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Articles

INFLUENCES AND INFLUENCE: JUSTICE SANDRA DAY O’CONNOR AND CONSTITUTIONAL DOCTRINE

Kenneth M. Murchison

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Sandra Day O’Connor was both the first woman appointed to the United States Supreme Court and the first justice that President Ronald Regan appointed. She served for nearly a quarter century and earned a reputation as a centrist on a Court that was often closely divided. As a result, she was frequently a member of the Court’s majority in cases with narrow majorities, and her views often defined the reach and limits of the Court’s rulings.
This article offers an assessment of Justice O’Connor’s impact on constitutional doctrine from the perspective of a decade after her retirement. After a brief biographical summary, it describes how five factors—gender, legislative experience, religion, and judicial experience—influenced her judicial decisions. It then surveys her impact on constitutional doctrine while she was a member of the Court and analyzes how enduring her contributions have been, and are likely to be, in the constitutional law of the future.

I. INFLUENCES

Born in El Paso, Texas, Sandra Day spent her early years on the Lazy B, a ranch in southeastern Arizona. Because education options in the remote area surrounding the Lazy B were limited, her parents sent her to live with her grandmother so she could attend school in El Paso. She continued to spend her summers on the ranch.

Sandra Day was an excellent student. She learned to read at age four and graduated from high school at sixteen. She completed her undergraduate and law school work in a six-year program at Stanford University that she completed in just five years, earning a bachelor’s degree in economics in 1950 and a law degree in 1952. As a law school student, she was a member of the Stanford Law Review. In a 2003 interview with Fox News, she gave the following description of her law school record: “I was high in my class. I had good grades.”

Six months after graduating from law school, Sandra Day married John O’Connor, a Stanford law student she had met when they were cite checking a law review article. She initially had difficulty finding a job as an attorney. Eventually, however, she obtained a job with the San Mateo County Attorney’s Office as a prosecutor, after first working as a...
volunteer. In 1954, she moved to West Germany with her husband. He was serving as a judge advocate in the Army, and she got a job as a civilian attorney.

The O’Connors returned to the United States in 1957. Sandra and another lawyer opened a law office in a Phoenix suburb. She devoted most of her time to raising her three sons, but she also became active in local Republican politics. Sandra Day O’Connor returned to full-time employment in 1969 as an assistant attorney general in Arizona. Also in 1969, the governor appointed her to a vacant seat in the Arizona state senate; a year later, the voters in the district elected her to a full-term, and then reelected her in 1972. In the same year that she was reelected, Republicans in the Arizona Senate elected O’Connor as the majority leader. When they did so, she became the first woman to hold the position of majority leader in any state in the United States.

Sandra Day O’Connor’s judicial career began in 1974, when she was elected as a superior court judge for Maricopa County. In 1979, Democratic Governor Bruce Babbitt appointed her to the Arizona Court of Appeals. Just three weeks after Justice Potter Stewart announced his retirement in July 1981, President Reagan nominated Judge O’Connor to become the first woman appointed to the Supreme Court. President Reagan was prepared to act so quickly because Justice Stewart notified the White House three months before publicly announcing his retirement.

The Senate quickly confirmed Judge O’Connor. O’Connor’s appointment had strong support. Republican Senator Barry Goldwater

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11 Sandra Day O’Connor, Faculty Profile, SANDRA DAY O’CONNOR COLLEGE OF LAW, https://apps.law.asu.edu/Apps/Faculty/Faculty.aspx?individual_id=51225 (last visited Sept. 9, 2016).
12 YARBROUGH, supra note 6, at 15; ABRAHAM, supra note 5, at 269.
13 ABRAHAM, supra note 5, at 269.
14 Faculty Profile, supra note 11.
15 YARBROUGH, supra note 6, at 15.
16 Id.
17 Id.
18 ABRAHAM, supra note 5, at 269.
19 YARBROUGH, supra note 6, at 15.
20 Id.
21 ABRAHAM, supra note 5, at 269.
22 Id.
23 Id.
24 YARBROUGH, supra note 6, at 15.
25 ABRAHAM, supra note 5, at 265, 267.
26 Id. at 265.
had warmly urged the President to appoint her, and Arizona’s Democratic Senator—Dennis De Concini—and various women’s groups also supported her.\(^27\) The only opposition came from the religious right, which feared her views on abortion.\(^28\) “The Reverend Jerry Falwell, head of the fundamentalist Moral Majority, encouraged ‘all good Christians’ to express concern over O’Connor’s nomination”; and anti-abortion groups opposed her confirmation.\(^29\)

At her confirmation hearings, Judge O’Connor emphasized her conservative views.\(^30\) She “called her vote in the Arizona legislature to decriminalize abortion a mistake,” but she declined to say how she would vote on abortion as a justice.\(^31\) She also expressed personal support for the death penalty and preventive detention and opposition to forced busing, and she explained her belief in judicial restraint.\(^32\) The Judiciary Committee approved her with a unanimous vote, except for Democratic Senator Jeremiah Denton who abstained because Judge O’Connor would not state her opposition to *Roe v. Wade*.\(^33\) Shortly thereafter, the Senate confirmed her appointment by a 99-0 vote.\(^34\)

The views of Justice O’Connor—like those of all judges—are the product of a wide variety of experiences in her background. The remainder of this section identifies five factors that seem to have impacted her judicial decisions.

**A. Gender: The First Female Justice**

Gender undoubtedly played a role in Justice O’Connor’s appointment as the first woman justice on the United States Supreme Court.\(^35\) “The more difficult question is determining the impact it had on her decisions.

\(^{27}\) Id. at 267.


\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Id.

\(^{32}\) Id. at 267–68.

\(^{33}\) ABRAHAM, *supra* note 5, at 268.

\(^{34}\) Id.

\(^{35}\) This appointment was certainly not Justice O’Connor’s first time to break the gender barrier. See O’CONNOR & DAY, *supra* note 1, at 96: “Before I rode occasionally on the roundup [at the ranch on which she was reared], it had been an all-male domain. Changing it to accommodate a female was probably my first initiation into joining an all-men’s club, something I did more than once in my life.”
Less than a month before the presidential election of 1980, candidate Ronald Reagan promised to appoint a woman to the Supreme Court.36 In a speech on October 14, 1980, Reagan declared that “[o]ne of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find, one who meets the high standards I will demand for all my appointments.”37 At the time Reagan made the promise, most observers regarded the election as a close one.38 Reagan did not move to a convincing lead until after the presidential debate, which was held a week before the election.39 Moreover, his opponent, President Jimmy Carter, had established a strong record of appointing women to federal judgeships.40

One has only to compare the opinions of Justice O’Connor and Justice Ruth Bader Ginsburg to establish that woman judges will not always agree, and Justice O’Connor herself has denied that gender is determinative for judicial decisions.41 Early in Justice O’Connor’s career, some scholars argued that her decisions reflected a “feminine” style of decision-making,42 but most political scientists rejected the

36 Maveety, supra note 28, at 105.
37 ABRAHAM, supra note 5, at 265.
38 Maveety, supra note 28, at 105 (“[A]ppointing the first woman justice to the Supreme Court . . . allow[ed] President Reagan to recover some desired standing with women’s rights groups.”).
40 ABRAHAM, supra note 5, at 263.
41 Sandra Day O’Connor, Madison Lecture: Portia’s Progress, 66 N.Y.U. L. REV. 1546, 1558 (1991). In the 2003 interview with Fox News, Justice O’Connor expressed her agreement with a statement she attributed to a woman judge from Minnesota: “At the end of the day, a wise old woman and wise old man will reach the same decision.” FOX NEWS, supra note 8. Contrast that view with one that Judge (now Justice) Sotomayor offered in a speech at the University of California Berkley Law School:

Justice O’Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases . . . . I am . . . not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.

Sonia Sotomayor, A Latina Judge’s Voice, 13 BERKELEY LA RAZA L.J. 87, 92 (2002). During the confirmation process, she clarified those remarks to Senator Patrick J. Leahy by saying that even though “one’s life experience shapes who you are,” a judge “ultimately and completely” has to “follow the law.” David M. Herszenhorn & Carl Hulse, Parties Plot Strategy as Sotomayor Visits Capitol, N.Y. TIMES (June 2, 2009), http://www.nytimes/2009/06/03/US/politics/03judge.html.
42 See, e.g., Susan Behuniak-Long, Justice Sandra Day O’Connor and the Power of Maternal Legal Thinking, 54 THE REVIEW OF POLITICS 417, 417, 421 (1992) (discussing how Justice O’Connor has promulgated the feminine jurisprudence); Suzanna Sherry, Civic Virtue
claim that she spoke in a different voice than her male colleagues. Nonetheless, the experiences of judges undoubtedly influence their decisions, and Justice O’Connor’s experiences as a woman who entered professional and family life during the middle of the twentieth century have undoubtedly influenced her decisions.

As a young woman, Justice O’Connor experienced the realities of gender discrimination. Despite being a member of the Stanford Law Review, she could not obtain a job with a private law firm. She was, however, offered a position as a legal secretary. She eventually got a job as an attorney with the San Mateo County Attorney’s Office, but only after initially working as a volunteer to prove her ability. These experiences seem to have given her sensitivity to artificial restraints that limit the ability of individuals to achieve their potential.

That sensitivity certainly extended to the barriers that constrain women. In the equal protection context, she provided the fifth vote to invalidate state annuity payments that made lower monthly payments to women than to men; she wrote a concurrence to the Court’s opinion upholding a “reasonable” affirmative action plan for women in the employment context; and she joined the opinion finding that the state had not established an “exceedingly persuasive justification” to exclude women from the Virginia Military Institute. When the issue turned to substantive due process, she was part of the plurality that affirmed a woman’s right to choose an abortion as a constitutionally protected right, and she provided the crucial vote to invalidate a partial birth abortion statute because it did not contain an exception for the life of the

43 Political scientists who have examined Justice O’Connor’s voting record have found that she speaks in a voice closely resembling that of her male colleagues. See, e.g., Beverly B. Cook, Justice Sandra Day O’Connor: Transition to a Republican Court Agenda, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 238, 245–48 (Charles M. Lamb & Stephen C. Halperin eds., 1991); Sue Davis, The Voice of Sandra Day O’Connor, 77 JUDICATURE 134, 134–39 (1993).
44 ABRAHAM, supra note 5, at 269.
45 Id.
46 Faculty Profile, supra note 11.
mother. At the same time, Justice O'Connor was no militant feminist. She refused to construe the Commerce Clause or Section 5 of the Fourteenth Amendment to allow Congress to enact federal legislation protecting women from violence. She cast the decisive vote that denied retroactive effect to the ruling requiring equality in annuity payments and she was also cautious in expanding liability for gender discrimination. In addition, she was part of the seven-member majority holding that neither a town nor its police department was liable for the murder of a woman’s three children by her estranged husband as the result of a failure to enforce a restraining order.

Moreover, one should note that Justice O'Connor did not limit her opposition to artificial barriers to only those barriers that restricted women. For her, and for a majority of the Supreme Court, the discrimination forbidden by the Fourteenth Amendment was discrimination based on gender, not just discrimination against women. Thus, in her first term on the Court, she wrote the majority opinion in a case holding that the Mississippi College for Women could not exclude men from its nursing program. Slightly more than two decades later, she supported congressional power to protect families and the disabled against state action. Specifically, in 2003, she joined Chief Justice Rehnquist’s opinion holding that the Fourteenth Amendment allowed Congress to extend the Family Medical Leave Act to states. The following year, she broke with the Chief Justice and the other conservative members of the Court to join Justice Stevens’s opinion holding that the Fourteenth Amendment authorized Congress to establish actions for damages against states that failed to make reasonable

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accommodations for the disabled to attend court.58

B. Politics: A Reagan Republican from the West

President Reagan nominated Justice O’Connor not just because she was a woman, but because she was a Republican who shared his opposition to expansion of federal power.59 Indeed, while gender was more important in producing her appointment,60 politics was probably a more important influence on her decisions.

A lifelong Republican, Justice O’Connor was part of the western wing of the party that favored reduced regulation, particularly federal regulation of business and property, as well as fewer federal controls on state governments.61 She was not, however, affiliated with the religious right that began its rise to power during the 1980 election. Indeed, as noted above, the religious conservatives objected to her appointment because she had voted to decriminalize abortion as a member of the Arizona Senate.62

The most obvious examples of the ways these basic political views appear to have influenced Justice O’Connor’s judicial decisions involved new limits on the scope of congressional power and expanded protections for property rights. She regularly joined the majorities limiting congressional power to use its authority under the Commerce Clause63 to regulate private parties,64 as well as majorities protecting states from private actions for money damages.65 She also authored an

59 Her opposition to expanded federal power was common in the ranching area in which she was reared: “Despite the federal programs to alleviate the Depression, President Franklin Roosevelt was heartily disliked by many of the ranchers [in southwest Arizona]. They were strongly opposed to an expanded role for the federal government. They believed in private initiative to solve all problems.” O’CONNOR & DAY, supra note 1, at 26.
60 See ABRAHAM, supra note 5, at 266.
61 See, e.g., YARBROUGH, supra note 6, at 15 (discussing Justice O’Connor’s “moderate to conservative record on most issues”).
62 ABRAHAM, supra note 5, at 267.
63 U.S. CONST. art. I, § 8, cl. 3: “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”
opinion denying Congress the power to force states to regulate in particular ways, and she was part of the majority that revived the protections of the Takings Clause after William Rehnquist became Chief Justice in 1986.

In some cases, Justice O’Connor would have gone even further than the Court’s majority to protect states from federal control. In her early years on the Court, she dissented from decisions rejecting a broader state immunity from generally applicable federal regulations. She also dissented when the Supreme Court abandoned that immunity altogether, when a majority of the Court recognized broad congressional power to impose conditions on moneys granted to states, and when the Court denied states the power to establish term limits for members of Congress. Finally, unlike a majority of the Court, Justice O’Connor would have denied Congress the power to regulate the private cultivation of marijuana for personal uses.

At least two sets of cases suggest that these views of federalism were more important for Justice O’Connor than gender. In defining the limits of federal power, she was unwilling to grant Congress the


See New York v. United States, 505 U.S. 144, 149 (1992); see also Printz v. United States, 521 U.S. 898, 935–36 (1997) (O’Connor, J., concurring) (commenting on the Court’s holding that states cannot be compelled to enact or enforce a regulatory program: “The provisions invalidated here . . . which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.”).

66 U.S. CONST. amend. V: “[N]or shall private property be taken for public use, without just compensation.”


72 Gonzales v. Raich, 545 U.S. 1, 42–43 (2005) (O’Connor, J., dissenting).
authority to grant a federal claim for damages to the victims of gender-related violence.74 Likewise, she was cautious about extending the reach of federal claims for sexual harassment.75

C. Legislative Experience: A Practical Politician

Justice O’Connor’s background is unique for modern Supreme Court justices in another respect: She held an elected legislative office at the state level.76 As noted above, the governor first appointed her to the Arizona Senate in 1969.77 The voters in her district subsequently elected her twice to the same seat, and her colleagues in the Senate elected her as majority leader in 1972.78 In 1974, she was elected to a county court judgeship in Arizona, and Democratic Governor Bruce Babbitt appointed her to the court of appeals in 1979.79

The experience as an elected state legislature distinguishes Justice O’Connor from all fifteen justices with whom she served on the Supreme Court.80 Moreover, as a legislator, Justice O’Connor developed a reputation as a moderate rather than a doctrinaire conservative. The willingness to compromise, which is essential for successful legislators, seems to have influenced her approach to judicial decision making. Commentators routinely describe Justice O’Connor’s approach as a pragmatic one that sought majority coalitions.81 Examples of her openness to pragmatic compromise abound in all areas of constitutional doctrine.

Justice O’Connor’s concern to protect states from expanding federal power was a deeply held political belief that led her to support

75 See supra note 54 and accompanying text (for examples of Justice O’Connor’s cautious approach to extending liability for gender discrimination).
77 See supra note 18 and accompanying text.
78 See supra notes 19–21 and accompanying text.
79 See supra notes 24–25 and accompanying text.
80 Indeed, Chief Justice Warren appears to be the last justice with experience as an elected state official and his experience was as a prosecutor and governor. For a brief summary of the backgrounds of the Supreme Court justices with whom Justice O’Connor served, see MCCLOSKEY, supra note 76, at 260–61.
greater limits on federal power than a majority of the Court eventually embraced. Even here, however, she rejected an absolutist approach. She voted to uphold congressional power to establish claims for monetary damages against the states in limited cases. Thus, she joined majorities that allowed claims against states for violating the Family Medical Leave Act, failing to make reasonable accommodations to allow the disabled access to courts, and making preferential transfers in violation of the Bankruptcy Act. When the issues turned to separation of powers, Justice O’Connor also established a pragmatic record. She was almost always a member of the majority when cases involving conflicts between the legislative and executive branches surfaced in the first decade she was a member of the Court. When new separation of powers cases arose later, she provided the decisive vote in the detainee cases of 2004, and she resisted strict limits on standing for citizen groups in some environmental cases.

82 Id. at 130.
83 Id. at 131–32.
87 See, e.g., Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 265–77 (1991) (holding that Congress violated the separation of powers doctrine through the creation of a Board of Review composed of congressional representatives with veto power over the MWAA director’s decisions as a condition of the airports’ transfer); Mistretta v. United States, 488 U.S. 361, 384 (1989) (holding that Congress did not violate the separation of powers doctrine by constructing a Sentencing Commission as an independent body in the judicial branch); Morrison v. Olson, 487 U.S. 654, 659–60 (1988) (finding no violation of the separation of powers and holding that Title VI of the Ethics in Government Act did not violate the Appointments Clause of the Constitution, the limitations of Article III, or the President’s authority under Article II); Bowsher v. Synar, 478 U.S. 714, 726–34 (1986) (holding that Congress was in violation of the doctrine of separation of powers through its assignment of certain functions under the Balanced Budget and Emergency Deficit Control Act to the Comptroller General); INS v. Chadha, 462 U.S. 919, 956–59 (1983) (holding that the Immigration and Nationality Act, allowing one House of Congress the ability to veto executive actions, was a violation of the separation of powers doctrine); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that, under separation of powers tradition, the President of the United States was entitled to absolute immunity from damages liability for acts committed under the duties of the office). But see Clinton v. New York, 524 U.S. 417, 453–69 (1997) (Scalia, J., joined by O’Connor, J., concurring in part and dissenting in part) (finding that the President did not violate the Constitution through cancelling § 4722(c) of the Balanced Budget Act of 1997 as an item of direct spending); see also infra note 469 for further discussion of Clinton v. City of New York.
Justice O’Connor’s decisions regarding the rights of individuals also show this inclination toward pragmatism. The abortion cases are perhaps the paradigmatic example. The 1992 decision reaffirming the woman’s right to choose an abortion while upholding most of the state restrictions before the Court was a triumph of judicial, if not electoral, politics. When she voted to invalidate the statute prohibiting partial-birth abortions in 2000, she said a crucial defect was the failure to include an exception to protect the life or health of the mother. Justice O’Connor’s equal protection decisions also have a pragmatic cast. Although she embraced strict scrutiny for all race-based classifications, she ultimately sustained some use of race as a factor in establishing legislative districts and making university admissions decisions. She also embraced substantial, but not absolute, limits on the use of gender classifications and meaningful, if vague, protections for homosexuals. Her decisions regarding both the Establishment and Free Exercise Clauses of the First Amendment similarly tried to steer a middle ground between the advocates of the “wall of separation” between church and state and its critics, and her free speech cases (disagreeing with the majority’s standing analysis and opining that the respondents do have standing). But see Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83, 110–11 (1998) (O’Connor, J., concurring) (agreeing with the majority that the respondent lacks standing); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 899–900 (1990). (O’Connor joined the majority opinion holding that respondents lacked standing.)

95 See, e.g., United States v. Virginia, 518 U.S. 515, 532–34 (1996) (finding a violation of the Fourteenth Amendment, where there was “‘no exceedingly persuasive justification’ for all excluding all women” from a program); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (holding that the State had no compelling purposes for its gender-based classification, which allowed only females to enroll as students in a nursing program).
97 U.S. Const. amend. I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”
98 See infra notes 296–353 and accompanying text (for a discussion of cases involving the freedom of religion).
allowed greater regulation at the edges of existing doctrine. Finally, Justice O’Connor was part of the majority that revived the Takings Clause as a limit on regulations of property, but the limits she supported allowed substantial regulation of property and temporary moratoria on development.

D. Religion: An Episcopalian

Over the last several decades, religious affiliation as a factor for choosing Supreme Court justices has declined. Historically, most judges have come from Protestant denominations, but justices from other religious groups have become a regular part of the Court for more than a century. Except for the seven years following Justice Murphy’s death in 1949, the Court has included a Roman Catholic since 1894 when Edward Douglas White was named an associate justice. The Court has also had a Jewish member for most of the time since Louis Brandeis joined the Court in 1916.

As an Episcopalian, Justice O’Connor shares the religious affiliation that has been most common among Supreme Court justices in American history. Episcopalians were also the most common religious group among the justices for most of her tenure on the Court. In terms of Justice O’Connor’s judicial decisions, however, her affiliation as an

99 See infra notes 354–435 and accompanying text (for a discussion of cases involving the freedom of speech).
101 See, e.g., Brown v. Legal Found. of Wash., 538 U.S. 216, 240–41 (2003) (holding that a law that requires lawyers to deposit client funds into an IOLTA account is not a “regulatory taking”).
104 Id. at 69.
105 Id.
106 Id.
107 ABRAHAM, supra note 103, at 68 (Table 5).
108 Id. Following the appointments of Chief Justice Roberts and Justice Alito, Roman Catholics are the now most common religious affiliation on the Court for the first time in United States history. The Court did not have a Jewish member between Justice Fortas’s resignation in 1969 and the appointment of Justice Ginsburg in 1993. Currently, the Court has three Jewish members—Justice Ginsburg, Justice Breyer, and Justice Kagan. Id.
Episcopalian was ultimately less significant than the groups to which she was not affiliated. She was not a socially conservative Roman Catholic, like most of the other Republican justices who were appointed after her.\footnote{Republicans have appointed six members of the Supreme Court since Justice O’Connor joined the Court in 1981. All but Justice Souter are Roman Catholics. \textit{Id.} at 69. Chief Justice Roberts and Justices Scalia, Thomas, and Alito all fit the category of socially conservative Roman Catholics; Justice Kennedy is more of a centrist. Recently confirmed Justice Gorsuch, President Trump’s nominee to replace Justice Scalia, is an Episcopalian like Justice O’Connor.} Nor was she part of the conservative evangelical groups that have dominated the religious right that first came to prominence following President Reagan’s victory in the 1980 election.\footnote{ABRAHAM, \textit{supra} note 5, at 267.} Indeed, as noted above,\footnote{See \textit{supra} note 29 and accompanying text.} the head of the Moral Majority advised “good Christians” to express concern over Justice O’Connor’s nomination.

One can see the impact of Justice O’Connor’s more traditional religious background in the struggle of the Court over the last quarter century to modify the standards for deciding when governmental support of religion violates the Establishment Clause of the First Amendment. She partially supported the Court’s retreat from the “wall of separation” that Justice Black tried to erect as the standard for the Establishment Clause,\footnote{Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). Despite Justice Black’s rhetoric, \textit{Everson} actually upheld the constitutionality of a government providing transportation to students at parochial schools. \textit{Id.} at 18. Interestingly, the early decisions of the Burger Court took a narrower view of governmental authority to provide financial support to religious institutions. \textit{See, e.g., Lemon v. Kurtzman}, 403 U.S. 602, 606–07 (1971) (prohibiting reimbursement of parochial school expenses for teacher salaries, textbooks, and instructional materials as a violation of the Establishment Clause).} but she never embraced the position that the Establishment Clause only prohibited preferences for particular religious groups.\footnote{See \textit{Maveety, \textit{supra} note 28, at 122–23 (discussing O’Connor’s dissatisfaction with the \textit{Lemon} test).} \textit{See supra} note 29 and accompanying text.} She agreed that the Establishment Clause could not be used to deny religious groups equal access to government facilities,\footnote{See \textit{Rosenberger v. Univ. of Va.}, 515 U.S. 819, 842 (1995) (O’Connor, J., concurring); Lamb’s Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–95 (1993).} and she was willing to tolerate considerable governmental support for religious institutions.\footnote{See, \textit{e.g.}, \textit{Zelman v. Simmons-Harris}, 536 U.S. 639, 643–44 (2002) (holding that the governmental pilot program providing educational choices does not violate the Establishment Clause); \textit{Mitchell v. Helms}, 530 U.S. 793, 867 (2000) (plurality opinion) (O’Connor, J., concurring) (finding that, because the program allocated aid “on the basis of neutral, secular criteria,” it cannot be considered an endorsement of religion); \textit{Agostini v. Felton}, 521 U.S.
She was also willing to uphold some longstanding religious practices by government officials. O’Connor was, however, less sympathetic to displays of religious objects on public property, and she consistently opposed government-sponsored prayers at public schools.

On issues of the free exercise of religion, Justice O’Connor also tried to articulate a moderate position. In one case, for example, she agreed that government could impose significant restraints on religious practices, but she rejected Justice Scalia’s position that the Free Exercise Clause imposed no restraints on generally applicable criminal laws. Instead, she advocated a fact-intensive, balancing test to evaluate laws that impose significant restrictions on religious practices.

E. Judicial Experience: A State Court Judge

Shortly after President Reagan appointed Justice O’Connor, his
Attorney General declared that the new appointee shared the President’s commitment to the philosophy of judicial restraint. At her confirmation hearing, Justice O’Connor confirmed “her belief in a “restrained role for the federal judiciary.”

At one level, these claims are puzzling. As the following section will demonstrate, the domain of constitutional law grew substantially during the time Justice O’Connor was a member of the Court, and she and other Reagan appointees contributed substantially to that growth. On the other hand, both the President and the nominee may have had in mind a desire to avoid a type of judicial decision common in the latter years of the Warren Court and in the early years of the Burger Court—decisions O’Connor and Reagan regarded as particularly legislative in nature. A number of cases expanding individual rights—*Miranda v. Arizona* and *Furman v. Georgia* involving criminal procedure, *Baker v. Carr* and *Swann v. Mecklenburg County Board of Education* regarding equal protection, *Wisconsin v. Yoder* and *Lemon v. Kurtzman* concerning freedom of religion, and *Roe v. Wade* accepting the woman’s right to choose an abortion, to name but a few—broadly defined those rights, apparently intending a significant modification of state practices across the country. Justice O’Connor opposed this form of judicial activism throughout her service on the Court.

Justice O’Connor’s style for deciding cases dominated the substance of her opinions across a wide array of subjects. Showing a strong preference for acting as what Professor Sullivan has denominated a “Justice of standards” as contrasted with a “Justice of rules,” Justice O’Connor almost always adopted balancing tests that were highly fact-specific. Her approach is one that has been both praised as confining the

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121 ABRAHAM, *supra* note 5, at 268.
122 Id. at 267.
124 *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (per curiam).
130 See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954). Of course, *Brown* was the paradigm for this type of decision, but by 1980 opponents of so-called judicial activism generally excluded it from this criticism.
Court’s decisions to the cases before it and criticized as inconsistent with the rule of law. At any rate, her approach stands in marked contrast to the decisions cited in the previous paragraph.

Some of the factors already discussed—Justice O’Connor’s political background as a conservative Republican and her experience as an elected legislator—undoubtedly contributed to her preference for narrow decisions. Nonetheless, Justice O’Connor’s prior judicial experience also seems at least partly responsible. Unlike nearly all other Supreme Court justices nominated since Justice Lewis Powell was appointed in 1971, Justice O’Connor was never a member of a federal court of appeals. She had, however, been a state court judge for seven years, five as a trial court judge and two on the Arizona Court of Appeals; and one might fairly describe her style as the approach of the United States common law tradition. She reached her judgments on a case-by-case basis with careful attention to the facts. Reasonable results appear to have been more important to her than grand theory, and she had respect, but not veneration, for precedent. As numerous examples demonstrate, Justice O’Connor normally preferred to modify prior decisions as she set the law on a new course.

The examples cut across all areas of constitutional law. In the federalism arena, she tempered her opposition to the expansion of federal control over state power by accepting a federal role in protecting

134 McCloskey, supra note 76, at 261. Since McCloskey’s book was published, President George W. Bush nominated Chief Justice John Roberts and Justice Samuel Alito; President Obama appointed Justices Sonia Sotomayor and Elena Kagan; and President Trump nominated Justice Neil Gorsuch. See United States Supreme Court Justices, The Green Papers, https://http://www.thegreenpapers.com/Hx/SupremeCourt.html (last visited Apr. 10, 2017). Both of President Bush’s appointments were judges of federal courts of appeal at the times of their appointments as was Justice Sotomayor and Justice Gorsuch. See Biographies of Current Justices of the Supreme Court, Supreme Court of the United States, https://www.supremecourt.gov/about/biographies.aspx (last visited Apr. 10, 2017). Justice Kagan was Solicitor General at the time of her appointment; previously, she had been Dean of the Harvard Law School and an advisor in the White House domestic policy office under President Clinton. Id. One might argue that Justice Souter has a judicial background similar to Justice O’Connor. Although he had served as a state court judge for twelve years, he was a member of the First Circuit for less than five months before he was nominated as a Supreme Court justice. Id.
135 Among justices who served with Justice O’Connor, only two had prior experience as state court judges, Justice Brennan and Justice Souter.
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and governmental regulations that impacted religious practices.\textsuperscript{144} In free speech cases, she allowed some but not all state regulations of cigars and smokeless tobacco,\textsuperscript{145} she advocated a reasonableness standard for airport regulations,\textsuperscript{146} and she agreed with broader but not unconstrained controls on child pornography.\textsuperscript{147} She was willing to grant the government broad, but not unlimited, authority to condemn private property,\textsuperscript{148} and she was willing to require compensation for regulations that she believed imposed extreme hardships.\textsuperscript{149}

Like most Supreme Court Justices, Justice O’Connor was willing to join opinions reversing cases she regarded as wrongly decided, especially prior decisions in which she previously dissented.\textsuperscript{150} That approach, however, was not her usual method. In several high profile cases, she expressed her preference for modifying rather than overruling previous decisions.\textsuperscript{151} The best-known example is Planned Parenthood holding that a Ten Commandments display did not violate the Establishment Clause; Allegheny Cty. v. ACLU, 492 U.S. 573, 623–25 (1989) (O’Connor, J., concurring) (stating that every case involving endorsement of religion must be analyzed under “its unique circumstances”) (emphasis original); Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring) (using careful scrutiny, employing both objective and subjective components, to determine that the particular crèche was not intended to endorse religion).


\textsuperscript{148} Compare Kelo v. City of New London, 545 U.S. 469, 494–505 (2005) (O’Connor, J., dissenting) (dissenting on the grounds that the Court significantly expanded the meaning of public use to include any taking that has predicted “positive side effects,” meaning that “[a]ny property may now be taken for the benefit of another private party”), with Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (allowing the exercise of eminent domain where it is “rationally related to a conceivable public purpose”).


\textsuperscript{151} See, e.g., Roper v. Simmons, 543 U.S. 551, 606 (2005) (O’Connor, J., dissenting) (opining that the court acted too soon after a previous decision); Lawrence v. Texas, 539 U.S.
of Southeastern Pennsylvania v. Casey, where she declined to overrule Roe v. Wade, even though she had previously criticized Justice Blackmun’s approach in that case.

II. INFLUENCE AS A MEMBER OF THE COURT

In terms of deciding cases, Justice O’Connor was a very influential justice during the twenty-four years she was a member of the Court. She was part of the “Federalism Five” that resurrected constitutional limits to federal power, and she concurred in most of the preemption and dormant Commerce Clause cases between 1981 and 2005. She was also a member of the majority in most of the separation of powers cases decided while she was a member of the Supreme Court. Her impact in cases involving individual rights extends from substantive due process and equal protection, to the guarantees of religious freedom and free speech, and the protection of private property under the Takings Clause. This section briefly summarizes her impact as a justice in federalism, separation of powers, and individual rights cases.

A. Federalism

During the 1990s, Justice O’Connor was part of the five-member majority that revived federalism-based limits on congressional power. She forcefully expressed her views when the issues concerned protecting states from direct federal controls, but she was generally a silent member

558, 579 (2003) (O’Connor, J., concurring in the judgment) (disagreeing with the majority’s decision to overrule Bowers v. Hardwick, 478 U.S. 186 (1986)).


153 Roe v. Wade, 410 U.S. 113, 153 (1973) (Justice Blackmun delivered the opinion of the court, asserting that a woman’s right to privacy encompasses her right to terminate her pregnancy).


155 Id. at 917, 940–41. For specific examples, see, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (finding that the ADEA was not appropriate legislation under section five of the Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress could not use the Commerce Clause to abrogate a state’s Eleventh Amendment immunity); City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding that Congress exceeded its Constitutional authority by enacting RFRA).

156 See Kelso & Kelso, supra note 154, at 917, 920–23.

157 Id. at 920.
of the majority when the Court limited congressional authority to regulate private parties. In the cases regarding congressional power to allow claims for monetary damages against the states, she only expressed her views in the exceptional cases where she abandoned the Federalism Five to allow persons denied family leave, the disabled, and bankruptcy trustees to bring claims.

The contemporary limits on congressional power actually began with Justice O’Connor’s 1992 opinion in *New York v. United States*. Joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, she refused to allow Congress to mandate that states adopt regulations for the disposal of low-level nuclear waste, even though she agreed Congress could directly impose the regulations itself or offer states financial incentives to adopt the regulations. When the Court expanded this immunity to forbid Congress from forcing states to assist in administering federal gun laws, Justice Scalia wrote the majority opinion. Justice O’Connor, however, added a concurring opinion in which she emphasized that the Congress could ask states to cooperate or provide financial incentives to states that did assist in enforcing federal law. In the case before the Court, she found the provisions requiring states to participate in the administration of the federal statute unconstitutional because they “utterly fail[ed] to adhere to the design and structure of our constitutional scheme.”

When the Court turned its attention to limiting the scope of congressional regulatory authority under the Commerce Clause, Justice O’Connor provided a crucial fifth vote to establish the new limits, but she contributed little to the doctrinal development. Chief Justice Rehnquist authored the 1995 opinion holding that Congress had exceeded its power under the Commerce Clause when it made

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158 *Id.*


161 Id. at 188.


163 Id. at 935–36 (O’Connor, J., concurring).

164 Id. at 936.

165 United States v. Lopez, 514 U.S. 549, 568 (1995) (Justice O’Connor joined in Justice Kennedy’s concurring opinion, opining that “[t]he history of the judicial struggle to interpret the Commerce Clause” gave them “some pause” about the majority’s decision).
possession of a gun on school grounds a federal crime. Justice O’Connor joined the majority opinion, but she also joined Justice Kennedy’s concurring opinion; it emphasized that “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.” In another case involving the scope of the Commerce Clause power, Justice O’Connor concurred silently when Chief Justice Rehnquist concluded that the Commerce Clause did not give Congress authority to establish a private claim for damages for violence based on gender.

Justice O’Connor was a less reliable member of the federalism majority when the issue concerned congressional power to enforce the guarantees of the Fourteenth Amendment. She agreed that Section Five of the Fourteenth Amendment did not allow Congress to define what constituted a violation of the free exercise of religion, to prohibit discrimination by employers against the disabled or the elderly, or to create a private claim for damages resulting from gender-related violence. Subsequently, however, she and Chief Justice Rehnquist joined the dissenters in those earlier cases to create a majority upholding the provisions that required states to comply with the federal requirements regarding family medical leave. A year later, she alone joined the dissenters to form a five-member majority that upheld congressional power to guarantee access to court for the disabled.

In 1996, the federalism majority found a third limit on federal power—this time recognizing state immunity from private actions for damages under the Indian Gaming Regulatory Act. The court held that Congress cannot force states

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166 Id. at 551.
167 Id. at 574 (Kennedy, J., concurring).
172 See Morrison, 529 U.S. at 626–27.
176 The court reversed Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989), which held
to pay damages to private individuals who are injured by state violations of federal legislation enacted pursuant to the Commerce Clause. After that decision, a steady stream of cases required the Court to define the scope of the new immunity. Three years later, the same five justices held that the immunity applied to claims based on statutes passed pursuant to the Copyright and Patent Clause and to claims brought in state court as well as cases filed in federal court. In 2000, they extended the immunity to adjudications by federal agencies.

Although Justice O’Connor joined each of the majority opinions summarized in the preceding paragraph, she deserted the federalism majority on a few cases that limited the scope of the immunity from monetary awards. On two occasions—one involving a violation of federal law governing family medical leave and the other involving denial of access to court for a disabled person—Justice O’Connor avoided the immunity by finding congressional authority to enact the legislation under Section Five of the Fourteenth Amendment. In one of her last decisions as a member of the Court, she concluded that the immunity did not always apply to the Congress’s Article I power to establish uniform laws regarding bankruptcies. She joined the justices, who normally dissented in the federalism cases, to hold that the state was not immune from liability in a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies.

that a State could be required to pay monetary damages to individuals.

177 *Seminole Tribe*, 517 U.S. at 47; *see also* Bd. of Tes v. Garrett, 531 U.S. 356, 360 (2001) (no federal jurisdiction for a suit seeking to force the State to pay damages to State employees for its failure to comply with the ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000) (no federal jurisdiction for a suit seeking to force the State to pay damages to State employees for age discrimination).


179 U.S. CONST. art. I, § 8, cl. 8: “The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . .”

180 *See Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that the State did not consent to suits for damages under FLSA, a federal statute).


185 *Id.* at 359.
With respect to the spending power, Justice O’Connor embraced federalism limits on congressional power broader than the majority of the Court was willing to accept. Dissenting in *South Dakota v. Dole* in 1987, she argued that Congress lacked the power to condition federal highway funds to states on the state’s agreement to raise the legal drinking age to 21. In her view, the requirement was “not a condition, but a regulation,” because the requirement went “beyond specifying how the money should be spent.” As a regulation, she concluded, the requirement fell “outside Congress’ power to regulate commerce because it fell within the ambit of §2 of the Twenty-first Amendment.”

**B. Separation of Powers**

With respect to issues regarding the powers of the branches of the federal government, Justice O’Connor’s most significant contribution was to support an expansive view of federal judicial power. Despite her narrow, fact-based approach to most doctrinal issues, she accepted judicial resolution of a wide array of constitutional issues. The preceding section explained her support for, and limitation of, new restraints on federal power coupled with her adherence to traditional doctrines restraining state power. This section describes her concurrence in the wide array of decisions defining the scope of congressional and presidential power. The following section summarizes how she participated in creating new doctrines to limit affirmative action and to increase protection for women and homosexuals while refusing to

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186 U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...”).


188 *Id.* at 213–14.

189 *Id.* at 216 (quoting *United States v. Butler*, 297 U.S. 1, 19–20 (1936)).

190 *Id.* at 212. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. See U.S. CONST. art. XXI, § 1. Section 2 provides: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. art. XXI, § 2. See generally KENNETH M. MURCHISON, THE FORGOTTEN IMPACT OF NATIONAL PROHIBITION ON FEDERAL CRIMINAL LAW DOCTRINES (1994) (discussing federal criminal law doctrine changed in response to national prohibition).

191 See supra Part II (discussing Justice O’Connor’s influence on the court).

192 For insight into the wide array of cases Justice O’Connor ruled in, see Kelso & Kelso, *supra* note 154, at 920–26.

193 See supra Part II.A (discussing federalism).
abandon completely the rights that the Warren and Burger Courts established. The result of all these decisions was to increase significantly the scope of constitutional law.

On one important issue—the authority of the Supreme Court as the final interpreter of the Constitution—Justice O’Connor took less of a case-by-case approach than was typical of her decisions in other areas. She joined opinions that resisted congressional attempts to overrule or to circumvent Supreme Court decisions involving the Commerce Clause and the protections afforded criminal defendants. Moreover, she concurred with the Court’s holding that Congress could not expand the guarantee of the free exercise of religion, although she dissented from the Court’s refusal to reconsider a decision that Congress had attempted to overrule.

In standing cases, Justice O’Connor took an arguably inconsistent path and her views were not particularly influential in delineating doctrinal contours. During her early years on the Court, she authored one standing opinion and joined another; both limited the ability of citizens to litigate constitutional issues. Near the end of her tenure, however, she authored a concurring opinion that allowed a noncustodial parent to challenge the “under God” phrase in the pledge of allegiance. In the 1990s, she joined in a majority decision holding that Congress lacked standing to challenge the Line Item Veto Act, and she joined Justice Scalia’s dissent arguing that Congress lacked the power to grant a group of voters standing to challenge the failure of the Federal Election Commission to classify the American Israeli Public Affairs Committee as a political committee. Later, however, she

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194 See infra Part II.C (discussing individual rights).
199 See Kelso & Kelso, supra note 154, at 948 (primarily discussing O’Connor dissent in Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992)).
occasionally favored broader standing for environmental groups, \(^{204}\) even when she was unable to persuade a majority of her colleagues to join her.\(^{205}\)

By the time Justice O'Connor joined the Supreme Court in 1981, the Court had begun to establish several separation of powers doctrines in response to cases arising from the Nixon presidency. \(^{206}\) Moreover, cases raising separation of powers issues arose regularly in the 1980s and early 1990s as the country remained divided between a Republican President and a Democratic Congress. Justice O'Connor was a regular member of the majority in those cases—from the early decisions that took a formalistic approach to defining the powers of the President and Congress, \(^{207}\) to the later ones that took a more functional approach to the issues. \(^{208}\) The majorities in most of these cases were substantial, and Justice O'Connor does not appear to have played a decisive role in the switch from a formalistic to a functional approach. \(^{209}\)

Justice O'Connor generally continued her position as a member of the majority as cases regarding the allocation of powers to the legislative and executive branches of the federal government resurfaced in the Supreme Court in later years. \(^{210}\) In 1997, she joined a unanimous Court


\(^{209}\) A more likely explanation is William Rehnquist’s replacement of Warren Burger as Chief Justice. Chief Justice Burger authored several of the most formalistic opinions. By contrast, Chief Justice Rehnquist normally took a more functional approach, perhaps reflecting the influence of his time as a clerk for Justice Robert Jackson. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634, 640 (1952) (Jackson, J., concurring) (discussing presidential power).

that denied the President temporary immunity from lawsuits based on matters that occurred before the President assumed the office, but her position has been far more important in other cases.

Justice O’Connor’s position was decisive in the detainee cases of 2004. She was the only justice who joined the majority opinion in both jurisdictional cases. In *Rumsfeld v. Padilla*, she concurred in Chief Justice Rehnquist’s opinion ruling that a prisoner had to file his habeas corpus petition in the District of South Carolina where he was incarcerated. In *Rasul v. Bush*, she joined Justice Stevens’ opinion holding that federal courts had jurisdiction under the habeas corpus statute to review the detentions of the detainees at the naval base in Guantanamo, Cuba. On the merits of the detainee challenge, she authored the plurality opinion; it concluded that due process entitled a detainee who was a United States citizen to receive “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” In a separation of powers decision that was one of the last cases in which she participated as Justice Alito was awaiting confirmation, Justice O’Connor was part of the majority. She joined Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer in rejecting the power of the United States Attorney General to forbid physicians from prescribing drugs covered by the federal Controlled Substances Act for use in physician assisted suicides authorized by state law.

### C. Individual Rights

A single direction of cases involving the rights of individuals is difficult to discern during the years that Justice O’Connor was a member of the Supreme Court. Her early years coincided with the last years of Chief Justice Burger’s tenure. Those years saw narrow constructions of some claims of individual rights, but no determined assault on the

\[\text{joined by O’Connor, J., concurring). For further discussion of Clinton, see infra note 469 and accompanying text.}\]


\[\text{213 Id. at 451.}\]

\[\text{214 Rasul, 542 U.S. at 484–85.}\]

\[\text{215 Hamdi, 542 U.S. at 533.}\]

\[\text{216 Gonzales v. Oregon, 546 U.S. 243 (2006).}\]

\[\text{217 Id. at 248–49, 274–75.}\]

modern rights framework that had been established in the Warren Court and the early years of the Burger Court.

By the time the Rehnquist Court reached its final makeup in 1995, the Court divided along ideological lines in many individual rights cases. Justices Scalia and Thomas, usually joined by Chief Justice Rehnquist, regularly attacked much of the rights framework that the Warren and Burger Courts had accepted. At the same time, they supported expansion of the protections afforded to economic interests and conservative Christian groups. On the other hand, Justices Stevens, Souter, Ginsburg, and Breyer usually supported the existing rights framework. Along with Justice Kennedy, Justice O’Connor occupied a centrist role, and her views were often determinative when the Court was closely divided. She generally supported revision of the substantive due process, equal protection, and religious freedom doctrines inherited from the Warren and Burger Courts, as well as the expansion of rights for economic interests. She refused, however, to abandon completely earlier precedents regarding substantive due process, equal protection, religious freedom, and free speech; and she declined to embrace the more radical versions of the new economic rights.

1. Substantive Due Process

The abortion cases offer the best known example of Justice O’Connor’s attempt to steer a centrist course in constitutional doctrine.

that criminalized sodomy was unconstitutional); United States v. Leon, 468 U.S. 897, 905, 926 (1984) (finding reasonable cause for a search); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (municipality’s nativity scene did not violate Establishment Clause); Marsh v. Chambers, 463 U.S. 783, 784, 795 (1983) (“Nebraska Legislature’s practice of opening each legislative day with a prayer by a chaplain paid by the State” did not violate Establishment Clause); Connick v. Myers, 461 U.S. 138, 154 (1983) (finding that a state employee had a limited First Amendment interest in circulating a questionnaire concerning internal office affairs).

219 Justice Stephen Breyer, who joined the Supreme Court on August 3, 1994 was the last justice to be appointed until John Roberts replaced William Rehnquist as Chief Justice.


221 See, e.g., Rosenburger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837, 845–46 (1995) (denial of school printing funds to a religious group was unconstitutional).

222 See Kelso & Kelso, supra note 154, at 921–22, 925–26, 929–32, 934–35.

Although anti-choice groups had objected to her nomination, Justice O’Connor quickly became a critic of the Court’s abortion jurisprudence. In her early years on the Court, she dissented several times when the Court struck down regulations governing abortions, and she criticized the trimester framework of *Roe v. Wade* as “completely unworkable.” In its place, she advocated a standard first suggested in a brief for the government: An abortion regulation is invalid only when it places an “undue burden” on a woman’s right to choose an abortion.

By 1992, conditions seemed ripe for *Roe* to be overruled. Republican Presidents had appointed eight of the nine justices, and Byron White, the one Democratic appointee, had been one of the two dissenters in *Roe*. Only two members of the Court—Justices Blackmun and Stevens—had consistently supported *Roe* in the decisions of the 1980s.

The reversal never materialized. Justice O’Connor joined with Justices Kennedy and Souter to author a joint plurality opinion. It reaffirmed *Roe’s* “essential holding,” which the plurality defined as recognizing that a woman’s right to choose whether to have an abortion was constitutionally protected. At the same time, the justices who authored the plurality opinion narrowed the scope of the protections of *Roe*. They embraced the standard that Justice O’Connor had urged in her earlier dissent: A regulation violated the woman’s right to choose an abortion only when it imposed an “undue burden” on her right to choose. Perhaps the best illustration of the change’s significance is shown by the fact that the plurality found that all but one of the regulations before it in the 1992 case were permissible under the new test. Eight years later, Justice O’Connor again provided the crucial

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226 *City of Akron*, 462 U.S. at 454.


228 *City of Akron*, 462 U.S. at 463.


230 *Casey*, 505 U.S. at 876–79.

231 The court upheld the statutory definition of emergency, the informed consent requirements, the 24-hour waiting period, the parental consent provision, and the reporting and record keeping requirements. *Id.* at 879–87, 899. The only provision that the plurality
fifth vote on an abortion decision. She agreed with Justices Stevens, Souter, Ginsburg, and Breyer that a state ban on dilation and extraction abortions placed an undue burden on the woman’s right to choose, but added a concurring opinion indicating that she would have upheld the ban if it had contained an exception when the procedure was necessary to protect the life of the mother.

Justice O’Connor’s votes in other substantive due process cases paralleled her cautious support for the woman’s right to choose an abortion, and her views were frequently necessary to form a majority. In 1986, she was part of the five-member majority that denied the existence of a right to engage in homosexual sex. Seventeen years later, she opposed overruling the 1986 decision, although she agreed that a statute criminalizing homosexual sodomy was unconstitutional as a denial of equal protection. She also agreed that a statute presuming a woman’s husband was the father of her child did not violate any substantive due process of the alleged biological father. In that case, however, she added a concurring opinion rejecting Justice Scalia’s narrow test for identifying unenumerated rights; and eleven years later, she authored an opinion for the Court holding that a statute that allowed a court to grant visitation rights to a grandparent whenever the court determined visitation was in the best interest of the child violated the substantive due process rights of the child’s mother. Twice during Justice O’Connor’s tenure as an associate justice, the Court rejected challenges arguing that state statutes violated an unenumerated “right to die.” On each occasion, Justice O’Connor joined Chief Justice Rehnquist’s majority opinion, but also added a concurring opinion. Those opinions indicated that she might accept a narrower version of the right being claimed in

found imposed an undue burden on women seeking abortions was the spousal notification provision. Id. at 887–98.

233 Id. at 950–51 (O’Connor, J., concurring).
237 Id. at 132 (O’Connor, J., concurring).
other factual circumstances. Similarly, when the Court invalidated an Alabama punitive damages award in 1996, Justice O’Connor was also a part of the majority, joining Justice Breyer’s concurring opinion that concluded the judgment “violate[d] the basic guarantee of nonarbitrary governmental behavior” that substantive due process protects. Finally, she was willing to recognize a right of access to courts as the basis for allowing Congress to impose money damages under Section 5 of the Fourteenth Amendment.

2. Equal Protection

By the time Justice O’Connor became an associate justice in 1981, the Supreme Court had confined the most radical possibilities of Warren Court decisions construing the Equal Protection Clause. The Court had refused to recognize the poor as a suspect class or education as a fundamental right, required proof of discriminatory intent to establish an equal protection claim, and confined the affirmative duty to desegregate to those governments that were responsible for the original discriminatory conduct. During Justice O’Connor’s tenure as a justice, equal protection expanded in new directions; and her views were generally determinative in defining the scope of the new protections.

One of the most notable of these decisions redefining equal protection was undoubtedly Bush v. Gore, the case that stopped the Florida recount in the presidential election of 2000 and guaranteed that George W. Bush would be the next President. Justice O’Connor was part

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240 Glucksberg, 521 U.S. at 736 (O’Connor, J., concurring) (“[R]espondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the . . . [state] laws at issue here.”); Cruzan, 497 U.S. at 287 (O’Connor, J., concurring) (“I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . and that the refusal of artificially delivered food and water is encompassed within that liberty interest. . . . I write separately to clarify why I believe this to be so.”) (internal citations omitted).
242 Id. at 597 (Breyer, J., concurring).
244 U.S. CONST. amend. XIV, §1: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
of both the seven-member majority holding that Florida had failed to establish a constitutional standard for the recount and the five-member majority ruling that no time existed for Florida to correct the error.249

Modern equal protection doctrine began with the decisions outlawing racial segregation.250 After Justice O’Connor joined the Court, the most significant racial cases involved legislative attempts to remedy the effects of past discrimination by giving special statutory protections to minorities. In those cases, the Court frequently ruled that the preferences were unconstitutional, but it stopped short of forbidding all racial classifications.251

An early case involved governmental employment.252 Justice O’Connor provided the fifth vote to invalidate a statutory scheme that gave preference to minority teachers during a layoff,253 but she added a concurring opinion. In it, she rejected an absolutist approach, arguing that

> a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan’s racial preference.254

A second group of cases involved requirements that programs “set aside” some portions of government contracts for minorities.255 In 1980, a majority of the Supreme Court had upheld a set-aside program

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249 Id. at 110.


251 For an illuminating comparison of Justice O’Connor’s positions in race and gender cases, see Paul Bender & Chelsea Sage Durkin, Justice O’Connor’s Race and Gender Jurisprudence, 39 ARIZ. ST. L.J. 829, 830–33 (2007).


253 Id. at 283–84 (1986).

254 Id. at 287 (O’Connor, J., concurring).

255 See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 453, 491 (1980) (holding that the minority set aside program was a legitimate exercise of Congressional power); City of Richmond v. Croson, 488 U.S. 469, 511 (1989) (finding that the City of Richmond’s set aside program violated the Equal Protection Clause).
established by the federal government.\textsuperscript{256} Nine years later, Justice O’Connor—speaking for a five-member majority—wrote the opinion of the Court invalidating a set-aside program established by the city of Richmond, Virginia.\textsuperscript{257} At least three aspects of the opinion are significant. First, she distinguished the 1980 precedent because of Congress’s Section 5 power to enforce the guarantees of the Fourteenth Amendment.\textsuperscript{258} Second, the opinion unequivocally held that the Court would apply “strict scrutiny” to all racial classifications, including those that were designed to assist disadvantaged minority groups.\textsuperscript{259} Third, although Justice O’Connor overturned the classification before the Court, she insisted that a state could use racial classifications when evidence established a pattern of racial discrimination in the past.\textsuperscript{260}

The year after the Richmond case, a different majority embraced the distinction that Justice O’Connor had articulated. Relying on the difference between the powers of the federal government and those of the states, the new majority upheld a federal set-aside program for broadcast licenses.\textsuperscript{261} This time, Justice O’Connor dissented.\textsuperscript{262}

The distinction between the powers of the federal government and the states to enact race-based programs of affirmative action did not prove to be an enduring one. In 1995, Justice O’Connor abandoned it in her opinion for a five-member majority that included Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.\textsuperscript{263} Reversing the precedents from 1980 and 1990, the Court now held that strict scrutiny applied to racial classifications established by the federal government as well as those enacted by the states.\textsuperscript{264} Although the 1995 decision ruled that the set-aside program applicable to federal contracts was

\textsuperscript{256} Fullilove, 448 U.S. at 491–92.
\textsuperscript{257} Croson, 488 U.S. at 511.
\textsuperscript{258} Id. at 489–90.
\textsuperscript{259} Id. at 493–94.
\textsuperscript{260} Id. at 509. (“Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. . . . Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” (internal citations omitted)).
\textsuperscript{261} Metro Broad., Inc. v. FCC, 497 U.S. 547, 552 (1990).
\textsuperscript{262} Id. at 602–31 (O’Connor, J., dissenting).
\textsuperscript{264} Id. at 227 (overruling Metro Broad., Inc. v. FCC, 497, U.S. 547 (1990), to the extent that it is inconsistent).
unconstitutional, Justice O’Connor continued to insist that strict scrutiny would not necessarily invalidate all affirmative action programs that used race-based classifications.

The next major group of cases involving race concerned the creation of legislative districts following the 1990 census. Here again, Justice O’Connor’s positions were pivotal, and her views were similar to the ones described in the preceding paragraphs. Basically, she tried to limit, but not to prohibit, the consideration of race when legislatures created districts in which minority voters constituted a majority of voters.

In the first case of this group, Justice O’Connor authored the majority opinion that was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. It held that voters stated an equal protection claim by alleging that North Carolina’s legislation was so extremely irregular it could rationally be viewed only as an effort to use race as the criterion to segregate races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification.

Two years later, the same five-member majority clarified that a bizarre shape was not a threshold requirement for invalidation; the constitutional standard was whether race was the dominant and controlling factor. Justice O’Connor joined Justice Kennedy’s opinion for the Court, but she added a concurring opinion in which she insisted that to receive strict scrutiny, a plaintiff had to prove “the State has relied on race in substantial disregard of customary and traditional districting practices.”

In 1996, the Court struck down two more redistricting plans, one of which was the North Carolina scheme now back before the Court on the merits. Justice O’Connor joined Chief Justice Rehnquist’s opinion for a five-member majority in the North Carolina case and authored a
plurality opinion in the other one. Each invalidated the plan it reviewed because race was the predominant factor that guided the creation of the districts in which a majority of the voters were members of a minority group. In *Bush v. Vera*, the case in which Justice O’Connor wrote the plurality opinion, she also added a concurring opinion in which she indicated that compliance with the Voting Rights Act would be a compelling interest that might justify a district if it were more compact and followed traditional district lines.

The North Carolina redistricting dispute returned to the Court two more times. In 1999, Justice O’Connor joined Justice Thomas’s opinion holding that a challenge to the revised version of the North Carolina redistricting plan raised factual issues that had to be initially resolved by the district court. Two years later, however, she joined the dissenters in the earlier cases to uphold the revised North Carolina plan on the merits in *Easley v. Cromartie*. This time, she concurred in Justice Breyer’s opinion; it reversed the district court finding that race was the predominant factor in creating the plan.

University admissions provided the final context in which Justice O’Connor participated in cases involving affirmative action programs that considered race. Justice O’Connor’s approach here paralleled her decisions in the redistricting cases. She applied strict scrutiny but that scrutiny did not invalidate all affirmative action programs using race as a factor. As in the redistricting cases, she allowed some consideration of race in university admissions, but refused to approve programs when she concluded that race was the predominant factor. In one of the cases that came before the Court in 2003, she wrote a concurring opinion explaining that an undergraduate admissions program that gave extra points to the minority applicants in a numerically-based system was

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273 *Bush v. Vera*, 517 U.S. 952, 957 (1996) (holding that the State’s district lines are unconstitutional).
274 *Id. See also Hunt*, 517 U.S. at 901–02.
275 *Vera*, 517 U.S. at 903–94 (O’Connor, J., concurring).
278 *Id. at* 237.
279 *See supra* notes 267–278 and accompanying text.
280 *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (holding that “the Law School’s narrowly tailored use of race in admissions” was valid in order to further a compelling interest of educational diversity).
invalid because it gave too much weight to race. In the other case, Justices Stevens, Souter, Ginsburg, and Breyer joined her majority opinion upholding a law school admissions scheme that allowed those reviewing applicant files to consider race without giving it a specific weight.

Justice O’Connor also supported more stringent equal protection limits outside the context of race-based affirmative action. She favored strengthening the standard of intermediate scrutiny for gender-based classifications, establishing an enhanced rationality review for classifications that adversely affected homosexuals, and occasionally using the Equal Protection Clause to protect individuals who did not fall within any specially protected class.

The net effect of the results in the gender cases was to provide significant protection against gender-based discrimination, while still allowing substantial leeway for programs to protect women from the current impacts traceable to exclusion from many employment opportunities in the past. In Justice O’Connor’s first term on the Court, she authored an opinion that emphasized the need for “an exceedingly persuasive justification” for governmental rules that discriminated on gender grounds, even when the individuals facing discrimination were males, not females. Fourteen years later, she joined Justice Ginsburg’s opinion strictly applying the “exceedingly persuasive justification” standard to preclude Virginia from excluding women from the Virginia Military Institute. In between those decisions, the Court held that an affirmative action program that allowed consideration of gender in selecting among candidates that meet the basic qualifications for a job did not violate the Civil Rights Act. Justice O’Connor’s concurring opinion emphasized that the goals in the affirmative action plan were reasonable because they were based on the percentage of qualified women in the work force, not the percentage in the general population.
In 1996, Justice O’Connor was part of a six-member majority that struck down, on equal protection grounds, a state constitutional amendment prohibiting state and local governments from granting homosexuals protections against employment discrimination. She, along with Justices Stevens, Souter, Ginsburg, and Breyer, joined in Justice Kennedy’s majority opinion. The scope of the protection the majority afforded was both modest and vague. The Court claimed to apply rational relationship review, but the Court gave a more careful scrutiny of the measure than had been typical in modern cases. Most noticeably, the majority ignored altogether Justice White’s 1986 opinion that upheld the constitutionality of criminalizing homosexual conduct to promote public morality. In addition, as noted above, Justice O’Connor also preferred using the Equal Protection Clause when the Court subsequently invalidated a statute criminalizing sexual relations between consenting homosexual adults.

Justice O’Connor also joined majorities to accept equal protection claims in at least two other cases that did not involve any suspect class. Early in her judicial tenure, she joined Justice White’s plurality opinion holding that the denial of a special use permit that would have allowed a house to be used as a group home violated the Equal Protection Clause; the opinion concluded that the denial was based on irrational prejudice against the mentally retarded. In 2000, she joined a unanimous decision allowing an equal protection claim by a “class of one.” The per curiam opinion held that the plaintiff stated an equal protection claim because she “allege[d] that she ha[d] been intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment.”

proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause."

Id. at 649.


290 Id. at 631–36.


292 See discussion supra Part II.B.1.


296 Id.
3. Freedom of Religion

A third area in which Justice O’Connor played a decisive role in defining individual rights involved the religion clauses of the First Amendment. As in other areas, she advocated a cautious, fact-centered analysis of the issues. She supported considerable modification in doctrine, but she resisted wholesale abandonment of prior standards.

When construing the Establishment Clause, Justice O’Connor supported some important changes in doctrine, but she rejected the argument that the clause allowed the government to support religion so long as it did not discriminate against particular religious groups.297 On the one hand, she joined majorities mandating that governments give religious groups equal access to government benefits298, allowing greater governmental support for religious institutions299, and permitting some displays of religious items on public property.300 At the same time, she opposed prayers at most government-sponsored events.301 For her, the critical question was whether the government conduct would reasonably be perceived as an “endorsement” of religion.302

Justice O’Connor consistently rejected the claim that the Establishment Clause required or permitted governments to deny religious groups access to government resources. In her first term on the Court, she was part of an eight-member majority holding that a state university could not preclude religious groups from using its facilities for worship activities;303 and she later joined a unanimous Court holding that a school district could not deny a church the same access to its facilities that it allowed other private organizations.304 She also helped form a seven-member majority that held allowing the Ku Klux Klan to display an unattended cross on the grounds of a state capitol presented no Establishment Clause problem.305 More significantly, she provided

299 See id.
302 For a favorable assessment of Justice O’Connor’s contribution to Establishment Clause jurisprudence, see Merritt & Merritt, supra note 297, at 933–48.
305 Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757, 769 (1995). In Pinette, she added a concurring opinion declaring that “[d]espite the messages of bigotry and racism that may be conveyed along with religious connotations,” the display essentially raised issues of “private religious expression.” Id. at 772 (O’Connor, J., concurring in part and
the fifth vote in a case holding that a state-run university could not refuse to allocate funds from the student activities fund that supported student publications to publications with a religious perspective. In the latter case, she added a concurring opinion offering four reasons why the funding did not violate the Establishment Clause: the publication was “strictly independent” of the university; the money from the student activities fund could only be used for publication purposes; the context made improbable “any perception of government endorsement of the religious message” because the activities fund also supported a “wide array of nonreligious, anti-religious and competing religious viewpoints;” and the money came from student fees administered by students.

Like most members of the Court, Justice O’Connor declined to extend the cases described in the preceding paragraph to require that religious institutions be included in all benefit programs. In 2004, she was part of the seven-member majority that joined Chief Justice Rehnquist’s opinion upholding the constitutionality of a state’s decision to exclude students pursuing degrees in theology from a publicly funded scholarship program.

Although Justice O’Connor declined to force governments to extend benefit programs to religious institutions, she was willing to increase governmental discretion to provide aid to them. She regularly joined narrow majorities that upheld inclusion of parochial schools in programs designed to provide support to private schools, but she resisted the argument that the only requirement for such programs was a prohibition of discrimination against particular religions.

Justice O’Connor’s views were frequently decisive in defining the reach of the Court’s decisions in the school aid cases. As early as 1983, she provided a crucial fifth vote and silently concurred in Justice Rehnquist’s opinion upholding a state tax deduction for the costs of tuition, books, and transportation at private schools, including parochial schools. In Warren Burger’s final year as Chief Justice, the Court unanimously agreed that a state could provide vocational rehabilitation services to a blind student who was studying at a Christian college and

concurring in judgment). As a result, she saw “no necessity to carve out . . . an exception to the endorsement test for the public forum context.” Id.

307 Id. at 849–51 (O’Connor, J., concurring).
309 See cases cited supra note 200 and accompanying text.
planned to pursue a religious career.\textsuperscript{311} This time, Justice O’Connor added a concurring opinion. In it, she emphasized that any aid to religion was the “result of petitioner’s private choice” and that “[n]o reasonable observer” would be “likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.”\textsuperscript{312} A decade later, Justice O’Connor authored an opinion for a five-member majority overruling a 1985 decision from which she had dissented.\textsuperscript{313} The new opinion concluded that teachers paid by the government could provide remedial instruction at private schools even if the private schools were affiliated with a particular religion.\textsuperscript{314} Three years later, she was part of a six-member majority that permitted states to lend educational materials and equipment, such as library and media materials and computer software and hardware, to parochial schools for use in nonreligious programs.\textsuperscript{315} This time, however, she only concurred in the judgment; her concurring opinion, which was joined by Justice Breyer, rejected the argument that government aid to religious schools never has “the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.”\textsuperscript{316} The most recent school-aid decision came in 2002; it upheld a voucher plan in which parents were free to use funds they received to pay tuition at religious schools.\textsuperscript{317} Justice O’Connor’s concurrence emphasized that she was convinced that “that the Cleveland voucher program is neutral as between religious schools and nonreligious schools.”\textsuperscript{318}

When the Court faced issues regarding display of religious symbols on public property, Justice O’Connor again adopted a highly contextual approach. In 1984, she provided the fifth vote in a decision allowing a nativity scene to be included as part of a Christmas display that also included nonreligious symbols.\textsuperscript{319} Her concurrence argued that what the Establishment Clause prohibited was “endorsement or disapproval of religion” by government.\textsuperscript{320} The display before the Court was

\textsuperscript{311} Witters v. Wash. Dep’t of Servs. for the Blind, 474 U.S. 481, 482 (1986).
\textsuperscript{312} Id. at 493 (O’Connor, J., concurring and concurring in the judgment) (\textit{citing} Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).
\textsuperscript{314} \textit{Agostini}, 521 U.S. at 209.
\textsuperscript{316} Id. at 837 (O’Connor, J., concurring in the judgment).
\textsuperscript{318} Id. at 670 (O’Connor, J., concurring).
\textsuperscript{320} Id. at 692 (O’Connor, J., concurring).
permissible under this test, she argued, because the “evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols” and the larger “display celebrates a public holiday” that “has very strong secular components and traditions.”321

Five years later, the Court reached a split decision, holding that the display of a crèche in a county courthouse violated the Establishment Clause, but that the display of a Christmas tree, a menorah, and a sign saluting liberty did not.322 Justice O’Connor and Justice Blackmun were the only two members of the Court that agreed with both results,323 and Justice O’Connor added a concurring opinion to explain her position.324 The crèche was impermissible, she concluded, because as “displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, [it] conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.”325 By contrast, the Christmas tree was “not regarded today as a religious symbol,” and combining the tree and a sign saluting liberty with “a religious symbol from a Jewish holiday also celebrated at roughly the same time of year” did not amount to an endorsement of “Judaism or religion in general.”326 In Justice O’Connor’s last full term, the Court again reached a split result, but this time Justice O’Connor was a member of the majority in only one of the cases. She agreed with the majority holding that the display of the Ten Commandments in a county courthouse violated the Establishment Clause.327 Her concurring opinion emphasized that the “purpose behind the counties’ display [was] relevant because it convey[ed] an

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321 Id. at 691–92.
323 The Chief Justice and Justices White, Scalia, and Kennedy argued that both displays were constitutional. See id. at 655 (Kennedy, J., concurring in part, dissenting in part). Justices Brennan, Marshall, and Stevens claimed neither display was constitutional. Id. at 637 (Brennan, J., concurring and dissenting); id. at 646 (Stevens, J., concurring in part, dissenting in part). The effect was to create a five-member majority (Justices Blackmun and O’Connor plus Justices Brennan, Marshall, and Stevens) holding the display of the crèche was unconstitutional and a six-member majority (Justices Blackmun and O’Connor plus the Chief Justice and Justices White, Scalia, and Kennedy) upholding the display of the menorah.
324 Id. at 623–37 (O’Connor, J., concurring).
325 Id. at 636.
326 Id. at 633, 635.
327 McCreary v. ACLU, 545 U.S. 844, 858 (2005).
unmistakable message of endorsement to the reasonable observer."

When Justice Breyer switched sides in the companion case and created a majority that allowed the display of the Ten Commandments as part of seventeen monuments and twenty-one historical markers located on the twenty-two acres of the grounds of the state capitol, however, she dissented.

Throughout her time on the Court, Justice O’Connor consistently opposed government prescriptions of prayers at public schools or at school-sponsored events, but she did not contribute greatly to the doctrinal development. In 1985, a six-member majority ruled that a statute requiring the public school day to begin with a moment of “silent meditation or voluntary prayer” violated the Establishment Clause. Justice O’Connor joined the majority opinion by Justice Stevens, but she also added a concurring opinion indicating that a “moment of silence” statute that did not “endorse” voluntary prayer might survive an Establishment Clause challenge. Seven years later, a five-member majority held that a school district violated the Establishment Clause when it invited a rabbi to deliver the benediction at a high school graduation. This time, Justice O’Connor did not write a separate opinion, but she did join the concurring opinions of Justices Blackmun and Souter as well as the majority opinion by Justice Kennedy. Finally, in 2000, she joined Justice Stevens’s opinion for a six-member majority that ruled a student-led prayer at a high school football game violated the Establishment Clause.

In other Establishment Clause cases, Justice O’Connor was generally part of substantial majorities. She did, however, frequently explain her views in concurring opinions.

Early in her career, she joined three opinions by Chief Justice Burger. The first invalidated a state law that gave governing bodies of schools and churches the power to prevent issuance of liquor licenses for premises within a 500-foot radius of the church or school. The second

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328 Id. at 883–84 (O’Connor, J., concurring).
329 Van Orden v. Perry, 545 U.S. 677, 681 (2005); id. at 703 (Breyer, J., concurring).
330 Id. at 736 (O’Connor, J., dissenting); see infra note 478 and accompanying text (for further discussion of Van Orden).
332 Id. at 73 (O’Connor, J., concurring in the judgment).
334 Id. at 599 (Blackmun, J., concurring).
335 Id. at 609 (Souter, J., concurring).
allowed governmental funding for legislative chaplains because of the “unique history” of those institutions in the United States.\textsuperscript{338} The third was a unanimous decision holding unconstitutional a statute that granted an absolute right not to work on the day an employee claims as the employee’s “Sabbath.”\textsuperscript{339} In the first two cases, Justice O’Connor concurred without any further elaboration of her views, but in the third she added a concurring opinion. The concurrence argued that the statute was unconstitutional because it “convey[ed] a message of endorsement of the Sabbath observance.”\textsuperscript{340}

In 1987, the first term after William Rehnquist became Chief Justice, Justice O’Connor was part of a seven-member majority holding a state law that mandated that creation science be taught in public schools along with evolution as unconstitutional.\textsuperscript{341} This time, she joined Justice Powell’s concurring opinion. It relied on legislative history to demonstrate that the primary purpose of the legislation was religious, while also emphasizing that the Court’s opinion was not intended to diminish “the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum.”\textsuperscript{342}

Seven years later, when a majority of the Court voted to dismiss a challenge to the words “under God” in the pledge of allegiance on lack of standing,\textsuperscript{343} Justice O’Connor concurred in the judgment. She would have reached the merits and ruled that the Establishment Clause did not preclude including the words in the pledge.\textsuperscript{344}

Justice O’Connor also took a centrist position when the Court faced issues concerning the Free Exercise Clause. Although she dissented in two cases early in her tenure as a justice,\textsuperscript{345} she was generally part of the majority even when the Court was closely divided. She only wrote one majority opinion early in her career; it rejected the claim of Native Americans for access to traditional sacred sites located on federal lands.\textsuperscript{346} In other cases, she occasionally joined a majority opinion

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\textsuperscript{340} Id. at 711 (O’Connor, J., concurring).
\textsuperscript{342} Id. at 597 (O’Connor, J., concurring).
\textsuperscript{344} Id. At 33 (O’Connor, J., concurring in the judgment).
\end{footnotes}
without explaining her views; but more frequently she added a concurring opinion qualifying her support of the majority position. When she agreed with the Court’s unanimous judgment rejecting the claim for a religious exemption from the involuntary issuance of a social security number, she argued that the Court should have continued the portion of the injunction ordering the government to pay benefits. She also added a concurring opinion in Employment Division v. Smith, the most controversial free exercise case decided while she was a member of the Court. Although she concluded that the ceremonial use of peyote was grounds for dismissal of a state drug counselor for cause, she rejected Justice Scalia’s position that any generally applicable criminal prohibition of particular conduct could survive a free exercise challenge. Instead, she applied strict scrutiny, concluding the prohibition against drug use was narrowly drawn to serve the legitimate governmental interest of discouraging the illegal use of drugs. Two years after Smith, the Court unanimously ruled that a city ordinance forbidding the ritual slaughter of animals was unconstitutional. Justice O’Connor joined Justice Blackmun’s opinion concurring in the judgment; the concurring opinion argued “that the First Amendment’s protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case.”

4. Freedom of Speech

The free speech decisions during Justice O’Connor’s quarter century on the United States Supreme Court are much more difficult to summarize than other major areas of constitutional law. The vastness of the doctrinal landscape combines with occasional atypical alliances to

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347 See, e.g., Locke v. Davey, 540 U.S. 712, 715 (2004) (rejecting the claim that the Free Exercise Clause requires states to include religious institutions in government scholarship program); O’Lone v. Estate of Shabazz, 482 U.S. 342, 344–45 (1987) (prison officials did not violate the Free Exercise Clause by precluding Islamic inmates from attending weekly religious service).
349 Id. at 724 (O’Connor, J., concurring in part and dissenting in part).
351 Id. at 903.
352 Id. at 894.
354 Id. at 577–8 (Blackmun, J., concurring).
355 The flag burning cases are paradigmatic. In each case, the majority consisted of Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy; the dissenters were Chief Justice
make it hard to put speech cases into neat pigeonholes. In the main, however, Justice O’Connor’s influence was similar to her impact in other areas, with one notable exception—she was a centrist who favored balancing standards that produced fact-specific decisions. Although she concurred in many cases invalidating federal and state regulations because they violated the free speech guarantee of the First Amendment, she often steered doctrine in ways that allowed somewhat greater regulation by government.

The one exception concerns religious speech. As explained in the preceding section, Justice O’Connor consistently supported a reconception that treated the use of government facilities as an issue of free speech rather than the establishment of religion. She twice authored concurring opinions explaining why granting religious groups access to these resources did not constitute an endorsement of religion, and her vote was critical to the majority in extending the free speech rationale to the allocation of a fund supported by student fees at a state university.

Justice O’Connor also played a decisive role in defining the limits of campaign finance regulation. The Burger Court established the First Amendment as a limit to legislative control of campaign finances in the years just before Justice O’Connor was appointed to the Supreme Court. Although she dissented in a few of the decisions during her tenure on the Court, she played a pivotal role in defining the scope of


See cases cited supra notes 303–307 and accompanying text.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846–52 (1995) (O’Connor, J., concurring) (providing the same assistance to a religious publication as it does to other publications is not an endorsement of religious perspective by the school); Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772-73 (1995) (O’Connor, J., concurring) (granting a permit to the Klu Klux Klan for a public display did not constitute an endorsement of religion).

Rosenberger, 515 U.S. at 845–46.

Buckley v. Valeo, 424 U.S. 1, 19 (1976); but cf. Cal. Medical Ass’n v. FEC, 453 U.S. 182, 184–85 (1991) (limiting contributions to multicandidate committees to $5,000 per year per contributor did not violate the First Amendment).

In 1987, she was part of the five-member majority that held expenditure limits on a non-profit advocacy group violated the First Amendment, but she ultimately proved willing to uphold some campaign finance limits. Between 2000 and 2003, she joined majorities that upheld state limits on contributions and party expenditures for a particular candidate’s campaign, as well as federal controls on direct corporate contributions to candidates and, most importantly, federal restrictions on soft money expenditures by political action committees. In the decisions upholding the state limits on contributions and to political party expenditures for particular candidates, she was the critical fifth vote, and she and Justice Stevens co-authored a portion of the opinion in the five-four decision upholding the restrictions on soft money contributions.

Judicial elections presented a special case of campaign speech regulation. In 2002, she joined a five-member majority holding that a state could not prohibit candidates in a partisan judicial election from stating their views on disputed legal or political issues. Her concurring opinion refused to accept preserving judicial impartiality as an adequate state interest for the restriction because the problem of judicial impartiality was “largely one the State brought upon itself by continuing the practice of popularly electing judges.”

Commercial speech was another area of First Amendment doctrine where the modern approach originated just before Justice O’Connor joined the Supreme Court but where many of its boundaries were largely undefined. In addition to the cases discussed in the text, see also FEC v. Nat’l Conservative Political Action Committee, 470 U.S. 480, 482–83 (1985) (discussing the constitutionality of the Presidential Election Campaign Fund Act); FEC v. Nat’l Right to Work Committee, 459 U.S. 197 (1982) (discussing National Right to Work Committee).

See FEC v. Colo. Republican Federal Campaign Comm., 533 U.S. 431, 437 (2001). When the Colorado case first came before the Court five years earlier, the Court ruled that limits on party expenditures violated the First Amendment if the expenditures were unrelated to the campaign of any candidate. FEC v. Col. Republican Federal Campaign Comm., 518 U.S. 604, 608 (1996). Justice O’Connor joined Justice Breyer’s plurality opinion in that case.


Id. at 792 (O’Connor, J., concurring).
determined during her tenure. Here again, her impact on the new doctrine was important. She accepted the four-part balancing test that the Court had devised for commercial speech, and she concurred in a number of decisions that struck down restrictions on commercial speech. Indeed, in the last major commercial speech decision before her retirement, she even authored the opinion invalidating a prohibition that forbade pharmacies from advertising that they sold “compounded” drugs.

Once again, however, Justice O’Connor avoided extremes; and, on several occasions, she supported allowing somewhat greater regulation of commercial speech than the most ardent proponents of constitutional protection would have allowed. She joined the majority in an opinion holding that restrictions on commercial speech did not have to be the least restrictive means available and supplied the fifth vote for the short-lived rule that allowed greater regulation of advertisements related to gambling. Although she agreed with the unanimous decision striking down a ban on advertising of alcohol prices, she added a concurring opinion emphasizing that no new test was required because the “regulation fail[ed] even the less stringent standard” set out in the Court’s four-part balancing test. Finally, her opinion in the case challenging state tobacco regulations upheld some indoor restrictions on sale practices for cigars and smokeless tobacco, although she did invalidate the state’s restrictions on outdoor advertising because the state had not shown a “reasonable fit” between the goal of discouraging use by young people and the regulatory means chosen.

Justice O’Connor was particularly deferential to state regulation of

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378 Id. at 532.
380 Id. at 561.
advertising in one important subset of commercial speech cases, those involving controls on advertising by attorneys. Shortly after she joined the Court, she joined a unanimous opinion holding that a state could not completely prohibit attorneys from listing their areas of expertise.\textsuperscript{381} In the next four cases in which the Court struck down limits on attorney advertising, however, she was more willing that most of her colleagues to uphold regulations designed to maintain the professionalism of the bar. She criticized the “rote application of the commercial speech doctrine in the context of state regulation of professional standards for attorneys,”\textsuperscript{382} and she dissented in all four decisions. She would have sustained regulations banning all targeted mailings to prospective clients,\textsuperscript{383} forbidding printed advertisements from including legal advice,\textsuperscript{384} prohibiting an attorney from advertising that the attorney had been certified as a trial specialist,\textsuperscript{385} and precluding an individual who was an attorney and an accountant from using the designations of CPA and CFP without further clarification.\textsuperscript{386} Eventually, however, she persuaded a bare majority to join her, and she authored the opinion upholding a state’s 30-day ban on direct mail solicitations of accident and disaster victims.\textsuperscript{387}

Justice O’Connor also played an important role in defining the modern limits of areas with a longer pedigree in First Amendment law. Her opinions defining the public forum and the permissible restrictions of speech within the forum reaffirmed the importance of free speech even as she modestly expanded the ability of government to regulate speech in the public forum.

\textsuperscript{381} In re R.M.J., 455 U.S. 191, 193, 206–07 (1982). The Supreme Court decided the first attorney advertising cases before Justice O’Connor joined the Court. See Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 448–49 (1978) (total ban of in-person solicitation of clients is permissible when the primary motivation behind the contact is the attorney’s pecuniary gain); In re Primus, 436 U.S. 412, 434, 437–38 (1978) (where the attorney is motivated by political goals rather than pecuniary gain, directed in-person solicitation is treated as political speech, not commercial speech for purposes of applying the protections of the First Amendment); Bates v. State Bar of Ariz., 433 U.S. 350, 383–84 (1977) (lawyer advertising was “commercial speech” for purposes of the First Amendment).


\textsuperscript{384} Peel, 496 U.S. at 118–19.


Decisions excluding jails, buses, military bases, private mailboxes, and fairs from the reach of the public forum preceded Justice O’Connor’s tenure on the Court. She, however, was a consistent member of the majority in a series of cases refining the boundaries of the doctrine. Only in one respect—by requiring schools and universities to make facilities and resources available to religiously affiliated organizations—did these decisions expand the public forum idea. The remainder substituted a less onerous reasonableness test for the more exacting requirement of the public forum cases.

Justice O’Connor was an important part of the majority in this articulation of the limits of the public forum. She was the decisive fifth member of the majority in cases excluding from public forum analysis the internal mail system of a public school district, a high school newspaper, and sidewalks located solely on property owned by the Post Office. She also authored the plurality opinion in the post office case and the opinion for a four-to-three majority declining to treat the combined federal campaign as a public forum.

Airport terminals presented a special case, and Justice O’Connor was an important influence as the Supreme Court resolved their status. When the issue first reached the Court, Justice O’Connor authored an opinion that struck down the airport regulation without considering the public forum issue. Instead, she found the airport’s regulation overbroad under a less stringent, reasonableness standard because it

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398 Bd. of Airport Comm’rs v. Jews for Jesus, Inc., 482 U.S. 569, 573–74 (1987) (not needing to address whether LAX is a public forum, because the resolution is facially unconstitutional).
prohibited all First Amendment activity.\textsuperscript{399} When the issue resurfaced in the Supreme Court five years later, she was part of the six-member majority that found an airport was not a public forum,\textsuperscript{400} but she also added a concurring opinion emphasizing that airport regulations were still subject to review as to their reasonableness.\textsuperscript{401}

Justice O'Connor was also a consistent member of the majority in cases defining what types of regulation were permissible in a public forum. Early in her Supreme Court career, she joined a unanimous decision requiring that peaceful picketing be allowed on the sidewalk in front of the Supreme Court building,\textsuperscript{402} but she authored the majority opinions in two subsequent decisions allowing some restrictions on sidewalks that were admittedly public forums. In one, her opinion for a five-member majority held that a prohibition of all signs within 500 feet of a foreign embassy was invalid,\textsuperscript{403} but a ban on “congregations” of more than three persons was permissible because it only applied to congregations when the police reasonably believed that a threat to the security or peace of the embassy is present.\textsuperscript{404} In the second opinion, she spoke for a six-member majority upholding a ban on picketing targeted at a single house in a residential neighborhood.\textsuperscript{405}

Regulation of the periphery of pornography was yet another area of free speech doctrine in which Justice O'Connor was influential. In particular, she helped set the special boundaries with respect to child pornography; and she formed part of the majority in cases allowing regulations to control the secondary effects of adult entertainment businesses.

Indeed, Justice O'Connor regularly supported efforts to suppress child pornography. In 1982, she was the decisive vote in the case allowing states to ban depictions of children engaged in sexual activity, even if the depiction was not obscene under existing rules governing pornography.\textsuperscript{406} Her concurring opinion emphasized her view that even though a statute did not have to include an exception for “depictions of serious social value,” applying a statute to “clinical pictures of adolescent sexuality such as those that might appear in medical

\textsuperscript{399} Id. at 575.
\textsuperscript{401} Id. at 687 (O'Connor, J., concurring).
\textsuperscript{404} Id. at 315, 331–32, 334.
textbooks” or to “pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of National Geographic” might be unconstitutional.407 Eight years after this initial decision, Justice O’Connor was part of a six-to-three majority holding that the government could make possession of child pornography a crime,408 even though the Court had previously ruled that possession of pornography involving only adults cannot be punished as a crime.409

Near the end of her Supreme Court career, Justice O’Connor agreed with another majority that the government could not suppress depictions of young adults that “appear” to involve children engaged in the production process.410 She dissented, however, from the majority’s conclusion that the statute’s prohibition against depictions that “convey the impression” that children were involved in the depiction was sufficiently overbroad to justify upholding a facial challenge to the statute.411

Justice O’Connor also generally joined the majority to uphold regulation of the secondary effects of adult entertainment businesses.412 The timing of these cases ranged from the 1980s until the beginning of the twenty-first century.

During the 1985 term, Justice O’Connor was part of the majority in two decisions expanding the government’s ability to regulate the secondary effects of adult businesses. One upheld an ordinance prohibiting an adult motion picture theater within 1000 feet of a residential dwelling, church, park, or school;413 the second allowed the use of a nuisance statute to padlock an adult bookstore that had previously been used as a place for prostitution and lewdness.414 In the nuisance case, Justice O’Connor added a concurring opinion.415 It emphasized that First Amendment concerns would be implicated if “a

407 Id. at 775 (O’Connor, J., concurring).
411 Id. at 260–63.
412 This area of constitutional doctrine is yet another one where the modern category was established in the years shortly before Justice O’Connor joined the Court, but was developed during her years as a justice. See Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 72–73 (1976).
415 Id. at 708 (O’Connor, J., concurring).
city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood.416 Because nothing “in the record or opinion below” suggested “such pretextual use of the New York nuisance provision in th[e] case,” she “concur[red] in the Court’s opinion and judgment.”417

Near the end of her tenure on the Court, Justice O’Connor wrote the plurality opinion in two more cases upholding restrictions on adult businesses. The first case applied the four-part, balancing test for content-neutral restrictions on symbolic speech to hold that a ban on public nudity did not violate the First Amendment as applied to exotic dancers.418 The second case ruled that a twenty-five-year-old study of the secondary effects of adult businesses was sufficient to support a zoning regulation applicable to adult bookstores in Los Angeles.419

In cases involving speech by public employees, Justice O’Connor was less frequently in the majority. She did, however, regularly apply a balancing test that usually, but not always, favored restricting the employee free speech rights that the Court had initially recognized in 1968.420 She provided the fifth vote that upheld the dismissal of an assistant district attorney because most of the assistant’s comments were matters of personal, not public, concern.421 Three years later, she joined Justice Scalia’s dissent when the majority reversed the dismissal of a deputy constable who had expressed, in a private conversation, the hope that a future attack on President Reagan might be successful.422 In 1994, Justice O’Connor authored a plurality opinion upholding a dismissal where the employer reasonably, but erroneously, believed that the employee had made disparaging comments regarding a supervisor.423 That same term, she concurred in a portion of the decision that a flat ban

416 Id.
417 Id.
on governmental employees receiving honoraria for appearances, speech, and articles violated the free speech rights of employees who were not members of the Federal Executive Service, but she would have limited the holding to appearances, speeches, and articles that were not work related. Finally, near the end of her time on the Court, Justice O’Connor concurred silently in a *per curiam* decision holding that a police officer’s sale of pornographic videos of himself wearing a generic police uniform was not engaging in speech on a matter of public concern.

One other area of free speech doctrine in which Justice O’Connor tried to chart a middle course involved hate speech. In 1992, she agreed with a unanimous judgment that a city ordinance prohibiting words that might reasonably arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” violated the First Amendment, but disagreed with the plurality view that a regulation on speech could never be limited on the basis of race, color, creed, religion, or gender. Instead, she joined Justice White’s concurring opinion that found the ordinance overbroad. In his view, the state supreme court’s construction of the statute did not narrow it sufficiently. It still applied to words that caused “anger, alarm or resentment,” and “such generalized reactions” were not sufficient to strip constitutional protection from offensive speech.

The Court subsequently limited the reach of the 1992 hate speech decision in two respects. Justice O’Connor was part of the majority in both cases, and she authored the plurality opinion in one.

Just a year after invalidating the hate speech ordinance, the Supreme Court unanimously upheld the constitutionality of a statute that enhanced a criminal sentence when the defendant selected the victim on the basis of the victim’s race. Justice O’Connor participated silently in Chief Justice Rehnquist’s opinion that concluded that the sentence enhancement was permissible because it was based on “conduct...
thought to inflict greater individual and societal harm” than similar crimes where the victim was not chosen on the basis of race.\footnote{Id. at 487–88.}

A decade later, Justice O’Connor wrote the plurality opinion sustaining a state statute that banned cross burning with intent to intimidate, but invalidating a statutory presumption that burning a cross in public was prima facie evidence of an intent to intimidate.\footnote{Virginia v. Black, 538 U.S. 347–48 (2003).} The statutory ban was permissible because intimidation is “constitutionally proscribable” as a type of “true threat” and the statute applied to all cross burning with intent to intimidate, not just cross burning “directed toward” one of several “specified disfavored topics.”\footnote{Id. at 360, 362.} By contrast, the statutory presumption was unconstitutional because it “ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.”\footnote{Id. at 367.}

5. Takings

Efforts to use the Takings Clause to expand protections for economic interests surfaced regularly during Justice O’Connor’s tenure on the Court. As in other areas, Justice O’Connor adopted a contextual approach that allowed the government significant authority to condemn and to regulate property, but she permitted judicial invalidation in cases where she concluded the government went too far.

Justice O’Connor embraced a broad, but not unlimited, view of the public uses for which the government could condemn property. In her third term as a justice, she authored the unanimous opinion upholding the expropriation of apartment buildings in Hawaii so that the units could be sold to the existing tenants as condominiums.\footnote{Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984).} Rejecting the view that the government could only condemn property when the government itself planned to use the property, she concluded that the desire to reduce the concentration of property ownership in the state was a sufficient public use to allow the government to take the property.\footnote{Id. at 245.} Twenty-one years later, however, she dissented when a five-member majority allowed the government to condemn property for economic development even though the property was not itself blighted or part of a
When the issue turned to the limits the Takings Clause placed on the regulatory powers of government, Justice O’Connor joined majorities that concluded that both regulations and permit conditions were takings for which compensation must be required. She refused, however, to extend those decisions as far as some members of the majorities would have wished. Instead, she joined with other justices in accepting a fairly robust regulatory power.

The initial regulatory takings case came in Justice O’Connor’s first term on the Court. She was part of a six-member majority that held that a regulation requiring all apartment owners to allow their buildings to be wired for cable television access was a taking that required compensation.440 In that case, Justice O’Connor silently joined Justice Marshall’s majority opinion; it held that a permanent physical occupation of real property by the government was always a taking, even if it had no adverse economic impact on the value of the property.441

The regulatory takings cases began in earnest in the 1986 Term after William Rehnquist was named Chief Justice and Antonin Scalia replaced him as an associate justice. That term, the Court decided six cases challenging regulations as takings, and Justice O’Connor was part of the majority in four of those cases.442

The Supreme Court held that two of the regulations were takings that could only be implemented if compensation were paid. Justice O’Connor wrote the majority opinion in one of the cases.443 It involved a statute providing that very small interests in individual allotments originally given to members of the Oglala Sioux tribe would revert to the tribe when the owner died.444 Applying the balancing test that Justice Brennan had articulated in 1978,445 she concluded that “the character of

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441 Id. at 441.
444 Id. at 706, 717.
the Government regulation” was decisive. By eliminating the right to bequeath property, the government had “destroyed one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . .” In the second case, Justice O’Connor was part of a five-member majority holding that the conditions imposed in a building permit constituted a taking. She silently participated in Justice Scalia’s opinion, which concluded that permit conditions had to be logically connected to the burden caused by the land use that was being permitted.

The other two decisions in which Justice O’Connor concurred silently involved majority opinions that essentially refused invitations to extend the Takings Clause as a general restraint on business and welfare regulations. In the first, the Court unanimously declined to designate as a taking an administrative order limiting the rates that a utility could charge cable television companies to use its poles. The second case rejected the claim that a change in welfare rules, which required that support obligations be assigned to welfare agencies, was a taking for which compensation was required.

In subsequent cases, Justice O’Connor provided important support for modest expansions of the protections of the Takings context in the regulatory context. In 1992, she was one of five members who joined Justice Scalia’s majority opinion holding that a regulation was always a taking when it destroyed all economically viable use of a piece of land. On three additional occasions, she was one of five members who supported the Court’s judgment. First, when the Court expanded the limits on permit conditions to require a “rough proportionality” between the condition and the burden imposed by the permitted use, she silently concurred in the majority opinion by Chief Justice Rehnquist.

Similarly, she joined the opinion of the Chief Justice without

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446 *Hodel*, 481 U.S. at 716.
447 *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
449 *Id.* at 834, 841.
452 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). Justice Kennedy provided a sixth vote for the result, but he concurred only in the judgment. *Id.* at 1032 (Kennedy, J., concurring in the judgment).
amplification when the Court ruled that interest earned on all trust accounts of attorneys is the property of the clients from whom the money in the account comes.\footnote{Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998).} Finally, she was also part of the majority holding that a property owner can challenge a regulation as a taking even if the owner acquired the property after the regulation was enacted.\footnote{Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).} This time, however, she added a concurring opinion in which she emphasized that “the temporal relationship between regulatory enactment and title acquisition” had to be considered as part of the analysis of whether the regulation interfered with the investment-backed expectations of the owner.\footnote{Id. at 632–33.} She also authored a plurality opinion concluding that a statute for funding medical benefits for retirees was a taking as applied to a specific company,\footnote{E. Enters. v. Apfel, 524 U.S. 498, 503–04 (1998).} and she concurred in a near unanimous opinion holding that amendments to the Oglala Sioux escheat statute were insufficient to cure the constitutional defects identified in her earlier opinion invalidating the statute prior to the amendments.\footnote{Babbitt v. Youpee, 519 U.S. 234, 236 –37, 239 (1997) (discussing the previous decision of Hodel v. Irving, 481 U.S. 704, 716–18 (1987)); see cases cited supra notes 443–447 and accompanying text.}

In decisions near the end of her service on the Court, Justice O’Connor joined opinions by Justice Stevens in which he declined to extend the precedents summarized in the preceding paragraph. The first case held that a thirty-two month moratorium on building in the Lake Tahoe area was not a taking.\footnote{Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 306–07, 342–43 (2001).} The second case largely nullified the significance of the early case regarding interest on lawyers’ trust accounts. Siding with the dissenters in the prior case,\footnote{Id. at 43 (Rehnquist, C.J., joined by Scalia, J. and Thomas, J., dissenting).} Justice O’Connor agreed that no compensation needed to be paid to the clients whose funds had been deposited in the trust accounts because they had not suffered any pecuniary loss.\footnote{Brown v. Legal Found. of Wash., 538 U.S. 216, 240–41 (2003).}

\textit{D. Dissents: Failed Attempts to Influence}

As the paragraphs above indicate, Justice O’Connor was not invariably a member of the majority. Briefly reviewing her dissents clarifies her views by identifying positions that she was unwilling to
abandon even when she could not persuade a majority of her colleagues to join her and identifies areas in which her influence grew.

In the federalism cases, Justice O’Connor’s greatest failure was her inability to convince a majority of her colleagues to provide states even greater protections from federal control. Five years before Justice O’Connor became a justice, the Supreme Court recognized state immunity from general federal regulations that interfered with integral state functions. Over the next four years, she dissented twice when the Court narrowly defined the scope of that immunity, and she dissented when the Court abandoned the immunity in 1985. She also dissented when the Court broadly construed congressional power to impose conditions on federal grants for highway construction and when the Court affirmed the power of Congress to tax the interest earned on bonds issued by states. Finally, she was part of the minority in two cases when Justice Kennedy deserted the federalism majority. In those cases, the Court ruled that the Constitution implicitly denied states the authority to establish term limits for federal representatives and upheld the authority of Congress to prohibit the private growing of marijuana as part of a comprehensive statute regulating illegal drugs.

When cases involved separation of powers, Justice O’Connor was slightly more willing than a majority of her colleagues to accept statutory delineation of the boundaries of those powers. Thus, she adhered to the functional view of presidential power when a majority of the Court invalidated the Line Item Veto Act. On one occasion, she

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465 South Dakota v. Dole, 483 U.S. 203, 212–18 (1987) (O’Connor, J., dissenting). The Court upheld a congressional provision that reduced the grant by five percent in any state that did not raise its legal drinking age to twenty-one. Id. at 205, 212.
468 Gonzales v. Raich, 545 U.S. 1, 5, 32 (2005).
469 Clinton v. New York, 524 U.S. 417, 436, 449 (1998); id. at 453 (Scalia, J., dissenting, joined by O’Connor, J.) (finding the “President’s cancellation of spending items to be entirely
was also more willing than the Court majority to accept congressional power to grant standing to individuals and citizen groups in environmental cases.\textsuperscript{470}

As the preceding section makes clear, Justice O’Connor was generally a member of the majority in individual rights cases. Her occasional dissents revealed her unwillingness to accept any rights as absolute, as she routinely looked for narrower bases for decision. A good example involves questions regarding the rights of homosexuals, which resurfaced in the last decade of her service as a justice.\textsuperscript{471} She concurred in the judgment that declared unconstitutional a statute criminalizing homosexual conduct, but she objected to the Court’s decision to base the decision on substantive due process rather than equal protection.\textsuperscript{472}

Justice O’Connor dissented several times in religion cases spread out over her entire tenure on the Court. In the 1980s, she dissented when the majority struck down a statute that imposed registration and reporting requirements on religious organizations that solicit more than fifty percent of their funds from nonresidents\textsuperscript{473} and again when the majority invalidated an Air Force regulation that prohibited a Jewish chaplain from wearing a yarmulke.\textsuperscript{474} She also dissented in two cases from the 1990s. The first involved the question of whether a state had to provide a sign language interpreter to a deaf student at a parochial school.\textsuperscript{475} She joined the portion of Justice Blackmun’s dissent in which he argued that the Court should not reach the constitutional issue, but should remand the case to the lower courts to consider statutory and regulatory issues.\textsuperscript{476} In the second, she authored a dissent that criticized the majority for not reconsidering its decision that generally applicable regulations of conduct never violate the Free Exercise Clause.\textsuperscript{477} Finally, during her last full term as a justice, she argued that the majority improperly analyzed the context in which the religious symbols were

\begin{itemize}
\item \textsuperscript{471} See, e.g., Lawrence v. Texas, 539 U.S. 558, 562 (2003) (discussing “the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct”).
\item \textsuperscript{472} Id. at 579 (O’Connor, J., concurring in the judgment).
\item \textsuperscript{473} Larson v. Valente, 456 U.S. 228, 230, 255 (1982); id. at 264 (O’Connor, J., joining dissenting opinion of Rehnquist, J.).
\item \textsuperscript{474} Goldman v. Weinberger, 475 U.S. 503, 528 (1986) (O’Connor, J., dissenting).
\item \textsuperscript{475} Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993)
\item \textsuperscript{476} Id. at 24 (O’Connor, J., dissenting).
\item \textsuperscript{477} City of Boerne v. Flores, 521 U.S. 507, 544–45 (1997) (O’Connor, J., dissenting).
\end{itemize}
Free speech cases also sparked a number of dissents. The most notable were the flag burning decisions, where Justice O’Connor was part of a four-member minority in both cases. In the Texas case, she joined the dissent of Chief Justice Rehnquist.\footnote{Texas v. Johnson, 491 U.S. 397, 421–35 (1989) (O’Connor, J., joining dissenting opinion of Rehnquist, C.J.) (opining that the Texas statute, criminalizing flag burning, should be upheld).} When the federal statute reached the Court a year later, she joined the dissent of Justice Stevens.\footnote{United States v. Eichman, 496 U.S. 310, 319–24 (1990) (O’Connor, J., joining dissenting opinion of Stevens, J.) (discussing the government’s “interest in protecting the symbolic value of the American flag.”).}

Justice O’Connor’s other dissents in free speech cases cut across a variety of doctrinal areas. Shortly after joining the Court, she dissented from a ruling that the First Amendment limits the power of school boards to remove books from libraries at junior high schools and high schools.\footnote{Bd. of Educ. v. Pico, 457 U.S. 853, 863, 875 (1982).} “If the school board can . . . determine initially what books to purchase for the school library,” she argued, “it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it.”\footnote{Id. at 921 (O’Connor, J., dissenting); see also id. at 885–86 (O’Connor, J., joining dissenting opinion of Burger, C.J.).} Thereafter, she filed two partial dissents in 1997. In one, she objected to the Court upholding the federal requirement that cable television systems dedicate some of their channels to local broadcast stations.\footnote{Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997); id. at 229 (O’Connor, J., dissenting).} In the other, she argued that a provision restricting children from accessing adult material on the internet could be constitutional if it did not unduly restrict adults from accessing the materials.\footnote{Reno v. ACLU, 521 U.S. 844, 886–88 (1997) (O’Connor, J., dissenting).} When the cable television case first came before the Court three years earlier, Justice O’Connor had dissented from the majority holding that the regulatory requirements were only subject to intermediate scrutiny because they were content neutral.\footnote{Turner Broad. Sys., Inc., 512 U.S. at 674–78 (1994) (O’Connor, J., concurring in part and dissenting in part) (disagreeing with the majority’s finding of content-neutrality).}

Justice O’Connor’s dissents in Takings Clause cases follow no clear ideological pattern. She dissented twice in 1987, but she did not write an opinion in either case. Instead, she joined Chief Justice

\footnote{Van Orden v. Perry, 545 U.S. 736–37 (2005) (O’Connor, J., dissenting).}
Rehnquist’s opinion contending that a state statute requiring the owner of underground coal to leave half of the coal in place was a taking, and she joined Justice Stevens’s opinion arguing that an unconstitutional regulation was not a “temporary taking” for the period of time that it remained in place. In her last full term as a justice, she wrote a dissent that argued that condemnation of unblighted property for economic development was not a public use under the Takings Clause, although she had broadly defined what constituted a public use in a majority opinion two decades earlier.

Justice O’Connor’s early dissents in a few cases later became majority positions in the mid-1990s. In 1990, she dissented from the Court’s ruling that Congress had greater authority than states to establish race-based classifications even though she had initially articulated the distinction; five years later, she authored the opinion rejecting the distinction between federal and state power. Similarly, she dissented from a 1985 decision holding that it was a violation of the Establishment Clause to allow public school teachers to provide remedial education to disadvantaged children in parochial schools; in 1997, she authored the majority opinion overruling the earlier decision. She also dissented in 1989 from a holding that Congress had the power to override state immunity from suit when Congress legislated under the Commerce Power; in 1996, she joined Chief Justice Rehnquist’s opinion overruling the 1989 decision. As noted above, she regularly

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489 Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–44 (1984) (“It is not essential that the entire community, nor even a considerable portion, ... directly enjoy or participate” in order “to constitute a public use”); see supra note 437 and accompanying text.
491 City of Richmond v. Croson, 488 U.S. 469, 489–90 (1989) (“That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate.”).
495 Pennsylvania v. Union Gas Co., 491 U.S. 1, 57 (O’Connor, J., dissenting).
496 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996) (“We feel bound to conclude that Union Gas was wrongly decided and that it should be, and now is overruled.”).
dissented when the Court struck down restrictions on attorney advertising until she finally persuaded a majority of her colleagues to uphold a prohibition against direct mail solicitation within thirty days of an accident or disaster.  

In one important area, Justice O’Connor changed her mind during her tenure on the Court. In 1989, she wrote the majority opinion holding that the execution of a mentally retarded defendant does not violate the Eighth Amendment if sentencers consider “mitigating evidence of mental retardation” when imposing a sentence; thirteen years later, she joined Justice Stevens’s majority opinion concluding that execution of the mentally retarded is excessive in light of “evolving standards of decency.”

III. INFLUENCE ON THE FUTURE

The cases discussed in the preceding section demonstrate that Justice O’Connor exerted considerable influence over the outcomes of cases decided while she was a member of the Supreme Court. The harder questions are how much influence she has had over constitutional doctrine since she retired and how much influence she will have over the constitutional doctrine of the future.

Justice O’Connor’s most obvious contribution that is likely to have an enduring impact is her role in expanding the amount and complexity of modern constitutional doctrine. Throughout her career, she supported both the creation of new constitutional protections and the refusal to eliminate substantial portions of the constitutional structure inherited from the Warren and Burger Courts. The result was to expand the domain of constitutional law, an expansion that is likely to endure for the foreseeable future.

By the time Justice O’Connor joined the Court in 1981, the Supreme Court had already established much of the current fabric of constitutional doctrine. The modern framework of constitutional doctrine began with the Warren Court expansion of due process protections for criminal defendants, the development of most modern free speech

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497 See supra notes 384–386 and accompanying text.
501 See, e.g., Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (holding that defendants have right to trial by jury even in misdemeanor cases); Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (requirement that an arrestee be advised of his rights); Gideon v. Wainwright,
claims and the protections of the Equal Protection Clause, and the growth in the limitations imposed by the religion clauses of the First Amendment, together with hints of a revival of substantive due process to protect noneconomic rights regarded as fundamental. The Burger Court changed the landscape somewhat. It confined the reach of the rights of criminal defendants, the protections equal protection afforded to minorities, and some free speech doctrines without


See, e.g., Regents of the Univ. of Ca. v. Bakke, 438 U.S. 265, 321 (1978) (race may be considered as a factor in evaluating medical school applications); Washington v. Davis, 426 U.S. 229, 251–52 (1976) (police training program was not racially discriminatory); Milliken
overruling the major decisions of the Warren Court. On the other hand, it expanded the scope of substantive due process,509 the reach of equal protection claims based on gender510 and illegitimacy,511 and some protections afforded by the speech512 and religion513 clauses of the First Amendment. It also vigorously asserted the Court’s power to resolve constitutional disputes among branches of the federal government.514

During her tenure on the Court, Justice O’Connor contributed substantially to the modification of this constitutional structure. On the one hand, she was part of the majority of justices appointed by Presidents Reagan and Bush that expanded constitutional doctrine in new ways. She supported the revitalization of both federalism limits on congressional power515 and the Takings Clause limits of governmental regulation of private property,516 as well as strict scrutiny of race-based affirmative action.517 At the same time, she (and sometimes Justice Kennedy) joined with the justices who usually dissented in the cases

v. Bradley, 418 U.S. 717, 722, 752–53 (1974) (district court’s imposition of a multidistrict remedy to segregation was improper); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4–6 (1973) (Texas’s system of financing education was constitutional); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) (appellee could challenge racially discriminatory provisions, but was entitled to no more); but see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31–32 (1971) (discussing the duties of school authorities and the scope of powers of federal courts to eliminate segregation in public schools).


513 See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (state may not compel Amish parents to send their children to school until age sixteen); Lemon v. Kurtzman, 403 U.S. 602, 635 (1971) (state may not provide aid to nonpublic schools).


515 See discussion supra Part II.A (on Federalism).

516 See discussion supra Part II.B.5 (on Takings).

517 See discussion supra Part II.B.2 (on modern Equal Protection).
involving congressional power, the Takings Clause, and affirmative action to retain some major precedents and to expand others. That majority refused to eliminate the woman’s right to choose an abortion\textsuperscript{518} or to abandon completely the standards previously established for the religion clauses.\textsuperscript{519} The majority also recognized the Due Process Clause as a source of substantive protection for unenumerated rights,\textsuperscript{520} read the Equal Protection Clause to impose substantial limits on gender discrimination,\textsuperscript{521} and placed less substantial limits on discrimination against homosexuals.\textsuperscript{522} She also combined with differing majorities to maintain a broad definition of free speech, while allowing expanded government regulation in some areas.\textsuperscript{523} The result of this combination of expansion and contraction was substantial growth in the size and complexity of constitutional doctrine.\textsuperscript{524}

The basic structure of this expanded constitutional doctrine has endured and is likely to endure for the foreseeable future. Chief Justice Roberts’s replacement of Chief Justice Rehnquist and Justice Alito’s replacement of Justice O’Connor insured that the majority that limited congressional power, required strict scrutiny for race-based programs of affirmative action, and expanded the protections for property interests remains in place. At the same time, the more recent appointments of Justice Sotomayor and Justice Kagan are likely to continue majorities that recognize a woman’s right to choose an abortion as constitutionally protected, reject narrow definitions of other fundamental rights, favor substantial protections against gender discrimination and some protections for homosexuals under the Equal Protection Clause, retain the modern framework for analyzing many disputes under the religion clauses, and continue most existing doctrinal categories for resolving free speech claims.

The current doctrinal pattern is likely to continue for the immediate future. Justice Gorsuch, President Trump’s nominee to replace Justice

\textsuperscript{518} See discussion supra Part II.B.1 (on Substantive Due Process and the right to abortion).
\textsuperscript{519} See discussion supra Part II.B.3 (on the Establishment Clause and religious groups’ access to government resources).
\textsuperscript{520} See discussion supra Part II.B.1 (on Substantive Due Process and unenumerated rights).
\textsuperscript{521} See discussion supra Part II.B.1 (on gender-based discrimination).
\textsuperscript{522} See discussion supra Part II.B.2 (on the rights of homosexuals).
\textsuperscript{523} See discussion supra Part II.B.4 (on free speech).
Scalia, has expressed admiration for his predecessor. Thus, the Senate’s confirmation of Justice Gorsuch will not produce a significant change in the Court’s ideological division.

A break in the current equilibrium will occur with the next several appointments, but one finds it hard to predict when they might occur. None of the three oldest members of the Court—Justices Ginsburg, Kennedy, and Breyer—have shown any inclination to retire, so how quickly changes occur is likely to depend on their health. How significant those changes will be will depend of the Presidents who appoint and the Senates that confirm their replacements.

Despite this general continuity, changes are likely to occur with respect to a number of important constitutional doctrines. New doctrines are most likely to arise in cases where the Court divided five to four, with Justice O’Connor siding with Justices Stevens, Souter, Ginsburg, and Breyer, and Justice Kennedy siding with Chief Justice Rehnquist and Justices Scalia and Thomas. In those areas, one can reasonably expect Justice Alito to side with the previous dissenters, thus making the views of Justice Kennedy determinative, rather than those of O’Connor.

Indeed, two important changes occurred almost immediately after Justice O’Connor’s retirement in 2005. The 2006 Term produced new abortion and affirmative action decisions. In both cases, Justice Alito’s replacement of Justice O’Connor allowed Justice Kennedy to form majorities for positions that he had previously advocated in dissent. As a result, legislatures are likely to have greater authority to prohibit abortions without providing an exception to protect the life of the mother, but less authority to use race as a factor in establishing affirmative action programs.

Important changes have also occurred with respect to other areas as well. Justice Alito’s replacement of Justice O’Connor has drastically restricted the power of governments to limit campaign contributions. Other changes—for example, the expanding equal protection rights for

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homosexuals, the new scope of Second Amendment rights, and the reluctant acceptance of the Affordable Care Act—might well still have occurred if she were still a member of the Court. One suspects, however, that in all these areas she would have urged her colleagues to avoid absolute standards and to adjust the new rules in response to changing factual circumstances.

The doctrinal changes that have occurred extend beyond high profile cases regularly covered by the popular press. For example, the Court has continued to constrict the free speech rights of public employees since Justice O’Connor left the Court. Although she generally joined decisions restricting those rights when she was a justice, the absolute rule that a public employee has no free speech protections with respect to speech in connection with official duties conflicts with the more contextual approach she typically used.

One can expect other modifications in the future. In the federalism arena, Justice Kennedy has been more deferential than Justice O’Connor to congressional authority to enact comprehensive statutes, but less willing to permit Congress to make states subject to private actions for damages. On freedom of religion issues, he has been more tolerant both of government support for religious schools and of religious

528 United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (invalidating the Defense of Marriage Act (DOMA)).
531 As noted above, see supra notes 235, 289–293, equal protection was Justice O’Connor’s favored doctrinal basis for expanding the rights of homosexuals. In addition, Justice O’Connor’s familiarity with guns from her early years growing up on a ranch in the west suggests that she would probably have supported a revival of Second Amendment rights. Finally, regardless of her views on the Affordable Care Act, the Court would probably have sustained the statute because Justice Alito was one of the dissenters in Sebelius.
532 See Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (declining to extend First Amendment protection to “every statement a public employee makes in the course of doing his or her job”); but cf. Lane v. Franks, 134 S. Ct. 2369, 2374–75, 2380 (2014) (employee who testified truthfully at trial was not acting within the scope of his official duties even if he learned some of the information on the matter from his public employment).
533 See supra notes 420–426 and accompanying text (free speech cases).
534 See supra notes 420–426 and accompanying text (free speech cases).
535 See, e.g., Gonzales v. Raich, 545 U.S. 1, 22 (2005) (find that Congress was acting well within its authority to distinguish between marijuana grown locally and marijuana grown elsewhere).
537 See Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002); Mitchell v. Helms, 530
displays in public spaces. \textsuperscript{538} In those areas and others, doctrines may well move in the direction of Justice Kennedy’s views, although neither the scope nor the complexity of doctrine will change very dramatically. \textsuperscript{539}

In one area, Justice O’Connor has continued the judicial debate since leaving the Court. As a justice, she concurred in the decision holding that the First Amendment does not allow states that elect their judges to prohibit judicial candidates from offering their opinions on legal or political topics. \textsuperscript{540} but her concurrence strongly criticized the practice of electing judges. \textsuperscript{541} Since she retired, the Court has placed some limits on a judge’s ability to hear cases involving litigants who have made large contributions to the judge’s election campaign, \textsuperscript{542} and it has upheld a state prohibition against judicial candidates personally soliciting campaign contributions. \textsuperscript{543} In contrast, Justice O’Connor has taken a slightly different tack. She has continued her criticism of an elected judiciary and has even proposed a plan for states to use bipartisan nomination commissions for the selection of judges. \textsuperscript{544}

Of course, doctrinal change in response to political change is nothing new. The New Deal acceptance of congressional power to regulate the national economy\textsuperscript{545} is only the best known example of a common phenomenon in the constitutional history of the United States. The Taney Court, appointed by Andrew Jackson and his successors, retreated from the broad nationalist views of John Marshall. \textsuperscript{546} The

\textsuperscript{540} Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).
\textsuperscript{541} Id. at 788–92 (O’Connor, J., concurring).
\textsuperscript{545} See, e.g., Wickard v. Filburn, 317 U.S. 111, 128–29, 133 (1942) (Congress properly considered the effect of consumption of homegrown wheat on interstate commerce); U.S. v. Darby Lumber Co., 312 U.S. 100, 105, 118 (1941) (Congress has power to regulate employment practices of industries preparing goods for sale in interstate commerce).
\textsuperscript{546} Compare Scott v. Sanford, 60 U.S. 393, 454 (1856), with McCullough v. Maryland, 17 U.S. 316, 436 (1819); Charles River Bridge v. Warren Bridge, 36 U.S. 420, 422–23 (1837), with Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 518 (1819); Briscoe v. Bank
protections afforded economic interests before the New Deal switch reflected the anti-regulatory views that dominated United States politics. The Warren Court liberalism of the 1960s coincided with the Great Society programs proposed by Lyndon Johnson. Indeed, the modern decisions described in this Article reflect Republican domination of presidential politics for twenty-eight of the forty years between 1968 and 2008. Surely, one should not be surprised that the constitutional doctrine of the twenty-first century will also be the product of the basic political trends of the future rather than decisions that reflect the influence of the political trends of the past.

Beyond her decisions in specific cases, Justice O’Connor did not articulate any grand theory of constitutional interpretation. Instead, her contribution was more one of style. She occasionally joined in overruling decisions, but she was frequently willing to modify them significantly on a case-by-case basis. Her decisions were generally fact specific, leaving her considerable discretion to accommodate the doctrine for unanticipated situations.

Justice O’Connor’s style has not had much influence on most of her colleagues, as the Court remains closely divided on many significant issues. Justice Gorsuch’s likely ideological alignment with the Chief Justice and Justices Thomas and Alito means that Justice Kennedy is the swing justice on most ideologically charged issues. Although Justice Kennedy is also an ideological moderate, his approach is less fact intensive than the one used by Justice O’Connor. Justice Breyer is perhaps the justice on the current Court whose emphasis on facts most nearly resembles Justice O’Connor’s approach. Interestingly, an early preliminary statistical analysis of the initial terms of the Roberts Court suggests that his influence may be rising.


548 See cases cited supra notes 501–505 and accompanying text.

549 See Murchison, supra note 539, at 60. Justice Alito was ideologically aligned with Justice Scalia, making Justice Kennedy the swing justice on ideologically charged issues prior to Justice Scalia’s death.

IV. Conclusion

Serving as the first woman to serve on the Supreme Court insured that Justice O’Connor would be an important figure in the Court’s history. But her influence goes far beyond breaking the gender barrier and probably guaranteeing that the Court will always include a female member.

Although gender was key to Justice O’Connor’s appointment, it was only one of many factors that has shaped her constitutional decisions. The most important of those factors seems to have been commitment to Republican politics. Other significant influences were her experiences as legislator and state judge as well as her religious background.

During her twenty-four years on the Supreme Court, Justice O’Connor exerted substantial influence at an important time of constitutional development. She played a major role both in producing the Court’s rightward shift during her tenure and in defining its reach. Her votes were often essential in producing the Court’s judgments, and her views often limited the scope of the Court’s doctrines.

Justice O’Connor’s influence on the general direction of constitutional doctrine is likely to continue until the basic ideological division of the Court changes. The majorities she helped to create are likely to endure for the foreseeable future—those providing new limits on congressional power, race-based programs of affirmative action, and governmental regulations of private property, as well as those accepting the woman’s right to choose an abortion, along with other unenumerated rights, expanding the Equal Protection Clause with respect to discrimination based on gender and sexual preference, continuing established doctrinal categories for analyzing restraints on speech, and retaining the Establishment Clause as a substantial restraint on governmental support of religion.

When one turns to specific doctrines, several changes have already occurred and one can anticipate more in the future. For the near term, those changes will probably be concentrated in areas where Justice O’Connor formed a five-member majority with Justices Stevens, Souter, Ginsburg, and Breyer. Taking a longer view, the enduring character of Justice O’Connor’s legacy will depend on the presidential politics of the next two decades. That dependence on political trends is nothing new, however. It has been a basic pattern of United States constitutional history.
THE ILLIBERTY OF CONTRACT

Donald J. Smythe*

[I]t has become customary to discuss many aspects of our problem under the heading of “freedom of contract.” . . . But the phrase also gives rise to misconceptions. In the first place . . . the question is not what contracts individuals will be allowed to make but rather what contracts the state will enforce.¹

—Friedrich A. Hayek

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I. INTRODUCTION

The term “liberty of contract” is usually associated with the

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doctrine that the due process clause of the United States Constitution prohibits or should prohibit the State\(^2\) from regulating contracts between private individuals.\(^3\) It is also often used synonymously with the term “freedom of contract.”\(^4\) Many libertarians and free-market advocates embrace the liberty of contract doctrine because they are averse to State interferences with private market transactions.\(^5\) But the term is ironic because a contract is only legally binding if courts will enforce it. Since courts constitute the third branch of government, they are State actors;\(^6\) and contractual enforcement involves the exercise of the State’s powers of coercion.\(^7\) This is problematic because the State’s exercise of coercion

\(^2\) When a capital “S” is used in the word “State,” it is meant to indicate a reference to government generally, not a state government within the United States.

\(^3\) The United States Supreme Court evinced a presumption against allowing government regulations of private activities during the *Lochner* era in the early twentieth century. But libertarian thought and laissez-faire doctrine did not influence the Court’s jurisprudence at that time. See, e.g., DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 1–10 (2011) (discussing court jurisprudence during the *Lochner* era.). Mayer argues that the distinction between substantive due process and procedural due process is an artifact of those who were critical of the Court’s liberty of contract jurisprudence. *Id.* at 11–42.


\(^5\) According to Professor Bernstein, “American courts began to assert that a right to contract free from unreasonable government regulations is protected by the due process clause of the Fourteenth Amendment” by the late nineteenth century. *Id.* Although the protections of the liberty of contract doctrine have waned since then, so much that “freedom of contract is . . . [now] . . . almost entirely unprotected under modern constitutional law,” the doctrine still stands for the normative principle that there should be a right to contract free from government regulation. *Id.*

\(^6\) The United States Supreme Court has generally limited the definition of State action under the “State action doctrine” to acts undertaken by the Executive and Legislative branches. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 507 (Aspen Publishers, 3rd ed. 2006). Nonetheless, “there seems little doubt that judges are government actors and that judicial remedies are [S]tate action.” Erwin Chemerinsky, *State Action*, 618 PRACTICING LAW INSTITUTE, LITIGATION ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES – LITIGATION 183, 209 (1999). This article refers to State action in the literal sense and not in the more limited sense defined by the scope of the State action doctrine.

\(^7\) This is not a novel observation. As the quote under the title of this article indicates, Friedrich Hayek not only understood that contractual enforcement involves the exercise of State coercion, he also thought it should be the starting point for a libertarian theory of contracts. *See Hayek, supra* note 1, at 230. In fact, modern libertarian scholars have also sought to justify the use of State coercion in contractual enforcements. *See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 14–15 (1974); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 15 (1998). The implications for the substance of contract law have yet to be fully explored. *See generally* Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 37–58 (2015), for a preliminary effort to explore implications for the substance of contract law.
impinges on liberty.

If the fundamental purpose of the State is to advance liberty, contract law requires justification. The theoretical justification for having contract law is important because it provides a basis for analyzing contract rules and doctrines. A fully developed libertarian theory of contracts should not only explain why contract law is necessary to advance liberty, but should also provide a basis for analyzing how specific contract rules and doctrines should be interpreted and applied to advance liberty. This article attempts to offer such a theory.

One does not have to be a libertarian to appreciate a libertarian perspective on contract law. Most people place great value on their liberty, and even if they would make significant trade-offs between their liberty and other rights that they value, an analysis focused on the relationships between liberty and contract rules and doctrines should help make those trade-offs clearer. Of course, a libertarian theory of contract law may also offer new insights into the ways in which contract rules and doctrines advance or impede liberty.

Much of the libertarian scholarship about contracts seems to overlap so much with utilitarian theories of contract that the libertarian thought often seems indistinguishable from utilitarianism. The most distinctive stream of modern libertarian thought proposes a “title-transfer theory of contracts.” The title theory treats contracts as transfers of title rather than as legally enforceable promises, and it regards refusals to perform contractual obligations as thefts of property. The use of State coercion to enforce contracts is therefore justified because it is used to prevent a theft. There are problems, however, with the title theory. Since many libertarians and free market advocates tend to regard private property rights as absolute, the view that a contract is a transfer of title inclines some to believe in the strict enforcement of all voluntary agreements. This is problematic, as proponents of the title theory

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10 As Murray Rothbard explained, “Failure to fulfill contracts must be considered as theft of the other’s property.” MURRAY ROTHBARD, MAN, ECONOMY, AND STATE 177 (1962). See also, Kinsella, supra note 9, at 21–22.
11 ROTHBARD, supra note 9, at 133. Support for strict enforcement of voluntary agreements is probably much stronger among free market advocates than among libertarians.
themselves have explained.\textsuperscript{12} Moreover, the title theory does not justify contractual enforcements of promises, unless the promises effect transfers of property.\textsuperscript{13} This is awkward and probably too limiting. Finally, the title theory does not, by itself, help to distinguish which agreements actually transfer title and which agreements do not. This can make the title theory seem confounding and even tautological because an agreement is legally enforceable only if it transfers title, but an agreement cannot transfer title unless it is legally enforceable.

Professor Randy Barnett has made important contributions to the title—or as he puts it, the “entitlement”—approach to contracts by articulating the role of consent in legitimizing entitlement transfers and helping to distinguish those that are contractually enforceable from those that are not.\textsuperscript{14} There is no doubt that consent plays an important role in legitimizing modern contractual enforcements, and Professor Barnett’s insights have therefore made important contributions to this article. From the perspective offered here, however, there are limitations to a consent-based theory of contracts. Perhaps most importantly, the consent theory does not explain why a court should use the power of State coercion to enforce a contract at all. If the purpose of the State is to minimize the exercise of coercion, why should the State itself use coercion to enforce a contract? Without more, the consent theory seems to depend on an assumption that the State’s purpose is not simply to minimize the exercise of coercion, but includes something else—at the very least, the purpose of enforcing consensual transfers of entitlements.

This article attempts to offer a more complete and systematic analysis of the relationship between liberty and specific contract rules and doctrines. The article presumes that the sole purpose of the State is to advance liberty, which is tantamount under the definition of liberty it uses to minimizing the exercise of coercion, including coercion by the State.\textsuperscript{15} Although consent may make the exercise of State coercion less

\textsuperscript{12} Murray Rothbard, for example, argues that only contracts under which the failure to enforce would be tantamount to theft should be legally enforceable. ROTHBARD, supra note 9, at 133.
\textsuperscript{13} Id. at 133–39.
\textsuperscript{14} See Randy Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 296–99 (1986); see also BARNETT, supra note 7, at 77.
\textsuperscript{15} To be more precise, under the terms used here, the advancement of liberty is
worrisome, this article does not presume that court enforcements of consensual agreements are any less coercive than court enforcements of non-consensual agreements. In that respect, this article attempts to offer a more coherent libertarian analysis. Moreover, since this article draws on a different tradition of libertarian thought, rather than title theory alone, it may also serve to stimulate—or provoke—further libertarian thought.\(^{16}\)

Any serious discussion of liberty should begin with a definition of the term. Scholars have debated the virtues of alternative conceptions of liberty, with some favoring narrow—or “negative” conceptions—and others favoring broader—or “positive”—conceptions.\(^{17}\) Negative conceptions of liberty typically define it in terms of what individuals enjoy freedom from, whereas positive conceptions of liberty tend to define it in terms of what individuals may enjoy the freedom to do.\(^{18}\) Negative conceptions of liberty tend to boil the definition down to what is minimally required for a free society, whereas positive conceptions of liberty are more expansive.\(^{19}\) Although prominent libertarian scholars have reasoned from markedly different conceptions of liberty,\(^{20}\) there is probably little disagreement among most scholars—and most people—about the desirability of being free from the exercise of coercion by others. It is reasonable to surmise that there is probably the greatest consensus about what liberty most minimally requires.

In the pursuit of the broadest consensus possible, this article defines liberty in a minimalist sense and outlines what might be called a tantamount to minimizing the exercise of coercion subject to the need to respect individuals’ spheres of personal autonomy and privacy.

\(^{16}\) This article shares some of the same presumptions and dispositions as those articulated by Professor Bruce Benson. See BRUCE L. BENSON, THE ENTERPRISE OF LAW (1990). Benson’s book drew primarily on economic theory to advance understanding of the possibilities for “privatizing” the law. See id. at 349–78 for a general discussion.

\(^{17}\) See, e.g., ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY xxxvi–lxiii (1969), for an overview of some of the controversies. As Berlin observes, neither narrow nor broad conceptions of liberty are either inviolable or sufficient. Id. at lx. Yet he also observes that “those who have ever valued liberty for its own sake believed that to be free to choose . . . is an inalienable ingredient in what makes human beings human.” Id.

\(^{18}\) See BERLIN, supra note 17, at xlii (framing the distinction between positive and negative liberty through the questions “Who is master?” and “Over what area am I master?”).

\(^{19}\) Id. at xlv (discussing how positive liberty expanded from the concept of negative liberty).

\(^{20}\) See, e.g., Daniel B. Klein, Mere Libertarianism: Blending Hayek and Rothbard, 27 REASON PAPERS, Fall 2004, at 7–11 for a comparative analysis of Murray Rothbard and Friedrich Hayek. As Klein observes, almost any conception of liberty is ambiguous and therefore ill-defined. Id. at 7.
minimalist libertarian theory of contracts.\textsuperscript{21} As Friedrich Hayek’s quote at the outset suggests, the article is distinctly Hayekian in motivation and spirit. Thus, following Hayek, the article defines liberty to require that individuals\textsuperscript{22} be as free as possible from the exercise of coercion by others, and that they have a sphere of personal autonomy and privacy within which they are free from intrusions by the State.\textsuperscript{23} Following Hayek again, coercion is defined to mean the control of the environment or circumstances of a person to the extent that she is forced to serve the ends of another. Such coercion can be exercised through the direct use of force or merely the threat of direct force.\textsuperscript{24}

Since contractual enforcements by courts involve the exercise of coercion by the State, it is difficult to justify contract law if the sole objective of the State is to minimize the exercise of coercion.\textsuperscript{25} In fact, modern attempts to justify contract law are often “speculative and rationalistic”\textsuperscript{26} when a more empirical, although perhaps less philosophically coherent, theory is warranted.\textsuperscript{27} Part II critiques the most prevalent modern theories of contract and offers a more empirical, and arguably more compelling, justification—one rooted in an understanding

\begin{footnotesize}
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\item The use of the indefinite article is deliberate. The author does not mean to suggest that this article offers the only possible “minimalist” libertarian theory of contracts.
\item The term “individual” is used in this article exclusively to mean natural persons, as opposed to corporate persons.
\item The first part of this definition of liberty is from Friedrich Hayek’s observation that liberty is “that condition of men in which coercion of some by others is reduced as much as is possible . . . .” HAYEK, supra note 1, at 11. The second part is from Hayek’s further observations that
\item \[\text{coercion . . . cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem by conferring the monopoly of coercion on the \{} State \text{and by attempting to limit this power of the \{} State . . . . This is possible only by the \{} State’s protecting known private spheres . . . .} \] \textit{Id. at 21.}
\item Hayek defines coercion as “[S]uch control of the environment or circumstances of a person by another that, in order to avoid great evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another.” \textit{Id.}
\item Since liberty is defined to mean freedom from the exercise of coercion by others, including the State, subject to having a sphere of personal autonomy and privacy that is free from intrusions by the State, stating that the objective of the State is to minimize the exercise of coercion is technically inaccurate. To be precise, the objective of the State is to minimize the exercise of coercion subject to the constraint that the State must respect individuals’ private spheres.
\item See HAYEK, supra note 1, at 54.
\item See Freyfogle, supra note 8, at 78–79. Freyfogle argues that most libertarian scholars ultimately depend on consequentialist arguments to justify private laws. Of course, some scholars do so more explicitly than others.
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of the role that private law played in primitive legal systems, and was suggested by Hayek himself.\textsuperscript{28} As the discussion elaborates, there is a stronger justification for contractual enforcements in primitive societies than there is in highly developed ones. Modern contract theories, which have narrowed the range of enforceable promises to those that manifest the intent of parties to commit themselves to legally enforceable bargains, have served to limit contractual enforcements and, consequently, the exercise of State coercion. The most important question is whether contract rules and doctrines can be developed and modified to advance liberty even further.

Part III discusses the implications of a minimalist libertarian justification for contracts and provides an analysis of several important contract rules and doctrines. From a minimalist libertarian perspective, contract rules and doctrines should help to minimize the need for contractual enforcements by facilitating “relational agreements,” which are agreements that are largely, if not entirely, enforced by the parties themselves. To that end, there is an important role in contract law for the statute of frauds, the parol evidence rule, the use of mercantile practices and customs in interpreting or supplementing ambiguous contracts, and the use of alternative dispute resolution (ADR) methods. Doctrines such as unconscionability, impracticability, and the unenforceability of agreements that are against public policy may also help to militate against the inappropriate exercise of State coercion. Part IV provides a brief conclusion to the article.

II. LIBERTY AND CONTRACT THEORY

A. Liberty, Utility, and Consent

The most common justifications for contractual enforcement are utilitarian. In fact, many libertarian theories of contract seem to be, at heart, utilitarian.\textsuperscript{29} Accordingly, they suffer from the same limitations as the utilitarian theories.\textsuperscript{30} From a utilitarian perspective, contractual

\textsuperscript{28} Hayek, supra note 1, at 140–41 (discussing recognition of private property as roots of primitive legal system).

\textsuperscript{29} Freyfogle, supra note 8, at 79. Richard Epstein, a prominent libertarian scholar, argues that rules of private law should be devised to maximize the total value of all property holdings. See Richard Epstein, Design for Liberty 79 (2011).

\textsuperscript{30} Hayek went to great lengths to denounce utilitarianism, which he characterized as being rooted in the “French rationalist tradition” of social thought founded upon idealistic assumptions of perfectly rational behavior. Hayek, supra note 1, at 56–61. In fact, he
enforcements are justified when the social benefits of the enforcements exceed the social costs associated with the exercise of coercion. The social costs and benefits are typically defined in economic terms. But purely libertarian values are inconsistent with the idea of trade-offs between individuals’ liberty and the end values served by their contracts. From a minimalist libertarian perspective, social welfare is always greater when social outcomes are achieved with the minimum exercise of coercion possible than when they are achieved with the exercise of any amount of coercion greater than that, regardless of the ends achieved. Any justification of contract law that is based on utilitarian considerations must assume that the role of the State is not to minimize the exercise of coercion but to maximize utility. Since the minimization of coercion is not equivalent to the maximization of utility, a utilitarian justification of contract law is not libertarian, at least not in a minimalist sense.

Some libertarian scholars justify contractual enforcement on the grounds that the parties to a contract voluntarily assent to subject themselves to the State’s power of coercion. 31 To the extent that the parties consent to bind themselves to contractual enforcements, when courts enforce the parties’ contract, they merely enforce the parties’ intentions and will. 32 By binding themselves to a legally enforceable contract, the parties are able to enjoy even greater freedom, since they can then trade their private property and other rights in return for private property and rights owned by others that are of greater value to them. 33

The consensual justification of contracts is probably an essential element of any modern theory of contract, but from the perspective offered here it is incomplete because it assumes that the purpose of the State is not simply to minimize the exercise of coercion, but includes, in addition, an obligation to enforce the intent and will of parties who consent to bind themselves to a legally enforceable agreement.

In fact, both the utilitarian and the consent justifications are what Hayek referred to as “speculative and rationalistic” rather than

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31 See Barnett, supra note 14, at 319.
32 Id.
33 As Friedrich Hayek observed, “The rules of property and contract are required to delimit the individual’s private sphere wherever the resources or services needed for the pursuit of his aims are scarce and must, in consequence, be under the control of some man or other.” HAYEK, supra note 1, at 141.
empirical. And without some important qualifications, they both imply that the State should enforce many agreements that would undermine the liberty of at least one party to the agreement. For example, both theories imply that courts should enforce a voluntary agreement under which one party sells himself into slavery in return for a payment of money (perhaps to be made to a family member). They also seem to imply that courts should enforce an agreement between neighbors establishing racially restrictive covenants (in the case of the utilitarian theory, of course, as long as the joint economic surplus earned by the neighbors exceeds the decrease in economic surplus to others). But any theory of contracts that justifies slavery or racially restrictive covenants seems incongruous with liberty. There is no justification for the use of the State’s coercive powers to enforce a transaction that would result in someone becoming the slave of another and thus subject to the other’s coercion, or for someone to use the State’s coercive powers not only to serve as the instrumentality for racism and discrimination but also to limit the liberty of others by preventing them from engaging in a voluntary transaction for the purchase of real property.

Both theories raise other, perhaps even more fundamental, problems. The utilitarian justification of contracts, for example, seems to imply that a unilateral promise should be enforced if the costs to the promisor of fulfilling the promise are less than the benefits to the promisee of having the promise fulfilled. It would be onerous—if not impossible—for courts to engage in such a cost-benefit calculation on a case-by-case basis, and it seems impossible to determine, as a general

34 Id. at 54.
35 Robert Nozick has argued that people should have the right to sell themselves into slavery. See NOZICK, supra note 7, at 331. Other libertarians typically argue that title to one’s self is inalienable. See, e.g., ROTHBARD, supra note 9, at 135. Unfortunately, their arguments can seem tautological—e.g. an agreement to transfer title to one’s self is not legally enforceable because one cannot legally convey title in one’s self. BARNETT, supra note 7, at 81. Barnett offers an argument that is not tautological, but it seems to make significant qualifications to the consent theory—he argues that a person cannot surrender her right to change her mind in the future about whether to transfer her rights in herself to another. See also Smythe, supra note 7, at 16–18 (arguing that the State prohibiting selling oneself into slavery uses State coercion to interfere with a voluntary private transaction).
36 For example, Richard A. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. CAL. L. REV. 1353, 1368 (1981). This is not to suggest that he would support the enforcement of racially restrictive covenants, but without further qualification or limitation, that appears to be the implication.
37 See Smythe, supra note 7, at 16–18, 34–35.
38 Hayek was highly skeptical about the capacity of human beings to make such rational calculations. HAYEK, supra note 1, at 54–58.
matter, whether the cost-benefit calculation would be positive or negative. The consent justification of contracts, on the other hand, implies that if a person has the intent and will to make (and fulfill) a promise, then the State should enforce that promise, regardless of whether the promise is unilateral or made in return for consideration. Without further qualification, the consent justification for contracts fails to draw any distinction between a contract and a promise. In that respect, it seems to prove too much. It would imply that courts should enforce many kinds of promises that they do not, such as engagement promises, intra-familial promises, and promises against public policy.

Neither the utilitarian nor the consent justifications of contracts alone therefore provide an adequate basis for a minimalist libertarian theory of contracts. In fact, it is doubtful that any ahistorical, philosophically grounded theories can provide an adequate basis for understanding and analyzing contract doctrines that have evolved and adapted to address nuanced, real-world problems in changing social and political contexts. It is ironic that modern libertarian scholars have been drawn to “rationalistic” theories. Hayek, one of the most influential libertarian scholars of the twentieth century, went to great lengths to reject the “French rationalist tradition” in social thought, and advocated instead for the more “empirical British tradition” of classical liberal thought. Hayek believed that law was the product of history and social evolution rather than rational calculation. Given that some of the British political economists who influenced Hayek also influenced the development of modern anthropological thought, the obvious place to look, therefore, for a minimalist libertarian—or Hayekian, if one prefers—theory of contract law, is in anthropological research and scholarship on the role of private law in primitive societies.

Some have argued that an award of damages could be devised to ensure that contracts are only breached when it is efficient for them to be breached, but that argument rests on too many assumptions to persuade most contract scholars. See generally Melvin A. Eisenberg, Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 CAL. L. REV. 975, 997–1014 (2005). Hayek, supra note 1, at 56–61.


Hayek was quite clear about the influence of anthropology on his views. As he wrote, “modern anthropology confirms the fact that ‘private property appears very definitely on primitive levels’ and that ‘the roots of property as a legal principle’ . . . are the very prerequisite of any ordered action. . . .” HAYEK, supra note 1, at 140 (internal quotations omitted).
B. Contract’s Primitive Roots

As it turns out, one does not have to look very far to see why and how anthropological research influenced Hayek. Modern anthropological research instructs us that the earliest forms of government in primitive societies emerged to protect liberty—to resolve conflicts, prevent violence and coercion, and provide peace and security, both within and between social groups. It is reasonable to surmise that disputes about failed or dishonored promises and agreements commonly led to interpersonal conflicts in early human societies, and that primitive legal systems evolved in part to help forestall and mitigate the interpersonal and inter-group violence that otherwise might have resulted.

Hayek, a remarkably erudite and accomplished scholar, drew on anthropological research on the role of law in primitive societies in formulating his own conceptions of law and liberty. It is not surprising, therefore, that his writings share many of the presumptions and perspectives of the anthropological research. For example, as the legal anthropologist Adamson Hoebel explained, “the really fundamental sine qua non of law in any society – primitive or civilized – is the legitimate use of coercion by a socially authorized agent.” Hoebel recognized that law and order depended upon the use or threat of coercion by the State, writing: “A legal rule without coercion is a fire that does not burn, a light that does not shine. No matter that often the force need not be unleashed . . . force is still present though latent.” Moreover, Hoebel defined legal coercion as the “general social acceptance of physical power, in threat or in fact, by a privileged party, for a legitimate cause, in a legitimate way, and at a legitimate time.” Hoebel’s conception of law and his recognition of the need for State coercion coincide almost to the letter with Hayek’s conception of the law, which strongly reflects the influence that the emerging field of legal anthropology had on

44 Id.
45 Hayek cited Henry Sumner Maine and Bronislaw Malinowski, influential pioneers in the field of legal anthropology, to support his claims that the institution of property is essential to freedom and that it even appeared in the earliest primitive societies. HAYEK, supra note 1, at 140.
47 Id.
48 Id. at 27.
49 HAYEK, supra note 1, at 20–21.
Hayek’s scholarship. 50

It is interesting, therefore, that Henry Sumner Maine, a pioneer in the study of the development of law in primitive societies, observed that in the earliest forms of civilization primitive tribunals emerged to resolve disputes legally because the alternative was for the parties or sub-groups involved to resort to violence. 51 Adamson Hoebel later inferred from detailed case studies that, in primitive societies, private disputes were commonly the source of conflict between group members, and the laws that emerged from early dispute resolution mechanisms were what we would consider today primarily private laws rather than public ones. 52 Although Henry Sumner Maine theorized that contractual obligations are characteristic of modern societies whereas status-based rules were characteristic of primitive ones, more recent research has concluded that both status-based rules and contractual obligations were present in primitive societies in varying degrees. 53 It seems reasonable to surmise, therefore, that private transactional disputes caused at least some of the conflicts that gave rise to the potential for violence in primitive societies.

Hoebel describes the function of the law in primitive societies as the disposition of “trouble cases,” by which he seems to mean the resolution of difficult interpersonal conflicts that might lead to violence or threats of violence. 54 Although most interpersonal disputes in modern, developed societies do not raise the potential for significant social disorder, in primitive societies they created the potential for “social explosions” that might pit one kin group against another and culminate in a “little civil war.” 55 As Hoebel explains, even a relatively minor

50 See generally G. P. O’Driscoll, supra note 41 for further evidence. As O’Driscoll observes, the Scottish political philosophers who influenced Hayek—including David Hume, Adam Ferguson, and Adam Smith—were also influential on the development of modern anthropology. Id. at 2. Hayek’s knowledge of anthropology shaped his theories about the evolution of social phenomena. Id. at 13.

51 HENRY SUMNER MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 288 (London, John Murray, Albemarle St. 1875) (“There is much reason in fact for thinking that, in the earliest times, . . . Courts of Justice existed less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong.”).

52 HOEBEL, supra note 43, at 28.

53 See Norbert Roulant, Criticism of Maine’s Theory, in LAW AND ANTHROPOLOGY: A READER 22 (Sally Falk Moore ed., Blackwell Pub’g 2005). As Roulant explains, Leopold Prostipil, an influential legal anthropologist, has turned Maine’s theories on their heads, arguing that contractual obligations in primitive legal systems can actually precede status-based rules. Id.

54 HOEBEL, supra note 43, at 280.

55 Id. (“Most of the trouble-cases do not, in a civilized society, loom large on the social
conflict between two or more individuals might have escalated and resulted in significant violence between their larger kinship subgroups. Of course, one potential source of such conflicts was from transactional disputes. The resolution of transactional disputes was probably, therefore, much more important to preventing the exercise of coercion in primitive societies than in modern, developed societies today.

In the most primitive societies, law was enforced by individuals without the need for anything like a modern State. In fact, the simplest primitive societies consisted of only a few closely related families and the communities were comprised of no more than a small kindred group. Although such a kindred group might have belonged to a tribe in an ethnological sense, communities were typically autonomous and not subordinate to any form of tribal government. Social relations were typically personal and economic resources were typically shared by all. Law and order was maintained primarily through informal mechanisms of social control, facilitated by strong family and kinship ties. On certain occasions, however, an individual would take action to enforce rights or take retribution against others. But when an individual acted in accordance with community norms to enforce rights or take retribution against another, that individual exercised coercion to enforce the law, implicitly acting as a public official. If the community implicitly acknowledged that the exercise of coercion by the wronged individual was in accordance with community norms, and in that sense, “lawful,” and restrained the wrongdoer from retaliating, then law and social order prevailed over interpersonal violence.

There was little need for even rudimentary forms of government in very simple societies in which there were strong interpersonal

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56 Id.
57 Id.
58 HOEBEL, supra note 43, at 50.
59 Id. at 293.
60 Id. at 293–94.
61 Id. at 294.
63 Id. at 50.
64 Id. at 276.
65 Id. at 276.
relationships between group members and economic resources were commonly shared. The need for more formal mechanisms of social control increased as primitive societies developed and engaged in more sophisticated, highly organized hunting practices. In these more advanced societies, kinship groups would come into more contact with one another and frequently consolidated into larger groups, which created the need for a more centralized political structure. The political leader of the consolidated group would then begin to take on the characteristics of a chief, and the political structure would begin to take on the characteristics of a rudimentary State. The full fruition of the law, however, did not begin until horticultural societies developed. Horticultural societies allowed political leaders to maintain control over wider geographic areas as well as more people, which both facilitated and necessitated further development of the law and legal systems.

As Hoebel summarized,

[...]

One can, of course, properly refer to such a central authority as a State. One might worry, however, that although such a central authority might nominally represent the “total social interest,” it might, in fact, be influenced by some social interests more than others.

Anthropological research thus implies that law and legal enforcement preceded the emergence of the modern State, and it

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66 Hoebel, supra note 43, at 294.
67 Id. at 309.
68 Id.
69 Id. at 316.
70 Hoebel, supra note 43, at 330.
71 This is one of the invertebrate libertarian (and non-libertarian) concerns about vesting a monopoly on the use of coercion in the State. Hayek believed that the rule of law and the concept of a limited government arose during the Middle Ages in England as a check against the newly asserted power of the English Parliament to create laws by statute. Hayek, supra note 1, at 167–70. Hayek embraced the principles of constitutional government, observing that “no person or body of persons has complete freedom to impose on the rest whatever laws it likes.” Id. at 181. He wrote that, “A free society . . . needs permanent means of restricting the powers of government, no matter what the particular objective of the moment may be.” Id. at 182.
emerged because it was necessary to forestall or mitigate violence or threats of violence resulting from interpersonal conflicts and disputes. Such conflicts probably often arose from disputes about the nature and extent of the parties’ obligations under some agreement, or the failure of one or both parties to meet their obligations under such an agreement. Therefore, the precursor to modern contract law originated from the social need to forestall and/or mitigate the exercise of coercion. When an individual, acting in accordance with community norms, exacted some form of retribution or took some form of compensation from another group member, that individual exercised coercion in a public capacity, and the behavior defined some primitive form of law. 72 As primitive societies developed, so too did the need for more sophisticated forms of social control. Consequently, a rudimentary form of government emerged and a primitive precursor to a State assumed a monopoly over the legitimate exercise of coercion. To the extent that State officials made consistent decisions to resolve such disputes, a rudimentary body of law was defined.

There are some clear implications for the relationship between contract law and liberty. Anthropological research suggests that the use of State coercion to enforce contractual obligations evolved, in part, to prevent the exercise of even greater coercion between the individuals who were parties to private transactional disputes. 73 Thus, the exercise of State coercion to enforce contracts—and other private law—was necessary to minimize the exercise of coercion in society overall. 74 Accordingly, there is really no need for any philosophical justification of contract law—or private law generally—because the original purpose of contract law was to advance liberty directly. Although private disputes are less likely to lead to interpersonal violence in highly developed societies, if the State suddenly declined to adjudicate private transactional disputes there would almost certainly be wide-ranging adverse social consequences. 75 Commerce would be significantly

72 "The privilege of applying force constitutes the official element in law. He who is generally or specifically recognized as rightly exerting the element of physical coercion is a splinter of social authority." HOEBEL, supra note 43, at 27 (internal quotations omitted).
73 See id. at 26–27 (discussing anthropological research).
74 "[S]ome government coercion might be more than compensated for by the consequent reductions in non-governmental coercion." Klein, supra note 20, at 17. Klein expresses skepticism about the usefulness of such arguments because they necessitate “the incorporation of theories of—or at least predictions about—social processes, about which we might disagree or in which we simply [do] not have any confidence.” Id.
75 HOEBEL, supra note 43, at 280.
disrupted and interpersonal violence or other forms of coercion would probably rise. A developed society that ceased to enforce contract laws altogether would almost certainly regress, and liberty would be impaired.

C. Adaptive Evolution and Ordered Liberty

Once a body of contract law has been established, individuals will naturally rely on it to advance their own interests. As Hayek observes, when the private legal rules are known and clear, individuals will subject themselves to the possibility of State coercion in order to pursue their own ends.76 In the enforcement of contract laws, individuals can use State coercion as a means to their own ends rather than allow themselves “to be used for the ends of others.”77

Hayek believed that, historically, it was the cumulative growth of social institutions, such as contract law, that allowed human reason and civilization to flourish,78 because it was “the evolution of well-constructed institutions, where the rules and principles of contending interests and compromised advantages would be reconciled, that had successfully channelled individual efforts to socially beneficial aims.”79 Thus, Hayek argued, “the indispensable foundation for the argument for liberty”80 is not to be found in “the Cartesian conception of an independently existing human reason that invented . . . institutions”81 but in “the emergence of order as the result of an adaptive evolution.”82

This may be why Hayek had so few quibbles with contract law. Hayek viewed contract law as a tool that individuals could use to construct private spheres within which they could enjoy their personal freedoms.83 As he observed, “[s]ince coercion is the control of the

76 “Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others.” HAYEK, supra note 1, at 21.
77 Id.
78 Hayek cites Hume, Ferguson, and others for insight into “how institutions and morals, language and law, have evolved by a process of cumulative growth and that it is only with and within this framework that human reason has grown and can successfully operate.” Id. at 57.
79 Id. at 60.
80 HAYEK, supra note 1, at 57.
81 Id.
82 Id. at 59.
83 As Hayek explained:
  That other people’s property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts. The whole network of rights created
essential data of an individual’s actions by another, it can be prevented only by enabling the individual to secure for himself some private sphere where he is protected against such interference.”84 Free individuals should have the right to decide what to include within their private spheres.85 Property law largely defines the private spheres that individuals begin with, and contract law enables them to trade with others for property and other rights that they would like to have under their autonomous control.86 To that end, contract law must be applied impartially and with as little judicial discretion as possible.87

Thus, for Hayek, “freedom of contract” meant a kind of ordered liberty. An individual enjoyed freedom of contract as long as she was free from the arbitrary exercise of coercion because contract rules and doctrines were known and applied equally and impartially. As Hayek explained:

Freedom of contract, like freedom in all other fields, really means that the permissibility of a particular act depends only on general rules and not on its specific approval by authority. It means that the validity and enforceability of a contract must depend only on those general, equal, and known rules by which all other legal rights are determined and not on the approval of its particular content by an agency of the government. This does not exclude the possibility of the law’s recognizing only those contracts which satisfy certain general conditions or of the [S]tate’s laying down rules for the interpretation of contracts which will supplement the explicitly agreed terms. The existence of such recognized standard forms of contract which, so long as no contrary terms are stipulated, will be presumed to be part of the agreement often greatly facilitates private dealings.88

Thus, contract doctrines that void contract clauses, excuse parties
from obligations, or fill gaps in their writings are consistent with freedom of contract.

D. The Hayekian Project

Although Hayek had few quibbles with contract law, he was emphatically not conservative and would have rejected any suggestion that the law should remain static. As he observed, the problem with conservatism is that

by its very nature it cannot offer an alternative to the direction in which we are moving. It may succeed by its resistance to current tendencies in slowing down undesirable developments, but, since it does not indicate another direction, it cannot prevent their continuance. It has, for this reason, invariably been the fate of conservatism to be dragged along a path not of its own choosing.

Hayek therefore believed that, even though improvements in the law are bound to be slow once the basic parameters of a free society have been established, there is still “ample scope for experimentation and improvement within . . . [the] legal framework” which will enable a free society to become even better. Thus, the central question is not whether contract law can be improved; it is about how contract law can be improved. In other words, it is about the direction of change, not whether change is desirable—change is inevitable because the law cannot remain static. Although Hayek did not himself suggest the direction in which contract law should be taken, the main thrust of his life’s work implies that contract law should be refined to make people even freer and thus increase their liberty further.

Given that private transactional disputes are less likely to result in interpersonal violence, the possibility for refinements and improvements in contract law should increase as societies develop. There should be opportunities to lessen the reliance on State coercion to enforce private agreements and arbiter private transactional disputes. Of course, if the scope of contract law is to be narrowed, there would probably have to be ancillary developments in social philosophy and jurisprudence that help to justify more refined contract rules and doctrines. It would be a

89 See, e.g., Hayek’s famous essay, “Why I am not a Conservative,” included as a postscript in Id. at 398.
90 Id.
91 Id. at 231.
92 HAYEK, supra note 1, at 231.
mistake to suggest that the development of American contract law has generally been motivated and shaped by libertarian concerns, but it is at least a happy coincidence that, broadly speaking, contract rules and doctrines appear to have been refined in ways that advance liberty in the United States in the modern era.

Principles of equity governed the common law approach to contracts. Promises were generally enforceable, regardless of whether they were made as part of a bargain.\(^93\) In the United States prior to the nineteenth century, these principles manifested themselves in the rule that “a sound price warrants a sound commodity.”\(^94\) The sound price rule authorized courts to inquire into the adequacy of consideration, which injected uncertainty into commercial contracts right at the onset of a significant expansion in commercial activity when commercial contracts were becoming more prevalent and complex.\(^95\) In the face of new circumstances and pressures, however, courts eventually began to shift from regulating the equity of commercial transactions to upholding the will of the parties.\(^96\) The doctrine of caveat emptor began to replace the sound price rule and consideration was made pre-requisite to a legally enforceable contract.\(^97\) Modern contract law thus began to revolve around a bargain theory and the parties’ intent and will to commit to a mutually beneficial, legally enforceable exchange.\(^98\)

The modern shift in contract jurisprudence to focus on the intent and will of the parties and the requirement that a contract have consideration narrowed the range of promises that courts can enforce. As

\(^93\) At early common law, courts of law would only enforce promises “under seal,” regardless of whether they were made as part of a bargain. \textit{John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions} 311–12 (2009). In the face of pressure to enforce unsealed promises, Chancery courts established jurisdiction over contracts and began enforcing them in equity. \textit{Id.} at 320–22. Promises were broadly enforced in Chancery courts, which followed a simple formula: “promises have to be kept . . . as long as they do not violate the laws of God and reason, that is, unless they are against good conscience themselves.” \textit{Id.} at 311, \textit{citing} Franz Metzger, \textit{The Last Phase of the Medieval Chancery}, in \textit{Law-Making and Law-Makers in British History} 84 (Alan Harding ed., 1980).


\(^95\) Courts’ reliance on principles of equity mirrored a preindustrial economy in which it was possible to identify “customary prices” for most commodities. As commercial activities expanded and became more complex, contract law began to assume a different role. \textit{Id.} at 936.

\(^96\) Horowitz observed that the turn away from “regulating the equity of agreements” began in England during Lord Mansfield’s time and continued throughout the nineteenth century. \textit{Id.} at 944–45.

\(^97\) \textit{Id.} at 946.

\(^98\) Horowitz, \textit{supra} note 94, at 947.
a result, the shift narrowed the use of State coercion to enforce private transactions. In fact, the intent of the parties and the consideration requirement operate as separate filters, each weeding out from the set of enforceable agreements a subset. The intent and will of the parties is manifest in an offer and acceptance. If there is no offer and acceptance, an agreement will not be enforceable, even if there is consideration.\textsuperscript{99} Consideration is manifest in evidence of an exchange, whether it is an exchange of property for a price or an exchange of promises. In the absence of a true bargain, an agreement is not legally enforceable even if the parties did manifest their intentions to be bound. The requirement that the parties intend to make a bargain thus narrows the range of contractually enforceable promises more than either the intent and will requirement or the consideration requirement would by themselves. It may have been through happenstance, but the general drift of modern contract law has been towards limiting the use of State coercion to enforce private transactions.

Of course, the scope of modern contract law remains exceptionally broad. That should not be surprising: although transactional disputes might be less likely to result in violence and disorder in more developed societies, the abolition of contract law would almost certainly cause society to unravel. It would undermine the cornerstones of ordered liberty by forcing people to plan their affairs and make decisions in an uncertain and unstable legal environment. Even from a minimalist libertarian perspective, therefore, there is still a need for contract law in any free society, and innovations in contract law need to be made incrementally to preserve liberty.

But the justification for retaining an established body of contract law does not exempt contract law from the kinds of scrutiny that typically apply to other ways in which the State exercises coercion. In fact, since contract rules and doctrines are created by statutes or case precedents, and since legislatures and courts are State actors, it is only natural to ask, on whose behalf do the rules and doctrines serve? Research and scholarship across a wide range of fields, with diverse political orientations, suggests that the law may reflect a bias in favor of politically powerful and dominant individuals and social groups.\textsuperscript{100}

\textsuperscript{99} The application of other contract doctrines that make an agreement unenforceable, such as unconscionability or impracticability, may also reflect the absence of intent. \textit{See} the discussion, \textit{infra} Part III.

\textsuperscript{100} A wide range of research and scholarships suggests that vested interests inordinately influence legislatures. For example, William Shughart writes,
Potential biases in the law create the possibility that some individuals could use the State’s power to enforce contract laws as a means of exercising coercion against other individuals.

In the spirit of the Hayekian project, one might therefore ask, could liberty be advanced by further limiting the role for courts in enforcing private agreements? Beyond that, if the objective is to advance liberty how should the existing contract rules and doctrines be developed and applied? The next section of this article addresses questions such as these and outlines the broader contours of a minimalist libertarian theory of contracts.

III. CONTRACT RULES AND DOCTRINES

A. Relational Agreements

One of the ways in which contract laws can advance liberty is by reducing the reliance on courts to enforce private agreements. This can be accomplished in part by facilitating relational agreements. A relational agreement is one that is typically enforced and arbitrated by the parties themselves, possibly without the assistance of a contract or recourse to the courts.

Small, homogeneous groups with strong communities of interest tend to be more effective suppliers of political pressure and political support (votes, campaign contributions, and the like) than larger groups whose interests are more diffuse. The members of smaller groups have greater individual stakes in favorable policy decisions, can organize at lower cost, and can more successfully control the free riding that otherwise would undermine the achievement of their collective goals. Because the vote motive provides reelection-seeking politicians with strong incentives to respond to the demands of small, well-organized groups, representative democracy frequently leads to a tyranny of the minority.


101 The discussion here draws a distinction between a relational agreement and a relational contract. As the terms are used here, a “relational agreement” is an agreement of an open-ended, ongoing nature between two or more parties which the parties themselves typically adapt to changed circumstances and unforeseen contingencies as they arise. The term “relational contract,” on the other hand, is a contract between the parties to a relational
common. Relational agreements sometimes arise, for example, in an office supply arrangement in which the buyer communicates his or her needs and the seller supplies goods without either party ever worrying about specifying the details of the agreement in writing.\(^{102}\) Depending on the manner of their communications, the parties may or may not have a contract; although, even if they did, it would typically be irrelevant to their transaction.\(^{103}\) In fact, there are costs and risks associated with the execution of a contract, which might incline parties to transact without one. For example, there are often significant costs associated with negotiating and drafting contract terms, and even if the terms have been carefully drafted there are often significant costs associated with litigating disputes, not to mention the risk that a court could hold a party to an obligation that the party did not intend to make.\(^{104}\) In some cases, therefore, the parties might intentionally prefer not to have a legally enforceable contract. For example, a trade contractor might prefer to rely on its reputation to assure its customers that it will perform the agreed work rather than make any written commitments that could be enforced in court; its customers might be happy to rely on the contractor’s agreement. Thus, the parties to a relational agreement may execute a contract to help enforce their agreement even though they generally adapt their obligations to changing circumstances without asserting their formal contract rights. See Donald J. Smythe, *The Role of Contractual Enforcement and Excuse: An Economic Analysis*, 2 Global Jurist Frontiers 1, 2 (2002) for an overview.

\(^{102}\) See Marianne Jennings, *The True Meaning of Relational Contracts: We Don’t Care About the Mailbox Rule, Mirror Images, Or Consideration Anymore—Are We Safe?,* 73 Denver U. L. Rev. 3, 12–18 (1995), for a discussion of this example, as well as her characterization of four generic types of long-term supplier relationships, ranging from the most informal, that may proceed without a contract, to those in which the parties execute carefully drafted, detailed writings to make their agreements as fully enforceable under contract law as possible.

\(^{103}\) A relational contract is one that is executed for an agreement under which the parties typically have ongoing obligations that are adapted to changing circumstances as the need arises. See Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. Cal. Interdisc. L.J. 227, 230–31 (2004). A relational contract is typically incomplete because “the parties are incapable of reducing important terms of the arrangement to well-defined obligations.” Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1091 (1981). Although the parties execute a legally enforceable contract, they do so with the understanding that the terms of their contract will be adapted as the transaction unfolds. In that respect, their formal contract provides only a framework within which such adaptations may occur. In some respects, therefore, their formal contract is more like a constitution for the administration of their agreement than a contract in the classical sense. Ian R. MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 894 (1978).

\(^{104}\) Smythe, *supra* note 103, at 250.
reputation because they expect high quality work for a modest price.

There are a variety of ways in which contract rules and doctrines may facilitate relational agreements. For one thing, the law might establish threshold requirement for courts to use the power of State coercion to enforce private agreements, such as through a statute of frauds requirement or other requirements that make obligations contingent upon evidence of an intent to be bound. The law might also facilitate relational agreements by relaxing rules about the kind of evidence that can be used to interpret contractual obligations. A “soft” parol evidence rule allows oral evidence and evidence about mercantile practices and customs to bear on the interpretation of contract terms; it thus also frees the parties from the need to negotiate and draft detailed written agreements. Not least of all, the law might facilitate relational agreements by supporting the use of ADR.

1. The Statute of Frauds

A purely relational agreement might be in the best economic interests of both parties. More to the point of this article, it would also avoid exposing them to the risk of State coercion in the event of a dispute. It would therefore be a mistake for courts to intervene in agreements that the parties would prefer to be self-enforcing. To that end, the statute of frauds—or other contract rules that require a party to provide evidence that the other party intended to commit itself to the risk that a court might enforce its obligations against it—helps to distinguish agreements that are contractually enforceable from those that are not. Of course, this was not the original purpose of the statute of frauds, but merely a fortunate consequence of its enactment. The statute of frauds was originally enacted to prevent fraudulent conveyance of real property by requiring written evidence to support claims that title to land had been conveyed contractually. Philip Hamburger, The Conveyancing Purposes of the Statute of Frauds, 27 AM. J. LEGAL HIST. 354, 372–74 (1983). Many at the time believed that the statute of frauds was first enacted to be an alternative to a centralized system for registering title to lands that the government would have to administer. Id. at 381–82.
therefore advances liberty. \footnote{This function is not unrelated to the original purpose of the statute of frauds.} Parties that do not wish the courts to intervene in their transactions can intentionally avoid satisfying the statute of frauds—and/or whatever other rules serve the same purpose—to put their transactions beyond the reach of the courts. This role for the statute of frauds is broader than its historic role, which was to prevent courts from enforcing obligations based on fraudulent claims of an oral contract. \footnote{Critics of the statute of frauds have long claimed that it has been used to prevent the enforcement of otherwise valid contracts much more frequently than it has prevented the enforcement of invalid ones. See, e.g., Lionel Morgan Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. Pa. L. Rev. 440, 442 (1931) ("How many unjust suits have been prevented as a result of the statute cannot be estimated, but the reports are filled with cases where just claims have been defeated by its operation.").} But that historic role also served to protect parties from the errant exercise of State coercion.

The danger of having a rule like the statute of frauds is that it may wreak injustice on the unsophisticated and expose them to the malfeasance of opportunistic transacting partners. For example, a more sophisticated party might ensure that a less sophisticated transacting party signs a writing to make obligations enforceable against the unsophisticated party when the sophisticated party avoids signing a writing that would make obligations enforceable against the sophisticated party. The unsophisticated party might have understood that he would be subject to the risk that the courts would enforce his obligations against him, but he may not have understood that his transacting partner’s obligations would not be enforceable against her. \footnote{ Courts carved out significant exceptions to respond to the misuses of the statute. Id. at 458–59. The Restatement (Second) of Contracts includes a doctrine of part performance in Section 129. See David G. Epstein, Ryan D. Starbird & Joshua C. Vincent, Reliance on Oral Promises: Statute of Frauds and Promissory Estoppel, 42 Tex. Tech. L. Rev. 913, 930–32 (2010) for a recent overview. \footnote{Summers, supra note 111, at 445–46.}}

Such concerns are mitigated, to some extent, by common law exceptions to the statute of frauds that allow enforcement under the doctrines of estoppel or part performance. \footnote{\footnote{Summers, supra note 111, at 445–46.}} For example, if the unsophisticated party had changed his position in reliance on an oral agreement and would suffer a detrimental injury unless the agreement was enforced, a court could enforce the agreement under the doctrine of estoppel even though the statute of frauds was not satisfied. \footnote{\footnote{Summers, supra note 111, at 445–46.}}

Unfortunately, there are risks to applying the exceptions too
broadly. If the parties intentionally chose not to sign a writing so that courts could not intervene, the application of the estoppel doctrine might allow one of the parties to use State coercion against the other opportunistically. Therefore, exceptions to the statute of frauds should be construed narrowly. 114 In fact, before an exception is applied, courts should look for evidence that the party seeking to have the exception applied reasonably did not understand that the failure to satisfy the statute of frauds would make the other party’s obligations unenforceable. 115 Such evidence might be provided by 1) the relative lack of sophistication of the party, 116 and/or 2) the absence of any non-legal methods of enforcing the obligations. 117 Examples of such evidence might be the tit-for-tat interactions inherent in an ongoing, repeated transactional relationship or the emotional and moral suasion inherent in a family relationship or close friendship. 118 Absent such evidence, courts should be cautious about applying exceptions to respect and preserve the ability of parties to opt out of contractual enforcement in the courts at the outset of their transactions.

The statute of frauds imposes transaction costs on contracting parties. Even if the writing necessary to satisfy the statute is minimal, in many transactions, the need to execute a writing in and of itself is an inconvenience. When the stakes are small, the parties might not bother, even though they would prefer to have a legally enforceable contract. Perhaps even more likely, if the stakes are small, the seller might prefer not to have a legally enforceable contract, even though the buyer would. For example, in a sale of a small consumer item—a bottle of milk or a

114 If anything, it seems the exceptions have been applied far too broadly. Id. at 448 (“[P]resent-day courts are practically unanimous in applying estoppel to validate contracts unenforceable under the Statute of Frauds.”).
115 Conversely, the question is whether the party seeking enforcement understood that the other party did not intend to commit to contractual enforcement of its obligations.
116 An unsophisticated party might not understand the legal effect of the statute of frauds whereas a more sophisticated one normally would. A party who knew the legal consequences of not getting the other to sign a writing that provided evidence of his obligations would be hard pressed to explain why he thought the other intended to have those obligations enforced against him in a court of law.
117 A party would be much more likely to transact without the safeguard provided by legal enforcement if there were ample non-legal methods of ensuring the other party complied with the agreement.
can of soda—the buyer might like to have contract remedies against the seller (if she thought about them), but the seller would probably prefer that the buyer not have them. Given the inconvenience, the parties would normally not bother executing a signed document. In such cases, however, it would be best if the statute of frauds did not apply. Since the statute might impose transaction costs disproportionate to the size of the potential surplus that the transaction could generate, most reasonable parties would not want to comply even if they would prefer that their agreements be legally enforceable. An alternative default rule might be appropriate for such transactions. For example, a writing could be required to prove the intent of the parties to opt out of contractual enforcement rather than to opt in.

The analysis has a number of implications that can be summarized as follows: A statute of frauds requirement should 1) not apply to small-stakes transactions; 2) not apply indiscriminately to transactions between a sophisticated party and an unsophisticated one, such as a merchant-consumer sale of goods; and 3) be subject to exceptions, such as the doctrines of estoppel and part performance; but 4) the exceptions should only be applied when i) the party seeking performance is relatively unsophisticated and ii) there are few, if any, non-legal methods available for the parties to use to enforce their obligations. There are typically only significant non-legal methods for the parties to use to enforce their obligations if they have an ongoing relationship of some kind; this would normally be the case only if they were relational transacting partners or family members.

2. Parol Evidence

Most contract disputes raise questions about the appropriate interpretation of the contract terms. The resolution of the disputes usually depends on which evidence a court will consider in interpreting the contract terms. This can make the application of the parol

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119 As a practical matter, it would not apply. Under the UCC Section 2-201(1) a signed writing is required to enforce a contract for the sale of goods only if the price of the goods is $500 or more. U.C.C. § 2-201(1) (AM. LAW. INST. & UNIF. LAW COMM’N 2015).
120 George Cohen, Interpretation and Implied Terms in Contract Law, in ENCYCLOPEDIA OF CONTRACT LAW AND ECONOMICS 125, 125–26 (Gerrit de Geest ed., 2d ed. 2011).
121 Questions about contract interpretation and the admissibility of extrinsic evidence are often conflated, but they are distinct. See generally Margaret N. Kniffin, Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else’s Clothes?, 62 RUTGERS L. REV. 75 (2009).
evidence rule dispositive. Some scholars have argued that, when the parties are sophisticated, courts should apply a “hard” parol evidence rule—that is, they should apply the parol evidence rule strictly and rely on the plain meaning of the parties’ writing to interpret the terms of the contract. \(^{122}\) This line of scholarship has been characterized as a neoformalist \(^{123}\) movement in modern contract scholarship, and is often rooted in neoclassical economic analysis. \(^{124}\) But it is doubtful whether the prescriptions should apply widely enough to be of much practical value. \(^{125}\)

The terms of any contract need to be negotiated and agreed upon using a language of some kind. Unfortunately, there are inherent limitations on the use of language that limit the precision of contract terms. There is no such thing as a “private” language. \(^{126}\) In other words, since a language must be shared, it cannot consist of words that have meanings to only the person who uses them. \(^{127}\) The meanings of words are inherently personal and they cannot therefore be understood in precisely the same way by different people. Although the meanings of words must be shared for any true communication to occur, they can only be shared imperfectly and any true communication is necessarily imperfect. \(^{128}\) In fact, it is not even certain that the understandings people have of the language they use at one time will be the same as their understandings of the same language at some later time. \(^{129}\)


\(^{124}\) Alan Schwartz and Robert Scott describe the work as part of a larger project, “arguing that the law should pursue the first order goal of maximizing contractual surplus when it chooses rules to regulate merchant-to-merchant contracts.” Schwartz, *supra* note 122, at 928.


\(^{127}\) Id. at 787.

\(^{128}\) Public language cannot reflect the parties’ private thoughts. *Id.* at 795.

\(^{129}\) Brian Bix, *Law, Language and Legal Determinacy* 37 (1993) ("Wittgenstein . . . has shown that there is no fact of the matter to prove that I mean the same thing by my current use of a word as I did by my former use.").
The need for the interpretation of contract language creates the need for an “interpreter.” Neither of the contracting parties alone could act as the interpreter, and the terms of a contract cannot be self-interpreting. In other words, the parties cannot contract in a definitive way for the interpretation of the terms in the contract. In order to specify how a particular right or obligation should be interpreted, they would have to use additional language, and that language would be subject to the same interpretive problems as the language that needed to be interpreted. Ultimately, a third party that has the authority to impose its interpretation on the parties must interpret the contract. Since the State has a monopoly on the legitimate exercise of coercion, the only third-party with that kind of coercive authority is a court of law. Even the contract interpretations of a private arbiter can only be enforced by a court.

The parol evidence rule limits courts’ use of extrinsic evidence in interpreting contract terms. It thus favors the use of evidence provided by a writing. Under the “four corners test,” if a writing is unambiguous on its face a court will exclude parol or other extrinsic evidence in interpreting the contract terms. But a court that relied exclusively on the writing to interpret the contract might rule differently than a court that relied exclusively on the parol evidence. And a court that used both the writing and the parol evidence to interpret the contract might rule either way or differently still. This is problematic because, from a purely theoretical perspective, there is no reason why a court should favor certain kinds of language, such as the language used in writing, over other kinds of language, such as verbal statements.

A court needs to first interpret a contract in order to determine whether the parties meant to exclude parol evidence before it can exclude parol evidence solely on the grounds that the contract excluded

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131 *Id.* at 1726.
132 Of course, this does not mean that a merger clause or other contract term bearing on the interpretation of the contract would be of no value to a judge or arbiter. It merely means that such a contract term could not by itself govern the interpretation of the contract.
134 Ricks, supra note 126, at 803 (“[T]he meaning of contractual language might be clear within the four corners of the document but ambiguous or different outside of that context or when more context is added.”).
it.\textsuperscript{135} It is illogical for a court to exclude parol evidence in interpreting whether the parties intended the contract to exclude parol evidence.\textsuperscript{136} If a court did consider parol evidence, that might raise ambiguities about the interpretation of the contract that were not evident from the writing. Such ambiguities might also raise the possibility that two courts—or even the same court at different times—might reach inconsistent interpretations of the contract, especially if they applied different versions of the parol evidence rule.\textsuperscript{137}

The parol evidence rule thus raises questions about the appropriate exercise of State coercion. Since the party with greater economic resources and better legal acumen usually drafts the writing used to provide evidence of the contract terms, a strict parol evidence rule will generally benefit dominant contracting parties at the expense of subordinate ones. In fact, it increases the likelihood that contracts will be ones of adhesion.\textsuperscript{138} Even where both parties are merchants and ostensibly sophisticated in contracting matters, the party with more economic and legal resources may use a standard form and the weaker party may be given a take-it-or-leave-it offer.\textsuperscript{139} As a general matter, the terms of any writing are more likely to reflect the interests of the stronger party, and a strict parol evidence rule will usually work to the advantage of the stronger party at the expense of the weaker one.

This means that under a strict parol evidence rule, there is a greater risk that the weaker party did not truly assent to the contract terms. The risk implicates liberty interests because when a court enforces the terms of a written agreement it exercises the power of State coercion. If a court enforced contract terms that the weaker party had not truly assented to, then the State’s coercive powers would, in effect, be used against the weaker party on behalf of the stronger party.\textsuperscript{140} If, on the other hand, the

\textsuperscript{135}Loth, supra note 130, at 1732 (“In legal theory it is an accepted proposition that the application of the law, or the identification of a legal proposition, presupposes an interpretation of the law.”).

\textsuperscript{136}Id. This reasoning appears to have been persuasive on the drafters of the UCC. For example, official comment 1(c) to UCC Section 2-202 rejects the idea that a court needs to find a writing to be ambiguous before it will consider parol evidence. U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM’N, 2015). But many state courts apply a strict—or “hard”—parol evidence rule under the state’s common law. See, e.g., Geoffrey Miller, Bargains Bicoastal: New Light on Contract Theory, 31 CARDOZO L. REV. 1475, 1522 (2010).

\textsuperscript{137}Application of a stricter parol evidence rule would obviously make the contract interpretation reflect the written language more than any oral language.


\textsuperscript{139}Id.

\textsuperscript{140}In fact, courts that are conscious of the imbalance in the bargaining power of parties
court declined to enforce an obligation of the stronger party because of “fine print” in the written instrument that the stronger party drafted, even though the weaker party believed the obligation to have been agreed upon, then the court would, in effect, facilitate a kind of malfeasance perpetrated by the stronger party against the weaker one. 141

Unfortunately, under a strict version of the parol evidence rule, the State’s coercive powers would probably be used on behalf of powerful and socially dominant parties and against weak and socially subordinate ones much more commonly than they would be used on behalf of the weak against the powerful. 142

The implication is that liberty would be advanced, in general, if courts applied “soft” parol evidence rules rather than strict—or “hard”—ones. As a general matter, parol evidence should be excluded only if a preponderance of all of the available evidence—including any extrinsic evidence—establishes that both of the parties intended for their agreement to exclude the use of parol evidence in the interpretation of their contract.

In the United States, the Uniform Commercial Code (“UCC”) incorporates an important role for mercantile practices and customs—courses of performances, courses of dealings, and usages of trade 143—in the interpretation of commercial contracts. Although it uses different terms, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) incorporates a role for similar kinds of

141 Courts might try to interpret the contract to satisfy the weaker party’s “reasonable expectations.” Id. at 637.
142 As Hayek observed:

That other people’s property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts. The whole network of rights created by contracts is as important a part of our own protected sphere, as much the basis of our plans, as any property of our own.

HAYEK, supra note 1, at 141. To the extent that rules of contract interpretation favored the stronger against the weak, they might also implicate the State in helping the stronger parties to usurp the rights of the weaker parties.

143 UCC § 1-303(d) states:

A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

U.C.C. § 1-303(d)(AM. LAW INST. & UNIF. LAW COMM’N 2015).
The conventional wisdom among most commercial law scholars has commonly been that the use of evidence about the parties’ past and present transactions and industry customs to interpret commercial contracts has a long history in European law, and was incorporated into the common law in part through the opinions of the great English jurist Lord Mansfield and the influence of Blackstone’s Commentaries. In line with that view, commercial law scholars have commonly thought that Mansfield’s opinions and judicial philosophy, including his insistence that mercantile practices and customs should inform the interpretation of commercial contracts, had significant influence on the development of American law after the American Revolution.

The conventional wisdom among commercial law scholars, however, has apparently not been shared by many legal historians. In fact, some legal historians have recently challenged the idea. Emily Kadens has persuasively argued that because medieval customs were inherently unstable and uncertain, medieval merchants frequently wanted legislatures and courts to impose contract rules upon them rather than find the rules governing their transactions in their mercantile practices. Interestingly, however, Kadens acknowledged that mercantile customs still played an important role in medieval

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(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Id.


146 LANGBEIN ET AL., supra note 93, at 496–500.


148 Kadens, supra note 147, at 1196–97.
commerce. As she observed, “custom offered more room for equitable development when the parties were close knit, repeat players who wanted less imposed, enacted law and more reliance on good faith, accommodation, and fair dealing in situations in which the risks were more evenly shared.” In other words, although there were many contexts in which medieval merchants preferred that legislatures or courts provided rules to govern their contracts, they preferred reliance on mercantile practices and customs in addressing contracts that we would consider relational.

Regardless of whether they influenced medieval law, the use of mercantile practices and customs to interpret commercial contracts would appear to support relational contracting practices. Over half a century ago, Stewart Macaulay’s seminal study of relational agreements revealed that the parties in many ongoing business transactions were much more fluid and flexible about their obligations than classical contract theorists typically assumed. In fact, Macaulay found that, even though the parties might execute a writing to provide evidence of their obligations at the outset of their agreement, over the course of their transaction their actual behavior would often deviate from the terms in the writing. Moreover, business firms’ approach to problems and unforeseen contingencies were typically much more cooperative and adaptive than classical contract theory implies; they would rarely, if ever, assert formal legal rights under their contract or threaten litigation. Macaulay’s early findings helped to influence the development of relational contract theory and undermine rigid formalism

149 Id. at 1199.
150 Id.
152 Macaulay, supra note 151. Interestingly, however, some recent research suggests that parties to relational agreements may learn how to improve their contracting practices as they transact over time. See generally K.J. Mayer & N. Argyres, Learning to Contract: Evidence from the Personal Computer Industry, 15 ORGANIZATIONAL SCI. 394 (2004).
153 Macaulay, Non-Contractual Relations, supra note 151, at 61–62.
Relational contract theorists typically believe that the use of mercantile practices and customs to interpret parties’ contracts helps to ensure that the interpretations reflect parties’ actual behavior rather than writings that merely provide a legal framework for their transactions.

Not all theorists agree. Some contract theorists argue that courts should adopt a formalist approach to contract interpretation, even when their agreements are clearly relational. Robert Scott, for example, argues that the parties themselves are free to use flexible rules to govern their non-legal, self-enforcement measures, but that courts should apply strict rules for contract enforcement. Moreover, when Scott argues that courts should apply strict legal rules, he means that they should reject the use of mercantile practices and customs to interpret parties’ contractual obligations and instead apply a “literalistic interpretation” wherein they simply “enforce verifiable express terms” of the parties’ writing. Scott argues that limiting courts to “the enforcement of facially unambiguous express terms will . . . generate better and more accurate interpretations of those portions of disputed contracts that the parties chose to reduce to formal, legal terms.”

While he acknowledges that strict formalism would encourage parties to expend more resources drafting written agreements, he argues that strict formalism is justified because courts are not competent to interpret the “contextual” evidence (such as course of performances, usages of trade, etc.) and “leaving contextual and other relational norms to be enforced by extralegal sanctions might actually improve the efficiency of the legal regulation of contracts.”

Recent research supports the claim that courts do not use evidence about mercantile customs and practices well. Lisa Bernstein, for example, has reviewed evidence from recent cases and concluded not only that courts probably make significant errors in evaluating usages of

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156 Id. at 852.
157 Id. at 859.
158 Id. at 860.
159 Scott, supra note 123, at 861.
trade, but also that these errors probably encourage the parties to many commercial contracts to incur higher contract drafting costs than they otherwise would so that they can specify their contract terms expressly and avoid the risks that courts will apply the wrong usages in adjudicating their disputes. Bernstein’s findings are consistent with her earlier research, in which she studied various trade associations’ attempts to codify their industry customs from the mid-nineteenth to the mid-twentieth century and found that “even in close-knit communities, merchant transactors do not, except within very local spheres or in very general ways, have similar views about the meaning of . . . commercial standards and usages of trade that the . . . [UCC] . . . direct[s] courts to take into account in deciding cases.”

Professor Scott, together with his coauthors Ronald J. Gilson and Charles F. Sabel, has recently expressed similar concerns about courts’ use of parties’ course of performances and course of dealings to interpret their contractual obligations. As Gilson et al. explain, “the manifest inability of generalist courts . . . to construe evanescent commercial practices . . . and the growing realization that . . . customary rules do not emerge spontaneously from practice . . . exposes the limitations of the contextualist understanding.” They argue that a textualist approach does not reject the use of context altogether, but instead allows the parties to “choose the extent to which a court can consider context at the enforcement stage.” It is, in that respect, less “imperialistic” than the contextual approach. By that, they seem to mean that courts’ use of mercantile practices and customs in interpreting parties’ contracts interferes with the parties’ autonomy and intrudes into private transactions. As support for the formalist approach, they observe that “both theory and available evidence suggest that legally sophisticated parties prefer a regime that follows the parties’ instructions specifying when to enforce formal contract terms strictly and when to delegate

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163 Id. at 96.
164 Id. at 43.
165 Id.
166 In concluding, for example, they observe that for textualists (such as themselves), “the allocation to the parties to decide who chooses the mix of text and context and when that choice is best made is the expression of intent of an autonomous agent.” Gilson et al., supra note 162, at 96.
authority to a court to consider surrounding context evidence.\footnote{167}

There are several problems with the neo-formalist arguments. To begin with, they offer no persuasive evidence that even legally sophisticated parties prefer courts that take a formalist approach to interpreting their contracts. The only reference that Gilson et al. provide to any empirical evidence that supports their claims is to an article by Geoffrey Miller that provides a detailed comparison of New York and California contract law and asserts that there is a “demonstrated preference of sophisticated contracting parties for the more formalistic New York approach . . .”.\footnote{168} Miller observes that the article actually draws on evidence presented in an earlier article by Theodore Eisenberg and Geoffrey Miller.\footnote{169} Moreover, he observes in a footnote that “[t]he results of the present study are not conclusive . . . [and] . . . depend in part on the reliability of Eisenberg and Miller’s empirical analysis.”\footnote{170} A reading of the Eisenberg and Miller article,\footnote{171} however, raises serious questions about the empirical support for the claim that sophisticated parties prefer formalist rules of contract interpretation.

The Eisenberg and Miller article analyzes choice of law and choice of forum provisions in a sample of 2,865 contracts reported to the Securities and Exchange Commission (“SEC”) over several months during 2002.\footnote{172} Since the firms that reported the contracts were subject to SEC reporting requirements they were obviously publicly traded corporations and thus qualify as sophisticated commercial actors. The majority of the contracts addressed financial matters or mergers: slightly over 63% of the contracts covered bond indentures, credit commitments, mergers, pooling and servicing agreements for asset-backed securities arrangements, securities purchases, security agreements, or underwriting agreements.\footnote{173} At the outset, Eisenberg and Miller provide several reasons why the contracts in their sample might specify that New York law should govern: New York has been a hub of commercial activity for many decades and has actually “cultivated its role as the choice of law...
for commercial matters through early efforts to promote enforceability of arbitration clauses, through legislation, and through the creation of specialized business courts."

They also observe that New York courts and lawmakers actively attempted to create legal rules that would encourage use of New York law for financial contracts, but none of the rules they mentioned were related to the use of parol evidence. In fact, a careful reading of Eisenberg and Miller’s results reveals that they have little, if anything at all, to say about the parol evidence rule. 

Across all types of contacts in their sample, New York law was chosen in about 46% of the contracts. After New York law in order of preference was Delaware law, which was chosen in about 14% of the contracts, and then California law, which was chosen in slightly over 7% of the contracts. New York law was the most common choice for ten of the thirteen types of contracts and all six of the financial types of contracts. California law, however, was actually a more common choice for employment contracts, and was almost as common a choice as New York law for licensing, merger, and settlement contracts. New York law, therefore, really only appeared to be dominant in financial contracts. In a regression analysis that excluded merger contracts and an “other” category, the choice of New York law was only positively and statistically significantly correlated with seven types of contracts, six of which were financial. The other type was “asset sales and purchases,” which could also be categorized as financial. The choice of New York law was not positively and statistically significantly correlated with any of the other four types of contracts, all of which were nonfinancial.

In fact, one of the statistically significant results in the Eisenberg and Miller regressions is that firms incorporated in California and firms with places of business in California chose not to contract under New York law. 

\[174\] Eisenberg & Miller, supra note 171, at 1481.
\[175\] Id. at 1490.
\[176\] Id.
\[177\] Id. at 1490–91.
\[178\] Id. at 1490–91. New York law was chosen in 20.41% of the licensing contracts compared to 16.33% for California law, in 16.75% of the mergers compared to 12.38% for California law, and in 17.81% of the settlement contracts compared to 15.07% for California law. Eisenberg & Miller, supra note 171, at 1491.
\[179\] Id. at 1492.
\[180\] Id. at 1501.
\[181\] Id.
\[182\] Eisenberg & Miller, supra note 171, at 1501.
York law. Eisenberg’s and Miller’s regression results indicate that the choice of New York law was negatively and significantly correlated with contracts reported by firms incorporated in California, and it was also negatively and significantly correlated with contracts reported by firms that had places of business in California. In the aggregate, 82.7% of the contracts reported by firms that were incorporated in California, or had their place of business in California, or used an attorney located in California chose California law and not New York law. And if one adds contracts involving a second party that was either incorporated in California or had a place of business in California, 93.3% chose California law and not New York law. In short, the Eisenberg and Miller results provide no compelling evidence whatsoever that sophisticated Californian firms showed a preference for New York’s “hard” parol evidence rule over California’s “soft” rule.

On the other hand, other empirical studies since Stewart Macaulay’s have essentially corroborated his results and have cast further doubts on the attraction—and even relevance—of a formalist approach to contract interpretation. About ten years after Macaulay’s study in the 1970s, Hugh Beale and Tony Dugdale interviewed thirty-three representatives from nineteen engineering manufacturing firms in Britain. They found that, in general, the firms in the study used contracts only for their primary obligations, in part because “within the trade certain terms and customs or unwritten laws were widely accepted.” Although some agreements were carefully negotiated and documented, most involved the exchange of inconsistent forms and many were highly informal. Interestingly, the firms were less concerned about forming legally enforceable contracts than they were about reaching a common understanding about the important or problematic terms of their deals. In the vast majority of cases, the respondents would settle disputes quickly and usually without the help of legal counsel. In fact, the respondents were wary of involving

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183 Id. at 1502.
184 Id.
185 Id. at 1499.
186 Eisenberg & Miller, supra note 171, at 1499.
188 Id. at 47 (internal quotations omitted).
189 Id. at 49–50.
190 Id. at 50.
lawyers in their transactions, either at the planning stages or in the event of disputes, because they felt lawyers were inflexible and not well informed about commerce. Whether that is true or not, the results of the study are inconsistent with the neo-formalist’s empirical claims.

In the 1990s, Lane Kenworthy, Stewart Macaulay, and Joel Rogers conducted a similar study of contracting relations between major U.S. automobile manufacturers and their suppliers as well as their dealers. They interviewed officials from each of the three major U.S. automobile manufacturers, fifteen suppliers, and several dealers, as well as representatives from state and national dealer associations; they also sent a written survey to 150 suppliers and received a 39% response. They found that the manufacturers had so much bargaining power that their contracts left suppliers with little, if any, legal protection. Although the imbalance in power created tensions, contract litigation between manufacturers and suppliers was “extremely rare.” Suppliers often indicated that transactional disputes were not worth litigating, especially since litigation might sever valuable business relationships. The most salient aspect of the manufacturers’ contractual relations with their dealers was the reliance on mediation and dispute resolution. Although the dealers generally had more leverage with manufacturers than the suppliers, manufacturers put significant effort into maintaining good relations with their dealers and the use of ADR mitigated recourse to litigation. The study suggests that contracting practices in the automobile industry were focused much more on avoiding litigation altogether than on limiting the scope of the evidence that could be used in contract litigation.

Also in the 1990s, Mark Suchman and Mia Cahill conducted a similar study of Silicon Valley attorneys and their role in the region’s high-tech industries and venture capital financing. They interviewed

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192 Id. at 59.
194 Id. at 635.
195 Id. at 647, 654.
196 Id. at 652.
197 Kenworthy, Macaulay & Rogers, supra note 193, at 653.
198 Id. at 660–64.
199 Id. at 674.
200 Id. at 666, 674.
roughly 25 “lawyers, venture capitalists, and entrepreneurs, as well as . . . several individuals who . . . played multiple roles over the course of their careers.” They found that Silicon Valley attorneys tended to see themselves as facilitators who help to manage transactional risks without “over-lawyer[ing]” transactions. In fact, they found that the typical venture financing agreement looked less like a “careful apportionment of legal rights” than a group of business founders, investors, and attorneys edging their “way over a cliff.” Interestingly, however, they attributed significant power to the attorneys as “venture capital deal makers,” which the attorneys acquired through their experience in the business. Perhaps most interesting of all, they observed that the attorneys helped to reduce transactional uncertainty by fostering and reinforcing industry norms and promoting a cooperative attitude between parties rather than an adversarial one. By promoting community norms, the attorneys helped to “homogenize” transactions, establish “contractual standards,” and “trade practices” that could help courts interpret ambiguous contract terms. Professor Suchman and Professor Cahill even suggest that the Silicon Valley attorneys may have influenced national legal standards for venture capital financing. In short, their study flatly contradicts any idea that the parties to venture capital financing agreements in Silicon Valley worried about whether strictly formalistic legal rules would apply to their written instruments.

There is no doubt that neo-formalist scholars can point to cases in which one of the parties alleged that the court’s use of mercantile practices and customs distorted the court’s interpretation of a contract. One of the limitations of this kind of empirical observation is that it is inherently biased towards cases that raise the most difficult interpretive problems. Such cases, of course, inevitably reflect only a tiny fraction of the contracts actually formed. The overwhelming majority of contracts, after all, are never litigated. A relatively small number of cases drawn from the billions of commercial contracts executed in a given year is a slender thread upon which to advocate rejecting principles of commercial law that have such deep roots across so many diverse legal

202 Id. at 682 n.19.
203 Id. at 696–97.
204 Id. at 697.
205 Suchman & Cahill, supra note 201, at 697.
206 Id. at 699–700.
207 Id. at 704–05.
208 Id. at 705–08.
The use of mercantile practices and customs to interpret contract terms may provide great value to the great mass of relational contracting agreements, even if, in a relatively small number of cases, they raise interpretative problems that the courts do not deal with well. In many transactions that are never litigated, the mercantile practices and customs that might be used to interpret the parties’ contract may not be in dispute or at all controversial. Eliminating a role for mercantile practices and customs would force the parties to incur higher drafting costs or perhaps simply to take the risk of having courts adjudicate disputes without them.

In light of the paucity of evidence in support of the neo-formalist analysis and the contrary evidence that other studies provide, the claim that sophisticated parties prefer courts to apply strictly textual interpretations of their contracts lacks sufficient support to justify recommending that courts depart from existing rules and practices. Even if there was sufficient support, the claim that the use of mercantile practices and customs to supplement or interpret contracts should be of any concern to sophisticated parties makes no sense whatsoever in light of the neo-formalists’ own behavioral assumptions about sophisticated parties.

Neo-formalists appear to have overstated the difficulties of excluding courses of performance, courses of dealing, and usages of trade from carefully negotiated contracts. Although there is some evidence that courts and lawmakers, as far back as the medieval period, in many parts of Europe, looked to mercantile customs in attempting to adjudicate disputes. Kaden, supra note 147, at 1177–83. Kaden alleges that customs were often indeterminate and did not provide a basis upon which to build the law, not that they were unhelpful in resolving disputes. Id. at 1194–95.

For example, Bernstein asserts that “the enforceability and effectiveness of a general clause opting out of all trade usages is at best unclear.” Bernstein, supra note 160, at 71. For support, Bernstein cites David V. Snyder, who writes “As custom and conduct are part of the agreement not only by the fiat of the UCC definition but also as a practical matter, the parties will have a rough time banishing them generally.” David V. Snyder, Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct, 54 S.M.U. L. REV. 617, 635 (2001). But in that part of his article, Professor Snyder was rejecting the use of conventional default rule analysis for industry custom and conduct. Id. The problem, as he explained, is that custom and conduct are not gap-fillers like most contract default rules but aids in the interpretation of contract terms. Id. If the contract defines the seller’s quantity as a “load,” for example, usage of trade may help to explain what a load is. Id. at 648. Without any express definition of the term “load”, a clause excluding usage of trade would leave the contract incomplete. Id. Professor Snyder suggests that the clause might be regarded as boilerplate and might thus be disregarded in favor of using industry custom to define the term “load” and complete the contract. Id. at 648–49. But in such a case, the parties’ writing could hardly be described as a complete expression of the terms of their agreement. Id. In fact,
disagreement about whether an integrated merger clause should exclude the use of courses of performance, courses of dealing, and usages of trade to supplement or explain contract terms, the preponderant weight of the primary and secondary authorities suggests that if parties intentionally and specifically exclude them with an express contract clause then courts should abide by their wishes.211 The principle of party autonomy, one of the overarching doctrines of modern contract law, requires courts' deference to a clear, unambiguous exclusion of courses of performance, courses of dealing, and usages of trade.212 Sophisticated parties who are assumed to specify all of their contractual rights and obligations in writing should also be able to draft a clause that expressly

211 Until relatively recently, there was apparently little disagreement about the ability of parties to exclude mercantile practices and customs. See Note, Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law, 55 COLUM. L. REV. 1192 (1955), in which the author writes,

if it appears from the contract that the parties intended to exclude the usage, the practice will, of course, be rejected. For example, the express provisions of a contract, although making no reference to a trade usage, may preclude its application because it is inconsistent with it, and hence the court will conclude that the parties could not have contracted with reference to it. Also where the usage is specifically excluded in the contract, or the contract excludes trade customs in general, the usage will not be admitted.

Id. at 1197. Although the question has not often arisen, some cases corroborate the author’s assertions. See, e.g., Kelly-Springfield Tire Co. v. True’s Oil Co., 184 P.2d 827, 829 (Wash. 1947) (finding that an express term excludes custom when it states, “the above plan shall not be subject to any verbal statements or agreements, or trade customs of any kind or nature”); Iowa Canning Co. v. F.S. Ainsa Co., 267 S.W. 540, 542 (Tex. Civ. App. 1924) (“[c]ustom is never admissible, or read into a written instrument, to contradict what is there plainly stated, and especially would that be so where the parties have expressly, or by necessary implication excluded a custom or usage of trade”); Steffner Co. v. Flottill Products, 147 P.2d 84, 86 (Cal. Dist. Ct. App. 1944) (“the parties by their contract may evidence an intention not to be bound by the usage”); see also 12 WILLISTON ON CONTRACTS § 34:11 (2015) (“[u]nder the common law, a custom or usage may be excluded from the terms of the contract either expressly or by implication.”). Professor Bernstein cites one case in which “a clause excluding usages was included in the written contract, but not mentioned in the court’s opinion.” Bernstein, supra note 160, at 71 n.29. In that case, however, the court held that “whether usage of trade . . . excluded the implied warranty of merchantability is a genuine issue of material fact and not appropriate for resolution on summary judgment.” Leighton Industries, Inc. v. Callier Steel Pipe & Tube, Inc., No. 89C8235, 1991 WL 18413, at *4 (N.D. Ill. Feb. 6, 1991).

212 The principle has been codified in UCC § 1-302 (AM. LAW INST. & UNIF. LAW COMM’N 2015), as well as the CISG. See Public Notice 1004, U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 FR 6262-02 Art. 6 (March 2, 1987).
excludes the use of courses of performances, courses of dealing, and usages of trade to interpret other contract terms. In fact, if the parties need help, there are many standard contract forms that suggest appropriate language, including at least one that is specifically intended for use in California,213 a state in which the neo-formalists seem to think the risks of errant contract interpretations are high.214 If parties are unaware that they can exclude mercantile practices and customs, or incapable of actually doing it, then they are hardly as sophisticated as the neo-formalist analysis assumes.

Even if parties were not able to exclude courses of performance, courses of dealing, and usages of trade with express contract clauses, they could avail themselves of other contracting options to forestall the use of mercantile practices and customs in interpreting their agreements. For example, if they were as perturbed about the risks that a court might misinterpret their agreements as the neo-formalists seem to think, the parties could opt out of contractual enforcement altogether.215 But even if they were unable or unwilling to opt out of contractual enforcement altogether, they could still opt out of “soft” parol evidence rules that might result in courts using mercantile practices and customs to interpret their agreements. In fact, the evidence that Gilson et al.216 cite about the purported preference of sophisticated parties for “hard” as opposed to “soft” parol evidence rules suggests that all the parties have to do to opt out of soft parol evidences rules and into hard ones is include, within their (complete and integrated) writing, a choice of law provision. If the parties are concerned that California law might govern their contract because they know California applies a soft parol evidence rule and they would prefer a hard rule like the one applied in New York, they can draft a choice of law clause specifying that New York law should apply.217 With fifty states, each following its own contract laws, the American legal system offers a large menu of choices.

214 See generally Gilson et al., supra note 162.
215 Lisa Bernstein has argued that, in the diamond industry, that is essentially what diamond traders have done. See generally Lisa Bernstein, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115 (1992).
216 Gilson et al., supra note 162, at 40.
217 According to Geoffrey Miller, “[b]oth New York and California recognize wide latitude of the parties to determine the law applicable to their agreements and the forum in which disputes will be resolved.” Miller, supra note 168, at 1508. As he explains, New York law is more receptive to choice-of-law clauses than California, which may invalidate them if they would significantly impair substantial legal rights, but it is debatable whether that makes New York law any more respectful of party autonomy.
The theory and available evidence therefore do not support courts abandoning the use of evidence about mercantile practices and customs in interpreting disputed contract terms. Nor do they support the need for a different set of contract rules for sophisticated parties—or any other parties. If anything, they support courts’ uses of mercantile practices and customs in interpreting ambiguous contract terms or supplementing the express terms of ambiguous contracts, and, in conjunction with the principle of party autonomy, they affirm the capabilities of sophisticated parties to select the contract rules that they believe are most appropriate for their agreements from among the rich menu the American legal system offers. If anything, the neo-formalist criticisms point to the value of refinements and improvements in the use of evidence to prove courses of performances, courses of dealings, and usages of trade, but not to the need to eliminate them from having a role in commercial contract adjudication. The use of mercantile practices and customs in interpreting and supplementing contract terms may not help to develop and improve contract laws, but it will probably help to support relational agreements and ensure that courts’ adjudication of contractual disputes impinges as little as possible on liberty.

3. Alternative Dispute Resolution

The uses of alternatives to conventional litigation often facilitate relational agreements. In fact, many contracts include clauses requiring the use of ADR methods to resolve disputes. Sometimes parties might also agree to use ADR to resolve disputes after they have arisen, even if their contract has no clause requiring them to do so. Whether the parties reach an agreement to use ADR ex ante or ex post, as long as they truly intended to bind themselves to their agreement under the general rules of contract law, courts should enforce their agreement just as they would enforce any other mutually consensual contractual commitments. In fact, since the use of ADR has the great virtue of avoiding the use of the courts and therefore the direct use of State coercion, it is a practice that advances liberty and should be encouraged. It is also a practice that may serve the parties’ economic

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218 See Beale & Dugdale, supra note 187, at 58–59; Kenworthy, Macaulay & Rogers, supra note 193, at 660–64; Suchman & Cahill, supra note 201, at 699–700; Bernstein, supra note 215, at 124.

219 Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. LEGAL. STUD. 1, 2–4 (1990) for a discussion of ex ante and ex post ADR agreements as well as the economic motives of the parties who make them.
interests. According to Steven Shavell, for example, ex ante agreements to use ADR probably increase the parties’ welfare by improving the resolution of some disputes and avoiding the high costs of litigation.\textsuperscript{220} Although it is less clear that ex post ADR agreements are always mutually beneficial,\textsuperscript{221} if parties truly intended to make a contractually enforceable agreement to bind themselves to ADR, that agreement should be enforced for the same reasons that other consensual contractual commitments should be enforced. Courts should not be responsible for rescuing parties from the consequences of their own bad decisions.

The Federal Arbitration Act ("FAA")\textsuperscript{222} now provides the most important part of the legal framework for the use of arbitration in the United States, even if, as is usually the case, parties contract for the use of arbitration under state contract law.\textsuperscript{223} In \textit{Moses H. Cone Memorial Hospital v. Mercury Construction Corp.}, the Supreme Court stated that there is a liberal federal policy favoring arbitration and that any doubts about the scope of arbitral issues should be resolved in favor of arbitration.\textsuperscript{224} Moreover, the FAA is highly deferential to arbitrators, and provides for judicial review of arbitral awards essentially only if the arbitrators were grossly malfeasant or incompetent.\textsuperscript{225} While the

\textsuperscript{220} Id. at 2.

\textsuperscript{221} Id. at 3.


\textsuperscript{223} When the FAA was enacted, its supporters contended that it was a procedural statute. In a series of subsequent decisions, the Supreme Court clarified that the FAA provided substantive federal law with broad preemptive effect over conflicting state laws. See Katherine Van Wezel Stone, \textit{Rustic Justice: Community and Coercion Under the Federal Arbitration Act}, 77 N.C. L. Rev. 931, 943–48 (1999). The FAA therefore now applies in state courts, as well as federal courts. Id. Moreover, unless there is a defect in the arbitration clause, the arbitrator must decide state contract law defenses. Id.

\textsuperscript{224} Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983).

\textsuperscript{225} 9 U.S.C. § 10 (1994). The four statutory grounds for vacating arbitral awards are as follows:

(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

\textit{Id.}
Supreme Court has made it clear that courts should not expand the scope of judicial review of arbitral awards beyond the grounds specified in the FAA, it has not rejected language that allows courts to overturn arbitral awards if they are in “manifest disregard” of the law,\(^\text{226}\) and it is not clear exactly what that language means.\(^\text{227}\) Unfortunately, it appears that courts have interpreted the language differently, and some still overturn arbitral awards on non-statutory grounds.\(^\text{228}\) Some scholars agree with a broader scope for judicial review. Michael LeRoy, for example, argues that “judicial review must be available to correct an arbitrator’s intentional flouting of the law”\(^\text{229}\) because “no man... is above the law.”\(^\text{230}\)

In spite of the concerns, there is a strong public policy in favor of supporting the finality of arbitral awards and other outcomes of ADR. Part of the purpose of ADR is to avoid litigation costs, and if the scope for reviewing arbitral awards is broadened too far then the potential economies will be lost because an ADR clause will simply add an additional step to the litigation process. If parties truly intend to commit themselves to binding arbitration, with the full knowledge that any arbitral award will be subject to the narrow grounds for judicial review available under the FAA, then courts should enforce any arbitral awards strictly, applying only the grounds for review that the parties impliedly agreed to. If courts broadened the scope of judicial review, they could overturn an award that was consistent with the parties’ agreement, potentially abusing the power of State coercion. State coercion would thus be used to interfere with a consensual private agreement rather than to support it. Moreover, since parties with more resources would probably, in general, be better able to use courts to challenge arbitral awards, State coercion would more commonly be used on behalf of socially and economically powerful parties than it would be used on behalf of weaker ones.

\(^\text{227}\) In a recent case, the U.S. Supreme Court contributed to the confusion by stating that “manifest disregard” of the law might simply mean in disregard of the standards under the FAA or it might mean an additional, non-statutory standard for reviewing arbitral awards. Hall Street Associates v. Mattel, Inc., 552 U.S. 576, 585 (2008).
\(^\text{228}\) See Michael H. LeRoy, Are Arbitrators Above the Law? The ‘Manifest Disregard of the Law’ Standard, 52 B.C. L. Rev. 137, 178 (2011) for an empirical study of challenges to arbitral awards comparing pre-\text{Hall} and post-\text{Hall} success rates. LeRoy observes that \text{Hall} actually caused a split among the federal circuits and that state courts continue to interpret the manifest disregard standard differently. \text{Id.} at 180–82.
\(^\text{229}\) \text{Id.} at 187.
\(^\text{230}\) \text{Id.} (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).
ADR clauses create problems, however, when it is not clear that both (or all) of the parties truly intended to commit themselves to ADR. If an arbitral award was enforced against a party that had not truly intended to be bound by an arbitral clause, the power of State coercion would be used inappropriately. Unfortunately, when State coercion of any kind is exercised, there is always the possibility that it may be used for the benefit of some and at the expense of others. Since it seems more likely that parties with fewer resources and less acumen might unintentionally become bound to ADR clauses than those who are better financed and more sophisticated,231 there is a risk that the misuse of State coercion to enforce arbitral awards would most commonly be on behalf of those with the most power and influence.

Fortunately, an arbitral award can still be defeated using general contract defenses targeted specifically at the arbitration clause.232 Thus, a claim that an arbitration clause is unconscionable could be used to overturn an arbitral award made under the arbitration clause. An aggrieved party might also be able to avail itself of other principles of contract law, such as the one stated in Section 211(3) of the Restatement (Second) of Contracts,233 which precludes a party from taking advantage of another party’s ignorance by enforcing a contract term if he knew that the other party would not have assented to the agreement if she had known about the contract term.234 In theory, an aggrieved party should be able to challenge an arbitral award using Section 211(3) of the Restatement (Second) of Contracts on the grounds that she did not truly assent to the arbitration clause. In practice, courts may not have been as receptive to the use of Section 211(3) as they should have been,235 but this is something that the courts can, and probably should, change if they are to avoid misusing their powers.

ADR clauses and binding arbitration facilitate relational agreements

231 As Stone observes:
Today many arbitration clauses are found not in contracts between equals in a shared community, but rather in contracts of adhesion between insiders and outsiders, such as between a powerful association and a nonmember or between a big corporation and a consumer.

Stone, supra note 223, at 1025.

232 Id. at 948–49.

233 Id. at 1019.

234 The Restatement states: “Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.” Restatement (Second) of Contracts § 211(3) (Am. Law Inst. 1981).

235 Stone, supra note 223, at 1024.
and help to avoid the direct use of State coercion, but they can also be abused. If liberty is to be advanced, courts should limit the scope of review of arbitral awards to the grounds that the parties have expressly or impliedly consented to under the FAA. But since more powerful parties can abuse arbitration at the expense of weaker parties, courts should be receptive to challenges against arbitral awards based on claims that 1) the arbitration clauses under which the awards were made were unconscionable or 2) the party seeking to enforce the award knew that the other party would not have assented to the contract if she had known that the writing included the arbitration clause.

B. Unconscionability

Although it may seem counter-intuitive, if the objective is to advance liberty, there is a role in contract law for rules or doctrines that allow courts to void contracts or contract terms. In the United States, the doctrine of unconscionability serves that purpose. The doctrine of unconscionability allows a court to void a contract or terms of a contract if the terms are so unfair that enforcing them would cause oppression and/or unfair surprise. Since that appears to be an interference with a market transaction, scholars who favor liberty and free markets have widely criticized the doctrine of unconscionability. As Robert Hillman has observed, however, there is a fine line between regulating a contract and interpreting it, and guile during the negotiation of an agreement often precedes an overreaching interpretation of contract terms later

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236 The Restatement states:

**UNCONSCIONABLE CONTRACT OR TERM**

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.


237 The doctrine is most commonly applied today using a two-pronged test that was first proposed by Arthur Leff. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967). The first prong applies a test for procedural abuse, which is satisfied by evidence of sharp dealing, deceptive bargaining tactics, and unequal bargaining power. See, e.g., CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 155 (1999). The second prong applies a test for substantive abuse, which is satisfied by evidence that the terms are so one-sided and grossly unfair that it would be inequitable to enforce them. *Id.* As UCC Section 2-302, comment 1 states, “The principle is one of the prevention of oppression and unfair surprise.” U.C.C. §2-302, cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2015).

on. Unconscionability cases, therefore, can often be understood to be about contract interpretation rather than contract regulation. One could argue that if the terms of an agreement are so unfair that it would be inequitable for a court to enforce them, the terms could not have been truly bargained-for. And, of course, if the terms were not truly bargained-for, then they could not really have been part of any meaningful, consensual agreement.

Unconscionability cases thus raise questions about the appropriate exercise of State coercion. If the terms of a contract are unconscionable, the party against whom enforcement of the terms is sought did not truly consent to the use of State coercion to enforce them. If a court enforced the contract, therefore, it would be using the State’s power of coercion to enforce a claim by the one party against another, even though the other had not consented to subject itself to the exercise of State coercion under such circumstances. The court would, in effect, be serving as an instrument through which one party exercised coercion against the other. Under such circumstances, one could argue that a court would further liberty by using the unconscionability doctrine to void the contractual obligation rather than enforce it.

Of course, the unconscionability doctrine is a double-edged sword and a court could apply it in error. If courts routinely applied the unconscionability doctrine to void contractual obligations in circumstances where the obliged parties did assent to the contract terms, that would undermine the ability of parties, in general, to commit themselves to legally enforceable agreements. Unconscionability, therefore, has an important role to play in advancing liberty, but it can also be abused. The risks to liberty associated with misapplying the doctrine, however, seem less than those associated with the risks of failing to apply it when it should be applied. When a court uses the unconscionability doctrine to void a contractual obligation it merely declines to exercise the State’s coercive powers to bind a party to the

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240 See id. at 129–43; See also Donald J. Smythe, Consideration for a Price, 34 N. ILL. U. L. REV. 109, 126–32 (2013) for a discussion of common law contract cases that are purportedly about unconscionability, but upon careful reading seem to be about contract interpretation.
241 Smythe, supra note 7, at 47.
242 Barnett, supra note 14, at 318.
243 Smythe, supra note 7, at 47.
244 Id.
245 Id.
purported obligation. That does not involve any exercise of coercion or even interfere with the parties’ agreement. The intent and will of the parties may be undermined when the court allows them to evade obligations to which they truly did intend to commit themselves, but that does not impede their liberty. Nonetheless, the unconscionability doctrine should be applied only in the appropriate circumstances. Those circumstances may be difficult to ascertain and verify and courts will inevitably make mistakes. If the purpose of the State is to advance liberty, however, the doctrine of unconscionability—or some other rule that allows courts to void inequitable, nonconsensual contract terms—should have an important role in modern contract law.

C. Impracticability

Sometimes after a contract has been formed a party seeks to be excused from the performance of an obligation. This has led to the development of a number of doctrines under which courts will grant parties excuses from contractual obligations. The doctrine of impracticability was the most recent excuse doctrine to emerge from the cases, and it is arguably the most relevant. Under the doctrine of impracticability a party may be excused from performance of its contractual obligations if its performance has become impracticable due to contingencies that were reasonably unforeseen at the time of contracting. In *Mineral Park Land Co. v. Howard*, for example, a party had contracted to build a bridge, but discovered that due to

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246 Id.

247 Smythe, *supra* note 7, at 47.

248 Under the doctrine of impossibility, a party may be granted an excuse from the performance of a contractual obligation if the party’s performance has become impossible. Under the frustration of purpose doctrine, on the other hand, a party may be excused from performance of a contractual obligation if the basic purpose of the contract has been frustrated. The doctrine of impracticability is the most recent and broadest excuse doctrine, and, in some cases, it allows a party to be excused when the party’s performance would simply cause an economic hardship. See Smythe, *supra* note 103, at 227–29, for an overview.

249 Id. at 227. The UCC has adopted the doctrine, which states:

> Delay in delivery or non-delivery . . . by a seller who complies with paragraphs (b) and (c) is not a breach of his duty . . . if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .”

U.C.C. §2-615(a) (AM. LAW INST. & UNIF. LAW COMM’N 2015). UCC § 2-615, comment 1 explains, “[t]his section excuses a seller . . . where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” U.C.C. § 2-615, cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2015).
difficult soil conditions that were unknown at the time of contracting, the construction costs would be several times larger than expected and building the bridge would cause it to suffer severe economic hardship, if not complete financial ruin; under those circumstances, the court excused the party from performance. The doctrine of impracticability is probably the most important excuse doctrine today since it has been adopted in Section 2-615 of the UCC and arguably also in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods. It is also the broadest.

As the scope of contractual excuse doctrines has broadened, some scholars have raised concerns, particularly those who fear that parties may be able to use broader excuse doctrines to evade contractual obligations to which they committed themselves to be bound. This article concurs with their concern. Nonetheless, some scholars may, at times, have misconstrued the courts’ role in adjudicating contractual disputes. For example, some scholars have criticized courts for interfering with the allocation of parties’ risks when they grant contractual excuses.

When a court grants a party an excuse from performance of a contractual obligation, it does not interfere with the contractual allocation of risks, even if the court has misapplied an excuse doctrine and allowed it to be used opportunistically. There is an important difference between a court using its coercive powers to change the risk allocation and a court misapplying an excuse doctrine. See, e.g., Clark P. Gillette, Commercial Rationality and the Duty to Adjust Long-term Contracts, 69 MINN. L. REV 521, 524 (1985); Alan O. Sykes, The Doctrine of Commercial Impracticability in a Second-Best World, 19 J. LEGAL STUD. 43 (1990); George G. Triantis, Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability, 42 U. TORONTO L. J. 450, 451–52 (1992).
allocations in an agreement, and a court declining to use its coercive powers to bind parties to a purported agreement allocating their risks. More to the point of this article, in the former case, the court would undermine liberty because it would use the power of State coercion against at least one of the party’s will; in the latter case the court could never undermine liberty because it would simply be declining to use the power of State coercion. In fact, it would probably be a mistake to presume that courts have run amuck and granted too many excuses when they should not have done so.255

Nonetheless, if parties are concerned about the possibility that courts might misapply an excuse doctrine, they have considerable flexibility to mitigate the risk contractually. Under the principle of party autonomy,256 parties are free to contract around any of the default rules or doctrines that would otherwise apply to their agreement, except, of course, for those such as the doctrine of good faith or fair dealing requirements that are usually considered integral to any reasonable bargain.257 In fact, the implication is that if parties are aware of the rules and doctrines that courts will apply to their agreement and they do not expressly waive or modify them, it is their intention to contract under them.258 The implication is just as strong for excuse doctrines that might apply to the parties’ contract as it is for any other contract rules or doctrines.259 Thus, if a court does apply the doctrine of impracticability to a contract between parties who understood their contractual rights and obligations at the time they made their agreement, the court’s decision is impliedly made under the terms of the parties’ bargain and in accord

255 If anything, courts may be too reluctant to grant contractual excuses. As Robert Scott has observed, “The most curious aspect of the commercial impracticability cases decided over the past 20 years has been the courts’ steadfast refusal to grant excuse for nonperformance despite the apparent invitation to do so in the Uniform Commercial Code and the Second Restatement.” Scott, supra note 253, at 2006 n.1.
256 The principle is reflected in UCC § 1-302 on “Variation By Agreement,” as well as the United Nations Convention on Contracts for the International Sale of Goods, Article 6. U.C.C. § 1-302 (AM. LAW INST. & UNIF. LAW COMM’N 2015); 1 U.N. Convention on Contracts for the Int’l Sale of Goods vi, Ch. 1, Art. 6 (1980) (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).
257 See, e.g., U.C.C. §1-320(b) (AM. LAW INST. & UNIF. LAW COMM’N 2015) (“The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement.”).
259 Smythe, supra note 103, at 264.
with their intent and will. \textsuperscript{260} Even if courts inadvertently apply an excuse doctrine when they should not, that is a risk that the parties bargained for at the time of contracting. In other words, as long as the parties are sophisticated enough to understand their rights and obligations at the time they contract, courts do not interfere with their contractual allocation of risks by applying a contract excuse doctrine; on the contrary, they actually comply with the parties’ allocation of risks.

In any case, it seems unlikely that courts commonly misapply excuse doctrines. The doctrine of impracticability, for example, is normally applied using a two pronged test. \textsuperscript{261} Under the most persuasive interpretation of the test, courts will grant an excuse only if the circumstances giving rise to the impracticability claim were reasonably unforeseen at the time of contracting and if the party under the obligation would suffer a severe economic hardship if it was required to perform. \textsuperscript{262} If a party succeeds with an impracticability claim under the test, it seems doubtful whether it could have truly intended to commit to any of the excused obligations, at least under the circumstances. \textsuperscript{263} For one thing, it is difficult to understand how a party could have truly agreed to perform an obligation under circumstances that were not reasonably foreseeable at the time of contracting. Moreover, it is equally difficult to understand how a party could have truly agreed to perform an obligation under any foreseeable circumstances that would cause it to suffer such a severe economic hardship, especially since the parties could have waived the application of the impracticability doctrine under those circumstances.

Excuse doctrines are another double-edged sword. On the one hand, if they are applied when they should not be, they allow a party to evade an obligation that it agreed to perform, thus facilitating opportunism; on the other hand, if they are not applied when they should be, then a court enforcing the contractual obligations uses the State’s power of coercion against a party without the party’s consent and against the party’s will. As with the doctrine of unconscionability, however, courts’ errors will have more adverse effects on liberty when they result in mistaken contractual enforcements than when they result in mistaken contractual excuses. When a court grants an excuse to a party it does not thereby exercise State coercion; it merely declines to use the power of State

\textsuperscript{260} Id.
\textsuperscript{261} Id. at 236.
\textsuperscript{262} Id.
\textsuperscript{263} Barnett, supra note 14, at 318.
coercion to compel the party to perform. When a court declines to grant an excuse to a party that did not, under the circumstances, truly intend to be bound to its performance, the court does exercise State coercion, and it does so against the party’s will. If the primary purpose of the State is to protect liberty, then there is an important role for the doctrine of impracticability in modern contract law.

D. Public Policy

The analysis in this article is premised on a definition of liberty that includes a respect for individuals’ “private spheres”—that is, realms of personal autonomy and privacy within which individuals should be free from government intrusions. This raises inevitable questions about what rights and freedoms should be included within individuals’ private spheres. Complete answers to those questions are beyond the scope of the article, but the reference to individuals’ spheres of private autonomy here is meant to include at least the rights and freedoms that individuals enjoy under all applicable constitutions and statutes. Of course, there will always be debate about the scope of individual rights and freedoms.\(^\text{264}\) For the sake of the present analysis, under United States law individual freedoms may be considered to be at least as broad as the full “penumbra” of rights and freedoms that individuals enjoy against the State under federal and state constitutions and statutes, as well as any of the judicial decisions that interpret them.\(^\text{265}\)

Setting aside debates about the scope of the rights protected within individuals’ private spheres, if one accepts the premise that these are rights the State may not intrude upon, there are some clear implications for contracts. If liberty is to advance, courts should refrain from enforcing agreements that impinge on individuals’ private spheres.\(^\text{266}\) This means that if an agreement between two parties creates an obligation that impinges on the rights or freedoms within an individual’s private sphere, a court should not enforce the obligation. If a court enforced the obligation it would thereby use the power of State coercion

\(^{264}\) As a general matter, it seems obvious that any serious libertarian should want individual rights and freedoms to be defined as broadly as possible.


\(^{266}\) See Smythe, supra note 7, at 51–58 for a related discussion of contract with lifestyle covenants.
to impinge on rights and freedoms that, as a matter of law, are supposed to be free from State impingement or interference.\textsuperscript{267} As a general matter, court enforcements of contractual rights and obligations are not considered “State action” and are thus usually beyond the reach of constitutional constraints.\textsuperscript{268} But if an agreement does create an obligation that impinges on rights or freedoms that an individual should enjoy free from State intrusion, the agreement should not be enforced as a matter of contract law, even though it can be enforced as a matter of constitutional law.\textsuperscript{269}

As a general matter, “contracts against public policy” are not enforceable.\textsuperscript{270} If the advancement of liberty is to be embraced as the most fundamental purpose of the State, an agreement that would, if enforced by a court, impinge on rights and freedoms that are protected against State intrusion should not be enforced as a matter of public

\textsuperscript{267} Id.

\textsuperscript{268} As Erwin Chemerinsky has observed, the United States Supreme Court has generally limited the definition of State action under the State action doctrine to acts undertaken by the executive and legislative branches. CHEMERINSKY, supra note 6, at 507–27. Thus, actions undertaken by the judicial branch, including court enforcements of private legal rights, are generally not considered State acts under the State action doctrine. Id. The most important exception is Shelley v. Kramer, in which the United States Supreme Court held that “action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment.” Shelley v. Kraemer, 334 U.S. 1, 14 (1948). Shelley, however, was an exceptional case involving a challenge against racially restrictive covenants. The Supreme Court has not followed Shelley in other cases and has generally not treated other court actions in other cases as State action. CHEMERINSKY, supra note 6, at 528.

\textsuperscript{269} Although courts are usually not considered State actors under the State action doctrine, they are still State actors in the common sense of the term. As Professor Chemerinsky observed, “[T]here seems little doubt that judges are government actors and that judicial remedies are state action.” CHEMERINSKY, supra note 6, at 527.

\textsuperscript{270} Juliet P. Kostritsky, Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory, 74 IOWA L. REV. 115, 117 n.4 (1988). The term “contracts against public policy” is confusing because a contract is a legally enforceable agreement and an agreement against public policy is not enforceable. The term is nonetheless an established idiom of American legal language. Moreover, it defines an established principle of American contract law. For example, the RESTATEMENT (SECOND) OF CONTRACTS, § 178(1) (AM. LAW INST. 1981) states:

178. When a Term is Unenforceable on Grounds of Public Policy
(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(Emphasis added.) See David Adam Friedman, Bringing Order to Contracts Against Public Policy, 39 FLA. ST. U. L. REV. 563 (2012), for a recent discussion and survey of “contracts against public policy.”
policy. It is easy to provide some examples of agreements that impinge on individual rights and freedoms that are protected against State intrusion:

(1) lifestyle covenants in an employment agreement that forbid a “non-ministerial” employee from having an abortion or marrying a person of the same sex;  
(2) an agreement between a gestational surrogate mother and another individual that obligated the mother to have an abortion;  
and 
(3) an agreement between neighbors not to post constitutionally permissible political signs during a political campaign.  

271 There is a “ministerial exception” that exempts religious organizations from anti-discrimination statutes that would otherwise prevent them from enforcing many obligations under lifestyle agreements. Since the ministerial exception arises as a matter of constitutional law, it arguably takes certain rights and freedoms outside the scope of individuals’ private spheres. See Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999). As the term suggests, the ministerial exception applies to an employee who qualifies as a “minister” within the religious organization. See Smythe, supra note 7, at 52 for a discussion of the ministerial exception. 

272 Lifestyle covenants and morals clauses have been used in some employment agreements since at least the middle of the twentieth century. They have been prevalent in the sports and entertainment industries. Some important cases arose during the McCarthy era, when film directors, writers, and actors were alleged to have violated morals clauses through their political associations. See, e.g., Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 87–88 (9th Cir. 1957); Twentieth Century–Fox Film Corp. v. Lardner, 216 F.2d 844, 847–48 (9th Cir. 1954); Loew’s, Inc. v. Cole, 185 F.2d 641, 644–45 (9th Cir. 1950). Some prominent recent cases have involved teachers at religious schools who were terminated for making lifestyle or moral decisions that violated the schools’ religious principles, such as using in vitro fertilization or marrying a person of the same sex. See Smythe, supra note 7, at 51–58. 

273 For a discussion of a recent case, see Katie O’Reilly, When Parents and Surrogates Disagree on Abortion, THE ATLANTIC (Feb. 18, 2016), http://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323. As O’Reilly explains, a “non-gestational” surrogate is one who is also the genetic parent of the child; a “gestational” surrogate, on the other hand, is not the genetic parent of the child and thus serves only as a surrogate for the gestation of the embryo. The legal issues surrounding such cases have not been fully settled, but it seems clear that the surrogate’s sphere of personal autonomy and privacy should include the sole right to decide whether to have an abortion. For a discussion of a case in which the surrogate’s autonomy was initially challenged, see Elizabeth Cohen, Surrogate Offered $10,000 to Abort Baby; CNN (March 6, 2013), http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/. 

274 The legal implications of agreements to restrict speech raise many nuances and have not been fully resolved. See Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 344–45 (1998). As Professor Garfield observes, a constitutional challenge against an agreement to restrict speech is difficult because it first requires proving that the court enforcement would involve State action and then requires proving that the party challenging court enforcement did not waive her First Amendment rights when she made the agreement. Id. at 349–58. There are obviously many agreements to restrict speech that should be enforceable, such as those governing trade secrets.
If a government enacted a statute that forbid an individual from having an abortion or marrying a person of the same sex, or required a surrogate to have an abortion, or forbid the posting of a constitutionally permissible political sign, a court would be obligated not only to decline to enforce the statute but also to declare it unconstitutional. As a matter of public policy, courts should decline to enforce an agreement that creates restrictions or obligations that impinge on the rights and freedoms within an individual’s private sphere for the same reason that they would decline to enforce a government statute that impinging on the same rights and freedoms.  

This does not mean that the State should prohibit agreements between individuals that create restrictions or obligations that impinge on rights and freedoms within their private spheres. Unless an agreement obligated one or more of the parties to engage in coercion of some kind, making it illegal would implicate the State in using its powers of coercion to restrict liberty.  

For example, if a clause in a surrogacy agreement requires the surrogate to have an abortion if the fetus shows signs of Down syndrome, that agreement should not be legally enforceable. A court should not use the power of State coercion to force a woman to have an abortion against her will, even if it was her intent and will to commit herself to having an abortion under those circumstances at the time she made the agreement. But the State has no business enacting a statute that regulates surrogacy agreements between private individuals. Liberty requires that individuals should be free to make whatever private surrogacy agreements they like, even if the agreements are not legally enforceable. If the surrogate voluntarily aborts a fetus with Down syndrome, that is her right; if she...
chooses not to abort the fetus that is her right too.

There is thus an important role in contract law for the principle that agreements against public policy will not be enforced. If liberty is to be advanced, courts should refrain from enforcing agreements that impinge on rights or obligations within individuals’ spheres of personal autonomy and privacy. Enforcing such agreements would impinge on liberties that are protected against State action under federal or state constitutions and statutes. While the State action doctrine does not usually extend to court enforcements of private agreements, the public policy rationale for the constraint on the exercise of State coercion does. Of course, the full penumbra of rights and freedoms established under federal and state constitutions and statutes is complex and sometimes uncertain. The logical test for whether the public policy restraint should apply is whether a legislature could use the power of State coercion to force an individual to perform or refrain from performing in exactly the same way that the agreement ostensibly requires. In general, if a legislature could force the individual’s performance or forbearance without violating any constitutional or statutory constraints, then the agreement should be enforced; if the legislature could not force the individual’s performance or forbearance without violating some constitutional or statutory constraint, then the public policy restraint should apply.

IV. CONCLUSION

This article outlines what might be called a minimalist—or Hayekian—libertarian theory of contracts. To that end, it defines liberty to require that individuals be as free as possible from the exercise of coercion by others, and that they have a sphere of personal autonomy and privacy within which they are free from intrusions by the State. Coercion is defined to mean the control of the environment or circumstances of a person to the extent that she is forced to serve the ends of another; that definition obviously includes the use of force or the threat of force. If the fundamental purpose of the State is to advance this minimalist conception of liberty, the most compelling justification for having contract laws at all is because they are necessary to avoid interpersonal conflict and violence. If such is the case, the need for private laws, including contract laws, was greater in primitive societies than it is in highly developed ones like the United States and other developed nations today.

Modern contract theorists have reformulated contract law around
the need to respect the intent and will of autonomous, free individuals and the need to facilitate exchange in a modern, capitalist economic system. For example, both the theory of contractual consent and the consideration requirement serve to advance liberty. Each operates as a separate screen, limiting the range of private agreements that may be enforced using State coercion. The consent theory filters out agreements when parties did not intend to make legally binding commitments and the consideration requirement filters our agreements in which there is no evidence of an exchange. Modern contract theories also imply that courts should respect individuals’ autonomy to make agreements that are not legally enforceable, such as those that are purely relational.

Relational agreements are quite common and parties are often able to enforce them without the use of the courts. To the extent that they limit reliance on the courts and thus the use of State coercion, they should be encouraged. As a general matter, they can be facilitated by contract laws that (1) have a well-defined statute of frauds or other threshold requirements for legally enforceable agreements that makes it easier for parties to opt out of contractual enforcement; (2) allow the use of parol evidence in interpreting ambiguous or incomplete contracts so that parties that wish to rely primarily on relational enforcement mechanisms can still use contractual safeguards without having to go to the expense of negotiating and drafting detailed, written agreements; (3) allow courts to use mercantile practices and customs in interpreting and supplementing parties’ agreements, which also helps parties to avoid unnecessary negotiating and drafting expenses; and (4) strictly enforce ADR clauses that parties clearly intended to commit themselves to, with only a narrow scope for judicial review.

The analysis suggests that other contract doctrines, such as unconscionability and impracticability, may also help militate against the inappropriate exercise of State coercion. The doctrines of unconscionability and impracticability help to prevent contractual enforcements when it is not clear under the circumstances that parties truly intended to commit themselves to a contractual obligation. They thus help to prevent the use of State coercion to force parties to provide performances or engage in forbearances that they did not truly consent to. As a general matter, the most sophisticated party to the transaction—the one with the greatest economic resources and legal acumen—typically drafts the written terms of a contract. Contract doctrines such as unconscionability and impracticability may, therefore, help to prevent the stronger parties in transactions from using the power of State
coercion against the weaker parties without their consent and against their will.

The doctrine that courts should refrain from enforcing agreements that are against public policy may play a more special role in limiting the inappropriate exercise of State coercion. Even a minimalist conception of liberty, such as the one Hayek provides, recognizes that individuals should have spheres of personal autonomy and privacy within which they are free to speak their minds, associate with whomever they choose, and do whatever they like free from any State interferences or restraints. In the United States, individuals’ private spheres should correspond at the least to all the rights and freedoms that they enjoy under all applicable federal and state constitutions and statutes. In fact, most libertarians would probably prefer to define the full scope of individuals’ rights and freedoms even more broadly than that. Although court enforcements are State action in the literal sense, they are not State action under the State action doctrine for the purpose of applying most constitutional constraints against State interferences with liberty. The “contracts against public policy” doctrine provides a way for courts to constrain themselves by declining to enforce agreements that purport to create individual restraints or obligations that would be unconstitutional if they were created under a government statute.

Since this article began with a quote by Friedrich Hayek, it is fitting that it should also end with one. Many of the most prominent contributions to modern contract theory, including those by some of the neo-formalist scholars that have been discussed in this article, have drawn on conventional economic rationality assumptions to offer normative prescriptions about contract rules and doctrines. This was in stark contrast to Hayek’s approach, which was always to make liberty the cornerstone of his analysis. One wonders what Hayek would have thought about modern contract scholarship, given that he wrote:

[R]ationalistic . . . theories . . . [are] . . . necessarily based on the assumption of the individual man’s propensity for rational action and his natural intelligence . . . . It would hardly be unjust to say that the rationalistic approach is . . . opposed to almost all that is the distinct product of liberty and gives liberty its value. Those who . . . cannot conceive of anything serving a human purpose that has not been consciously designed are almost of necessity enemies of freedom.278

278 Hayek, supra note 1, at 60–61.
Book Review

THE PREMATURE ANTI-FASCISTS

William E. McSweeney∗

“Men of my generation . . . have had Spain in our hearts. . . . It was there that they learned . . . that one can be right and yet be beaten, that force can vanquish spirit, and that there are times when courage is not rewarded.”1

—Albert Camus

Far from being rewarded for their courage and their prescience, the American exemplars of both qualities who fought for the Spanish Republic were scorned by their countrymen upon their arrival in New York City on December 15, 1938.2 Many among their number, you see, were (oh-my-God!) Communists.3 And the war they had fought in would soon thereafter be so dimly remembered—if at all—that scant years later, some veterans would be told that they looked too young to have fought in The Spanish-American War!

Only weeks before their arrival in New York, they, along with 2,500 brothers—remnants of the International Brigades—on the eve of their leaving Barcelona, had paraded before 300,000 cheering Spaniards.4 Parade over, they drew up in formation in a central square, to be thanked by both Prime Minister Juan Negrín and the country’s greatest orator, Dolores Ibarruri, “La Pasionaria” (The Passion Flower). “Mothers! Women!” she began,

1 ADAM HOCHSCHILD, SPAIN IN OUR HEARTS: AMERICANS IN THE SPANISH CIVIL WAR, 1936–1939 xvii (2016) [hereinafter SPAIN].
2 See id. at 348.
3 Id. at xix.
4 See id. at 335.
When the years pass by and the wounds of war are stanched . . . when pride in a free country is felt equally by all Spaniards—then speak to your children. Tell them of the International Brigades. Tell them how, coming over seas and mountains, crossing frontiers bristling with bayonets . . . these men reached our country as crusaders for freedom. They gave up everything, their loves, their country, home and fortune . . . they came and told us: ‘We are here, your cause, Spain’s cause is ours. It is the cause of all advanced and progressive mankind.’ Today they are going away. Many of them, thousands of them, are staying here with the Spanish earth for their shroud.5

Speaking directly to the soldiers, she added,

Comrades of the International Brigades! Political reasons, reasons of state . . . are sending you back, some of you to your own countries and others to forced exile. You can go proudly, You are history. You are legend. You are the heroic example of democracy’s solidarity and universality. We shall not forget you, and, when the olive tree of peace puts forth its leaves again, mingled with the Spanish Republic’s victory—come back!6

That victory wasn’t to be. In 1931 a democracy had been established in Spain—the King driven out; the Popular Front having won a majority in Parliament and thereafter having instituted social reform; the army having been brought within new constitutional bounds.7 In reaction to this upsetting of the old, established order—that which had favored Spain’s 1%—Francisco Franco and his Nationalist (read Fascist) Army in 1936 mounted what was to be a three-year rebellion against the duly-elected Republicans, whose conclusion saw the Nationalists victorious.8

How could that army not prevail? Hitler and Mussolini provided personnel and materiel to the Nationalists; our own Texaco Oil Company provided fuel to them—on credit. (Years later, in oil-industry circles, the joke was told that the first person to effectively be issued a Texaco credit card was Francisco Franco).9 The Western powers—England, France, The United States—remained neutral.10 Edmund Burke’s remark was never truer, never more applicable: “The only thing necessary for the triumph of evil is for good men to do nothing.”11

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5 SPAIN, supra note 1, at 336–37.
6 Id. at 337.
7 See id. at 27.
8 Id. at 27–49.
9 SPAIN, supra note 1, at 29–30, 169–70, 174.
10 Id. at 44–46.
But the good men and women profiled in Adam Hochschild’s outstanding “Spain In Our Hearts” did everything—sacrificed, fought, died—for a cause they believed in: universal justice, equality for all, dignity for all. They were of course influenced by the Soviet Union and its promise of egalitarianism. Many of them spent time there during the 1920s and 1930s, animated by that promise. 12 They wanted to change the world for the better, but soon found that Joseph Stalin cynically voided all promises, betrayed the believers in democracy. Stalin, with his show trials, his purges of perceived dissenters from state—his—policy, his perfidy in signing the non-aggression pact with Hitler—Stalin was scarcely an exemplar of decency. 13 His cynicism and opportunism were manifested in Spain.

Ostensibly on the side of the Republicans, Stalin did little for them—certainly little when compared to that support given to Franco by Hitler and Mussolini. And what little he offered came at an extortionist price. He infiltrated the Republican cause with Soviet “advisers”—secret police—who duly reported to him any combatants that were free-thinkers, loyalists to the cause and to their comrades, disregaders of the orthodox party line from Moscow; he had many of the latter executed on the battlefield; and, after recalling to Moscow those of his agents whom he saw as imperfectly adhering to his dictates, he executed them as well. 14 His actions, then, were obstructionist, counter-productive to the Republican cause; his words were vaporous—all promise, scant fulfillment. To Stalin, the Spanish theater-of-war was simply theater, pretense. Duplicitously, he in fact wanted the Republicans to lose, so that he could be heard by all the world to say, in effect, “There, look at the evil wrought by Mussolini and Hitler!” 15 Those Fascists, then, had their counterpart in the person of Stalin. All three personified evil.

Goodness was personified by an array of idealists, some of them known, many of them little-known. All went to Spain, all contributed to the Republican cause: novelists John Dos Passos, 16 Ernest Hemingway, 17 Andre Malraux, 18 George Orwell; 19 journalists Louis

12 Id. at 11–12.
13 See id. at 18, 85, 188–89, 233–34, 349.
14 See SPAIN, supra note 1, at 188–89, 233–34.
15 Id. 46–47.
16 Id. at 10.
17 Id. at 141–43.
18 SPAIN, supra note 1, at 33.
19 Id. at 64–65.
Fischer, Martha Gellhorn, Herbert Matthews; polemicists Milly Bennet and Marion Merriman; warriors Edward Barsky, Bob Merriman, Phil Schachter.

But to so label these persons is to reduce them, to disregard the merging that occurred within many of them. Edward Barsky was a medical doctor, who alternated between suturing and soldiering. Orwell was a memoirist (“Homage To Catalonia”), but he was also a combatant, until a bullet through his neck invalided him home. Malraux was a novelist (“Man’s Fate”), but he was also a pilot who organized and flew with a squadron of volunteer pilots from other countries. “For Whom The Bell Tolls” was the most famous novel dealing with the war, but its author did more than bear witness to it: the Hemingway who as a teenager had served as an ambulance driver during The Great War easily evolved into the mature Hemingway whose instinct to succor the wounded still obtained. “Beneath his swagger,” Hochschild writes,

was a man who cared deeply. He talked with U.S. Ambassador Claude Bowers about saving American medical staff and the men they were looking after in the event of a Franco victory, in which he feared the wounded would be slaughtered and the nurses raped—as had already happened when the Nationalists captured Republican military hospitals. He found out how many American wounded were in which hospitals and began planning which ports they could be evacuated from. He and several reporter friends also assured the ambassador that a French hospital had agreed to care for Americans too severely wounded to travel all the way home.

In the event, Hemingway’s proposed efforts would be precluded for reasons of state. Most of the Brigades’ volunteers had by now been wounded or killed—the latter “with the Spanish earth for their shroud”—and the Communist International, or Comintern, through

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20 Id. at 33–34.
21 Id. at 159.
22 SPAIN, supra note 1, at 151.
23 Id. at 156.
24 See id. at 120–21.
25 Id. at 122–23.
26 See SPAIN, supra note 1, at 49.
27 Id. at 221–22.
28 See, e.g., id. at 122–23, 286, 288.
29 Id. at 191–95.
30 SPAIN, supra note 1, at 33.
31 Id. at 300–01.
which the malignant, spectral Stalin controlled Communist parties around the world, had cancelled all recruiting.32 Fearful of hearing an imminent Republican death rattle, negotiating from weakness, Prime Minister Juan Negrin announced that the Internationals would be sent home; his hope was that this action—this gamble—would be met with the democracies’ insistence on Franco’s removal of Hitler’s and Mussolini’s soldiers and airmen.33 All members of the International Brigades were subsequently withdrawn from combat and ordered to leave Spain.34 The bright Republican dream had ended; the rainbow had faded.

Fascism thrives on acquiescence—something that only the foreseeing Winston Churchill intuitively knew. The Brigades left; the Western powers brought no pressure upon Franco, who would prevail and subsequently rule Spain as a police state for the next 36 years.35 Franklin Delano Roosevelt came to regret that the Western democracies—chief among them, his own—had turned their backs on the Republican cause, and he would characterize our arms embargo to the Republicans as “a grave mistake.”36

Those who served the Republican cause had a deeply ingrained sympathy for the underdog; their struggle in Spain wasn’t a one-off, a résumé-builder. Indeed, many of them continued in their fight against fascism. Medical doctor Edward Barsky would be active in social causes for all of his life, and a decade after the fall of Spain, he paid the exorbitant price exacted for his activism—a victim of the zeitgeist of his time.37

For, in the 1950s the Cold War was at its coldest: the Soviets had blockaded East Berlin;38 they had detonated their first atomic bomb;39 China, formerly an American ally, had fallen to communist

32 Id. at 332.
33 Id.
34 Spain, supra note 1 at, 332.
35 Id. at 347.
36 Id. at 353.
revolutionaries, communist North Korea had invaded non-communist South Korea; Americans had been arrested for spying for the Soviets. Consequently, our nation easily slid into paranoia, tacitly giving leave for the formation of committees—representatively, the Motion Picture Alliance for the Preservation of American Ideals and the House Un-American Activities Committee—whose ostensible purpose was to safeguard “American” values. From witnesses these committees demanded purity, disallowed pluralism; demanded orthodoxy, disallowed heterodoxy. Perniciously, the upshot of their hearings was the disabling of numerous Americans—communists, sympathizers, and neither—from pursuing their respective professions.

And such was the reactionary spirit of the epoch that the historically progressive state of Wisconsin produced Senator Joseph R. McCarthy, who spoke of possessing a list—in the event, never proffered—of 205 communists within the State Department, who defamed its Secretary, Dean Acheson, as having communist sympathies; who labeled as a traitor Secretary of Defense George C. Marshall.

This, then, was the political atmosphere that prevailed when Edward Barsky drew the attention of the House Un-American Activities Committee. At the time chairman of the Joint Anti-Fascist Refugee Committee, which lobbied against Franco and provided aid to those who had escaped Spain, Barsky was summoned before HUAC and ordered to

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45 See generally supra notes 43–44.
46 Id.
50 Spain, supra note 1, at 355.
give the names of those persons. He balked, knowing that providing such names could put those so aided and their families at risk. He was consequently sentenced to six months in prison for contempt of Congress, and was stripped of his New York State medical license.

Seeking to regain his license, Barsky appealed to the United States Supreme Court, which ruled against him. But one associate justice on The Court resisted paranoia. In his dissent, William O. Douglas, an unreconstructed New Dealer, underscored the lunacy of conjoining political conviction with medical competence: “When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us.”

Barsky would regain his license and continue his practice of medicine. He would continue, as well, his practice of social activism unto our own time, organizing doctors and nurses and, with them, traveling to Mississippi in the “Freedom Summer” civil-rights campaign of 1964.

Edward Barsky had many spiritual sisters and brothers, one of whom, though not mentioned by name, is anonymously alluded to toward the end of Hochschild’s book. The author writes that “Almost all of the 2,800 Americans who took part in the Spanish Civil War are gone now; only one is known to be alive.” That person was Delmer Berg, who died not long after the publication of “Spain,” specifically on 28 February 2016, at the age of 100. Delmer Berg, an inveterate anti-Facist—warrior in the Lincoln Brigade, warrior in the U.S. Army during World War II, his heroism the subject of a posthumous tribute by Senator John McCain—Delmer Berg’s life could itself form a book.

As it stands, “Spain In Our Hearts” is wonderful, exhaustively

51 Id.
52 Id.
53 Id.
55 Barsky, 347 U.S. at 474 (Douglas, J., dissenting); Spain, supra note 1, at 355.
57 Spain, supra note 1, at 365.
58 Id.
researched, elegantly written. Yet all things under our sun, no matter their worth, can be enhanced. My hope is that Adam Hochschild’s good work enjoys many subsequent editions; it merits them. My further hope is that the virtuous life of Delmer Berg—“I didn’t know a damn thing politically . . . I wanted to do something to help the Spanish people”61—can be incorporated into all such editions; it can only serve to enhance an already noble effort.

I nonetheless emphasize that Delmer Berg’s exclusion from the current edition of “Spain” in no way diminishes it. It stands as a worthy testament to those who fought a worthy fight. Most impressive, and consistent with the persons he profiles, Hochschild eschews power-worship, avoids glorifying only the famous. He instead celebrates the everyman, which, in his compelling book, is the extraordinary man—and woman.

The final pages of “Spain” tell of those who suffered the essential tragedy, the tragedy of loss. The word “closure” has become trite and meaningless. But there was comfort, consolation, finally, for two women whose loved ones had died in Spain. Republican polemicist Marion Merriman, after 50 years, was contacted by a Spaniard who had witnessed Bob Merriman’s execution at the hands of the Nationalists.62 She drew solace from the fact that husband Bob, consonant with the man she knew, had shown leadership and heroism in his final hours.63 And in 2012 Rebecca Schachter, whose eloquent words will form a fit conclusion to this review, traveled to Brunette, Spain, where Phil Schachter had died.64 There, she ascended to the top of a scarred ridge, where

there was an old bombed-out brick structure, the only one around. . . . Here, kneeling down touching the earth, I felt very close to my Uncle Phil, so I spoke to him. . . . I told him that his coming to Spain with the Abraham Lincoln Brigade, his willingness to give everything he had believing it could make the world more fair, more free—that this volunteering, hopeful spirit was a source of profound inspiration. Then I paused, and somehow I managed to say kaddish for this son, brother, uncle. All this brought up enormous emotion. It hardly seemed just my own, or my family’s. [It] felt part of a universal sorrow for the human struggle that played out in Spain during those dark days that

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62 SPAIN, supra note 1, at 367–69.
63 Id.
64 Id. at 370.
were just the beginning of the trauma and tragedy that overcame all of Europe and throughout the world. Before leaving, I placed some stones I brought from home on the window wall of the brick structure.\textsuperscript{65}

\textsuperscript{65} \textit{Id.} at 370–71.
I. INTRODUCTION

The current immigration crisis facing the courts of the United States can be described in one word: crowded. The dockets for courts across
the country have continued to grow in recent years, with no sign of slowing down as civil wars and gang violence have broken out around the world, leading to an influx of immigrants into the United States.\(^1\) At the time of this writing, the current total number of pending cases before U.S. immigration courts is 542,411, and courts have struggled with how to streamline this process for both immigrants and the government.\(^2\)

Regardless of whether an immigrant has entered into the United States legally or illegally, he or she may still be subject to removal. The Department of Homeland Security (“DHS”) may issue an order of removal against an immigrant for a variety of reasons. The U.S. immigration laws allow a respondent (an immigrant in removal proceedings) to apply for relief from removal. Common forms of relief from removal include asylum, withholding of removal, and two specific methods under the United Nations Convention Against Torture (“CAT”): withholding of removal and deferral of removal.\(^3\)

This Note focuses on respondents who are subject to removal because they have been convicted of a crime of moral turpitude, a crime relating to controlled substances, or a crime of terrorism under 8 U.S.C. § 1182(a)(2), § 1227(a)(2)(A)(iii), (B), (C), (D), or § 1227(a)(2)(A)(ii).\(^4\) Because of their convictions, these respondents are barred from applying for all but one of the above methods of relief from removal. The sole method of relief for this group of respondents is deferral of removal under the CAT.

\(^*\) J.D., May 2017, Quinnipiac School of Law; B.B.A., Belmont University. Thank you to those involved throughout the entire note-writing process: to Dean Neal Feigenson and Professor William Dunlap for their feedback and support in developing this piece; to the entire staff of Volume 35 for their diligent work in the final edits and comments; and lastly to my parents, brother, sister, and Nia Campinha-Bacote, for their support throughout the past three years.


\(^3\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT”), Dec. 10 1984, 1465 U.N.T.S. 85.

\(^4\) The crimes covered in § 1182(a)(2) include crimes of moral turpitude and crimes relating to controlled substances, and § 1227 includes convictions of similar offenses, with the addition of aggravated felonies, certain firearm crimes, and a section of “miscellaneous crimes.” 8 U.S.C. § 1182(a)(2)(A) (2012); 8 U.S.C. § 1227(a)(2)(A), (B), (C), and (D) (2012). Such miscellaneous crimes that can render a respondent removable pursuant to § 1227 include offenses of espionage, treason and sedition, or a violation of the Military Selective Service Act. § 1227(a)(2)(D).
All initial removal proceedings take place before an Immigration Judge ("IJ"). Respondents are entitled to appeal from an IJ’s unfavorable ruling to the Board of Immigration Appeals ("BIA"). The federal circuit courts have split, however, on the following question: May a criminal respondent obtain judicial review of a BIA affirmation of an IJ denial of the respondent’s CAT claim for deferral of removal? The governing law is 8 U.S.C. § 1252(a)(2)(C), which bars judicial review of orders of removal for respondents convicted of a crime covered under one of the statutes listed above. The relevant portion of the statute reads:

(a)(2) Matters not subject to judicial review:  
(C) Orders against criminal aliens – Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.7

A majority of circuits have held that pursuant to § 1252(a)(2)(C), this group of “criminal aliens” may not seek judicial review of denials of deferral of removal under the CAT unless the petition for review involves a constitutional claim or a question of law.8 Most recently, in Ortiz-Franco v. Holder, the Second Circuit became the seventh federal court of appeals to take this position.9 Two circuits, the Seventh and Ninth, have maintained that § 1252 does not bar judicial review of respondents’ claims.10 The Seventh Circuit’s position is that § 1252(a)(2)(C) concerns only “final” orders of removal and that a denial of deferral of removal under the CAT is not technically “final.”11

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6 § 1229a(c)(5); see also, Executive Office for Immigration Review, 8 C.F.R. § 1003.1(b)(2)–(3) (2015).  
8 See infra Part IV(A) and note 79.  
10 Wanjiru v. Holder, 705 F.3d 258 (7th Cir. 2013); Lemus-Galvan v. Mukasey, 518 F.3d 1081 (9th Cir. 2008).  
11 Wanjiru, 705 F.3d at 264.
The Ninth Circuit has held that because decisions regarding deferral of removal under the CAT are always made on the merits, § 1252(a)(2)(C) does not apply to the review of these claims.12

This Note argues that the majority view is the correct interpretation of § 1252(a)(2)(C) based on the plain meaning of the statutory language, the legislative history of the statute, and the policy of streamlining the immigration process, particularly for criminal respondents. Part II begins by explaining the process of removal procedures and the methods of relief, followed by the process of an IJ’s decision and the rights a respondent has to an appeal. Part III discusses the interpretation of § 1252 and its effect on a criminal respondent’s ability to seek judicial review of an unfavorable BIA decision. Lastly, this Note will compare the majority’s interpretation of § 1252 with the interpretations of the Seventh and Ninth Circuits, and discuss why the majority’s reading of the statute is correct. Finally, this Note will argue that either Congress or the Supreme Court should intervene to declare what the proper interpretation of the statute is. Without such a declaration, lower courts will continue to interpret the statute differently, resulting in an unequal application of the law, and consequently an unequal treatment of respondents.

II. AN OVERVIEW OF IMMIGRATION PROCEDURE

A. Removal Proceedings

If the United States Customs and Immigration Service (“USCIS”) determines a respondent is removable for any reason, USCIS serves a “Notice to Appear” to begin removal proceedings against the respondent.13 Many things may render a respondent removable, with the most common grounds for removal including entrance into the United States without admission or parole, conviction of a “crime of moral

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12 Lemus-Galvan, 518 F.3d at 1083.
13 8 U.S.C. § 1229(a)(1) (2012). An issuance of a Notice to Appear means the respondent must appear in a United States Immigration Court. Respondents are not appointed attorneys for removal proceedings—rather, they “may be represented by counsel,” and respondents are given a list of attorneys when served with a Notice to Appear. This list provides the names of attorneys who represent respondents pro bono or for a lower cost. § 1229(a)(1)(E) (emphasis added). An order of removal is synonymous with an order for deportation, as deportation and removal mean the same thing, and this Note uses “removal” in the discussion of the proceedings a respondent faces. Chupina v. Holder, 570 F.3d 99, 104 (1st Cir. 2009); see also § 1229a(c)(2)(A)-(B) (“the term ‘removable’ means . . . [an] alien [who] is inadmissible . . . or deportable . . . “).
The next step in the removal process involves a hearing with an IJ, where the IJ determines whether the respondent is removable. The respondent faces the burden of proving entitlement to admission to the United States “beyond doubt,” or the respondent must prove by clear and convincing evidence of lawful presence within the United States. In removal proceedings, the IJ has full authority to receive evidence, question the respondent or any witnesses, and may make a decision based solely on the evidence at the removal proceeding. Based on the evidence, if the IJ determines the respondent has not met the burden of proof, the IJ issues a notice ordering the respondent to be removed from the United States.

B. Relief from Removal

While a respondent may contest his or her removability in court, the respondent—if ordered removable or conceding removability—can also apply for relief from removal. In doing so, the respondent faces a different burden of proof than required for contesting removability: he or she must prove eligibility for relief and entitlement to the IJ’s favorable exercise of discretion. In using that discretion, the IJ must determine whether the respondent is credible, considering “the totality of the circumstances, and all relevant factors.” The IJ considers the testimony...
of the respondent and any witnesses, as well as country condition reports of the country of removal as proof that it would be unsafe to remove the respondent to that country.\textsuperscript{23}

When a respondent fears torture or persecution upon the return to his or her home country, the respondent may apply for three forms of relief: asylum, withholding of removal, or protection under the CAT.\textsuperscript{24}

1. Asylum

A respondent is eligible for asylum if the respondent proves that he or she meets the definition of a refugee.\textsuperscript{25} Under U.S. law, a refugee is:

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{26}

While an asylum seeker must meet this definition, there remains a difference between someone who is granted refugee status (a refugee) and someone who is granted asylum (an asylee).\textsuperscript{27} While both refugees and asylees meet the legal definition of a refugee, one difference between the two lies within the application procedure.\textsuperscript{28} An individual applies for refugee status while outside the United States.\textsuperscript{29} The United States only permits a limited number of refugees per year, the application process is long, and the individual must actually be invited into the country.\textsuperscript{30} A refugee must receive a referral to the U.S. Refugee Admissions Program (“USRAP”), which begins the application process

\textsuperscript{23}Id.
\textsuperscript{24}Protection under the CAT, a United Nations treaty, is protection sought under U.S. law, as the CAT was implemented into U.S. law and effective as of 1999. See Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.18 (2003).
\textsuperscript{28}Fact Sheet - Asylum and Withholding of Removal Relief Convention Against Torture Protections (hereinafter “Fact Sheet”), U.S. DEP’T OF JUSTICE at 2 (Jan. 15 2009).
\textsuperscript{29}Id.
\textsuperscript{30}8 U.S.C. § 1157(a) (2012).
for individuals seeking refugee status. 31 After an interview, a USCIS officer determines whether the individual is eligible for refugee resettlement, and if the officer makes such a determination, the refugee (and sometimes his or her family) is invited to enter the United States. 32

An asylum seeker applies for asylum while he or she is within the United States or at a U.S. port of entry. 33 To avoid removal from the United States, a respondent can apply for asylum, and if the IJ determines that the respondent meets the legal standard of past persecution or a well-founded fear of persecution, the IJ will grant asylum. 34 A well-founded fear of future persecution is presumed if the respondent can prove past persecution in the country of removal, but this presumption is rebuttable if there is another area of the country in which the applicant could safely relocate, or there has been a change in circumstances within the country of removal, which proves any future persecution is unlikely. 35

While the choice to grant asylum is a matter of the IJ’s discretion, 36 some circumstances mandate the denial of an asylum application. An asylum seeker “convicted by final judgment of a particularly serious crime,” will not receive asylum. 37 The term “particularly serious crime” is rather broad and always changing as a conviction of any aggravated felony is considered a “particularly serious crime,” and 8 U.S.C. § 1158 also grants a great deal of authority to the Attorney General to choose

32 Id.
33 An immigrant enters the United States either legally or illegally. Many individuals not granted one of the limited number of refugee visas may still choose to enter the United States out of desperation, because of conditions in his or her home country. Asylum, U.S. CITIZENSHIP AND IMMIGR. SERVICES, http://www.uscis.gov/humanitarian/refugees-asylum/refugees (last visited Apr. 3, 2017).
34 8 U.S.C. § 1158(a) (2012); Refugees, supra note 31. This process is called “defensive asylum,” because the respondent has been declared removable and he or she is defending their ability to stay within the United States. Had the respondent chosen to apply for asylum before his or her immigration status expired, the respondent would apply for “affirmative asylum,” which typically involves less-adversarial proceedings for the individual, as the respondent in an affirmative asylum case has the opportunity to interview with an asylum officer, who decides whether or not to grant the asylum application; whereas an individual in a defensive asylum case must appear in court before an IJ, and be subject to cross examination by the Department of Homeland Security. For more explanation on the asylum process, see Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 1208.13 (2013).
35 § 1208.16(b)(1)(i)(A)–(B).
36 Meaning, the IJ has the ability to exercise discretion in determining whether the respondent meets the definition of refugee. § 1208.14(a) (2005).
37 § 1158(b)(2)(A)(ii).
which crimes fall into the category of a particularly serious crime.  

2. Withholding of Removal

The second type of relief is withholding of removal. To succeed in a claim for withholding of removal, the respondent faces a different burden of proof than a claim for asylum in that the respondent must prove that it is *more likely than not* that his or her life or freedom is threatened because of the respondent’s race, religion, nationality, membership in a particular social group, or political opinion. To have a successful asylum claim, a respondent must only convince the IJ that the respondent meets the definition of a refugee as listed above—that he or she has faced persecution or has a well-founded fear of persecution—whereas withholding of removal requires a judge to go beyond finding a well-founded fear and find that it is *more likely than not* the respondent’s life or freedom is in danger.

The “more likely than not” standard makes a withholding of removal decision more objective than that of asylum, and consequently more difficult to receive. Similar to asylum, withholding of removal must be denied if a respondent has been convicted of a “particularly serious crime.”

3. The Convention Against Torture

Because of the criminal bars on applications for asylum and

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39 § 1158(a); § 1208.16(b).

40 § 1158(a); § 1208.16(b).

41 For a more detailed explanation of the difference between the granting of asylum status or withholding of removal, see INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987) (stating that withholding of removal “has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation. In contrast, the reference to ‘fear’ in the [INA asylum section] § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien” (citation omitted)).

42 8 U.S.C. § 1231(b)(3)(B)(i)–(iv) (2012). Subsection (b)(3)(B) concludes with a disclaimer stating that any conviction for which a respondent was sentenced to a total of five years of imprisonment constitutes an aggravated felony. The statute continues, “The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.” (Emphasis added). Id.
withholding of removal, a respondent convicted of a “particularly serious crime” may then turn to the CAT, a United Nations treaty to which the United States is a party. Although the United States is a party to the CAT, in order for the Convention to have legal effect, the Senate was required to ratify the treaty through its own legislative action, with the understanding that upon ratification, Articles 1–16 of the CAT would not be self-executing. A violation under a self-executing treaty results in a member country’s immediate response. To avoid such an effect, the United States chose to sign the CAT as a non-self executing treaty, and the U.S. government was responsible for enacting legislation within its national legal system to provide compliance with the CAT. This treaty, and the Senate’s ratification of it was enacted through the Foreign Affairs Restructuring Act of 1998 (FARRA)—which meant that while a respondent may seek relief from removal under the CAT, the respondent is technically seeking relief under the U.S. law that implemented the CAT. This Note, however, will refer to the relief as relief from removal under the CAT.

A respondent may apply for CAT relief pursuant to Article 3 of the Convention, which prohibits any party to the treaty from returning an individual to a country where “there are substantial grounds for believing that he would be in danger of being subjected to torture.” Within the CAT itself, there are two types of relief. The first is withholding of removal, which is different from the withholding of removal under U.S. law previously discussed. Withholding of removal under the CAT “prohibits returning aliens to a specific country where they would face torture.” Withholding of removal is the CAT’s default method of relief, unless the respondent is subject to a “mandatory denial of withholding of removal.” Similar to the automatic denials of applications for asylum and withholding of removal under U.S. law, if the respondent has been convicted of a particularly serious crime, the IJ

43 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85.
44 Treaties And Other International Agreements: The Role of the United States Senate, CONGRESSIONAL RESEARCH SERV. LIBRARY OF CONGRESS at 290 (Jan. 2001).
45 See BLACK’S LAW DICTIONARY 1566 (10th ed. 2014).
46 See id.
48 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, Dec. 10 1984, 1465 U.N.T.S. 85.
49 Fact Sheet, supra note 28.
50 § 1208.16(c)(4).
must also deny an application for withholding of removal under the CAT.\textsuperscript{51}

The second type of relief under the CAT is deferral of removal, the relief at issue within this Note.\textsuperscript{52} Even with criminal convictions that might otherwise bar a respondent from applying for asylum or withholding of removal under U.S. law or the CAT, a respondent fearing torture is still permitted to apply for one form of relief: deferral of removal under the CAT.

To apply for relief under the CAT, the respondent must first prove that relief under the CAT is proper.\textsuperscript{53} To prove relief under the CAT is proper, the respondent must prove it is more likely than not that he or she will be subjected to torture upon return to his or her home country.\textsuperscript{54} In making the decision as to whether it is more likely than not that the respondent will be subjected to torture, the IJ considers any evidence of past torture, the possibility of relocation to a safer region of the country, evidence of “flagrant” human rights violations, or any other evidence pertaining to the conditions of the country of removal.\textsuperscript{55} If the respondent meets that burden, and the IJ determines it is more likely than not that the respondent will be subjected to torture in the country of removal, relief under the CAT is proper.\textsuperscript{56}

If relief is proper, the IJ then determines which form of relief (withholding or deferral of removal) under the CAT is appropriate.\textsuperscript{57} As discussed, when a respondent’s criminal convictions bar withholding of removal under the CAT, the respondent’s sole hope for relief from removal lies within deferral of removal under the CAT.\textsuperscript{58}

While deferral of removal protects a respondent from potential torture in the country of removal, there are disadvantages to this type of relief. Most significantly, if granted deferral of removal under the CAT, the respondent will not receive any type of permanent immigration status within the United States.\textsuperscript{59} Deferral of removal under the CAT is a less

\textsuperscript{51} § 1208.16(d)(2). This subsection refers to “241(b)(3) of the Act,” which was codified at 8 U.S.C. § 1231(b)(3) (2012), which denies withholding of removal based on a conviction of a particularly serious crime.
\textsuperscript{52} § 1208.16(c)(4).
\textsuperscript{53} Id.
\textsuperscript{54} § 1208.16(d)(2).
\textsuperscript{55} § 1208.16(c)(3)(i)–(iv).
\textsuperscript{56} § 1208.16(c)(4).
\textsuperscript{57} Id.
\textsuperscript{58} § 1208.17(a) (2009).
\textsuperscript{59} § 1208.17(b)(1)(i).
secure form of protection as compared to withholding of removal under the CAT because “[d]eferral of removal can be terminated more quickly and easily if an alien no longer is likely to be tortured in the country of removal or if the U.S. government receives assurances that the alien will not be tortured if returned.”\textsuperscript{60} This means that if a respondent is granted deferral of removal under the CAT and it is later determined that the country of removal is now safe for the respondent to return, an IJ can terminate the deferral of removal, and USCIS will remove the respondent from the United States.\textsuperscript{61} Notably, if the respondent is granted deferral of removal under the CAT, but the respondent is already in custody or subject to custody (either by the state or federal government), the respondent may still be subject to custody for the remainder of his or her time within the United States.\textsuperscript{62}

C. Appealing the Immigration Judge’s Decision

If an IJ determines that the respondent is not entitled to deferral of removal under the CAT, the respondent may appeal this decision.\textsuperscript{63} The respondent has 30 days to appeal to the BIA.\textsuperscript{64} The BIA will review facts found by the IJ under a clearly erroneous standard, and it will review “questions of law, discretion, judgment, and all other issues in appeals of decisions of immigration judges de novo.”\textsuperscript{65} BIA decisions are considered final and binding upon officers and employees of DHS and all IJs.\textsuperscript{66} If the respondent wishes to appeal the decision of the BIA, he or she may then attempt to seek judicial review in a federal court of appeals.

\textsuperscript{60} Fact Sheet, supra note 28.
\textsuperscript{61} §§ 1208.17(b)(1)(iii)–(iv), (d) (2009).
\textsuperscript{62} § 1208.17(b)(1)(ii).
\textsuperscript{63} 8 U.S.C. § 1229a(c)(5) (2012); see also, Executive Office for Immigration Review, 8 C.F.R. § 1003.1(b)(2)–(3) (2008).
\textsuperscript{64} Proceedings to Determine Removability of Aliens in the United States, 8 C.F.R. § 1240.53(a) (2013). Filing an appeal with the BIA includes filing the EOIR-26, through which the respondent states the reasons for appeal. EOIR is an acronym for the Executive Office of Immigration Review, an administrative agency within the Department of Justice, which is responsible for adjudicating immigration cases. \textit{EOIR Mission}, \textit{THE U.S. DEP’T OF JUSTICE}, http://www.justice.gov/eoir (last visited April 3, 2016).
\textsuperscript{65} Executive Office for Immigration Reviews, 8 C.F.R. §§ 1003.1(d)(3)(i)–(ii), (c)(7) (2008).
\textsuperscript{66} § 1003.1(g). The only scenario in which a BIA decision is not final is if the case must be referred or modified to the Attorney General. \textit{Id.} Pursuant to § 1103(g), the Attorney General has the authority to determine which administrative decisions may be reviewed. \textit{Id.} Such decisions are not at issue within this note and will consequently not be discussed.
III. JUDICIAL REVIEW PURSUANT TO 8 U.S.C. § 1252

Chapter 8 U.S.C. § 1252 discusses the scope of review and eligibility requirements for judicial review of orders of removal. A petition for judicial review must be filed no later than 30 days after issuance of the final order of removal (which is the date of the BIA’s decision). 67 A federal court of appeals may decide the petition for review based only on the administrative record of the order, which means the IJ’s findings of fact and the decision are considered conclusive unless those findings are contrary to law. 68

Federal courts of appeals cannot review orders of removal against criminal respondents unless the petition involves constitutional claims or questions of law. 69 More specifically, this criminal bar on judicial review is meant for:

[A]n alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1252(a)(2)(C). 70 The exception to this criminal bar on judicial review is contained in § 1252(a)(2)(D), which provides:

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. 72

The statute continues, declaring that § 1252 is the “sole and exclusive means for judicial review of any cause or claim under the [CAT].” 73

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68 § 1252(b)(4)(A)(C).
69 § 1252(a)(2)(C).
70 Id.
71 The crimes in these statutes are discussed in note 4, supra. All of these prerequisite crimes typically constitute a “particularly serious crime,” so the convictions of these crimes ultimately end up limiting a respondent’s options for relief from removal as well as severely narrowing their options for review of decisions concerning their orders of removal. Id.
72 § 1252(a)(2)(D) (emphasis added).
73 § 1252(a)(4).
IV. WHERE THE CIRCUITS SPLIT

After the enactment of § 1252, federal courts of appeals grappled with their ability to review a denial of deferral of removal under the CAT when the petitioning respondent had been convicted of one of the prerequisite crimes. The majority view, consisting of seven circuits, interprets § 1252(a)(2)(C) as a limitation on these petitions for review, but the minority view, held by the Seventh and the Ninth circuits, have found denials of deferral of removal under the CAT to be outside of the scope of the statute.74

A. The Majority View

The majority view considers § 1252 unambiguous in that the statute instructs federal courts of appeals to review these petitions only if the petition involves a constitutional claim or question of law.75 An example of a valid petition involving a question of law is a claim asserting that the BIA adjudicated a respondent’s application of deferral of removal under the incorrect legal standard.76 A respondent may only argue a constitutional claim if a clause within the Constitution has been violated (such as a lack of due process adjudicating the order of removal against the respondent).77

Reading § 1252(a)(2)(C) as limiting review of denials of deferral of removal under the CAT is based on a reading of the plain language of the statute, as well as the legislative history and policy behind the statute. The plain language argument is simple to understand: the statute’s language limits judicial review of a final order of removal for criminal respondents to questions of law and constitutional claims.78 Seven circuits have read the statute as such.79

74 See infra Sections (A) and (B).
75 Ortiz-Franco v. Holder, 782 F.3d 81, 86 (2d Cir. 2015).
76 See, e.g., Pieschacon-Villegas v. Att’y Gen. of U.S., 671 F.3d 303 (3d Cir. 2011) (holding that the BIA was free to hold evidence as insufficient for a petitioner’s claim for deferral of removal under the CAT, but it was not free “to ignore th[e] evidence altogether”; and because this was the incorrect legal standard to apply, the Third Circuit was able to review the order of removal). Id. at 310, 314.
77 See, e.g., Xiao Ji Chen, v. U.S. Dep’t of Justice, 471 F.3d 315, 324 (2d Cir. 2006) (a constitutional claim “clearly relates to claims brought pursuant to provisions of the Constitution of the United States.”).
79 See Ortiz-Franco, 782 F.3d at 86; Escudero-Arciniega v. Holder, 702 F.3d 781, 785 (5th Cir. 2012); Pieschacon-Villegas, 671 F.3d 303, 309–10 (3d Cir. 2011); Constanza v.
To bolster this interpretation of § 1252, the Second Circuit in *Xiao Ji Chen v. U.S. Dep’t of Justice* discussed the purpose of the statute, which was to “limit aliens to one bite of the apple and thereby streamline what the Congress saw as uncertain and piecemeal review of orders of removal.” In other words, by narrowing the types of claims the circuit courts can hear, criminal respondents are unable to continue delaying their removal. Limiting judicial review of orders of removal was likely an attempt to “streamline” the high number of cases on immigration courts’ dockets. If a circuit court were to remand a case to the BIA or the IJ, it would only add to the immigration court system’s backlog. This is an especially important concern today, as the dockets of immigration courts continue to grow, and limiting claims for criminal respondents might alleviate some of that case traffic. The Executive Office of Immigration Review (“EOIR”)—the agency that oversees both the immigration courts and the BIA—is more knowledgeable and experienced with its rules and regulations, and is arguably better equipped than circuit courts to adjudicate a respondent’s claims and subsequent appeals. There is already a second level of review in place, which is the BIA. The BIA hears appeals relating to the merits of the respondent’s case, and Congress likely recognized the expertise of EOIR to handle the merits of each case when it drafted § 1252(a)(2)(C) and consequently did not see a need for circuit courts to hear the merits again, resulting in narrower jurisdiction for judicial review. By limiting judicial review to constitutional claims and questions of law, Congress granted deference to the appropriate agency, and attempted to “streamline” the process for all respondents in removal proceedings.

In joining the majority view, the Second Circuit was the most recent circuit to weigh in on the debate, adding its support through a
discussion of both the statutory language and history of § 1252 in Ortiz-Franco v. Holder. The petitioner, Ortiz-Franco, a native of El Salvador, entered into the United States illegally in 1987, and between 1992 and 1996, Ortiz-Franco was convicted of criminal possession of a weapon in the third degree, attempted petit larceny, as well as possession of a controlled substance. Based on these convictions, Ortiz-Franco was notified in July 2005 that he was removable pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) as an alien present in the United States without being admitted or paroled. Furthermore, Ortiz-Franco was also charged with removability on the basis of his conviction of the violation of a law relating to controlled substances and a conviction of a crime of moral turpitude pursuant to § 1182(a)(2)(A)(i)(I)–(II).

Ortiz-Franco applied for asylum, withholding of removal, and deferral of removal under the CAT. Based on his criminal record, however, his only viable application for relief was deferral of removal under the CAT. The IJ denied Ortiz-Franco’s application for deferral of removal under the CAT, and the BIA affirmed that decision. Ortiz-Franco, arguing the BIA and the IJ erred in their conclusions that he did not prove a likelihood of torture, appealed to the Second Circuit.

In discussing its jurisdiction to review Ortiz-Franco’s petition, the Second Circuit stated that in similar cases, the court had assumed it did not have jurisdiction except for petitions related to questions of law and constitutional claims. To determine if it was explicitly barred from reviewing the petition under § 1252, the court first examined the nature of the CAT as a whole. As a non-self-executing treaty, the CAT “confers no judicially enforceable right on individuals.” Nor does the CAT give any guidance as to the scope of judicial review under the Convention. Congress, in its implementation of the CAT into U.S. law under the FARRA, however, noted that nothing in the FARRA “provid[es] any court jurisdiction to consider or review claims raised

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84 782 F.3d 81.
85 Id. at 83–84.
86 Id. at 84.
87 Id.
88 Ortiz-Franco, 782 F.3d at 83.
89 Id. at 84.
90 Id. at 85.
91 Id.
92 Ortiz-Franco, 782 F.3d at 86.
93 Id. at 87.
94 Id.
95 Id. at 88.
under the CAT ‘except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252).’ The court cited this language to show that the legislation giving effect to the CAT did not provide any guidance for a court exercising judicial review, but instead directed such a court to § 1252 to determine its ability to review a claim under the CAT. With this in mind, the court then considered whether it could grant Ortiz-Franco’s petition under § 1252.

The court concluded that § 1252(a)(2)(C) and (D) limited its jurisdiction because Ortiz-Franco had been convicted of one of the prerequisite crimes. Ortiz-Franco did not claim that the BIA or the IJ made a legal error in reviewing the denial of his deferral of removal, nor did he base his petition for review on a constitutional claim. Ortiz-Franco only contested “the correctness of [the] IJ’s fact-finding,” which, according to the Second Circuit, did not suffice as a question of law under § 1252. He was only claiming that El Salvador was unsafe for him to return to and that it was more likely than not that members of a gang within El Salvador would torture and kill him. Ortiz-Franco was subject to the criminal bar and his petition for review was for a factual determination, which meant that § 1252(a)(2)(C) precluded the Second Circuit from reviewing the petition.

Ortiz-Franco’s final argument was that § 1252(a)(4) permitted judicial review. This provision states, “[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the CAT.” Ortiz-Franco argued that if § 1252 is designed to be the sole and exclusive means for judicial review of claims under the CAT, then claims arising under the CAT should not then be subject to the criminal limitation. In other words, why would a statute be the sole and exclusive means of review if the review is then limited so

96 Ortiz-Franco, 782 F.3d at 88 (citation omitted).
97 Id.
98 Id.
99 One of those offenses is a crime of moral turpitude. See 8 U.S.C. § 1182(a)(2)(A)(i)(I); Ortiz-Franco, 782 F.3d at 84, 88.
100 Ortiz-Franco, 782 F.3d at 91.
101 Id.
102 Id. at 83.
103 Id. at 88 (citing 8 U.S.C. § 1252(a)(2)(C) (2012)).
104 Ortiz-Franco, 782 F.3d at 88 (citing 8 U.S.C. § 1252(a)(4)).
105 Id.
narrowly? This point has some merit, especially considering the fact that the CAT is a product of international law, and Congress might have intended § 1252 to be the sole and exclusive means for CAT claims because it wanted to ensure claims under an international treaty were reviewed to the greatest extent possible. The Second Circuit, however, disagreed with Ortiz-Franco’s argument. Citing support from the Eighth Circuit, the court responded to this argument stating that while § 1252 might, unfortunately for Ortiz-Franco, be the only means for review of a claim under the CAT, the petition for review is still subject to the limitations listed within the plain language of the statute, including the limitation in (a)(2)(C). The court continued, “§ 1252(a)(4) simply serves to ‘confirm[ ]’ that the statutory right to judicial review [for a claim under the CAT] exists only as part of a review of a final order of removal.”

Judge Lohier, in his concurrence in Ortiz-Franco, suggested that an examination of the legislative history of § 1252 would support the court’s decision as well. Judge Lohier agreed with the majority that the statute is clear in that it limits judicial review to constitutional claims and questions of law, but he stated the important role legislative history plays in interpreting statutes, and in this case in particular, the statute’s history would only bolster the majority’s argument. Especially in an immigration matter that Lohier referred to as a “high-stakes” case, a review of the legislative history can be useful “to reinforce or confirm a court’s sense of the text,” to ensure the correct application of law to the case.

Within the conference report for the REAL ID Act of 2005, under which § 1252 was codified, Congress’s intent is clear in that it “sought broadly to limit judicial review of appeals of orders of removal by ‘criminal aliens.’” The Conference Report also notes that this limitation was meant to provide “criminal aliens [with] fewer opportunities to delay their removal.” Second and perhaps more notably, in enacting the CAT, the Senate reported that the “competent authority[,]” which, as Judge Lohier points out, is the “Attorney General

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106 Id. (discussing Lovan v. Holder, 574 F.3d 990, 998 (8th Cir. 2009)).
107 Id. at 89 (quoting Omar v. McHugh, 646 F.3d 13, 18 (D.C. Cir. 2011)).
108 Ortiz-Franco, 782 F.3d at 92 (Lohier, J., concurring).
109 Id.
110 Id. (citation omitted).
[and agencies in the executive branch such as EOIR] in deportation cases,"\(^{113}\) should handle all CAT matters. Therefore, as Judge Lohier wrote, not only is the plain language of the statute clear in its limitation of judicial review for criminal respondents, but the legislative history of the statute and the CAT confirms and supports the Second Circuit’s interpretation and resultant decision not to review Ortiz-Franco’s petition.\(^{114}\)

**B. The Minority View**

Two circuits, the Seventh and the Ninth, do not view § 1252(a)(2)(C) and (D) as limiting judicial review to constitutional claims or questions of law for criminal respondents who have been denied deferral of removal under the CAT.\(^{115}\) While the two circuits agree that subsection (C) does not limit their review of deferral claims, their respective rationales for that conclusion differ. The Seventh Circuit sees deferral of removal as a “temporary” order of removal. And because § 1252(a)(2)(C) only applies to “final” orders of removal, the criminal bar on judicial review is not applicable to deferral of removal claims.\(^{116}\) The Ninth Circuit argues that because decisions on deferral of removal under the CAT are made on the merits, § 1252(a)(2)(C) does not apply to those claims.\(^{117}\)

1. **The Seventh Circuit**

Where the Seventh Circuit’s interpretation of § 1252 differs from the majority is the meaning of “final order of removal” and its relation to a denial of deferral of removal under the CAT.\(^{118}\) Section 1252(a)(2)(C) states, “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [prerequisite] offense . . . .”\(^{119}\) As explained, if at any point in the future, the country of removal is deemed safe to return, a

\(^{113}\) Id. at 93 (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101–30, at 17 (1990)).

\(^{114}\) See id. at 92.

\(^{115}\) See Wanjiru v. Holder, 705 F.3d 258, 263 (7th Cir. 2013); Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1083 (9th Cir. 2008).

\(^{116}\) Wanjiru v. Holder, 705 F.3d 258, 263–64 (7th Cir. 2013).

\(^{117}\) Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1083 (9th Cir. 2008) (emphasis added).

\(^{118}\) Ortiz-Franco, 782 F.3d at 89 (citing Wanjiru, 705 F.3d at 264).

respondent granted deferral of removal under the CAT might ultimately be removed from the United States and returned to the country of removal.\textsuperscript{120} Because deferral of removal under the CAT means the respondent could be removed at any future point in time, and his or her removal is simply \textit{deferred}, this relief lacks the finality that other types of relief offer, and the Seventh Circuit concluded that deferral of removal was therefore temporary.\textsuperscript{121} As the Seventh Circuit explained, because denial of deferral of removal under the CAT is not a final order, and § 1252 concerns “judicial review of a \textit{final} order of removal,” the § 1252 (a)(2)(C) limitation does not apply to petitions for review of CAT deferral of removal claims.\textsuperscript{122}

The Seventh Circuit explained this interpretation of § 1252(a)(2)(C) in \textit{Wanjiru v. Holder}.\textsuperscript{123} The plaintiff in \textit{Wanjiru} was similar to Ortiz-Franco in that he was convicted of a serious crime, and thus only eligible for deferral of removal under the CAT.\textsuperscript{124} The IJ denied Wanjiru’s deferral of removal claim, and the BIA affirmed.\textsuperscript{125} Wanjiru appealed to the Seventh Circuit Court of Appeals, which was left with the task of deciphering whether § 1252(a)(2)(C) barred the court from reviewing the denial of deferral of removal.\textsuperscript{126}

The Seventh Circuit compared deferral of removal under the CAT to an injunction, a temporary remedy that “prevents the government from removing the person in question, but it can be revisited if circumstances change.”\textsuperscript{127} A denial of deferral of removal under the CAT “can be final enough to permit judicial review, but at the same time not be the kind of ‘final’ order covered by § 1252(a)(2)(C).”\textsuperscript{128} The classification of a denial of deferral of removal under the CAT to be “final enough” for such an order is the court’s reference to § 1252(a)(1) as the first hurdle an order of removal must overcome to be eligible for judicial review.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{120} Asylum and Withholding of Removal, 8 C.F.R. §§ 1208.17(b)(1)(iii)–(iv), (d).
\item \textsuperscript{121} Ortiz-Franco, 782 F.3d at 89.
\item \textsuperscript{122} Id.; § 1252(a).
\item \textsuperscript{123} 705 F.3d 258 (7th Cir. 2013).
\item \textsuperscript{124} The respondent pleaded guilty to having “sexual intercourse . . . with another person . . . without the latter’s consent[,]” which the IJ charged as a particularly serious crime. \textit{Id.} at 261.
\item \textsuperscript{125} \textit{Id.} at 262.
\item \textsuperscript{126} \textit{Id.} at 263.
\item \textsuperscript{127} \textit{Wanjiru}, 705 F.3d at 264.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} 8 U.S.C. § 1252(a)(1) (2012) reads: “Judicial review of a final order of removal . . . is governed only by chapter 158 of title 28, \textit{except} as provided in subsection (b) of this section . . . .” (Emphasis added). Subsection (b) of § 1252 contains the procedure for judicial
\end{itemize}
That is, once an order of removal is issued and thus passes this requirement under (a)(1), the order is then subject to the limitations within § 1252(a)(2), titled “Matters not subject to judicial review,” as well as the specific limitation at issue here within § 1252(a)(2)(C), that a final order of removal is not reviewable if the respondent has committed any of the prerequisite crimes. The Seventh Circuit saw the decision of the denial of deferral of removal under the CAT as final enough to surpass the requirement under § 1252(a)(1), but because deferral of removal behaves like an injunction, a temporary remedy that is “not final enough,” the limitation of judicial review under § 1252(a)(2)(C) does not apply to deferrals of removal under the CAT.

The Seventh Circuit’s interpretation has merit, and its rationale for taking the time to review a respondent’s case stemmed from the court’s view on the United States’ obligations under international law. The CAT originated in the United Nations (UN), an international organization dedicated to protecting the human rights of every person, not just those without criminal records. The exact situation that the plaintiffs in both Ortiz-Franco and Wanjiru faced is why deferral of removal under the CAT was created and why criminal respondents are still permitted to apply for relief: because the UN believes no one should be subjected to torture. When an order of removal could potentially involve sending anyone (even someone convicted of a crime) into a situation of torture, that individual should arguably have the ability to pursue an avenue of relief from removal to avoid such torture, and the Seventh Circuit likely wanted to ensure that it was not sending the petitioner into a situation where he faced a high probability of torture or even death.

Also, under deferral of removal under the CAT, the U.S. government retains the ability to keep the respondent in custody until there is a determination that the respondent may be safely removed to his or her home country or “a willing third country.” The fact that a respondent would “rather live in a U.S. jail than risk return to [the country of removal]” sends a very strong statement of that respondent’s...
fear of torture. 135 If deferral of removal is denied and the respondent is sent back to the country of removal and later tortured or killed, the United States has arguably failed to meet its obligations under the CAT. This could lead to an outrage within the human rights community, and the Seventh Circuit’s interpretation of “final” within § 1252(a)(2)(C) demonstrates the court’s belief that in the enactment of the statute, “Congress [did not] shut off avenues of judicial review that ensure this country’s compliance with its obligations under an international treaty.” 136

a. Response to the Seventh Circuit

A counter argument to the Seventh Circuit’s interpretation of deferral of removal under the CAT as “not final enough,” is that while deferral of removal might not technically be final, the denial of deferral of removal is, and the order is therefore subject to the bar on judicial review under § 1252(a)(2)(C). When a court denies a claim for deferral of removal under the CAT, the IJ is saying the country of removal is safe, and that the respondent should be returned to that country. The court is effectively issuing a final order of removal.

The Second Circuit also responded to the Seventh Circuit’s interpretation of § 1252, explaining:

[If we were to treat the adjudication of the deferral claim as some non-final determination rather than...’as part of the review of a final order of removal[,]’...this Court would lack jurisdiction to review any denial of deferral, even one that did raise a constitutional claim or a question of law.137

In other words, if a denial of deferral of removal under the CAT is not a final order, the petition for review of such an order should have never even passed the first requirement of a final order under § 1252(a)(1)—“judicial review of a final order”—and judicial review of any adjudication of a claim of deferral of removal under the CAT would be prohibited. Such a conclusion does not make sense in reading the

135 Wanjiru, 705 F.3d at 267.
136 Id. at 265.
137 Ortiz-Franco v. Holder, 782 F.3d 81, 89 (2d Cir. 2015) (quoting Chupina v. Holder, 570 F.3d 99, 100 (2d Cir. 2001)). The court in Chupina could not review the Petitioner’s claims under the CAT because the Petitioner’s claims were still pending before the IJ, and therefore not final and unable to pass the jurisdictional requirement under § 1252(a). Chupina, 570 F.3d at 100.
remainder of the statute. If the Seventh Circuit’s interpretation is correct, one is then left with the question as to why Congress would even include the caveat for constitutional claims or questions of law for final orders of removal within § 1252—a statute concerning final orders of removal—if a decision regarding deferral of removal (whether granted or not) is not final in the first place.

Under the Seventh Circuit’s view, the only explanation for exceptions such as constitutional claims and questions of law is that Congress intended to allow all adjudications of deferrals of removal under the CAT to be eligible for judicial review, which seems unlikely. The Seventh Circuit also fails to mention why withholding of removal under the CAT is not also free from this restriction within § 1252(a)(2)(C). If Congress truly did not want to limit petitions for review involving CAT claims, then a denial of withholding of removal under the CAT must also be free from the limitation on judicial review. The Seventh Circuit may have viewed withholding of removal as constituting a more “final” order than its counterpart under the CAT, and therefore “final enough” to be subject to the restrictions within the statute, but even that rationale does not align with the remainder of the statute, specifically § 1252(a)(4).

Section 1252(a)(4), titled “Claims under the United Nations Convention,” reads: “a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture . . . .” If § 1252 is to be the “sole and exclusive means for judicial review” for any claim under the CAT, the petition must be filed “with an appropriate court of appeals in accordance with this section . . . .” If a petition for review must be filed in accordance with “this section” (§ 1252(a)(1)), the petition for review must meet all of the requirements as listed in § 1252(a), which include the limitations within § 1252(a)(2)(C).

Therefore, if a claim under § 1252(a)(4) requires section (a) to be the sole and exclusive means for review, Congress must have concluded that any orders under the CAT are final, because section (a) concerns “[j]udicial review of a final order of removal.” The only way the Seventh Circuit’s claim of its jurisdiction to review the denial of deferral of removal under the CAT makes sense is if the use of the word “final”

139  Id. (emphasis added).
140  § 1252(a)(1) (emphasis added).
in § 1252(a)(1) is different than the use of the word within § 1252(a)(2)(C).

The Seventh Circuit does read the statute in this way when it treats deferral of removal as “final enough to permit judicial review, but simultaneously not the same kind of ‘final’ covered by § 1252(a)(2)(C).” Without an explanation as to why it interprets “final” two different ways, the Seventh Circuit’s argument that deferral of removal is a temporary remedy simply does not withstand a plain reading of the statute. If Congress intended for there to be two different interpretations of “final” within the same statute, it seems that Congress would have set forth such a definition.

b. What Constitutes A Final Order of Removal

Within chapter 12 of the United States Code (containing the statute at issue), section 1101 contains the definitions for terms within the chapter, but it contains no definition for the term “final.” There is, however, the definition of an “order of deportation” and an explanation of when that order becomes final. An “order of deportation”—synonymous with an “order of removal”—is “the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.” As discussed earlier, a respondent may not apply for deferral of removal without first being ordered removed and then determined eligible for protection under the CAT. If the IJ determines a respondent is not entitled to deferral of removal under the CAT, deferral of removal will not be granted, thereby enforcing an order of removal. An order of removal is “final upon the earlier of [:] (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.”

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141 Wanjiru, 705 F.3d at 264.
143 Chupina v. Holder, 570 F.3d 99, 104 (2d Cir. 2001); § 1101(a)(47)(A). An IJ is a “special inquiry officer” as used in this definition. See Executive Office for Immigration Review, 8 C.F.R. § 3.0 (2003) (“immigration judges (referred to in some regulations as special inquiry officers) . . . .”).
144 Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 1208.17(a) (2009).
145 Id.
146 §§ 1101(a)(47)(B)(i)–(ii).
Based on this definition, the BIA’s affirmation of an IJ’s decision enforcing an order of removal is therefore a final order of removal. Now final, the order is subject to § 1252(a). The limitation on judicial review within § 1252(a)(2)(C) uses the same exact phrase of a “final order of removal,” as § 1252(a)(1). It is difficult to justify the Seventh Circuit’s use of § 1252(a)(1) as applicable to a denial of deferral of removal under the CAT, while simultaneously holding § 1252(a)(2)(C) as inapplicable.

A decision must be final before making its way to a federal court of appeals, and the Second Circuit explained, “[t]reating the denial of deferral as a final, reviewable order therefore accords with the ‘presumption favoring judicial review of administrative action.’”\(^\text{147}\) By denying deferral of removal, the IJ is effectively saying the respondent is removable, and “that a removal order may be carried out at once.”\(^\text{148}\) It is important to remember that the classification of deferral of removal as a final order of removal does not rid a criminal respondent of his or her right to appeal this decision.\(^\text{149}\) All this classification means is that a court of appeals is limited in its authority to hear reviews of criminal respondents pursuant to § 1252(a)(2)(C).

Lastly, while the Seventh Circuit sought to take extra care of U.S. obligations under the CAT and ensure it would not send someone into a country with a likelihood of torture, using this argument to permit judicial review completely ignores the experience and expertise that both the immigration courts and the BIA hold. The agency, EOIR, that has been delegated the authority to adjudicate these claims, is far more familiar not only with which standards to follow in making a removal decision, but also with the conditions of the countries of which the respondents may be removed. This familiarity likely comes from the handling of the high number of cases any IJ sees each and every day. The United States is still meeting its obligations under the CAT, as IJs and the BIA are plenty equipped to determine the likelihood that an individual will be subjected to torture.

2. The Ninth Circuit

The Ninth Circuit agrees with the Seventh Circuit that a court of appeals has jurisdiction to review a denial of deferral of removal under

\(^{147}\) Ortiz-Franco v. Holder, 782 F.3d 81, 89 (2d Cir. 2015) (citation omitted).
\(^{148}\) Id.
\(^{149}\) Id.
the CAT, but the Ninth Circuit reached its conclusion differently.\textsuperscript{150} Similar to most respondents who find themselves with deferral of removal under the CAT as their only form of relief, the petitioner in \textit{Lemus-Galvan} was ordered removed on the basis of a conviction of one of the prerequisite crimes.\textsuperscript{151} The government argued that because this conviction was the basis for the IJ’s denial of deferral of removal, the Ninth Circuit was barred from reviewing the petitioner’s claim.\textsuperscript{152} The court thought otherwise, and held that § 1252(a)(2)(C) did not deprive the court of jurisdiction because decisions regarding deferral of removal under the CAT are always decisions made on the merits.\textsuperscript{153} According to the Ninth Circuit, § 1252(a)(2)(C) does not apply when a respondent petitions for review of a denial of deferral of removal under the CAT because a conviction of a prerequisite crime is not what ultimately renders the respondent removable.\textsuperscript{154} The decision falls outside the scope of § 1252(a)(2)(C) because the respondent is not “removable by reason of having committed a criminal offense covered . . . .”\textsuperscript{155} Rather, the respondent is removable because the IJ has determined that it is not more likely than not that the respondent will be tortured upon return to the country of removal. This is a determination made on the merits, one that requires the IJ to weigh and consider evidence and issue a decision based on the IJ’s findings of fact and relevant evidence. This determination, according to the Ninth Circuit, goes deeper than an automatic determination of removability because of the commission of a crime, and therefore, because the IJ’s decision denying the respondent deferral of removal under the CAT was based on the merits, it fell outside the scope of § 1252(a)(2)(C).\textsuperscript{156} 

\textit{a. Response to the Ninth Circuit}

The Ninth Circuit is correct in explaining that the IJ must determine whether it is more likely than not that a respondent will be subjected to torture in the country of removal, and that this determination is made on the merits. This determination, however, does not change the fact that the respondent was originally removable because of a commission and

\begin{itemize}
  \item \textsuperscript{150} See \textit{Lemus-Galvan v. Mukasey}, 518 F.3d 1081 (9th Cir. 2008).
  \item \textsuperscript{151} The petitioner was convicted of attempted second-degree murder. \textit{Id.} at 1083.
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} See \textit{Lemus-Galvan}, 518 F.3d at 1083.
  \item \textsuperscript{155} \textsection{} U.S.C. \textsection{} 1252(a)(2)(C) (2012).
  \item \textsuperscript{156} \textit{Lemus-Galvan}, 518 F.3d at 1083.
\end{itemize}
conviction of a prerequisite crime. As noted earlier, the DHS issues an order of removal to the respondent, which contains the basis for the order.\textsuperscript{157} The respondents who are the focus of this Note have been deemed removable and thus issued an order of removal because of their commission of one of the prerequisite crimes within § 1252(a)(2)(C).

The respondent is then permitted to apply for relief from removal before an IJ and in doing so, is permitted to try and convince the IJ that he or she should not be removed from the United States.\textsuperscript{158} And § 1252(a)(2)(C) also forbids judicial review of “any final order of removal against an alien who is removable by reason of having committed a criminal offense covered . . . .”\textsuperscript{159} In a respondent’s claim for deferral of removal under the CAT, the fact that an IJ is determining the likelihood of torture does not change the fact that the respondent is still removable because of the commission of a crime. The very title of the form of relief—\textit{deferral} of removal—tells us that the respondent is already removable, (in this case \textit{because} of the commission of one of the covered offenses) and the IJ is only deciding whether or not that removal should be postponed. In \textit{Lemus-Galvan}, the petitioner was always removable because of his conviction, and the BIA’s affirmation of the IJ’s denial of deferral of removal under the CAT was the final order of removal against the petitioner.\textsuperscript{160} So while the Ninth Circuit was correct in asserting that the IJ does make a decision on the merits, the IJ was not determining whether the respondent was removable. DHS already made that decision when it issued the order of removal. The IJ was only determining if the respondent was entitled to relief from removal. Therefore, the Ninth Circuit was still subject to the limitations on judicial review of a denial of deferral of removal.

VI. CONCLUSION

Through a simple reading of the language within 8 U.S.C. § 1252(a)(2)(C) and (D), it is clear that respondents who have committed any of the crimes listed within § 1252(a)(2)(C) and who are seeking review of a denial of deferral of removal under the CAT may only do so if the petition for review involves a constitutional claim or a question of law. The majority interpretation, which the Second Circuit most recently

\textsuperscript{157} See supra, Part II.
\textsuperscript{159} § 1252(a)(2)(C).
\textsuperscript{160} §§ 1101(a)(47)(B)(i)–(ii).
joined in *Ortiz-Franco*, is correct because it follows not only the plain language of the statute, but also the Congressional intent and policies behind the statute. The Seventh Circuit’s view that deferral of removal under the CAT is not “final” for purposes of judicial review of a final order of removal under § 1252 is incorrect as the IJ’s decision to deny the application for deferral of removal acts as the final decision in the respondent’s removal proceedings. The Ninth Circuit’s reasoning that § 1252 does not forbid judicial review of denials of deferral of removal because deferral of removal claims are always made on the merits is also incorrect. While an IJ must determine whether it was more likely than not that the respondent would be subjected to torture in the country of removal, this determination—one made on the merits—does not change the fact that the respondent was removable because of the conviction of one of the listed crimes. As a conviction of one of these crimes renders a respondent removable, the respondent is thus subject to the bar on judicial review under § 1252.

Lastly, as *Ortiz-Franco* was recently denied certiorari to the United States Supreme Court, the courts of appeals will likely continue to struggle with the correct interpretation of this statute. It is irrelevant whether clarification comes from Congress or the Supreme Court, but clarification is absolutely necessary. In an area as complex as immigration law, both federal courts and the immigration court system would benefit from clarity to provide for more uniformity within the immigration system. With such different interpretations, as Judge Lohier pointed out, criminal respondents in two very large circuits (the seventh and the ninth) have access to federal courts, and their counterparts in the remainder of the country do not. “This is not a sustainable way to administer uniform justice in the area of immigration. Congress, or the Supreme Court, can tell us who has it right and who has it wrong.”

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161 *Ortiz-Franco v. Holder*, 782 F.3d 81, 93 (2d Cir. 2015) (Lohier, J., concurring).
FORGIVE AND REGRET: ANALYSIS AND PROPOSED
CHANGES TO CONNECTICUT’S REVENGE PORN STATUTE

Julia M. Sorensen*

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Over the past several decades, a proliferation of technological advancements has led to the emergence of new, more powerful tools of communication. These new tools have spurred a unique crop of societal wrongs, challenging legislative and judicial authorities to grapple with an unexplored frontier of abuses that cannot be properly addressed within the confines of existing remedial constructs. One such new form of misconduct is “revenge pornography,” the practice of non-consensually disseminating sexually explicit images of a former partner in order to harass and humiliate him or her.\(^1\) Traditional avenues of relief have proved inadequate for victims of this new scheme,\(^2\) and as a result, thirty-six states across the country have enacted legislation to criminalize it.\(^3\)
In 2015, the Connecticut General Assembly followed suit and passed a statute making the nonconsensual sharing of intimate images a class A misdemeanor, punishable by up to one year imprisonment and a fine of up to $2,000. Given the novelty of the issue, Connecticut, like other states, struggled to formulate workable and Constitutionally-permissible language that is broad enough to address most factual circumstances of revenge pornography, but not so far-reaching as to infringe on First Amendment rights. This Note will evaluate the strengths and weaknesses of the Connecticut statute, contrast it with the language of other states’ enactments, and suggest amendments to narrow its scope with better-tailored language while remaining inclusive of a wide range of appropriate victims.

Part I of this Note will provide background information on the inception of revenge pornography, including the most common factual scenarios found in recent cases, its characterization as a gendered sexual offense, the issue of permanence, and the onset of content-specific websites. Part II will detail the failings of existing civil remedies, including the incongruity of Connecticut common law, the systemic obstacles to bringing a claim, and the barriers attendant to revenge pornography that obstruct effective recourse for many victims.

Part III will provide an overview of the trend toward criminalization, the push-back from powerful advocacy organizations, such as the American Civil Liberties Union (“ACLU”), and legal challenges brought against newly-created revenge pornography laws. Part IV will describe Connecticut General Statute § 53a-189c, the Connecticut law that became effective in 2015. This section will touch upon prior failed attempts to pass the legislation, its eventual unanimous support, and a thorough analysis of the legislative intent and final

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CODE ANN. § 18.2-386.2 (West 2016)), Washington (WASH. REV. CODE ANN. § 9.61.260 (West 2016)), and Wisconsin (WIS. STAT. ANN. § 942.09 (West 2016)).
See Mark Pazniokas, CT House May Wait a Year on ‘Revenge Porn’ Bill, CONN. MIRROR (May 1, 2014), http://ctmirror.org/2014/05/01/ct-house-may-wait-a-year-on-revenge-porn-bill/.
Emily Poole, Comment, Fighting Back Against Non-Consensual Pornography, 49 U.S.F. L. REV. 181, 184 n.26 (2015).
See Pazniokas, supra note 5.
CONN. GEN. STAT. § 53a-189c (2016).
language—including commentary from legislative leaders.

Part V will compare and contrast the language and scope of the Connecticut law with those of other states. This will be a critical evaluation that will draw on the facts of past cases, emphasizing practical implications. Finally, it will conclude with commentary on how the Connecticut law should be amended to better target the offending behavior, expand its applicability in relevant factual scenarios, and increase deterrence without inviting Constitutional challenges.

I. BACKGROUND

Revenge pornography is a subset of a broader range of material known as non-consensual pornography, which consists of any sexually explicit image of an individual captured or disseminated without the depicted person’s consent. Non-consensual pornography implicates a more expansive array of factual situations that will not be addressed here, including voyeurism, child pornography, extortion, cyber hacking, and identity theft. Revenge pornography, as it is addressed here, refers exclusively to ex-lovers who distribute lawfully obtained sexual images of their former partner without his or her consent, as a means of exacting revenge after the relationship sours.

A. Prevalence and Common Conceptions of Revenge Pornography

Internet security corporation McAfee and Pew Research have conducted recent studies that illustrate the degree to which modern relationships have transformed to embrace, and perhaps even expect, the exchange of sexual images among intimate partners. Therefore, it is possible that McAfee had a vested interest in the outcome of this survey.


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10 Poole, Comment, supra note 6, at 181.
12 McAfee, which has since merged with Intel Security, generates revenue through the sale of Internet security products, including software that helps consumers secure their computer systems and networks. MCAFEE, INC., McAfee is Now Part of Intel Security, INTEL SECURITY, http://www.mcafee.com/us/index.html (last visited Apr. 24, 2017). Therefore, it is possible that McAfee had a vested interest in the outcome of this survey.
Research, thirty-four percent of adults aged twenty-five to thirty-four, and twenty-two percent of adults aged thirty-five to forty-four, have received nude photographs from a paramour. McAfee reports that one in ten ex-partners have threatened to expose risqué images of their former partner online, and those threats have been carried out nearly sixty percent of the time. Moreover, about twenty-five percent of people who have transmitted intimate images of themselves have regretted it following a break up, yet research shows that ninety-four percent of them persist in believing that their revealing photographs are safe in the hands of their current partners.

According to the Cyber Civil Rights Initiative, women are disproportionately the victims of revenge pornography, with sample data showing that ninety percent of victims are female. Given that women are the targets, and men are largely the transmitters and consumers of revenge pornography, some label it as a “gendered crime,” meaning it overwhelmingly impacts the female population. Embedded within the intended result of humiliation and shame is the implication that women should be ashamed of their sexuality.

B. Blame-Shifting and the Scope of Consent

Revenge pornography apologists often shift blame to women for having ever consented to image creation, thus advancing an “assumption of risk” mentality. One such apologist, blogger Mark Webster, argues that revenge porn “victims” are not victims at all, and that revenge porn is the direct consequence of “slutty” women’s own actions, for which they should take responsibility. Victim advocates, however, emphasize that the “you should have known better” response minimizes the transmitter’s accountability, and essentially asserts that it is a woman’s

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14 Dewey, supra note 13.
16 Id.
18 Poole, Comment, supra note 6, at 186, 192.
19 Id. at 193.
20 See, e.g., Mark Webster, Why Feminism is to Blame for Revenge Porn, RETURN OF KINGS (July 4, 2015), http://www.returnofkings.com/66488/why-feminism-is-to-blame-for-revenge-porn (asserting that women and their narcissistic need for constant self-validation are to blame for revenge pornography—not the disseminators).
21 Poole, Comment, supra note 6, at 193.
22 Webster, supra note 20.
fault that her partner disseminated sexually explicit images of her.\textsuperscript{23} Regardless of the extent to which one assigns responsibility to the transmitter or the victim, the point is that revenge pornography is a group-defined injury\textsuperscript{24} occurring within the female community, and thus has the potential to be used as a tool for reinforcing an archaic gender hierarchy.\textsuperscript{25}

The scope of consent in sharing explicit images is context-specific and situational, as is often the case with the sharing of sensitive information within any relationship.\textsuperscript{26} Some researchers have argued that entrusting an intimate partner with sexual images is no different from customers entrusting credit card information to their waiter, or patients providing sensitive health information to doctors.\textsuperscript{27} Waiters and doctors who abuse private information by distributing it to unauthorized individuals without consent face criminal penalties and, they argue, sexual information deserves no less protection than financial or health information.\textsuperscript{28} The obvious distinction between these relationships is that personal relationships lack a legally cognizable expectation of confidentiality. But given the growing expectation for transmission of intimate images between partners,\textsuperscript{29} the ease with which they are now transmitted, and the apparent large-scale misconception about the probability that such images will be non-consensually disseminated,\textsuperscript{30} it makes sense that the enactment of legal sanctions is being debated.

One could argue that because the transmission of such images has evolved into a normative expectation in romantic relationships that the assumption of risk argument akin to “don’t take naked pictures,” is no more a solution to revenge pornography than “don’t get in a car” is a solution to being hit by a drunk driver.\textsuperscript{31} While the implication that transmitting sexual images of oneself is as unavoidable as vehicular travel may be a gross overstatement, the fact remains that the practice is

\textsuperscript{23} Id.
\textsuperscript{25} See, e.g., \textit{id.} (recognizing that sexual conduct has historically been used by men to control and oppress women, who are harmed as part of a group-defined injury).
\textsuperscript{26} Danielle Keats Citron & Mary Anne Franks, \textit{Criminalizing Revenge Porn}, 49 WAKE FOREST L. REV. 345, 356 (2014).
\textsuperscript{27} \textit{id.} at 355.
\textsuperscript{28} \textit{id.}
\textsuperscript{29} See Press Release, Eichorn, \textit{supra} note 13; see also Dewey, \textit{supra} note 13.
\textsuperscript{31} WHAT IS REVENGE PORN?, \textit{supra} note 11.
now a somewhat commonplace feature of modern relationships, and thus cannot be ignored.

C. Statistics and Common Factual Scenarios

The humiliation of revenge pornography is in some cases coupled with the fear of physical attacks and stalking given that some offenders post identifying information alongside the images. According to one study of 1,244 victims, more than fifty percent of all revenge pornography images were accompanied by the victim’s full name and links to their social networking profiles, and in twenty percent of instances, the images were coupled with the victim’s e-mail address and phone number. When the images are combined with identifying information, they turn up among the top search results on popular Internet search engines. The professional consequences can be catastrophic, as one employment expert estimates that as many as eighty percent of employers perform Internet searches of candidates before they are even invited for interviews.

Victims often experience a swift and long-lasting elimination of professional, educational, and social opportunities, crippling their ability to earn a living and forcing them to alter their daily lives. One survey by the Cyber Civil Rights Initiative of 361 revenge porn victims sheds some light on the effect revenge porn had on specific arenas of their lives. The survey showed thirty percent of victims reported being harassed or stalked in person or over the phone by individuals who saw

33 Citron & Franks, supra note 26, at 350–51.
34 Id.
37 Cecil, Note, supra note 35, at 2523–24
38 Results were achieved through a survey hosted on endrevengeporn.org from August 2012 to December 2013. Participants self-selected into the study by visiting the website and filling out the survey on their own accord. Results depicted are reflective of a female-heavy sample, due to most of the site visitors being women. CYBER CIV. RTS. INITIATIVE, REVENGE PORN STATISTICS (Dec. 2013), https://www.cybercivilrights.org/ncpstats/.
39 Id.
the material online. It was reported that six percent of victims were fired from their jobs or were kicked out of school because of the material, thirteen percent had difficulty getting a job or getting into school because of the material, and forty-two percent were forced to explain the incident to professional or academic supervisors or colleagues. It was reported that thirty-four percent of victims had relationships with family jeopardized and thirteen percent said they lost a significant other as a result of revenge porn. Additionally, fifty-one percent report suicidal thoughts as a result of their victimhood, forty-two percent sought psychological services, and three percent have legally changed their names.

Others sources report victims beings forced into hiding or relocating to avoid constant threats of sexual abuse. To make matters worse, scholars underscore that images published online create a permanent digital footprint, and despite difficult and costly removal efforts, the images never really go away because of the instantaneous and amplifying power of the Internet.

Revenge porn is spreading rapidly across the web and around the world with the popularity of content-specific websites, such as myex.com. Most of these websites did not exist five or six years ago, but have evolved into an effective vehicle for offenders. Some websites even boast the express purpose of hosting revenge pornography and humiliating victims, and their operators regularly deny removal requests. These websites play a major role in facilitating the large-scale distribution of revenge porn, yet are immune from liability as a result of federal laws that seek to shield Internet service providers from liability for third-party content.
II. INADEQUACIES OF EXISTING STATE AND FEDERAL REMEDIES

Existing state and federal remedies fail to reliably address the distinctive factual circumstances of revenge pornography, and any relief obtained is often not commensurate with the severity of the offense. Bringing a civil claim can pose logistical obstacles specific to revenge pornography victims. For example, victims who lose their job as a result of revenge porn may not have the resources to pay court fees.\textsuperscript{51} Also, some have found it difficult to find lawyers willing to take their cases given how novel this area of law is, and given the unpredictability of factfinders who continue to harbor an attitude of risk assumption.\textsuperscript{52} But perhaps most obstructive is the inevitable magnification of embarrassment that accompanies the creation of a public record in court where pseudonymous litigation is largely disfavored.\textsuperscript{53} Moreover, scholars note that revenge pornography defendants are often judgment proof, making the efforts futile.\textsuperscript{54} And, even a victim who is awarded damages lacks any mechanism to ensure that websites will remove and destroy the images, which is the ultimate goal for most victims.\textsuperscript{55}

A. Lack of Federal Statutory Relief

1. Communications Decency Act

With no federal statute criminalizing revenge porn, victims have looked to pursue actions against websites that knowingly host revenge pornography images. These hosting websites, which are recognized under the law as “Internet Service Providers” (“ISPs”), are protected by a 1996 statute called the Communications Decency Act (“CDA”), which provides far-reaching civil immunity to ISPs that are not responsible for the original creation of the content they host.\textsuperscript{56} Section 230 of the CDA states, “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”\textsuperscript{57}

\textsuperscript{51} See supra Part I (noting that in one study thirteen percent of surveyed victims had difficulty securing a job or gaining admission to a school because of revenge porn). Citron & Franks, supra note 26, at 358.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Citron & Franks, supra note 26, at 358–59.
\textsuperscript{56} Cecil, Note, supra note 35, at 2539–40.
includes “any information service, system, or access software that provides or enables computer access by multiple users to a computer server . . . .”58 In other words, as long as website operators are not creating unlawful material, they are treated as innocent conduits and immune from civil liability even though they are hosting the images.59

The rationale behind this approach is to protect innocent ISPs from liability for the actions of third-party users. One court stated that holding ISPs liable for such content would have “an obvious chilling effect” on free speech and unfairly burden ISPs by assigning them the “impossible” task of “screen[ing] each of their millions of postings for possible problems.”60 Given that almost every website allows for some form of user-generated content, there are powerful implications for the shallow scope of liability for ISPs.

Even if ISPs are given notice of offending content, they are under no legal obligation to remove it.61 Courts have concluded that imposing such a duty charges ISPs with editorial responsibility for third-party content and forces them to transform from service providers to content generators.62 For two decades, courts have been unwavering in their enforcement of civil immunity for ISPs under the CDA, and have even held in one case that an ISP can knowingly host unlawful material, such as child pornography, without liability.63

2. Copyright Infringement

Another federal claim that victims have pursued, this time with mixed results, is copyright infringement. It is estimated that the victims themselves originally capture upwards of eighty percent of revenge pornography images.64 The copyrights to self-created images, colloquially known as “selfies,” are automatically vested in the creator of the image, even if someone else rightfully obtains or distributes it.65

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59 Id. at 2540.
61 Id. at 758–59.
62 Id.
65 Layla Goldnick, Note, Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for its Victims, 21
Section 512 of the Online Copyright Infringement Liability Limitation Act allows a copyright holder to send removal notices to ISPs who are hosting copyrighted images.66 If an ISP fails to act pursuant to the take-down notice, they are subject to liability for contributory copyright infringement.67 Putting aside the population who are ineligible for use of copyright infringement theories because they did not capture the images themselves,68 there are additional barriers to victims who have the potential to bring these claims.

Copyright infringement inevitably draws more attention to the victim and the image, as they would need to create a public record of the image by registering it with the U.S. Copyright Office,69 using their name in the filings.70 Once the material is registered and the removal notices are sent to ISPs, many providers ignore it, recognizing that liability is unlikely considering many victims cannot afford to hire a lawyer.71 If a victim can afford to sue, their damages are limited to the removal of the image and actual damages—an award that may not even cover a complaint filing fee, let alone the costs of litigation.72

3. Cyber Stalking

The federal cyber stalking statute is also beyond reach for many victims. Section 2261A bans as a felony a “course of conduct” intended to harass or intimidate someone in another state, placing that person in reasonable fear of bodily injury or death that would reasonably be expected to cause “substantial emotional distress.”73 If the offender only distributes an image once or twice, it would not violate the statute as not satisfying a “course of conduct,” even though a single post or e-mail can result in the image spreading across the Internet rapidly.74

B. Lack of Civil Relief in Connecticut

Turning to state civil remedies, Connecticut law offers
unpredictable, if not inadequate, avenues for relief. Claims for defamation, libel, invasion of privacy, and intentional infliction of emotional distress all present an uphill battle for victims who are trying to improvise absent a legally cognizable cause of action for revenge pornography. Some causes of action simply do not allow for recovery under revenge pornography facts. Others have legal standards that require creativity in mapping the factual circumstances of this new form of wrongdoing onto traditional legal theories, presenting a case of first impression that makes relief unpredictable at best. As the Co-Chairman of the General Assembly’s Judiciary Committee stated, “the civil remedy really is no remedy at all,” for revenge porn. While this is arguably an overstatement, the fact remains that civil relief can be largely discretionary, and thus unpredictable.

1. Defamation and Libel

A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him. In Connecticut, a defamatory statement is interpreted as a false statement. Therefore, this remedy is inapplicable if no false information is distributed with the image, or if the information distributed is truthful. Although other jurisdictions have recognized defamation claims in instances in which the offender publishes false accounts of the victim’s sexual preferences accompanying the images, such cases are not paradigmatic. Additionally, it may be difficult for some victims to prove a reputational injury. Those who lose their job as a result of revenge porn may simply be terminated without reason or given a false reason for the termination, making it difficult to argue the causal connection. Moreover, the reputational loss for young victims may be prospective as opposed to contemporaneous. A claim for libel will not yield any greater relief, as truth is an affirmative defense to an allegation of libel.

77 Id. at 851.
79 Poole, Comment, supra note 6, at 184.
2. Invasion of Privacy

Claims for invasion of privacy also bear issues for victims. The Connecticut standard for false light invasion of privacy, as adopted from the Restatement (Second) of Torts § 652E, is “(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” Connecticut courts have also embraced Comment C, which instructs that the essence of a false light privacy claim is that the matter published: (1) is not true, and (2) is such a “major misrepresentation of his character, history, activities or beliefs that serious offenses may reasonably be expected to be taken by a reasonable man in his position.” In other words, as long as the item published is substantially true, the actor is shielded from liability—even if there is a more favorable light in which the subject can be presented in keeping with reality. Again, the same limitation that applies to defamation and libel is controlling here. Simply distributing unedited revenge pornography images is not a misrepresentation of the victim’s past activities.

Similarly, Connecticut recognizes invasion of privacy to private life, a claim that is also adopted from the Restatement (Second) of Torts § 652D. This creates “a tort action for the invasion of personal privacy as being triggered by public disclosure of any matter that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.” Comment B states that sexual relations are normally recognized as entirely private matters giving rise to actionable invasion of privacy. There is an exception, however, that restricts the invocation of this claim to only unreasonable publicity. Courts have interpreted it to apply only to serious grievances, finding that even moderate levels of offensiveness are insufficient to give rise to a successful cause of action. Thus, prevailing under this legal standard would require a factfinder to determine that the distribution of images

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82 Id.
83 Id. at 1331.
85 Id.
86 Id.
87 Id. at *15.
88 Chapman, 2008 WL 5511264, at *15.
voluntarily created and lawfully obtained, perhaps without express instruction not to share them, constitutes “unreasonable publicity.” These parameters make relief unpredictable at best, and unavailable at worst.

3. Intentional Infliction of Emotional Distress

An action for intentional infliction of emotional distress (“IIED”) also hampers the opportunity for relief to many victims. In Connecticut, this cause of action requires the plaintiff to prove,

(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct;
(2) that the conduct was extreme and outrageous;
(3) that the defendant’s conduct was the cause of the plaintiff’s distress; and
(4) that the emotional distress sustained by the plaintiff was severe.89

While in reality this threshold is easily met through the horrifically painful experiences of most victims, providing sufficient proof is problematic.

Victims may struggle to document the seriousness of their mental suffering, especially if they were too embarrassed to seek psychiatric help. A 2002 Fifth Circuit case illustrated the challenge to meet the high standard, holding that persistent physical and verbal sexual assault, leading to the victim’s job termination, was not severe enough to meet the required threshold.90 The victim reported feeling humiliated, belittled, and very depressed.91 Even three years later, she suffered depression and daily thoughts about the sexual contact, causing her headaches and loss of appetite for which she sought medical attention.92 The court stated her years-long emotional distress was not “unendurable” enough to meet the standard, noting her failure to report the cause of her symptoms to her physician.93

Some courts, however, have recognized IIED claims in cases of revenge pornography.94 In one such case, the victim was found to meet

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90 Smith v. Amedisys Inc., 298 F.3d 434, 449–50 (5th Cir. 2002).
91 Id.
92 Id. at 450.
93 Id.
the threshold standard when the offender posted the victim’s images to at least twenty-three different websites along with her personal information, resulting in the victim facing death threats, sexual solicitations multiple times per day for more than a year, and a case of shingles that caused her doctor to order emergency counseling. This case demonstrates the high level of documented, severe mental distress required to satisfy the IIED standard, which many victims may struggle to substantiate. A slightly less egregious fact pattern would provide discretion to factfinders who may be hesitant to grant a remedy to victims absent legal recognition of revenge porn as wrongful behavior.

C. Private Sector Actors

Despite obstacles to relief, other actors are slowly taking steps to assist in the battle forged by a growing number of victims. National advocacy groups, such as Without My Consent and the Cyber Civil Rights Initiative, have worked to put victims in touch with free legal clinics. A Pittsburgh-based law firm, K&L Gates, runs the Cyber Civil Rights Legal Project, an organization that has roughly fifty lawyers volunteering their time for around 100 victims of revenge pornography. Additionally, some large-scale ISPs have pledged to remove reported nonconsensual images from their websites, including Facebook, Google, Reddit, and Twitter. Making this pledge, however, is not easy for ISPs such as Google, which took two years to develop and implement a workable reporting and removal system, while other ISPs remain unwilling or without the resources to monitor such content.

In short, federal and state civil relief is largely inadequate and unpredictable. Given the uniqueness of this new form of wrongdoing, mapping the typical victim’s facts onto existing causes of action is tantamount to trying to fit a square peg into a round hole. This largely puts discretion in the hands of factfinders, who are faced with either stretching the traditional interpretation of legal standards to cover this novel wrong, or barring the opportunity for relief. For many victims, the

95 Id.
97 Id.
98 CNN WIRE, supra note 35.
99 Id.
publicity coupled with the uncertainty of relief is enough to stifle their attempt at vindicating their rights.

III. THE TREND TOWARD AND OPPOSITION TO STATE-CREATED CRIMINAL OFFENSES

Since 2013, state criminalization of revenge pornography has swept the country, with the number of states having such statutes skyrocketing from three in 2013 to thirty-four by 2016. Additionally, one advocacy organization reports that many other states are actively engaging its efforts to advise in the creation of such a statute. The laws vary widely, with a vast array of requirements and exemptions.

A. The Philosophical Debate Over Criminalization

Despite the surge in enactments, legislators have extensively debated criminalization and received significant push-back from civil rights advocacy organizations, including the ACLU, as well as the Electronic Frontier Foundation (“EFF”)—an organization that strives to protect civil liberties in the digital realm. These and similar organizations are concerned that certain statutory language is vague, over-broad, and infringes on First Amendment rights.

Some opponents offer philosophical and conceptual criticisms, stressing that these laws are creating a fundamentally new category of criminal behavior. Adi Kamdar, an activist at the EFF, argued that “[w]e generally don’t think that finding more ways to put people in prison for speech is a good thing.” Another EFF spokesman stated that statutes

100 Goldnick, Note, supra note 65, at 614.
102 Id. at 4.
104 About EFF, ELEC. FRONTIER FOUND. (Feb. 17, 2017), https://www.eff.org/about.
criminalizing revenge porn almost inevitably overreach, and “[t]he concern is that they’re going to shrink the universe of speech that’s available online.”107 Lee Rowland, a Senior Staff Attorney for the ACLU who focuses on First Amendment rights, stated simply that “[w]e don’t use criminal law to remedy humiliation.”108 She also contends that criminalization should be a tool for punishing harm that is exclusively intentional,109 but some statutes do not require a finding of specific intent to cause harm.110

Victim advocates, however, emphasize the philosophical importance of criminalization. They point to the lasting and destructive consequences of the nonconsensual images, and aver that criminal law has long prohibited privacy invasions and other violations of autonomy.111 One victim advocate noted that “[w]e have criminal laws when we as a society find a type of conduct so outrageous that we need to punish people for it . . . . It’s a reflection of our social norms and values.”112 Some scholars argue that it is fair to conceptualize revenge porn as a form of sexual abuse even though it does not involve physical contact.113 They analogize voyeurism laws to demonstrate that physical contact is not needed to cause legally cognizable harm and suffering.114

Scholars also note the practical need for deterrence as some perpetrators may be judgment-proof, but do not want to be convicted of a crime that will land them in jail and show up on their record forever.115 Moreover, the permanence of the Internet mandates a strong need for deterrence. Despite some promising private sector efforts to patrol against revenge porn,116 once something is on the Internet, it is there forever.117 Researchers of cyber sexual harassment emphasized that online affronts, particularly ones including personal information, are very difficult, if not impossible, to erase.118 This permanence is only

108 Waddell, supra note 103.
109 Id.
110 See, e.g., MD. CODE ANN., Revenge Porn Prohibited § 3-809 (West 2016).
111 Citron & Franks, supra note 26, at 361, 364–65.
112 Waddell, supra note 103.
113 Citron & Franks, supra note 26, at 362.
114 Id. at 363.
115 Id. at 349, 361.
116 See supra Part II.C. Goldstein, supra note 96.
117 Goldnick, Note, supra note 65, at 625.
118 Franks, Sexual Harassment 2.0, supra note 2, at 683. See also Goldnick, Note, supra note 65, at 586 n.17.
exacerbated by the amplifying capacity of the Internet: having an infinite audience that allows others to join in instantaneously and anonymously. 119

Professor Marialice Curren of the University of St. Joseph states that it is “nearly impossible” to purge a digital footprint from the Internet. 120 Professor Curren compares an attempt at scrubbing the Internet of an image to removing a tattoo: “it’s painful, it’s costly, and there’s always a remnant” because it never really goes away. 121 It is no surprise, therefore, that the ultimate goal for most victims, above all else, is image removal. 122 Given this goal and the difficulty of removal, one can see why criminalization is an attractive, if not fitting, mechanism for deterrence.

B. Common Statutory Language and Successful Constitutional Challenges

With significant variation in statutory language among the states, it is helpful to gain a general understanding of the most common provisions of state revenge porn laws and the constitutional challenges brought to them. 123 To trigger a violation, some states require that the image was created with the expectation of privacy or with an understanding that the image would remain only within that relationship. 124 More than ten states require an intent to harass or cause emotional harm to the person depicted in the image. 125 Others provide that a person is in violation if the content was distributed for the purpose of financial gain, or conversely, if the distribution of the images causes financial losses to the depicted person. 126

Each state has its own grading system for penalties, but for first offenses it generally ranges from imprisonment spanning 90 days to 2 years, to fines from $500 to $10,000. 127 Additionally, the presence of aggravating factors or subsequent violations can elevate the classification of the crime, as seen in Georgia where a subsequent

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119 Franks, Sexual Harassment 2.0, supra note 2, at 682–83.
120 Wilson, supra note 45.
121 Id.
122 Citron & Franks, supra note 26, at 358–59.
123 See generally, Goldnick, Note, supra note 65, at 615–17.
124 Id. at 616–17.
125 Id. at 616.
126 Id. at 617.
127 See generally, Goldnick, Note, supra note 65, at 618.
violation elevates the offense to a felony punishable by a term of 1 to 5 years imprisonment and a fine of up to $100,000. 128

Most states include at least one or more statutory exemptions,129 the content of which is often the subject of constitutional challenges. For example, many states exempt images distributed within the course of law enforcement or prosecutorial activities, images that result from voluntary public exposure, images created in a commercial setting, and images related to newsworthy events.130

One of the ACLU’s most successful challenges to date was striking down the Arizona revenge porn law. Enacted in 2014, the Arizona law failed to require that the image be created with the expectation of privacy, failed to require an intent to harass or cause harm, failed to require proof of actual harm suffered, and failed to provide an exemption for news publications.131 The ACLU and others brought suit in federal court, arguing the law was over-broad, in violation of the First Amendment, and that it would lead to the conviction of a photojournalist who transmits an image of war victims.132 The judge stayed the action pending the legislature’s work to remedy the constitutional issues, but lawmakers failed to agree on a revision.133 In July 2015, the Arizona Attorney General entered into an agreement that would permanently block the law as written.134 Proponents revived the bill in 2016, and sidestepped prior constitutional snags by exempting news organizations and requiring an intent to harm the person depicted in the image.135

California, by contrast, was one of the first states to criminalize revenge porn,136 and crafted its language using the guidance of civil liberty advocacy organizations in an attempt to avoid First Amendment challenges.137 Legislators collaborated with the ACLU and the EFF to

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128 Id. at 619.
129 Id. at 621.
130 Id. at 621–22.
134 Id.
incorporate constitutionally protective provisions such as the requirement of a finding of serious emotional distress and the requirement of an intent to cause that harm. These and other changes spawned accusations that the bill was “dilute[d],” and some complained that the legislation created a “loophole” that exempted “selfies.” As a result of this criticism, an amendment was enacted the following year to cure the selfie loophole, but the language remains narrow, and the ACLU points to the statute as a model for other states.

California is not alone in drafting provisions designed to evade the challenges encountered in Arizona. Wisconsin lawmakers also sought to avoid First Amendment concerns by exempting material that is “newsworthy or of public importance.” Florida, which abandoned its attempt at a revenge porn bill in 2013 due to First Amendment difficulties, later narrowed its language to avoid such issues by creating what one newspaper called a “watered down” version. Similarly, the ACLU criticized Connecticut’s first revenge porn proposal in 2014, which did not pass, but a narrower version of the bill with a higher bar for violations was successfully passed the following year.

Note, supra note 35, at 2535–36.

138 Id. at 2535–37.

139 See Flaherty, supra note 137.


142 See WIS. STAT. ANN. § 942.09 (West 2016) (explaining that this law does not apply to “a person who posts or publishes a private representation that is newsworthy or of public importance”); Cecil, Note, supra note 35, at 2537.

143 Cecil, Note, supra note 35, at 2536.


146 CONN. GEN. STAT. § 53a-189c (2016).
IV. CONNECTICUT’S REVENGE PORNOGRAPHY STATUTE

A. Occurrences Within Connecticut

Prior to enacting of the Connecticut statute, there were multiple documented cases of revenge pornography in the state. One case occurred in 2013 when a seventeen-year-old Stamford High School student posted a photograph of him and his ex-girlfriend, engaged in a sexual act, to the photo-sharing application Instagram to retaliate following their break up.147 Another incident occurred in 2015 when a thirty-two-year-old man from Plainville posted nude photographs of a former love interest to her Facebook page, and electronically transmitted them along with sexually charged comments to more than a dozen people who knew her, including her mother.148 He did this for revenge after discovering that she corresponded online with another man.149 Plainville Police Department Lieutenant Nicholas Mullins stated at the time that it was “fairly common” for officers to get called for revenge porn complaints.150 “We see it, not very often, but fairly regularly,” he said.151

Another Connecticut resident, who testified anonymously in support of the proposed statute at a public hearing, shared that an ex-boyfriend retained intimate photographs of her for five years following their break up before sharing them online.152 He threatened her for years with distributing them, and ultimately posted them on Facebook and identified her by name.153 When she reported it to a police officer, he

147 Josh Chapin, Stamford High School Student Accused of Posting “Revenge Porn” on Instagram, NBC CONN. (Dec. 18, 2013), http://www.nbconnecticut.com/news/local/Stamford-Student-Arrested-After-Posting-Sexually-Explicit-Photo-of-Ex-Girlfriend-Police-236493971.html. Because the photograph was taken without the victim’s consent, the offender was charged with voyeurism and dissemination of voyeuristic materials. Although the incident was touted as an instance of revenge porn, it perhaps fits more appropriately within the larger category of nonconsensual pornography. Id. See also, supra Introduction (discussing the distinction between nonconsensual pornography and revenge pornography, as well as the definition of revenge pornography as used in this Note).
149 Id.
150 Id.
151 Id.
152 Hearing on H.B. 6921 (statement of anonymous Connecticut resident).
153 Id.
told her that the posting was not illegal because she initially gave him voluntary access to the photographs. 154 Former State Victim Advocate, Garvin G. Ambrose, who supported the legislation, stated he is aware of several additional instances of revenge pornography occurring in Connecticut. 155

B. Attempts at Criminalization

The Connecticut General Assembly created an initial incarnation of its revenge pornography statute in 2014. 156 Groups, such as Connecticut Sexual Assault Crisis Services, supported its passage, urging lawmakers to conceptualize an intimate relationship to imply what is tantamount to an informal contract of confidentiality that deserves protection. 157 After passing through the Judiciary Committee 158 and earning unanimous support in the Senate, 159 the bill was never called in the House of Representatives 160 due in part to constitutional objections. 161 The Connecticut ACLU called it “badly flawed” and cautioned that it would not pass constitutional muster as written. 162 The group urged a revision requiring that the image be taken with the understanding that it was to remain private in order to find a violation. It also warned that as written, 163 the bill would cause media outlets and other third parties to be wrongfully prosecuted. 164 The ACLU expressed disappointment in lawmakers’ unwillingness to incorporate the group’s input in drafting the proposal, 165 and although lawmakers eventually asked for some guidance, 166 the bill failed to pass.

The following year, an amended version continued to draw opposition. The ACLU persisted in its disapproval, calling the

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154 Id.
159 CONN. S., VOTE FOR SB-489 SEQUENCE NO. 237, 134th Reg. Sess. (Conn. 2015).
161 Stuart, supra note 145.
162 Id.
163 Id.
164 Dixon, supra note 157.
165 Stuart, supra note 145.
166 Dixon, supra note 157.
language unconstitutionally over-broad and in violation of the right to free speech and the press.\(^\text{167}\) Specifically, they objected to ambiguous definitions for qualifying images, and requested inclusion of the following requirements: the requirement to prove actual resultant harm, the requirement of an understanding of privacy for the images, and the requirement of specific intent to cause harm.\(^\text{168}\) Joining the opposition was the Connecticut Criminal Defense Lawyers Association, which echoed the ACLU’s concerns about over-breadth and the potential for inappropriate prosecutions.\(^\text{169}\)

One lawmaker remarked that disseminating images of some entertainers who expose large portions of their breasts in revealing attire, such as Jennifer Lopez, would be criminalized under the proposal.\(^\text{170}\) State Rep. Arthur J. O’Neill, who has served in the General Assembly for nearly three decades,\(^\text{171}\) expressed apprehension regarding the criminalization of speech and questioned how such a law could be enforced in an age where Internet content does not conform to state boundaries.\(^\text{172}\)

Lawmakers worked to refine and tailor the statutory language throughout the committee process and in the days leading up to debate in the General Assembly.\(^\text{173}\) They attempted to narrow the scope of the legislation in order to address the free speech concerns.\(^\text{174}\)

C. Final Statutory Language and Legislative Intent

In May and June of 2015, the bill passed unanimously through both chambers, with thirty-four legislators from both sides of the aisle and both chambers co-sponsoring it.\(^\text{175}\) Upon passage, State Rep. William Tong, Co-Chairman of the legislature’s Judiciary Committee, stated that criminalization was commensurate with the gravity of the harm that this

\(^{167}\) Hearing on H.B. 6921, supra note 141.

\(^{168}\) Id.

\(^{169}\) Hearing on H.B. 6921 (statement of Elisa L. Villa, President of the Connecticut Criminal Defense Lawyers Association).


\(^{172}\) Altimari, supra note 170.

\(^{173}\) Id.

\(^{174}\) Id.

act caused, and stressed that “[c]ivil penalties are not enough of a deterrent.” The statute, which became effective October 1, 2015, categorizes revenge pornography violations as a class A misdemeanor, punishable by up to one year imprisonment and a fine of up to $2,000.

1. Elements of the Crime

The statute provides:

Sec. 8. (a) A person is guilty of unlawful dissemination of an intimate image when (1) such person intentionally disseminates by electronic or other means a photograph, film, videotape or other recorded image of (A) the genitals, pubic area or buttocks of another person with less than a fully opaque covering of such body part, or the breast of such other person who is female with less than a fully opaque covering of any portion of such breast below the top of the nipple, or (B) another person engaged in sexual intercourse, as defined in section 53a-193 of the general statutes, (2) such person disseminates such image without the consent of such other person, knowing that such other person understood that the image would not be so disseminated, and (3) such other person suffers harm as a result of such dissemination. For purposes of this subsection, “disseminate” means to sell, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, present, exhibit, advertise or otherwise offer.

Section 8(a)(1) begins by establishing the requirement of intent. Lawmakers clarified during the House debate that the intent requirement refers simply to the intent to disseminate the image, and not the intent to cause harm. In other words, if a man mistakenly attaches a nude photograph of his ex-girlfriend to an e-mail, in genuine error, he cannot be convicted under this statute. While the ACLU pushed for the requirement to instead have intent to cause “serious emotional distress”—a higher standard—lawmakers thought that formulation to be overly narrow. The bill’s proponent, Rep. Tong, explained that while serious emotional harm is common, there are many other types of harm that can accrue of equal magnitude, including harm to employment, mental health and wellbeing, family relations, finances, and

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176 Altimari, supra note 170.
177 CONN. GEN. STAT. § 53a-189c (2016); CONN. GEN. STAT. § 53a-26 (2016); CONN. GEN. STAT. § 53a-42 (2016).
178 CONN. GEN. STAT. § 53a-189c (2016).
179 Id.
180 Id.
182 Id. at 3860.
The language attempts to describe the areas of exposure or type of behavior that would need to be depicted to trigger application of the statute. This language was the subject of debate throughout the legislative process, with the ACLU and certain legislators arguing the definitions were too broad and unspecific, which could lead to penalties for distributing images of certain celebrities who purposely display partial nudity. Proponents responded that while there are some fact patterns imaginable that could cause concern, it is impossible to tailor the language to account for every fact-specific occurrence of revenge porn. Additionally, the exemption for voluntary exposure in section 8(b)(1)(A) will cover many of these instances.

The statute goes on to require that the dissemination took place without the consent of the other person, and with the knowledge that the other person understood that the image would not be disseminated, under section 8(a)(2). This was a previous point of criticism, as the ACLU took issue with earlier versions that failed to require an understanding or agreement that the images would be kept private.

Another section requires that the victim suffered harm as a result of the dissemination. This too was a subject of contention when the bill was debated. Rep. Tong explained that the harm requirement was necessary as a matter of constitutional dimension, establishing the state’s compelling interest in curtailing the speech that is otherwise protected under the First Amendment. State Rep. Richard A. Smith, a member of the Judiciary Committee, argued that harm should not be an element of this crime. He remarked that he knew of no other criminal statute requiring a showing of non-violent “harm,” noting that the category of harms to which the proponent refers are normally associated with civil recovery where damages are sought.

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182 Id. at 3853.
185 Id.
186 CONN. GEN. STAT. § 53a-189c (2016).
187 Press Release, supra note 185.
188 CONN. GEN. STAT. § 53a-189c (2016).
190 Id. at 3852–55, 3857–58.
191 Id.
192 Id. at 3852–55.
2. Exemptions

Subsections (b), (c), and (d) carve out several exemptions and classify the criminal act:

(b) The provisions of subsection (a) of this subsection shall not apply to:
(1) Any image described in subsection (a) of this section of such other person if such image resulted from voluntary exposure or engagement in sexual intercourse by such other person, in a public place, as defined in section 53a-181 of the general statutes, or in a commercial setting;
(2) Any image described in subsection (a) of this section of such other person, if such other person is not clearly identifiable; or
(3) Any image described in subsection (a) of this section of such other person, if the dissemination of such image serves the public interest.
(c) Unlawful dissemination of an intimate image is a class A misdemeanor.
(d) Nothing in this section shall be construed to impose liability on the provider of an interactive computer service, as defined in 47 USC 230, an information service, as defined in 47 USC 153, or a telecommunications service, as defined in section 16-247a of the general statutes, for content provided by another person.193

The first category that the statute exempts is images resulting from voluntary exposure or sexual intercourse in a public place or commercial setting.194 During debate, one legislator questioned the meaning of the term “commercial setting,” and whether a more specific definition is needed.195 For example, it was argued, if an amateur photo shoot takes place in one’s own home, it is unclear whether that would qualify as a commercial setting.196 The proponent clarified that a commercial setting is generally one in which an image is captured for purposes of publication and/or in exchange for money.197 This language, however, is not included in the statute

The most controversial exemption is the safe harbor for disseminations serving the “public interest.”198 The provision sought to address the concerns of critics who asserted that the bill imposed criminal penalties on news organizations and other third parties for disseminating newsworthy images, thereby offending the First Amendment.199 Proponents offered the “Anthony Weiner” example,
arguing that absent this exception, media outlets publishing the lewd photographs former New York Congressman Anthony Weiner took of himself would have been criminal. Proponents of the exception argued that in some circumstances, such as an elected official engaging in deviant sexual behavior, dissemination is a matter of public interest; therefore, the media should not be held criminally responsible for publishing such an image. Rep. Tong offered no clear-cut definition of “public interest,” but said it would depend on the totality of the circumstances, and insisted that judges regularly make those type of discretionary decisions.

The ambiguity of the term “public interest” alarmed other lawmakers, who argued the term made the bill almost unworkable. One legislator remarked that under this language a person who disseminates a nude image of a school teacher could be exculpated by asserting that it is in the “public interest” for parents to know that the person teaching their children is undertaking risqué photo shoots. Rep. O’Neill found thousands of different judicial interpretations of the term “public interest,” which Connecticut law defined broadly as the “totality of circumstances of any given case against the backdrop of current societal expectations, a standard which on its own is of very little practical help.” Rep. Smith countered that he did not think any of the images the statute contemplated could serve the public interest. Others lamented that this exemption was not inserted into the bill until after the committee process, and thus was never fully vetted through a public hearing.

Lastly, in line with federal treatment under § 230 of the CDA, the statute exculpates ISPs, such as website owners, for offending content that users generate.

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200 H.R. Proc., supra note 75, at 3796.
201 Id. at 3803–23.
202 Id.
203 Id.
205 Id. at 3864.
206 Id. at 3849.
207 Id. at 3822.
208 See supra, Part II.
V. CRITICAL EVALUATION OF THE CONNECTICUT STATUTE & SUGGESTIONS FOR REVISION

The legislature’s struggle to formulate and agree upon workable and constitutional language was, at first blush, a success. The bill achieved unanimous bicameral support, and dodged roadblocks from civil liberties advocates by making revisions that addressed many of their strongest criticisms. The real test, however, will be its practical application moving forward and the extent to which it can appropriately address most factual circumstances of the crime while withstanding potential constitutional challenges. With that said, and after reviewing other states’ enactments, changes should be made to better tailor the statutory language by narrowing its scope while remaining inclusive of a wide range of victims. This will help prevent confusion and unintended consequences in its application, and enable prosecutors to effectively hold offenders culpable.

A. Better Defining the Elements of the Crime

In addition to the behavior and areas of exposure in an image that trigger the statute—certain portions of the body with less than a fully opaque covering and sexual intercourse—masturbation should also qualify. Masturbation is included in other statutes, including Wisconsin, Utah, Delaware, and California, which the ACLU points to as a model revenge porn statute. Masturbation, as defined in C.G.S. § 53a-193(8), is “the real or simulated touching, rubbing or otherwise stimulating a person’s own clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, either by

210 Although the analysis of this Note broaches some First Amendment issues presented by laws criminalizing revenge porn, it primarily focuses on public policy considerations. As such, the question of whether the speech at issue falls within one of the traditional categories of constitutionally unprotected speech, such as obscenity, is beyond the scope of this Note, as is the question of whether a revised version of the Connecticut statute could survive strict scrutiny.

212 Hearing on H.B. 6921, supra note 141.
213 CONN. GEN. STAT. § 53a-189c (2016).
214 WIS. STAT. ANN. § 942.09(1)(d) (West 2016). WIS. STAT. ANN. § 948.01(7)(c) (West 2016).
218 Hearing on H.B. 6921, supra note 141.
manual manipulation or with an artificial instrument."\textsuperscript{219}

The United States Supreme Court has recognized masturbation as a form of sexual conduct that deserves government regulation in some circumstances.\textsuperscript{220} The Court characterized it as being in the same vein as a “lewd exhibition of the genitals.”\textsuperscript{221} This is exactly the type of content to which the Connecticut statute already applies in a revenge porn context.\textsuperscript{222} Given that masturbation has a preexisting statutory definition under Connecticut law, and because the U.S. Supreme Court recognizes it as lewd behavior, its inclusion in the statute is unlikely to be deemed unconstitutional or overly vague. Moreover, this change would not substantively alter the statute aside from appropriately enhancing its scope.

The statute applies upon non-consensual dissemination and with the perpetrator’s knowledge that the other person understood that the image would not be disseminated.\textsuperscript{223} It is easy for one to imagine circumstances under which no discussion ever takes place between partners about the dissemination of the image, yet there is an implicit expectation of privacy. The absence of an express discussion about the recipient’s ability to distribute the image may give him or her grounds to argue a lack of understanding that the image would not be disseminated, despite an implicit understanding. It would be within the court’s discretion to conclude that a victim’s failure to speak amounts to a waiver of privacy.

The knowledge requirement should instead mirror Colorado’s or Virginia’s statutes. In order to be found culpable, Colorado’s law requires that the disseminator knew or should have known that the depicted person had a reasonable expectation that the image would remain private.\textsuperscript{224} This gives the factfinder two opportunities to hold the defendant accountable: first, upon a finding of actual knowledge of intended privacy, and second, upon a finding that a reasonable person in the defendant’s position should have known under the circumstances of the relationship that the image was meant to remain private. Similarly, 

\textsuperscript{221} Id.
\textsuperscript{223} COLO. REV. STAT. ANN. § 18-7-108(1)(II)(B) (West 2016). “Reasonable expectation of privacy” is defined differently among the states. For example, New York’s statute defines the term as (1) reflecting whether the person viewed has a subjective expectation of privacy at the time and place of the viewing, and (2) whether from an objective standpoint it is an expectation that accords with societal conventions. N.Y. PENAL LAW § 250.40 (McKinney).
Virginia’s statute requires that the offender know, or have reason to know, that they are not authorized to disseminate the images. This would prevent an offender from claiming ignorance in the absence of an express dissemination prohibition, even though he or she may very well know that their former partner would reasonably expect the images to remain private based on other facts and circumstances of their relationship. This simply modifies the standard in order to account for factual scenarios in which there may not have been an express discussion regarding dissemination, but nonetheless, there are circumstances surrounding the creation of the image or the relationship which would give the disseminator reason to know that the victim expected privacy.

Other states have similar versions of this language, including Delaware and Utah, which require that the image was created under circumstances in which the individual has a reasonable expectation of privacy. Similarly, Idaho requires that the disseminator knew or reasonably should have known that one or both parties agreed or understood that the image should remain private. None of the aforementioned statutes have been challenged on these grounds or held unconstitutional as of this writing.

Another change is to clarify the term “harm.” The ACLU insisted that requiring a showing of harm is necessary, and their claims were validated the following summer when the Arizona statute was struck down, due in part, to the omission of a harm requirement. Nevertheless, as Rep. Smith cogently observed during legislative debate, this type of “harm” is a concept largely foreign to criminal statutes, as general “harm” is usually reserved for injuries in civil causes of action. It is important, then, to define exactly what type of “harm” the statute will recognize.

While the California statute requires proof of serious emotional distress, victims report many other forms of harm from which they deserve protection. Instead, the statute should include a non-exclusive

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225 VA. CODE ANN. § 18.2-386.2(A) (West 2016).
226 DEL. CODE ANN. tit. 11, § 1335(a)(9) (West 2016).
227 UTAH CODE ANN. § 76-5b-203(2)(b) (West 2016).
228 IDAHO CODE ANN. § 18-6609(2)(b) (West 2016).
list of the categories of harm that qualify so that factfinders are not forced to speculate given the vagueness of the term and its absence from other criminal statutes. The list should be similar to Hawaii’s, which clarifies harm to “health, safety, business, calling, career, financial condition, reputation, or personal relationships.” These harms cover the types statistically and anecdotally reported, so this change makes the statute more inclusive of realistic factual scenarios.

B. Clarifying and Narrowing the Scope of Exemptions

Exempting an image for serving the “public interest” is widely criticized as overly vague, and having the capacity to wrongfully exculpate offenders who may defend themselves using a loose definition of the term, which may apply, for example, to the revenge porn of a school teacher. The carve-out seeks to protect the First Amendment and hold harmless the media, publishers, booksellers, and librarians who otherwise could be charged for publishing newsworthy or artistic images. A common illustration of this is the famous Pulitzer Prize-winning photograph “Napalm Girl,” the publishing of which would be a criminal act absent the exclusion. In fact, the statute would fail to pass constitutional muster without some version of this exception, as was seen with the formerly-defunct Arizona statute. While a provision of this kind is necessary to avoid wrongful prosecutions, it is equally important to specify what exactly “serves the public interest,” in order to prevent wrongful immunity under a broad reading of “public interest.”

Instead, serving the public interest should be defined as a dissemination relating to a “newsworthy event,” a term used in states such as Colorado and Wisconsin. Colorado defines a “newsworthy event” to mean “a matter of public interest, public concern, or related to a public figure who is intimately involved in the resolution of important

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233 HAW. REV. STAT. ANN. § 711-1110.9(1)(b) (West 2016).
236 Press Release, AM. CIV. LIBERTIES UNION, supra note 8.
239 COLO. REV. STAT. ANN. § 18-7-108(2), (6)(a) (West 2016).
240 WIS. STAT. ANN. § 942.09(3m)(b)(3) (West 2016).
public questions or, by reason of his or her fame, shapes events in areas of concern to society. 241 This definition would satisfy First Amendment concerns242 while conveying a definition that would disallow the dissemination of nude photos of a teacher based simply on the notion that education serves the public interest.243 Additionally, the phrase “relating to victims of war or natural disaster” should be included in defining a newsworthy event in order to avoid the arguments made in the name of “Napalm Girl.”244

Connecticut should also create an additional exemption for law enforcement and related functions, which is found in other states such as Utah,245 Wisconsin,246 Maryland,247 Delaware,248 Georgia,249 and Pennsylvania.250 The Utah statute, for example, excludes lawful practices of law enforcement agencies, prosecutorial agency functions, the reporting of a criminal offense, court proceedings or any other judicial proceeding, and lawfully and generally accepted medical practices and procedures.251 These exclusions are not offensive to civil liberties, and in fact further the aims of critics of revenge porn statutes who seek to limit prosecutions to only the most appropriate wrongdoers. Moreover, they do not threaten victims’ mechanism to protect and vindicate their rights as this category of disseminations is not what triggers the harms the statute is seeking to punish.

C. Elevating Punishment for Subsequent Offenses

Violation of the Connecticut statute is a class A misdemeanor,

241 COLO. REV. STAT. ANN. § 18-7-108(2), (6)(a) (West 2016).
243 An Act Concerning Invasions of Privacy, H.B. 6921, 2015 Reg. Sess. (Conn. 2015), http://www.ctn.state.ct.us/ctnplayer.asp?odID=11555. As discussed above, the clarification is meant to prevent teacher images from automatically falling into the exemption by virtue of the image depicting an individual who is a public educator. It should be noted, however, that the clarification is not intended to wholly exempt teachers’ revenge porn from being subject to the exception. For example, if the image depicted a teacher masturbating to photographs of her elementary school students, the image would certainly fall into the exception.
244 Antigone Books v. Horne, supra note 238.
245 UTAH CODE ANN. § 76-5b-203(3)(a) (West 2016).
246 WIS. STAT. ANN. § 942.09(3m)(b)(2) (West 2016).
249 GA. CODE ANN. § 16-11-90(c)(1) (West 2016).
250 18 PA. CONS. STAT. § 3131(e) (2016).
251 UTAH CODE ANN. § 76-5b-203(3)(a) (West 2016).
punishable by up to one year imprisonment and a fine of up to $2,000. Unlike other statutes, however, there is no graduating severity of punishment for subsequent violations. Given the pervasive and permanent harm that this crime causes, and the strong need for deterrence, an elevation of its classification and penalties for multiple violations would be more commensurate with the damage inflicted.

In Georgia, for example, subsequent violations result in reclassification from an aggravated misdemeanor punishable by a fine of up to $5,000 and imprisonment of up to one year, to a felony punishable by imprisonment of up to five years and a fine of up to $100,000. Utah also increases the potential sentencing term from up to one year for first offenses to five years for subsequent offenses, and Delaware elevates its punishment for first offenses from one year imprisonment to two years imprisonment for subsequent offenses.

Given the destructive nature of this crime, it is only fitting for Connecticut to recognize the magnifying culpability in recurring wrongdoers. For subsequent offenses, the crime should shift from a class A misdemeanor to a class E felony, which is punishable by up to three years imprisonment. This will strengthen deterrence and more appropriately penalize offenders who continuously seek to traumatize and sexually humiliate others.

VI. CONCLUSION

The Connecticut statute takes the meaningful step of criminalizing this destructive new practice, and should be lauded for ambitiously formulating workable language absent a greater development of such statutes in other jurisdictions. That lack of guidance, however, indicates an unavoidably superficial understanding of the unintended

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253 See supra Parts I and III.
255 UTAH CODE ANN. § 76-3-204 (West 2016).
257 DEL. CODE ANN. tit. § 1335(c) (West 2016). DEL. CODE ANN. tit. 11, § 4206(a) (West 2016).
258 DEL. CODE ANN. tit. § 1335(c) (West 2016). DEL. CODE ANN. tit. 11, § 4205(b)(7) (West 2016).
259 CONN. GEN. STAT. § 53a-35a(9) (2016).
consequences attendant to these statutes. Though Connecticut’s final legislative incarnation largely inoculated itself from the most glaring constitutional criticisms, the true test of its merits and efficacy will occur upon practical application and judicial challenge.

As written, the elements of the crime and the exemptions must be better tailored to ensure full inclusion of the targeted behavior and to prevent the capacity for inappropriate prosecutions. Most notably as to the elements of the crime, (1) the term “harm” must be clarified, (2) “masturbation” must be added to the list of offending content, and (3) the knowledge requirement should be changed from actual knowledge to allow alternatively for a finding that the disseminator should have known that the depicted person had a reasonable expectation of privacy. Additionally, the exemptions must be better defined, including a more specific “public interest” carve-out and the creation of a new exception for law enforcement and judicial authorities. There should also be an elevated classification and punishment for subsequent offenses to ensure that the penalty is proportionate to the increasing gravity of harm that victims realize.

These changes seek to narrow the statute’s scope while remaining inoffensive to the Constitution; provide better statutory guidance to judges, prosecutors, and citizens; and prevent unintended prosecutions. None of these changes, however, obstruct a genuine wrongdoer’s path to prosecution under the most common factual circumstances of revenge pornography. It is the hope that these revisions will help fortify the constitutionality of the statute, offer prosecutors a fair opportunity to meet their burden of proof, deter potential offenders, and, perhaps most importantly, to accomplish justice on behalf of victims.