote, "[Indian gaming] isn't just a reservation issue. We need to take a good look at our state's future. I, for one, don't want gambling to be a part of that."[233] Traditionally, gambling issues generate considerable public discussion.[234] Consequently, a perception problem could cause more public discourse about whether the state needs so much gambling.[235] A perception problem of DFS is not ridiculous, and possibly even an accurate description, thanks to the unprecedented marketing campaign of DFS operators. The marketing tactics of the major DFS operators have been historically loud, aggressive, and overbearing.[236] The advertisements are relentless, with reports of DFS commercials airing every ninety seconds and marketing expenditures surpassing $750 million.[237] The display was a classic example of gambling operators pushing the limits,[238] and the DFS advertising tactics created nothing short of public outrage, if not outright enemies.

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230. 517 U.S. 44 (1996).

231. RAND & LIGHT, *supra* note 124, at 124.

232. I. NELSON ROSE & ROBERT A. LOEB, BLACKJACK AND THE LAW 208 (1998).

233. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 43 (1997) (quoting Lisa Schnebly-Heidinger, *Getting Their Ultimate Revenge: Arizona Tribes Can Profit From Our Vices and Addictions*, ARIZ. REPUBLIC (July 4, 1993)).

234. Symposium, *A Changing Game: Challenging the Status Quo in Sports Law*, 23 JEFFREY S. MOORAD SPORTS L.J. 363, 414 (2016).

235. ROSE & LOEB, *supra* note 232, at 213 (stating that the next crash will occur when the general population is turned off by all of this gambling).

236. *See DraftKings TV Commercials*, ISPOT.TV, https://www.ispot.tv/brands/IEY/draftkings (last visited Nov. 7, 2016) (displaying various commercials used by Draft Kings to market DFS).

237. Don Van Natta, *The implosion of the daily fantasy industry is a bro-classic tale of hubris, recklessness, political naïveté and a kill-or-be-killed culture*, ESPN (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

238. I. NELSON ROSE & ROBERT A. LOEB, BLACKJACK AND THE LAW 213 (1998).

The massive amounts of revenue at stake render a complete removal of tribal gaming unrealistic. A more likely scenario is that the demands made by the state during tribal compact negotiations will become more unreasonable and the politics surrounding the tribal compact negotiations[239] more contentious. The state politicians could threaten to limit the nature of the games offered or reduce the number of gaming devices allowed under the tribal compact if certain demands are not met.[240] Additionally, state legislators could rationalize unreasonable demands by saying it is necessary to mitigate fees for traffic congestion, road maintenance, and higher crime.[241] Sitting governors could use hardball negotiation tactics or simply refuse to negotiate at all.[242] The unreasonableness of their demands would be moot, as the state would be able to threaten to use *Seminole Tribe* immunity if the tribes do not make the concessions the state asks for.[243] Beyond a state's ability to threaten *Seminole Tribe* immunity, the tribes are also at a disadvantage from a negotiating standpoint. The tribal gaming revenue is more important to the tribes,[244] the states outnumber the tribes, state-taxed property exceeds tribal lands,[245] and the tribes lack representation in the state government.[246] These factors give the states leverage during the tribal compact negotiation process. The lack of meaningful recourse on the part of the tribes puts them in a precarious position of having to potentially agree to unreasonable demands made by the state.

The politics involved could also influence the state judiciary, which could be problematic for the tribes because the judiciary could limit the scope of games that tribal gaming operators could offer. The judiciary could influence the scope of tribal gaming based on their interpretation of the controversial "permits such gaming" phrase.[247] The IGRA has a catch-all definition for Class III gaming, stating that "all forms of gambling" that do *not* fall in Classes I or II are considered

239. Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971 (2007) (stating that "[g]aming compact negotiations are highly politicized").

240. RAND & LIGHT, *supra* note 124, at 121.

241. *Id.* at 122.

242. *Id.* at 121; *In re* Indian Gaming Related Cases, 331 F.3d 1094, 1098 (9th Cir. 2003) (explaining the governor in that case refused to negotiate with the tribes over the interpretation of "permits such gaming").

243. 517 U.S. 44 (1996).

244. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 27 (1997) (stating how the Indians are "still fighting for survival" these days).

245. Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 446 (2006).

246. Rand, *supra* note 239, at 971.

247. RAND & LIGHT, *supra* note 124, at 70.

Class III.[248] This catch-all definition makes whether a state "permits such gaming" a very important determination because a state must offer that particular type of casino game in order for the tribes to offer it. The term could be interpreted expansively or restrictively and the interpretation guides the analysis to very different results.[249] An expansive determination would build off the dichotomy of regulation-prohibition established by the Supreme Court in *California v. Cabazon Band of Mission Indians*.[250] Theoretically, if a state employs an expansive determination, the tribes would be more likely to offer DFS because the state is regulating gambling, as opposed to prohibiting gambling.[251] In other words, the prohibition-regulation distinction supports the proposition that if a state allows one Class III game, the state must negotiate Class III games in general.[252] This interpretation would be favorable for tribes interested in potentially offering DFS. Additionally, an expansive interpretation would provide the strongest argument for tribes to include DFS in a duly negotiated tribal compact even if *DFS is illegal under state law*.[253] This would be highly advantageous for the tribes because not only could they potentially circumvent the DFS controversy existing at the state level, but the tribes would also have the opportunity to offer an entirely unique contest within the gambling market.

The alternative interpretation is a restrictive approach, in which "permits such gaming" would be read very narrowly.[254] This interpretation could be viewed as a strict application of *Cabazon*, which means dichotomizing regulation and prohibition as mutually exclusive. Negotiations would be limited to games only expressly authorized by state law. Accordingly, if a state did not expressly allow fantasy sports, the tribal compact could not include fantasy sports. Consequently, the interpretation of "permits such gaming" greatly impacts the tribes, but not DFS operators. Thus, generally speaking, the more that politics are involved, the worse it is for the tribes. If the political environment comes into play in this judicial interpretation, it is more likely that there would be a narrow interpretation of "permits such gaming." However, note that such a clear, bright-lined dichotomy of either being expansive or restrictive is likely over simplifying the

248. *Id.* at 70; 25 U.S.C. § 2703(8).

249. RAND & LIGHT, *supra* note 124, at 77 (stating "plainly, the two general interpretations—expansive and restrictive—reach very different results.").

250. 480 U.S. 202 (1987).

251. RAND & LIGHT, *supra* note 124, at 70.

252. *Id.* at 73.

253. *Id.* at 71.

254. *Id.* at 74.

analysis, but is an important illustration nonetheless.[255] A state likely would not simply exist at one end of the spectrum, but such an illustration conceptually depicts how important such a simple interpretation is. Those three words are, for the purposes of the interaction between DFS and tribal gaming, a mighty sword that is held by the state judiciary.

C. Exclusivity Provisions in Revenue Sharing Agreements Might be Vulnerable with DFS Legislation

The IGRA explicitly prohibits state taxation in a tribal compact. A successful workaround to this prohibition of state taxation, albeit a controversial one, is a state providing substantial exclusivity to receive such payment.[256] If the payment is a valuable economic benefit that is providing substantial exclusivity, it circumvents the IGRA prohibition on state taxation.[257] The Department of Interior has interpreted this to mean that the tribes can make payments for additional benefits.[258] A typical exclusivity payment usually entails the tribes paying a percentage of casino revenues in order to have exclusivity in a state without commercial casinos.[259] This mechanism has become the "surest–perhaps only–way" for the states to receive more than reimbursement, beyond regulatory costs.[260] As stated above, the revenue sharing mechanism has its critics. For example, critics point out that states can stonewall tribes by continually demanding more of the revenue.[261] A revenue sharing arrangement has also been dubbed a short-term solution, likely because while revenue sharing percentages increase, exclusivity is shrinking.[262] In summation, the above means that the negotiation of this provision is worth hundreds of millions of dollars, if not billions, to the states.[263]

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255. *Id.* at 77 (noting that "[n]either approach, perhaps, is completely satisfactory in its extreme form in the context of casino-style games . . . .").

256. Gatsby Contreras, Comment, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. Gender Race & Just. 487, 497 (2002). *See also* Rand & Light, *supra* note 124, at 152-53.

257. *Id.* at 151.

258. *Id.* at 152.

259. *Id.*

260. *Id.*

261. Eric S. Lent, Comment, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 Geo. L.J. 451, 452 (2003) (citing Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 23, 1997), http://www.doi.gov/news/archives/indnmcom.html).

262. Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 60 (2007).

263. Rand & Light, *supra* note 124, at 152.

1. Does the Legalization of DFS Infringe on Tribal Exclusivity?

The Connecticut Attorney General Letter was prudent for emphasizing the uncertainty of whether DFS legislation would infringe on tribal exclusivity because an analysis hinges on the definition of several terms and the stakes are very, very high. The Department of Interior stated that if a state can offer "meaningful concessions" to a tribe for a valuable economic benefit, the revenue sharing agreement does not constitute taxation.[264] A meaningful concession would come in the form of substantial exclusivity. Under the IGRA, if substantial exclusivity is not available or becomes unavailable, revenue sharing payments to the state must stop.[265] Therefore, the critical question is whether DFS legislation undermines the tribal compact's substantial exclusivity to the point that the revenue sharing mechanism is destroyed. If DFS infringes this invisible threshold, then under the IGRA, revenue sharing payments must stop.[266]

Hypothetically, and very simplistically, this means that if Connecticut passes a DFS bill that successfully undermines the tribe's substantial exclusivity, Connecticut's very large tribal gaming checks would stop. An abrupt loss of such a massive revenue source would be catastrophic for the state's economy.[267] Therefore, maintaining the requisite degree of exclusivity, which successfully holds together a revenue sharing provision, is of the utmost importance. There is at least one court that has defined the term exclusive:

> [T]he Tribes enjoy the exclusive "right to operate" so long as the Tribes are the only persons or entities who have and can exercise the "right to operate" electronic games of chance in the State or, in other words, as long as all others are prohibited or shut out from the "right to operate" such games.[268]

In this instance, the tribes's exclusivity argument appears relatively straightforward: DFS legislation expands the gambling market and reduces exclusivity.[269] According to the definition of exclusivity as defined in case law above, such an infringement would need to be

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264. Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419, 424 (2009).

265. *Id.*

266. *Id.*

267. *See* Harlan McKosato, *The Fantasy Bet: Is Fantasy Sports a Game of Skill or Gambling?*, INDIAN COUNTRY MEDIA NETWORK (Apr. 14, 2016), http://indiancountrytodaymedianetwork.com/2016/04/14/fantasy-bet-fantasy-sports-game-skill-or-gambling-164072 (discussing how much revenue is generated through tribal gaming).

268. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 93 F. Supp. 2d 850, 852 (W.D. Mich. 2000), *aff'd,* 271 F.3d 235 (6th Cir. 2001).

269. McKosato, *supra* note 267.

done by *a game of chance.*[270] If a game of chance can undermine exclusivity, the analysis then turns on the language of the DFS legislation. While there is clearly some element of chance in DFS, legislation may categorize DFS a game of skill. The result being that a game of skill conceivably dodges an infringement of the exclusivity requirement.[271] However, absent such express legislative language, confusion runs amuck.[272] A judicial determination of whether DFS is a game of skill or chance creates yet another layer of complexity, and perhaps fear, because the determination might be made by the federal courts.[273] The language used in the Connecticut Attorney General's letter suggests that it is uncertain as to whether it would be the federal or state courts making this determination.[274]

Assuming the federal government is making the determination of whether DFS is a game of luck or skill, this is problematic to the states for several reasons. First, the revenue sharing agreement is filling the pockets of the state and local governments, not the federal government.[275] This means a tribe could file an action in federal court to stop casino-style gaming that violates the tribal compact.[276] Second, it is unclear where a federal court would look when defining crucial terms.[277] Third, even if the source of the definitions were known, those definitions might not be applied consistently by different courts. Lastly, the degree of reliance a federal court would have on federal policy is unknown. If a federal court supports tribal development con-

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270. Per the Connecticut Attorney General Opinion, it would also need to be an electronic game of chance. Letter from George Jepsen, Attorney General, State of Connecticut, to Senate President Martin Looney and Senate Majority Leader Bob Duff, Senators, State of Connecticut (Apr. 18, 2016), http://www.ct.gov/ag/lib/ag/opinions/2016/2016-03_fantasy_sports_contests.pdf. That also opens up a series of questions regarding what is electronic and how fantasy sports are played. However, this Article does not focus on the electronic aspect as much as the game of chance aspect.

271. Dustin Gouker, *DraftKings, FanDuel Beat The Clock in New York: Legislature Passes Fantasy Sports Bill*, LEGAL SPORTS REPORT (June 17, 2016, 11:15 PM), http://www.legalsportsreport.com/10514/new-york-passes-fantasy-sports-bill/ (noting that New York labeled fantasy sports a skill game).

272. *See* Jepsen, *supra* note 270.

273. *Id.* Federal law governs the compacts and "federal courts have exclusive jurisdiction over disputes arising out of the Compacts." This means that the decision would be taken away from the state courts and placed in the hands of the federal government to make such an important determination. *Id.*

274. *See* Jepsen, *supra* note 270 (lacking certainty when saying they thought a federal court would make such determination).

275. RAND & LIGHT, *supra* note 124, at 152 ("Revenue sharing agreements with state and local governments include percentage payments, fixed compact payments, fees and taxes, contributions to community funds, and redistribution to non-gaming tribes.").

276. *Id.* at 126.

277. *Id.* "In making that determination, a federal court *very likely* would not be bound by a state legislature's–or any other state official's–characterization of daily fantasy sports contests as not constituting 'contests of chance.'" *Id.* (emphasis added).

sistent with federal policy, a la *California v. Cabazon Band of Mission Indians*,[278] such deference plausibly supports a conclusion that there has been an infringement of exclusivity. In *Cabazon*, the Court's heavy reliance on federal policy was virtually outcome determinative and a similar judicial approach in the context of DFS would likely have the same result.[279] Arguably, a court's rationale might be that not only does DFS *not* enhance tribal economic development, but as another competitive gambling game, it potentially contributes to the demise of tribal development. The IGRA is thought to generally be protective of tribal interests and this was even noted in the Connecticut Attorney General's letter.[280]

The tribes might have an additional argument, rooted in traditional contract law. The tribal compact between the state and tribe is a contract between two sovereigns. The Department of Interior must ensure that the bargained for exchange between the state and the tribe is appropriate.[281] Hypothetically, the tribes could argue that DFS legislation is retroactively eliminating, or at least materially reducing, the bargained for exchange in the original tribal compact. If the tribal compact was made prior to DFS legislation, then subsequent DFS legislation could materially alter the gambling landscape. The increase in competition among the gambling entities in such a competitive field is arguably a substantial disruption to the gambling market in the state. A holding in the United States Court of Appeals for the Ninth Circuit potentially supports this; in *In Re Gaming Related Cases*[282] the court stated that as long as the interpretation of the IGRA strengthens the tribal economy, the IGRA is not violated.[283] Since DFS legislation would legitimize another form of gambling, the tribal economy would suffer because of the increase in competition.

278. 480 U.S. 202 (1987).

279. *See supra* notes 145-147 and accompanying text.

280. *See id.* (stating that courts typically have been protective of tribes under the IGRA).

281. *See, e.g.*, *Oversight Hearing on Indian Gaming Regulatory Act: Role and Funding of the National Indian Gaming Commission Before the S. Comm. On Indian Affairs*, 108th Cong. (2003); Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 23, 1997), http://www.scienceblog.com/community/older/archives/N/int0938.shtml (stating that the Department of Interior has an obligation to ensure that the benefit received by the state is equal or appropriate in light of the benefit conferred on the tribe). *See also* Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419 (2009); Steven Andrew Light, et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657 (2004) (citing *In re* Indian Gaming Related Cases, 331 F.3d 1094, 1115 (9th Cir. 2003)).

282. 331 F.3d 1094 (9th Cir. 2003).

283. *In re Gaming Related Cases*, 331 F.3d at 1111.

V. CONCLUSION

The purpose of this Article was to analyze the looming collision of Daily Fantasy Sports ("DFS") and tribal gaming. This Article honed in on three potential effects. First, state politics will continue to grow in importance because of the states' increasing reliance on tribal gaming revenue, the mounting political pressure to secure tribal gaming revenue, and the fact that DFS is currently being legalized at the state level. Second, which essentially builds off the first effect, is that the increasing importance of politics will be disadvantageous to tribal gaming interests. For example, the states will continue to have leverage during the mandatory Indian Gaming Regulation Act ("IGRA") tribal compact negotiation process for Class III gaming. Lastly, exclusivity provisions holding together the valuable revenue sharing agreement might be infringed by DFS legislation.

Relatively speaking, the first two predictions—or perhaps even merely observations—are more risk-averse because politics already plays such an important role in these industries. Since the IGRA dictates that the tribal compact is negotiated at the state level and DFS is legalized at the state level, state politics is already paramount in each. Therefore, if DFS and tribal gaming continue to grow, the political component will likely grow proportionally. Similarly, politics being a disadvantage to the tribes is also not a novel prediction. History has shown, and scholarly work has noted, that politics typically plays against the interests of the Native American tribes. The third potential effect—that the revenue sharing agreement might be vulnerable with DFS legislation—is the most potentially impactful effect, yet the most difficult to predict. It is a very unscholarly statement, particularly for a conclusion, but the lack of judicial guidance and the variables involved[284] make it difficult to predict how DFS legislation will impact tribal gaming. One major uncertainty is what constitutes "substantial exclusivity" and the judicial approach when analyzing whether DFS infringes tribal gaming exclusivity. The staggering amount of revenue at stake, coupled with the judicial uncertainty, compounded by the inherent unpredictability of each industry, means states should be cautious and cognizant about an underlying tribal compact. The financial stakes are so high that measures should be taken to ensure DFS legislation does not infringe tribal exclusivity. A state with an underlying tribal compact should even consider renegotiating its tribal compact if there is potential uncertainty about how DFS legislation would impact the exclusivity held by the tribes. At a minimum, a state should at least contemplate how DFS legislation

284. *See supra* notes 9-10 and accompanying text.

could impact tribal gaming on a large scale because these two industries are simply too large to avoid each other. Building on the "complex" metaphor presented in the Introduction, the collision of DFS legislation and tribal gaming could be symbolized by the smashing of two very large jars of mayonnaise—two highly complex, political industries that will clash *somehow* in the near future.

JUSTICE AND BOUNDED MORAL RATIONALITY IN BANKRUPTCY

JOOHO LEE†

I. INTRODUCTION

What is corporate reorganization about? How ought we treat firms under financial distress? Should we even allow them to reorganize at all? These questions have motivated an ongoing debate about the purpose of Chapter 11 of the Bankruptcy Code—and about bankruptcy law in general—that one commentator has dubbed the 'Great Normative Debate' in bankruptcy theory.[1] The Great Normative Debate is often seen as a debate between two major camps of scholars who hold "radically different views of the underlying normative bases of the role of bankruptcy law and the aims of legal scholarship."[2] On one side are the "proceduralists" who deny the preservation of firms as an aim of bankruptcy, pay special attention to ex-ante effects of policymaking, and place limits on judicial discretion. On the other side are "traditionalists" who desire to see firms preserved for the sake of non-creditor stakeholders, pay special attention to the ex-post determination of rights and needs of those who are involved in bankruptcy proceedings, and advocate for broader judicial discretion in satisfying the aims of bankruptcy.

However, even after several decades, the Great Normative Debate continues to rest on shaky ground. In fact, it is not much of a normative debate at all. A normative theory is one that appeals to reason in attempting to establish and justify ultimate values or norms that ought to guide its subject matter.[3] Normative debates require rational deliberation over the reasoning by which theories develop and justify their ultimate norms and values. Yet, too often, bankruptcy theories are offered without much of a justification for their foundational norms or values. Instead, groups of bankruptcy scholars have engaged in a great deal of talking past each other as they appeal to

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1. *See* Adam J. Levitin, *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOK. J. CORP. FIN. & COM. L. 67, 71 (2009).

2. Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 575 (1998).

3. *See, e.g.*, Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75 (1996).

each of their uncontested axioms.[4] This process, in the words of another in a similar context, is akin to an argument between one group of scholars who argue, "'I like oysters and think everyone should eat oysters'" and another group of scholars who argue, "'I like strawberries and think everyone should eat strawberries.'"[5] Such debates are not truly normative debates, and the theories that emerge from such debates are not truly normative theories.

In this Article, I address the continuing deficiencies within normative theories of bankruptcy by critiquing existing normative theories and presenting an alternative contractarian theory of bankruptcy that emphasizes the importance of ongoing consent in determining justice in bankruptcy. The Great Normative Debate has been deeply influenced by the "Creditors' Bargain" model, a theory widely understood to be a contractarian theory of sorts.[6] Contractarianism is a philosophical approach to resolving a normative disagreement that proceeds by asking "what the people involved in the dispute would have agreed to do about the issue had they considered the possibility of disagreement before reaching the point at which the actual disagreement took place."[7] Although contractarian theories of bankruptcy come closest to presenting a genuine normative account for bankruptcy law, existing theories fall short because they have serious defects within their normative argument.

In response to the normative shortcomings of existing theories, this Article will present an alternative contractarian theory[8] of bankruptcy by beginning with a different starting point than other existing

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4. Baird, *supra* note 2, at 575.

5. Thomas Donaldson, *The Epistemic Fault Line in Corporate Governance,* 37 ACAD. MGMT. REV. 256, 269 (2012).

6. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain,* 91 YALE L.J. 857, 858-60 (1982). I will argue later in this essay that the Creditors' Bargain is not quite a contractarian theory.

7. Kim Lane Scheppele & Jeremy Waldron, *Contractarian Methods in Political and Legal Evaluation*, 3 YALE J.L. & HUMAN. 195, 196 (1991). JOHN RAWLS, A THEORY OF JUSTICE (1971) is widely considered to have revitalized contractarianism as a modern philosophical approach with deep roots in classic social contract theorists such as John Locke, Thomas Hobbes, and Jean-Jacques Rousseau.

8. While it can refer to social contract theories in general, contractarianism can also refer to a type of social contract theory that follows the Hobbesian tradition of self-interested agreement. *See, e.g.*, DAVID P. GAUTHIER, MORALS BY AGREEMENT (1986). This contractarianism is distinct from contractualism, which is a type of social contract theory that follows the Kantian tradition of agreement as a form of justification out of respect for individuals. *See, e.g.*, THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER (1998). In this Article, I will use the term "contractarian" to refer to social contracts reasoning in general without distinguishing between contractarianism and contractualism. Nevertheless, my views align closer to those of the contractualists as opposed to the contractarians.

theories. Contractarian theories have a variety of starting points.[9] Mine will be a notion familiar in the economics literature: bounded rationality.[10] I will argue that bankruptcy law and the political process by which norms and policy goals are determined can be justified as a contractarian response to bounded *moral* rationality. Reasonable people within a hypothetical choice situation would choose to rely on a democratic political process within a norm-generating community to supply the content of justice within a specific bankruptcy context rather than determine principles of justice in bankruptcy in the abstract. One of the most important normative implications for such a theory is the importance of *ongoing consent* as a foundational value for bankruptcy policy.

One important reason for revisiting the Great Normative Debate is that there is a growing concern that normative theories of bankruptcy have little relevance for many concrete policy issues. Take, for instance, the issue of claims trading, which is the practice of buying and selling of claims against companies in financial distress. Traditionalists argue that debtor and community interests ought to play a role in bankruptcy policymaking in addition to creditor interests. Practically, this translates to a heavier reliance on the bankruptcy court to balance competing creditor, debtor, and community interests within the context of a particular Chapter 11 filing.[11] Unfortunately, this line of argument does not provide much guidance for claims trading policy. While some may feel that claims trading undermines the *community* of shared interests among various actors within the reorganization,[12] others may feel that the practice ought to be preserved because the *debtor* is the one who ultimately benefits.[13] On the other hand, proceduralists typically criticize Chapter 11 as inefficient and

9. *See* Rawls, *supra* note 7. Rawls gave us the "veil of ignorance" for instance, whereas Dworkin asked us to imagine a hypothetical insurance market in RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2002).

10. For a classic introduction to the notion of bounded rationality, see Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

11. *See* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (1999); *see also* Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031 (1994).

12. Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1716 (1995); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2015 (2002).

13. Adam J. Levitin, *Finding Nemo: Rediscovering the Virtues of Negotiability in the Wake of Enron*, 2007 COLUM. BUS. L. REV. 83, 87-88 (2007) ("Creditors' ability to cashout at a certain value, rather than remain involved through the course of a bankruptcy and receive an uncertain payout, increases their risk tolerance when originating loans, making equity investments, or purchasing debt from other creditors. Creditors' ability to assume more risk ultimately benefits borrowers in the form of lower borrowing costs.").

tend to favor market- or contract-based approaches.[14] Yet nothing about these approaches would necessarily preclude or require the practice of claims trading as a matter of normative theory either. Even if the introduction of market mechanisms within the reorganization process might seem like a step in the right direction to some,[15] claims trading might seem like a threat to efficiency gains of bankruptcy law to others.[16] Given the variance of policy proposals that can result from similar starting points, the ultimate verdicts on policy proposals for claims trading seem as if they are a matter of empirical knowledge and theory rather than a normative one. As a result, Professor Adam Levitin has argued that the Great Normative Debate is "of little use in formulating policy"[17] concerning issues like claims trading. Instead of turning these issues into an "imperfect battleground"[18] for the Debate, Levitin advocates for understanding policy issues for what they are: "a diverse collection of practices and markets—rather than as a meme for normative ideas . . . ."[19]

However, while a deeper and richer understanding of the issue at hand is certainly necessary for better policymaking, it is a mistake to downplay the importance of normative theories in bankruptcy policy, including those that pertain to issues like claims trading. In fact, while it is not sufficient in and of itself, a normative grounding is nevertheless just as necessary for policymaking as an empirical understanding of the issue at hand because an evaluation of plausible policy alternatives first requires determining their aims. Any comparison between alternatives requires a criterion by which they will be evaluated—in other words, what philosophers call a "covering value" of a

14. For instance, Professor Baird proposes a market-based solution in which anyone, including the firm's claimants, who can bid for the entire firm in an auction may be able to reduce the costs of reorganization. *See* Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986); Douglas G. Baird, *Revisiting Auctions in Chapter 11*, 36 J.L. & ECON. 633 (1993). More radically, Professor Barry Adler suggests that a "Chameleon Equity" firm comprised of ex-ante contracts between equity investors and creditors in dealing with financial distress would be more efficient. Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993). Similarly, Professor Bebchuk has proposed that individual claimants be given a waterfall-like allocation of rights to exercise options, with the lowest classes of claimants first, to pay the claimants above them in the waterfall the full value of their claims and receive a pro-rata share of the remaining value of the firm, should they choose to exercise them. Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988).

15. Robert K. Rasmussen & David A. Skeel, Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85, 104 (1995) (stating that claims trading "epitomizes the development of markets in connection with bankruptcy . . . .").

16. Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648 (2010).

17. Levitin, *supra* note 1, at 112.

18. *Id.* at 76.

19. *Id.* at 112.

comparison. [20] For instance, to evaluate which one of two mountains is taller, one must refer to "height" as a value, even if height is a placeholder notion that encompasses a set of specified values. In the same way, choosing a "better" policy among several alternatives for any issue first requires asking the question of "better how?" Only by clearly articulating a true normative theory of bankruptcy that establishes some foundational value as the ultimate covering value for policymaking can policy debates even begin, even if they cannot end until the empirical facts have been considered as well.

As a result, ignoring the role that normative theories play in bankruptcy policymaking can lead to a serious lack of attention to the covering value of one's policy proposals. Take, again, Professor Levitin's policy proposal for claims trading. His analysis might be the most helpful and insightful examination of claims trading in recent years. Nevertheless, Levitin simply seems to assume that the sole covering value of claims trading policy is whether it increases the efficiency of the claims trading process itself. For instance, he advocates utilizing creditors' committees to facilitate claims trading because it would represent a step toward "improving market efficiency by enabling claims sellers to comparison shop among buyers' offers . . . ."[21] But why ought claims trading be allowed in the first place? Why should we care about improving the efficiency of the claims trading market? Shouldn't communitarian concerns also matter? And if improving the efficiency of claims trading undermines the communitarian interests represented in Chapter 11, how ought the tension be adjudicated? Professor Levitin gives no answers to such questions. Instead, he simply assumes that we ought to care about the efficiency of the claims trading market and that efficiency alone can provide guidance for policymaking, yet all the while acknowledging that "[b]ankruptcy law will always straddle market and communitarian tendencies . . . ."[22]

By outlining a normative theory that argues that policymakers should take care to not interfere with the practice of claims trading because it preserves an important aspect of ongoing consent in ensuring justice in bankruptcy, this Article responds to Professor Levitin's dismissal of the Great Normative Debate. In Part II, I discuss the Great Normative Debate and focus on two contractarian theories—the

20. RUTH CHANG, MAKING COMPARISONS COUNT 3-4 (2002) ("Every comparison must proceed in terms of a value . . . . To deny that comparisons must be relative to a value is to assert that there is a sensible notion of comparison *simpliciter*. But there is no such notion.").

21. Levitin, *supra* note 1, at 112.

22. *Id.*

Creditors' Bargain model and the Bankruptcy Choice model[23]—that exemplify "true" normative theories with real normative implications for claims trading. I will argue that while these two theories have much to offer, they ultimately fall short. Then, in Part III, I introduce a contractarian framework with the notion of bounded moral rationality as a starting point. Since a just outcome is difficult to ascertain ex-ante in a bankruptcy proceeding, I will argue that justice in bankruptcy is best understood in purely procedural terms. Rather than choosing normative principles ex-ante, reasonable actors who are aware of their limits would respond within a hypothetical choice situation to defer distributive judgments to the "community" of interested parties within a bankruptcy proceeding. Then, in Part IV, I discuss why the notion of ongoing consent is necessary to a procedural scheme for determining justice in bankruptcy under the conditions of bounded moral rationality and connect it to the practice of claims trading. In doing so, I show why the Great Normative Debate matters for policy issues like claims trading. Claims trading, along with the negotiations among creditors in Chapter 11, reflects the morally necessary predicates of the procedural norm of ongoing consent: the rights of voice and exit. I close in Part V.

II. THE GREAT NORMATIVE DEBATE AND CONTRACTARIANISM

Given the different "uncontested axioms" that opposing sides have as starting points within the Great Normative Debate, any meaningful advancement of discussion requires an undertaking focused on "aesthetics and morals."[24] And if this undertaking is to not devolve into an assertion of mere preferences, what is required is a rational examination of the normative foundations and methods that are implicit between these two sides. Unfortunately, such a rational examination is often missing. Take, for instance, a classic example of the Debate: the exchange between Professors Elizabeth Warren and Douglas Baird on bankruptcy policy in 1987.[25] Rather than offering rational justifications of their fundamental value claims, they merely offer them as premises to be assumed.

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23. Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993).

24. Baird, *supra* note 2, at 599. The reference to aesthetics and morals is a citation of Professor Ronald Coase, who remarked that the choice between different social arrangements and their total effects ought to be carried out in broader terms than simply economic ones. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960).

25. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987).

Professor Warren looks to legal and historical analyses and concludes that bankruptcy law is an instrument that distributes the losses of a debtor's multiple defaults according to a number of factors that encompass a variety of competing values.[26] However, this style of argumentation amounts to committing what is known as the naturalistic fallacy, which is a well-known philosophical mistake of attempting to derive an "ought" from an "is."[27] One cannot derive what bankruptcy law ought to be simply by pointing to what it is or what it has been if one does not provide any justification for why the law ought to continue to reflect what it is or has been.[28] To do so would be to bypass the normative argument altogether and just assume an "ought" from an "is."

On the other hand, Professor Baird maintains that the costs of forum shopping introduced by bankruptcy law as an alternate debt collection mechanism can only be justified by a collective action problem among debtors.[29] He seems to dismiss policy goals that do not pertain to economic efficiency, such as rehabilitation, as sources of potential justifications for the increased costs of a parallel debt collection system.[30] Yet he provides no justification for why economic efficiency is the only relevant value for bankruptcy policy. To assume a value for policy making without providing a normative justification as to why it ought to be the sole value is to simply beg the question.[31] Just as was the case with Professor Warren, Professor Baird also assumes that which he ought to rationally justify.

Fortunately, not all contributions to the Great Normative Debate resort to question begging. Whether by coincidence or design, the best attempts to articulate the normative principles undergirding each position within the Debate are *contractarian* theories. The Creditors' Bargain model, which is explained in Subsection A below, represents the proceduralist position. Insofar as it is a departure from the stan-

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26. Warren, *supra* note 25, at 777.

27. This mistake has roots in the discussion of the "is-ought problem" in DAVID HUME, A TREATISE OF HUMAN NATURE (David Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739) and has first been formalized in GEORGE E. MOORE, PRINCIPIA ETHICA (1903). For a modern version of the argument that a prescription cannot be merely factual, see Richard M. Hare, *Objective Prescriptions*, *in* 4 PHILOSOPHICAL ISSUES 15 (Enrique Villanueva ed., Ridegview Pub. Co. 1993).

28. Professor Baird makes the same point in Baird, *supra* note 25, at 817 ("Warren seems to derive what bankruptcy law ought to be from what it is, but one cannot derive the normative from the positive.").

29. Baird, *supra* note 25, at 827. This account is largely based on the Creditors' Bargain model, which I will discuss below in greater detail.

30. Professor Warren makes this point in Warren, *supra* note 25, at 803 ("By focusing on an economic rationale—without defending this exclusive focus—Baird eliminates without discussion or proof any other values that may be served by bankruptcy.").

31. Question begging is a form of circular reasoning in which the argument assumes as its premise the very conclusion that it is arguing.

dard wealth-maximization paradigm, it utilizes the contractarian method to rationally justify the need for bankruptcy law as a solution to a collective action problem among the contracting actors. Unfortunately, it leaves much to be desired as a normative theory. Alternatively, the Bankruptcy Choice model, which is explained in Subsection B, represents the traditionalist position. It uses the contractarian method to rationally justify two broad normative principles of bankruptcy law within a Rawlsian framework. However, it also has a fatal flaw in that it attempts to apply a theoretical framework for the basic structure of society to only bankruptcy law without paying attention to how it relates to the rest of the basic structure.

A. The Creditors' Bargain

The dominant normative paradigm for the proceduralists (and for bankruptcy theory in general) is the Creditors' Bargain model. Introduced in 1982,[32] this paradigm is widely recognized as having "elevated" bankruptcy scholarship from its more humble origins by offering a theoretical framework for explaining and justifying bankruptcy's existence.[33] Since its introduction, the model has been further developed in subsequent articles and a book on the subject.[34] The crux of the model begins with an important assumption: bankruptcy law's purpose is to maximize the value of the debtor's total pool of assets available for creditors.[35] Because the bankruptcy estate is a common pool, however, there arises a coordination problem among creditors if left to their own devices under state collection law. Thus, the sole and distinct purpose of bankruptcy within the Creditors' Bargain model is to set in place rules that allow the creditors to act as if they were only one creditor who would rationally choose between courses of action to maximize his or her return.[36] Within this model, nonbankruptcy entitlements are disrupted within bankruptcy only insofar as they solve this coordination problem, nothing more. Distributional issues that are undesirable as a result of a corporate reorganization, for instance, are not bankruptcy issues and ought to be addressed outside of bankruptcy.

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32. *See* Jackson, *supra* note 6.

33. *See, e.g.*, Mary Josephine Newborn, *The New Rawlsian Theory of Bankruptcy Ethics*, 16 Cardozo L. Rev. 111 (1994).

34. *See* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy,* 51 U. Chi. L. Rev. 97 (1984); *see also* Thomas H. Jackson, The Logic And Limits Of Bankruptcy Law (Beard Books 2001) (1986); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989).

35. Jackson, *supra* note 34, at 24.

36. *Id.*

Unfortunately, the Creditors' Bargain rests on a murky normative foundation. On one hand, the model, along with other law and economics approaches to specific issues in bankruptcy, can be understood to rely on a utilitarian normative framework. While this is rarely explicitly stated, it is usually understood that increasing the efficiency of the bankruptcy process, the result of which is the maximization of the value of the total bankruptcy estate and thus overall social wealth, will lead to a more desirable, and thus morally preferred, outcome for all of society.[37] This is the reason behind the model's fundamental assumption that creditors' returns ought to be maximized.[38] On the other hand, the model is also explicit in utilizing what seems like a contractarian normative framework. The Creditors' Bargain is introduced as a way of viewing bankruptcy "as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex-ante position."[39] The use of the contractarian method is even more explicit in a revision and update of the original Creditors' Bargain—a "bargain redux"—which justifies the ex-ante agreement among creditors to disrupt their nonbankruptcy entitlements in the event of a bankruptcy by appealing to a risk-sharing "bankruptcy tax" among those involved in the bankruptcy proceedings.[40]

This dual approach to normative reasoning is a serious problem. Resorting to both utilitarianism and contractarianism within the Creditors' Bargain can render the entire normative framework incoherent and disingenuous.[41] In fact, modern contractarianism is a rejection of and an alternative to utilitarianism and other consequentialist moral theories.[42] Yet, if this is the case, where can

37. *See, e.g.*, Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1089 (1991) ("Our model would produce more efficient allocations of the assets . . . . As a consequence, social welfare would be enhanced.").

38. Jackson, *supra* note 34, at 24.

39. Jackson, *supra* note 6, at 860.

40. *See* Jackson & Scott, *supra* note 34.

41. David Gray Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341 (1987).

42. *See, e.g.*, Rawls, *supra* note 7, at 15 ("To be sure, I want to maintain that the most appropriate conception of this situation does lead to principles of justice contrary to utilitarianism and perfectionism, and therefore that the contract doctrine provides an alternative to these views."). Utilitarianism has its share of critics. *See, e.g.*, David Lyons, *Utility as a Possible Ground of Rights*, 14 NOÛS 17 (1980) (arguing that utilitarianism is incapable of accommodating or accounting for institutional rights); Bernard Williams, *Integrity*, *in* UTILITARIANISM: FOR & AGAINST 108 (1973) (arguing that utilitarianism is an attack on an individual's integrity). Citing the problems of boundaries, indefiniteness, and moral monstrosity within utilitarianism, Judge Richard Posner attempted to articulate wealth maximization as a distinct normative theory. *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). However, this position also has its share of astute critics. *See, e.g.*, Jules L.

the true normative basis of the model be found among the twin pillars of hypothetical consent and utility maximization?

Unfortunately, any attempt to interpret one in light of the other results in the model losing its legitimacy as a distinct normative framework. If the Creditors' Bargain is interpreted as a contractarian framework ultimately resting on a utilitarian normative foundation, there is not much of a contractarian theory left to make a distinct normative contribution apart from utilitarianism or wealth maximization. Yet, from a utilitarian or wealth maximization perspective, the Creditors' Bargain becomes unnecessary and not all that particularly helpful. As other proceduralists have noted, there may not be a common pool problem at all when looking at the issue from a pure efficiency-centric point of view.[43] Furthermore, again from the point of view of efficiency, there may be other problems (such as issues of illiquidity and the debt overhang problem) that bankruptcy ought to address beyond the common pool problem.[44] Lastly, it may even be the case that overall social welfare or wealth would not be enhanced by enacting rules among creditors to act as if the reorganizing firm were owned by one owner.[45]

On the other hand, it is unclear whether the Creditors' Bargain can even be seen as a utilitarian framework ultimately resting on a contractarian foundation. Why should not other values that creditors have, including those that may conflict with economic efficiency, play a role in bankruptcy policy if what really matters is their hypothetical consent? At first blush, to assume that creditors would only wish to maximize the value of the bankruptcy estate at the expense of any other values that they would hold would be to resort to question begging. Yet, even if the Creditors' Bargain model could be interpreted as a contractarian model, it is a shoddy contractarian theory at best. This is because even if one were to accept the premise that bankruptcy exists solely to solve the common pool problem among creditors, there is no justification as to why *only creditors* are a part of the contractarian position.[46] The core tenet of contractarianism—indeed, the

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Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1979); Ronald M. Dworkin, *Is Wealth a Value?,* 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

43. *See, e.g.*, Adler, *supra* note 14, at 314 ("Bankruptcy's solution to the common pool problem, however, rests on a faulty premise: that there *is* a common pool problem.").

44. *See, e.g.*, Kenneth M. Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. CHI. L. REV. 1557 (2013).

45. The contractarian device within the risk-sharing modification to the "bargain redux" is likely not even as efficient as other market-based ex-ante approaches. *See* Barry E. Adler, *Bankruptcy and Risk Allocation,* 77 CORNELL L. REV. 439 (1991).

46. There may be an unspoken assumption that society as a whole would agree that social welfare is best served if bankruptcy policy were enacted as if only creditors

reason why it is a justifiable philosophical method—is that it is a hypothetical thought experiment used to justify the state of affairs or norms to the very people who are subject to the contractarian outcome. This means that the scope of the contracting parties must be broad enough to include, at the very least, "those whose interests clash directly in the dispute, as well as others who stand to be affected by the externalities of a settlement one way or another."[47] Artificially limiting the scope of the contracting parties by resorting to a specific function of bankruptcy (in this case, a solution to the common pool problem among creditors) is also begging the very question that the contractarian method must justify.

B. The Bankruptcy Choice Model

Despite the shortcomings of the Creditors' Bargain model, traditionalist accounts have not been particularly successful in challenging its dominance. The reason for the lack of success may be because "the articulation of alternative points of view has not been nearly so coherent and well focused."[48] Nevertheless, there is an alternative contractarian approach to the Creditors' Bargain that advances a traditionalist position: the "Bankruptcy Choice" model.[49] This account begins with a "value-based account" of bankruptcy law.[50] From this perspective, the firm is not a pool of assets but rather a "moral, political, and social agent."[51] As a result, the core "problem" to be solved is not the problem of collecting debt, but rather the transformation of "competing and various interests and values accompanying financial distress . . . into a renewed vision of the corporation . . . ."[52] Thus, bankruptcy law's main function is to create the conditions needed for a discourse that rehabilitates a "crisis of human values" into an "informed and coherent vision of the corporation as personality."[53]

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were parties to the hypothetical contract (perhaps because it would lower the cost of capital), but such an assumption must be justified or, at the very least, made explicit. And even if such an assumption were explicit, the theory would no longer be a contractarian theory but rather a variant of a utilitarian or wealth maximization theory.

47. Scheppele & Waldron, *supra* note 7, at 210.

48. Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 Mich. L. Rev. 336, 337-38 (1993). This admission comes from Professor Elizabeth Warren, who is widely acknowledged to be one of the leading proponents of the traditionalist viewpoint.

49. Korobkin, *supra* note 23, at 544.

50. Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 Colum. L. Rev. 717, 721 (1991).

51. *Id*. at 768.

52. *Id.* at 766.

53. *Id.*

This discourse is not to be completely unguided, however. Instead, the Bankruptcy Choice model deduces normative principles of bankruptcy law by proceeding from a hypothetical choice situation similar to that of John Rawls in *A Theory of Justice*.[54] Within this scenario, normative principles are justified because they would be "freely, fairly, and rationally chosen" by consenting rational persons.[55] Because "the problem of financial distress affects virtually all persons in society to some degree," the model begins with all persons in society within the choice situation rather than merely creditors.[56] Furthermore, to preserve the fairness of the conditions under which the principles are to be derived, those within the choice situation are to be ignorant of their legal status (for example, whether he or she is a creditor or a debtor), in addition to "all other natural and social characteristics that might affect their position relative to others in the context of financial distress," including social status, risk tolerance, and personal wealth.[57] Under these conditions, the model argues that the normative principles that ought to guide bankruptcy policy are the principles of "inclusion of affected persons," which would allow all affected persons to have at least some possibility of promoting their aims within the reorganization,[58] and "rational planning," which would seek to maximally satisfy the diverse aims of all those who are affected by giving those who are most affected (essentially, those who are most vulnerable) the most influence within the reorganization.[59]

Unfortunately, while the Bankruptcy Choice model is an admirable attempt to deduce rational normative principles of bankruptcy, it suffers from the crippling defect of ignoring the economic relationship between bankruptcy and nonbankruptcy law. Within the Rawlsian framework, the primary subject of justice is the basic structure of society, which is defined as "the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation."[60] Thus, *A Theory of Justice* is not concerned with the specifics of a particular segment of the law. Instead, it is concerned with how all of the institutions work together as a whole in concert. Justice is evaluated at the societal level, not at the level of a particular segment of the basic structure. However, despite purport-

54. Korobkin, *supra* note 23, at 544 (arguing that "the bankruptcy choice model closely follows the paradigm of the hypothetical choice situation as originally developed by John Rawls in *A Theory of Justice*."); *see also* Rawls, *supra* note 7.

55. Korobkin, *supra* note 23, at 552.

56. *Id.* at 554.

57. *Id.* at 565.

58. *Id.* at 572, 575.

59. *Id.* at 584-86.

60. John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 159 (1977).

ing to be a variant of the Rawlsian theory of justice, the Bankruptcy Choice model attempts to deduce the normative principles of bankruptcy without taking into consideration the way in which they fit with nonbankruptcy law. Bankruptcy law is already criticized for not being cognizant enough of the ways it interacts with nonbankruptcy law.[61] A normative theory of bankruptcy ought not exacerbate the problem.

Bankruptcy law cannot be coherently examined without also examining nonbankruptcy law, which exist alongside one another, because "by and large, existing bankruptcy law does not set substantive rights and its procedural rights can be understood only against the background of nonbankruptcy procedural rights."[62] What implications would the principles of inclusion and rational planning have on the Uniform Commercial Code, which governs all transactions that create a security interest in personal property, or various state and regional laws that govern security interests in real property, for instance? Would the principle of inclusion somehow overrule a corporation's board's fiduciary duties to its shareholders? How can the principle of rational planning, which advocates that those who have the most financial stake in a reorganization ought to have the most influence in it, be reconciled with contract or tort law, which both require more than mere impact? A contractarian theory of bankruptcy must be able to provide us with some kind of answers to these questions.

More importantly, by examining only a part of the broader institutional framework that addresses financial distress, the Bankruptcy Choice model fails as a normative theory in toto. The hallmark of a normative theory of bankruptcy is that it provides a justification for why bankruptcy law ought to exist at all. For example, the fundamental justification for the Creditors' Bargain model is that bankruptcy law is the rational and desirable response to the collective action problem among creditors under nonbankruptcy law.[63] However, in applying the hypothetical "social contract" only to bankruptcy law as opposed to social structure in general, the Bankruptcy Choice model

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61. *See, e.g.*, Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953 (1981).

62. Baird, *supra* note 25, at 827.

63. *Id.* at 827-28 ("Jackson and I have asked *why* a parallel debt collection system is desirable at all. The answer, we assert, is the collective action problem. But we then suggest that *this* reason for a second avenue of enforcement provides no reason for reassessing relative entitlements. Workers should not have a different place in line simply because someone has been able to start a bankruptcy proceeding. All that Jackson and I require is that the differences in the two avenues follow from the reasons for having the two avenues in the first place. We have no objection to differences in multiple avenues of enforcement. We object only to *unnecessary* differences.").

fails to answer the most important question for normative theories: Why have bankruptcy at all? How does bankruptcy law fit with the rest of the basic structure? After all, why should value-based deliberation not occur continuously for all group activities in society? Would pluralistic values not be better adjudicated at the democratic and legislative level rather than at the level of reorganization? Furthermore, if the normative principles of bankruptcy law are chosen by all in society, why should they not apply to the basic structure in general as well? Could it be that the principles of inclusion and rational planning are not adequate or even compatible with what hypothetical actors would choose for the basic structure of society overall? These questions are not adequately addressed within the Bankruptcy Choice model. Answers must be sought elsewhere.

C. Policy Implications of Flawed Normative Theories

Before presenting an alternate contractarian theory of justice in bankruptcy, it is important to pause here to recognize that even flawed theories can have concrete implications for policy issues when they are explicit in articulating and defending the normative values that motivate their ultimate conclusions. Despite the claims of Professor Levitin, for instance, both the Creditors' Bargain and Bankruptcy Choice models have something concrete to say about the practice of claims trading because they both provide rational arguments defending their views.

The Creditors' Bargain model has direct normative implications for claims trading because it provides a clear rationale that can be applied to analyze various economic issues associated with the practice. Claims trading attracts sophisticated buyers who aim to maximize their profits rather than minimize their losses.[64] These buyers often attempt to leverage their superior knowledge of the bankruptcy reorganization process and sometimes use their position on the creditors' committee to further their own interests, which are different from that of the creditors as a group.[65] This may result in the introduction of an anticommons problem in which "ownership interests are fragmented and conflicting."[66] In an anticommons, "multiple owners

64. Chaim J. Fortgang & Thomas Moers Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 Cardozo L. Rev. 1, 114-15 (1990) ("In most traditional chapter 11 cases, claims and interests are held by parties who are losing money. Therefore, the business people at the negotiating table usually focus on minimizing losses so that their institution can focus on profit-making activities elsewhere. With the advent of claims trading, however, claims are increasingly held by parties who are making money. For these parties, the chapter 11 process is their profit-making activity.").

65. Baird & Rasmussen, *supra* note 16, at 661-66.

66. *Id.* at 652.

are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use."[67] In a mirror image from the tragedy of the commons, the anticommons can result in a tragedy of the anticommons in which the shared resource is underutilized.[68] Yet, the hypothetical choice situation within the Creditors' Bargain model, insofar as it is a prescriptive rather than a descriptive account of bankruptcy, advocates that such a tragedy be prevented and the assets of the bankruptcy estate be maximized. As a result, the model provides a normative account of why claims trading ought to be prevented or regulated so as to preserve the shared ownership interests among creditors or otherwise promote the maximization of the estate somehow.[69]

Although it is not as clear as the Creditors' Bargain, the Bankruptcy Choice model can also have direct normative implications for claims trading because it emphasizes the deliberative purpose of bankruptcy proceedings. The model's underlying assumption is that bankruptcy law "accomplishes a kind of 'group therapy': the values of the participants in financial distress are rehabilitated into a coherent and informed vision of what the estate as enterprise shall exist to do."[70] Yet, claims trading can undermine this therapeutic process because it replaces those who may have a long-term or value-based stake in the corporation with those whose only concern is to maximize their returns.[71] This can destroy the valuable relationships within the community of shared interests that are created by Chapter 11.[72] As a result, claims trading can compromise the group therapy, throwing it into a chaotic zero-sum game of profit maximization and undermining the principle of "rational planning" in the process. Given these effects, the normative foundations of the Bankruptcy Choice model implies the need for greater regulation of claims trading or, at the least, greater judicial discretion to disallow the practice or impose greater requirements so as to "protect" the vulnerable parties who often are the assignors of claims[73] and bring order and stability into the value-based discourse over the fate of the reorganizing entity.

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67. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

68. *Id.*

69. As an empirical matter, however, it is not at all clear whether claims trading actually introduces or exacerbates the anticommons problem, if it exists at all. *See, e.g.*, Levitin, *supra* note 1, at 101-08.

70. Korobkin, *supra* note 50, at 722.

71. *See, e.g.*, Fortgang & Mayer, *supra* note 64, at 6 (stating that "there is a real world difference between the attitude of a longtime creditor and an investor who has just invested its money.").

72. Tung, *supra* note 12, at 1718.

73. *See, e.g.*, *In re* Allegheny Int'l, Inc., 100 B.R. 241, 243 (Bankr. W.D. Pa. 1988) ("By the filing of a bankruptcy case, a market in nonpublicly traded securities is cre-

On its face, the Great Normative Debate may seem to say very little about a myriad of concrete policy issues. However, once the debate is narrowed down to theories that have clearly articulated their rationale for the covering values that should guide bankruptcy policy, it becomes clear that careful attention to normative theories can play an important role in policy debates. In fact, when one considers the alternative of not grounding one's argument in any fundamental values and simply leaving one's assumptions and axioms unstated, careful attention to normative theories is a necessary part of any policymaking decision.

III. JUSTICE IN BANKRUPTCY

In this section, I will argue that bankruptcy law exists to cope with the difficulties of making an ex-ante determination of justice in dealing with financial distress. I begin with the relatively uncontroversial assumption that bankruptcy proceedings ought to have a just outcome.[74] Of course, justice is a contested concept, with varying conceptualizations throughout history. The same holds true for any given bankruptcy proceeding and for financial distress as a general matter. Nevertheless, I argue below that justice in bankruptcy law is best understood in the purely procedural sense. This is because reasonable people in society who attempt to determine the content of justice in response to financial distress are constrained by bounded moral rationality, which is an idea that humans have significant limits to discerning justice in a messy, complex web of interests and morally relevant factors such as those that constitute a bankruptcy proceeding. Furthermore, the myriad of interests and the shifting composition of those who have a stake in a corporation render any ex-ante determination of a just outcome even more difficult in the context of reorganizations. As a result, I will draw on a theory of business ethics known as Integrative Social Contracts Theory ("ISCT") and argue that reasonable people in society who are attempting to establish a set of rules that guide the aftermath of financial distress will opt to defer the determination of the content of justice to those who will partici-

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ated. Claimants are not protected by a disclosure statement. It is an undesirable practice.").

74. If one conceives bankruptcy law as a subset of the law of civil procedure, one could even point to the Federal Rules of Civil Procedure to support this position. *See generally* Charles W. Mooney Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004); FED. R. CIV. P. 1. ("[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Of course, whether or not bankruptcy law is a subset of civil procedure, it seems uncontroversial to assume that the outcome of a bankruptcy proceeding (or any legal matter) ought to have a just outcome.

pate within the bankruptcy system, both at a general level and at a sub-level of each reorganization.

A. Bounded Moral Rationality

Bounded rationality is primarily an economic concept that rejects unrealistic assumptions about the capacity of rational actors in neoclassical economics and, instead, takes seriously the human constraints under which economic decisions are made. Simply put, human rationality has limits, and decision-making has costs. The costs associated with decision-making for finite decision-makers means that "satisficing" behavior, which is to stop seeking greater returns once one's returns exceed a predetermined "aspiration level" rather than to continue to seek to maximize returns, is more rational than the utility maximization model of the standard rational choice model, which presupposes an unbounded capacity for rational deliberation about preferences and outcomes.[75] Since the introduction of the notion of bounded rationality in economic decision-making, overwhelming evidence of its descriptive validity and the greater predictive accuracy it provides when incorporated within economic models, among other reasons, have led to its widespread acceptance.[76]

The insight of bounded rationality can be extended into the realm of moral reasoning. Bounded *moral* rationality describes the limitations of moral reasoning as an analogical corollary of bounded rationality within behavioral economics.[77] It refers to human limitations in discovering and processing all morally relevant facts during moral deliberation, and in identifying and applying the relevant normative principles to the appropriate interpretation of the context for moral action.[78] The former limitation is largely cognitive; there is not a big difference between this limitation and the limitations that are assumed by the notion of bounded *economic* rationality. The latter, however, is a departure in that it concerns limitations in interpreting

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75. *See, e.g.*, Simon, *supra* note 10.

76. For an overview of this development, see John Conlisk, *Why Bounded Rationality?*, 34 J. Econ. Literature 669 (1996).

77. The notion of bounded moral rationality is not my own creation. Along with a contractarian response to it that is roughly similar to that of my own, bounded moral rationality was introduced in Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 Acad. Mgmt. Rev. 252 (1994). It was later developed in a subsequent book-length treatment in Thomas Donaldson & Thomas W. Dunfee, Ties That Bind: A Social Contracts Approach To Business Ethics 30 (1999) ("All of this is fiendishly difficult for finite minds to accomplish with any confidence. This pattern of difficulty, indicative of the 'boundedness' of moral rationality, is similar to Herbert Simon's concept of the same name. Human beings have finite intellectual resources and will inevitably be forced to 'satisfice' in both economic and moral decision making.").

78. Donaldson & Dunfee (1999), *supra* note 77, at 28-31.

moral intuitions and moral theory. Our moral intuitions are not always consistent, and no moral theory has been able to give a fully satisfying account of them.[79] As a result, bounded moral rationality refers to both the limitations and the incoherence of our moral decision-making capacity.

Our bounded moral rationality is only amplified within the context of financial distress because the institutional context of any hypothetical bankruptcy regime will be so artifactual and complex. The very idea of bankruptcy and the rules that govern financial distress are the products of human artifice. The institutional context that governs firms in financial distress is a complicated historical artifact, constituted from the input and actions of countless politicians, businessmen, legislators, judges, lawyers, etc., over a long period of time, and this complicates—perhaps fatally problematizes—any attempt to deduce any "pure" moral logic or reason from it.[80] Furthermore, financial distress occurs within an imperfect world, where the market, the political and legislative processes, and market participants do not always act in consistent ways.[81] As an illustration, take the existing institutional governance regime for bankruptcy in our society. Our bankruptcy laws are the result of a wide array of complex and often inconsistent sets of regulatory regimes. The federal bankruptcy regime interacts with a myriad of both state and federal law in difficult ways.[82] State collection laws are complex and multifaceted, and they differ from jurisdiction to jurisdiction.[83] And not only does bankruptcy law build off of nonbankruptcy law, it also disrupts nonbankruptcy law as well. Any attempt to comprehend and interpret the systemic effects of financial distress through a consistent normative lens, therefore, is likely to add to the limitations of our bounded moral rationality.

Moral rationality is even more highly bounded at the level of corporate reorganizations because firms are purely artifactual as well. Firms are legal fictions that exist to serve the purposes of those who create or have a stake in them.[84] Because their aims and very nature

79. *See, e.g.*, Saguiv A. Hadari, *Value Trade-off*, 50 J. POLITICS 655, 655 (1988) ("no known ethos has managed to be entirely coherent.").

80. *See, e.g.*, Carlson, *supra* note 41, at 1389 ("Considering the tens of thousands of congressmen, judges and lawyers who have contributed to the content of bankruptcy law, it would have been a miracle if all of them were driven by the same ethical impulse every time a legislative decision was made.").

81. *See, e.g.*, Warren, *supra* note 48.

82. *See, e.g.*, Eisenberg, *supra* note 61; *see also* Adler, *supra* note 14.

83. *See, e.g.*, Warren, *supra* note 25, at 783-84; Warren, *supra* note 48, at 382-84.

84. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

are what their stakeholders make of them, determining justice when corporations are reorganized requires adjudicating between a fluid and dynamic set of interests and parties who have a stake in the outcome. First, like most other group endeavors, various stakeholders are likely to have differing views on what constitutes a just outcome. For instance, secured creditors may construe justice as receiving that to which they are entitled by contract, whereas employees of a reorganizing business may construe it as a fair allocation of the losses associated with financial distress among all responsible parties. Furthermore, different parties are likely to have a wide range of values that inform their conception of the business, which will also affect their understanding of what a just outcome would be. Lastly, given the proliferation of practices like claims trading and the growing use of sophisticated financial instruments, the composition of those who have a stake in the reorganization is more fluid and dynamic. In sum, ascertaining the justice of an outcome in a bankruptcy proceeding prior to the proceeding itself is a very tall order, particularly when one attempts to do so without all the relevant facts that are sensitive to a complex and artificial institutional context.

B. Pure Procedural Justice

Given the state of our moral limitations, what ought to be the principles of justice for any given bankruptcy proceeding? From a contractarian perspective, they ought to be those that arise from a hypothetical agreement among reasonable people in society. Imagine a society that is without bankruptcy but otherwise similar to ours. How would those within this fictional society choose to handle financial distress in light of a dizzying array of complex state collection laws, debtor practices, and, in the case of corporate financial distress, a potential creditor rush to dismember an economically sound business? What principles of justice could they agree on if they held a wide range of value systems and interests and were aware of their bounded moral rationality, assuming that they were able to strive for agreement in good faith and as impartially as possible, almost as if they were completely unaware of their own particular economic situation?[85]

85. Most contractarian theories would proceed by making an assumption that hypothetical contractors would not be aware of various aspects of their situation so that the agreement would be impartial. But I am sympathetic to the basic critique that the self cannot exist apart from its connections from the world and that there is no view from nowhere. *See, e.g.*, Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, And The Practice Of Theory In Literary And Legal Studies 436-67 (1989). Nevertheless, an assumption that parties can strive for an agreement on principles of justice as disinterested as possible does not seem as nearly controversial as imposing ignorance that strips the contractors of their identities.

As argued above, moral reasoning in the context of a firm in financial distress is highly bounded. Not only does this render an ex ante determination of justice difficult, it also makes it unlikely that the justice of a reorganization can be ascertained as a matter of universal principle without regard to the nature of the firm and its situation at hand. Yet, this is what the aforementioned models within the Great Normative Debate often attempt to do. Proceduralists often interpret justice in bankruptcy as a matter of welfare, whereas traditionalists often interpret it as a matter of adjudicating multiple values or policy goals. Unlike these positions, a contractarian justification for a bankruptcy regime would opt for a much more modest approach. Given the highly bounded nature of morality in bankruptcy, reasonable people choosing normative principles within our hypothetical choice situation would choose to understand justice in bankruptcy as a matter of pure procedure.[86]

Procedural justice is a notion of justice that is distinct from distributive and corrective justice.[87] In the most general terms, it pertains to the legitimacy of an outcome as a property of the way it was produced rather than as an intrinsic property.[88] Procedural justice can be divided into three types: perfect procedural justice, imperfect procedural justice, and pure procedural justice.[89] Perfect procedural justice is characterized by (a) an independent criterion of a just outcome that is defined separately from the procedure itself, and (b) the possibility that a procedure can be devised to ensure the desired outcome. The procedure for requiring the person who slices the cake to take the last piece to ensure an equal division is a famous example of perfect procedural justice. Imperfect procedural justice also shares characterization (a) but does not share (b). A criminal trial, in which the desired outcome is that the defendant be charged as guilty only if he committed the offense is an example of imperfect procedural justice because there can be no set of laws devised to ensure this outcome. Attempts to justify and refine bankruptcy law according to just one

86. In doing so, I am assuming that bankruptcy law is a set of procedures that pertain to financial distress, regardless of its scope (meaning, whether bankruptcy pertains only to debt collection or is also concerned with a broader value-based discourse on the reorganizing entity), and that procedural justice can be a relevant and sufficient criterion for determining the justice of a reorganization. To assume these things is not to assume that bankruptcy law *cannot* be a matter of distributive justice as well. Instead, my argument is that bankruptcy law can *also* be a matter of procedural justice and that this conception is superior.

87. For a more extensive discussion of procedural justice and its relation to distributive and corrective justice, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238-40 (2004).

88. *See, e.g.*, BRIAN BARRY, POLITICAL ARGUMENT 97-98 (reprt. 2010) (1965).

89. For an introduction to, and a more in-depth discussion of, this distinction, see RAWLS, *supra* note 7, at 85-86.

criterion, such as economic efficiency, or multiple criteria, implicitly assume an imperfect procedural notion of justice because concepts such as economic efficiency or community interest are understood independently from the bankruptcy procedure itself. Pure procedural justice, however, shares neither (a) nor (b). Instead, an outcome is just in the pure procedural sense if the procedure is properly followed. An example of pure procedural justice is gambling, where the final distribution of money among players is just as long as they all followed the predetermined rules of the game.

The main advantage of conceiving the justice of a hypothetical bankruptcy proceeding in purely procedural terms is that it does not require omniscience on the part of the theorist or the policymakers. In the words of John Rawls:

> [T]he great practical advantage of pure procedural justice is that it is no longer necessary in meeting the demands of justice to keep track of the endless variety of circumstances and the changing relative positions of particular persons. One avoids the problem of defining principles to cope with the enormous complexities which would arise if such details were relevant.[90]

Thus, conceiving the justice of a hypothetical bankruptcy proceeding as a matter of pure procedure is an attractive and justifiable position. Rather than choosing a single norm, such as economic efficiency, without any justification or deferring to a bankruptcy judge to come to an imperfect facsimile of a just outcome evaluated along a wide set of norms and values that are defined separately from the bankruptcy process itself, reasonable people in our hypothetical choice situation would opt to leave aside the ex-ante determination of the substance of justice according to normative principles and, instead, agree on an acceptable procedure that will define the justice of a bankruptcy proceeding on its own and without reference to some other principles of justice outside of the bankruptcy proceeding.

C. The Shape of Procedural Justice in Bankruptcy

If a just determination of the outcome of a firm in financial distress can depend solely on a set of procedures, what kinds of procedures would hypothetical contractors in a society without a bankruptcy regime want? ISCT[91] can help flesh out the type of procedure that our hypothetical actors will choose to give substance to jus-

90. *Id.* at 87.

91. *See generally*, *supra* note 77 and accompanying text.

tice in bankruptcy.[92] ISCT is a contractarian theory of business ethics that begins with bounded moral rationality as a starting point. Although it has had limited influence on legal scholarship to date,[93] it is widely considered to be one of the foremost "centers of gravity" in management literature as a normative theory of business,[94] and it is intended to be a *general* normative theory of business, with implications for all economic activity. The theory posits that reasonable actors who are aware of (a) their bounded moral rationality in economic activity and (b) their diverse and often conflicting sets of commitments would quickly realize that "it would be impossible to obtain an intellectual consensus concerning adoption of a single morality as the framework" for business activity.[95] Given this realization, they would agree to 1) defer a majority of substantive norms to norm-generating communities that are embedded in particular economic contexts and 2) allow themselves the freedom to choose and affiliate with these communities while 3) ensuring the basic conditions for freedom and economic cooperation.[96]

Following the lead of ISCT, I propose that the hypothetical actors within our fictional society would do the same for determining the justice of dealing with a firm in financial distress. First, they must determine what are the appropriate norm-generating communities in the context of financial distress. A helpful approach to address this question is to apply a systems analysis to the law.[97] Systems are "regularly interacting or interdependent group[s] of items forming a unified whole" guided by one or more purposes of functions.[98] They can be identified through the "human participant test," which asks if people actually participate in the activity under consideration; the "interac-

92. In general, ISCT is not an attempt to spell out the substance of the norms that will guide economic activity in the world. Rather, it is an attempt to establish a mode of moral reasoning and a broad framework for guiding the process by which norms are generated within economic communities.

93. Some notable exceptions include: 1) an attempt to apply ISCT to the issue of credit card solicitations to college students in Laurie A. Lucas, *Integrative Social Contracts Theory: Ethical Implications of Marketing Credit Cards to U.S. College Students*, 38 AM. BUS. L.J. 413 (2001); and 2) the usage of ISCT in determining the parameters of corporate social responsiveness in regulating corporate behavior in David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999).

94. For a discussion on the influence of contractarian methodology and ISCT in particular, see Pursey P.M.A.R. Heugens, Muel Kaptein & J. (Hans) van Oosterhout, *The Ethics of the Node Versus the Ethics of the Dyad? Reconciling Virtue Ethics and Contractualism*, 27 ORG. STUDIES 391, 392 (2006).

95. DONALDSON & DUNFEE (1999), *supra* note 77, at 27.

96. *Id.* at 36-38.

97. Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479 (1996).

98. *Id.* at 482.

tion principle," which attempts to set boundaries to systems by grouping persons and things that interact more closely and more frequently with each other than others; and the "purpose principle," which identifies the purpose or goals of the system and includes those that are necessary for the achievement of these ends within the system. [99] Legal systems such as bankruptcy are self-organizing networks comprised of elements and their interconnections that order themselves through form innovation and norm emergence.[100] Thus, norm-generating communities within our contractarian model can be understood as networks of highly interactive participants who, along with the institutions that they create, organize themselves according to norms that define and guide their shared purpose.

Once our hypothetical actors use a systems approach to delineate the scope of the norm-generating communities in question, they are likely to agree that there ought to be at least two distinct levels of norm-generation within their procedure for determining the content of justice in bankruptcy. This is because their shared purpose in crafting their agreement (also, the ultimate purpose of bankruptcy law), is to cope with the problem of bounded moral rationality in determining the justice of a bankruptcy proceeding. As argued above, moral rationality is even more bounded when it comes to reorganizing the distressed entity rather than simply liquidating all of its assets. This difference is not of degree but of kind. Entities such as corporations and municipalities can be reorganized because they are purely artifactual and reflect the aims and commitments of various interested parties, which can be adjusted through collective deliberation. Natural persons, on the other hand, have aims and commitments that are uniquely their own, and they cannot be adjusted through collective deliberation. Thus, reorganization requires dealing with problems of coordinating the adjustment of vested interests and commitments in the very nature of the enterprise that do not arise in simple liquidations. Yet, reorganizations nevertheless face most, if not all, the problems of coordination among claimants and context-specific determinations of good faith, fraudulent transfers, etc., that are present even in a liquidation case.

Thus, our hypothetical contractors are likely to recognize that there exists one broad set of problems associated with bankruptcy in general and, at a lower level, numerous context-specific sets of problems associated with each particular reorganization. This would give rise to multiple levels of norm-generating communities within our

99. *Id.* at 498-99.

100. *See* Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Valuation in Bankruptcy*, 2004 UTAH L. REV. 483 (2004).

procedure to produce a just outcome. At the broader level, there would be a single system that governs bankruptcy proceedings. Yet, nested within this broader system would be particular and short-lived sub-systems that are organized around particular issues and entities that are candidates for reorganization. Coming back to the real world, such an agreement would reflect, respectively, (1) a federal bankruptcy system comprised of the interactions among bankruptcy professionals, academics, policymakers, and other repeat players and general bankruptcy institutions, such as the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure; (2) different communities within the system governed by distinct sets of regimes for individual bankruptcies, firms undergoing liquidation, and firms undergoing reorganization; and last, (3) discrete "reorganization communities" of institutional actors and stakeholders, such as the bankruptcy judge, the debtor-in-possession, and the creditors' committee, that are formed around each particular reorganization at the sub-level. In other words, our hypothetical contractors would essentially choose a regime that mirrors what we have today and look to these communities to generate a conception of justice that is applicable to the particular bankruptcy proceeding at hand.

IV. THE IMPORTANCE OF ONGOING CONSENT

In the previous section, I argued that the contractarian response to bounded moral rationality would be to defer the determination of justice in bankruptcy to a broad bankruptcy community and make a further delegation to organization-specific communities for reorganization-specific determinations of justice. It is the legitimacy of this *process* rather than congruence with a predetermined notion of justice that renders an outcome of a bankruptcy proceeding just. In this section, I will flesh out the conditions for this legitimacy and connect them to the current bankruptcy system. In doing so, I will also be able to show why claims trading matters for bankruptcy policy and why the Great Normative Debate matters for claims trading policy. The norm of ongoing consent is a procedural requirement for norm-generation due to the nature of the hypothetical contract entered under the conditions of bounded moral rationality. Ongoing consent has at least two components: the right of voice and the right of exit. The political system in the United States allows for the rights of voice and exit at the broad system level of bankruptcy policymaking, and the Bankruptcy Code allows for the right of voice at the level of particular reorganizations. However, there would be no adequate right of exit within this regime if there were no robust claims trading market to support the right of exit at the reorganization level.

A. The Procedural Norm of Ongoing Consent

Consent is a central legitimizing principle in bankruptcy.[101] This is not so only for intuitive reasons. From the point of view of bounded rationality, consent is a necessary procedural constraint upon the hypothetical social contract that justifies the deference of norm-generation to context-specific communities as well as the democratic political process by which the norms are generated. By consent, I do not mean voluntary acquiescence to political authority.[102] Instead, I use it to refer to the nature of participation within a process that proceeds from an individual's freedom and autonomy. This notion of consent is foundational to modern social contracts reasoning in which individual contractors come to an agreement on a set of principles or procedures within the hypothetical choice situation.[103] Communal consent is thus synonymous with the social contract itself. Without it, there is no ground for justification for normative principles or procedures within a modern contractarian theory.

Within my account, consent is important also as an *ongoing* phenomenon because the hypothetical contractors have no possibility of knowing ex-ante the content of justice that will emerge from norm-generating communities. Because they desire and need to preserve their freedom and autonomy throughout the norm-generation process, our hypothetical contractors would insist on interpreting consent as an ongoing phenomenon, comprised of a right to participate in or withdraw from the deliberative process of norm-generation.[104] Ongoing consent preserves the freedom and autonomy of the actors in unexpected situations. Democratic processes typically operate upon the principle of majority rule.[105] Without the ongoing notion of consent, participants within norm-generating communities could potentially find themselves in minority positions without any opportunity to exer-

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101. *See, e.g.*, Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 Am. Bankr. L.J. 663, 737 (2009) ("Understanding and improving bankruptcy law requires continued sensitivity to the bankruptcy system's traditional reliance on party consent.").

102. This notion of consent is a hallmark of classic social contract theorists. *See, e.g.*, John Locke, Second Treatise On Civil Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

103. *See, e.g.*, Samuel Freeman, The Cambridge Companion To Rawls 1, 5 (2002) ("For the first priority of justice for Rawls is to maintain equal freedom and respect for persons in their capacity as democratic citizens. This indicates the way justice as fairness is grounded in an ideal of persons as free and equal citizens who exercise their capacities for justice and rationality (the two moral powers) as they jointly govern public matters and freely pursue their conceptions of a good life.").

104. Donaldson & Dunfee (1999), *supra* note 77, at 41.

105. *See, e.g.*, Locke, supra note 102, § 96. Agreement by the majority is also a prerequisite for legitimate community-norms in ISCT. *See* Donaldson & Dunfee (1999), *supra* note 77, at 39.

cise their autonomy and freedom. Thus, ongoing consent is a safeguard against unforeseen circumstances that hypothetical contractors would agree to uphold within norm-generating communities.

The two rights implied by the notion of ongoing consent are the rights of voice and exit. First, ongoing consent implies the right of voice within a community. The right of voice is "the right of members of a community to speak out for or against existing and developing norms" during the norm-generating process.[106] This right preserves the consent of economic actors in the evolution of norms within moral communities and ensures that the content of justice that emerges from the political process is broadly acceptable to those within the community rather than only to a few of its members. Although community members are not required to exercise their voice, the option to do so must be available in the event that the need arises. Second, ongoing consent implies the right of exit from a community.[107] This right is important particularly because of the moral free space that is accorded to norm-generating communities and the dynamism with which circumstances and morally relevant facts change over time. Without the right of exit, the agent would be consenting to a form of coercion that lies beyond the bounds of her moral rationality, which is inconsistent with the aims of the hypothetical agreement itself. As a result, the legitimacy of the contractarian response to bounded moral rationality involves not only a democratic deliberative process but also one that is constrained by the procedural norm of ongoing consent, characterized by the right of voice and the right of exit.

B. The Right of Voice in Bankruptcy

Bankruptcy policymaking is a political process.[108] As a matter of principle, it can be characterized as "fundamentally a political exercise" because it pertains to making collective decisions about loss distribution in society.[109] And as a descriptive matter, there can be no doubt that politics drives bankruptcy policymaking. Of course, the legislative process behind the drafting and refinement of the Bankruptcy Code is a political exercise.[110] Throughout its history, the main forces that have characterized American bankruptcy—"the rise

106. Donaldson & Dunfee (1999), *supra* note 77, at 43.
107. *Id.* at 42.
108. *See, e.g.*, Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 Cornell L. Rev. 1399, 1405 (2012) ("Bankruptcy is ultimately a distributional exercise, rather than a system to maximize returns to creditors, and this characteristic makes it inherently political.").
109. *Id.* at 1453.
110. *See, e.g.*, Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. Econ. & Org. 527 (2004).

of organized creditor groups and the countervailing influence of populism, together with the emergence of the bankruptcy bar"[111]—have been primarily *political* factors, and this reality "shows no signs of decline."[112] Not only do bankruptcy professionals and special interest groups exert political pressures on possible bankruptcy policy reform,[113] they can also derail reform efforts as well.[114]

For both parties to the Great Normative Debate, relying on a political process to determine just outcomes is a major problem. Traditionalists often see the political process as a necessary "imperfection" that "constrains" policy options and debates.[115] Proceduralists view the political process as a significant obstacle for achieving market-based solutions to an inefficient system.[116] Such resistance to politics stems from the parties' commitment to justice in bankruptcy as a form of perfect or imperfect procedural justice. Within a representative democracy with political parties representing discrete policy options to which the electorate has a nontrivial amount of party-based commitment, the political equilibrium that results from the democratic process lies somewhere between the prevailing party's desired policy outcome and a utilitarian optimum.[117] In other words, subjecting policymaking outcomes to a political process will result in an equilibrium that would be considered to be imperfect regardless of which point of view one takes. As a result, if one evaluates the outcome of the political process in light of principles of justice determined apart from the process, the result is likely to be imperfect.

Once justice is understood in purely procedural terms, however, the reliance on politics is no longer a problem. In fact, the democratic political process becomes the primary and *necessary* forum for exercising the right of voice—and thus satisfying the norm of ongoing consent—at the broad bankruptcy policy level. Because the right of voice arises out of a notion of ongoing consent with respect to the content of the norms that emerge from the bankruptcy system, it refers to advocacy with respect to values or commitments. Nevertheless, concern for one's own interests, both economic and noneconomic, is also a valid commitment, and thus the right of voice within the political process

111. DAVID A. SKEEL JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 2 (2001).

112. *Id*. at 2.

113. *See, e.g.*, Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189 (1999).

114. *See, e.g.*, Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J.L. & POL. 893 (1997).

115. Warren, *supra* note 48, at 377-86.

116. *See, e.g.*, Adler, *supra* note 14.

117. Assar Lindbeck & Jörgen W. Weibull, *A Model of Political Equilibrium in a Representative Democracy*, 51 J. PUB. ECON. 195 (1993).

ought not be artificially restrained by preordained principles.[118] Furthermore, in terms of exercising the right of voice, there is nothing deficient about asserting unjustified values and commitments according to one's preferences, provided that they take place within the rules and procedures set forth by the larger political system itself. As a result, there is no need for any Rawlsian veil of ignorance that constrains the process of determining a just outcome in bankruptcy. What is needed is real actors advocating for their values and interests while conforming to basic structural norms to guarantee ongoing consent.

The right of voice is exercised at all levels of the general bankruptcy regime. In actual bankruptcy policymaking, normative commitments such as justice, fairness, and beneficence play a real role in shaping the preferences of all those who are involved, and they shape the very way that bankruptcy is interpreted, both in practice and in law. Throughout its history, bankruptcy politics has been swept up by the "currents of ideology" and normative concerns.[119] Political and judicial actors' consistent appeal to normative virtues such as equity, fairness, honesty, truthfulness, justice, and loyalty influence bankruptcy jurisprudence and give content to the Bankruptcy Code itself.[120] Within academic circles, collective deliberation takes the form of exchanges like the Great Normative Debate, which also sometimes influence legislative and policy debates as well. Most importantly, all citizens in our society have the formal right of voice through their political participation and through their elected representatives. As a result, the general bankruptcy regime is infused with the input of participants who exercise their right of voice.

The right of voice is also present at the sub-system level of particular reorganizations.[121] In fact, some have argued that the whole point of Chapter 11 is to create "a community of interests by providing a bargaining framework and devices to encourage cooperation among the various actors in the reorganization."[122] From this point of view, the automatic stay, which provides temporary relief for the distressed

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118. Indeed, this is the approach within the current bankruptcy system, to a certain extent. *See, e.g.*, *In re* Figter Ltd., 118 F.3d 635 (9th Cir. 1997) (providing an example of allowable strategic behavior that is intended to further a claimant's economic self-interest). Nevertheless, 11 U.S.C. § 1126(e) (2012) allows the court to disqualify entities from voting during the confirmation period if they act in bad faith.

119. SKEEL JR., *supra* note 111, at 15.

120. *See, e.g.*, Matthew Bruckner, *The Virtue in Bankruptcy*, 45 LOY. U. CHI. L.J. 233 (2013*)*; *see also In re* Kaiser Aluminum Corp., 456 F.3d 328 (3d Cir. 2006).

121. For instance, 11 U.S.C. § 1109(b) (2012) grants a "party in interest" the right of voice on any issue under a Chapter 11 proceeding. 11 U.S.C. § 901(a) (2012) grants this right to Chapter 9 cases as well.

122. Tung, *supra* note 12, at 1718.

entity by halting most actions against its property upon the filing of bankruptcy,[123] can not only solve the collective action problem of debtors attempting to dismember an economically sound debtor prematurely, but can also provide the necessary breathing room for participants within the bankruptcy proceeding to have the opportunity to exercise their right of voice.

The strongest avenue for stakeholders to exercise their right in Chapter 11 is through creditors' committees, which are the primary negotiating bodies for the formulation of a reorganization plan.[124] The plan confirmation process is another way for various classes of affected parties to voice their opinion with respect to the justice of the outcome.[125] However, the current framework may not provide non-claimant stakeholders enough of an opportunity to exercise their right of voice. Parties of interest, such as the town in which the reorganizing business is located or neighboring small businesses whose fates are tied up with that of the distressed entity, may turn to informal mechanisms like the media and local politics to exert a certain amount of pressure within a particular Chapter 11 proceeding. However, if they can be considered part of this reorganization "community" (the determination will vary from context to context and party to party, of course), the right of voice may require a more formal means for these "community interests" to be represented as well.[126]

One major set of proposals within the bankruptcy process that threatens the norm of ongoing consent, and thus ought to be discouraged, concerns the elimination of much of the political process of reorganization due to concerns associated with economic efficiency. Some of these proposals include eliminating the reorganization process altogether in favor of a market-based approach.[127] Nevertheless, there was a significant amount of concern in the aftermath of the Chrysler[128] and GM bankruptcies[129] over the possibility that section 363 sub rosa asset sales could undermine the procedural guarantees set forth within the confirmation process.[130] Much of the worry has

123. 11 U.S.C. § 362 (2012). *See also* Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REFORM, 175 (1978).

124. 11 U.S.C. § 1102(a)(2) (2012) allows the U.S. Trustee to appoint committees not only of claimants holding unsecured claims, but also other creditors or equity holders upon request of a party of interest if necessary to assure adequate representation.

125. 11 U.S.C. § 1129 (2012).

126. *See, e.g.*, GROSS (1999), *supra* note 11; Gross (1994), *supra* note 11, for an extended argument along these lines, but for reasons different from that of my own.

127. *See, e.g.*, Baird, Adler, and Bebchuk, *supra* note 14 (discussing various market-based proposals to auction off the firm or its assets).

128. *In re* Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009).

129. *In re* Gen. Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

130. *See, e.g.*, Barry E. Adler, *A Reassessment of Bankruptcy Reorganization after Chrysler and General Motors*, 18 AM. BANKR. INST. L. REV. 305 (2010); *see also* Ralph

since died down,[131] but practices such as asset sales or prepackaged bankruptcies that sacrifice some inclusiveness for the sake of economic efficiency and speed nevertheless pose a real danger to the right of voice for some stakeholders in the reorganization. Insofar as these practices replicate some of the abuses of the old equity receivership system, particularly that of freezing out certain classes or types of claimants,[132] they represent not only the potential to raise the cost of credit but also to violate the constraints of the procedural norm of ongoing consent, as represented by the right of voice for all members of the reorganization community.

Lastly, it is important to note that the right of voice does not imply a right to get one's way. Take, for instance, the so-called Chapter 11 cramdown provisions within the Bankruptcy Code.[133] Among other requirements, Chapter 11 of the Bankruptcy Code requires that all impaired classes of claimants must approve a reorganization plan for it to be confirmed. [134] However, the Code also allows the court to approve a plan even if an impaired class of claimants does not accept the plan as long as the plan meets all other applicable requirements for plan confirmation, does not discriminate unfairly, and is fair and equitable.[135] Such provisions allow for the procedural determination of justice in corporate reorganizations without violating the right of voice of the impaired claimants who refuse to accept a proposed plan because the very act of refusal is an exercise of voice in and of itself. The refusal to accept a plan will also most likely be preceded by negotiations during which the claimants express their views and participate within the process of determining the just outcome of a particular case. The failure to get one's way cannot be an impediment to a procedural conception of justice. A requirement for unanimity will cripple rather than promote any meaningful deliberation. Nevertheless, because the right of voice does not necessarily imply that one has given consent to an outcome in bankruptcy, the right of exit is just as important, if not more so, as the right of voice in securing the ongoing consent of those who participate within the bankruptcy process.

Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375 (2010).

131. *See, e.g.*, Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531 (2009).

132. *See, e.g.*, Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 767-68 (2010).

133. 11 U.S.C. § 1129(b)(1). For more on cramdowns, see Kenneth N. Klee, *All You Ever Wanted To Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).

134. 11 U.S.C. § 1129(a)(8).

135. 11 U.S.C. § 1129(b)(1).

C. The Right of Exit and Claims Trading in Bankruptcy

The right of exit is essential for the exercise of ongoing consent because exit is often the only viable means of legitimizing a procedural determination of justice in matters that will almost always lead to disagreement. At the general bankruptcy level, the right of exit exists as a matter of political and social reality. Those who do not wish to participate within the federal bankruptcy system can choose to change professions, academic interests, or political allegiances without an inordinate amount of hardship. Even simple abstinence from the politics of bankruptcy policy may be enough. However, things become more difficult at the reorganization level for some stakeholders within the reorganization community. Aside from simply walking away from one's claims against the distressed entity and excusing one's self from the proceedings, how can one avoid compromising one's autonomy by being forced to go along with a conception of justice that cannot be reconciled with other commitments that one has?

Claims trading is a practice that allows those who are bound to a bankruptcy proceeding to exercise their right of exit. Sellers may wish to sell claims for a variety of reasons. They may desire to avoid the administrative hassle of reorganization, lack bankruptcy expertise, face liquidity concerns, or have a low tolerance for risk.[136] More importantly, however, they may wish to exit the bankruptcy proceeding because of some non-economic reason that has a special bearing on one's commitments and values. The bankruptcy court can approve a reorganization plan without the consent of a class of creditors as long as the plan fully compensates their claim.[137] However, the shape of justice that is determined through the plan may nevertheless violate the commitments or values of claimants in ways that extend beyond the amount of their claim. Claims trading gives them a procedure by which they can exit the proceeding for such non-economic reasons.

Suppose, for instance, a large firm obtained a secured loan from a socially responsible lender to finance its sustainability initiatives. However, its eco-friendly ventures flop and the firm files voluntarily for Chapter 11. Fortunately for the majority of its creditors (who do not care about environmental sustainability), the debtor in possession has negotiated with the employees' union to lower its pension obligations and has streamlined the firm's business operations to focus exclusively on hydro-fracking. The socially responsible lender opposes both of these maneuvers, but the reorganization plan leaves all se-

136. Levitin, *supra* note 1, at 93-94; *see* Tung, *supra* note 12, at 1700; *see also* Baird & Rasmussen, *supra* note 16, at 660.

137. 11 U.S.C. § 1129(a)(8)(B).

cured creditors unimpaired.[138] Given the state of affairs, what is our lender's option from a normative standpoint? It lent to the firm because its commitments and values were aligned with that of the firm at the time. But it is powerless now to oppose the plan from confirmation. Thus, the lender's freedom and autonomy is at stake if it cannot exercise its right of exit. Having been aware of such a possibility within the hypothetical social contract, this lender would not have agreed to defer the generation of norms to the reorganization community if it were not assured the right of exit by some other way. A robust claims trading market affords this guarantee.

Because the right of exit is often central to the norm of ongoing consent, courts should generally be wary of limiting claims trading. However, there may be instances when the right of exit can undermine rather than reinforce the ongoing norm of consent within a bankruptcy proceeding. In such instances, courts should exercise their general equitable powers[139] to limit claims trading as narrowly as possible. For instance, courts will sometimes limit or refuse to recognize the trading of claims if it could cause the distressed entity to lose its ability to carry over its net operating losses ("NOLs") to offset future liability on taxable income.[140] Debtors who ask for an injunction against claims trading in such instances typically claim that because NOLs constitute a property of the bankruptcy estate, attempts to sell one's claim and jeopardize its loss for the business as a going concern constitutes a violation of the automatic stay.[141] As noted above, the automatic stay is important to secure the ongoing consent of bankruptcy participants because it allows for the breathing room to exercise their right of voice. If there arises a situation in which a claimant exercising its right of exit would jeopardize the entire bankruptcy proceeding even before it begins, the claimant could effectively be commandeering the right of voice from the rest of the participants within the proceeding. In such instances, the court might be able to best preserve the ongoing consent of bankruptcy participants by granting a *temporary* injunction against the trading of claims for a limited period

138. 11 U.S.C. § 1124 (2012).

139. 11 U.S.C. § 105(a) (2012) grants the court very broad powers to administer the bankruptcy estate. "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* The need for careful contextual analysis due to bounded moral rationality is why we grant bankruptcy courts such a broad power, and the need for determining when and how to utilize these powers is certainly one of the reasons for having a normative theory of bankruptcy.

140. 26 U.S.C. § 172 (2012) allows for a tax deduction equal to the amount of net operating loss carryovers and carrybacks for a particular tax year. However, 26 U.S.C. § 382 (2012) limits the entity's ability to utilize this deduction if it undergoes an ownership change, subject to special exceptions for Chapter 11 reorganizations under § 382(l)(5).

141. *See, e.g.*, *In re* Prudential Lines Inc., 928 F.2d 565 (2d Cir. 1991).

of time. Doing so would provide enough space for legitimate negotiations to take place but nevertheless provide a meaningful opportunity for exit. Only in the most exceptional cases should a court ever grant a *permanent* injunction against claims trading.

As the case with NOL carryovers shows, balancing the right of exit with other considerations in bankruptcy can be a tricky affair. However, this is why a normative theory is important. Once the norm of ongoing consent is established as the fundamental value by which all considerations are measured, other considerations like maximizing the value of the estate, for instance, must take a backseat to the right of exit in instances when the exercise of this right would not undermine ongoing consent. Limits to core aspects of this fundamental value can only be justified due to various aspects of the value itself. Limiting the right of exit, which is an important aspect of the norm of ongoing consent, is only permitted when the exercise of this right would undermine the norm of ongoing consent. Other considerations are relevant and should certainly play an important role in determining and fine-tuning various policy decisions, but not at the expense of ongoing consent.

V. CONCLUSION

Re-examining the Great Normative Debate through the small window of claims trading sheds light on the central justification for having bankruptcy and corporate reorganizations at all. Bankruptcy law exists to cope with the problem that bounded moral rationality poses to the determination of justice in a complex phenomenon that is the handling of firms in financial distress. Bankruptcy is complicated, but it nevertheless requires a normative justification of its aims, not for its own sake but for regulating and refining practices and institutions that intersect with bankruptcy law. As a matter of normative justification, we cannot simply throw up our hands and adopt an anything-goes approach or defer completely to a bankruptcy judge with unlimited power. Neither can we attempt to reduce a complicated phenomenon for the sake of simplicity or elegance. Both mistakes are fatal because they rely on central tenets as axioms rather than providing a fully justified account for these tenets. In this Article, I have outlined an approach in which those assumptions are not made. Instead, I have argued for a contractarian theory that explains why a set of policy aims advanced within a democratic political process guided by the procedural norm of ongoing consent can be rational, justified, and legitimate. Nevertheless, the norm of ongoing consent has significant implications for the substance of bankruptcy law as well. There must be sufficient avenues for participants within both the bank-

ruptcy policymaking level and the particular bankruptcy proceeding level to advocate for or against developing norms within their context and to exit their respective "systems" if they desire to do so.

In a way, I have outlined a meta-theory of bankruptcy, insofar as it recognizes the value of the ongoing debates between proceduralists, traditionalists, and others who have a stake in the policy debates. Such exchanges are a part of an ongoing political process by which norms emerge within the bankruptcy system. They are thus central to determining the substantive content of justice in bankruptcy as a general matter. They are also certain to influence the determination of justice at the particular reorganization level over time as well. Within this political approach to normative bankruptcy theory, the discourse at the policy level can merely reflect various preferences and commitments. Some may prefer to see bankruptcy law refined to maximize economic efficiency, whereas others want to see noneconomic interests also be given weight. This is fine. Advocating policy proposals based on such uncontested axioms is not a problem, provided that those who do so adhere to the procedural norm of ongoing consent. In particular, if bankruptcy scholars do not already do so, they ought to feel fully justified in exercising their right of voice within the academic debate. Or even their right of exit.

DOES ACTUAL INNOCENCE ACTUALLY MATTER? WHY THE *SCHLUP* ACTUAL INNOCENCE GATEWAY REQUIRES NEWLY PRESENTED, RELIABLE EVIDENCE

I. INTRODUCTION

A man was suspected, interviewed, arrested, indicted, tried in state court, convicted, sentenced, and imprisoned, all the while asserting his innocence.[1] After exhausting every option for post-conviction relief within the state, this man filed a first and a second petition for habeas corpus in federal court.[2] His petitions were denied, and he once again asserted his innocence.[3] This man had evidence that could potentially exonerate him, yet the United States Court of Appeals for the Eighth Circuit refused to consider the evidence in response to his pleas for assistance.[4] This man is Ricky Kidd.[5] Kidd is currently serving a life sentence without the possibility of parole, and he still asserts his innocence.[6]

A jury convicted Kidd in *State v. Kidd*[7] for the murder of two men.[8] After exhausting all state court remedies, Kidd filed two federal habeas corpus petitions, the second of which the Eighth Circuit denied because the evidence presented to prove his innocence was not considered new.[9] The Eighth Circuit applied a stricter standard than other circuits apply for new evidence.[10] Because Kidd fell short of the stricter standard, the Eighth Circuit affirmed Kidd's conviction.[11]

The Innocence Network is a group of organizations from around the world that provides free legal services to individuals who maintain their innocence even despite their convictions.[12] The Network notes

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1. Kidd v. Norman, 651 F.3d 947, 947, 948 (8th Cir. 2011) [hereinafter *Kidd III*].
2. *Kidd III*, 651 F.3d at 949.
3. *Id.* at 950, 954.
4. *Id.*
5. *Id.* at 947.
6. *Id.* at 947. *See also Ricky Kidd – Still Incarcerated Even Though Someone Else Confessed*, JAWS OF JUSTICE RADIO (May 13, 2013, 9:00 AM), http://www.kkfi.org/program-episodes/ricky-kidd-still-incacerated-even-though-someone-else-else-confessed/ (interviewing Kidd regarding his ongoing efforts to prove his innocence).
7. 990 S.W.2d 175 (Mo. Ct. App. 1999).
8. State v. Kidd, 990 S.W.2d 175, 177-78 (Mo. Ct. App. 1999) [hereinafter *Kidd I*], *aff'd sub nom.* Kidd v. Norman, 651 F.3d 947 (8th Cir. 2011).
9. *Kidd III*, 651 F.3d at 949-53.
10. *Id.* at 953.
11. *Id.* at 953-54.
12. *About the Innocence Network*, THE INNOCENCE NETWORK, http://innocencenetwork.org/about/ (last visited Dec. 21, 2016).

that at least 347 innocent men and women have been exonerated based on DNA testing, twenty of whom were sentenced to death for their alleged crimes.[13] Seventy percent of the 347 exonerations involved eyewitness misidentification.[14] Forty-three percent involved misidentifications involving the race of the exoneree.[15] Forty-six percent involved misuses of forensic sciences.[16] The Midwest Innocence Project, an affiliate of the Innocence Network, is currently advocating for Ricky Kidd's immediate release from prison based on the compelling evidence that demonstrates Kidd's innocence.[17]

This Note will first explore *Kidd v. Norman*,[18] including the facts, holding, and complex procedural background.[19] Next, this Note will explore the series of cases that formed and refined the actual innocence gateway.[20] Then, this Note will discuss the current circuit split regarding the definition of new evidence as it relates to the actual innocence gateway.[21] Finally, this Note will explain how the Eighth Circuit has too narrowly defined new evidence for purposes of the actual innocence gateway for procedurally barred habeas petitions.[22]

II. FACTS AND HOLDING

In *State v. Kidd*,[23] the Sixteenth Circuit Court for Jackson County, Missouri convicted Ricky Kidd on two counts of felony murder in the first degree and two counts of armed criminal conduct.[24] The judge sentenced Kidd to life in prison without the possibility of parole.[25] Kidd navigated his way through a complex post-conviction procedural maze, all the while asserting he was actually innocent of the crimes for which he had been convicted.[26]

On February 6, 1996, Oscar Bridges and George Bryant were shot dead in Bryant's home in Kansas City, Missouri.[27] Bryant's four-year-

13. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Dec. 21, 2016).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Ricky Kidd*, MIDWEST INNOCENCE PROJECT, http://themip.org/ricky-kidd/ (last visited Dec. 21, 2016). The Midwest Innocence Project filed a Missouri Rule 91 petition, requesting habeas relief on Kidd's behalf in February of 2016 while awaiting the results of DNA testing. *Id.*
18. 651 F.3d 947 (8th Cir. 2011).
19. *See infra* notes 23-79 and accompanying text.
20. *See infra* notes 80-131 and accompanying text.
21. *See infra* notes 132-216 and accompanying text.
22. *See infra* notes 236-347 and accompanying text.
23. 990 S.W.2d 175 (Mo. Ct. App. 1999).
24. State v. Kidd, 990 S.W.2d 175, 177 (Mo. Ct. App. 1999).
25. Kidd v. Norman, 651 F.3d 947, 947 (8th Cir. 2011).
26. *Kidd III*, 651 F.3d at 947.
27. *Id.* at 948.

old daughter, Kayla, witnessed the murders and later testified against Kidd and his co-defendant, Marcus Merrill.[28] Kayla witnessed a white car pulling into Bryant's driveway as she watched television in the living room.[29] Two men dressed in black exited the car, entered the house at Bryant's invitation, and briefly conversed with Bridges in the kitchen.[30] After the conversation, the men shot Bryant and chased Bridges into the basement where they shot him as well.[31] While the two assailants were preoccupied, Bryant escaped out of the open garage door and yelled for help.[32] Richard Harris, who later testified against Kidd at trial, heard Bryant's cry.[33] Harris observed two men exit the house, drag Bryant behind a car, and shoot Bryant twice.[34]

At Kidd's trial, Kayla testified to what she witnessed the day of the murder but was unable to identify the shooters.[35] However, prior to trial, Kayla identified Kidd to the police as one of the murderers.[36] Kidd was sentenced as a prior offender to life in prison without the possibility of parole.[37] The trial court noted that Kidd was not charged as a prior offender in the indictment, but the assistant prosecutor determined that it was not necessary to amend the indictment.[38] The Missouri Court of Appeals for the Western District of Missouri later noted Kidd was erroneously sentenced as a prior offender because the prosecutor improperly offered evidence regarding past drug trafficking offenses.[39] The jury found Kidd guilty on all counts and the court sentenced him according to his status as a prior offender.[40]

Kidd appealed to the Missouri Court of Appeals for the Western District of Missouri, claiming that the trial court erred in admitting

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28. *Id.*
29. *Kidd I*, 990 S.W.2d at 177.
30. *Id.* at 178.
31. *Id.*
32. *Id.*
33. *Kidd III*, 651 F.3d at 948.
34. *Kidd I*, 990 S.W.2d at 178. Richard Harris was George Bryant's neighbor. *Kidd III*, 651 F.3d at 948. Harris was walking home at the time of the murders. *Id.* One of the assailants observed Harris and attempted to catch him, but Harris escaped. *Id*.
35. *Id.*
36. State v. Kidd, 75 S.W.3d 804, 807 (Mo. Ct. App. 2002) [hereinafter *Kidd II*], *aff'd sub nom.* Kidd v. Norman, 651 F.3d 947 (8th Cir. 2011). During the investigation, detectives interviewed Kayla, and she identified Merrill and Kidd as the murderers. *Kidd II*, 75 S.W.3d at 807. The court allowed the statements of detectives Jay Thompson, Robert Guffrey, and Jay Pruetting under a hearsay exception. *Id.* The exception permitted "testimony of a secondary witness introduced for corroboration of an identifying witness's unimpeached testimony concerning extrajudicial identification of the accused . . . ." State v. Harris, 711 S.W.2d 881, 885 (Mo. 1986) (en banc).
37. *Kidd II*, 75 S.W.3d at 806.
38. *Id.* at 807.
39. *Id.* at 806-07.
40. *Id.*

hearsay statements that did not qualify for an exception; in denying Kidd's request to sever from his co-defendant, Merrill; and in allowing testimony regarding Kidd's nickname as it was unfairly prejudicial.[41] The Missouri Court of Appeals for the Western District of Missouri noted that a portion of the hearsay statements qualified for an exception.[42] Additionally, the court determined the alibi evidence Kidd presented at the trial was not irreconcilable with Merrill's mistaken identity defense, meaning the joint trial did not prejudice Kidd.[43] Finally, the court determined that Harris's testimony regarding the nickname was relevant to describe the murderer's manner or demeanor and, thus, was not unfairly prejudicial.[44] Thus, the appellate court affirmed the trial court's judgment.[45]

Kidd filed a petition for post-conviction relief in the Missouri Court of Appeals due to ineffective assistance of counsel.[46] The Sixth Amendment of the United State Constitution prohibits ineffective assistance of counsel.[47] Kidd alleged that his appellate counsel did not challenge the trial court's determination that Kidd was a prior offender.[48] The appellate court affirmed the denial of Kidd's petition

41. *Kidd I*, 990 S.W.2d at 177. During Harris's testimony, Harris referred to Kidd as "[t]he Terminator," which Kidd argued was unfairly prejudicial. *Id.*

42. *Id.* at 180. Further, the court noted the remaining testimony was hearsay, yet admissible absent a showing that "the error was so prejudicial that it deprived the defendant of a fair trial." *Id.* at 181 (quoting State v. Richardson, 923 S.W.2d 301, 311 (Mo. 1996) (en banc)).

43. *Kidd I*, 990 S.W.2d at 182. The trial court must sever the trial of co-defendants if those co-defendants present irreconcilable defenses. *Id.* (quoting State v. Oliver, 791 S.W.2d 782, 786 (Mo. Ct. App. 1990)). The appellate court determined Kidd's alibi defense and Merrill's mistaken identity defense were not "inherently irreconcilable." *Id.*

44. *Id.* at 185.

45. *Id.* at 186.

46. *Kidd II*, 75 S.W.3d at 806. Missouri Rule 29.15 states, "A person convicted of a felony after trial claiming that the . . . sentence imposed violates . . . the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel . . . may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15." MO. CT. R. CRIM. P. 29.15.

47. U.S. CONST. amend. VI. The relevant part of the Sixth Amendment of the United States Constitution reads, "In criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . *and to have the Assistance of Counsel for his defense*." *Id.* (emphasis added). *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (noting that the constitutional right to counsel is understood as the effective assistance of counsel, meaning the ineffective assistance of counsel may establish a constitutional violation).

48. *Kidd II*, 75 S.W.3d at 806. Kidd elaborated that during his appeal, his counsel did not object to Kidd being sentenced as a prior offender, even though nothing in the information shown to the court demonstrated that he was a prior offender. *Id.* Further, the lack of notice of the State's intention to charge him as a prior offender violated his constitutional right to due process. *Id.* The trial court sentenced Kidd to life imprisonment without the possibility of parole for the murder charges and a life sentence for each of the armed criminal action charges, all to be served consecutively. *Id.* at 807. The

because while Kidd's appellate counsel erred, Kidd did not suffer prejudice as a result.[49] The Missouri Court of Appeals explained Kidd's sentence, life imprisonment without the possibility of parole, was the minimum sentence for non-capital first-degree murder and, thus, the failure to challenge the improper sentencing did not prejudice Kidd.[50]

Kidd filed a petition for habeas corpus in the United State District Court for the Western District of Missouri.[51] The federal district court initially dismissed the petition, but Kidd obtained new counsel and filed a petition for relief for the final judgment based on several ineffective assistance of trial counsel claims.[52] Kidd acknowledged the claims were procedurally defaulted because Kidd did not raise the claims in the proceedings that followed his conviction.[53] However, Kidd claimed that he could circumvent the default by presenting new evidence that proved he was actually innocent of the crime.[54] The district court conducted an evidentiary hearing at which the court reviewed several pieces of new evidence.[55] The court reviewed the new evidence Kidd presented to support his assertion that Gary Godspeed Jr., Gary Godspeed Sr., and Marcus Merrill, Kidd's co-defendant, actually killed George Bryant and Oscar Bridges.[56] The new evidence included testimony from Merrill admitting Kidd was not involved in the murders.[57] Additionally, Kidd presented evidence that Godspeed

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trial court took into account Kidd's status as a prior offender in his sentencing. *Id.* at 806.

49. *Id.*

50. *Id.* The Missouri Court of Appeals vacated the trial court's sentence, dismissed the armed criminal action charges, and resentenced Kidd based on two counts of first degree, non-capital murder. *Id.* at 808. The appellate court did not sentence Kidd as a prior offender. *Id.*

51. *Kidd III*, 651 F.3d at 947. Kidd based the petition on § 2254 of the United States Code. *Id.* (citing 28 U.S.C. § 2254 (2012)). This federal statute provides that

> [t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States.

28 U.S.C. § 2254. Kidd relied on the aforementioned ineffective assistance of counsel claim as the constitutional violation that merited a writ of habeas corpus. *Kidd III*, 651 F.3d at 947.

52. *Id.* at 947, 949.

53. *Id.* at 949. Kidd failed to raise the ineffective assistance of counsel claims in the state proceedings, and as a result, the claims were procedurally defaulted in the district court. *Id.*

54. *Id.* Kidd asserted a *Schlup* actual innocence claim, the purpose of which is to circumvent procedurally defaulted claims. *Id.* at 951. The United States Supreme Court has noted that procedural default "prohibits subsequent habeas consideration of claims not raised, and thus defaulted." McCleskey v. Zant, 499 U.S. 467, 490 (1991).

55. *Kidd III*, 651 F.3d at 949-50.

56. *Id.* at 949.

57. *Id.* Merrill admitted during cross examination that he and Kidd spoke while Merrill was in prison. *Id.* During that time, Kidd implied that his attorney could assist

Sr. had contacted Kidd before the murders, attempting to obtain Kidd's help in robbing Bryant, and Godspeed Sr. confessed to murdering Bridges and Bryant.[58] Furthermore, the evidence included new testimony from eyewitness Richard Harris, which greatly discredited Harris as a witness.[59]

The federal district court denied the petition, reasoning the new evidence upon which Kidd based his claim was available to the defense at the original trial and, thus, did not satisfy the requirements for a showing of actual innocence.[60] The court determined Merrill's most recent testimony was the only piece of new evidence, and the court deemed Merrill an unreliable witness.[61]

In the face of defeat in the federal district court, Kidd then obtained a certificate of appealability from the United States Court of Appeals for the Eighth Circuit.[62] On appeal to the Eighth Circuit, Kidd claimed the district court erred in applying an overly narrow standard of new evidence.[63] Kidd asserted the Eighth Circuit's standard for new evidence, as laid out in *Amrine v. Bowersox*,[64] was inconsistent with the standard for actual innocence established in *Schlup v. Delo*[65] and *House v. Bell*[66] by the United States Supreme Court.[67]

On appeal, Kidd presented additional new evidence to the Eighth Circuit.[68] The evidence demonstrated Merrill and the Godspeeds traveled from Georgia to Kansas City together a few days before the murders.[69] Additionally, the evidence indicated a close relationship between Merrill and the Godspeeds, including evidence demonstrating

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Merrill in reducing his sentence if he testified. *Id.* The court later determined that this admission reduced Merrill's credibility as a witness because it showed that Merrill had an incentive to lie for Kidd to obtain release. *Id.* at 950.

58. *Id.*

59. *Id.* Harris's testimony was discredited because of his connections to drugs, the fact that he was potentially high at the time he observed the murders, and other inconsistencies in his testimony. *Id.*

60. *Id.*

61. *Id.*

62. *Id. See also* FED. R. APP. P. 22 ("In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice . . . issues a certificate of appealability under 28 U.S.C. § 2253(c)."). Kidd's proceeding arose under 28 U.S.C. § 2254 and, therefore, required a certificate of appealability. *Kidd III*, 651 F.3d at 947, 950.

63. *Kidd III*, 651 F.3d at 947. The Eighth Circuit quoted the precedential case *Amrine v. Bowersox*, which specifically states, "Evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Id.* (quoting Amrine v. Bowersox, 238 F.3d 1023, 1029 (8th Cir. 2001)).

64. 238 F.3d 1023 (8th Cir. 2001).

65. 513 U.S. 298 (1995).

66. 547 U.S. 518 (2006).

67. *Kidd III*, 651 F.3d at 951, 953.

68. *Id.* at 951.

69. *Id.*

Godspeed Sr. employed Merrill, and Merrill lived with Godspeed Jr. at one point.[70] Godspeed Sr. rented a car the day before the murders that matched the description of the car witnessed leaving the crime scene.[71] Merrill and the Godspeeds were together the morning of the shooting, had access to the guns used in the murders, and communicated their plans to rob someone later that day.[72] Kayla knew Godspeed Jr. as her father's brother, and on two occasions during the murder investigation, Kayla identified the murderer as her father's brother.[73] Beyond establishing the connection between Merrill and the Godspeeds with the murder, Kidd provided evidence that strengthened his alibi and impeached the eyewitness, Harris.[74]

The Eighth Circuit affirmed the denial of Kidd's successive habeas petition.[75] The appellate court reasoned that precedent compelled the court to apply the standard from *Amrine*, which defined new evidence as evidence that was not presented at the original trial and could not have been discovered with reasonable diligence at the time of the original trial.[76] The court determined that all of the new evidence presented by Kidd was not new according to the *Amrine* standard.[77] Due to the factual similarity between *Amrine* and Kidd's case, the Eighth Circuit felt compelled to decide this case in a similar manner and denied Kidd's petition.[78] Kidd then appealed to the United States Supreme Court, which denied certiorari.[79]

III. BACKGROUND

A. The Supreme Court's General Treatment of Actual Innocence Claims

1. The Carrier *Standard*

In *Murray v. Carrier*,[80] the United States Supreme Court determined that a petitioner must show cause for a procedural default in

70. *Id.* Additionally, Merrill paid for a room at a hotel where Godspeed Sr. stayed the night before the murders. *Id.*

71. *Id*. The car in question was a white Oldsmobile, which several witnesses claimed to have seen leaving the crime scene. *Id.*

72. *Id.*

73. *Id.* On two occasions Kayla told the police "daddy's brother killed daddy." *Id.*

74. *Id.* The evidence included Harris's history with drugs, his marijuana use at the time of the murders, the inconsistencies between the description of the shooter and Kidd, and other eyewitness testimony that did not place Harris outside of the Bryant home at the time of the murders. *Id.*

75. *Id.* at 954.

76. *Id.* at 953.

77. *Id.*

78. *Id.*

79. Kidd v. Norman, 133 S. Ct. 137 (2012).

80. 477 U.S. 478 (1986).

order for the court to address the successive habeas petition.[81] The Court noted that an attorney's inadvertent failure to raise a claim of error in the prior post-conviction proceedings does not show cause for a procedural default; thus, the court cannot hear the defaulted claim.[82] However, a court may hear the petitioner's claim if the petitioner can establish the petitioner's actual innocence.[83] In *Smith v. Commonwealth of Virginia*,[84] the underlying case in *Carrier*, a jury convicted Michael Smith of capital murder following rape.[85] Without his knowledge, Smith's counsel appealed to the Virginia Supreme Court without mentioning certain errors that occurred at trial.[86] However, the Supreme Court denied certiorari, noting that courts only recognize errors assigned within the appeals and the errors were not mentioned in Smith's appeal to the Virginia Supreme Court.[87]

After an additional petition and denial, Smith filed a petition for a writ of habeas corpus.[88] The United States District Court for the Eastern District of Virginia denied the petition, holding that Smith's claimed error regarding the prosecutor withholding the victim's statements was procedurally defaulted because Smith did not raise it in his original appeal to the Virginia Supreme Court.[89]

Smith then appealed to the United States Court of Appeals for the Fourth Circuit, claiming that his attorney inadvertently left the claim of error out of his initial appeal, resulting in the default.[90] Smith argued that because the claim was mistakenly excluded on appeal, the Fourth Circuit should hear his petition.[91] Smith did not assert a Sixth Amendment ineffective assistance of counsel claim because he believed that his attorney had mistakenly, as opposed to intentionally, left the claim out of his appeal.[92] The Fourth Circuit remanded the

81. Murray v. Carrier, 477 U.S. 478, 485 (1986). Procedural default is defined as requiring "federal courts to deny consideration of the merits of a federal constitutional claim raised by a prisoner convicted in state court whenever the relevant state procedural law would find the claim 'defaulted.'" Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737, 738 (1991).

82. *Carrier*, 477 U.S. at 482.

83. *Id.* at 497.

84. 248 S.E.2d 135 (Va. 1978).

85. *Carrier*, 477 U.S. at 482.

86. *Id.* Smith asserted that the state court judge erred in part in not keeping statements of the victim out of evidence. *Id.* The court referred to the omission of the statement as the "discovery claim." *Id.*

87. *Id.*

88. *Id.* at 483.

89. *Id.* The court explained the petitioner should show cause for the procedural default in state court. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

case to the district court, reasoning that cause of the default only needed to be the result of the attorney's inattention or inadvertent action, not necessarily a deliberate tactical strategy.[93] In the face of the remand, the petitioner appealed to an en banc panel in the Fourth Circuit, which determined only deliberate decisions to exclude a claim from a petition for habeas corpus satisfy the cause requirement.[94] The United States Supreme Court ultimately granted certiorari to decide the issue.[95]

The Supreme Court determined the Fourth Circuit erred in applying the wrong standard for evaluating cause of a procedural default.[96] The Court held the petition was procedurally defaulted, yet Smith could bypass that default by showing Smith was actually innocent of the crime.[97] The Court reasoned a petitioner must demonstrate that it is more likely than not a constitutional violation resulted in the conviction of an innocent person.[98]

2. The Sawyer *Standard*

In *Sawyer v. Whitley*,[99] the United States Supreme Court held that to circumvent the procedural bar to successive habeas corpus petitions based on a showing of actual innocence, the petitioner must show by clear and convincing evidence that but for the constitutional error underlying the petition, no reasonable jury would have sentenced the petitioner to death under state law.[100] In *State v. Sawyer*,[101] the underlying cause of action for *Sawyer v. Whitley*, the state of Louisiana convicted Robert Wayne Sawyer of first-degree murder for the death of Fran Arwood, sentencing Sawyer to death.[102] The

93. *Id.* at 483-84.
94. *Id.*
95. *Id.* at 481-82. The Court noted a counsel's conduct that does not reach the standard for ineffective assistance according to the Sixth Amendment does not create cause for procedural default. *Id.* at 484.
96. *Id.* at 488.
97. *Id.* at 497. If the petitioner could demonstrate his innocence, the Court would hear his petition even though he did not raise the constitutional error in earlier appeals. *Id.*
98. *Id.* at 496. The Supreme Court later elaborated that the *Carrier* standard requires the petitioner to demonstrate that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. Schlup v. Delo, 513 U.S. 289, 327 (1995) [hereinafter *Schlup I*]. This is a lesser standard than the *Sawyer* standard, which required that the petitioner show by clear and convincing evidence that no reasonable juror would have convicted in light of the new evidence. *Schlup I*, 513 U.S. at 327.
99. 505 U.S. 333 (1992).
100. Sawyer v. Whitley, 505 U.S. 333, 336 (1992) [hereinafter *Sawyer II*].
101. 422 So. 2d 95 (La. 1982).
102. State v. Sawyer, 422 So. 2d 95, 97 (La. 1982) [hereinafter *Sawyer I*], *aff'd sub nom.* Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

sentence was based on evidence that Sawyer committed aggravated arson at the time of the murder by dousing the victim with lighter fluid and lighting her on fire.[103] The trial court determined that the aggravated arson was an aggravating circumstance, justifying a death sentence under Louisiana state law.[104] The Supreme Court of Louisiana affirmed Sawyer's conviction, reasoning the evidence used to convict Sawyer showed Sawyer possessed the intent to commit murder.[105]

Sawyer filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana, but the federal district court denied relief because Sawyer failed to base his petition on a constitutional violation.[106] The United States Court of Appeals for the Fifth Circuit affirmed the denial because the petition did not warrant relief.[107]

After a series of appeals and petitions for post-conviction relief, including two writs of certiorari to the United States Supreme Court, Sawyer finally reached the Supreme Court in 1992.[108] The Supreme Court granted certiorari to review the petitioner's second petition for habeas relief based upon Sawyer's claim that he was actually innocent of the crime.[109] Sawyer contended the Fifth Circuit erred in 1) determining Sawyer did not sufficiently demonstrate the cause of his failure to raise certain claims in his first habeas petition and 2) finding Sawyer failed to demonstrate his actual innocence of the crime.[110] Sawyer asserted because the Fifth Circuit noted that Sawyer failed to demonstrate his actual innocence of the crime, the Fifth Circuit could not reach the merits of the claim.[111]

The Supreme Court reasoned that if a petitioner cannot show cause for the failure to raise the issues in his first petition and prejudice resulting therefrom, the petitioner can still circumvent the general bar to a second petition if the petitioner can show that the petitioner was actually innocent of the crime.[112] The Court empha-

103. *Sawyer I*, 422 So. 2d at 99.
104. *Id.* at 102.
105. *Id.* at 99. The district court specifically noted that its review was not to take the place of the jury in sentencing but, instead, to see if improper motivations or arbitrary factors had a role in the sentencing. *Id.* at 106.
106. Sawyer v. Whitley, 772 F. Supp. 297, 308 (1991) [hereinafter *Sawyer III*].
107. Sawyer v. Butler, 848 F.2d 582, 585-86 (5th Cir. 1988) [hereinafter *Sawyer IV*], *aff'd sub nom.* Sawyer v. Whitley, 505 U.S. 333, 336 (1992).
108. *Sawyer II*, 505 U.S. at 337-38.
109. *Id.* at 335-36.
110. *Id.* at 336.
111. *Id.* at 335-36.
112. *Id.* at 338-39. *See also* Wainwright v. Sykes, 433 U.S. 72, 77 (1977) (noting that without a showing of cause for the failure to raise a pretrial objection to an indictment and the resulting prejudice, a petition for habeas corpus would be procedurally barred).

sized that a petitioner must demonstrate by clear and convincing evidence that without constitutional error in failing to present the evidence underlying the claim of actual innocence, no reasonable juror could have determined that the defendant was eligible for a sentence of death.[113] The Court held that Sawyer failed to meet this standard and, thus, affirmed the second denial of Sawyer's habeas corpus petition.[114]

3. Schlup v. Delo*: Supreme Court Adopts the* Carrier *Standard Instead of the* Sawyer *Standard for Purposes of the Actual Innocence Gateway*

In *Schlup v. Delo*,[115] the United States Supreme Court determined the standard established in *Murray v. Carrier*, rather than the standard established in *Sawyer v. Whitely*, applies to procedurally barred successive petitioners for habeas corpus when the petitioner claims to be actually innocent of the crime.[116] In *Schlup*, a Missouri jury convicted Lloyd Schlup, a prisoner in a Missouri penitentiary, for assisting in the murder of another inmate.[117] The trial court sentenced Schlup to death.[118] Through a petition for habeas corpus in the United States District Court for the Eastern District of Missouri, Schlup asserted that because of the ineffective assistance of his counsel, the trial court did not contemplate evidence that showed he was actually innocent of the crime.[119] The district court refused to review the evidence in question, reasoning that Schlup's petition did not satisfy the *Sawyer* standard by showing with clear and convincing evidence that but for the underlying constitutional error, no reasonable juror would determine Schlup was guilty.[120]

Schlup appealed to the United States Court of Appeals for the Eighth Circuit, claiming the district court erred in 1) failing to reach the merits of his claim because evidence demonstrated cause and prejudice and 2) failing to find that he was actually innocent of the murder.[121] The Eighth Circuit affirmed the district court's denial of Schlup's cause and prejudice claim as well as his actual innocence claim.[122] The court reasoned that Schlup failed to meet the *Sawyer*

113. *Sawyer II*, 505 U.S. at 336.
114. *Id.* at 350.
115. 513 U.S. 298 (1995).
116. *Schlup I*, 513 U.S. at 326-27.
117. *Id.* at 302-05.
118. *Id.* at 305.
119. *Id.* at 306.
120. *Id.* at 301, 306.
121. Schlup v. Delo, 11 F.3d 738, 739 (8th Cir. 1993) [hereinafter *Schlup II*].
122. *Schlup I*, 513 U.S. at 301.

standard requiring clear and convincing evidence that no reasonable juror would have found him guilty of murder.[123]

Schlup then appealed to the United States Supreme Court, which granted certiorari to decide whether the *Carrier* standard or the more stringent *Sawyer* standard was more appropriate in procedurally barred habeas claims where a petitioner asserts his actual innocence.[124] In reviewing both standards, the Court determined the *Carrier* standard was more appropriate in reviewing actual innocence claims.[125] The Court recognized that society's interest in finality, comity, and preservation of judicial resources generally prohibits courts from examining the merits of a second habeas petition.[126] However, the Court emphasized these interests must be balanced against society's interest in preventing a fundamental miscarriage of justice.[127]

The Court determined that the standard from *Carrier*, as opposed to the *Sawyer* standard, incorporated the balance of these interests when the petitioner asserts that but for a constitutional violation the petitioner would not have been convicted.[128] The Court noted that a petitioner must base his or her innocence claim on new evidence that was not presented at the original trial.[129] The Court reasoned that the qualifications for actual innocence, namely that the petitioner is actually innocent of the crime and can support the claim with new, reliable evidence that was not presented at the trial level, are met in so few cases, so the less stringent *Carrier* standard adequately protects the individual's interest in preventing the fundamental injustice of a death sentence for an innocent person while not posing a significant threat to comity, finality, and preservations of judicial resources.[130] When a petitioner asserts an actual innocence claim to circumvent a procedural default to successive petitions for habeas corpus, the *Sawyer* standard does not adequately protect an individual's interest in avoiding a fundamental miscarriage of justice.[131]

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123. *Schlup II*, 11 F.3d at 743.

124. *Schlup I*, 513 U.S. at 301, 326-27.

125. *Id.* at 326-27.

126. *Id.* at 318.

127. *Id.* at 309.

128. *Id.* at 326-27.

129. *Id*. at 324.

130. *Id*. at 325-27.

131. *Id*. at 325-26. The court opined that "[t]he paramount importance of avoiding the injustice of executing one who is actually innocent thus requires application of the *Carrier* standard." *Id.*

B. THE CIRCUIT SPLIT

1. Application of the Broader Understanding of New Evidence: The Seventh and Ninth Circuits

a. The Seventh Circuit: *Gomez v. Jaimet*

In *Gomez v. Jaimet*,[132] the United States Court of Appeals for the Seventh Circuit determined a petitioner need only supply evidence newly presented to the court, as opposed to evidence not discoverable at the original trial with an exercise of due diligence, to support a claim of actual innocence in a procedurally barred habeas petition.[133] In *Gomez*, an Illinois trial court convicted Ariel Gomez of first-degree murder and sentenced him to thirty-five years in prison following a fatal drive-by shooting at a Chicago bus stop.[134] During trial, Gomez's attorney did not allow Gomez to testify.[135] Gomez appealed his conviction to the Illinois Appellate Court, asserting that he did not voluntarily waive the constitutional right to testify on his own behalf, and, therefore, Gomez's trial counsel was ineffective.[136] However, the appellate court affirmed his conviction.[137] Gomez then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, which denied the petition.[138] The district court reasoned that the ineffective assistance of counsel claim upon which Gomez based his petition was procedurally defaulted because Gomez had not raised the claim in his motion for a new trial in Illinois state court.[139] Additionally, the court noted Gomez did not demonstrate he was actually innocent of the murder as required to circumvent the procedural default.[140]

Gomez then appealed to the United States Court of Appeals for the Seventh Circuit, asserting that his claim of actual innocence overcame the procedural default.[141] The Seventh Circuit emphasized Gomez must support the actual innocence claim with new reliable evidence that was not presented at trial.[142] The State argued Gomez must support his claim of actual innocence with newly discovered reli-

132. 350 F.3d 673 (7th Cir. 2003).
133. Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003).
134. *Gomez*, 350 F.3d at 675-76.
135. *Id.* at 675.
136. *Id.* at 677.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* Gomez premised his ineffective assistance of counsel claim on the fact that his attorney did not advise Gomez to testify at trial. *Id.* The court based the procedural default in the state court proceeding on the fact that Gomez did not raise the ineffective assistance of counsel claim in his motion for a new trial. *Id.*
141. *Id.* at 678.
142. *Id.* at 679.

able evidence.[143] In response, the Seventh Circuit noted there was nothing in *Schlup v. Delo*[144] to indicate that new evidence needed to be unavailable at the original trial.[145] The court went on to explain that requiring new evidence to be newly discoverable when a petitioner asserts an ineffective assistance of counsel claim would add a roadblock to the actual innocence gateway laid out in *Schlup*.[146] The court determined the standard for an actual innocence gateway claim is sufficiently stringent and noted it was inappropriate to develop an additional roadblock that had no Supreme Court approval.[147]

b. The Ninth Circuit: *Griffin v. Johnson*

In *Griffin v. Johnson*,[148] the United State Court of Appeals for the Ninth Circuit held that to circumvent a procedural bar to a successive habeas corpus petition based on a claim of actual innocence, the petitioner must present new, reliable evidence that was not presented at the original trial.[149] In *Griffin*, James Griffin was indicted for intentional murder in Oregon state court.[150] Griffin, encouraged by his attorney, accepted a plea bargain for a twenty-five year prison sentence after a key expert witness changed his testimony immediately before trial.[151] However, Griffin later applied for post-conviction relief in Oregon state court where, as required by Oregon state law, he asserted that he did not voluntarily or intelligently admit guilt.[152] Griffin also asserted ineffective assistance of counsel claims because Griffin's attorney refused to investigate Griffin's mental illness.[153] Griffin did not present any evidence to support either claims in the post-convic-

143. *Id*.
144. 513 U.S. 298 (1995).
145. *Gomez*, 350 F.3d at 679.
146. *Id.* at 680.
147. *Id.* The court determined the threshold for an actual innocence claim is sufficiently high because the court requires a petitioner to present new, exculpatory evidence that would make any reasonable juror more likely than not to acquit the petitioner. *Id.* at 179-80.
148. 350 F.3d 956 (9th Cir. 2003).
149. Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003).
150. *Griffin*, 350 F.3d at 959.
151. *Id.* Griffin's attorney relied upon an expert witness testifying that a fingerprint on the murder weapon did not match Griffin's, which was the primary basis of Griffin's defense. *Id.* The expert changed his mind, deciding he could not conclusively testify that the fingerprint belonged to Griffin. *Id.* Additionally, Griffin's lawyer did not pursue an insanity defense, even though Griffin informed him of a childhood mental illness diagnosis and a court's conclusion in an unrelated attempted rape conviction that Griffin needed psychiatric care. *Id.* Instead, Griffin's lawyer informed Griffin for the first time that he could be sentenced to life in prison if he did not accept the plea bargain. *Id.*
152. *Id.*
153. *Id.*

tion hearing so the court affirmed his conviction.[154] Griffin then appealed to the Oregon Court of Appeals based on a claim that his trial attorney had a conflict of interest.[155] The court of appeals also affirmed Griffin's conviction.[156]

Griffin then petitioned for federal habeas corpus relief to the United States District Court for the District of Oregon based, in part, on an ineffective assistance of counsel claim.[157] The district court denied the petition, reasoning Griffin's claims were procedurally defaulted because Griffin failed to show cause and prejudice or actual innocence to bypass the procedural default on his claim.[158] However, the district court issued a certificate of appealability for Griffin's ineffective assistance of counsel claim.[159]

Griffin appealed to the United States Court of Appeals for the Ninth Circuit, claiming the new evidence presented to support his claim of actual innocence only needed to be newly presented, not newly discovered.[160] The Ninth Circuit noted the United States Supreme Court's discussion of newly presented evidence versus newly discovered evidence in *Schlup*.[161] Consequently, the Ninth Circuit determined that evidence used to support a claim of actual innocence needs only to be newly presented, not newly discovered.[162] The Ninth Circuit determined that in light of the newly presented evidence furnished by Griffin, it was still not more likely than not that no reasonable juror would have convicted Griffin of the crime; therefore, the Ninth Circuit affirmed the decision of the district court.[163]

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154. *Id.*

155. *Id.* Griffin dropped the ineffective assistance of counsel claim and involuntary admission claim. *Id.* Griffin asserted the conflict of interest claim because his attorney had previously prosecuted Griffin on multiple occasions. *Id.*

156. *Id.*

157. *Id.* at 960.

158. *Id.* Under precedent established in *Sawyer v. Whitely*, a court is not entitled to reach the merits of a successive habeas petition based on claims that have been procedurally defaulted by the petitioner not properly pleading all of his claims in state court unless he demonstrates the cause of the default and the prejudice resulting therefrom. Sawyer v. Whitely, 505 U.S. 333, 338-39 (1992). A court can reach the merits of the petition if the petitioner can present evidence to show that he is actually innocent of the crime. *Sawyer II*, 505 U.S. at 339.

159. *Griffin,* 350 F.3d at 960.

160. *Id.* at 961. Griffin defined newly presented evidence as evidence that had not been presented to the trial court. *Id.*

161. *Id.* at 961-62. The Ninth Circuit specifically noted the use of "evidence that was not presented at trial" in Justice Stevens's opinion in *Schlup v. Delo*. *Id.* Additionally, the Ninth Circuit referenced the use of "newly discovered evidence" in Justice O'Connor's concurrence in the *Schlup* opinion. *Id.*

162. *Id.* at 962. The Ninth Circuit cited to its previous opinions in *Sistrunk v. Armenakis* and *Majoy v. Roe*, which both required new evidence be newly presented, not newly discovered. *Id.*

163. *Id.* at 965-66.

2. Application of the Moderate Understanding of New Evidence: The Third Circuit

a. The Third Circuit: *Hubbard v. Pinchack*

In *Hubbard v. Pinchack*,[164] the United States Court of Appeals for the Third Circuit determined that new evidence used to support a claim of actual innocence in a procedurally barred habeas petition is sufficient if it is not simply a repackaging of the evidence shown at trial.[165] In *Hubbard*, the State of New Jersey convicted Frank Hubbard of murder.[166] Hubbard appealed the conviction through the state court system without success.[167] Hubbard then filed a petition for habeas corpus in the United States District Court for the District of New Jersey.[168] The district court denied Hubbard's first habeas petition, reasoning the claims Hubbard presented, including a claim of ineffective assistance of counsel, were procedurally defaulted because he did not assert the claims in his state court proceedings.[169]

Hubbard then appealed to the Third Circuit, claiming that the district court erred in denying his petition for habeas relief based on actual innocence.[170] The Third Circuit affirmed the denial of post-conviction relief, reasoning that the only new evidence that Hubbard set forth to support his claim of actual innocence was his own testimony.[171] The court reasoned that allowing a defendant's own testimony to satisfy the new evidence requirement for an actual innocence claim would set the bar far too low, allowing almost anyone to pass through the actual innocence gateway.[172]

b. The Third Circuit: *Houck v. Stickman*

In *Houck v. Stickman*,[173] the United States Court of Appeals for the Third Circuit determined that evidence used to support a claim of actual innocence only needs to be newly presented evidence if that same evidence is used to support the underlying ineffective assistance of counsel claim.[174] In *Houck*, Houck was prosecuted for and con-

164. 378 F.3d 333 (3d Cir. 2004).
165. Hubbard v. Pinchack, 378 F.3d 333, 341 (3d Cir. 2004).
166. *Hubbard*, 378 F.3d at 336.
167. *Id.* at 336-37.
168. *Id.* at 336.
169. *Id.* at 336-37. The court noted that Hubbard did not argue that he was actually innocent. *Id.* at 336.
170. *Id.* at 337.
171. *Id.* at 341-42.
172. *Id.* at 341.
173. 625 F.3d 88 (3d Cir. 2010).
174. Houck v. Stickman, 625 F.3d 88, 94-95 (3d Cir. 2010).

victed of kidnapping, among several other charges.[175] Houck filed a petition for state habeas corpus relief, which did not contain an ineffective assistance of counsel claim based on Houck's counsel's failure to raise an alibi defense in his original trial, but he did raise other ineffective assistance of counsel claims.[176] Houck's petition was denied in state trial court as well as state appellate court.[177] Houck then filed a petition for habeas corpus in the United States District Court for the Western District of Pennsylvania, again asserting ineffective assistance of counsel claims, which included a claim regarding his alibi defense.[178] The district court denied the petition because the claims were procedurally barred.[179] The court noted that Houck did not establish cause and prejudice or actual innocence, which is required to circumvent the procedural bar.[180] Thereafter, however, the court granted Houck a certificate of appealability to address the actual innocence claim.[181]

Houck appealed to the United States Court of Appeals for the Third Circuit.[182] The Third Circuit noted that it chose to review Houck's claim because Houck asserted that he was actually innocent of the crime and Houck insisted that but for the constitutional violation in his original trial, he would not have been convicted.[183] The Third Circuit emphasized that Houck would need to demonstrate that he was actually innocent based on new, reliable evidence and that it was more likely than not that no reasonable juror would have convicted Houck.[184] Thus, reasoning that Houck did not present a preponderance of evidence proving that no reasonable juror would find him guilty, the Third Circuit affirmed the district court's denial.[185]

Despite denying post-conviction relief, the Third Circuit importantly noted that it would be unfair to require new evidence to be newly presented and not available at the time of the original trial with an exercise of due diligence in ineffective assistance of counsel claims that were predicated on the counsel's failure to uncover or present exculpatory evidence at trial.[186] The court reasoned that to circumvent

175. *Houck*, 625 F.3d at 90. The other charges included "aggravated assault, carrying a firearm without a license, reckless endangerment, and criminal conspiracy." *Id.*
176. *Id.* at 91.
177. *Id.*
178. *Id.*
179. *Id.* at 92.
180. *Id.* Houck did not explicitly assert an actual innocence claim in his petition, so the judge did not address actual innocence. *Id.*
181. *Id.* at 92-93.
182. *Id.* at 93.
183. *Id.*
184. *Id.*
185. *Id.* at 95, 97.
186. *Id.* at 94.

the procedural bar to the subsequent habeas petition, a petitioner must present new, reliable evidence to prove actual innocence.[187] If the petitioner could present new, reliable evidence, the court could reach the merits of the ineffective assistance of counsel claim.[188]

The problem is, the court noted, if the petition bases the ineffective assistance of counsel claim on the attorney's failure to discover exculpatory evidence at the time of the original trial, the very evidence that proves the ineffective assistance of counsel claim cannot be used to support the actual innocence claim because it would not be considered new by the more restrictive standard.[189] The situation would place the petitioner in a catch twenty-two in that the petitioner must assert the evidence is new and could not have been discovered with due diligence to pass through the actual innocence gateway.[190] After the petitioner gets through the gateway, the petitioner then must assert that the evidence could have been discovered with due diligence to prove that the counsel was ineffective.[191] The court determined that requiring evidence to be newly presented to support an actual innocence claim is a more equitable approach when the underlying constitutional violation is ineffective assistance of counsel based on the attorney not discovering exculpatory evidence.[192] Even in light of the new approach, Houck's evidence was insufficient to reach the threshold requirement, which mandates that it be more likely than not that no reasonable juror would have convicted Houck in light of the new evidence.[193]

3. Application of the Narrow Understanding of New Evidence: The Eighth Circuit

a. The Eighth Circuit: *Amrine v. Bowersox*

In *Amrine v. Bowersox*,[194] the United States Court of Appeals for the Eighth Circuit determined new evidence must be newly presented and not available at the original trial with an exercise of due diligence.[195] In *Amrine*, the State of Missouri prosecuted and convicted Joseph Amrine, then a prisoner in a federal penitentiary, for the mur-

187. *Id.* at 93.
188. *Id.*
189. *Id.* at 94.
190. *Id.*
191. *Id.* The court was specifically referencing the approach passed down in *Gomez v. Jaimet*. *Id.*
192. *Id.*
193. *Id.* at 95. Namely, the court noted that it was not more likely than not that no reasonable juror would have found Houck guilty of the crimes. *Id.*
194. 238 F.3d 1023 (8th Cir. 2001).
195. Amrine v. Bowersox, 238 F.3d 1023, 1029 (8th Cir. 2001).

der of a fellow inmate.[196] The Missouri Supreme Court affirmed Amrine's conviction and denied his subsequent request for post-conviction relief.[197] Amrine then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri.[198] The district court denied Amrine's first petition of habeas corpus.[199] Amrine filed an amended petition in district court, intending to bypass the procedural bar by asserting a claim of actual innocence.[200] However, the district court again denied his claim, determining the new evidence Amrine used to support the claim of actual innocence was not reliable, as mandated by the Supreme Court.[201]

Amrine then appealed to the Eighth Circuit, claiming the district court misapplied *Schlup v. Delo* by requiring the evidence be unavailable with an exercise of diligence at the time of the original trial.[202] The Eighth Circuit affirmed the denial, reasoning that most of the new evidence presented by Amrine would have been available at the first trial and the only piece of legitimately new evidence was unreliable.[203]

b. The Eighth Circuit: *Nash v. Russell*

In *Nash v. Russell*,[204] the United States Court of Appeals for the Eighth Circuit affirmed the denial of Donald Nash's second federal petition for habeas corpus, reasoning Nash failed to present new evidence that had not been presented at his trial and could not have been discovered with an exercise of diligence to support his actual innocence claim.[205] The murder of Judy Spencer had remained unsolved until 2007, at which point investigators reopened the investigation to analyze DNA evidence found on Spencer's body.[206] After investigators determined Nash's DNA matched the DNA found under Spencer's fin-

196. *Amrine*, 238 F.3d at 1026.

197. *Id.*

198. *Id.*

199. *Id.* The court noted the basis of the denial was that the claims were without merit or procedurally barred. *Id.*

200. *Id.*

201. *Id.* at 1026, 1028. The Supreme Court determined a petitioner must support a claim for actual innocence with new, reliable evidence. *Schlup I*, 513 U.S. at 324.

202. *Amrine*, 238 F.3d at 1029.

203. *Id.* An incriminating witness from Amrine's initial trial had recanted his testimony, but the district court found the witness to be unreliable. *Id.* at 1028. The Eighth Circuit noted that the district court's credibility determinations are reviewed with great deference and found no reason to overturn the determinations. *Id.* at 1029.

204. 807 F.3d 892 (8th Cir. 2015).

205. Nash v. Russell, 807 F.3d 892, 899 (8th Cir. 2015).

206. *Nash*, 807 F.3d at 895.

gernails, Nash was charged with capital murder and convicted in Missouri state court in 2009.[207]

At Nash's trial, the state moved to exclude evidence indicating another potential suspect, which the court granted.[208] Nash filed a direct appeal based in part on the trial court excluding the third party suspect evidence in violation of Nash's Sixth Amendment rights.[209] The Missouri Supreme Court affirmed Nash's conviction, and Nash failed to file a motion for post-conviction relief in a timely manner.[210]

Nash then filed a petition for habeas corpus in the United States District Court for the Eastern District of Missouri, alleging Nash's actual innocence amongst other claims.[211] The court denied Nash's motion to amend his petition for habeas corpus to include new evidence supporting the claim.[212] Nash appealed to the Eighth Circuit, which affirmed the denial of the district court.[213] The Eighth Circuit reasoned the *Amrine* standard applied to new evidence in claims of actual innocence, which requires new evidence to not have been presented at the original trial and could not have been discovered earlier with an exercise of due diligence.[214] The court determined, without extensive elaboration, the evidence Nash presented was not new under the *Amrine* standard.[215] Thus, the Eighth Circuit determined Nash was not eligible for habeas relief in federal court, and affirmed the judgment of the district court.[216]

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207. *Id.*

208. *Id*. Specifically, the state requested DNA evidence from Lambert Anthony Feldman III that was found on Spencer's shoes be excluded under Missouri's direct connection rule. *Id.* The rule requires evidence implicating a third party suspect to show a direct connection to the crime. *Id.*

209. *Id.* at 896.

210. *Id.*

211. *Id.*

212. *Id*. Nash sought to include evidence of another unidentified male's DNA on the victim's shoes, a study regarding the likelihood of DNA remaining under someone's fingernails, and a report from an expert stating Nash's DNA was under the victim's fingernails because they cohabited. *Id.*

213. *Id.* at 898-99.

214. *Id.* at 899. The court also referenced the application of the *Amrine* standard in *Kidd v. Norman*, noting the prior discussion of the circuit split on the definition of new evidence and the approval of the *Amrine* standard. *Id. See also* Kidd v. Norman, 651 F.3d 947, 952-53 (8th Cir. 2011).

215. *Nash*, 807 F.3d at 899. The court noted the DNA evidence could have been discovered at the original trial with an exercise of due diligence, and the expert testimony and scientific study replicated what Nash presented at the original trial. *Id.*

216. *Id.*

C. The Supreme Court's Application of New Evidence in *House v. Bell*

In *House v. Bell*,[217] the United States Supreme Court determined the standard for invoking actual innocence to circumvent a procedural bar to a successive habeas petition is not the same as the standard for invoking claims under the Anti-Terrorism and Effective Death Penalty Act of 1996[218] governing claims of insufficient evidence.[219] In *House*, the State of Tennessee prosecuted and convicted Paul Gregory House for murder, sentencing him to death.[220] The Tennessee Supreme Court affirmed House's conviction and subsequently denied two petitions for post-conviction relief.[221] House filed a petition for habeas corpus in the United States District Court for the Eastern District of Tennessee based on several ineffective assistance of counsel claims.[222] The district court determined that the petition was procedurally defaulted but held an evidentiary hearing to determine if House's new evidence satisfied either the standard from *Schlup v. Delo*[223] for actual innocence or the standard from *Sawyer v. Whitely*[224] for ineligibility for the death penalty.[225] The court determined that House's evidence did not satisfy either standard and, thus, denied House's petition for relief.[226]

House appealed to the United States Court of Appeals for the Sixth Circuit.[227] In a split en banc decision, the Sixth Circuit affirmed the denial of the writ of habeas corpus.[228] However, the six dissenting judges argued House had met the lesser *Schlup* standard for actual innocence, which required that in light of new evidence, it was more likely than not that no reasonable juror would have con-

217. 547 U.S. 518 (2006).
218. 28 U.S.C. § 2254.
219. House v. Bell, 547 U.S. 518, 538-39 (2006).
220. *House*, 547 U.S. at 521. The jury in House's trial also found all three aggravating circumstances required to sentence House to death. *Id.* at 533. These circumstances are a previous conviction involving violence, a murder that is especially heinous, and a murder committed during the course of a rape or kidnapping. *Id.* at 532.
221. *Id.* at 533-34.
222. *Id.* at 534.
223. 513 U.S. 298 (1995).
224. 505 U.S. 333 (1992).
225. *House*, 547 U.S. at 534. *Schlup* requires that it be more likely than not that no reasonable juror would have convicted House of the crime in light of the new evidence. *Id.* at 536-37 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). The stricter *Sawyer* standard requires that House show by clear and convincing evidence that "but for a constitutional error, no reasonable juror would have found [House] eligible for the death penalty under the applicable state law." *Id.* at 539 (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992)).
226. *Id.* at 535.
227. *Id.*
228. *Id.* at 535-36.

victed House for the murder.[229] The majority of the en banc panel agreed with the district court, reasoning House's new evidence fell short of the requirements in *Schlup* and *Sawyer*.[230]

The Supreme Court granted certiorari and reversed the Sixth Circuit's ruling.[231] The Court noted in light of House's new evidence, it was more likely than not that no reasonable juror would have convicted House; therefore, the claim satisfied the *Schlup* standard for actual innocence.[232] House's new evidence consisted of DNA evidence, bloodstains on House's clothing, a new suspect, and testimony from witnesses.[233] The Supreme Court did not specifically determine the definition for new evidence in an actual innocence claim but determined that House's claim did meet the exacting standard under *Schlup*.[234] The Court reversed the denial of House's procedurally barred petition for habeas corpus and remanded the case back to the Sixth Circuit for proceedings consistent with the opinion.[235]

IV. ANALYSIS

In *Kidd v. Norman*,[236] the United States Court of Appeals for the Eighth Circuit incorrectly applied the narrowest definition of new evidence to evaluate Ricky Kidd's actual innocence claim for procedurally defaulted petitions for habeas corpus.[237] The Eighth Circuit erred in

229. *Id.* at 536-37. The dissenters also argued the evidence supporting House's actual innocence claim was so compelling that House was entitled to immediate release from prison under Sixth Circuit precedent. *Id.*

230. *Id.* at 535-36. For a more in-depth look at the reasoning laid out by the Sixth Circuit's majority and dissenting opinions, see House v. Bell, 386 F.3d 668 (6th Cir. 2004).

231. *House*, 547 U.S. at 536.

232. *Id.* at 554, 547-48.

233. *Id.* at 553-54.

234. *Id.* at 554.

235. *Id.* at 555, 537. The Court noted the State's concession that some of the evidence presented by House was new, so the issue of whether that evidence was actually new under the definition of new evidence was not before the Court. *Id.* at 537. However, the remainder of the evidence was not stipulated to by the State, and, thus, the Court's examination of such evidence to support House's actual innocence claim is telling. *Id.* When reviewing the evidence for purposes of House's actual innocence claim, the Court determined that much of the evidence House presented—including the bloodstain evidence and the new witness testimony—was new evidence. *Id.* The Court noted that its only job in a *Schlup* inquiry is to review all evidence, regardless of its admissibility at the initial trial, in order to "assess the likely impact of the evidence on reasonable jurors." *Id.* at 537-38 (quotations omitted).

236. 651 F.3d 947 (8th Cir. 2011).

237. *See infra* notes 23-79 and accompanying text. *See also* Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737, 738 (1991) (defining procedural default as requiring "federal courts to deny consideration of the merits of a federal constitutional claim raised by a prisoner convicted in state court whenever the relevant state procedural law would find the claim 'defaulted.'").

its definition of new evidence in an actual innocence claim due to the purposes underlying the actual innocence gateway in *Schlup v. Delo*,[238] the Supreme Court's use of new evidence in *House v. Bell*,[239] the inapplicability of the Eighth Circuit's definition to a petitioner's claim when the underlying constitutional violation is the ineffective assistance of counsel, and the exacerbation of the fundamental miscarriage of justice the actual innocence gateway is designed to prevent.[240]

After a jury convicted Kidd of first-degree murder, Kidd unsuccessfully appealed the conviction through the Missouri state judicial system.[241] Eventually, Kidd filed a writ of habeas corpus in the United States District Court for the Western District of Missouri, arguing he had a colorable ineffective assistance of counsel claim.[242] Although Kidd acknowledged he failed to raise the ineffective assistance of counsel claims in his state post-conviction proceedings, which generally default the claims, Kidd argued that the court should still address the procedurally defaulted claims because Kidd could show actual innocence.[243]

The district court denied the petition, reasoning that Kidd failed to present new, reliable evidence to support his claims, as required by the *Schlup* standard.[244] The *Schlup* standard, as created by the United States Supreme Court, allows a petitioner to escape a procedural default, such as a failure to raise an ineffective assistance of counsel claim in an earlier proceeding, if the habeas corpus petition is based on a constitutional violation.[245] A petitioner must demonstrate with new, reliable evidence that the petitioner is actually innocent of the crime.[246] Upon Kidd's appeal, the United States Court of Appeals for the Eighth Circuit determined the standard announced in *Amrine v. Bowersox*,[247] requiring that evidence supporting an actual inno-

238. 513 U.S. 298 (1995).
239. 547 U.S. 518 (2006).
240. *See infra* notes 249-354 and accompanying text.
241. *See* State v. Kidd, 990 S.W.2d 175, 186 (Mo. Ct. App. 1999) (finding the trial court did not abuse its discretion in allowing testimony at trial referring to Kidd as the "Terminator" because the evidence was more probative than prejudicial); State v. Kidd, 75 S.W.3d 804, 815 (Mo. Ct. App. 2002) (concluding the lower court's denial of Kidd's post-conviction motion, in which he claimed ineffective assistance of counsel, was not clearly erroneous).
242. Kidd v. Norman, 651 F.3d 947, 949 (8th Cir. 2011).
243. *Kidd III*, 651 F.3d at 947. To circumvent the procedural bar to successive federal petitions for habeas corpus, a petitioner must demonstrate either cause for the failure to raise a claim and the resulting prejudice or actual innocence of the underlying crime. Schlup v. Delo, 513 U.S. 298, 314-15 (1995).
244. *Kidd III*, 651 F.3d at 951-54.
245. *Schlup I*, 513 U.S. at 314-15.
246. *Id.* at 324.
247. 238 F.3d 1023 (8th Cir. 2001).

cence claim to have been unavailable and undiscoverable with an exercise of due diligence at the time of the original trial, was the appropriate standard to apply per stare decisis.[248]

First, this Analysis will show that new evidence for the purposes of an actual innocence gateway claim should be interpreted as evidence that is newly presented in order to be consistent with the purposes underlying *Schlup*.[249] Next, this Analysis will review the United States Supreme Court's decision in *House v. Bell*, specifically the Court's examination of newly presented, but previously available, evidence.[250] Then, this Analysis will demonstrate that the Eighth Circuit's definition of new evidence improperly precludes the actual innocence gateway for certain Sixth Amendment claims involving ineffective assistance of counsel.[251] Finally, this Analysis will expose the Eighth Circuit's error in continually applying the *Amrine* standard to actual innocence gateway claims because of its misquotation of *Schlup*, its inappropriate reliance on stare decisis, and its exacerbation of the very fundamental miscarriage of justice that the actual innocence gateway was designed to prevent.[252]

A. The Eighth Circuit's Application of the *Amrine* Standard is Inconsistent with the Purposes Underlying *Schlup v. Delo*

In *Schlup v. Delo*,[253] the Supreme Court acknowledged that the purpose of the actual innocence gateway was to balance the societal interest in finality, comity, and preservation of judicial resources with the accused individual's interest in preventing a fundamental miscarriage of justice.[254] To fulfill this purpose, the Supreme Court established a general disposition regarding the actual innocence gateway—a disposition of lenience over stringency.[255] Specifically, regarding the standard to prove claims of actual innocence, the *Schlup* Court determined that applying a more lenient standard of proof was more appropriate than a restrictive standard of proof because justice merits extra protection.[256]

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248. *Kidd III*, 651 F.3d at 953. The court noted it previously applied the *Amrine* standard to cases similar to Kidd's; thus, it was required to apply the *Amrine* standard to Kidd's actual innocence claim. *Id.*

249. *See infra* notes 253-271 and accompanying text

250. *See infra* notes 272-293 and accompanying text.

251. *See infra* notes 294-307 and accompanying text.

252. *See infra* notes 308-347 and accompanying text.

253. 513 U.S. 298 (1995).

254. Schlup v. Delo, 513 U.S. 298, 318-21 (1995).

255. *Schlup I*, 513 U.S. at 326-27.

256. *Id.*

Specifically, the standard from *Murray v. Carrier*[257] and the standard from *Sawyer v. Whitley*[258] both refer to the standard of proof required to raise an actual innocence claim after successive habeas petitions; however, they differ in the level of proof required.[259] The *Carrier* standard requires a petitioner whose second habeas petition is procedurally barred to show that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.[260] The *Sawyer* standard requires that a petitioner show by clear and convincing evidence that without the constitutional error underlying the claim of actual innocence, no reasonable juror would have found the petitioner eligible for the death penalty.[261] Therefore, as the Court noted in *Schlup*, the standard in *Carrier* is much more lenient.[262] Thus, to remain consistent with the purposes of the actual innocence gateway, the Supreme Court indicated courts must apply the more lenient *Carrier* standard.[263] In designating the *Carrier* standard as the appropriate standard of proof, the Supreme Court demonstrated its proclivity toward a more forgiving treatment of actual innocence claims, especially in light of the possible extreme injustice at stake.[264]

Because the purpose of the actual innocence gateway is to balance the state's interests in finality, comity, and preservation of judicial resources with an individual's interest in justice if the individual is actually innocent of the crime, the Supreme Court determined that extra judicial protection is crucial in selecting the appropriate standard of proof.[265] Despite the Court's proclivity of leniency regarding actual innocence claims, the Eighth Circuit has repeatedly required defendants to meet an additional burden for actual innocence claims through its *Amrine* standard, which requires new evidence for purposes of the actual innocence gateway be newly presented and not available at the original trial with an exercise of due diligence.[266] The Eighth Circuit

257. 477 U.S. 478 (1986).
258. 505 U.S. 333 (1992).
259. *Schlup I*, 513 U.S. at 326-27.
260. *Id.* at 327.
261. Sawyer v. Whitley, 505 U.S. 333, 336 (1992).
262. *Schlup I*, 513 U.S. at 327.
263. *Id.* at 326-27.
264. *Compare Sawyer II*, 505 U.S. at 336 (adopting a stricter clear and convincing standard of proof when the petitioner claims "he is 'actually innocent' of the death penalty to which he has been sentenced . . . ."), *with Schlup I*, 513 U.S. at 325 (explaining the importance of imposing a more lenient standard of proof on a habeas petitioner "alleging a fundamental miscarriage of justice" than the standard imposed on a petitioner claiming his sentence is too severe, and thus adopting the more lenient *Carrier* standard for actual innocence claims).
265. *Schlup I*, 513 U.S. at 325.
266. *See* Kidd v. Norman, 651 F.3d 947, 953 (8th Cir. 2011) (applying the *Amrine* standard to Ricky Kidd's actual innocence claim); Nooner v. Hobbs, 689 F.3d 921, 935

is not ignorant of the additional burden it applies.[267] By applying the *Amrine* standard, the Eighth Circuit imposes a burden above that imposed by other circuits and in contravention of the Supreme Court's general disposition of leniency toward actual innocence claims.[268] Therefore, the Eighth Circuit's application of the *Amrine* standard is inconsistent with protecting the individual's interest in avoiding injustice if the individual is actually innocent of the crime.[269] As a result, the Eighth Circuit erred in *Kidd v. Norman*[270] because the *Amrine* standard is inconsistent with the purposes underlying *Schlup,* which established the requirements of the actual innocence gateway.[271]

B. The Supreme Court's Use of New Evidence in *House v. Bell* Invalidates the Eighth Circuit's Use of the *Amrine* Standard

In *Kidd v. Norman*,[272] Kidd argued that the United States Supreme Court's decision in *House v. Bell*[273] invalidated the use of the

(8th Cir. 2012) (applying the *Amrine* standard to Terrick Nooner's actual innocence claim); *see also* Nash v. Russell, 807 F.3d 892, 899 (8th Cir. 2015) (applying the *Amrine* standard to Donald Nash's actual innocence claim).

267. *Kidd III,* 651 F.3d at 953 (quoting the United States Court of Appeals for the Seventh Circuit in Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003), which determined that the additional requirement to new evidence raises the threshold to satisfy a claim of actual innocence, thus, imposing an additional requirement).

268. *Compare Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard to Ricky Kidd's actual innocence claim, requiring new evidence to be newly presented and unavailable at the original trial with an exercise of due diligence), *with* Houck v. Stickman, 625 F.3d 88, 93-94 (7th Cir. 2010) (requiring only that new evidence be newly presented to the court, not requiring evidence be unavailable at the original trial with an exercise of due diligence), Gomez v. Jaimet, 350 F.3d 673, 679 (3d Cir. 2003) (applying the *Amrine* standard with an exception for claims based on ineffective assistance of counsel), *and Schlup I*, 513 U.S. at 324 (determining a more lenient standard of proof is appropriate in actual innocence claims, demonstrating the Court's less exacting general disposition).

269. *Compare Schlup I*, 513 U.S. at 324 (determining that the lesser standard in *Carrier* is more appropriate for actual innocence claims to balance the state's interest in finality, comity, and preservation of judicial resources with the individual's interest in justice), *with Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard, which incorporates an additional burden to an actual innocence claim by requiring the petitioner provide new evidence that was not available at the original trial and could not have been discovered with an exercise of diligence).

270. 651 F.3d 947 (8th Cir. 2011).

271. *Compare Kidd III*, 651 F.3d at 953 (applying the standard from *Amrine* requiring new evidence be newly presented and not available at the original trial with the exercise of due diligence, and thus imposing an additional threshold requirement to an actual innocence claim), *with Schlup I*, 513 U.S. at 324 (determining the standard from *Carrier* properly struck the balance in an actual innocence claim between finality, comity, and preservation of judicial resources and an individual's interest in avoiding a fundamental miscarriage of justice).

272. 651 F.3d 947 (8th Cir. 2011).

273. 547 U.S. 518 (2006).

Eighth Circuit's *Amrine* standard.[274] The United States Court of Appeals for the Eighth Circuit rejected this argument, reasoning the relevant issue in *House* was what standard of review applied to claims of actual innocence.[275] The Eighth Circuit thus stated that the issue in *House* did not address the definition of new evidence within the actual innocence standard.[276] However, in *House*, the Court acknowledged that the *Schlup* standard, developed in *Schulp v. Delo*,[277] requires the court reviewing the habeas petition to evaluate all evidence to determine whether a reasonable juror would have been more likely than not to find the petitioner guilty.[278] The Court in *Schlup* specifically noted that the more stringent standard in *Sawyer v. Whitley*,[279] which required that a petitioner make his case by clear and convincing evidence, was not the appropriate standard.[280]

In *House*, Paul Gregory House, convicted of capital murder, presented new evidence to circumvent the procedural bar to his petition for habeas corpus.[281] This evidence included the testimony of several people, evidence that semen consistent with House's DNA was on the nightgown and underwear of the victim, and evidence showing the victim's blood was on House's jeans.[282] However, before analyzing this evidence, the Court emphasized that House must present new, reliable evidence to support his actual innocence claim.[283] The Court noted that there was no dispute that House had presented some new, reliable evidence.[284] More specifically, House presented evidence that

274. Kidd v. Norman, 651 F.3d 947, 953 (8th Cir. 2011).

275. *Kidd III*, 651 F.3d at 953.

276. *Id.* at 953-54. The Eighth Circuit determined that the standard from *Schlup*, which required that a petitioner show that it was more likely than not that no reasonable juror would have found him guilty of the crime for which he was convicted, as opposed to the Antiterrorism and Effective Death Penalty Act of 1996 standard, which required that a petitioner show by clear and convincing evidence that no reasonable juror would have found the petitioner eligible for the death penalty for the crime for which he was convicted, was more appropriate. *Id.*

277. 513 U.S. 298 (1995).

278. *See* House v. Bell, 547 U.S. 518, 537-38 (2006) (noting that a reviewing court must examine "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995))).

279. 505 U.S. 333 (1992).

280. Schlup v. Delo, 513 U.S. 298, 323-24 (1995). The Court determined that the *Carrier* standard was sufficiently strict to ensure that a petition had to be extraordinary to meet the standard, yet still provided a way to avoid a fundamental miscarriage of justice. *Schlup I*, 513 U.S. at 323-24.

281. *House*, 547 U.S. at 521.

282. *Id.* at 528-29.

283. *Id.* at 536-37.

284. *Id.* at 537. The Court noted the State conceded that some of the evidence presented by House was new, so the issue of whether that evidence was actually new under the Court's definition of new evidence was not before the Court. *Id*. Specifically, the opinion cites pages 2078-79 (or 538-40) to reference the actual evidence the state

the bloodstains on House's clothing resulted from a mishandling of the evidence while in police custody and the testimony of several individuals implicated the victim's husband as the real murderer.[285] The bloodstain evidence was used to convict House in the state court trial and, thus, would have been available for testing at the time of the initial trial.[286] Further, the testimony implicating a different suspect could have been discovered at the original trial if House's attorney conducted a more diligent investigation.[287] This evidence that the Court determined was new and reliable to satisfy House's actual innocence claim was newly presented to the Court.[288] However, the evidence could have been discovered at the original trial with an exercise of diligence.[289] The Court considered the evidence and determined it

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stipulated was new. *Id.* The cited pages described the stipulated evidence to include the semen DNA evidence found on the victim's clothing. *Id.* at 540. Consequently, the Supreme Court did not determine that said DNA evidence was new because it was stipulated as new. *Id.* at 538. However, it is clear from the inclusion of the phrase "some of the evidence" and the citation to pages describing the stipulation that the State's stipulation only applies to the DNA evidence. *Id.* at 537-40. The remainder of the evidence was not stipulated to by the State, and, thus, the Court's examination of the evidence to support House's actual innocence claim is telling. *Id.* Furthermore, the Court rejected the State's argument that the evidentiary determinations of the district court "tie[d] [the Court's] hands." *Id.* at 539. The Court reasoned the *Schlup* inquiry requires "a holistic judgment about 'all the evidence.'" *Id.* (citing *Schlup I*, 513 U.S. at 329). The Court proceeded to note its uncertainty regarding some of the district court's conclusions and its hesitancy to rely heavily on the district court's determinations. *Id.* at 539-40. Therefore, the Court determined that much of the evidence House presented, including the bloodstain evidence and the new witness testimony, was new evidence because it reviewed the evidence for purposes of House's actual innocence claim. *Id.* The State stipulated that only some of House's evidence was new, the Court had the authority to examine "all the evidence," and the Court voiced doubt regarding the district court's evidentiary determinations. *Id.*

285. *Id.* at 547-50.

286. *Id.* at 528-29.

287. *Id.* at 554.

288. *Id.* at 549.

289. *Id.* at 528-29. This new evidence that showed the victim's blood found on House's jeans most likely spilled on the jeans after the jeans were in police custody. *Id.* at 553. The blood samples and the jeans were stored in the same box in the hot trunk of a car for several hours while being transported by two FBI agents. *Id.* Evidence confirmed that the blood samples in the vials did actually spill in transport and that the jeans were stored in the same bag as the samples. *Id.* at 543-44. The Court found that the evidence would likely have cast serious doubt on the reliability of the samples. *Id.* at 547. Finally, the new evidence contained testimony from several witnesses which implicated the victim's husband, not House, as the real murderer. *Id.* at 548-53. This included testimony that the husband had confessed to the murder to two separate people, as well as testimony from two people regarding a history of abuse perpetrated by the victim's husband, and testimony from two people regarding suspicious behavior of the victim's husband. *Id.* at 551. Lastly, House presented evidence that demonstrated that the bruises on House's body at the time of the murder were actually too old to have resulted from the crime. *Id.* at 553.

was sufficient to satisfy House's actual innocence gateway claim, reversing the opinion of the appellate court.[290]

Thus, the Court implicitly determined that evidence is new and reliable when it is used to support a claim for actual innocence in a procedurally barred successive petition for habeas corpus if that evidence is newly presented to the Court, even though it could have been discovered with an exercise of diligence at the time of the original trial.[291] In applying the *Amrine* standard to claims of actual innocence, the Eighth Circuit requires that new evidence be newly presented to the court and requires that the evidence would have been undiscoverable at the original trial with an exercise of diligence.[292] Therefore, the Eighth Circuit's continued application of the *Amrine* standard is inappropriate because it imposes a burden upon a showing of actual innocence beyond that required by the United States Supreme Court.[293]

C. The *Schlup* Actual Innocence Gateway Applies to Sixth Amendment Ineffective Assistance of Counsel Claims

The actual innocence gateway from *Schlup v. Delo*[294] provides the means for a court to hear a procedurally barred petition for habeas corpus regarding a claim of actual innocence if the petition is based upon an underlying constitutional violation.[295] Ineffective assistance of counsel is considered a violation of the Sixth Amendment of the United States Constitution.[296] Therefore, the actual innocence gateway from *Schlup* provides a means for procedurally barred claims of

290. *Id.* at 555.

291. *Compare id.* at 540-53 (utilizing evidence that was available at the original trial to determine the validity of a claim of actual innocence in a procedurally barred petition for habeas corpus), *with Kidd III*, 651 F.3d at 953 (requiring evidence used to support an actual innocence claim be newly presented and unable to be discovered at the original trial with an exercise of due diligence).

292. *Kidd III*, 651 F.3d at 953.

293. *Compare id.* at 953 (requiring the application of the stricter *Amrine* standard, that evidence be newly presented and could not have been discovered at the original trial with an exercise of diligence, to claims of actual innocence), *with House*, 547 U.S. at 539 (referencing the *Schlup* requirement to examine "all the evidence" supporting an actual innocence claim in a federal habeas proceeding), *and Schlup I*, 513 U.S. at 328 (requiring an examination of all evidence in an actual innocence claim).

294. 513 U.S. 298 (1995).

295. Schlup v. Delo, 513 U.S. 298, 316 (1995).

296. U.S. Const. amend. VI. *See also* Strickland v. Washington, 466 U.S. 668, 686 (1984) (noting the Sixth Amendment right to counsel is understood as the effective assistance of counsel, meaning the ineffective assistance of counsel establishes a constitutional violation).

actual innocence to be heard if the petitions are based on ineffective assistance of counsel claims.[297]

The United States Supreme Court allows a defendant to use new evidence to support a claim of actual innocence if the claim is based on an underlying ineffective assistance of counsel claim.[298] Ineffective assistance of counsel claims can and have included allegations that an attorney failed to discover or improperly utilized evidence that was available at the original trial.[299] In *Kidd v. Norman*,[300] Kidd requested the court to analyze evidence that his attorney could have discovered or better utilized with due diligence at the time of Kidd's trial.[301] This evidence could have demonstrated to a jury that Kidd's co-defendant, Merrill, had a strong relationship with the alternative suspects, which associated them in the days leading up to the murder; that Kidd had an alibi; that the victim's daughter implicated the alternative suspects in the murder; and that a vital witness was under the influence of drugs at the time of the murder.[302]

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297. *Compare Schlup I*, 513 U.S. at 316 (allowing a petitioner to circumvent a procedural bar to successive habeas petitions only when a constitutional error occurred in the initial trial), *with* House v. Bell, 547 U.S. 518, 534 (2006) (acknowledging that ineffective assistance of counsel in an initial trial is considered a constitutional error), *and* Houck v. Stickman, 625 F.3d 88, 93 (3d Cir. 2010) (applying the *Schlup* actual innocence gateway to a petitioner's procedurally barred habeas corpus petition when the underlying constitutional violation was a Sixth Amendment ineffective assistance of counsel claim).

298. *Compare House*, 547 U.S. at 534-36 (applying the *Schlup* actual innocence gateway to a petition for habeas corpus where House asserted multiple ineffective assistance of counsel claims), *with Schlup I*, 513 U.S. at 336 (determining that Schlup's procedurally barred habeas corpus petition was eligible to pass through the actual innocence gateway in order for the Court to decide the merits of Schlup's underlying ineffective assistance of counsel claim), *and* Herrera v. Collins, 506 U.S. 390, 404 (1993) (determining that the claim of actual innocence itself was not a constitutional claim and, instead, was a gateway for the Court to hear the constitutional claim).

299. *Houck*, 625 F.3d at 94. *See* Williams v. Taylor, 529 U.S. 362, 390 (2000) (determining that an attorney's failure to investigate and present mitigating evidence constituted ineffective assistance of counsel); *see also* Wiggins v. Smith, 539 U.S. 510, 534 (2003) (noting that a failure to investigate mitigating evidence is considered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution).

300. 651 F.3d 947 (8th Cir. 2011).

301. Kidd v. Norman, 651 F.3d 947, 951 (8th Cir. 2011).

302. *Kidd III*, 651 F.3d at 951. Additional evidence included that one of the Merrills paid for a hotel room in which one of the suspects stayed the night before the murder, one of the suspects rented a white car similar to that identified leaving the crime scene, and testimony placing Merrill and the suspects together on the morning of the murders. *Id.* Further evidence demonstrated Merrill traveled with the alternative suspects just days before the murder, shared an apartment with one of the suspects, and was employed by the other suspect. *Id.* Finally, Kidd's trial counsel failed to appropriately investigate and confirm Kidd's alibi, failed to raise eyewitness testimony from the victim's daughter implicating the alternative suspects, and failed to impeach a vital witness at trial with information relating to drug use at the time of the murders. *Id.*

The quandary arises under the Eighth Circuit's application of the *Amrine* standard.[303] In order to pass through the actual innocence gateway so that a court will address the merits of the underlying ineffective assistance of counsel claim, the Eighth Circuit requires a defendant like Kidd to assert that all of the evidence used to support the claim could not have been discovered at the original trial with an exercise of due diligence.[304] However, after a defendant passes through the actual innocence gateway, in order to find the defendant had ineffective assistance of counsel, that same court would then require the defendant to assert that the same evidence that the petitioner used to support the claim could have been discovered with an exercise of diligence, his or her attorney did not exercise that diligence, and as a result, the attorney was constitutionally ineffective.[305] Thus, a defendant claiming actual innocence based on an ineffective assistance of counsel claim is caught in the ultimate catch twenty-two.[306] Therefore, courts should allow a defendant to use new evidence—meaning evidence that is newly presented to the court but that may have been available at the original trial with an exercise of due diligence—when the underlying constitutional violation is a Sixth Amendment ineffective assistance of counsel claim, as it was in *Kidd*.[307]

D. Dismantling the *Amrine* Standard

1. The Eighth Circuit Misquoted the United States Supreme Court's Definition of New Evidence in Schlup v. Delo

In *Amrine v. Bowersox*,[308] the United States Court of Appeals for the Eighth Circuit misquoted the standard for new evidence from

303. *Compare Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard to procedurally defaulted habeas petitions when the petitioner asserts he is actually innocent of the crime), *with* Gomez v. Jaimet, 350 F.3d 673, 680 (7th Cir. 2003) (noting when a constitutional violation underlying an actual innocence claim is ineffective assistance of counsel based on the trial attorney not discovering evidence at the time of the trial, it would "defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation.").

304. *Kidd III*, 651 F.3d at 952-53.

305. *Houck*, 625 F.3d at 94.

306. *Gomez*, 350 F.3d at 680.

307. *Compare Schlup I*, 513 U.S. at 314, 316 (allowing a petitioner to present new evidence to pass through the actual innocence gateway when the petitioner's initial trial was tainted by ineffective assistance of counsel), *with Williams*, 529 U.S. at 390 (determining that an attorney's failure to investigate and properly utilize evidence that was available at the original trial constitutes ineffective assistance of counsel), *Houck*, 625 F.3d at 94 (determining that the *Amrine* standard was generally appropriate, with a narrow exception for ineffective assistance of counsel claims, as long as the new, reliable evidence was the very evidence the petitioner uses to support his claim of actual innocence), *and Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard even though Kidd based his actual innocence claim on the ineffective assistance of his counsel).

308. 238 F.3d 1023 (8th Cir. 2001).

Schlup v. Delo[309] established by the United States Supreme Court.[310] In *Amrine*, the Eighth Circuit noted that the district court properly applied the standard for new evidence in an actual innocence gateway claim consistent with the Supreme Court's definition in *Schlup*.[311] The appellate court elaborated that evidence is only new for the purposes of an actual innocence claim if it was not available at the original trial and could not have been found at the original trial with an exercise of due diligence.[312] However, in *Schlup*, the Supreme Court did not say anything to indicate a requirement that evidence be unavailable at the original trial with an exercise of due diligence.[313] Instead, the Court determined an actual innocence claim must only be supported with new, reliable evidence that was not presented at the original trial.[314] Thus, in *Amrine*, the Eighth Circuit improperly stated the Supreme Court's *Schlup* standard for new evidence in an actual innocence claim.[315]

2. *Stare Decisis is Inappropriate When a Fundamental Miscarriage of Justice is at Stake*

The United States Supreme Court determined that the concept of stare decisis is not an ironclad doctrine that must be followed in every case, particularly when there are constitutional issues involved.[316] Specifically, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[317] the Court determined that a judgment must be influenced by prudential and practical concerns to test the effect of overruling or affirming a prior holding.[318] The Court further explained that when determining whether precedent is applicable, courts may examine if the precedent has proven to be unworkable in practice, the consequences and potential inequality of overruling, whether the rule is an anachronistic relic in relation to how the law has developed, and

309. 513 U.S. 298 (1995).
310. Amrine v. Bowersox, 238 F.3d 1023, 1029 (8th Cir. 2001).
311. *Amrine*, 238 F.3d at 1029.
312. *Id.*
313. *See* Schlup v. Delo, 513 U.S. 298, 337-38 (1995) (refusing to create the requirement that evidence be unavailable at the original trial with an exercise of due diligence and instead elaborating that an actual innocence analysis "allows the reviewing tribunal also to consider the probative force of *all* relevant evidence that was either excluded or unavailable at trial." (emphasis added)).
314. *Id.*
315. *Compare Amrine*, 238 F.3d at 1029 (noting the district court's decision was consistent with *Schlup* in requiring new evidence that was not presented at trial and could not have been found at trial with an exercise of due diligence), *with Schlup I*, 513 U.S. at 337-38 (requiring only that new evidence either be excluded from the original trial or unavailable at the original trial, but not both).
316. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992).
317. 505 U.S. 833 (1992).
318. *Casey*, 505 U.S. at 854.

whether facts or culture are viewed so differently that the rule is no longer applicable or justifiable.[319]

The *Amrine* standard is unworkable in practice because it makes the actual innocence gateway completely inaccessible to procedurally defaulted claims asserting ineffective assistance of counsel.[320] The *Amrine* standard requires the new evidence used to support an actual innocence gateway claim to be newly presented and undiscoverable at the original trial with an exercise of due diligence.[321] The additional burden of the *Amrine* standard in the Eighth Circuit creates a catch twenty-two for petitioners asserting an underlying ineffective assistance of counsel claim; thus, it is unworkable in practice.[322] In *Kidd v. Norman*,[323] the Eighth Circuit itself acknowledged that the United States Court of Appeals for the Third Circuit's more moderate approach to new evidence may be more appropriate in circumstances where the petitioner asserts an underlying ineffective assistance of counsel claim.[324] However, ignoring this reasoning, the Eighth Circuit still chose to apply the *Amrine* standard based on stare decisis.[325]

It is unlikely that modifying or eliminating the requirements of the *Amrine* standard will have unfair consequences on those who have reasonably relied on the rule because the United States Courts of Appeal for the Third, Seventh, and Ninth Circuits have all developed definitions of new evidence that do not create the issues inherent in the *Amrine* standard.[326] The alternative standards demonstrate the

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319. *Id.* at 854-55.

320. *Compare Schlup I*, 513 U.S. at 314, 316 (allowing a petitioner to present new evidence to pass through the actual innocence gateway when the petitioner's initial trial was tainted by ineffective assistance of counsel), *with* Williams v. Taylor, 529 U.S. 362, 390 (2000) (determining that an attorney's failure to investigate and properly utilize evidence that was available at the original trial constitutes ineffective assistance of counsel), *and* Houck v. Stickman, 625 F.3d 88, 94 (3d Cir. 2010) (determining that the *Amrine* standard was generally appropriate, with a narrow exception for ineffective assistance of counsel claims, as long as the new, reliable evidence was the very evidence the petitioner used to support his claim of actual innocence).

321. *See* Kidd v. Norman, 651 F.3d 947, 953 (8th Cir. 2011) (discussing and applying the *Amrine* standard).

322. *See Houck,* 625 F.3d at 94 (determining it is unfair to apply the *Amrine* standard to petitioner when the petitioner claims his trial counsel was ineffective by not discovering exculpatory evidence at the time of the trial if the petitioner is relying on the very evidence the attorney did not discover to support his actual innocence gateway claim to reach the underlying constitutional claim).

323. 651 F.3d 947 (8th Cir. 2011).

324. *Kidd III*, 651 F.3d at 953.

325. *Id.*

326. *Compare* Griffin v. Johnson, 350 F.3d 956, 961-63 (9th Cir. 2003) (determining a petitioner asserting a claim of actual innocence must support the claim with new, reliable evidence that was not available at the original trial, but need not present evidence that was also unavailable at the original trial with an exercise of diligence), *with* Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003) (determining a petitioner asserting a claim of actual innocence must support the claim with new, reliable evidence that

Eighth Circuit could depart from stare decisis without significant consequences on the actual innocence gateway or procedurally barred petitions for habeas corpus.[327]

While the *Amrine* standard is not necessarily outdated, the law surrounding the actual innocence gateway has developed to preserve its original purpose.[328] The purpose of the actual innocence gateway is to balance the state's interest in finality, comity, and preservation of judicial resources with an individual's interest in avoiding a fundamental miscarriage of justice.[329] As demonstrated, the *Amrine* standard circumvents that purpose by applying an additional burden for defendants claiming actual innocence.[330] The standard was ineffective when the Eighth Circuit originally decided *Amrine* and is ineffective as actual innocence gateway jurisprudence has developed.[331]

Finally, society and culture have developed in a way that favors justice and a well-functioning legal system.[332] Advancements in tech-

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was not available at the original trial, but need not present evidence that was also unavailable at the original trial with an exercise of diligence), *and Houck*, 625 F.3d at 94-95 (noting the standard for new evidence required evidence that was not presented to the court at trial and was also unavailable at trial with an exercise of due diligence but allowing a narrow exception for petitioners who assert an underlying ineffective assistance of counsel claim based on the attorney's failure to discover evidence at the time of the original trial).

327. *See Kidd III*, 651 F.3d at 952-54 (explaining how the Seventh and Ninth Circuits' approach to new evidence are criticized for being too broad, the Eighth Circuit's approach is criticized for its inapplicability to ineffective assistance of counsel claims, and the Third Circuit's approach is modified by allowing an exception to the *Amrine* standard for ineffective assistance of counsel claims).

328. *See Schlup I*, 513 U.S. at 318-21 (recognizing the purpose of the actual innocence gateway is to balance society's interests in finality, comity, and preservation of judicial resources with an individual's interest in avoiding a fundamental miscarriage of justice if the individual is actually innocent of the crime).

329. *Id.*

330. *Compare Schlup I*, 513 U.S. at 324 (determining that the lesser *Carrier* standard of proof is more appropriate for actual innocence claims to balance the state's interest in finality, comity, and preservation of judicial resources with the individual's interest in justice), *with Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard, which incorporates an additional burden to an actual innocence claim, requiring that the petitioner provide new evidence that was not available at the original trial and could not have been discovered with an exercise of diligence).

331. *Compare Schlup I*, 513 U.S. at 324 (determining that the lesser standard in *Carrier* is more appropriate for actual innocence claims to protect an individual's interest in avoiding the fundamental miscarriage of justice of a sentence of life imprisonment or death for an innocent person), *with Kidd III*, 651 F.3d at 953 (recognizing the *Amrine* standard is flawed in that it is inapplicable to petitioners asserting an ineffective assistance of counsel claim, yet applying *Amrine* because it has applied *Amrine* in similar circumstances in the past), *and* Nash v. Russell, 807 F.3d 892, 899 (8th Cir. 2015) (demonstrating the Eighth Circuit is consistently applying the *Amrine* standard to actual innocence claims).

332. Judge J. Thomas Greene, *Some Current Causes for Popular Dissatisfaction with the Administration of Justice*, 14 UTAH B.J., no. 4, May 2001, at 4, 35 (noting public dissatisfaction with a legal system that functions unfairly by favoring the wealthy,

nology and DNA testing have resulted in exoneration of as many as 347 innocent men and women, and society is privy—more than ever—to the systemic injustices linked to many guilty verdicts.[333] In light of the increasing importance of equitable principles in society, the Eighth Circuit's continued application of a standard that the court itself recognized as one that undercuts equity is erroneous.[334]

The Supreme Court determined there are circumstances where it is appropriate and necessary to depart from precedent in order to preserve justice.[335] The Supreme Court has even demonstrated this to be true in the context of the actual innocence gateway in *Schlup* when the Court noted that its sworn allegiance to the doctrine of stare decisis did not preclude it from applying the more lenient standard of proof in *Murray v. Carrier*[336] to claims of actual innocence.[337] Particularly in *Kidd*, the Eighth Circuit recognized the issues of unfairness inherent in the *Amrine* standard, yet insisted it was bound to apply the standard to Ricky Kidd because of stare decisis.[338] By refusing to depart from precedent and follow the Supreme Court's example upholding stare decisis, the Eighth Circuit has erred, failing to make a prudential and practical determination in *Kidd*, especially in light of the potential fundamental miscarriage of justice imposed.[339]

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treating races differently, being influenced by politics, and disproportionately targeting minorities and non-English speakers).

333. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Dec. 21, 2016). *See also* Greene, *supra* note 332, at 35 (noting public dissatisfaction with a judicial system influenced improperly by the wealth or race of the client and the perceived greed of lawyers and judges).

334. *Compare* Green, *supra* note 332, at 35 (noting public dissatisfaction with a legal system that functions unfairly by favoring the wealthy, treating races differently, allowing itself to be influenced by politics, and disproportionately targeting minorities and non-English speakers), *with Kidd III*, 651 F.3d at 953 (acknowledging the merits of the Third Circuit's modified approach to new evidence for petitioners like Ricky Kidd, yet refusing to apply the more equitable method because of stare decisis), *and Nash*, 807 F.3d at 899 (continuing to apply the *Amrine* standard to petitioners in spite of the alternative approach).

335. *See Casey*, 505 U.S. at 854 (recognizing the doctrine of stare decisis required affirmation of prior holdings determining women have the constitutional right to an abortion before fetal viability).

336. 477 U.S. 478 (1986).

337. *Schlup I*, 513 U.S. at 326. The Court indicated its disposition toward actual innocence claims is more lenient because "the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence is reflected in our decisions that permit reduced procedural protections at sentencing." *Id.*

338. *See Kidd III*, 651 F.3d at 953 (noting the merits of the Third Circuit's approach to new evidence because it allows application of the actual innocence gateway to petitioners such as Ricky Kidd but refusing to apply the modified standard because of stare decisis).

339. *Compare Casey*, 505 U.S. at 854 (recognizing stare decision was not an immutable rule and, based on the judiciary's "prudential and pragmatic considerations," could

3. The Eighth Circuit is Perpetrating the Fundamental Miscarriage of Justice Exemplified in Kidd v. Norman

While it may be easy to assume the injustice faced by Ricky Kidd is a settled occurrence of the past, the United States Court of Appeals for the Eighth Circuit is still applying the *Amrine* standard based on a misinterpretation of the United States Supreme Court opinion in *Schlup* and the unjustified application of stare decisis.[340] In *Nash v. Russell*,[341] the Eighth Circuit reviewed Donald Nash's claim of actual innocence.[342] The court cited to the standard for new evidence used to support an actual innocence claim from *Schlup* and stated this standard requires new, reliable evidence that was not presented at the original trial.[343] The Eighth Circuit then referenced its own additional requirement that evidence is new only if it was not presented at trial and could not have been found at the time of the original trial with an exercise of due diligence.[344] The potential fundamental injustice borne by Ricky Kidd when the Eighth Circuit declined to review evidence that could demonstrate Kidd's actual innocence in 2011 was imposed on Donald Nash in 2015.[345] Reflecting on the 347 innocent men and women who were exonerated of their crimes based on new DNA evidence, twenty of whom had been sentenced to death, it is

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be overturned in order to honor countervailing constitutional principles), *with Kidd III*, 651 F.3d at 953 (recognizing the *Amrine* standard precluded Ricky Kidd and others asserting ineffective assistance of counsel claims from utilizing the actual innocence gateway, yet refusing to overturn stare decisis in light of the constitutional issue).

340. *Compare Amrine*, 238 F.3d at 1029 (noting the district court was consistent with *Schlup* in requiring new evidence that was not presented at trial and could not have been found at trial with an exercise of due diligence), *with Schlup I*, 513 U.S. at 327-28 (requiring only that new evidence either be excluded from the original trial or unavailable at the original trial, but not both), *Casey*, 505 U.S. at 854 (recognizing stare decisis was not a rigid rule and could be overturned in order to honor countervailing constitutional principles), *Kidd III*, 651 F.3d at 953 (recognizing the *Amrine* standard precluded Ricky Kidd and others asserting ineffective assistance of counsel claims from utilizing the actual innocence gateway, yet refusing to overturn stare decisis in light of the constitutional issue), *and Nash*, 807 F.3d at 899 (requiring new evidence used to support an actual innocence claim be not presented at the original trial and unavailable with an exercise of due diligence per *Amrine*).

341. 807 F.3d 892 (8th Cir. 2015).

342. *Nash*, 807 F.3d at 899.

343. *Id.* The court noted *Schlup* gave several examples of new, reliable evidence "including exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.*

344. *Id.* (citing *Amrine*, 238 F.3d at 1028; *Kidd III*, 651 F.3d at 951-53).

345. *See Kidd III*, 651 F.3d at 954 (affirming the district court's denial of Kidd's petition for habeas corpus, thus denying Kidd the opportunity to present evidence which may have proven Kidd's innocence); *Nash*, 807 F.3d at 899 (affirming the district court's judgment and recognizing Nash's new evidence deserves "serious consideration," yet denying Nash an opportunity for federal habeas relief).

clear how important it is for a court to be able to view new evidence.[346] Until the Eighth Circuit corrects its interpretation of new evidence and stops applying the *Amrine* standard to actual innocence claims, more men and women may face the fundamental miscarriage of justice the *Schlup* actual innocence gateway was created to avoid.[347]

V. CONCLUSION

In *Kidd v. Norman*,[348] the United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of Kidd's petition for habeas corpus after concluding that Kidd's petition was procedurally barred because Kidd failed to raise a constitutional claim in a prior proceeding.[349] Kidd asserted that he could circumvent the procedural bar by demonstrating his actual innocence pursuant to *Schlup v. Delo*[350] under the actual innocence gateway.[351] The actual innocence gateway requires a petitioner to demonstrate that in light of new evidence, it is more likely than not that no reasonable juror would convict the petitioner.[352] However, following Eighth Circuit stare decisis, the Eighth Circuit applied the standard created in *Amrine v. Bowersox*[353] to Kidd's new evidence, which required that new evidence be newly presented and unavailable with an exercise of due diligence at the original trial.[354] The court determined that Kidd's evidence could have been discovered at the original trial with an exercise of due diligence and affirmed the district court's denial of his petition.[355]

The Eighth Circuit erred in applying the *Amrine* standard to *Kidd* because the *Amrine* standard imposes an additional burden on petitioners that is inconsistent with both the purposes of the *Schlup* actual innocence gateway and the Supreme Court's reasoning in *House v. Bell*[356] regarding the use of new evidence.[357] Further, the *Schlup* actual innocence gateway applies to petitioners claiming a constitutional violation, and the Eighth Circuit's restrictive *Amrine* standard applied in *Kidd* highlights the catch twenty-two for petitioners when their underlying constitutional violation is ineffective assistance of

346. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Dec. 21, 2016).
347. *Schlup I*, 513 U.S. at 320.
348. 651 F.3d 947 (8th Cir. 2011).
349. Kidd v. Norman, 651 F.3d 947, 948 (8th Cir. 2011).
350. 513 U.S. 298 (1995).
351. *Kidd III*, 651 F.3d at 948.
352. Schlup v. Delo, 513 U.S. 298, 324, 326-27 (1995).
353. 238 F.3d 1023 (8th Cir. 2001).
354. *Kidd III,* 651 F.3d at 953.
355. *Id.* at 953-54.
356. 547 U.S. 518 (2006).
357. *See supra* notes 253-293 and accompanying text.

counsel based on failure to discover and present evidence.[358] Individuals must insist their evidence could not have been discovered at the original trial to proceed through the actual innocence gateway, yet must then insist that the evidence could have been discovered to prove that the counsel was ineffective.[359] Finally, the Eighth Circuit continues to err in applying the *Amrine* standard to procedurally barred petitions for habeas corpus because it relied on a misquotation of the Supreme Court in the development of the standard, inappropriately applied stare decisis to factually similar cases, and is further perpetrating the fundamental injustice that the actual innocence gateway intends to address.[360]

Due to the split between the United States Courts of Appeals on this issue, the United States Supreme Court should resolve whether new evidence used to support an actual innocence gateway claim from *Schlup* must be newly presented to the court or must also have been unavailable with an exercise of due diligence at the time of the original trial.[361] The Supreme Court determined that an individual's interest in avoiding a fundamental miscarriage of justice, such as serving a life sentence as an innocent person, is so important that it deserves extra judicial protection.[362] That protection should not be applied inconsistently from one circuit to the next when the very life and liberty of the accused is on the line.[363]

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358. *See supra* notes 294-307 and accompanying text.
359. *See supra* notes 304-305 and accompanying text.
360. *See supra* notes 308-347 and accompanying text.
361. *See supra* notes 132-216 and accompanying text.
362. *See supra* note 264 and accompanying text.
363. *See supra* notes 132-216 and accompanying text.

ONE STEP FORWARD, TWO STEPS BACK: THE BOARD OF IMMIGRATION APPEALS MUST REMIND COURTS THAT FAMILY IS THE QUINTESSENTIAL PARTICULAR SOCIAL GROUP TO PREVENT COURTS FROM SIDESTEPPING FAMILY-BASED ASYLUM CLAIMS

I. INTRODUCTION

"I had always hoped that this land might become a safe and agreeable Asylum to the virtuous and persecuted part of mankind, to whatever nation they might belong."[1] George Washington, the first President of the United States, envisioned the United States as a safe haven for persecuted individuals worldwide.[2] Today, the United States offers asylum, perhaps on a much more structured and restrictive basis than Washington hoped for, to asylum seekers who demonstrate that they are the victims of persecution, or have a well-founded fear of persecution, because of the asylum seeker's race, religion, nationality, political opinion, or membership in a particular social group.[3] The legal test for cognizable particular social groups is especially difficult for asylum seekers to satisfy.[4] To pass muster, an asylum seeker's particular social group must be comprised of individuals who share a common immutable characteristic, the group must be defined with particularity, and the group must be socially recognizable within the asylum seeker's society.[5]

Family relationships are immutable; an individual's family is something that is impossible to alter and should not be required to change.[6] Additionally, societies across the globe recognize families as distinct groups.[7] Moreover, family is a readily identifiable group with a distinct benchmark separating family members from everyone else.[8]

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1. Letter from George Washington, Gen. of U.S. Army, to Francis A. Vanderkemp, Rev. (May 28, 1788), *in* 6 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES 300-01 (W.W. Abbot & Dorothy Twohig eds., 1997).

2. *See id.* (communicating Washington's vision for the United States).

3. 8 U.S.C. § 1158(b)(1)(A) (2012).

4. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 230 (B.I.A. 2014).

5. *In re M-E-V-G-*, 26 I. & N. Dec. at 237.

6. *See* Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (opining that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.").

7. *See* Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011) (indicating that family-based particular social groups meet the social distinction requirement because few groups are "more readily identifiable than the family.").

8. *See* Hernandez-Ortiz v. I.N.S., 777 F.2d 509, 516 (9th Cir. 1985) (defining family as "a small, readily identifiable group").

Therefore, family is the prototypical example of a particular social group for purposes of an asylum claim, and courts should not require family-based groups to demonstrate an additional protected ground for claiming asylum nor any unique nexus requirements.[9]

Nevertheless, early last year, the Board of Immigration Appeals ("BIA") signaled that there may be ambiguity regarding whether a family may qualify as a particular social group and whether the nexus requirement, the condition that the persecution be on account of membership in a group, is different for family-based groups.[10] Seeking guidance on this subject, the BIA specifically invited amicus curiae to address what the BIA itself deemed to be a circuit split regarding the proper analysis for family-based particular social groups.[11] The BIA should resolve any ambiguity by siding with the majority of circuits to address this issue in holding that family constitutes a particular social group regardless of whether the family members were persecuted on the basis of an additional protected ground.[12]

This Topic Note will first discuss the legal setting of asylum claims based on membership in a particular social group.[13] It will then delve into the BIA's ostensible circuit split: cases from the United States Courts of Appeals for the Fourth and Ninth Circuits versus cases from the United States Courts of Appeals for the Fifth, Seventh, and Eighth Circuits.[14] Subsequently, this Note will review several circuit court cases that unquestionably recognize family-based groups

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9. *See* Aldana-Ramos v. Holder, 757 F.3d 9, 15 (1st Cir. 2014) (clarifying that "[t]he law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.").

10. BIA Amicus Invitation at 1, Matter of L-A-, No. 16-01-11 (B.I.A. 2016). The BIA invited interested members of the public to address the issue:

> Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family, has he or she satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another protected ground?

BIA Amicus Invitation at 1, Matter of L-A-, No. 16-01-11 (B.I.A. 2016).

11. *See* BIA Amicus Invitation at 1, Matter of L-A-, No. 16-01-11 (B.I.A. 2016) (requesting that *amici* specifically address a purported circuit split and "*compare Hernandos-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), *with Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).").

12. *See, e.g.*, *Gebremichael*, 10 F.3d at 36 (reasoning that family is a cognizable particular social group); *Crespin-Valladares*, 632 F.3d at 124 (opining that family ties may provide a valid particular social group for purposes of asylum); Flores-Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015) (recognizing family as the quintessential particular social group); Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) (explaining that family is a cognizable particular social group under the Immigration and Nationality Act's definition).

13. *See infra* notes 22-82 and accompanying text.

14. *See infra* notes 83-134 and accompanying text.

as cognizable particular social groups.[15] Then, it will survey a disagreement between the United States Courts of Appeals for the First and Fifth Circuits regarding the proper analysis for family-based particular social groups.[16] Next, this Note will review two Eighth Circuit cases that clarify prior intra-circuit ambiguity on this issue.[17] This Topic Note will then argue that family membership satisfies the particular social group test.[18] Thereafter, it will address the BIA's purported circuit split and propose that the BIA resolve the ambiguity and clarify that the nexus requirement is satisfied when an asylum seeker has shown persecution on account of family membership.[19] Finally, this Note will conclude by discussing the Eighth Circuit's contribution to the ambiguity on this issue.[20]

II. BACKGROUND

A. The Immigration and Nationality Act Sets Forth the Qualifications for Asylum

In 1952, Congress enacted the Immigration and Nationality Act[21] ("INA") into law.[22] The McCarran-Walter bill was the substantive basis for the INA, which is codified within Title 8 of the United States Code.[23] The INA addresses asylum law and specifically establishes the qualifications for asylum.[24] As set forth therein, to qualify for asylum, a person must be physically present in the United States, regardless of method or place of entry, and must meet the definition of refugee set forth in another provision of the INA.[25] An asylum applicant must also establish by clear and convincing evidence that his or her asylum application was filed within one year after his or her arrival date in the United States.[26] Furthermore, an individual seeking

15. *See infra* notes 135-169 and accompanying text.
16. *See infra* notes 170-191 and accompanying text.
17. *See infra* notes 192-213 and accompanying text.
18. *See infra* notes 227-248 and accompanying text.
19. *See infra* notes 249-272 and accompanying text.
20. *See infra* notes 273-290 and accompanying text.
21. 8 U.S.C. §§ 1101-1537 (2015).
22. *Immigration and Nationality Act*, United States Citizenship & Immigration Servs., https://www.uscis.gov/laws/immigration-and-nationality-act (last updated Sept. 10, 2013).
23. *Id.* "Aliens and Nationality" is the subject of Title 8 of the United States Code. *Id.*
24. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A).
25. *Id.*
26. 8 U.S.C. § 1158(a)(2)(B). However, an asylum application filed after the one-year period may still be considered if the applicant demonstrates "extraordinary circumstances relating to the delay in filing." 8 U.S.C. § 1158(a)(2)(D). Additionally, an asylum application that was previously denied may be considered if the applicant establishes "the existence of changed circumstances which materially affect the applicant's eligibility for asylum." *Id.*

asylum must demonstrate past persecution or a well-founded fear of future persecution on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[27] The INA further provides that either the Secretary of Homeland Security or the United States Attorney General has discretion to grant asylum to an alien who followed the requirements and procedures set forth by the INA.[28]

A particular social group is a group comprised of members who share a common immutable characteristic.[29] Particular social groups must be defined with particularity.[30] Finally, a particular social group must be socially distinct within the society in question.[31]

B. The Immigration and Nationality Act Defines the Term Refugee

Asylum applicants and refugees must meet the INA definition of refugee.[32] Under the INA, a refugee is a person who was persecuted in the past or who has a well-founded fear of future persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion.[33] Persecution includes, but is not limited to, confinement, torture, or economic deprivation so severe that it constitutes a threat to an individual's life or freedom.[34] In order to meet the INA's refugee definition, the government, or persons or organizations that the government is unable or unwilling to control, must have inflicted the harm or suffering.[35]

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27. 8 U.S.C. § 1158(b)(1)(A).

28. *Id.* The Secretary of Homeland Security or the United States Attorney General has this discretion so long as the asylum applicant meets the statutory definition of refugee as defined within the INA. *Id.*

29. *See In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (explaining that an immutable characteristic is a characteristic that members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences).

30. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014) (noting that particularity means that the group's defining terms have commonly accepted definitions within the society in question and that the group is both discrete and has definable boundaries).

31. *See In re M-E-V-G-*, 26 I. & N. Dec. at 259 (opining that "[t]o be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society" and further explaining that "[s]ociety can consider persons to comprise a group without being able to identify the group's members on sight.").

32. 8 U.S.C. § 1158(b)(1)(A).

33. 8 U.S.C. § 1101(a)(42)(A) (2012).

34. *In re* Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

35. *In re Acosta*, 19 I & N. Dec. at 222.

C. An Overview of the Adjudicative Process by which Asylum is Granted in the United States

The adjudicative process by which asylum is granted in the United States is multifarious and complex because it is under the purview of two separate agencies, and the process has several possible entry and exit points.[36] An individual who seeks asylum in the United States has two avenues to do so: the individual may apply affirmatively or defensively.[37] The asylum process may begin when a noncitizen, who is not in removal proceedings, files an affirmative asylum application with United States Citizenship and Immigration Services ("USCIS").[38] USCIS is an administrative agency within the United States Department of Homeland Security ("DHS").[39] An affirmative asylum applicant appears before an asylum officer who first conducts a nonadversarial asylum interview and then either grants the application or refers the case to an immigration judge ("IJ").[40] The process may also begin when the DHS places a noncitizen in removal proceedings and the noncitizen requests asylum as a defense against removal from the United States.[41] Noncitizens who file defensive asylum applications appear before an IJ in removal proceedings.[42] IJs are part of the Executive Office for Immigration Review ("EOIR"), an administrative agency within the United States Department of Justice.[43]

Defensive cases, in which noncitizens file asylum applications with IJs after the initiation of removal proceedings against them, are adversarial proceedings.[44] In such proceedings, the noncitizen respondent may and the DHS must present evidence and cross-examine

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36. *See The Asylum Process*, TRAC Immigration (Aug. 7, 2006) http://trac.syr.edu/immigration/reports/159/ (distilling the components of affirmative and defensive asylum applications and noting the complexity of the asylum process).

37. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 305 (2007).

38. *The Affirmative Asylum Process*, United States Citizenship & Immigration Servs., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last visited Feb. 23, 2017).

39. *Our History*, United States Citizenship & Immigration Servs., https://www.uscis.gov/history-and-genealogy/our-history/our-history (last updated Feb. 11, 2016).

40. 8 C.F.R. §§ 208.9(b), 208.14(b)–(c)(1) (2016). An asylum officer must "refer the application to an immigration judge, together with the appropriate charging document, for adjudication in removal proceedings" if the applicant "appears to be inadmissible or deportable." 8 C.F.R. § 208.14(c)(1).

41. 8 U.S.C. §§ 1229, 1229a (2012); *Obtaining Asylum in the U.S.*, United States Citizenship & Immigration Servs., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last updated Oct. 19, 2015).

42. 8 U.S.C. § 1229a(b)(1).

43. 8 C.F.R. § 1003.0(a) (2016).

44. Ramji-Nogales, *supra* note 37, at 309.

witnesses.[45] At the end of the proceeding, the IJ renders a removal decision, which includes the disposition of the asylum claim.[46] Subsequently, the respondent and DHS are each entitled to file one motion to reopen the proceedings and one motion to reconsider the IJ's decision, with limited exceptions.[47] Either party may also appeal the IJ's decision to the Board of Immigration Appeals ("BIA").[48] The BIA is a component of the EOIR, serving as the highest administrative body to interpret and apply immigration laws.[49] Notably, all BIA decisions are binding on DHS officers and IJs in the administration of United States immigration laws, unless the United States Attorney General or a federal appellate court modifies or overrules the decision.[50] The Attorney General has discretion to review the BIA's decisions.[51]

Typically, an asylum applicant may pursue judicial review of an adverse decision from the BIA or the Attorney General by filing a petition for review with the United States Court of Appeals for the judicial circuit in which the removal hearing was held.[52] The United States Courts of Appeals will generally uphold administrative findings of fact.[53] These federal appellate courts review questions of law and constitutional issues de novo.[54] Additionally, the United States Supreme Court determined that federal appellate courts must generally grant deference to the BIA's interpretation and establishment of immigration laws.[55]

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45. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.2(a) (2016). The IJ also has authority to cross-examine the respondent and any other witnesses. 8 U.S.C. § 1229a(b)(1).

46. 8 U.S.C. § 1229a(c)(1)(A). *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 417 (2007) (noting that an IJ's removal decision "will include the asylum determination").

47. 8 U.S.C. § 1229a(c)(6)–(7); 8 C.F.R §§ 1003.23(b)(1), 1240.2(a).

48. 8 C.F.R § 1003.1(b)(3).

49. *Board of Immigration Appeals*, UNITED STATES DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals (last updated Mar. 24, 2016); 8 C.F.R § 1003.0(a).

50. UNITED STATES DEP'T OF JUSTICE, *supra* note 49. In general, the BIA renders appellate decisions "by conducting a 'paper review' of cases." *Id.*

51. 8 C.F.R § 1003.1(h).

52. 8 U.S.C. §§ 1252(a)(2)(B)(ii), 1252(b)(2) (2012). However, the DHS may not appeal adverse decisions of the BIA because, as previously mentioned, the BIA's decisions bind the DHS. Ramji-Nogales, *supra* note 37, at 310 n.30.

53. *See* 8 U.S.C. § 1252(b)(4)(B) (providing that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary").

54. 8 U.S.C. § 1252(a)(2)(D).

55. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (establishing that agency-made law is entitled to deference from federal appellate courts when the underlying statute is silent or ambiguous on the issue under consideration and the agency's interpretation is reasonable); Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) (establishing that when an agency declines to follow judicial precedent interpreting an ambiguous statute under the agency's interpretive authority, the agency's superseding construction must be rea-

D. Seminal Decisions by the Board of Immigration Appeals Addressing Membership in a Particular Social Group

1. In re Acosta*: The Board of Immigration Appeals Clarifies the Meaning of Particular Social Group for the First Time*

In *In re Acosta*,[56] the Board of Immigration Appeals ("BIA") clarified the standard for a valid particular social group for purposes of asylum for the first time.[57] The Immigration Judge ("IJ") determined that Acosta was ineligible for asylum.[58] Acosta worked as a taxi driver in El Salvador and guerillas, who sought to disrupt transportation in the city of San Salvador, repeatedly threatened him.[59] The guerillas beat and killed several of Acosta's friends and fellow taxi drivers; subsequently, Acosta fled to the United States after he was assaulted and received three threatening notes.[60] Acosta was later placed in deportation proceedings, so he applied for asylum as a defense to deportation.[61] The IJ found that Acosta failed to meet his burden of proof for such relief.[62]

Acosta then appealed to the BIA, arguing that the IJ erred in determining that Acosta failed to meet the burden of proof to establish his eligibility for asylum.[63] The BIA affirmed the IJ's denial of asylum, reasoning that Acosta did not show that his fear of persecution was well-founded and that the persecution was on account of membership in a particular social group or any of the other protected grounds.[64] In explaining its reasoning, the BIA clarified the meaning of particular social group for the first time.[65] The BIA applied the doctrine of *ejusdem generis*, which is used to interpret statutes that list classes of persons or things that are consistent with one another, and noted that a particular social group is a group of individuals, all of whom have an immutable characteristic in common that they either cannot change, or should not be required to change, because it is central to who they are.[66]

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sonable); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (determining that federal appellate courts must afford *Chevron* deference to the BIA's adjudicative lawmaking).

56. 19 I. & N. Dec. 211 (B.I.A. 1985).

57. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

58. *In re Acosta*, 19 I. & N. Dec. at 212-13.

59. *Id.* at 216.

60. *Id.* at 217.

61. *Id.* at 213.

62. *Id.* The IJ determined that Acosta failed to show that persecution, by the guerillas or the government, was likely to occur if Acosta was forced to return to El Salvador. *Id.*

63. *Id.*

64. *Id.* at 236.

65. *Id.* at 233.

66. *See id.* at 233 (explaining that, "we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed

2. In re M-E-V-G-*: The Board of Immigration Appeals Establishes and Defines a Three-Prong Test for Particular Social Group*

In *In re M-E-V-G-*,[67] the BIA clarified each of the three prongs of the particular social group test.[68] In *M-E-V-G-*, Valdiviezo fled Honduras after members of the Mara Salvatrucha gang kidnapped him and his family when they were traveling in Guatemala, assaulted them, and threatened to kill Valdiviezo if he did not join their gang.[69] Valdiviezo applied for asylum and argued that he was eligible for asylum due to his membership in the particular social group of Honduran youth, who are actively recruited by gangs but refuse to join because they oppose the gangs.[70] The IJ denied Valdiviezo's application for asylum, opining that Valdiviezo failed to demonstrate that he was eligible for relief under the INA.[71] Valdiviezo appealed to the BIA, which affirmed the IJ's denial of asylum.[72]

Valdiviezo then appealed to the United States Court of Appeals for the Third Circuit.[73] The Third Circuit determined that the IJ erroneously decided that Valdiviezo failed to establish that he was eligible for asylum and remanded the case to the BIA for further consideration.[74] However, the BIA again denied Valdiviezo's asylum application, holding that Valdiviezo failed to demonstrate the elements of particularity and social visibility.[75] On yet another appeal by Valdiviezo, the Third Circuit again remanded the case to the BIA, ex-

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toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or *kinship ties* . . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.") (emphasis added). The BIA subsequently added "social visibility" and "particularity" requirements to *Acosta*'s particular social group analysis. *See* In re C-A-, 23 I. & N. Dec. 951, 959-61 (B.I.A. 2006) (recognizing "particularity" as a requirement in the particular social group analysis); *see also* In re A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007) (noting that proposed particular social groups must be "recognizable" and "defined by terms that provide an adequate benchmark for determining group membership"); In re S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) (clarifying that an asylum applicant who claims persecution on account of membership in a particular social group must establish "particularity" and "social visibility" to provide "greater specificity to the definition of a social group").

67. 26 I. & N. Dec. 227 (B.I.A. 2014).

68. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

69. *In re M-E-V-G-*, 26 I. & N. Dec. at 228.

70. *Id.*

71. Valdiviezo-Galdamez v. Mukasey, 502 F.3d 285, 288 (3d Cir. 2007).

72. *In re M-E-V-G-*, 26 I. & N. Dec. at 228. The BIA reasoned that Valdiviezo failed to show that the persecution was "on account of a protected ground." *Id.* at 228-29.

73. *Id.* at 228.

74. *Valdiviezo-Galdamez*, 502 F.3d at 293.

75. *In re M-E-V-G-*, 26 I. & N. Dec. at 229.

plaining that the BIA needed to clarify its particular social group requirements.[76]

Accordingly, in complying with the Third Circuit, the BIA clarified the social visibility requirement.[77] A valid particular social group is comprised of individuals who share a common immutable characteristic, is defined with particularity, and is socially recognizable within the asylum seeker's society.[78] The BIA further clarified that the requirement of particularity means there must be a clear benchmark for determining who falls within a discrete yet narrowly-defined group.[79] In addition, the BIA explained that the social distinction requirement means that society must perceive the group as a group.[80] Ultimately, the BIA remanded the case to the IJ for further fact-finding regarding Valdiviezo's proposed particular social group.[81]

E. The Board of Immigration Appeals's Purported Circuit Split

1. The United States Courts of Appeals for the Fourth and Ninth Circuits Unquestionably Recognize Family as a Valid Particular Social Group

a. *Hernandez-Avalos v. Lynch*: The Fourth Circuit

In *Hernandez-Avalos v. Lynch*,[82] the United States Court of Appeals for the Fourth Circuit recognized that membership in a family constitutes a protected ground for purposes of asylum.[83] Hernandez-Avalos's husband's cousin was killed when he refused to join the Mara 18 gang in El Salvador.[84] Shortly thereafter, heavily armed gang members threatened to kill Hernandez-Avalos if she identified the gang members as her husband's cousin's killers.[85] On two other occasions, Mara 18 members came to Hernandez-Avalos's house, again

76. *Id.*
77. *Id.* at 237.
78. *See id.* (clarifying that to qualify for asylum on the basis of a particular social group, an applicant "must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.").
79. *See id.* at 239 (observing that the concept of wealth is "too amorphous to provide an adequate benchmark" for a particular social group (citing *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007))); *see also* Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (stating that a particular social group must have definable boundaries and noting that a large subset of a population might never meet this requirement).
80. *In re M-E-V-G-*, 26 I. & N. Dec. at 240. The BIA also clarified that the social distinction requirement does not mandate that the group be visibly seen by society. *Id.*
81. *Id.* at 252.
82. 784 F.3d 944 (4th Cir. 2015).
83. Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015).
84. *Hernandez-Avalos*, 784 F.3d at 947.
85. *Id.*

threatening to kill her, and informed her that her son would soon join their gang.[86] Hernandez-Avalos then left El Salvador and applied for asylum on the basis of her membership in a family-based particular social group.[87] The IJ denied Hernandez-Avalos's asylum application, finding that she failed to demonstrate that she was likely to undergo persecution because of a protected ground.[88] Hernandez-Avalos appealed to the BIA, which then affirmed the IJ's decision.[89] Upon appeal to the Fourth Circuit, the court determined Hernandez-Avalos had established her eligibility for asylum.[90] The Fourth Circuit reasoned that Hernandez-Avalos's nuclear family qualified as a particular social group and opined that Hernandez-Avalos's relationship to her son was at least one central reason the gang members persecuted her.[91]

b. *Flores-Rios v. Lynch*: The Ninth Circuit

In *Flores-Rios v. Lynch*,[92] the United States Court of Appeals for the Ninth Circuit recognized that family is the quintessential particular social group.[93] In *Flores-Rios*, gang members murdered Flores-Rios's father outside of his church.[94] Flores-Rios's cousin witnessed the murder and agreed to testify against the gang members responsible, but the cousin was murdered the day before the gang members' hearing.[95] Flores-Rios's family received threats from the gang, so Flores-Rios and his sister fled Guatemala and subsequently entered the United States.[96] Flores-Rios then applied for asylum on the bases of religious persecution and membership in a particular social group, his family.[97] The IJ rejected both Flores-Rios's religion and family-based asylum claims.[98]

Flores-Rios appealed to the BIA, but the BIA dismissed the appeal without addressing his family-based asylum claim.[99] Flores-Rios

86. *Id.*
87. *Id.* at 947, 949. Hernandez-Avalos argued that the nuclear family qualifies as a particular social group for asylum purposes. *Id.* at 949.
88. *Id.* at 948.
89. *Id.*
90. *Id.* at 950.
91. *Id.*
92. 807 F.3d 1123 (9th Cir. 2015).
93. Flores-Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015).
94. *Flores-Rios*, 807 F.3d at 1125.
95. *Id.*
96. *Id.*
97. *Id.* Related to his family-based claim, Flores-Rios asserted that he faced persecution by the gang because of the gang's vendetta against his family. *Id.*
98. *See id.* (finding that "violence and witness intimidation—not religious persecution—led to the murders of Flores-Rios's relatives.").
99. *Id.*

subsequently appealed to the Court of Appeals for the Ninth Circuit.[100] The Ninth Circuit determined that the BIA's failure to address Flores-Rios's social group claim was an error that required remand.[101] It further opined that family relationship constitutes membership in a particular social group, declining to hold that a family may only establish a particular social group when the persecution on that basis is entwined with an additional protected ground.[102] Therefore, the Ninth Circuit vacated the BIA's denial of Flores-Rios's asylum application and remanded for further findings.[103]

2. The United States Courts of Appeals for the Fifth, Seventh, and Eighth Circuits Contribute to Confusion About Family-Based Particular Social Groups

a. *Ramirez-Mejia v. Lynch*: The Fifth Circuit Leaves Open the Question of Whether Family is a Cognizable Social Group

In *Ramirez-Mejia v. Lynch*,[104] the United States Court of Appeals for the Fifth Circuit did not reach the question of whether Ramirez-Mejia's family met the requirements of a particular social group.[105] The Fifth Circuit denied Ramirez-Mejia's petition for review and upheld the BIA's rejection of her family-based asylum claim.[106] Ramirez-Mejia applied for asylum as an affirmative defense to removal when she was arrested for theft after entering the United States without inspection.[107] After Ramirez-Mejia's brother was murdered, Ramirez-Mejia fled Honduras because the individuals responsible shot up her family's business while she was there.[108] In reviewing the application for asylum, the IJ rejected Ramirez-Mejia's argument that her nuclear family constituted a particular social group, reasoning

100. *Id.* at 1124-25.
101. *Id.* at 1126.
102. *See id.* at 1128 (referencing other courts of appeals that recognize family as a particular social group). The court in *Flores-Rios* cites: Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (noting that "every circuit to have considered the question has held that family ties can provide a basis for asylum."); Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) (opining that "membership in the same family . . . is widely recognized by the caselaw."); Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (recognizing that, "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."). *Id.*
103. *Id. See* Gonzales v. Thomas, 547 U.S. 183, 186-87 (2006) (deciding that where the BIA had not addressed whether the family-based group was a cognizable particular social group, the Ninth Circuit was required to remand to the BIA for the BIA's determination of the issue because a court of appeals cannot generally review issues de novo).
104. 794 F.3d 485 (5th Cir. 2015).
105. Ramirez-Mejia v. Lynch, 794 F.3d 485, 492 (5th Cir. 2015).
106. *Ramirez-Mejia*, 794 F.3d at 487.
107. *Id.*
108. *Id.*

that her family did not meet the particular social group requirements of particularity and social visibility.[109] Subsequently, the BIA dismissed her appeal, affirming the IJ's decision without addressing whether Ramirez-Mejia's family comprised a particular social group.[110]

Ramirez-Mejia was removed to Honduras, where she moved to reopen her case based on her discovery of previously unavailable evidence.[111] The BIA granted the motion to reopen and remanded Ramirez-Mejia's case to the IJ.[112] The IJ held that Ramirez-Mejia's family was not a cognizable social group and that she was not persecuted on account of her membership in her family.[113] Ramirez-Mejia appealed to the BIA, which again dismissed her appeal.[114]

Finally, Ramirez-Mejia then appealed to the Fifth Circuit, claiming that the BIA erroneously determined that she was ineligible for asylum because her removal order was reinstated.[115] The Fifth Circuit upheld the BIA's determination that Ramirez-Mejia failed to show that she was persecuted because of her membership in her family and declined to address whether her family constituted a particular social group.[116] However, because the Fifth Circuit did not reach the question of whether Ramirez-Mejia's family met the requirements of a particular social group, the court left open the question of whether family may constitute a particular social group.[117]

b. *Yin Guan Lin v. Holder*: An Unpublished Case from the Seventh Circuit

In *Yin Guan Lin v. Holder*,[118] the United States Court of Appeals for the Seventh Circuit, in an unpublished decision, determined that Lin did not meet the requirements for a successful asylum claim.[119] The Seventh Circuit reasoned that Lin did not meet the immutable

109. *Id.* at 488, 492. The IJ further held that Ramirez-Mejia failed to demonstrate that she was persecuted "on account of" her family membership. *Id.* at 492.
110. *Id.*
111. *Id.* at 488.
112. *Id.*
113. *Id.* The IJ refused to consider her eligibility for asylum because Ramirez-Mejia's removal order was reinstated. *Id.*
114. *Id.* at 489.
115. *Id.*
116. *Id.* at 492.
117. *See id.* (ending the inquiry before analyzing whether Ramirez-Mejia's family-based group was a cognizable social group).
118. 411 F. App'x 901 (7th Cir. 2011).
119. Yin Guan Lin v. Holder, 411 F. App'x 901, 902 (7th Cir. 2011). Lin's claim for asylum was predicated on his membership in a particular social group, which he defined as "family members of known Chinese debtors who fear punishment from creditors for outstanding debt." *Yin Guan Lin*, 411 F. App'x at 905.

characteristic requirement, subsequently acknowledged that family may constitute a particular social group, but ultimately opined that his family membership was not the reason for his persecution.[120] Specifically, the court also reasoned that a personal dispute, which arose due to creditors attempting to collect Lin's father's debts, caused Lin's persecution.[121] In essence, because Lin's father's persecution was not on account of a protected ground, Lin's social group claim failed.[122] Ultimately, the Seventh Circuit recognized that, while family may constitute a particular social group, Lin failed to demonstrate that his relationship to his father motivated the persecution.[123]

c. *Malonga v. Holder*: The Eighth Circuit Does Not Clearly Address Family as a Social Group

In *Malonga v. Holder*,[124] the United States Court of Appeals for the Eighth Circuit did not squarely address family-based particular social groups.[125] Malonga applied for asylum on the grounds of persecution on account of his political opinion and his membership in the Lari ethnic group, a subset of the Kongo tribe in the Republic of Congo.[126] The IJ denied Malonga's asylum application and concluded that his ethnic group was not a particular social group.[127] The BIA affirmed the IJ's decision.[128] Malonga then appealed to the Eighth Circuit, which concluded that the Kongo tribe's Lari ethnicity was a cognizable particular social group.[129] The Eighth Circuit reasoned that members of Malonga's tribe were identifiable by their surnames

120. *Id.* at 905.
121. *Id.* at 906.
122. *See id.* at 905-06 (reasoning that "[a]ny harm that Lin faced arose from a personal dispute between his father and his father's creditors. Debtors who fear creditors do not qualify for social group membership.").
123. *Id.* at 905.
124. 621 F.3d 757 (8th Cir. 2010).
125. Malonga v. Holder, 621 F.3d 757, 760 (8th Cir. 2010) [hereinafter *Malonga II*]. Malonga did not claim persecution on account of a family-based group; therefore, the Eighth Circuit only addressed Malonga's claims that he was persecuted in the past and feared future persecution because of his ethnicity and political opinion. *Malonga II*, 621 F.3d at 760.
126. Malonga v. Mukasey, 546 F.3d 546, 549 (8th Cir. 2008) [hereinafter *Malonga I*].
127. *Malonga I*, 546 F.3d at 549. The IJ reasoned that Malonga's asylum application was untimely filed. *Id.*
128. *Id.*
129. *Id.* at 554. In making this determination, the Eighth Circuit rejected the IJ's reasoning that Malonga's proposed group was not a valid particular social group because Malonga's group made up a "substantial minority" of the population in the Democratic Republic of Congo. *Id.* at 553-54. Specifically, the Eighth Circuit reasoned that "the more likely that the society at large recognizes the alleged group (by, for example, linguistic or kinship commonalities), the more likely that the group is a particular social group . . . ." *Id.* at 553.

and shared a distinct accent and dialect.[130] The Eighth Circuit held that it lacked jurisdiction to review whether Malonga timely filed his asylum application and remanded the case to the BIA for further proceedings.[131] The BIA dismissed Malonga's appeal, noting that the size of Malonga's proposed group was relevant to whether the group was cognizable.[132] The Eighth Circuit granted Malonga's petition for review of the BIA's decision and remanded the case for reconsideration.[133]

3. The Precedent Cases from the United States Courts of Appeals for the First, Second, and Fourth Circuits that the Board of Immigration Appeals Failed to Consider

a. *Gebremichael v. I.N.S.*: The First Circuit Determines that Nuclear Family is the Quintessential Particular Social Group

In *Gebremichael v. INS*,[134] the United States Court of Appeals for the First Circuit opined that the nuclear family is a prototypical example of a particular social group.[135] In *Gebremichael*, Ethiopian military authorities persecuted Gebremichael's father and brother, so Gebremichael helped smuggle his brother out of the country.[136] As a result, Ethiopian military authorities imprisoned and tortured Gebremichael for months.[137] Gebremichael traveled to the United States on a student visa and applied for asylum on the basis of a well-founded fear of persecution because of his political opinion.[138] The IJ denied his application for asylum.[139] Gebremichael then appealed to the BIA, which affirmed the IJ's denial of asylum.[140]

Subsequently, Gebremichael filed a motion to reconsider with the BIA while concurrently appealing to the First Circuit.[141] Before the First Circuit, Gebremichael argued that the BIA erred in determining that he was ineligible for asylum because the Ethiopian military au-

130. *Id.* at 554.
131. *Id.* at 556.
132. *Malonga II*, 621 F.3d at 763. The BIA specifically found that the harm Malonga suffered "did not rise to the level of persecution" and the majority of the harm did not occur on the basis of a protected ground. *Id.* at 764.
133. *Id.* at 760.
134. 10 F.3d 28 (1st Cir. 1993).
135. *Gebremichael*, 10 F.3d at 36.
136. *Id.* at 31.
137. *Id.*
138. *Id.* at 32.
139. *Id.*
140. *Id.* The BIA rendered its decision over two years after it heard oral arguments for the case, during which time the political climate in Ethopia, Gebremichael's country of origin, had changed. *Id.*
141. *Id.* at 33. The BIA reaffirmed its holding that Gebremichael did not qualify for asylum. *Id.* at 32-33.

thorities imprisoned and tortured him on account of his relationship to his brother, whom Gebremichael helped leave the country.[142] Accordingly, the First Circuit addressed whether family is a cognizable particular social group under the INA and, if so, whether the imprisonment and torture were on account of Gebremichael's family membership.[143] The First Circuit opined that family is a cognizable particular social group.[144] The court further reasoned that the link between the persecution Gebremichael suffered and his family membership was clear.[145] Thus, because family constitutes a protectable particular social group, the First Circuit vacated the BIA's holding that Gebremichael was ineligible for asylum and remanded the case.[146]

b. *Vumi v. Gonzales*: The Second Circuit Emphasizes that the Board of Immigration Appeals has Recognized Family as a Valid Particular Social Group

In *Vumi v. Gonzales*,[147] the United States Court of Appeals for the Second Circuit determined that the BIA erred in its evaluation of family-based asylum applications because the BIA itself had recognized that family may constitute a particular social group for purposes of asylum.[148] Soldiers for the Democratic Republic of Congo imprisoned, raped, and tortured Vumi because they suspected her ex-husband, who served as a bodyguard for President Laurent Kabila, of involvement in the president's assassination.[149] Vumi sought asylum in the United States based on two grounds: her relationship to her husband and her membership in the group of family members of an individual who worked as a bodyguard for Kabila when the assassination took place.[150] The IJ found that Vumi established that she was

142. *Id.* at 31, 35.

143. *Id.* at 36.

144. *See id.* at 36 (explaining that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family . . . . '[A] prototypical example of a "particular social group" would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.'" (quoting Ravindran v. I.N.S., 976 F.2d 754, 761 n.5 (1st Cir. 1992))).

145. *Id.* at 36.

146. *Id.* at 36-37.

147. 502 F.3d 150 (2d Cir. 2007).

148. *See* Vumi v. Gonzales, 502 F.3d 150, 155 (2d Cir. 2007) (discussing BIA decisions that recognize family as a particular social group); *see also, e.g.*, *In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) (opining that "[s]ocial groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups.").

149. *Vumi*, 502 F.3d at 151-52.

150. *Id.* at 153, 154.

persecuted but denied her asylum application, reasoning that the persecution was not on account of a particular social group.[151]

On appeal, the BIA affirmed the IJ's denial of Vumi's application for asylum, noting that Vumi's family-based group did not qualify as a particular social group.[152] Vumi again appealed, specifically to the Second Circuit, arguing that the BIA erred in upholding the IJ's denial of her asylum application.[153] The Second Circuit vacated the BIA's decision and remanded the case for further proceedings, reasoning that the BIA failed to fully evaluate Vumi's social group claim.[154] The court further reasoned that the BIA itself has recognized that family may constitute a particular social group.[155] Thus, the Second Circuit reminded the BIA of the BIA's own precedent regarding family-based particular social groups and directed the BIA to apply said precedent.[156]

c. *Crespin-Valladares v. Holder*: The Fourth Circuit Recognizes that Family Ties Can Provide a Valid Basis for Asylum

In *Crespin-Valladares v. Holder*,[157] the United States Court of Appeals for the Fourth Circuit determined that family relationships may constitute a basis for asylum.[158] In *Crespin-Valladares*, border officials apprehended Crespin and his family when they attempted to enter the United States without authorization.[159] Crespin applied for asylum as an affirmative defense to removability.[160] Crespin claimed that he had a well-founded fear of persecution due to his membership in the particular social group of family members who actively resist gangs in El Salvador by being prosecutorial witnesses.[161] The IJ

151. *Id.* at 152.

152. *See id.* at 155 (reasoning that Vumi's group did not qualify because she did not claim any familial relationship with the relatives of other assassination suspects).

153. *Id.* at 151.

154. *See id.* at 154 (noting that the BIA "completely ignored her individual family relationship to" her ex-husband and only evaluated the second of Vumi's social group claims).

155. *See id.* at 155 (recognizing that "'kinship ties' may form a cognizable shared characteristic for a particular social group." (citing *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985))). The *Vumi* court also explained that the BIA has acknowledged that a family or clan may constitute a particular social group when its members are recognizable due to "immutable characteristics inextricably linked to family ties." *Id.* (quoting *In re* H-, 21 I. & N. Dec. 337, 342 (B.I.A. 1996)).

156. *See id.* (explaining that "under [BIA] precedent, family membership can constitute membership in a particular social group for purposes of asylum") (internal quotation omitted).

157. 632 F.3d 117 (4th Cir. 2011).

158. Crespin-Valladares v. Holder, 632 F.3d 117, 124-25 (4th Cir. 2014).

159. *Crespin-Valladares*, 632 F.3d at 120.

160. *Id.*

161. *Id.* at 120-21.

found that Crespin's proposed group qualified as a particular social group under the INA and granted Crespin's asylum application.[162] The IJ reasoned that Crespin's persecution was on account of his membership in a valid particular social group.[163] The government appealed to the BIA, which vacated the IJ's grant of asylum and ordered the Crespins' removal, reasoning that Crespin's proposed group did not meet the INA standard for particular social group and that Crespin did not have a well-founded fear of future persecution.[164]

Crespin then appealed to the Fourth Circuit, arguing that the BIA erred in denying his asylum claim.[165] The Fourth Circuit opined that family ties can provide a valid basis for asylum.[166] The court reasoned that family relationships have particular, well-defined boundaries and are readily apparent and understood by others to be social groups.[167] On that basis, the Fourth Circuit remanded the case to the BIA with instructions that the BIA review the IJ's findings, that a sufficient nexus existed between Crespin's persecution and his family membership, and that the Salvadorian government was unable or unwilling to control the MS-13 gang.[168]

F. The United States Courts of Appeals for the First and Fifth Circuits Disagree on the Appropriate Analysis for Family-Based Social Groups

1. Orellana-Monson v. Holder*: The Fifth Circuit Analyzes a Family-Based Group as Derivative of Another Proposed Particular Social Group*

In *Orellana-Monson v. Holder*,[169] the United States Court of Appeals for the Fifth Circuit rejected a family-based particular social group claim.[170] The Fifth Circuit determined that the family-based social group failed because it was derivative of a group that lacked the requisite particularity.[171] In *Orellana-Monson*, the Fifth Circuit con-

162. *Id.* at 121. The IJ also granted the derivative applications of Crespin's wife and children. *Id.*

163. *Id.*

164. *Id.* This occurred nearly two years after the IJ granted the Crespins' asylum applications. *Id.*

165. *Id.*

166. *See id.* at 125 (noting that kinship ties meet the immutability prong of the particular social group test because they are innate and unchangeable).

167. *See id.* at 125-26 (acknowledging that family-based groups meet the second and third prongs of the particular social group test).

168. *Id.* at 129.

169. 685 F.3d 511 (5th Cir. 2012).

170. Orellana-Monson v. Holder, 685 F.3d 511, 522 (5th Cir. 2012).

171. *See Orellana-Monson*, 685 F.3d at 521-22 (reasoning that because the elder brother's proposed group was "exceedingly broad and encompasse[d] a broad cross section of society" the younger brother's claim that he belonged to a group comprised of the

sidered the asylum claims of two brothers who fled El Salvador to the United States in fear that the Mara 18 gang would kill the elder brother and his family if the elder continued to refuse to join the gang.[172] The brothers applied for asylum and the IJ denied the Orellana-Monsons' asylum claims because the brothers did not qualify as members of any particular social group.[173] On appeal, the BIA dismissed the Orellana-Monsons' appeal without analyzing whether the brothers were members of a particular social group.[174]

The Orellana-Monsons then appealed to the Fifth Circuit.[175] The Fifth Circuit denied the Orellana-Monsons' petition for review, stating that the brothers failed to show membership in any particular social group.[176] The brothers then petitioned for rehearing en banc, arguing that the Fifth Circuit erred in using the BIA's analysis, which was inconsistent with the Fifth Circuit's standard for particular social group.[177] The Fifth Circuit granted the Orellana-Monsons' petition, vacated the BIA's decision, and remanded for further proceedings.[178] In the ensuing proceedings, the BIA determined that the elder Orellana-Monson's proposed social group was overly-broad and, thus, yet again dismissed the brothers' petition.[179] Subsequently, the Orellana-Monsons appealed to the Fifth Circuit.[180] The Fifth Circuit upheld the BIA's denial of the brothers' asylum claims, reasoning that the proposed family-based social group did not meet the particularity and social visibility requirements.[181]

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elder brother's family members was "derivative" of the elder brother's group and, thus, also lacked particularity). Specifically, the Fifth Circuit reasoned that because the elder brother's group was "too amorphous since it encompasse[d] a wide swath of society . . . then a group consisting of all family members of that already large segment, is even less particularized and therefore does not meet the particularity requirement." *Id.* at 522. The elder brother's proposed group was "men who were recruited but refused to join Mara 18." *Id.* at 521.

172. *Id.* at 515.

173. *Id.* at 516.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* (arguing that the BIA's reliance *on In re* S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008), "constituted a drastic change in [the Fifth Circuit]'s standard for determining what constitutes a particular social group.").

178. Orellana-Monson v. Holder, No. 08-60394, slip op. at 4 (5th Cir. 2010) (per curium).

179. *Orellana-Monson*, 685 F.3d at 517.

180. *Id.*

181. *Id.* at 522.

2. Aldana-Ramos v. Holder*: The First Circuit Definitively Rejects the Notion that Family-Based Groups Require a Showing of Persecution on Account of Another Protected Ground*

In *Aldana-Ramos v. Holder*,[182] the United States Court of Appeals for the First Circuit explicitly rejected the BIA's attempt to tack on an additional requirement for family-based particular social group claims.[183] The First Circuit opined that the BIA's conclusion regarding the Aldana-Ramos brothers' asylum application was legally flawed and remanded the case for further proceedings.[184] In *Aldana-Ramos*, two brothers fled Guatemala and applied for asylum on the basis of their membership in the particular social group of their nuclear family after the "Z" gang kidnapped their father, held him for ransom, and eventually murdered him.[185] Before fleeing to the United States, the Aldana-Ramos brothers depleted their financial resources to pay their father's ransom and moved to a town four hours away after they were continually stalked and threatened by "Z" gang members.[186]

The IJ presiding over the Aldana-Ramos brothers' application review denied the application because the Aldana-Ramos brothers' immediate family did not qualify as a particular social group.[187] The Aldana-Ramos brothers subsequently appealed to the BIA, which upheld the IJ's denial of asylum.[188] The BIA also reasoned that the Aldana-Ramos brothers failed to draw a sufficient nexus between the persecution and their purported protected ground.[189] The First Circuit rejected the BIA's holdings related to the Aldana-Ramos brothers' asylum claim and explicitly rejected the BIA's attempt to tack on an additional requirement for family-based particular social group claims.[190]

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182. 757 F.3d 9 (1st Cir. 2014).

183. Aldana-Ramos v. Holder, 757 F.3d 9, 12 (1st Cir. 2014).

184. *Aldana-Ramos*, 757 F.3d at 12.

185. *Id.* at 12-13.

186. *Id.* at 13. The "Z" gang continued threatening and stalking the brothers even after they moved to a town four hours away. *Id.*

187. *Id.* at 13-14. The IJ further reasoned that the brothers failed to establish a nexus between the persecution and a protected ground. *Id.* at 13.

188. *Id.* at 14.

189. *See id.* (noting how the BIA concluded "that although Haroldo was certainly the victim of 'a terrible crime,' the crime was motivated by the 'Z' gang's perception of his wealth 'and not on account of a protected characteristic of the respondents' father or of their family.'").

190. *Id.* at 15.

G. A Focused Review of the United States Court of Appeals for the Eighth Circuit's Return to Past Precedent to Resolve Ambiguity on the Issue of Family-Based Groups

1. Bernal-Rendon v. Gonzales*: The Eighth Circuit Establishes that Family Can Be a Cognizable Social Group*

In *Bernal-Rendon v. Gonzales*,[191] the United States Court of Appeals for the Eighth Circuit acknowledged that immediate family can constitute a particular social group.[192] The Bernal-Rendon family applied for asylum as an affirmative defense to removal from the United States after the Bernal-Rendons overstayed the departure date of their visitor visas.[193] The Bernal-Rendons argued the Fuerzas Armadas Revelutionarios de Colombia-Ejercito Popular ("FARC") targeted them in Colombia on account of their membership in the Bernal-Rendon family.[194] The Bernal-Rendons fled Colombia after several incidents, including: Mrs. Bernal-Rendon suspecting that her maid was a FARC spy, the family receiving threatening phone calls from unknown callers, and members of the FARC kidnapping and interrogating Mrs. Bernal-Rendon's sister for three days.[195]

The IJ denied the Bernal-Rendon family's asylum claim for failure to meet the application deadline and the BIA affirmed.[196] The Eighth Circuit opined that the Bernal-Rendons were correct in asserting that a nuclear family can qualify as a particular social group.[197] In reaching this determination, the Eighth Circuit relied upon First Circuit precedent.[198] The court used the Ninth Circuit's decision in *Sanchez-Trujillo v. INS*[199] to further support its opinion.[200] Nevertheless, the Eighth Circuit affirmed the BIA's denial of the Bernal-Rendons' asylum claim for failure to satisfy the nexus requirement.[201]

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191. 419 F.3d 877 (8th Cir. 2005).
192. Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005).
193. *Bernal-Rendon*, 419 F.3d at 879.
194. *Id.*
195. *Id.*
196. *Id.* at 880. The Eighth Circuit noted that, under 8 U.S.C. § 1158(a)(2)(B), an applicant for asylum is required to submit his or her asylum application within one year of arriving in the United States. *Id.* However, the Eighth Circuit did not review the IJ's decision regarding the timeliness of the Bernal-Rendon family's asylum application because the Eighth Circuit lacked jurisdiction. *Id.*
197. *Id.* at 881.
198. *See id.* (citing Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993)) (stating that the nuclear family is the plainest example of a group that shares immutable and identifiable characteristics).
199. 801 F.2d 1571 (9th Cir. 1986).
200. *See Bernal-Rendon*, 419 F.3d at 881 (explaining that the prototypical particular social group consists of "the immediate members of a certain family" (citing Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986))).
201. *Id.* at 879. The Eighth Circuit reasoned that it lacked jurisdiction to review the IJ's decision about the timeliness of the Bernal-Rendon family's asylum application. *Id.*

2. Aguinada-Lopez v. Lynch*: The Eighth Circuit Harkens Back to Prior Precedent in Assuming the Validity of Family-Based Groups*

In *Aguinada-Lopez v. Lynch*,[202] the United States Court of Appeals for the Eighth Circuit assumed family-based groups are cognizable particular social groups.[203] Aguinada-Lopez fled El Salvador and sought asylum in the United States after members of the Dieciocho gang threatened and physically assaulted him on four occasions.[204] Aguinada-Lopez did not belong to a gang, but his cousin belonged to the MS-13 gang, a rival of the Dieciocho gang.[205] Aguinada-Lopez asserted that the Dieciocho gang persecuted him due to his membership in two family-based particular social groups.[206] The IJ found that the second group was a cognizable particular social group; however, the BIA disagreed and rejected both of Aguinada-Lopez's proposed groups.[207]

The Eighth Circuit denied Aguinada-Lopez's initial petition for review.[208] Subsequently, Aguinada-Lopez filed a petition for rehearing and a motion for stay of removal.[209] The Eighth Circuit granted Aguinada-Lopez's motion, thus allowing him to remain in the United States until the court rendered its decision on rehearing.[210] Ulti-

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202. 825 F.3d 407 (8th Cir. 2016).

203. Aguinada-Lopez v. Lynch, 825 F.3d 407, 409 (8th Cir. 2016) [hereinafter *Aguinada II*].

204. *Aguinada II*, 825 F.3d at 408.

205. *Id.* A short time after Aguinada-Lopez left El Salvador, members of the Dieciocho gang murdered his cousin in front of Aguinada-Lopez's house as a "threat for [Aguinada-Lopez] not to return" to El Salvador. *Id.*

206. *Id.* at 409. Aguinada-Lopez's purported groups were "male, gang-aged family members of murdered gang members" and "male, gang-aged family members of [Aguinada-Lopez's] cousin Oscar." *Id.*

207. *See id.* (noting the BIA's conclusions that "both proposed family-based social groups are not viable" and finding the circumstances of Aguinada-Lopez's case indistinguishable from *Antonio-Fuentes* and *Constanza*, "the Eighth Circuit's precedent decisions . . . ."). *See* Antonio-Fuentes v. Holder, 764 F.3d 902, 905 (8th Cir. 2014) (rejecting a family-based group because the petitioner failed to establish that gangs singled out his family and, therefore determining that his family was indistinguishable from "'any other Salvadoran family that has experienced gang violence.'"); Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011) (per curiam) (reasoning that "a family that experienced gang violence" was not sufficiently particular to be perceived as a group by society).

208. *See* Aguinada-Lopez v. Lynch, 814 F.3d 924, 927 (8th Cir. 2016) [hereinafter *Aguinada I*], *vacated and superseded*, 825 F.3d 407 (8th Cir. 2016) (reasoning that the BIA did not err in rejecting Aguinada-Lopez's asylum claim because there was no nexus).

209. Petition for En Banc Rehearing and also for Rehearing by Panel, Aguinada-Lopez v. Lynch, 825 F.3d 407 (8th Cir. 2016) (No. 15-1095); Petitioner's Motion for Stay of Removal, Aguinada-Lopez v. Lynch, 825 F.3d 407 (8th Cir. 2016) (No. 15-1095).

210. *See* Judge Order, Aguinada-Lopez v. Lynch, 825 F.3d 407 (8th Cir. 2016) (No. 15-1095) (granting Aguinada-Lopez's motion for a stay of removal "while the petition for rehearing is pending"). However, in the interim, Aguinada-Lopez was removed to El

mately, the Eighth Circuit denied Aguinada-Lopez's petition for review and vacated its prior opinion.[211] The Eighth Circuit assumed Aguinada-Lopez's proposed family-based groups were cognizable, but affirmed the BIA's denial of asylum for lack of sufficient nexus.[212]

III. ANALYSIS

Family satisfies the three-prong test for particular social groups set forth in *In re M-E-V-G-*[213] because family is indisputably made up of individuals who share a common immutable characteristic—a familial relationship.[214] Additionally, societies across the globe recognize families as distinct groups.[215] Moreover, family is a readily identifiable group with a distinct benchmark separating family members from everyone else.[216] Thus, family-based groups that meet *M-E-V-G-*'s three-prong test are prototypical particular social groups that courts should not require to demonstrate an additional protected ground for claiming asylum.[217] Nevertheless, earlier this year, the

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Salvador contrary to the court's stay of removal. *See* Emergency Motion for Return of Petitioner to the United States, Aguinada-Lopez v. Lynch, 825 F.3d 407 (8th Cir. 2016) (No. 15-1095) (moving the Eighth Circuit to compel the government to return Aguinada-Lopez to the United States). The Eighth Circuit then directed "Respondent Loretta Lynch . . . to immediately return Remberto Aguinada-Lopez to the United States." Judge Order, Aguinada-Lopez v. Lynch, 825 F.3d 407 (8th Cir. 2016) (No. 15-1095). Aguinada-Lopez subsequently filed a motion to reopen before the BIA, which the BIA granted. Judge Order, Aguinada-Lopez v. Lynch, 825 F.3d 407 (8th Cir. 2016) (No. 15-1095).

211. *Aguinada II*, 825 F.3d at 408 n.1.

212. *Id.* at 409. In reaching this assumption, the Eighth Circuit cited its own prior precedent, *Bernal-Rendon v. Gonzales*, wherein the Eighth Circuit opined that "a nuclear family can constitute a social group" and recognized the immediate family as the "prototype" of a social group. *Id.* (citing Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005)).

213. 26 I. & N. Dec. 227 (B.I.A. 2014).

214. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

215. *See* Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011) (indicating that family-based particular social groups meet the social distinction requirement because few groups are more "readily identifiable than the family.").

216. *See* Hernandez-Ortiz v. I.N.S., 777 F.2d 509, 516 (9th Cir. 1985) (defining family as a "small, readily identifiable group.").

217. *Compare In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (noting that "kinship ties" are a paradigmatic common, immutable characteristic for a cognizable particular social group), *with* Aldana-Ramos v. Holder, 757 F.3d 9, 15 (1st Cir. 2014) (clarifying that "[i]t is well established in the law of [the First] [C]ircuit that a nuclear family can constitute a particular social group"); Vumi v. Gonzales, 502 F.3d 150, 155 (2d Cir. 2007) (recognizing that "the [BIA] has held unambiguously that membership in a nuclear family *may* substantiate a social-group basis of persecution."); Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) (opining that "membership in a nuclear family qualifies as a protected ground for asylum purposes."); Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) (acknowledging that "[m]embership in the same family . . . is widely recognized by the caselaw" as a particular social group); Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) (explaining that the Seventh "[C]ircuit recognizes a family as a cognizable social group"); Bernal-Rendon v. Gonzales, 419 F.3d

Board of Immigration Appeals ("BIA") recognized that there is ambiguity regarding whether family may qualify as a particular social group and whether the nexus requirement, the condition that the persecution be *on account of* membership in a group, is different for family-based groups.[218] Seeking guidance on this subject, the BIA specifically invited amicus curiae to address what the BIA itself deemed to be a circuit split regarding the proper analysis for family-based particular social groups.[219]

First, this Analysis will demonstrate that family membership is an immutable characteristic.[220] Second, this Analysis will show that family membership is socially distinct.[221] Then, this Analysis will illustrate that family membership is defined with particularity.[222] After demonstrating that family meets the three-prong test for particular social groups, this Analysis will subsequently argue the BIA's purported circuit split does not exist by illustrating that the cases identified as creating a split merely add ambiguity to the issue and do not directly contradict the well-settled precedent.[223] Next, this Analysis will examine the United States Court of Appeals for the Eighth Circuit's intracircuit inconsistency related to family-based social groups.[224] Finally, this Analysis will recommend that the BIA issue a precedential decision clarifying that family is a cognizable particular social group and that the nexus requirement is satisfied when an asylum seeker has shown persecution on account of membership in the asylum seeker's family.[225]

877, 881 (8th Cir. 2005) (noting that "a nuclear family can constitute a social group"); Flores-Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015) (determining that "the family remains the quintessential particular social group.").

218. BIA Amicus Invitation at 1, Matter of L-A-, No. 16-01-11 (B.I.A. 2016). The BIA invited interested members of the public to address the issue:

> Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family, has he or she satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another protected ground?

BIA Amicus Invitation at 1, Matter of L-A-, No. 16-01-11 (B.I.A. 2016).

219. *See* BIA Amicus Invitation at 1, Matter of L-A-, No. 16-01-11 (B.I.A. 2016) (requesting that *amici* specifically address a purported circuit split and "*compare Hernandos-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), *with Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).").

220. *See infra* notes 227-232 and accompanying text.

221. *See infra* notes 233-240 and accompanying text.

222. *See infra* notes 241-248 and accompanying text.

223. *See infra* notes 249-272 and accompanying text.

224. *See infra* notes 273-285 and accompanying text.

225. *See infra* notes 286-290 and accompanying text.

A. Family Membership: A Characteristic That Courts Cannot and Should Not Require Individuals to Change

To demonstrate membership in a particular social group for purposes of asylum, an individual asylum-seeker must first show that the proposed group is comprised of individuals who share a common immutable characteristic.[226] An immutable characteristic is a trait that a group of individuals share, which the individuals either cannot change about themselves or should not be forced to change because the trait is central to who they are.[227] Family is a group into which an individual is born, and it is both fundamental to an individual's identity and something that an individual cannot change about himself or herself.[228] Family bonds individuals by blood, through shared physical attributes, and by law.[229] Moreover, history has recognized the bonds of marriage, children, and family as central to the human condition.[230] Therefore, family membership is an immutable characteristic.[231]

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226. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

227. *See In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (explaining how the BIA interprets persecution for being a member of a particular social group). The BIA specifically stated:

> We interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or *kinship ties* . . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id. (emphasis added).

228. *See In re Acosta*, 19 I. & N. Dec. at 233 (recognizing "kinship ties" as an example of an innate, immutable characteristic).

229. *Family*, Black's Law Dictionary (8th ed. 2004) (defining family as "[a] group of persons connected by blood, by affinity, or by law, esp. within two or three generations" or "[a] group consisting of parents and their children.").

230. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (noting that "Confucius taught that marriage lies at the foundation of government . . . this wisdom was echoed centuries later and half a world away by Cicero, who wrote, 'The first bond of society is marriage; next, children; and then the family.'" (citing Cicero, De Officiis 57 (W. Miller trans., Harvard Univ. Press 1913) (44 B.C.E.))).

231. *Compare In re Acosta*, 19 I. & N. Dec. at 233 (explaining that an immutable characteristic is one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."), *with* Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (opining that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."), Crespin-Valladares v. Holder, 632 F.3d 117, 124 (4th Cir. 2011) (reasoning that family ties are "paradigmatically immutable" and pointing out that the BIA has "affirmed that family bonds are innate and unchangeable."), *and* Dep't of Homeland Sec. Supplemental Brief at 7, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (conceding that membership in an immediate family "usually is immutable," reasoning that "it is generally not possible to change the fact of who is one's parent or child . . . . This type of family relationship is

B. Family: A Discrete and Narrowly-Defined Social Group

The second step in proving that an individual is a member of a particular social group is demonstrating that the proposed group is defined with particularity.[232] In order to meet the particularity requirement, the society in question must have commonly understood and accepted definitions for the terms used to define the group.[233] These terms should combine to describe a group that is subtle, yet has clear boundaries.[234] Undoubtedly, family satisfies the particularity requirement because the characteristics defining family form a precise benchmark, distinguishing those who fall within the family from those who do not.[235] Family is a quintessential example of a group that is defined with particularity because family is a source of vital relationships and common concerns for most individuals.[236] Furthermore, the United States Supreme Court has recognized that family is the vehicle through which individuals instill and pass down moral and cultural values.[237] In fact, the Court has consistently opined that the Constitution affords protection to the family because the family is deeply

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generally fundamental to an individual's identity, and is not a change that one should be required to make.").

232. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

233. *In re M-E-V-G-*, 26 I. & N. Dec. at 239.

234. *Id. See, e.g.*, *In re* A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014) (acknowledging that "the terms used to describe the group—'married,' 'women,' and 'unable to leave the relationship'—have commonly accepted definitions within Guatemalan society[,]" the society at issue in that case, and that those "terms can combine to create a group with discrete and definable boundaries.").

235. *Compare In re M-E-V-G-*, 26 I. & N. Dec. at 239 (explaining that "[i]t is critical that the terms used to describe the group have commonly accepted definitions in the [relevant] society" and, thus, a group that is "amorphous, overbroad, diffuse, or subjective" will not satisfy the particularity requirement), *and In re A-R-C-G-*, 26 I. & N. Dec. at 393 (recognizing the relationship status of "married" as having a commonly accepted definition in Guatemalan society and, thus, satisfying the particularity requirement), *with* Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (opining that "[t]he family unit . . . possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum."), *and* Dep't of Homeland Sec. Supplemental Brief at 8, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (asserting that "[a] defined family unit, such as an immediate family, ordinarily will satisfy the requirement of particularity").

236. *See* Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (recognizing that family is "a prototypical example of a particular social group" because family is "a focus of fundamental affiliational concerns and common interests for most people." (quoting Ravindran v. I.N.S., 976 F.2d 754, 761 n.5 (1st Cir. 1992) (internal quotations omitted))).

237. Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977).

grounded in America's history and tradition as a nation.[238] Hence, family membership is defined with particularity.[239]

C. Family Membership: Recognized and Perceived as Distinct and Important by Societies Worldwide

The third and final step in establishing membership in a cognizable particular social group is demonstrating that the proposed group is socially distinct within the society in question.[240] In order to be socially distinct, society must perceive the group to be a unit; it must recognize or set the group apart from others within the given society.[241] Societies recognize families as distinct groups.[242] In fact, few groups are more universally recognized than family.[243] Moreover, courts have an established history of recognizing that immediate families are readily-identifiable groups.[244] Additionally, the United States Supreme Court has avowed the family as an inviolable group that must be protected because it is fundamental to the history and tradition of the United States.[245] The protection afforded to family is not

238. *Moore*, 431 U.S. at 503. The Court explained, "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." *Id.*

239. *Compare In re M-E-V-G-*, 26 I. & N. Dec. at 239 (explaining that to meet the particularity requirement, a "social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group."), *and* Dep't of Homeland Sec. Supplemental Brief at 8, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (conceding that "it has long been recognized that certain family units are discrete and have identifiable boundaries" and acknowledging that defined family units typically meet the particularity requirement), *with Moore*, 431 U.S. at 503 (clarifying that the Constitution protects family units because family is a central component of American history and tradition).

240. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

241. *See In re M-E-V-G-*, 26 I. & N. Dec. at 238 (explaining that in order to be socially distinct a group need not be "ocularly visible" but must be perceived as a group by society).

242. *See In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) (noting that "[s]ocial groups based on innate characteristics such as . . . family relationship[s] are generally easily recognizable and understood by others to constitute social groups.").

243. *See* Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011) (indicating that family-based particular social groups meet the social distinction requirement because few groups are "more readily identifiable than the family.").

244. *See, e.g.*, Hernandez-Ortiz v. I.N.S., 777 F.2d 509, 516 (9th Cir. 1985) (defining family as a "small, readily identifiable group"); *In re C-A-*, 23 I. & N. Dec. at 959 (opining that family-based social groups "are generally easily recognizable and understood by others to constitute social groups."); Aldana-Ramos v. Holder, 757 F.3d 9, 15 (1st Cir. 2014) (acknowledging that family ties "can be sufficiently permanent and distinct" to constitute the "linchpin" of a particular social group (quoting Ruiz v. Mukasey, 526 F.3d 31, 38 (1st Cir. 2008))).

245. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) (establishing that "the Constitution protects the sanctity of family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

limited to the nuclear family, but extends to safeguard the equally venerable relationships with uncles, aunts, cousins, and grandparents.[246] Accordingly, family membership satisfies the third prong of the particular social group test because it is socially distinct.[247]

D. The Board of Immigration Appeals Mistook Ambiguity for a Circuit Split Between the United States Courts of Appeals for the Fifth, Seventh, and Eighth Circuits and the United States Courts of Appeals for the Fourth and Ninth Circuits

Through critical analysis of *Ramirez-Mejia v. Lynch*,[248] *Yin Guan Lin v. Holder*,[249] *Malonga v. Holder*,[250] *Hernandez-Avalos v. Lynch*,[251] and *Flores Rios v. Lynch*[252] it is clear that a circuit split does not exist.[253] In *Ramirez-Mejia*, the United States Court of Ap-

246. *See Moore*, 431 U.S. at 504 (explaining that relationships with uncles, aunts, cousins, and grandparents receive Constitutional protection because "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.").

247. *Compare In re M-E-V-G-*, 26 I. & N. Dec. at 238 (opining that "the 'social distinction' requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it."), *and In re* A-R-C-G-, 26 I. & N. Dec. 388, 394 (B.I.A. 2014) (explaining that "[w]hen evaluating the issue of social distinction," courts look to the available evidence to decide whether the society in question "makes meaningful distinctions based on the common immutable characteristics" of the group members), *with In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (explaining that "[t]he shared characteristic might be an innate one such as sex, color, or *kinship ties*") (emphasis added), *In re C-A-*, 23 I. & N. Dec. at 959 (recognizing that family relationship-based social groups "are generally easily recognizable and understood by others to constitute social groups."), *and* Dep't of Homeland Sec. Supplemental Brief at 9, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (conceding that "an immediate family relationship is a trait based upon which virtually all societies draw significant distinctions such that it will generally meet the social distinction test.").

248. 794 F.3d 485 (5th Cir. 2015).

249. 411 F. App'x 901 (7th Cir. 2011).

250. 621 F.3d 757 (8th Cir. 2010).

251. 784 F.3d 944 (4th Cir. 2015).

252. 807 F.3d 1123 (9th Cir. 2015).

253. *Compare* Ramirez-Mejia v. Lynch, 794 F.3d 485, 492 (5th Cir. 2015) (declining to address whether family may constitute a particular social group), Yin Guan Lin v. Holder, 411 F. App'x 901, 905-06 (7th Cir. 2011) (recognizing that "[i]t is true that the family unit can constitute a social group," but implying that a family-based group requires an additional nexus by stating, "[a]ny harm that Lin faced arose from a personal dispute between his father and his father's creditors. Debtors who fear creditors do not qualify for social group membership."), *and* Malonga v. Holder, 621 F.3d 757, 763 (8th Cir. 2010) (citing Malonga v. Mukasey, 546 F.3d 546, 553 (8th Cir. 2008)) (noting that "the more likely that the society at large recognizes the alleged group (by, for example, linguistic or kinship commonalities), the more likely that the group is a particular social group" but not squarely addressing whether family is a cognizable social group), *with* Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) (recognizing "that mem-

peals for the Fifth Circuit concluded that Ramirez-Mejia did not demonstrate that she was persecuted on account of her family membership.[254] However, the Fifth Circuit did not reach the question of whether Ramirez-Mejia's family met the requirements of a particular social group.[255] Thus, this case does not directly address the issue of whether family-based groups must show persecution on account of an additional protected ground.[256] In *Yin Guan Lin*, an unpublished decision, the United States Court of Appeals for the Seventh Circuit determined that Lin, the asylum applicant, did not meet the requirements for a successful asylum claim.[257] The Seventh Circuit acknowledged that family may constitute a particular social group but ultimately opined that Lin's family membership was not the reason for his persecution.[258] In essence, because Lin's father's persecution was not on account of a protected ground, Lin's asylum claim failed.[259] While the inclusion of this case in the BIA's purported circuit split suggests that this case is among cases that stand for the proposition that family-based groups must meet an additional requirement, prior published Seventh Circuit precedent recognizes family as a cognizable social group.[260]

In *Malonga*, the United States Court of Appeals for the Eighth Circuit considered Malonga's asylum claim, which was based on the protected grounds of political opinion and ethnicity.[261] Malonga used the fact that his family members were also persecuted as evidence of

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bership in a nuclear family qualifies as a protected ground for asylum purposes."), *and* Flores Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015) (noting that "family remains the quintessential particular social group" and rejecting the notion "that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with another protected ground.") (internal quotation omitted).

254. *Ramirez-Mejia*, 794 F.3d at 492.

255. *See id.* (noting, "[w]e . . . do not address whether her family was a particular social group.").

256. *Id.*

257. *Yin Guan Lin*, 411 F. App'x at 906. Lin's proposed social group was "family members of known Chinese debtors who fear punishment from creditors for outstanding debt." *Id.* at 905.

258. *Id.*

259. *See id.* at 905-06 (reasoning that "[a]ny harm that Lin faced arose from a personal dispute between his father and his father's creditors. Debtors who fear creditors do not qualify for social group membership.").

260. *Compare* Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) (noting that the Seventh "[C]ircuit recognizes a family as a cognizable social group under the INA" (citing Torres v. Mukasey, 551 F.3d 616, 629 (7th Cir. 2008))), *with* Orellana-Monson v. Holder, 685 F.3d 511, 522 (5th Cir. 2012) (employing flawed particular social group analysis by stating that "Andres's claim that he belongs to a social group consisting of Jose's family members is similarly problematic. Here the membership in a particular family is derivative of Jose's claim which we have already determined to lack particularity."), *and Yin Guan Lin*, 411 F. App'x at 905-06 (requiring Lin's family-based claim to be derivative of his father's persecution).

261. *Malonga II*, 621 F.3d at 760.

his own persecution due to political opinion and ethnicity, but he did not argue that the persecution was on account of family membership.[262] The Eighth Circuit determined that there was not a sufficient nexus between the disappearances and deaths of Malonga's family members and Malonga's asserted protected grounds.[263] Because Malonga did not claim persecution on account of a family-based group, the issue of whether family-based groups may be cognizable social groups was not properly before the Eighth Circuit in this case.[264]

However, in *Hernandez-Avalos*, the United States Court of Appeals for the Fourth Circuit recognized that an asylum seeker satisfies the nexus requirement for a valid asylum claim when that individual demonstrates persecution on account of the individual's family membership.[265] Upholding Hernandez-Avalos's asylum claim, the Fourth Circuit acknowledged that membership in a nuclear family qualifies as a protected ground for purposes of asylum.[266] The court noted that Hernandez-Avalos's membership in her nuclear family was at least one main reason she was persecuted.[267] In *Flores-Rios*, the United States Court of Appeals for the Ninth Circuit clarified that family-based particular social groups need not demonstrate that family membership is connected to another protected ground in order to constitute a cognizable particular social group.[268] In fact, the Ninth Circuit explicitly rejected the notion that a family-based group only constitutes a cognizable particular social group when the persecution on a family-based ground is coupled with another protected ground.[269] Of course, membership in a family-based particular social group may be intertwined with shared nationality, political opinion, race, religion, or other protected ground.[270] However, the Immigration and National-

262. *Id.* at 760, 763. Notably, Malonga did not include family-based particular social group among the protected grounds for his asylum claim. *Id.* at 760.

263. *Id.* at 766.

264. *Id.* at 763.

265. *Hernandez-Avalos*, 784 F.3d at 949. An asylum seeker, therefore, is not required to show an additional nexus between the persecution and an additional protected ground—persecution on account of family ties is enough. *Id.* at 949 (quoting Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009)).

266. *Id.*

267. *See id.* at 950 (explaining that "Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities.").

268. Flores-Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015).

269. *See Flores-Rios*, 807 F.3d at 1128 (noting that the Ninth Circuit has "declined to hold . . . that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with another protected ground.") (internal quotation omitted).

270. *See* 8 U.S.C. § 1101(a)(42)(A) (2012) (setting forth the protected grounds of "race, religion, nationality, membership in a particular social group, *or* political opinion") (emphasis added).

ity Act ("INA") by no means requires that family-based asylum seekers show more than one protected ground.[271]

E. Inconsistency Within the United States Court of Appeals for the Eighth Circuit Further Illustrates why the Board of Immigration Appeals Must Issue a Precedential Decision, Even in the Absence of a Circuit Split

Although a circuit split does not exist, the United States Court of Appeals for the Eighth Circuit's inconsistent treatment of family-based particular social groups illustrates why the BIA must nevertheless resolve the ambiguity on this issue.[272] In 2005, the Eighth Circuit in *Bernal-Rendon v. Gonzales*[273] plainly recognized that family-based groups can constitute viable particular social groups.[274] Notably, the Eighth Circuit's determination in *Bernal-Rendon* aligned with the BIA's then longstanding precedent recognizing that family is a prototypical example of a particular social group.[275] However, in 2011, the Eighth Circuit in *Constanza v. Holder*[276] departed from *Bernal-Rendon* and determined that the family-based group in that case was not a cognizable particular social group.[277] This proved problematic because in *Constanza*, the Eighth Circuit reached this de-

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271. *Id.*

272. *Compare* Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005) (establishing that "a nuclear family can constitute a social group" and that "the immediate members of a certain family" is the "prototype" of a particular social group), *and* Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011) (determining that "Constanza's family is no different from any other Salvadoran family that has experienced gang violence. Thus, Constanza's family lacks the visibility and particularity required to constitute a social group."), *with* 8 C.F.R. § 1003.1(d)(1) (establishing that the BIA must issue precedent decisions to "provide clear and uniform guidance . . . on the proper interpretation and administration of the [INA] and its implementing regulations.").

273. 419 F.3d 877 (8th Cir. 2005).

274. *Bernal-Rendon*, 419 F.3d at 881. The court relied upon precedent from the United States Courts of Appeals for the First and Ninth Circuits to support this determination. *Id. See* Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (stating that there is "no plainer example of a social group" than "nuclear family."); *see also* Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986) (regarding "the immediate members of a certain family" as a prototypical social group).

275. *Compare In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (interpreting persecution due to membership in a particular social group to mean persecution directed toward an individual member of a group that shares an immutable characteristic, and using "kinship ties" as an example of an immutable characteristic), *with Bernal-Rendon*, 419 F.3d at 881 (recognizing that family is the clearest "example of a social group based on common, identifiable and immutable characteristics") (internal quotation omitted).

276. 647 F.3d 749 (8th Cir. 2011).

277. *Compare In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) (noting that family-based groups can satisfy the social visibility requirement because "groups based on innate characteristics such as . . . family relationship[s] are generally easily recognizable and understood by others to constitute social groups."), *with Constanza*, 647 F.3d at 754 (reasoning that "Constanza's family is no different from any other Salvadoran family

termination by conflating the particular social group analysis with the nexus analysis.[278] In 2014, in *Antonio-Fuentes v. Holder*,[279] the Eighth Circuit overlooked BIA precedent to retrace its flawed reasoning from *Constanza*.[280] However, in 2016 in *Aguinada-Lopez v. Lynch*,[281] the Eighth Circuit recalled its previous acknowledgment of family as a cognizable social group.[282] The *Aguinada-Lopez* court assumed without deciding that Aguinada-Lopez's family-based social group was a cognizable particular social group but did not reach the issue because of perceived problems with the nexus requirement.[283] While recognizing *Bernal-Rendon* was a step in the right direction, the Eighth Circuit's problematic divergence of outcomes exemplifies the BIA's obligation to abrogate the ambiguity for family-based social groups.[284]

The majority of circuits to address this issue have determined that membership in a family-based group satisfies the requirements of a cognizable particular social group.[285] However, due to the confusion

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that has experienced gang violence. Thus, Constanza's family lacks the visibility and particularity required to constitute a social group.").

278. *Compare In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (establishing the three-prong test for cognizable particular social groups)*, In re* W-G-R-, 26 I. & N. Dec. 208, 218 (B.I.A. 2014) (explaining the importance of analyzing the three-prong particular social group test separately from the nexus analysis, and specifically stating "we must separate the assessment whether an applicant has established the existence of one of the enumerated grounds . . . from the issue of nexus"), *and* Brief for National Justice For Our Neighbors et al. as Amici Curiae at 13, Matter of L-A-, No. 16-01-11 (B.I.A. Feb. 25, 2016) (noting that the Eighth Circuit's decision in "*Constanza* is in tension with *Bernal-Rendon*'s clear holding and rests on principles rejected by the [BIA] in *M-E-V-G-* and *W-G-R-*; therefore, it cannot now support an argument that family-alone is not a particular social group."), *with Constanza*, 647 F.3d at 753-54 (conflating the nexus analysis with the social group analysis by addressing whether Constanza was "specifically targeted" because of his family membership instead of first determining whether Constanza's asserted family-based group was even a particular social group).

279. 764 F.3d 902 (8th Cir. 2014).

280. Antonio-Fuentes v. Holder, 764 F.3d 902, 905 (8th Cir. 2014). The court reasoned, "Fuentes, like the alien in *Constanza*, did not establish that gangs specifically targeted his family as a group . . . . Fuentes failed to show that his family is 'different from any other Salvadoran family that has experienced gang violence.'" *Antonio-Fuentes*, 764 F.3d at 905 (quoting *Constanza*, 647 F.3d at 754).

281. 825 F.3d 407 (8th Cir. 2016).

282. *See* Aguinada-Lopez v. Lynch, 825 F.3d 407, 409 (8th Cir. 2016) (citing *Bernal-Rendon*, 419 F.3d at 881) (establishing that "a nuclear family can constitute a social group" and that "the immediate members of a certain family" is the "prototype" of a particular social group).

283. *Aguinada II*, 825 F.3d at 409.

284. *See* 8 C.F.R. § 1003.1(d)(1) (establishing that the BIA, "through precedent decisions, *shall* provide clear and uniform guidance to the [government], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations.") (emphasis added).

285. *See* Aldana-Ramos v. Holder, 757 F.3d 9, 15 (1st Cir. 2014) (clarifying that "[i]t is well established in the law of [the First] [C]ircuit that a nuclear family can constitute a particular social group"); Vumi v. Gonzales, 502 F.3d 150, 155 (2d Cir. 2007) (recogniz-

on this issue, the BIA should, following the plain language of the INA, issue a precedential decision clarifying that the nexus requirement is satisfied when an asylum seeker has shown persecution on account of membership in the asylum seeker's family.[286] In a supplemental brief to the BIA addressing the purported circuit split, the Department of Homeland Security ("DHS") itself unequivocally recognized that family can be a cognizable social group under the INA.[287] The DHS further advised that an asylum seeker satisfies the nexus requirement if she can establish that family membership was at least one central reason for the persecution.[288] Although even the DHS concedes that family-based groups may be cognizable particular social groups, for the sake of clarity, the BIA must issue a precedential decision to resolve the ambiguity in the Fifth, Seventh, and Eighth Circuits.[289]

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ing that "the [BIA] has held unambiguously that membership in a nuclear family *may* substantiate a social-group basis of persecution."); Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) (opining that "membership in a nuclear family qualifies as a protected ground for asylum purposes."); Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) (acknowledging that "[m]embership in the same family . . . is widely recognized by the caselaw" as a particular social group); Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) (explaining that the Seventh "[C]ircuit recognizes a family as a cognizable social group"); Bernal-Rendon v. Gonzales, 419 F.3d at 881 (noting that "a nuclear family can constitute a social group"); Flores-Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015) (determining that "the family remains the quintessential particular social group.").

286. *See* 8 C.F.R. § 1003.1(d)(1) (establishing that the BIA, "through precedent decisions, *shall* provide clear and uniform guidance to the [government], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations.") (emphasis added).

287. *See* Dep't of Homeland Sec. Supplemental Brief at 22, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (conceding that "in many, if not most societies, an immediate family unit will qualify as a cognizable particular social group.").

288. *See* Dep't of Homeland Sec. Supplemental Brief at 22, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (admitting that if an asylum applicant establishes that "membership in a cognizable family-based particular social group is at least one central reason for the persecution suffered or feared, then the applicant has, in fact, satisfied the nexus requirement . . . [and] need not additionally demonstrate . . . another protected ground.").

289. *Compare* Ramirez-Mejia v. Lynch, 794 F.3d 485, 492 (5th Cir. 2015) (declining to address whether family may constitute a particular social group), Yin Guan Lin v. Holder, 411 F. App'x 901, 905-06 (7th Cir. 2011) (requiring Lin's family-based claim to be derivative of his father's persecution), *and* Malonga v. Holder, 621 F.3d 757, 763 (8th Cir. 2010) (failing to squarely address whether family is a cognizable social group, but noting that kinship commonalities increase the likelihood that the proposed group is a cognizable social group), *with* Dep't of Homeland Sec. Supplemental Brief at 22, Matter of L-A-, No. 16-01-11 (B.I.A. Apr. 21, 2016) (recognizing that family qualifies as a valid particular social group "in many, if not most societies"), *and* 8 C.F.R. § 1003.1(d)(1) (establishing that the BIA, "through precedent decisions, *shall* provide clear and uniform guidance to the [government], the immigration judges and the general public, on the proper interpretation and administration of the [INA] and its implementing regulations.") (emphasis added).

IV. CONCLUSION

The first President of the United States, George Washington, envisioned that the United States would stand as a sanctuary for individuals who fled their home countries because of persecution.[290] To this day, the United States remains a nation that offers asylum to individuals fleeing persecution.[291] However, today, asylum seekers must prove that they were persecuted and demonstrate a nexus between the persecution and a protected ground.[292] The legal test for cognizable particular social groups is especially difficult for asylum seekers to pass.[293] An asylum seeker's particular social group must be comprised of individuals who share a common immutable characteristic, defined with particularity, and socially recognizable within the asylum seeker's society.[294]

An individual's family is something about the individual, which cannot and should not be required to change; family relationships are immutable.[295] In addition, family membership is clearly defined and understood by societies to have discreet and definable boundaries.[296] Moreover, societies worldwide recognize families as distinct and important groups.[297] Therefore, family is the prototypical example of a particular social group for purposes of an asylum claim and courts should not require family-based groups to demonstrate an additional protected ground for claiming asylum.[298]

Early last year, the Board of Immigration Appeals ("BIA") recognized that there is ambiguity regarding whether family may qualify as a particular social group and whether the nexus requirement, the condition that the persecution be on account of membership in a group, is different for family-based groups.[299] Seeking guidance on this subject, the BIA specifically invited amicus curiae to address what the BIA itself deemed to be a circuit split regarding the proper analysis for family-based particular social groups.[300] Despite the BIA's concern that there is a circuit split related to whether family-based asylum claims should also contain persecution on the basis of an additional protected ground, the cases that supposedly create this split either do not directly address this issue or are outlier cases, in conflict with

290. *See supra* notes 1-2 and accompanying text.
291. *See supra* note 3 and accompanying text.
292. *See supra* note 3 and accompanying text.
293. *See supra* note 4 and accompanying text.
294. *See supra* notes 4-5 and accompanying text.
295. *See supra* notes 6, 226-231 and accompanying text.
296. *See supra* notes 8, 232-239 and accompanying text.
297. *See supra* notes 7, 240-247 and accompanying text.
298. *See supra* note 9 and accompanying text.
299. *See supra* note 10 and accompanying text.
300. *See supra* note 11 and accompanying text.

their own circuit precedent.[301] Therefore, the BIA should resolve this ambiguity in circuit authority by siding with the majority of circuits in holding that family constitutes a particular social group regardless of whether the family members were persecuted on the basis of an additional protected ground.[302]

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301. *See supra* notes 249-284 and accompanying text.
302. *See supra* notes 12, 285-289 and accompanying text.