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THE FIRST AMENDMENT IN THE ERA OF PRESIDENT TRUMP

ERWIN CHEMERINSKY†

It's truly my great honor and pleasure to be here. You might remember last summer, in campaigning for President, Donald Trump referred to the press, and I'm quoting his exact words, as "dishonest, disgusting, and scum."[1] Just ten days ago, you might have heard in a press conference, President Donald Trump said that the "press is out of control."[2] He referred to the press as the greatest threat facing the country. The next day, in a Tweet, he referred to the press as being the enemy of the people.[3]

As long as there has been a United States, there has been an adversarial relationship between those in government and the press. It's never started quite so soon in a President's administration as what we're seeing in the last few weeks. But also, never in American history has any President spoken of the press in these terms. It certainly forces us to think about what is the nature of the First Amendment in the context of the Trump Presidency.

Now, this is supposed to be a talk about the First Amendment, in a slightly different context, because *Denver Law Review* was kind enough to invite me and it was supposed to be delivered on September 6, and by coincidence, I had a Ninth Circuit argument the next day so I had to postpone. But though I apologized for having delayed this, I think the timing could not be more appropriate in talking about what is the nature of the First Amendment and its protections in this moment of American history, and what the Trump Administration is likely to mean for it.

I think to answer this question, I need to develop two points. The first is what's the nature of the Supreme Court's protection of the First Amendment? It doesn't make sense to look at just what Donald Trump is saying because we need to consider the Supreme Court's orientation to free speech at this moment in American history. Then second, what exactly can

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† Dean and Jesse H. Choper Distinguished Professor of Law, University of California Berkeley School of Law. This speech was originally presented at the University of Denver Sturm College of Law on February 28, 2017.

1. *See* Jeremy Diamond, *Trump Launches All-Out Attack on the Press*, CNN (June 1, 2016), http://www.cnn.com/2016/05/31/politics/donald-trump-veterans-announcement.

2. *Donald Trump Says Press Is 'Out of Control,'* BBC (Feb. 16, 2017), http://www.bbc.com/news/av/world-us-canada-38997075.

3. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 2:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065.

the Trump Administration do and what can't it do with regard to its assault on the press.

It's interesting to talk about the Roberts Court and freedom of speech. Obviously, we look at what the Roberts Court's orientation of the First Amendment is in order to imagine what it could with regard to some of the cases coming up in terms of Trump Administration actions. I think that the Roberts Court is in some ways different from any other we have seen in American history with regard to freedom of speech. It is a Supreme Court that is very protective of freedom of speech except when the institutional interest of the government as government are implicated. Then it's not at all protective of speech.

So, in talking about the Roberts Court and to have a basis for talking about how the Trump Administration is going to be dealt with in the courts, let me separate each of these two things I've said about the Roberts Court. One is its general orientation towards protecting speech, but the other is its refusal to do so when the government as government is involved.

You find its strong commitment to free speech as a general matter, in so many developments and areas. For example, the Roberts Court has refused to expand the categories of unprotected speech with the First Amendment. If you study free speech law, you know that at least since the early 1940s, the Supreme Court has said that there are some categories of speech that are unprotected, so the government can prohibit or at least regulate the expression. Incitement of illegal activity, obscenity, child pornography, and false and deceptive advertising are all categories of unprotected speech.

The Roberts Court has been asked to expand those categories and create new categories of unprotected speech, but it has refused to do so. Most notably, in a couple of cases, the Roberts Court was asked to find that violent speech is unprotected, and therefore, the speech can be prohibited or at least regulated by the government. The Roberts Court emphatically refused to do so.

One of these cases was *United States v. Stevens*[4] involving a federal law that prohibited the sale or distribution or possession of images of animal cruelty. One of the arguments that the United States government made to the Supreme Court was just as the government could try to dry up the market for child pornography by prohibiting possession of it, so should the government be able to dry up the market to depictions of animal cruelty. The government focused on these so-called snuff films that depicted great cruelty to animals.

Then-Solicitor General Elena Kagan argued the case to the Court and said that such violent depictions, pure violence depicted towards animals,

4. 559 U.S. 460 (2010).

should be outside the scope of First Amendment protections, but the Supreme Court, in an 8–1 decision, rejected that argument. Chief Justice Roberts wrote for the Court and only Justice Alito dissented. Chief Justice Roberts explicitly said that there is no exception to the First Amendment with regard to violent speech.

Another example of this was a case called *Brown v. Entertainment Merchants*.[5] California adopted a law that made it a crime to sell or rent violent video games to minors under eighteen years of age without parental consent. It didn't prohibit such violent video games, it just required the same kind of parental consent that the Supreme Court has approved for sexually explicit materials. But the Supreme Court, in a 7–2 decision, declared the law unconstitutional. Here, Justice Scalia wrote the opinion for the Court. What's more, the Court expressly declared that there is no exception to the First Amendment for violent speech. The Court emphatically said that children are protected under the First Amendment, and that video games, even violent ones, are speech protected under the Constitution.

The Court couldn't analogize, as Justice Breyer did in his dissent, to regulations of sexually explicit speech. But Justice Scalia said sexually explicit speech is a category outside the First Amendment, at least regarding obscenity, because there's no such category with regard to violent speech.

Another illustration of the Roberts Court's commitment to free speech is that it's narrowed the existing categories of unprotected speech. Not only is it unwilling to create new ones, but it's been unwilling to extend the existing ones and has even limited them. I think perhaps the most revealing case with regard to the Roberts Court and free speech is a decision called *Snyder v. Phelps*[6] that involved a small church at Topeka, Kansas, the Westboro Baptist Church, led by Fred and Margie Phelps that make it a practice of going to funerals of those who died in military service. They use that as the occasion for expressing a vile anti-gay, anti-lesbian message.

Matthew Snyder was a Marine who died in military service in Iraq. The members of Westboro Baptist Church went to his funeral in Maryland. They asked the police where they could stand before the funeral and during it. The officers pointed to a spot about one thousand feet away from the funeral. Before the funeral service began, they chanted and sang. During the service, they were silent but held up signs. That night on the news, Matthew Snyder's father, Albert Snyder, was able to watch footage and read the signs. He was deeply offended. He sued, based on diversity jurisdiction in federal court, for intentional infliction of emotional distress and invasion of privacy. After all, the Supreme Court had said that there

5. 564 U.S. 786 (2011).
6. 562 U.S. 443 (2011).

can be tort liability for speech so long as it's consistent with the First Amendment.

The jury ultimately awards $10 million in compensatory and punitive damages. But the Supreme Court found that the awarded damages and liability violated the First Amendment. What's more, it was an 8–1 decision. Chief Justice Roberts wrote for the Court and Justice Alito dissented. I think this case stands with a very important proposition—that the government cannot punish speech or hold speech liable just because it's offensive. The Court said there cannot be liability for intentional infliction of emotional distress for speech that is otherwise protected by the First Amendment.

Let me give you a third way that the Roberts Court is protective of speech. It has been quite emphatic that any content-based restrictions on speech must meet strict scrutiny. If you study First Amendment law, you know that even before the Roberts Court, the Supreme Court had said that content-based restriction of speech—attempts by government to regulate speech based on the topic or the message—must meet strict scrutiny and must be narrowly tailored to achieve a compelling purpose.

But no Supreme Court has been more insistent on that proposition than the Roberts Court. I will give you a couple of examples. *United States v. Alvarez*[7] is a case where the results surprised me, though I was pleased by it. There's a federal law that makes it a federal crime for individuals to claim to have received military honors that he or she didn't actually earn. This involved a man in Riverside, California, who went to a meeting, it was a board that he was elected to, and he claimed to have been awarded the Congressional Medal of Honor that he didn't actually earn. The United States government prosecuted him for violating the Stolen Valor Act of 2005.

Ultimately, the case came to the Supreme Court, and in a 6–3 decision, the Supreme Court found the federal statute unconstitutional and ruled in favor of Alvarez. Here, Justice Kennedy wrote the opinion for the Court. Justice Kennedy said the federal statute is a content-based restriction on speech, whether it applies is entirely on the content of the message. If somebody falsely claims to receive a military honor, then it's a federal crime. But Justice Kennedy said since it has to meet strict scrutiny, the government has to show not just a compelling interest, but that the law is narrowly tailored to achieve its purpose. The Court said the government failed strict scrutiny; the government couldn't show us it was hurt by the relatively few instances in which individuals falsely claim military honors. Moreover, he said there are other remedies available. More speech, as according to this case. Just expose that the person didn't actually receive the military honor.

7. 567 U.S. 709 (2012).

Or another example of the Supreme Court being insistent that content-based restrictions have to meet strict scrutiny was *Reed v. Town of Gilbert*.[8] The town of Gilbert is in Arizona. It had an ordinance that prohibited signs on public property, but it had about two dozen categories of exceptions. One exception was for political signs. The ordinance was very broad in this exception. Political signs could be put up throughout the election season, there could be more than one sign on the same piece of public property, the signs could be almost any size, and the signs could remain up during the election season.

On the other hand, there was another exception for directional signs—signs to give people directions to a meeting or to worship services. These signs had to be put up only a few hours before the meeting or the worship service and they needed to be taken down several hours after. There can be only one sign on a particular piece of public property giving directions, and it had to be quite small.

Reed is the pastor of the Good News Church in Gilbert, Arizona. He says their church relies on signs to tell people where worship services are being held on Sundays and challenged the ordinance. The lawyer representing Clyde Reed and the Good News Church did something very clever in his brief before the Supreme Court—something that all of us who handle appeals might learn from. The first page of his brief is two pictures. One picture is a corner in Gilbert, Arizona, during the election season. It was crowded with many different signs of various sizes and shapes. The other picture was a corner where there's one tiny sign for the Good News Church all by itself.

The Supreme Court unanimously declared the Gilbert ordinance unconstitutional. Justice Clarence Thomas wrote the opinion for the Court. He said all content-based restrictions on speech must meet strict scrutiny unless it is a category of unprotected speech. He subjected this ordinance to strict scrutiny and declared it unconstitutional. I did some quick research after this case came down, looked at just the cities where I live in Orange County, California. Every single one of them had a content-based restriction on signs on public property, every one of which would be unconstitutional. I haven't done the research for Denver, for surrounding cities. My guess is the same is true here.

One final way in which the Roberts Court has been very protective of speech is expanding who is protected by the First Amendment's safeguarding of expression. The most famous case here, perhaps the most important case in the first dozen years of the Roberts Court, is *Citizens United v. Federal Election Commission*.[9] There, the Supreme Court held

8. 135 S. Ct. 2218 (2015).
9. 558 U.S. 310 (2010).

that corporations have the right to spend unlimited amounts of money from their corporate treasuries on elections.

Just seven years earlier, in *McConnell v. Federal Election Commission*,[10] the Supreme Court upheld the same provisions that were struck down in *Citizen United*. *Citizens United* explicitly overruled *McConnell*. Of course you can ask, what was the difference between 2003 and 2010? Did the Court find some musty history of the First Amendment that led it to believe it made a mistake? No, the difference is that Justice O'Connor, who'd been in the majority in *McConnell*, was replaced by Justice Alito, who then cast the deciding vote with those with the dissent in *McConnell* to overrule.

Citizens United v. Federal Election Commission has an enormous effect in our political system. The effect is probably less seen with regard to presidential elections. It's much more at the local or even the state level. Campaigns where the candidates have less name recognition, campaigns where money can make so much difference. There's now starting to be a substantial body of political science literature that shows in these elections, campaign spending makes a difference, and the ability of corporations to spend the money of their treasuries determines who gets elected and determines who even runs for office, as often people choose not to run, knowing the corporate wealth that will be ready against them.

If you put together all of the cases that I described for you, you can see why I say the Roberts Court has generally been a strongly pro-speech Court, and you have to keep that in mind, but there is an important point here. The Roberts Court has not been a pro-speech Court when the institutional interests of the government as government are at stake. I can give you many illustrations of this as well. Think about the situations where the government can claim an institutional interest. One would be the employment context. Here, a very important case from the Roberts Court is *Garcetti v. Ceballos*.[11] Richard Ceballos is a deputy district attorney in Los Angeles County. He's also an adjunct professor at my law school. He had a case where he doubts about the veracity of the testimony of the witness, a deputy sheriff. He did some investigation, and he concluded that the deputy sheriff was lying. He wrote a memo to the file to that effect.

His supervisor, by coincidence a former student of mine at the University of Southern California Law School, told him to soften the tone of the memo. He refused to do so. He turned it over to the defense lawyer, as he believed he was constitutionally obligated to do under *Brady v. Maryland*.[12] His supervisor removed him from his supervised position and transferred him to much less desirable location. He sued and said that this

10. 540 U.S. 93 (2010).
11. 547 U.S. 410 (2006).
12. 373 U.S. 83 (1963).

demotion violated the First Amendment, because it was retaliation for him writing that memo and giving it to the defense lawyer.

The Supreme Court ruled 5–4 against Richard Ceballos. Justice Kennedy wrote the opinion for the Court. Ironically, he was joined by the same justices who joined him in *Citizens United* four years later—Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. Justice Kennedy said, "There is no First Amendment protection for the speech of government employees on the job in the scope of their duties." That is upholding, I'm quoting, "There is no First Amendment for the speech of government employees on the job in the scope of their duties."

Think of a whistleblower who stays internal to the organization and then gets demoted or fired. There's no protection. Over a decade and a half ago, I was asked to do a report on the Los Angeles police department in the wake of the Rampart scandal. I had the chance to interview almost a hundred police officers as part of preparing my study. I learned that there was a code of silence strictly enforced with the Los Angeles police department, that officers who came forward and reported misconduct felt that their back wouldn't be protected if they were in danger. Indeed, I learned a new phrase—"freeway therapy"—that if an officer reported misconduct of another officer he or she would be transferred to the precinct furthest from where he or she lived. In Los Angeles, that can be a two-hour drive, hence the phrase freeway therapy.

I concluded that to deal with the problem of police abuse in Los Angeles, the code of silence had to be tackled. There had to be protection for officers who came forward and reported misconduct. *Garcetti v. Ceballos* said there is no First Amendment protection for the officer who comes forward and reports misconduct within the department. There's no First Amendment protection for speech on the job in the scope of duties.

When you think about the institutional interest of the government, another area you might focus on is students. Here too, there's a Roberts Court case rejecting protection of freedom of speech. The case is called *Morse v. Frederick*.[13] The Olympic torch was through Juno, Alaska. A school released its students to stand on the sidewalk and watch. A student got together with his friends and unfurled a banner that said, "Bong hits for Jesus." My favorite part of the oral argument was when Justice Souter said, "I have no idea what that means."

But the principal thought that was a message to encourage illegal drug use. She confiscated the banner and suspended the student from school. The Supreme Court ruled 5–4 in favor of the principal and against the student. Chief Justice Roberts determined that schools have an important interest in discouraging illegal drug use. Therefore, the Chief

13. 551 U.S. 393 (2007).

Justice said schools can punish speech that they see as encouraging illegal drug use.

Justice Stevens, writing for dissent, argued that there's no reason to believe that this banner would have any effect in encouraging illegal drug use. Is it hard to believe that New York students, the smartest or the slowest among them, were likely to use illegal drugs because of this banner? But that didn't matter to the majority.

Another area of focus on the interest of government as government is in the context of the military. I argued a Supreme Court case a few years ago on behalf of Dennis Apel. Dennis had been part of a protest on a military base, and he was then issued an order that prevented him from ever going onto a military base again. What was involved here is whether he could go in the public area of the military base, which was on the side of a major road, the Pacific Coast Highway. We won unanimously in the Ninth Circuit, but I lost in the Supreme Court by the close margin of nine to nothing. Justice Breyer, writing for the Court, expressing the need for great deference to the military when it comes to regulating speech, even when it comes to areas of military bases that are public.

Another area where we might see the institutional interest of the government as government is regarding prisoners. Again, the Roberts Court has not been protective of speech. To give you an example, there was a case a decade ago, *Beard v. Banks*.[14] It involved the Pennsylvania rule that said that in a maximum-security prison, inmates could not have any written material, and that would include any photographs of family members. They couldn't have newspapers, they couldn't have books, they couldn't have magazines, they couldn't have pictures of loved ones. What is a clearer restriction of free speech than that? And yet, the Supreme Court upheld that rule, proclaiming the need for great deference to prisons and prison authorities.

You see this deference to the government as government when national security is at stake. I think one of the more important cases the Roberts Court with regard to freedom of speech was *Humanitarian Law Project v. Holder*[15] in 2010. It involved the federal statute that makes it a federal crime to give material assistance to a terrorist organization. The issue in this case is whether speech alone is enough to be found material assistance.

The facts of the case are quite important. It involved two groups of Americans. One wanted to advise a Kurdish group on how to use international law in the United Nations for peaceful resolution of the disputes. This Kurdish group wanted to form a separate country, breaking away from Turkey. The other involved a group of Americans that wanted to help a Sri Lankan group. The Sri Lankan group was seeking to get

14. 548 U.S. 521 (2006).
15. 561 U.S. 1 (2010).

humanitarian assistance from the United Nations and other international organizations.

There was no allegation at any stage of the litigation that these American groups were advocating terrorism or devising how to commit terrorist activity. It was speech on how to use international law to peacefully resolve disputes and to get humanitarian assistance. Yet, the Supreme Court ruled, in a 6–3 decision, that this speech could be punished as material assistance for a terrorist organization. Both the Sri Lankan and the Kurdish groups were labeled by State Department as terrorist organizations, and the Supreme Court said any speech to help them could be punished.

A dissenting Justice Breyer said that what the Court should have thought of here is whether this speech is inciting illegal activity. We have a test for that, and it was announced in *Brandenburg v. Ohio*[16] in 1969. Speech can be punished for inciting illegal activity only if it's directed at causing imminent illegality and it's likely to result in illegality. He said the majority doesn't even mention the test. The majority expresses the need for great deference to the government as government.

I'll give you one more example of how the Roberts Court has not been protective of speech when government as government is involved, and that's in the area of government speech itself. In fact, I find one of the most troubling areas in terms of First Amendment in the Roberts Court is creating this new principle that if the government itself is the speaker, then there's no basis for a First Amendment challenge. I'll mention a case from just a year and half ago, from June of 2015. It's a case called *Walker v. Texas Division of the Sons of Confederate Veterans*.[17]

Texas has two kinds of license plates. There are the general plates, the ones you get if you don't request anything else, and then there are specialized plates. There are many ways in which specialized plates can come to be produced. Nonprofit organizations can request that Texas produce specialized plates with particular insignias, slogans, pictures. For example, the Texas Department of Motor Vehicles has produced license plates that say, "Go Gators," referring to the University of Florida sports team. They produced license plates that say, "I'd rather be golfing," and so on.

The Texas Division of the Sons of Confederate Veterans requested that the Texas Department of Motor Vehicles issue license plates with the Confederate flag. Texas refused to do so, and a lawsuit was brought against them. The Fifth Circuit said that this was a content-based restriction on speech and should be unconstitutional.

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16. 395 U.S. 444 (1969).
17. 135 S. Ct. 2239 (2015).

The Supreme Court, in a 5–4 decision, reversed in favor of the State of Texas. Justice Breyer wrote the opinion for the Court. His opinion was joined by Justices Ginsburg, Kagan, and Thomas. Justice Alito wrote the dissent, joined by Chief Justice Roberts, as well as Justices Scalia and Kennedy. That's not a split you see every day on the Roberts Court. Justice Breyer said that when the government is the speaker, its speech cannot be challenged as violating the First Amendment. He says the government has to be able to speak. It needs to encourage people to recycle, encourage parents to vaccinate their children. He said license plates are a form of government speech, they're a government-issued ID. He said, Texas, since it is government speech, can refuse to have the Confederate flag on the license plates.

Justice Alito, writing for the dissent, said the license plate may be government speech, but what's on it is private speech. Texas has created a forum for private messages. He disagreed with the majority that when people see something on a license plate, they perceive it as government speech. He says when people see "Go Gators" on a Texas license plate, they don't assume that the Texas legislature has encouraged people to root for the Florida Gators rather than the Texas Longhorns. When they see "I'd rather be golfing," they don't assume the State of Texas has encouraged people to golf rather than go to work.

I like the result in this case. I like that Texas isn't going to issue license plates with the Confederate flag. But I find myself much more in agreement with the dissent than with the majority. Texas doesn't have to allow private groups to put messages on a license plate. Once it does so, it shouldn't be able to discriminate based on the content, based on the topic or the viewpoint.

The reason I'm so upset about the government speech factor is I see no stopping point. The Supreme Court has said that the government can speak by adopting private speech as its own. Imagine that a city council said that "we are going to allow anti-abortion protests, but not pro-choice protests in city park" and then adopt the anti-abortion protest as its own government speech. Or what if a city playhouse says, "We're only going to produce plays written by Republican authors." Or libraries say, "We're only going to buy books written by liberal authors." All of that should clearly violate the First Amendment, but the speech adopted by the city council, the playhouse, and the library is all government speech. Should the government be able to engage in content-based restrictions just by declaring the message to be adopted as government speech? That seems the door the Court has opened by saying it's going to give so much deference to government as government.

I've tried to give you a detailed picture of the Roberts Court being protective of speech, but not when the government as government is involved. It's in this context that I think I can talk about what we're seeing

already, what we might see over the course of the next four years from the Trump Presidency.

In some ways, of course, it's early to be talking about the Trump Presidency. We're just one month and eight days into the Trump Presidency, but we certainly had the statements I mentioned in my introduction, of the press is the enemy of the American people, the press being out of control. What are some of the things that the Trump Administration might do, and how might the courts deal with these in light of the law that I just described to you?

One thing that candidate Donald Trump repeatedly said is that he wanted to see the American law of defamation changed.[18] He said that if he became President, the law of libel and slander would be revised to make it much easier for plaintiffs to succeed. He spoke approvingly of the law in England in this regard that does make it much easier for plaintiffs to succeed. In the United States, if the plaintiff is a public official or a public figure, he or she can recover for defamation only by proving actual malice, that the defendant knew the statement was false or acted with reckless disregard of the truth. In England, generally, the burden of proof is reversed, and also, there's no notion of actual malice.

I do not think that President Trump is going to succeed in this regard. First, as we all know, defamation law is state law—it's not federal law. There is no federal law with regard to libel and slander. It's a law in each of the fifty states, so what can the President and Congress do about it? But second, limits on defamation come from the First Amendment and there's no indication that the Roberts Court or even any of its members want to reconsider those.

If you ask me what the most important free speech case is in all of American history, I would say *New York Times v. Sullivan*[19] in 1964. No free speech case is more revered, none is more canonical than that. When it came down, then-University of Chicago law professor Harry Calvin said it should be an occasion for dancing in the streets. It was *New York Times v. Sullivan* that said that a public official can recover for defamation only by proving with clear and convincing evidence, falsity in the statement, and actual malice.

It was *New York Times v. Sullivan* that said that public debate has to be open and robust. It was *New York Times v. Sullivan* that said that even a false speech has to be protected by the First Amendment so it would be the breathing space that expression needs. It was *New York Times v. Sullivan* that said that even "vituperative attacks on public officials," those were the Court's words, are protected by the First Amendment.

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18. *See* Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html.

19. 376 U.S. 254 (1964).

Now, one of the justices on the current Court has called into question *New York Times v. Sullivan*. I do not see that President Trump's desire to change defamation law will come to any fruition. I don't think the states are going to change their law, but even if they do, the First Amendment still limits defamation recovery.

But that's just one area where candidate and President Trump called for changes in the law. It's clear that President Trump has a focus, one might say a preoccupation, of those who are leaking information to the press. You might have seen two weeks ago when national security advisor Michael Flynn was forced to resign. There was a good deal of attention. Why was he forced to resign? He had impermissible, and maybe illegal, contacts with Russia before Trump was inaugurated. He lied to Vice President Pence and others about this.

What did President Trump say about Flynn? Did he criticize Flynn for the contacts with Russia? Did he criticize Flynn for the lies, including to the Vice President? No. What President Trump said was these were results of leaks, maybe as a result of leaks from holdovers from the Obama Administration. In fact, if you're seeing today's news, the headline of CNN, it is President Trump saying that perhaps President Obama is responsible for those leaks.[20]

Last week, there were reports of other impermissible contacts between those in the Trump campaign and Russia. President Trump criticized the media for reporting this and again said they're going to look for leaks. You might have seen in the last couple of days White House Press Secretary Sean Spicer said, he took the phones of those who work for him and looked at the phones to see if they were sending leaks, including by encrypted messages.

There are certainly things that the United States government can do if it wants to go after those who are leaking information. One thing you can do is bring prosecutions under the Espionage Act of 1918[21] that makes it a crime to disclose national security information. It's interesting that the Espionage Act of 1918 and its precursor, the Espionage Act of 1917,[22] had been on the books now just about a century. In an entire hundred years, there have only been twelve prosecutions brought under the Espionage Act. Nine of them were brought during the Obama administration.

Given the attitude that President Trump has expressed towards those who are leaking information and his attitude towards the press more generally, I predict we are going to see more, many more prosecutions under the Espionage Act for leaking national security information.

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20. Eli Watkins, *Trump Says Obama Behind Leaks*, CNN (Mar. 1, 2017, 1:05 AM), http://www.cnn.com/2017/02/27/politics/donald-trump-barack-obama-leaks.

21. Act of May 16, 1918, ch. 75, 40 Stat. 553 (current version at 18 U.S.C. §§ 792–799 (2012)).

22. Act of June 15, 1917, ch. 30, 40 Stat. 217 (current version at 18 U.S.C. §§ 792–799 (2012)).

First Amendment issues may arise. I think that the First Amendment would protect the press that publishes the information, but I don't think that the First Amendment's going to provide protection for the government official who is caught leaking the information. After all, in *Garcetti v. Ceballos* that I told you, the Supreme Court held that there's no First Amendment protection for speech of government employees on the job within the scope of their duties. In general, the Supreme Court has failed to provide much protection in the context of somebody who might be providing information to the press.

Yet history also shows the importance of such leaks of information. The Watergate scandal and the cover-up, illegal activity, came to light only because of an anonymous source—Deep Throat. The torture that occurred in Abu Ghraib was revealed only because of leaks. The massive illegal wiretapping done under the Bush Administration was revealed only because of leaks. The more the government is successful in using the Espionage Act to dry up such leaks, the more all of us will lose a key check on the government.

Another tactic that I believe we're going to see from the Trump Administration is forcing reporters to disclose their sources. This too was done perhaps more by the Obama Administration than any prior administration. Think of New York Times reporter Judy Miller going to prison for not fully disclosing sources, but that was before the Obama Administration. I can point to a number of instances where the Obama Administration tried to force reporters to face the penalty of contempt of court to disclose their sources. I think because of the preoccupation for leaks in the Trump Administration, you'll see them trying to bring reporters before grand juries and force them to disclose their sources.

Here too, the law provides relatively little protection. The key Supreme Court case here was *Branzburg v. Hayes*[23] in 1972. There, the Court ruled 5–4 that reporters do not have any First Amendment protection that is keeping them from disclosing their sources. States and state courts generally have some "shield law" protecting reporters, but there is no federal shield law, and the absence of a federal shield law means that if the Trump Administration wants to bring reporters forward, they can do so.

Another thing that we began to see and are likely to see even more is the Trump Administration discriminating among media outlets. You might remember that during the presidential campaign, President Trump's campaign denied media credentials to the Washington Post and Politico because he found their reporting to be too unfavorable. Last Friday, the Press Secretary did an informal briefing, he called it, and I'm quoting, "a gaggle," and excluded from being there among others, the New York

23. 408 U.S. 665 (1972).

Times, the Los Angeles Times, Politico, and BuzzFeed.[24] The editors of the New York Times responded to this by saying that in all the years the New York Times has been covering the Presidency, never before have they seen a President exclude members of the media on the basis of a particular outlet being unfavorable in covering an administration.[25]

This was an informal briefing. There's no doubt that presidents and press secretaries have done informal briefings to some and not all of the media, and yet the idea of literally someone standing at the door and saying, since you're from the New York Times, or you're from the Los Angeles Times, or you're from Politico, you're not welcome. Whereas all of the far-right media was allowed into that briefing.

I think if this becomes a pattern, you will see a lawsuit filed certainly if there is an official press conference and only those who report favorably to the President are allowed in. I think here, the media will win and the Trump Administration will lose, that this is viewpoint discrimination. It's being done by the government at official events, and viewpoint discrimination goes to the very core of the First Amendment.

Now I focused on only some of the things that are likely to occur in the next four years, but just that these have happened in such a short time shows why it's so important to focus on the Trump Presidency and the First Amendment and why it's so important to do so in the context of where is the Roberts Court with regard to free speech, when are they likely to be a check on the government and when are they likely to side with the government.

I conclude with the words of James Madison from the Federalist papers. He said, "Knowledge will forever govern ignorance: [that] people who mean to be their own Governors, must arm themselves with the power [that] knowledge gives."[26] He said, "A popular Government, without popular [knowledge], or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[27]

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24. *See* Julie Hirschfeld Davis & Michael M. Grynbaum, *Trump Intensifies His Attacks on Journalists and Condemns F.B.I. 'Leakers,'* N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/us/politics/white-house-sean-spicer-briefing.html.

25. *Id.*

26. James Madison, Letter to W.T. Barry (Aug. 4, 1822), https://www.loc.gov/item/mjm018999.

27. *Id.*

TOO YOUNG TO UNDERSTAND, BUT OLD ENOUGH TO KNOW BETTER: DEFINING THE RIGHTS OF TRANSITION-AGE YOUTH IN THE CHILD WELFARE SYSTEM

ELIZABETH FORDYCE[†]

ABSTRACT

Older youth in the foster care system are often caught in the transition from childhood to adulthood. They are pushed to be independent in a system that historically and jurisdictionally has existed because of their dependency. Unlike their peers who may test responsibility, make mistakes, and learn from those mistakes in supportive environments, oftentimes, the rules and court orders of foster care rigidly confine the day-to-day existence of transition-age youth.

Current research around adolescent development and decision-making capacity indicates that transition-age youth are neither children nor adults. With the passage of the Preventing Sex Trafficking and Strengthening Families Act (the SFA) in 2014, Congress opened the door for states to adopt laws, policies, and practices more in line with the developmental stage of this age group. The law specifically requires states to provide foster youth with a list of their rights with respect to education, health, visitation, and court participation.

This Article critiques the SFA's rights provision in the context of the juvenile court's historical underpinnings, the rights of parents and the state, current developmental research, and common practice around older youth transitions to adulthood. In doing so, this Article highlights the legal paradox facing transition-age youth and questions the validity of "rights" without enforcement. This Article emphasizes the need for culture change within the child welfare community to appropriately integrate current research into policy and practice in the pursuit of achieving better life outcomes for older youth transitioning from care.

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INTRODUCTION

For older youth in the foster care system, particularly those nearing their emancipation, there exists a developmental paradox. They are caught between the freedoms of childhood and the responsibilities of adulthood.[1] They are still the subjects of legal proceedings where judges and other professionals are making decisions in their "best interests" and

1. *See* JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, SUCCESS BEYOND 18: A BETTER PATH FOR YOUNG PEOPLE TRANSITIONING FROM FOSTER CARE TO ADULTHOOD 2–3 (2013) [hereinafter JIM CASEY, SUCCESS BEYOND 18] (noting young people are legal adults at age eighteen, yet still need support).

yet simultaneously encouraged to ready themselves for the challenges of living on their own.[2]

The child welfare system as a whole has struggled to define the rights and responsibilities of older youth in its care, specifically as compared to the clearly delineated rights and interests of their parents and the state at large. Indeed, transition-age youth[3] in child welfare have a unique hybrid status.

From the moment they enter foster care, the system and its many players hold court hearings, visits, and meetings where decisions are made for and on behalf of the youth.[4] Court orders, rules of placement, licensing regulations, and laws govern these youth's day-to-day lives. In this system, the adults—judges, attorneys, caseworkers, Court Appointed Special Advocates (CASAs), and others—assess and decide what is "best" for them.[5] These decisions, made by those who are in many ways strangers, range in significance and include where youth can go to school, whether they can have cell phones, who they can spend time with, what extracurricular activities they can be involved in, whether they can get driver's licenses, and many other life decisions, both big and small.[6] While youth may be a part of these decisions, too often they are left on the outside, deemed "too young to understand" the concerns and considerations of the adult professionals in their lives.[7]

At the same time, as these youth approach the age of eighteen, they are expected to act more like adults.[8] They participate in independent living classes and create plans for housing, education, and employment.[9] The system expects them to take advantage of the services and opportu-

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2. *Id.* at 17–20; *id.* at 4 ("Young people in foster care must have opportunities to practice decision-making and planning and gain increasing levels of autonomy.").

3. The definition of "transition-age youth" tends to vary by context and use. In this Article, the Author specifically uses the term to reference youth, ages sixteen to twenty-one, who are in the process of transitioning out of the foster care system.

4. Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U. N.H. L. REV. 97, 101 (2013) ("Under current juvenile law, the legal principles that govern the operation of the juvenile dependency court are the best interests of the child and family preservation.").

5. *Id.* at 102 ("The best interest standard is a child-centered principle that focuses on the safety and well-being of the child.").

6. *See id.* (recognizing best interest standard "directs and guides many court decisions about appropriate outcomes for children").

7. *See infra* notes 330–35 and accompanying text (discussing the system's treatment of youth as "outsiders").

8. *See* JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, THE ADOLESCENT BRAIN: NEW RESEARCH AND ITS IMPLICATIONS FOR YOUNG PEOPLE TRANSITIONING FROM FOSTER CARE 1 (2011) [hereinafter JIM CASEY, THE ADOLESCENT BRAIN] ("Unlike younger children in foster care, for whom safety and protection are the greatest need, older youth are in the process of developing greater autonomy and practicing adult roles and responsibilities.").

9. *See* Miriam Aroni Krinsky, *A Not So Happy Birthday: The Foster Youth Transition from Adolescence into Adulthood*, 48 FAM. CT. REV. 250, 251 (2010) ("While the average age of financial independence in America is twenty-six years of age, our current policies and practices are premised on the presumption that foster youth can somehow attain financial and emotional independence by age eighteen.").

nities offered to them. Often, if a youth does not take advantage of those services as decided by the state, then the state asks the court to dismiss the case once the youth reaches age eighteen. When this happens, court proceedings that were once designed to further the youth's well-being and protection are often arbitrarily dismissed leaving the youth to fend for him or herself. Indeed, when older youth in dependency proceedings make mistakes, when they challenge rules, or otherwise act in disregard of the court processes, they often hear that they are "old enough to know better."[10]

These youth are stuck between childhood and adulthood, where the laws of neither truly fit their situations. Historically, our federal and state laws have not been crafted for flexibility, particularly with the nuances necessary to address the stages of development for this age group.[11]

In September 2014, Congress passed the Preventing Sex Trafficking and Strengthening Families Act (the SFA), a law aimed at enhancing engagement of older youth in their own dependency cases.[12] Among its many provisions, the SFA requires that each state provides foster children under age fourteen a copy of their rights with respect to education, health, visitation, and court participation.[13]

This Article considers the SFA's "list of rights" provision in light of the historical landscape and court culture surrounding children's rights in dependency cases. If rights equate to status or value in court proceedings, how does the SFA's provision fit with the current status of transition-age youth in the foster care system? First, Part I summarizes the history of the dependency court, its purpose, and the interests at stake in such cases. Part II addresses the unique status of transition-age youth, from the "magic" of adulthood at age eighteen to the state of research on adolescent brain development and decision making. Part III analyzes the rights of youth in dependency proceedings, the potential impact of the SFA's rights provision, and the emergence of state Foster Care Bills of Rights. Finally, this Article recognizes that the developmental needs of transition-age youth call for system reform with more flexible legal parameters, greater advocacy on behalf of the direct wishes of youth, and an overall change in child welfare culture.

10. *See infra* notes 186–89 and accompanying text (discussing the legal responsibilities of young people upon reaching the age of majority).

11. *See infra* notes 192–96 and accompanying text (discussing the disconnect between rigid jurisdictional statute in Colorado and developmental needs of transition-age youth).

12. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113, 128 Stat. 1919, 1928–30 (2014).

13. *Id.* § 113(d).

I. THE HISTORY OF THE DEPENDENCY COURT

A. The Underpinnings of a Child Welfare System

To fully understand the context of the rights-based culture in the dependency courts, we must start by examining the origins of juvenile law. The history of "[c]hildren's status can be viewed as a movement from children as property, to children as welfare recipients, to children as rights-based citizens."[14]

In fact, the early inklings of family law date back to the sixteenth and seventeenth centuries, where intervention into the family was justified both by the need to regulate poverty and the need to regulate wealth.[15] Published in 1697, the "first English-language book on children and the law, *Law Both Ancient and Modern Relating to Infants*, . . . described children as chattel."[16] Children were the property of their parents, and as property owners, parents could use and treat children as they wished.[17] At the time, for the wealthy classes, family law was meant to ensure the "proper passage of wealth" and guarantee that taxes were collected on such property.[18] For the poorer classes, laws allowed the government to assume an obligation to care for children as an "ultimate parent," and provided a mechanism for apprenticeship programs for such youth.[19]

The eighteenth century saw the American colonies adopt laws similar to the English Poor Laws,[20] expanding the state's reach to removal of poor children not solely due to their poverty, but also because "their parents were not providing 'good breeding, neglecting their formal education, not teaching a trade, or were idle, dissolute, unchristian or uncapable.'"[21]

With the industrialization era and the coming of the nineteenth century, America responded with the "first great event" in child welfare: the House of Refuge Movement.[22] Many of these houses emerged not with the intent of protecting children from their caretakers, but more so in an

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14. Marvin Ventrell, *The History of Child Welfare Law*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 189, 193 (Donald N. Duquette et al. eds., 3d ed. 2016) (discussing the historical development of children's rights).

15. *Id.* at 200 (noting driving social policies leading to early child welfare intervention).

16. Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, COLO. LAW., Jan. 2003, at 65, 66 (characterizing early views on children).

17. *Id.*

18. Ventrell, *supra* note 16, at 201 (discussing early interest of court or crown where patriarch denied prior to heir's majority).

19. *Id.* at 201 (noting concepts emerging out of Elizabethan Poor Laws).

20. *Id.* (referencing "statutory scheme dealing with the custody of poor children").

21. *Id.* at 205 (quoting Douglas R. Rendleman, Parens Patriae*: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 212 (1971) (recognizing "poor plus" system of North American Poor Laws)).

22. *Id.* at 208 (detailing the American response to urban poor children).

effort to address poverty as a major cause of vagrancy and criminal acts by children.[23]

B. Parens Patriae *and the Child Savers*

Ultimately, the judicial system validated the efforts of the House of Refuge Movement, and through a series of cases, established a practice of state intervention into the private family unit through the doctrine of *parens patriae*.[24] *Parens patriae*, meaning "ultimate parent or parent of the country," provided a basis for the "state's authority and obligation to save children from being criminal."[25] It has continued to serve as the foundation upon which the modern juvenile court is based.[26] As our United States Supreme Court has noted: "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."[27]

In an early documented opinion, the Pennsylvania Supreme Court considered the case of Mary Ann Crouse, a child incarcerated at the Philadelphia House of Refuge because she was beyond her parent's control.[28] In dicta, the court discussed the state's authority to intervene: "To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? . . . The right of parental control is a natural, but not an unalienable one."[29] Other courts similarly adopted this view,[30] and the *parens patriae* doctrine thereafter became the cornerstone of juvenile law.[31]

Just as the courts were adopting the *parens patriae* paradigm, "child savers" were also making their mark on the development of juvenile law in the nineteenth century.[32] These were individuals dedicated to saving "those less fortunately placed in the social order."[33] Largely consisting of "bourgeois wom[e]n," the movement sought to instill "white, Protestant, middle-class values" into children so that they could "become proper citizens."[34]

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23. *Id.* at 208–09 ("The movement began with the Society for the Prevention of Pauperism, which believed that poverty was a cause, if not the primary cause, of crime committed by children.").
24. *Id.* at 210 (noting early court involvement in juvenile matters).
25. *Id.* (defining state intervention).
26. *See In re* K.G., 808 N.E.2d 631, 635–37 (Ind. 2004) (providing historical perspective of juvenile court).
27. Schall v. Martin, 467 U.S. 253, 265 (1984) (describing role of parents and State).
28. Ventrell, *supra* note 16, at 211 (citing *Ex parte* Crouse, 4 Whart. 9, 10 (Pa. 1839)).
29. *Ex parte* Crouse, 4 Whart. at 11 (detailing *parens patriae* authority of the State).
30. Ventrell, *supra* note 16, at 214–17 (discussing cases of Emily and Mary Ellen).
31. *Id.* at 218 (analyzing development of juvenile court philosophy).
32. *Id.* (noting Progressive Era movement of "Child Saving").
33. *Id.* (defining "movement").
34. *Id.* at 191–92 (providing underlying views of movement).

The work of the child savers and the *parens patriae* movement culminated in the creation of the juvenile court.[35] In 1899, Cook County, Illinois, formally opened the first juvenile court, which served as the model for subsequent juvenile courts across the country.[36] Under the juvenile court, the *parens patriae* doctrine justified both delinquency and dependency intervention.[37]

C. The Fundamental Rights of Parents

In addition to the judicially-embraced *parens patriae* authority of the state, a historical look at U.S. Supreme Court opinions also details a clear recognition of a parent's fundamental right—under the Due Process Clause of the Fourteenth Amendment of the Constitution—to the care, custody, and control of his or her children.[38]

This recognition of parents' rights by the Court began in 1923 with the case of *Meyer v. Nebraska*,[39] where a teacher was criminally charged for teaching German to a student (at the parents' request) in violation of a statute prohibiting the teaching of a language other than English to children who had not yet completed eighth grade.[40] Here, the Court interpreted the concept of liberty to include a parent's right to "establish a home and bring up children."[41]

The Court continued to solidify this fundamental right of parents to their children through a series of cases, including, among others, *Pierce v. Society of Sisters*,[42] *Wisconsin v. Yoder*,[43] *Santosky v. Kramer*,[44] and *Troxel v. Granville*.[45] With each case, the Court distinctly defined the right as a fundamental liberty interest in the care, custody, and control of the children.[46] This right of parents rests on two essential presumptions: "(1) parents possess what children lack in areas of functioning, and (2) parents' love and affection for their children generally causes parents to

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35. *Id.* at 219 (detailing history of juvenile court formation).

36. *Id.*

37. *Id.* (recognizing that juvenile court had authority both to handle delinquent behavior and to protect dependent children).

38. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing parents' rights to children as "perhaps the oldest of the fundamental liberty interests recognized by this Court").

39. 262 U.S. 390 (1923).

40. *Id.* at 396–97 (reciting facts of case); *see also* Ann M. Haralambie, *U.S. Supreme Court Cases Regarding Child Welfare*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES, *supra* note 14, at 275, 277 (discussing Supreme Court recognition of parental rights).

41. *Meyer*, 262 U.S. at 399 (defining rights under the Fourteenth Amendment).

42. 268 U.S. 510, 534 (1925) (recognizing right to direct education of children).

43. 406 U.S. 205, 214 (1972) (upholding parents' right to free exercise of religion for children).

44. 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

45. 530 U.S. 57, 65–66 (2000) (detailing constitutional case law on the fundamental right of parents to children).

46. *See id.* (providing a historical account of Supreme Court parental right cases).

act in their children's best interests."[47] While of constitutional magnitude, these rights are not absolute, thereby allowing intrusion by the state under *parens patriae* authority.[48]

D. Children as Subjects

At each historical junction detailed above, the focus was on the state as the "protector of the helpless or less fortunate."[49] The role of children throughout was either as property or as the beneficiary of assistance.[50] The juvenile system has consistently "held a *paternalistic view* of children because of their status as minors and because of societal concerns for child welfare."[51] Because children have historically been viewed as dependents and not individuals, the role of the juvenile court has been to "dictate[] the appropriate outcomes for children *without regard for the child's rights* and without consideration of the child's point of view."[52]

E. Gault *and the Delinquent Child*

The broad scope of a court's authority under the *parens patriae* doctrine continued, largely unfettered, until the U.S. Supreme Court's case of *In re Gault*[53] in 1967.[54] The *Gault* Court authored the now famous line in the historical shift from youth as welfare recipients to youth as rights-based individuals: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[55] In the case, the Court considered the procedural due process rights of fifteen-year-old Gerald Gault, who was arrested based upon a neighbor's complaint that Gault and his friends made indecent remarks to her on the phone.[56] The *Gault* Court held that a trial court's "exercise of the power of the state as *parens patriae* was not unlimited[,]"[57] and recognized that juveniles, like adults, have due process rights to "notice of charges, confrontation and cross-examination, prohibition against self-incrimination, and the right to counsel."[58]

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47. Jennifer K. Smith, Comment, *Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation*, 32 SEATTLE U. L. REV. 769, 776 (2009) (addressing bases for parental rights doctrine).

48. *See* Haralambie, *supra* note 40, at 277 (noting limit to parental rights); *see also* Smith, *supra* note 47, at 776–77 (same).

49. *See* Malempati, *supra* note 4, at 100 (depicting State as parent).

50. *See* Ventrell, *supra* note 16, at 201 (characterizing history of children's rights).

51. Malempati, *supra* note 4, at 100 (emphasis added) (describing *parens patriae* view of juvenile court).

52. *Id.* (emphasis added) (noting limited role of child in court process).

53. 387 U.S. 1 (1967).

54. *See* Ventrell, *supra* note 16, at 221 (citing *In re* Gault, 387 U.S. 1, 30–31 (1967)).

55. *In re* Gault, 387 U.S. at 13.

56. *Id.* at 4 (providing facts of case).

57. *Id.* at 30 (citing Kent v. United States, 383 U.S. 541, 555 (1966)).

58. *See* Ventrell, *supra* note 16, at 221 (detailing juvenile due process rights recognized in *Gault*).

Seen by some as a "great advancement in children's rights",[59] with *Gault*, the "*parens patriae* authority essentially disappeared from the delinquency court context" thereafter distinguishing the court's involvement with juveniles in delinquency cases from the experiences of youth in dependency court.[60] Despite the marked change in delinquency matters, "*Gault* did not dismantle, or even limit, the *parens patriae* authority of the dependency court."[61] Children in dependency cases "remained the beneficiaries of the court's *parens patriae* authority," but the view shifted from youth as pre-delinquents to youth needing protection from maltreatment.[62]

F. Today's Dependency Court

Today, the *parens patriae* doctrine continues to provide courts with the authority to act in the best interests of children.[63] In many ways, the court's adherence to its paternalistic view of children "has impeded the progress of the juvenile court into an effective rights-based system, particularly in the area of dependency cases."[64] The dependency system continues to pose "a struggle between the rights of parents to maintain family autonomy and the rights of the state to intervene and protect the interests of a child in cases of abuse and neglect. Little attention, however, is paid to the affirmative rights that children have in the dependency context."[65]

II. THE STATUS OF OLDER YOUTH IN FOSTER CARE

In the world of parents' rights, state intervention, and children needing protection, older youth sit on a fence with one foot still dangling in the days of their childhood and the other stretching to touch the ground of adulthood. As of September 2015, approximately twenty-six percent of youth in foster care were age fourteen and older.[66] A prior report determined that youth over age fourteen "remain in foster care at least twice as long as the total foster care population, on average."[67] During fiscal year 2015, over 20,000 youth exited the system through emancipa-

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59. *Id.*

60. Kelly Crecco, *Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings*, 11 FIRST AMEND. L. REV. 490, 495–96 (2013) (describing historical separation of juvenile court proceedings).

61. Ventrell, *supra* note 16, at 221.

62. Crecco, *supra* note 60, at 496 (emphasizing change in view of dependent children).

63. *In re* K.G., 808 N.E.2d 631, 636 (Ind. 2004) (recognizing *parens patriae* jurisdiction); Smith, *supra* note 47, at 778 (recognizing *parens patriae* jurisdiction).

64. Malempati, *supra* note 4, at 101.

65. Smith, *supra* note 47, at 778 (providing that children's rights are often overlooked).

66. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2016).

67. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 8.

tion, heading out to the world on their own.[68] For these youth, emancipation meant having "left care without a legally sanctioned permanent family relationship to offer guidance and support as they made the transition into adulthood."[69]

Before we can evaluate the rights belonging to transition-age youth, we must first consider their place in the current dependency landscape, including their stages of development, their potential outcomes as interdependent adults, and the laws pertaining to their age group.

A. Emerging Adulthood: A New Developmental Stage

Contrary to laws across the country, developmentally, there is no magic transformation from adolescent to adult on one's eighteenth birthday.[70] Adulthood is not a moment in time event, but rather the culmination of a gradual process of growth and preparation.[71]

Erik Erikson, a German-born American psychoanalyst who established an eight-stage theory to healthy psychosocial development from infancy to death,[72] described this transition-age period in two parts: the adolescent stage (from ages twelve to eighteen) and the young adulthood stage (from ages nineteen to forty).[73] In the adolescent stage, youth struggle between identity and role confusion.[74] This is the time when youth are sorting through "beliefs, values, and ideals" to determine who they are.[75] This period is also when youth develop a sense of self-sufficiency.[76] Then, in the young adulthood stage, the young person seeks to develop intimacy and avoid isolation.[77] For Erickson, these are two distinct developmental events.[78]

Research has come to show, however, that "young people do not move seamlessly from adolescence at age 18 to young adulthood at age

68. CHILDREN'S BUREAU, *supra* note 66, at 3; MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE 3 (2004).

69. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 8–9.

70. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) (noting arbitrary nature of age eighteen as dividing line between childhood and adulthood).

71. *See* MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 1 (2011) (describing transition to adulthood); *see also* JIM CASEY, SUCCESS BEYOND 18, *supra* note 1, at 8 (discussing adolescence as a developmental stage).

72. *See* Richard O. Brooks, *"The Refurbishing": Reflections upon Law and Justice Among the Stages of Life*, 54 BUFF. L. REV. 619, 650–51 (2006) (recounting Erikson's theory of development).

73. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 15 fig.1 (presenting Erikson's stages).

74. *Id.* (noting psychosocial crisis of each stage); *see* Brooks, *supra* note 72, at 652 tbl.1 (describing psychosocial modality as "to be oneself (or not to be)").

75. Andrea Corn & Howard Raab, *Age-Appropriate Time Sharing for Divorced Parents*, 81 FLA. B.J. 84, 86 (2007) (detailing the psychosocial stage of adolescence).

76. *Id.*

77. *See* JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 15 fig.1 (presenting Erikson's stages).

78. *Id.* (highlighting seven stages).

19, as the traditional model might suggest."[79] Many now support the concept that there is instead a transition process of "emerging adulthood," ranging roughly from age eighteen to age twenty-five.[80] Emerging adulthood does not occur at some pre-determined age, but rather represents the time period when youth are moving towards greater independence.[81]

B. Adolescent Brain Development and the Impact of Trauma

Over the last decade, neuroscience research has demonstrated that the adolescent brain is not the same as the adult brain.[82] In fact, it was previously believed that brain development was complete by age six.[83] Research now shows, however, that adolescence is a second wave of significant brain growth and development.[84] This development begins at puberty and stretches all the way to the mid-twenties.[85] For a young woman, the brain generally reaches full maturity between ages twenty-one and twenty-two.[86] For a young man, this point is not reached until almost age thirty.[87]

Neuroscience rests on several key principles of brain architecture, as articulated by Harvard University's Center on the Developing Child.[88] They include the following concepts:

- Brains are built over time, from the bottom up.
- Brain architecture is comprised of billions of connections between individual neurons across different areas of the brain.
- The interactions of genes and experience shape the developing brain.
- Cognitive, emotional, and social capacities are inextricably intertwined throughout the life course.[89]

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79. *Id.* at 15 (noting changing research on adolescent development).
80. *Id.* at 15–16, 16 fig.2 (recognizing new developmental stage).
81. *Id.* at 15–16 (defining stage).
82. *Id.* at 20 (highlighting distinctions in brain development).
83. *Id.* at 2 (noting historical assumption on brain development).
84. *See* Gene Griffin, *Child Development and the Impact of Abuse and Neglect*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES, *supra* note 14, at 69, 80 (referencing research of Jay N. Giedd and others); *see also* DANIEL R. WEINBERGER ET AL., THE ADOLESCENT BRAIN: A WORK IN PROGRESS 1 (2005) (recognizing "profound brain growth and change" during adolescence).
85. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 20 (defining period of development).
86. *Id.* at 22 (detailing female development).
87. *Id.* (defining male development).
88. Griffin, *supra* note 84, at 79 (referencing Ctr. on the Developing Child, *Brain Architecture*, HARV. U., http://developingchild.harvard.edu/science/key-concepts/brain-architecture (last visited July 6, 2017)).
89. *Id.* (articulating key concepts of brain architecture).

Beginning at puberty, a number of important changes in the adolescent brain occur.[90] First, the prefrontal cortex gradually develops.[91] This is the part of the frontal lobe that is responsible for functions such as "reasoning, decision making, judgment, and impulse control . . . ."[92] It is the last part of the brain to reach full development.[93] As the prefrontal cortex develops, youth become less dependent on the limbic system—"the emotional center of the brain"—when making decisions.[94]

Second, during adolescence, the brain changes its production of dopamine—the "chemical that links action to pleasure[.]"[95] When this occurs, youth need to reach a higher threshold of stimulus prior to feeling pleasure.[96] As a result, they seek new excitement and risk.[97]

Third, adolescence is the period of "use it or lose it."[98] During this time, the gray matter of the brain starts to thin as the synapses—"links between neurons that transmit and receive information"—undergo a pruning process.[99] Those synapses that are frequently used become stronger and more established through a process called myelination.[100] Those that are unused are pruned away.[101] Through this process, youth may lose as many as 30,000 synapses per second over the entire cerebral cortex.[102]

Young people in the foster care system undergo this developmental process just as their peers, yet many are simultaneously impacted by prior trauma.[103] Specifically, youth who have experienced physical or emo-

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90. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 20–23, 23 figs.3 & 4 (describing impact of brain development on adolescent functioning).

91. *Id.* at 20–21 (defining "prefrontal cortex" as "part of the brain that governs a person's executive functions").

92. *Id.* at 20; *see* WEINBERGER ET AL., *supra* note 84, at 1 (listing prefrontal cortex functions as "setting priorities, organizing plans and ideas, forming strategies, controlling impulses, and allocating attention").

93. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 20; WEINBERGER ET AL., *supra* note 84, at 1.

94. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 20 (explaining the transition from emotional to rational decision making).

95. *Id.* at 21; WEINBERGER ET AL., *supra* note 84, at 1 (discussing "one of the neuronal mechanisms that increase[s] the capacity for more mature judgment and impulse control").

96. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 21–22 (describing the functional impact of chemical change).

97. *Id.* (explaining changing behavior of adolescents based on dopamine increase during this period).

98. *Id.* at 22 (highlighting a critical mechanism for brain resiliency).

99. *Id.*; *see also* WEINBERGER ET AL., *supra* note 84, at 11–12, 12 fig. 3 (depicting the cutting back of "inefficient or ineffective connections to achieve maximal efficiency of function").

100. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 22; WEINBERGER ET AL., *supra* note 84, at 11 ("Like Michelangelo starting with a block of granite and eliminating rock to create the masterpiece David, certain connections are strengthened and others eliminated--in essence, brain functions are sculpted to reveal and allow increasing maturity in thought and action.").

101. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 22.

102. *Id.* (detailing extent of myelination process).

103. Griffin, *supra* note 84, at 80 (recognizing that adverse childhood experiences may cause short or long term developmental damage).

tional abuse may suffer disrupted or delayed brain development.[104] These delays may negatively impact the behavioral, emotional, or social development of youth.[105]

The beautiful phenomenon of the brain rewiring during adolescence, through the "use it or lose it" processes, however, means that it is possible for the effects of trauma to be offset.[106] The brain has great neuroplasticity, or resiliency, during this period.[107] When a youth has corrective experiences and supportive relationships during this time, the youth's brain will literally rewire and create new neural connections.[108] On the other hand, the failure to provide opportunities to establish resiliency means that those neural pathways may be lost.[109] The manner by which the system supports and facilitates the transition to adulthood for older youth in the foster care system is indeed crucial to their future well-being and success.

C. The Midwest Study

The challenges faced by those exiting the foster care system are well-documented through the Midwest Evaluation of the Adult Functioning of Former Foster Youth (Midwest Study).[110] A longitudinal study conducted by researchers at Chapin Hall at the University of Chicago, the Midwest Study followed a sample of young people (initial baseline interviews of 732) from Illinois, Wisconsin, and Iowa as they transitioned from the foster care system into adulthood.[111] Researchers interviewed the youth participants at ages seventeen or eighteen years old, with repeat interviews conducted at ages nineteen, twenty-one, twenty-three or twenty-four, and twenty-six.[112] The study compared the outcomes of foster youth across a variety of domains to the outcomes of their nonfoster care peers, who were documented through the National

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104. JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 25 (acknowledging that completion of brain development may occur later for youth impacted by trauma).

105. *Id.* (noting the impact of trauma).

106. *Id.* at 27 (emphasizing room for brain healing during time period).

107. *Id.* at 27–28 (explaining that the brain is not hard-wired by age three as previously believed).

108. *Id.* at 28 (recognizing that rewiring occurs with healthy, supportive relationships and experiential learning opportunities); *see also* JIM CASEY, SUCCESS BEYOND 18, *supra* note 1, at 8 ("Neuroscience makes clear that support during the cognitive, social, and emotional development processes of adolescence and emerging adulthood can lead to healthy and constructive adulthood.").

109. *See* JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 22 (describing the pruning process).

110. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth*, CHAPIN HALL, http://www.chapinhall.org/research/report/midwest-evaluation-adult-functioning-former-foster-youth (last visited July 6, 2017) (providing full PDFs of Midwest Study reports).

111. COURTNEY ET AL., *supra* note 71, at 3 (setting forth parameters of study).

112. *Id.* at 4 (detailing survey waves).

Longitudinal Study of Adolescent Health (Add Health).[113] Former foster youth struggled across the board in the comparisons.[114]

Youth growing up outside of the foster care system generally benefit from the support of family, both financially and emotionally.[115] It is estimated that "parents provide their young adult children with material assistance totaling approximately $38,000 between the ages of 18 and 34."[116] Meanwhile, foster youth enter the adult world without the same built-in safety nets. The study found that "[o]n many dimensions that would be of concern to the typical parent, [the young people in the Midwest Study were] faring poorly as a group."[117]

In addition, young people interviewed through the Midwest Study were much less likely to be living with their biological parents than their peers.[118] In fact, in a separate 2003 survey, about fifty-five percent of young men and forty-six percent of women (outside of the foster care system) between the ages of eighteen and twenty-four were living with at least one of their parents.[119] Meanwhile, since exiting foster care, about eighteen percent of former foster youth had experienced homelessness at least once between the ages of seventeen and twenty-one.[120]

The Midwest Study demonstrated similarly poor outcomes for former foster youth in areas of education and employment.[121] Nearly a quarter of the Midwest Study youth did not graduate high school or obtain their General Educational Development (GED) by age twenty-one as compared to eleven percent of their Add Health peers.[122] Moreover, only thirty percent of Midwest Study youth completed any college compared to fifty-three percent of Add Health youth.[123] Fewer young people in the Midwest Study were employed, on average, as compared to their peers, and their peers generally earned about one dollar more per hour than the former foster youth.[124] The median earnings among those Midwest Study

113. *Id.* at 5 (explaining comparison groups).

114. *See id.* at 6 ("Across a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement, these former foster youth are faring poorly as a group.").

115. *See* MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, at 5 (2007) (citation omitted) (describing ongoing support of family during transition years).

116. *Id.* (quantifying parental support to young people).

117. *Id.* at 83 ("If the outcomes of these young adults were assessed through the same lens that most U.S. parents would use to view the progress of their own children, the findings presented here should be very troubling.").

118. *Id.* at 14 (noting that former foster youth were more likely to be living with relatives than biological parents compared to their peers).

119. *Id.* at 5 (highlighting parental support in housing).

120. *Id.* at 15 (recognizing homelessness as problem experienced by former foster youth often more than once).

121. *Id.* at 26–37 (detailing survey results in education and employment areas for former foster youth at age twenty-one).

122. *Id.* at 26 (providing results on educational achievement).

123. *Id.* (stating survey results regarding post-secondary education pursuits).

124. *See id.* at 31–32 (comparing employment outcomes for former foster youth and peers).

youth who were employed was only $5,450 at the age of twenty-one, as compared to the $9,120 made by their peers.[125] A significant amount of the young people in the Midwest Study benefited from public assistance of some kind.[126]

Former foster youth in the study were also more likely to receive mental health counseling and substance abuse treatment, to become pregnant, and to become involved with the criminal justice system.[127]

While the Midwest Study noted a number of devastating outcomes for the former foster youth population, it also acknowledged several strengths, including the youth's ability to "exhibit extraordinary optimism and high aspirations," as well as close relationships with members of their biological family.[128] In addition to comparisons to their Add Health peers, the Midwest Study provided researchers the opportunity to compare the outcomes of youth exiting foster care in Illinois to those exiting in Wisconsin and Iowa.[129] At the time, Illinois was the only state of the three to allow youth to remain in foster care until age twenty-one as opposed to age eighteen.[130] The study found that with more time in foster care—and perhaps more supportive opportunities to rewire their brain and heal past trauma—youth had better life outcomes across several domains.[131]

D. The Federal Legislative Landscape

The Midwest Study provided a look at the impact of existing federal law targeted towards transition-age youth, as well as an impetus for future legislative change.

In 1986, Congress amended Title IV-E of the Social Security Act, creating an Independent Living Program utilizing federal dollars to help states support older youth in the foster care system in their transition to adulthood.[132] Subsequently, in 1999, Congress passed the Foster Care Independence Act (Chafee Act),[133] which created the John Chafee Foster Care Independence Program. The Chafee Act doubled the federal funding available to states for independent living purposes and expanded

125. *Id.* at 35 (distinguishing groups based on income).

126. *See id.* at 38–39 (explaining survey results regarding receipt of government benefits).

127. *Id.* at 44–46 (mental health and substance abuse treatment); *id.* at 50–53 (pregnancy); *id.* at 64–67 (criminal justice system involvement).

128. *Id.* at 84 (reviewing positive results gathered by study).

129. *See id.* at 87 (comparing Illinois, Iowa, and Wisconsin systems).

130. *Id.* (noting Illinois' extended care system).

131. *See id.* at 87–88 (recognizing benefit of longer transition period from foster care system while acknowledging need for further time to study impact of law); *see also* Courtney et al., *supra* note 110.

132. Frank E. Vandervort, *Federal Legislation Protecting Children and Providing for Their Well-Being*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES, *supra* note 14, at 231, 253 (detailing congressional response to transition of older youth from foster care).

133. John H. Chaffee Foster Care Independence Program, 42 U.S.C. § 677 (2012).

youth eligibility for services.[134] It also provided vouchers for post-secondary education and vocational training.[135] In part, researchers intended the Midwest Study to look at how foster youth were transitioning to adulthood since the Chafee Act became law.[136]

The initial stages of the Midwest Study informed further federal policy change related to this population.[137] In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act (the Fostering Connections Act), which formally recognized the benefit of providing older youth in care additional time for their transitions.[138] The Fostering Connections Act amended the definition of "child" in Title IV-E of the Social Security Act.[139] The new definition included young people up to age twenty-one (instead of terminating services at age eighteen), if the young person was engaged in one of four activities: (1) completing high school or a GED program, (2) enrolled in college or vocational school, (3) participating in a program to remove employment barriers, or (4) employed at least eighty hours per month.[140] Young people between the ages of eighteen and twenty-one were also eligible to remain in care if they were incapable of performing the four activities previously listed due to a medical condition.[141]

Following this policy change under the Fostering Connections Act, states were eligible to receive federal funding to reimburse the costs of foster care for youth in this transition-age group, as of 2011.[142] A number of states then modified their local laws to match this expanded definition of child.[143] In many ways, this change marked an awareness that young people exiting foster care, just like their non-foster care peers, need time to achieve their goals, make permanent connections or achieve legal permanency, learn from mistakes, and develop new skills or supports.[144] States continue to work towards effective implementation of the Fostering Connections Act, particularly addressing whether policies and prac-

134. COURTNEY ET AL., *supra* note 115, at 5 (providing account of federal legislation).

135. *Id.* (discussing services provided by Chafee Act).

136. *Id.* at 6 (identifying one goal of the Midwest Study).

137. COURTNEY ET AL., *supra* note 71, at 2 (noting impact of Midwest Study on federal legislation).

138. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949.

139. *Id.* § 201(a) (extending the definition of "child" under federal law).

140. 42 U.S.C. § 675(8)(B)(iv)(I)–(IV) (2012) (highlighting eligibility requirements).

141. *Id.* § 675(8)(B)(iv)(V) (recognizing a medical condition exception).

142. *See* JIM CASEY, SUCCESS BEYOND 18, *supra* note 1, at 10 (providing recommendations to leverage federal funding from Fostering Connections to Success and Increasing Adoption Act).

143. *See, e.g.*, CAL. WELF. & INST. CODE §§ 388.1, 11400(aa) (West 2017) (defining non-minor dependent status for older youth); NEB. REV. STAT. §§ 43-4501 to -4514 (2017) (establishing Young Adult Bridge to Independence Act); 42 PA. CONS. STAT. § 6302 (2017) (defining "child").

144. *See* JIM CASEY, SUCCESS BEYOND 18, *supra* note 1, at 7–9 (describing needs of transition-age youth and appropriate design for foster care system support).

tices are developmentally-appropriate for this transition-age population.[145]

E. The Research on Adolescent Decision Making

Just as the delinquency courts were first to adopt the view of children as "rights-based" individuals, so too have other courts been willing to consider the research on adolescent development.[146] In 2005, the United States Supreme Court in *Roper v. Simmons*,[147] held that the death penalty for those under age eighteen at the time of their convictions was prohibited by the Eighth and Fourteenth Amendments to the Constitution.[148] In so finding, the Court took ample time to analyze research on the developmental differences between youth and adults.[149] The Court noted three key differences.[150] First, youth tend to exhibit a "lack of maturity and an underdeveloped sense of responsibility" more often than adults, "qualities [which] often result in impetuous and ill-considered actions and decisions."[151] In fact, "adolescents are overrepresented statistically in virtually every category of reckless behavior."[152]

Second, juveniles are more susceptible to peer pressure or other outside negative influences.[153] They have less control over their own environments.[154] Third, their character is less well-formed or fixed than that of adults.[155] With these principles in mind, the Court determined that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[156]

Following the Court's *Roper* opinion in 2005, the American Psychological Association (APA) faced criticism for what some viewed as inconsistent positions on adolescent decision making.[157] The *Roper* Court, in its ultimate opinion and accompanying analysis of adolescent development, heavily relied upon the APA's position that adolescents are

145. *See id.* at 3 (emphasizing the need to extend foster care jurisdiction based on "unique developmental tasks of [adolescent] life stage and their legal status as adults").

146. *See* Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 583–86 (2009) (discussing the U.S. Supreme Court's reliance on adolescent development research).

147. 543 U.S. 551 (2005).

148. *See id.* at 578–79 (stating holding).

149. *See id.* at 569–73 (differentiating the judgmental capacity of adults from adolescents).

150. *Id.* at 569–70 (noting "general differences between juveniles under 18 and adults").

151. *Id.* at 569 (internal quotations omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (highlighting the first distinction between adults and adolescents).

152. *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992)) (noting recklessness of adolescence).

153. *Id.* (describing the second distinction between adolescents and adults).

154. *Id.* (explaining juvenile susceptibility to outside influence).

155. *Id.* at 570 (recognizing the third distinction between adults and adolescents).

156. *Id.* at 572–73 (analyzing developmental research in context of death penalty sentence).

157. *See* Steinberg et al., *supra* note 146, at 583–84 (describing alleged inconsistency of APA's positions on adolescents).

less mature than adults in terms of criminal responsibility.[158] In 1990, however, the APA asserted in *Hodgson v. Minnesota*[159] that "because adolescents had decision-making skills comparable to those of adults, there was no reason to require teenagers to notify their parents before terminating a pregnancy."[160] To many, these two briefs represented contradictory positions on the developmental capacity of young people.[161] In fact, however, these two positions can be reconciled through careful analysis of existing research.[162]

Following these cases, a number of researchers from the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice considered age differences in many cognitive and psychosocial capacities.[163] Researchers determined:

> [W]hereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities that were referred to in the [APA's] *Hodgson* brief—abilities that permit logical reasoning about moral, social, and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in the majority opinion in *Roper*—capacities such as impulse control and resistance to peer influence.[164]

Indeed, studies show that there are no "appreciable differences" in logical reasoning or competency-related abilities between youth age sixteen and older and adults.[165] On the other hand, "psychosocial characteristics such as impulsivity, sensation seeking, future orientation, and susceptibility to peer pressure" continue to develop "well beyond middle adolescence and even into young adulthood . . . ."[166]

The MacArthur Juvenile Capacity Study demonstrated: "By age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but adolescents' psychosocial functioning, even at the age of 18, is significantly less mature than that of individuals in their mid-20s."[167] This analysis affirmed the allegedly contradictory views of

158. *See Roper*, 543 U.S. at 568–73 (analyzing case in light of adolescent development research); *see also* Steinberg et al., *supra* note 146, at 583 (detailing the *Roper* analysis of the APA's position).

159. 497 U.S. 417 (1990).

160. Steinberg et al., *supra* note 146, at 584 (citation omitted) (referencing Hodgson v. Minnesota, 497 U.S. 417 (1990)).

161. *See id.* ("Justice Kennedy explicitly asked at oral argument in *Roper* if the APA had 'flip-flopped' between 1989 (when its final amicus brief was filed in the abortion case) and 2004 (when its brief was filed in the juvenile death penalty case).").

162. *See id.* at 584–87 (reconciling APA positions).

163. *Id.* at 585 (establishing the reason for MacArthur Juvenile Capacity Study).

164. *Id.* at 586 (summarizing findings that distinguish cognitive capacity from psychosocial capacity in decision making).

165. *Id.* (recognizing the similarity between adults and older youth in logical decision making abilities).

166. *Id.* at 587 (describing age differences in psychosocial characteristics).

167. *Id.* at 592 (presenting study findings).

the APA in its briefs in *Hodgson* and *Roper*.[168] The distinction in decision making is clear:

> When it comes to decisions that permit more deliberative, reasoned decision making, where emotional and social influences on judgment are minimized or can be mitigated, and where there are consultants who can provide objective information about the costs and benefits of alternative courses of action, adolescents are likely to be just as capable of mature decision making as adults, at least by the time they are 16. . . .
>
> In contrast, in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experienced, adolescents' decision making, at least until they have turned 18, is likely to be less mature than adults'.[169]

Certainly, the United States Supreme Court appreciated these distinctions in adopting the APA research, both in *Hodgson*—where the Court upheld the right of adolescents to seek abortions without parental consent—and in *Roper*—where the Court rejected the juvenile death penalty.[170]

These studies, however, create space for similar discussions on adolescent decision making in the dependency arena. In terms of cognitive abilities, foster youth over age sixteen are capable of logical reasoning equivalent to that of adults.[171] They can engage in case-planning and legal decision making when they have adult support to advise them through this process.[172]

In contrast, the studies call into question the psychosocial abilities of youth to make decisions when emotions are high, peer pressure exists, and adult consultation is absent.[173] These include decisions such as driving without a license, purchasing drugs or alcohol, or engaging in sexual activity.[174] The lack of maturity with these types of decisions does not negate responsibility or justify actions, but rather, demonstrates the need for greater restraint or added protection to help transition-age youth nav-

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168. *See id.* at 586 ("[W]e believe that APA's seemingly contradictory positions in *Hodgson* and *Roper* are in fact quite compatible with research on age differences in cognitive and psychosocial capacities.").

169. *Id.* at 592 (highlighting contextual differences in decision making abilities of adolescents).

170. *See id.* at 583–84 (describing distinctions in adolescent ability in the context of Supreme Court holdings).

171. *Cf. id.* at 592 (discussing mature decision making of adolescents in medical, legal, and research study contexts).

172. *Cf. id.* (noting adolescent capability in "legal decision making (where legal practitioners, such as defense attorneys, can play a comparable role)").

173. *See id.* at 592–93 (emphasizing lack of mature decision making from adolescents in particular contexts).

174. *See id.* at 593 (providing examples of immature decision making contexts).

igate these events.[175] Indeed, in some ways, transition-age youth are both old enough to understand and yet not always old enough to know better.

To adequately meet the needs of young people as they transition into adulthood, we must design a system that recognizes these distinctions.

III. DEFINING THE RIGHTS (AND RESPONSIBILITIES) OF OLDER YOUTH IN DEPENDENCY CASES

A. The Legal Significance of Age Eighteen

While the age of eighteen does not indicate any magical, transformative experience in the journey from child to adult, particularly as research on adolescent development now notes an emerging adulthood spanning all the way to age twenty-five, the legal system, for all intents and purposes, views the age of eighteen as a significant marker.[176] Even as the *Roper* Court carefully weighed the research on distinctions between capacities of adolescents and adults, it fell back to eighteen as its default.[177]

The majority described the difficulty: "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach."[178] Ultimately, the Court found that "a line must be drawn[,]" and that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[179]

At the age of eighteen, young people assume a number of "rights" in our country. In almost every state, by the age of eighteen young people are eligible to vote in elections or serve on juries.[180] At eighteen, young people can enlist to fight in our military, or even marry, without their parents' consent.[181]

Turning eighteen also means that young people may be legally responsible for their actions in ways they never have been before.[182] If they commit a criminal offense, they subject themselves to the adult criminal

175. *Cf. id.* at 592 (describing immature decision making due to lack of consultation with knowledgeable or experience expert).

176. Roper v. Simmons, 543 U.S. 551, 574 (2005) (determining age of eighteen to be a dividing line between juveniles and adults).

177. *Id.* (noting need to draw line of distinction).

178. *Id.* (recognizing subjectivity of choosing eighteen as age of distinction).

179. *Id.* (explaining Court's analysis in deciding upon eighteen as "age at which the line for death eligibility ought to rest").

180. *See id.* apps. B & C (listing state laws on voting and jury service).

181. *See id.* app. D (referencing state laws on marriage without parental consent); *see also* 10 U.S.C. § 505(a) (2012) ("[N]o person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian . . . .").

182. *See* Krinsky, *supra* note 9, at 250 (recognizing eighteen as "time of change" where "youth can exercise the right to vote, enlist in the military, and sign legal documents").

system and face corresponding consequences.[183] In most states, the age of eighteen is considered the age of majority.[184] Upon reaching majority, young people can legally enter into contracts or sign apartment leases.[185] If they lapse in payments or responsibilities under these agreements, they face the repercussions.

Yet despite these "coming of age" rights and responsibilities in many areas of our legal system, the dependency systems across our country are not consistent in taking note of any change to the young person's legal status. Even following the Fostering Connections Act, some states continue to use age eighteen as the end of a court's intervention or legal jurisdiction over youth.[186] For young people in these states, services may be provided by means of administrative programs, yet there no longer remains any legal enforceability for such services as youth begin to tackle the world of adulthood.[187]

In other states, the dependency system has extended jurisdiction over young people until the age of twenty-one, yet there is no marked difference in how the dependency court system treats those young people as they cross the threshold of eighteen. In Colorado, for example, the continuing jurisdiction statute reads, "the jurisdiction of the court over any child adjudicated as neglected or dependent shall continue until he becomes twenty-one years of age unless earlier terminated by court order."[188] Prior to a youth's eighteenth birthday, the Colorado court should consider the activities outlined in the Fostering Connections Act to assess whether the youth needs more time after age eighteen to stay within the dependency court's jurisdiction.[189] Nothing about the youth's status, however, actually changes at eighteen.[190] Furthermore, prior to eighteen, youth in foster care in Colorado receive an attorney, not to represent their

183. *See* United States v. Marshall, 736 F.3d 492, 498 (6th Cir. 2013) ("The Supreme Court's decisions limiting the types of sentences that can be imposed upon juveniles all presuppose that a juvenile is an individual with a chronological age under 18.").

184. *See* Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 U. KAN. L. REV. 343, 374–75 (2012) (providing historical account of reduction of age of majority from twenty-one to eighteen by state legislatures in 1970s).

185. *See* Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1125 (2012) ("In the United States, most jurisdictions have a functional minimum age for the right to contract of eighteen years old.").

186. *See* Bruce A. Boyer, *Foster Care Reentry Laws: Mending the Safety Net for Emerging Adults in the Transition to Independence*, 88 TEMP. L. REV. 837, 850 n.66 (2016) (cataloging states that do not extend jurisdiction beyond eighteen by statute, but provide some support for former foster youth post-eighteen).

187. *See id.* at 850 (recognizing administrative approach to extended service provision).

188. COLO. REV. STAT. § 19-3-205(1) (2016) (providing for continuing jurisdiction of court).

189. *See id.* § 19-3-205(2)(a) (listing considerations for extending jurisdiction past age eighteen).

190. *See id.* § 19-3-205(1) (providing for jurisdiction continuing until age twenty-one with no specified change at age eighteen).

direct wishes, but to represent their best interests.[191] Upon turning eighteen, youth continue in a "best interests" court system with the same model of guardian ad litem representation, now stretching all the way until age twenty-one if the court determines continued jurisdiction would be best for them.[192] Without changing system culture to match developmentally-appropriate milestones for this transition-age population, we run the risk of making age twenty-one the old cliff of age eighteen.

Indeed, the age of eighteen is both significant and totally insignificant, depending on our perspective.[193] The law does not always exhibit flexibility, and so for need of clarity, our system creates importance around the chosen age.[194] The dependency system does not consistently match the line drawn in other legal contexts; yet, it also does not authentically follow the developmental lessons that we know to be true for transition-age young people. Perhaps most critically, as some have recognized, "The notion that a single line can be drawn between adolescence and adulthood for different purposes under the law is at odds with developmental science."[195]

B. The Current Status of Youth Rights

While the rights of parents and states' interests have been consistently articulated in dependency cases,[196] the same cannot be said for the rights of children. Children are thought to have "interests," while parents are thought to have "rights."[197] Many fear that affording rights to children will only come at the expense of the rights of their parents, as if parents have already cornered the market on rights with little to go around.[198]

Still others believe that the rights of children are subsumed by the rights of their parents, or in their parents' absence, by the state under the

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191. *Id.* § 19-3-203(3) (providing for appointment of guardian ad litem charged with representation of child's best interests).

192. *Cf. id.* §§ 19-3-203, -205 (providing for jurisdiction and legal representation with no marked change at age eighteen).

193. *Compare* JIM CASEY, THE ADOLESCENT BRAIN, *supra* note 8, at 15 (explaining that change from adolescent to adult is not complete on eighteenth birthday), *with* Preston & Crowther, *supra* note 184, at 374 (recognizing age of legal majority at age eighteen).

194. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) (adopting eighteen as default distinction).

195. Steinberg et al., *supra* note 146, at 583 (highlighting disconnect between law and research).

196. For a discussion of the rights of parents and the State's *parens patriae* interest, see *supra* notes 24–48 and accompanying text.

197. *Compare supra* notes 38–48 and accompanying text, *with infra* notes 202–89 and accompanying text.

198. *See* Howard Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69, 70 (2006) (explaining lack of American laws with "children's rights" in title).

parens patriae doctrine.[199] Under this viewpoint, children do not need separate, independent rights.[200] They are taken care of when the system protects the rights of others.[201] Such a view can be easily understood in a system completely designed around child protection and best-interest decision making.

When discussing the rights of parents, federal and state courts are consistently clear in their definition: Parents have a right to the care, custody, and control of their children.[202] This is the starting point for the discussion of protections that children are thereby owed.[203] Even in cases where children have been recognized to have some independent status, the "right" is not so easily defined; it is fluid based on the child's context or the issues at stake in the particular court proceeding.[204]

In Alabama, a court recognized, "Parents and their children share a liberty interest in continued association with one another, i.e., a fundamental right to family integrity."[205] In Colorado, children have protected interests "in continuing family relationship[s] . . . [and] in a permanent, secure, stable, and loving environment."[206] Children in Florida have a "fundamental liberty interest to be free of physical and emotional violence at the hands of [their] . . . most trusted caretaker."[207] In Georgia, children have a liberty interest in "maintaining the integrity of the family unit and in having a relationship with [their] biological parents."[208] Kansas has noted a child's fundamental liberty interest in his or her parentage, reciprocal to a parent's interest in maintaining the familial relationship with the child.[209] Children in Massachusetts have an absolute interest in "freedom from abusive or neglectful behavior."[210] Texas acknowl-

199. *Cf.* Troxel v. Granville, 530 U.S. 57, 68 (2000) (establishing legal presumption that fit parents act in children's best interests); *see also* Schall v. Martin, 467 U.S. 253, 265 (1984) (noting State's obligation to control children when parent is unable).

200. *Cf. Troxel*, 530 U.S. at 72–73 (recognizing rights of parents to make decisions for children and limits on State intervention with no discussion of rights of children).

201. *Id.*

202. *See, e.g.*, *id.* at 65 (noting constitutional right of parents to "care, custody, and control of their children"); *see also* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (same); *In re* K.M., 653 N.W.2d 602, 607 (Iowa 2002) (same); Rideout v. Riendeau, 761 A.2d 291, 297 (Me. 2000) (same).

203. *See, e.g.*, *Santosky*, 455 U.S. at 758–69 (applying Mathews v. Eldridge, 424 U.S. 319 (1976), standard test to assess procedural due process owed to parents at termination of parental rights hearings).

204. For a discussion of how the rights and interests of children are defined across the country, see *supra* notes 198–203 and accompanying text.

205. J.B. v. DeKalb Cty. Dep't. of Human Res., 12 So. 3d 100, 115 (Ala. Civ. App. 2008).

206. *See* People *ex rel.* C.A.K., 652 P.2d 603, 607 (Colo. 1982) (identifying interests at stake in termination of parental rights hearing).

207. *See* Kingsley v. Kingsley, 623 So. 2d 780, 785 (Fla. Dist. Ct. App. 1993) (second alteration in original) (internal quotation omitted) (describing child's fundamental liberty interest).

208. *See* Kenny A. *ex rel.* v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (discussing constitutional interests of children).

209. *See* Ferguson v. Winston, 996 P.2d 841, 846 (Kan. Ct. App. 2000) (addressing fundamental liberty interests of parents and children in paternity action).

210. *See* Care & Protection of Robert, 556 N.E.2d 993, 998 (Mass. 1990) (emphasizing absolute interest in freedom from harm compared to child's interest in family integrity, which is not absolute).

edges that children have an "interest in a final decision and thus placement in a safe and stable home."[211]

There are countless other statements of recognition that youth too have interests at stake in these proceedings.[212] There is overlap amongst many, and yet no clear trumpeted statement of the right.[213] It is unclear whether interests in these cases are equated to the rights of parents or are mere factors in the "best interest" decision making itself. What is the value of these expressions?

At times, the federal courts have attempted to wade into these murky waters.[214] In 1989, the United States Supreme Court heard the case of *DeShaney v. Winnebago County Department of Social Services*.[215] In this case a boy and his mother sued county social workers after the boy was severely beaten and permanently injured by his father following reports made expressing concerns for the boy's safety.[216] Despite the reports, the county failed to act in removing the boy from his father's care.[217] The boy brought an action under 42 U.S.C. § 1983, alleging that the Department's failure to act deprived him "of his liberty interests in 'free[dom] from . . . unjustified intrusions on personal security'" under the Due Process Clause of the Fourteenth Amendment.[218] The Court, however, rejected this argument and held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[219]

In doing so, the Supreme Court made a careful distinction relevant to youth in state custody foster care.[220] The Court found:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself,

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211. *See In re* J.F.C., 96 S.W.3d 256, 304 (Tex. 2002) (considering promotion of child's interests by Texas rules).

212. *See, e.g.*, *In re* Dependency of M.S.R., 271 P.3d 234, 244 (Wash. 2012) (recognizing fundamental liberty interests of children in termination proceedings, including "interest in being free from unreasonable risk of harm and a right to reasonable safety; in maintaining the integrity of the family relationships, . . . and in not being returned to (or placed into) an abusive environment over which they have little voice or control").

213. *Compare supra* notes 205–12 and accompanying text, *with* Troxel v. Granville, 530 U.S. 57, 65 (2000) (defining parents' fundamental right to care, custody and control of child).

214. *See* Dale Margolin Cecka, *The Civil Rights of Sexuality Exploited Youth in Foster Care*, 117 W. VA. L. REV. 1225, 1253–57 (2015) ("Foster children's rights while in custody of the state are not well settled.").

215. 489 U.S. 189 (1989).

216. *Id.* at 191–93 (recounting facts of case).

217. *Id.* at 192–93 (describing action taken by county department).

218. *Id.* at 194–95 (alteration in original) (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

219. *Id.* at 195 (stating holding of Court).

220. *See* Taylor I. Dudley, *Bearing Injustice: Foster Care, Pregnancy Prevention, and the Law*, 28 BERKELEY J. GENDER L. & JUST. 77, 96–97 (discussing applicability of *DeShaney* in other contexts).

> and at the same time fails to provide for his basic needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause [of the Fourteenth Amendment].[221]

Since *DeShaney*, several courts have addressed violations of the substantive due process rights of foster children.[222] In 2003, the Washington Supreme Court heard the case of *Braam ex rel. Braam v. State*,[223] a class action filed against the State "in an effort to improve the lives of foster children in the State's care."[224] The plaintiffs in *Braam* specifically challenged the State's practice of indiscriminately moving children from placement to placement, in addition to the lack of appropriate mental health treatment to meet the children's needs.[225]

The *Braam* case provided a solid opportunity to explore the landscape of the substantive due process rights of foster children across the country.[226] The Washington court concluded that "foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety."[227] Any violations of these rights would be measured under the professional judgment standard—"whether the State's conduct falls substantially short of the exercise of professional judgment, standards, or practices."[228] Since *Braam*, other foster youth have sought relief, with varying degrees of success, from violations of their substantive due process right to be free from harm while in state custody.[229]

It is worth noting that the *Braam* court dismissed the plaintiffs' claims based on state statutes.[230] None of the dependency laws created a private cause of action for youth.[231] The court stated "that parties believing themselves aggrieved by [the State's] failure to abide by these [state] statutes, including a foster child through an attorney or guardian ad litem, will have an opportunity to raise the issue in the context of dependency actions."[232] The court similarly rejected claims under other federal child

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221. *DeShaney*, 489 U.S. at 200 (distinguishing case at hand from case with child in state custody); *Cf.* Youngberg v. Romeo, 457 U.S. 307, 314–25 (1982) (requiring State to provide necessary services to involuntarily committed mental patients to ensure their "reasonable safety").

222. *See, e.g.*, Cecka, *supra* note 214, at 1253–57 (recounting case law on foster child's right to be free from harm while in state custody).

223. 81 P.3d 851 (Wash. 2003).

224. *Id.* at 854 (providing case background).

225. *Id.* at 855 (describing nature of claim).

226. *See id.* at 856–57 (providing string citation to persuasive authority on substantive due process rights of foster children).

227. *Id.* at 857 (defining the substantive due process right).

228. *Id.* at 858 (identifying appropriate culpability standard for violations of children's substantive due process rights).

229. *See* Cecka, *supra* note 214, at 1253–57 (providing case law summary).

230. *See Braam*, 81 P.3d at 863 (affirming trial court's dismissal of state claims).

231. *Id.*

232. *Id.* (identifying context of dependency case to be proper avenue for violations of state statutes as opposed to separate cause of action).

welfare laws, noting that the federal funding mandates of such laws did not create an explicit cause of action.[233]

In addition, courts have also evaluated the procedural due process rights of youth under the Fourteenth Amendment. *Kenny A. ex rel. Winn v. Perdue*,[234] a case heard by the U.S. District Court for the Northern District of Georgia, was a class action brought by foster youth in Fulton and DeKalb counties, asserting various violations of their due process rights under the Georgia constitution.[235] Among their arguments, the plaintiffs claimed that they had a constitutional right to counsel in all deprivation cases, not just at the time of termination of parental rights hearings.[236] The court recognized that foster youth in state custody were "entitled to constitutionally adequate procedural due process when their liberty or property rights [were] at stake."[237] In *Kenny A.*, the court defined the youth's fundamental liberty interests at stake in such cases as "a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents."[238] The process of taking a child into state custody creates a "special relationship" that "gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm."[239]

The court then conducted the three-part *Mathews v. Eldridge* test to assess what process was owed in such cases.[240] Ultimately, the *Kenny A.* court concluded that children had a procedural due process right to counsel under the Georgia constitution.[241]

Thus, while courts have recognized substantive and procedural rights of children in foster care, the historical landscape is varied in consistency and enforceability. Future litigation will no doubt continue to refine the rights, yet it is uncertain whether there will ever be one clear right comparable to that of parents in such dependency cases.

More recently, in 2011, a class action suit, *D.B. v. Richter*,[242] was filed in the Supreme Court of the State of New York on behalf of transition-age youth in the foster care system.[243] Specifically, the class in-

233. *Id.* at 863–65 (affirming trial court's dismissal of federal statutory claims).
234. 356 F. Supp. 2d 1353 (2005).
235. *Id.* at 1355–56 (stating facts of case).
236. *Id.* at 1357.
237. *Id.* at 1359 (recognizing procedural due process rights of children).
238. *Id.* at 1360 (articulating rights of foster children).
239. *Id.* (providing that fundamental liberty interests of child are at stake throughout the proceedings).
240. *Id.* at 1360–61 (discussing the Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976), analysis).
241. *Id.* at 1360 (stating holding of court under Due Process Clause of Georgia Constitution).
242. Index No. 402759/11 (N.Y. Sup. Ct.) filed Oct. 17, 2011.
243. Notice of Proposed Class Action Settlement at 1, *D.B. v. Richter*, Index No. 402759/11 (N.Y. Sup. Ct. 2011), http://www.legal-

volved all youth between the ages of seventeen and twenty-one who were currently in foster care with a permanency goal of emancipation (Another Permanent Planned Living Arrangement or APPLA) or who left foster care to live on their own.[244] The action was filed against the New York City Administration for Children's Services (ACS) in an effort to help transition-age youth enforce their "right to receive help in finding appropriate and adequate housing and to receive other help from ACS until [their] 21st birthday."[245] As a result of the case being filed, the parties reached a settlement that required ACS to establish policies regarding services and support for youth transitioning out of foster care, specifically around the area of housing.[246]

This case targeted the protections owed to transition-age youth in the dependency system.[247] It raised additional questions about the rights of this in-between age group of young people, as well as the enforceability of rights bestowed on them.

C. The Strengthening Families Act and Foster Care Bills of Rights

Congress furthered the conversation around transition-age youth in foster care, specifically their engagement in case planning and their rights in the system, with the passage of the SFA in September 2014.[248] The SFA is "designed to promote well-being and normalcy for youth in foster care[,]" included provisions encouraging states to identify and protect youth at risk of sex trafficking, to improve opportunities for youth in foster care, to support permanency efforts through adoption incentives, and to enhance international child support recovery efforts.[249]

In one key provision, the SFA called for states to implement a "reasonable and prudent parent standard," which would allow foster parents to make more of the day-to-day decisions for youth in their homes.[250] The goal is to provide a sense of normalcy to foster youth by allowing them to participate in extracurricular, cultural, and social activities with

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aid.org/media/152814/d.b.%20v.%20richter%20notice.english.pdf (providing notice of a proposed settlement to all eligible youth).

244. *See id.* at 1; *see also Proposed Class Action Settlement Averts the Danger of Homelessness for Young People Aging Out of Foster Care*, LEGAL AID SOC'Y (Oct. 20, 2011), http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/proposedclassactionsettlementavertsthedangerofhomelessness.aspx (detailing news coverage of proposed class action).

245. Notice of Proposed Class Action Settlement, *supra* note 243 (asserting right of current and former foster youth in case).

246. *See id.* at 2–4 (summarizing terms of proposed settlement).

247. *Id.* (identifying services to be provided to current and former foster youth).

248. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014) (codified as amended in scattered sections of 42 U.S.C.).

249. *See* JENNIFER POKEMPNER ET AL., PROMOTING NORMALCY FOR CHILDREN AND YOUTH IN FOSTER CARE 2 (2015) (summarizing general provisions of SFA); *see also* Preventing Sex Trafficking and Strengthening Families Act § 2 (providing Table of Contents for Act's provisions).

250. Preventing Sex Trafficking and Strengthening Families Act § 111 (establishing standard for supporting normalcy for children in foster care).

their peers.[251] It is a recognition that youth in foster care still need to just be kids.[252]

Other provisions seek to empower youth ages fourteen and older to engage in their own dependency cases.[253] The SFA specifies that the case plan "shall be developed in consultation with the child [age fourteen or older] and, at the option of the child, with up to 2 members of the case planning team who are chosen by the child and who are not a foster parent of, or caseworker for, the child."[254] This provision seems to reflect an understanding of the adolescent's cognitive capacities for decision making at these ages.[255] With guidance and opportunity, they are able to participate in these decisions.

The SFA also amended the federal language to describe this process as "transition planning for a successful adulthood," as opposed to transition planning for "independent living."[256] This also reflects changing views around successful outcomes for these youth, recognizing that adults do not, in fact, live independently, but rather live "interdependently" with support from many permanent connections with friends and family.[257]

In the discussion of furthering youth rights, the essential provision, the "List of Rights" addition, reads:

> (b) List of Rights.—The case plan for any child in foster care under the responsibility of the State who has attained 14 years of age shall include—
>
> (1) a document that describes the rights of the child with respect to education, health, visitation, and court participation, the right to be provided with the documents specified in section 475(5)(I) in accordance with that section, and the right to stay safe and avoid exploitation; and

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251. *Id.*; POKEMPNER ET AL., *supra* note 249, at 8–21 (analyzing implementation strategies for normalcy provisions).

252. *Cf.* POKEMPNER ET AL., *supra* note 249, at 5 ("Indeed, normalcy for youth means being able to do what is considered 'routine' for many teenagers . . . .").

253. Preventing Sex Trafficking and Strengthening Families Act § 113 (providing for involvement of older foster youth in their own case planning).

254. *Id.* (designing case planning with emphasis on youth engagement).

255. *See supra* notes 164–65 and accompanying text (discussing adolescent capacity for logical decision making).

256. Preventing Sex Trafficking and Strengthening Families Act § 113 (amending terminology to reflect changing views).

257. Jill K. Jensen, *Fostering Interdependence: A Family-Centered Approach to Help Youth Aging Out of Foster Care*, 3 WHITTIER J. CHILD & FAM. ADVOC. 329, 329–30 (2004) ("Programs that focus on the concept of 'independent living' should be redefined as preparation for 'interdependent living.'"); *id.* at 330 ("Interdependent living . . . is defined as 'being able to carry out management tasks of daily life and having a productive quality of life through positive or appropriate interaction with individuals, groups, organizations, and social systems.'" (quoting ANTHONY N. MALUCCIO ET AL., PREPARING ADOLESCENTS FOR LIFE AFTER FOSTER CARE: THE CENTRAL ROLE OF FOSTER PARENTS 10 (1990))).

> (2) a signed acknowledgment by the child that the child has been provided with a copy of the document and that the rights contained in the document have been explained to the child in an age-appropriate way.[258]

The effective date for this provision was September 29, 2015, with a delayed date permitted if state legislation was required.[259]

A collaborative brief on effective implementation of the SFA articulated the rationale behind these provisions.[260] With regard to case planning, the SFA represents a "recognition that young people should be included in these important processes and that youth as young as age 14 can have a very informed perspective that can lead to better permanency outcomes and compliance with the case plan."[261] Providing youth with their rights is intended to "strengthen[] their self-sufficiency and prepare[] them for a successful transition out of foster care and into adulthood."[262] While the report recommends that the Department of Health and Human Services should provide a model List of Rights, it acknowledges the absence of a clear list in the SFA itself.[263]

With this general mandate, the list of rights in each state may look somewhat different from one another, so long as they cover the essential topics—education, health, visitation, and court participation.[264] Even before the enactment of the SFA, a number of states enacted Foster Children Bill of Rights.[265] With the SFA's passage, additional states have sought to adopt such lists in an attempt to define the rights of foster children and foster parents and satisfy the SFA's requirements.[266] Some of these Bills of Rights are enacted through state statute, others find their way in departmental policy or regulation.[267]

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258. Preventing Sex Trafficking and Strengthening Families Act § 113 (establishing "List of Rights" provision).

259. *See* CHILDREN'S DEF. FUND ET AL., IMPLEMENTING THE PREVENTING SEX TRAFFICKING AND STRENGTHENING FAMILIES ACT (P.L. 113-183) TO BENEFIT CHILDREN AND YOUTH 26 (2015).

260. *Id.* at 8–9 (stating it was a "collaborative effort of Children's Defense Fund, Child Welfare League of America, First Focus, Generations United, Foster Family-based Treatment Association, and Voice for Adoption").

261. *Id.* at 26.

262. *Id.*

263. *See id.* at 27 ("It would be helpful for HHS to provide a model for the List of Rights.").

264. POKEMPNER ET AL., *supra* note 249, at 14 ("Youth should know what the law requires and allows. They should be supported in advocating for themselves on all important issues, including normalcy, family visitation, educational choices, and health care.").

265. *See* Jill Reyes, *Child Welfare Bills of Rights for Foster Children*, 31 CHILD L. PRAC. 156, 156 (2012) (discussing state trend to pass child welfare bills of rights prior to passage of any federal legislation).

266. *Foster Care Bill of Rights*, NAT'L CONF. STATE LEGISLATURES (Aug. 25, 2016), http://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx (noting pending state legislation to define rights of foster children and parents).

267. *See* Reyes, *supra* note 265 (noting use of statute of local child welfare agency policy to create bills of rights).

On the whole, such lists of rights are fairly benign. They generally set forth expectations for the foster care system at large in terms of how children in its care should be treated.[268] Such bills often include "provisions regarding frequent contact with parents, siblings, and family members, foster youth's access to their advocates and the courts, and participation in age-appropriate school activities."[269]

The ABA Center on Children and the Law has "also assessed which states' child welfare bill of rights include: protection against abuse or corporal punishment, access to healthcare, protections against excessive medication, and preparation for independence."[270] As of 2012, only five states—California, Colorado, Maryland, Nevada, and Pennsylvania—included all four of these topics in their statutes, while six additional states—Hawaii, Maine, New Mexico, New York, Texas, and Wisconsin—incorporated these provisions into their departmental policies.[271]

The focus of such lists is primarily on what youth in foster care deserve: safe and healthy placements where their day-to-day needs are met,[272] an explanation of why they are in care,[273] the ability to participate in case planning,[274] educational stability,[275] freedom from abuse or neglect,[276] sibling contact,[277] privacy,[278] prompt access to any needed treatment or services,[279] visitation with birth parents,[280] representation of

268. *See, e.g.*, N.C. GEN. STAT. § 131D-10.1(b) (2016) ("The purpose of this Article is to assign the authority to protect the health, safety and well-being of children separated from or being cared for away from their families.").

269. *See* Reyes, *supra* note 265 (noting that most states have policy adopting "Bill of Rights for Foster Children" from Philadelphia in 1973).

270. *Id.*

271. *Id.* (listing states with comprehensive bill of rights in either statute or policy).

272. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-529(A)(2) (2016) (stating the right to "live in a safe, healthy and comfortable placement"); CAL. WELF. & INST. CODE § 16001.9(a)(1) (2016) (stating the right to "live in a safe, healthy, and comfortable home").

273. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-529(A)(3) (stating the right to "know why the child is in foster care and what will happen to the child and the child's family, including siblings, and case plans").

274. *See, e.g.*, 11 PA. CONS. STAT. § 2633(16) (2011) (discussing the right to involvement in case planning and court participation); TEX. FAM. CODE ANN. § 263.008(b)(14) (West 2017) (discussing the right to participation in or development of treatment plans).

275. *See, e.g.*, ARK. CODE ANN. § 9-28-113 (2016) (discussing the right to continuity of educational services); 11 PA. CONS. STAT. § 2633 (noting the right to educational stability); S.C. CODE ANN. § 59-38-10 (2016) (discussing the right to educational services).

276. *See, e.g.*, HAW. REV. STAT. § 587A-3(a)(1) (2016) (stating the right to live in home "free from physical, psychological, sexual, and other abuse"); N.C. GEN. STAT. § 131D-10.1(a)(1) (2016) (stating the right to "safe foster home free of violence, abuse, neglect, and danger").

277. *See, e.g.*, CONN. GEN. STAT. § 17a-10a(a) (2016) (ensuring the right to sibling visitation); FLA. STAT. § 39.4085(15) (2016) (ensuring the right to regular sibling contact).

278. *See, e.g.*, DEL. CODE ANN. tit. 13, § 2522(a)(11) (2016) (granting right to "have their confidentiality protected as required by state and federal law"); 11 PA. CONS. STAT. § 2633(17) (granting right to confidentiality).

279. *See, e.g.*, DEL. CODE ANN. tit. 13, § 2522(4) (granting right to access treatment necessary to meet needs); FLA. STAT. ANN. § 39.4085(7) (2016) (establishing goal of dependent children receiving necessary treatment).

their voices in court,[281] access to personal possessions,[282] freedom from discrimination,[283] independent living services,[284] lifelong connections with kin,[285] and opportunities to experience normalcy.[286]

The SFA requires states to provide these lists (or those similar) to youth using youth-friendly language.[287] This is documented by having the youth's signature acknowledging receipt of the rights.[288] While this documentation addresses notification to youth of their rights, concerns remain regarding enforcement.[289]

D. The Meaning of Rights

The term "Bill of Rights" is an interesting one. Historically, it referenced the first ten amendments to the United States Constitution, encompassing a "list of treasured liberties."[290] The original Bill of Rights was thought to be "the product of the bitter struggles of men and women who loved freedom and hated tyranny."[291] It was the recognition of almost inherent rights.[292]

The various state Bills of Rights for foster youth are similarly lofty in nature, though often lacking in protections. Unfortunately, these state

280. *See, e.g.*, HAW. REV. STAT. § 587A-3(a)(3) (ensuring a child's right to contact with parents); N.J. STAT. ANN. § 9:6B-4(e) (West 2016) (establishing a right for children placed outside their home to visit their parents).

281. *See, e.g.*, CAL. WELF. & INST. CODE § 16001.9(a)(17) (2016) (establishing policy of foster children's right to "attend court hearings and speak to the judge"); TEX. FAM. CODE ANN. § 263.008(b)(13) (2016) (noting right to participation in court).

282. *See, e.g.*, MASS. DEP'T OF CHILDREN & FAMILIES, FOSTER CHILD BILL OF RIGHTS (highlighting right to access in policy bill of rights).

283. *See, e.g.*, CAL. WELF. & INST. CODE § 16001.9(a)(23) (establishing policy or foster children's right not to be subjected to discrimination or harassment); 11 PA. CONS. STAT. § 2633(2) (granting right to "[f]reedom from discrimination because of race, color, religion, disability, national origin, age or gender").

284. *See, e.g.*, DEL. CODE ANN. tit. 13, § 2522(a)(12) (granting right to independent living services beginning at age sixteen); HAW. REV. STAT. § 587A-3(a)(10) (ensuring a child's right to age-appropriate life skills training and transition planning starting at age twelve).

285. *See, e.g.*, MASS. DEP'T OF CHILDREN & FAMILIES, *supra* note 282 (highlighting right to receive support in maintaining positive connections with relatives).

286. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-529(a)(6) (2016) (establishing right to attend "community, school and religious" activities); ARK. CODE ANN. § 9-28-113(b) (2016) (establishing rights related to education).

287. *See* POKEMPNER ET AL., *supra* note 249, at 9 (discussing details of Act's "list of rights" provision).

288. *See* 42 U.S.C. § 675a(b)(2) (2012) (requiring "signed acknowledgement by the child").

289. *See* POKEMPNER ET AL., *supra* note 249, at 10, 10 n.46 (recognizing that child's acknowledgement of receipt does not address enforcement of child's right).

290. *See* Garrett Epps, Speech, *The Bill of Rights*, 82 OR. L. REV. 517, 521 (2003) (delivering history of the Bill of Rights to the U.S. Constitution).

291. *See* Frank H. Elmore, *Liberty Under the Bill of Rights*, 50 FED. RULES DECISIONS 65, 65 (1970) (presenting historical account of Bill of Rights).

292. *See id.* at 66 (describing Bill of Rights amendments as "most essential portions of the Constitution").

Bills of Rights "typically do not create enforceable rights or specify any means for their enforcement."[293]

In Colorado, for example, the statute specifically reads that the legislature only intended the list as "guidelines to promote the physical, mental, social, and emotional development of youth in foster care and to prepare them for a successful transition back into their families or the community."[294] These guidelines may be limited in application "to reasonable periods during the day or restricted according to the routine of foster care homes to ensure the protection of children and foster families." As such, the rights are neither absolute nor enforceable.[295]

In Florida, the statutory list delineates that it establishes "goals and not rights."[296] It shall not "be interpreted as requiring the delivery of any particular service or level of service in excess of existing appropriations[,]" nor shall it create any "cause of action against the state . . . ."[297] Similarly, Hawaii's list establishes "guiding principles."[298] Arizona and North Carolina make clear that any violations do not create causes of action.[299] These are expectations of care, meant more so to inform foster parents and state agencies of their enduring obligations to youth, not to allow youth to have an equal and enforceable stake in the proceedings.

A few states have described grievance procedures for violations of any listed rights, falling short, however, of creating separate causes of action. In Delaware, aggrieved youth "may motion the court . . . for appropriate equitable relief."[300] Nevada provides rights of redress.[301] Pennsylvania allows for filing of a grievance in accordance with county policy.[302] Youth in Rhode Island can seek appropriate equitable relief from the family court.[303] In Montana, youth should contact the Foster Care Program Officer, who will follow-up on their concerns.[304]

Thus far, there have been few cases across the country actually litigating the rights listed in the various state Bills of Rights. In the Arizona

293. *See* POKEMPNER ET AL., *supra* note 249, at 10 (noting lack of creation of enforceable rights).
294. COLO. REV. STAT. § 19-7-101(2) (2016) (setting limits on enforceability).
295. *See id.*
296. FLA. STAT. § 39.4085 (2016).
297. *Id.* (limiting enforceability of Bill of Rights).
298. HAW. REV. STAT. § 587A-3(a) (2016).
299. ARIZ. REV. STAT. ANN. § 8-529(C) (2016); N.C. GEN. STAT. § 131D-10.1(a) (2016).
300. DEL. CODE ANN. tit. 13, § 2522(b) (2016) (establishing remedy).
301. NEV. REV. STAT. § 432.550 (2015) (allowing child to redress alleged violation with foster care provider or employee, agency, juvenile court, guardian ad litem or attorney for child).
302. 11 PA. CONS. STAT. § 2633(24)–(25) (2016) (establishing grievance process).
303. R.I. GEN. LAWS § 42-72-15(m) (2016) (providing remedy for child aggrieved by violation of bill of rights).
304. MONT. DEP'T OF PUB. HEALTH & HUMAN SERVS., CHILD & FAM. SERVS. DIV., THE POLICY OF THE STATE OF MONTANA REGARDING RIGHTS OF YOUTH IN FOSTER CARE (2015), http://dphhs.mt.gov/CFSD.aspx (follow "Montana Foster Youth Rights" hyperlink) (establishing process for youth to express concerns about care or treatment).

case of *K.D. v. Hoffman*,[305] a thirteen-year-old argued that the court violated her rights when it denied her request to attend and testify at a termination of parental rights hearing.[306] She asserted that the Arizona Bill of Rights for Children and Youth in Foster Care Act (AZ Bill of Rights Act) gave her the right to "attend the . . . court hearing and speak to the judge."[307] Despite this argument, the Arizona Court of Appeals determined that the legislature did not intend to grant youth in foster care absolute rights in passing the AZ Bill of Rights Act, and thus the act established no legally enforceable right or cause of action.[308]

New Jersey, on the other hand, clearly recognizes a private cause of action for violations of the Children's Bill of Rights.[309] In *K.J. v. Division of Youth and Family Services*,[310] a federal district court of the District of New Jersey discussed the Bill of Rights in detail.[311] It noted that the "Act outlines the State's responsibilities when undertaking to protect children by placing them outside of the home."[312] It recognized this as an affirmative obligation of the State.[313] It was designed to "protect the most fundamental rights of children placed outside the home[,]" recognizing the rights of youth independent of their parents.[314]

Moreover, the court noted that the Child Placement Bill of Rights Act was created separately from the rest of the child welfare laws, "suggesting that it was meant to provide a separate remedy."[315] Despite a lack of any articulation of a remedy within the Act itself, the court held that it nonetheless provided a private right of action, as doing so was "proper and necessary."[316] Thus, in New Jersey, youth have equitable access to enforcement of their rights.[317]

In sum, the SFA provides that youth in every state receive a copy of their rights; yet for the vast majority of youth across the country, having "rights" means something less than a guarantee—whether through a bill

305. 359 P.3d 1022 (Ariz. Ct. App. 2015).
306. *See id.* at 1023 (describing procedural history and basis of claim).
307. *See id.* at 1023–24 (relying on alleged violation of subsection (A)(16) of Bill of Rights to assert cause of action).
308. *Id.* at 1024 (limiting enforceability of Arizona Bill of Rights for Children and Youth in Foster Care Act).
309. K.J. v. Div. of Youth & Family Servs., 363 F. Supp. 2d, 728, 743–48 (D.N.J. 2005) (considering federal due process claims and state law claims of foster youth).
310. *Id.*
311. *Id.* at 741–45.
312. *Id.* at 741 (referencing N.J. STAT. ANN. § 9:6B-1 to 9:6B-6 (West 2016)).
313. *Id.* at 742 (citing N.J. STAT. ANN. § 9:6B-2(b) (West 2016)).
314. *Id.*
315. *Id.* at 741.
316. *Id.* at 745 ("[T]he Child Placement Bill of Rights Act seeks to remedy the harm which arises when the State agencies and the placement system fail to carry out the State's affirmative obligation to protect the fundamental rights of the children entrusted to its care.").
317. *Id.*

of rights or through case law.[318] Indeed, "mere encouragement and policy promulgation without any accompanying enforcement mechanism is not likely to bring about dramatic improvements for foster youth."[319]

IV. THE CHANGING CULTURE OF A LONG-STANDING SYSTEM

In a myriad of ways, the SFA causes advocates to engage in conversations about the value of transition-age youth. It recognizes the essential piece they bring to case planning for their own life outcomes.[320] It acknowledges that this age group should be focused on transitioning with supportive connections, not ultimate day-to-day independence.[321] It requires from states a declaration of expectations as to what youth deserve from a system legally obligated to support their well-being.[322]

Each of these elements of the Act is crucial to creating a dependency system built around the emerging adulthood of this age group in the pursuit of achieving better outcomes for their futures. The SFA, however, is just the beginning. While it provides for the rights of youth by name, it does little to encourage the enforceability of such rights, or even to create accountability for the promises that such lists of rights make to youth.

Our child welfare history shows our progression in viewpoint regarding youth.[323] Since the time of *Gault*, the delinquency system has been two steps ahead in considering the status of young people, specifically the status of their development and decision-making capacity.[324] It is time for the dependency system to follow suit, moving past the paternalistic paradigms and instead considering this age group's need for an environment of both independence and support.

A. A Look Towards Developmental Appropriateness

Much of this discussion is less about specific laws or policies, and ultimately, more about culture change in our dependency systems. Judges are crucial in this process—asking questions of youth (and other parties) rooted in a knowledge of developmental research, giving young people an equal place at the table, and holding them, their families, and

318. For a discussion of the rights of transition-age youth both in bills of rights and in case law, see *supra* notes 200–90 and accompanying text.

319. Paul Jacobson, Note, *Promoting "Normalcy" for Foster Children: The Preventing Sex Trafficking and Strengthening Families Act*, 81 MO. L. REV. 251, 263 (2016).

320. *See* Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113(a), 128 Stat. 1919, 1928 (2014) (providing for greater engagement of older youth in case planning).

321. *See id.* § 113(c) (amending terminology to focus on transition planning).

322. *See id.* § 113(d) (requiring states to provide a "list of rights").

323. *See* Ventrell, *supra* note 16, at 192–93 (discussing change in view as to children's status).

324. *See In re* Gault, 387 U.S. 1, 13 (1967) (describing delinquency court's shift to acknowledging youth as rights-based individuals).

their case professionals accountable for their actions.[325] Creating a developmentally-appropriate system does not mean making excuses for the "bad" choices of our youth; it means establishing an environment where young people can try new things, make mistakes, and have support in learning from them.

One author, Emily Buss, recently called for the adoption of a new lens for the law around minors: "developmental jurisprudence."[326] This is "an examination of the role of law as a developmental agent—an agent that shapes how children grow up . . . ."[327] Essentially, this view advocates that "in all the domains in which law is already operating, it should be more universally attuned to its childrearing impact."[328] Professor Buss explains the role of the law in the development of older youth, specifically the message that we send to youth about their place in society.[329] "[Y]oung people are conditioned to assume the status of outsider: They are not a part of the social and professional community to which all the court personnel, their own lawyers included, belong, and they are not included in the hearings in any meaningful way."[330] This experience "perpetuates the youth's dependent status in the system" and "deprives them of an important opportunity to begin, in a highly structured and supported environment, to exercise decision-making authority over their own lives."[331] This is exactly the result that we, as a system, should seek to avoid.

B. Recommendations for Change

Changes to our system start with changes to our courts, our laws and policies, and our practices. We must be intentional in evaluating how our status quo supports or hinders the successful transition of older youth as they exit the child welfare system.

1. The Meaningful Participation of Youth

The dependency system has spent much time and attention in recent years on youth attending court. Now, courts must move beyond attendance and look for meaningful participation. Professionals must spend the

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325. *See, e.g.*, Jennifer Pokempner, *Implementing the Older Youth Permanency Provisions of the Strengthening Families Act: The Court's Role*, 35 CHILD L. PRAC. 65, 73–74 (providing lists of questions court can ask regarding older youth permanency provisions of the SFA).

326. Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016) (establishing new perspective on laws regarding minors).

327. *Id.* at 751.

328. *Id.* at 755 (explaining that developmental jurisprudence looks to "parenting model," just as therapeutic jurisprudence looks to "treatment model").

329. *See id.* at 766 (considering developmentally valuable procedures for youth).

330. *Id.*

331. *Id.* at 767.

time with youth—both fully preparing them prior to court and fully debriefing the experience with them after the hearing.[332]

Keeping in mind the research discussed above, there must be opportunities for young people to practice deliberative decision making, free from social influences and supported by "consultants who can provide objective information about the costs and benefits . . . ."[333] This is the time when transition-age youth have the ability to create new, healthy brain pathways and prune those pathways that have not proven successful.[334] Courts can support these opportunities by asking attorneys and other professionals how decisions have been made and what the role of the youth has been in such processes.[335]

2. A Meaningful Time Period for Transition

The results of the Midwest Study demonstrated that with additional time and support in their transition, young people can have greater success in their life outcomes.[336] This concept informed the Fostering Connections Act's extension of federal funding for young people between the ages of eighteen and twenty-one who are pursuing important goals.[337] As states have implemented the Fostering Connections Act and extended the court's jurisdiction, they have done so in a number of developmentally-appropriate ways.[338] One option is to design the extended foster care system around an opt-in or opt-out provision.[339] This provision recognizes that in most states, young people are legal adults at the age of eighteen.[340] The opt-in or opt-out provision takes notice of that age, requiring foster youth in the system at age eighteen to either choose to remain in the system (opt-in) or choose to exit the system (opt-out). This is about consent.

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332. *See* ELIZABETH WHITNEY BARNES ET AL., SEEN, HEARD, AND ENGAGED: CHILDREN IN DEPENDENCY COURT HEARINGS 8–11 (2012) (detailing benefits of children's attendance in court and addressing common concerns).

333. *See* Steinberg et al., *supra* note 146, at 592; *see also* JIM CASEY, SUCCESS BEYOND 18, *supra* note 1, at 12–14 (offering ten key elements to effective case planning with transition-age youth).

334. *See* Steinberg et al., *supra* note 146, at 592 (explaining supports needed in logical decision making).

335. *See, e.g.*, Pokempner, *supra* note 325 (emphasizing the court's role in the process).

336. *See* WEINBERGER ET AL., *supra* note 84, at 5–6 (describing "[a] process of competitive elimination").

337. *See* COURTNEY ET AL., *supra* note 115, at 87–88 (comparing Illinois results with Iowa and Wisconsin results).

338. *See* COURTNEY ET AL., *supra* note 71, at 1–2 (noting impact of the Midwest Study on federal legislation).

339. *Compare* ALL. FOR CHILDREN'S RIGHTS ET AL., ASSEMBLY BILL 12 PRIMER 9 (2014), http://www.cafosteringconnections.org/wp2/wp-content/uploads/2014/10/AB-12-Primer_Updated-1-1-14.pdf (characterizing California's extended care as "opt-out" program, meaning that youth's foster care "will be extended past age 18 unless s/he elects to exit care"), *with Fostering Connections to Success Act's Older Youth Extensions in Pennsylvania*, JUVENILE L. CTR., http://www.jlc.org/fosteringconnections#conditions (last updated July 28, 2015) (providing opt-in choice for young people to remain in the system).

340. *Cf.* JIM CASEY, SUCCESS BEYOND 18, *supra* note 1, at 4 (illustrating developmentally-appropriate legal framework for young people between ages eighteen and twenty-one).

Either way, such a statutory provision requires the courts and the child welfare agencies to take note that, specifically at eighteen when the legal stakes become higher in many other domains, the dependency system also values the informed decision making of young people.

Hand in hand with this type of provision, many states have also adopted a "reentry" option.[341] This allows young people who choose to leave the dependency system after the age of eighteen the ability to re-enter the system to receive services and supports until the age of twenty-one.[342] It gives them the extra time to work on their goals, such as school, job training, or employment.[343] Re-entry is the developmentally-appropriate mechanism whereby youth can make a (hopefully informed) decision to try the world on their own, while simultaneously benefiting from an existing safety net if they need additional support.[344]

Certainly, extension of foster care jurisdiction with its accompanying provisions comes with its own challenges. This is a means, however, to evaluate state laws and policies and bring developmental science into the dependency world.

3. Meaningful Legal Representation

The SFA calls for recognition of the rights of young people in dependency cases. With rights comes status, along with procedural protections. If the system intends to provide young people an equitable voice in the proceedings, it must do that through effective counsel. The right to counsel for children in dependency cases was well-analyzed by the *Kenny A.* court, discussed above, as a procedural due process right.[345] For transition-age youth, the developmentally-appropriate choice is for that counsel to be client-directed, as opposed to representing the youth's best interests.[346] The youth's attorney can be that sound consultant advising the youth of the costs and benefits of various decisions. With this support, young people can be empowered to strengthen their decision-making capacity in a safe environment.

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341. Boyer, *supra* note 186, at 839, 857–59 (exploring foster care reentry laws).

342. *See id.* at 839 (providing that roughly half of states allow young people to return to foster care "after some form of trial independence").

343. *See id.* at 858–60 (explaining that many state statutes or procedures governing reentry require youth to commit to satisfying activity under Fostering Connections Act as a condition).

344. *Id.* at 839 ("The safety net embodied by these reentry or trial independence programs appropriately acknowledges many of the unique challenges faced by youth seeking to navigate the difficult transition from foster care to independence.").

345. Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (upholding right to counsel "under the Due Process Clause of the Georgia Constitution").

346. *See* JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, FOSTER CARE TO 21: DOING IT RIGHT 5 (2011) ("Legal representation must be youth-driven, responsive, and respectful of the unique needs of each young person.").

CONCLUSION

Transition-age youth in foster care have immeasurable challenges ahead of them as they exit a system that has often made decisions for them. Historically, the dependency courts have sent these youth countless messages of working "about" them and "for" them, rarely messages of working "with" them. The legal landscape generally provides these youth with a lesser voice than their parents, or even than the state, in determining what is "best" for them.

With the Preventing Sex Trafficking and Strengthening Families Act (the SFA), Congress opened the door for states, courts, and professionals to have deeper conversations about how youth are encouraged—or sometimes hindered—in their transition process.

Maya Angelou is often quoted as saying, "I did then what I knew how to do. Now that I know better, I do better."[347] Today, we have more research than ever on the adolescent brain, decision-making capacity, and life outcomes upon emancipation.[348] We now know better about what our systems are doing well and what we are failing to do. The SFA gives us an opportunity to turn this knowledge into practice and do better for transition-age youth in our foster care system.

347. J.N. Salters, *35 Maya Angelou Quotes That Changed My Life*, HUFFINGTON POST: BLOG (May 29, 2014, 2:50 PM), http://www.huffingtonpost.com/jn-salters/35-maya-angelou-quotes-th_b_5412166.html.

348. For a discussion of the research surrounding adolescent development and the longitudinal life outcomes of young people exiting the foster care system, see *supra* notes 84–132, 147–76 and accompanying text.

FOREWORD

MICHAEL HARRIS[†]

Normally, when you hear an "animal advocate" speak it is about one of two topics, either about the humane treatment of animals or about animal rights. The humane treatment of animals is a topic that has a lengthy history in this country. The work of some of the largest animal advocacy groups in the world, like the Humane Society, largely falls under this umbrella. Over the past half-century or so, the fight to criminalize or otherwise make illegal various forms of animal abuse—whether against domestic pets, farm animals, or animals used for commercial gain—has seen some success in the United States, starting with the federal Animal Welfare Act and trickling down to various state and local laws across the nation.

Some of us distinguish, however, between advocating for humane treatment and advocating for animal rights. Animal rights advocates often start with the premise that animals, like humans, have autonomy. Accordingly, to protect this autonomy, animals should be given some of the legal protections and privileges normally associated with humans. For example, personhood, perhaps starting with non-human primates and cetaceans, has long been seen as the ultimate goal of animal rights activists. This has been the life work of the animal rights lawyer Steve Wise and others. Another example would be the right for an animal to protect its interests in the courtroom, perhaps through some human guardian *ad litem*. We have seen in recent years conceived lawsuits to seek compensation on the behalf of animals held for entertainment, or most recently, the idea of suing an animal's captor for libel when the public is told the animal is enjoying his captive home. Still others have stressed the need for direct legislative action—often at the state level—that would give animals statutory rights to protect their autonomy and freedom.

Some animal rights activists and scholars are not fully convinced that arguing that some animals have autonomy (which often sounds short-hand for intelligence) and, therefore, should extend to specific rights, is the best path forward. For example, Martha Nussbaum has stat-

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ed that as used in the animal rights context, the term autonomy has not been well defined and ignores that the concept of autonomy has many different meanings depending on the philosophical approach one choose to consider or apply. Martha has suggested that animal rights activists should focus less on the vague concept of autonomy and instead focus on species-specific, central capacities: life, bodily health, bodily integrity, play, sense/imagination/thought, emotion, practical reason, affiliation, and control over one's environment.

More practically, one of the problems that has confronted Steve, for example, is that judges have demanded he show more than autonomy as a basis for granting primates the legal status of personhood; the judges also demanded that he demonstrate that primates could take an active role in fulfilling the "rights and duties" of citizenship within a society. Apparently this means voting, paying taxes, holding down a job, and otherwise not being a burden to the rest of society.

Thus, what is intriguing about Martha's approach is the ability to now argue that fulfilling "rights and duties" of citizenship is not the proper basis for determining personhood; instead, it is the ability of an animal to lead a meaningful life and even enrich the lives of other animals around her.

It is also exciting that science is rapidly proving that Martha is right regarding the capabilities of animals. We are truly in a revolutionary time with respect to scientific analysis of the cognitive, emotional, and social lives of so many animals. When I first entered the field of wildlife conservation in the 1990s, the fields of wildlife biology, conservation, and ecology focused almost exclusively on the physical needs of a species. In other words, the focus was largely on what essential habitat conditions a group of animals need to survive and reproduce. Today, scientists are fascinated with the knowledge that animals feel emotions, connect socially, and have points of view based upon their interactions with the world around them. Moreover, the work of Dr. Marc Bekoff and others in the field of compassionate conservationism has helped document the vast amount of research into animal feelings that has exploded over the past couple decades.

The problem for animal rights activists, however, is that rational thinking and sound science does not necessarily translate into legal protections and principles. If you did not already know this, you certainly do today as a result of the current policy direction of our nation on so many issues as a result of last year's presidential election. The reason for this—at least in my mind—is that, in a democratic society, law and policy often reflect a mixture of human emotions, which can be influenced by secular philosophy and science, but are also shaped by a collection of individual beliefs, biases, prejudices, and other basic fears, such as feeling that one's own place in the world is threatened. Collectively, these

emotions help form basic social norms that help hold us together and, more importantly, provide the basis for new legal rights and obligations.

Of course, history shows us that social norms are not always stagnant. They can both evolve and devolve. That is a subject that can be, and has been, explored in great depth elsewhere. For our purposes here, I merely wish to make a suggestion as to how social norms often do in fact change—namely through deliberation. I believe that our society, basic constitutional structure, established political institutions, and even some existing laws are designed to promote deliberation as a means of establishing new legal rights and protections. Of course, the system also ensures that deliberation is often painfully slow, which is a major contributor to some of the reasons our democracy has proven, so far, inadequate in protecting the rights of so many beings. I would be the first to argue that as a society we need to do a better job of deliberating and figure out methods to speed the process up.

Still, I believe that deliberation is the only proven means in our society to ensure lasting, and hopefully better, legal protections for humans, non-human animals, and even the environment. Which leads me to our approach to animals' rights at Friends of Animals.

Simply put, through our work we seek to convince, or even force, governmental decision-makers to incorporate the whole body of knowledge regarding an animal's well-being before undertaking any human-initiated action that could impact that animal. Despite the capabilities approach discussed by Martha, and despite this vast, ever-growing body of knowledge we can call compassionate conservationism, legal protections for animals still focus almost exclusively on physical suffering, death, or loss of elements essential to an animal's ability to survive.

What we are trying to establish is what Friends of Animals calls a "right to ethical consideration." This right is not the granting of specific substantive rights to animals, like the right to life or freedom. We fully support the granting of such individual rights to animals in many cases. Again, such rights are currently not part of our common social norm and are not embodied in most human legal systems. On the other hand, there is already philosophical, scientific, and I would also argue, legal tools available to us to make a strong case—whether before legislatures, administrators, or judges—to implement a right to ethical consideration in many jurisdictions.

Establishing a right to ethical consideration is a pathway to strengthening legal protections for animals. By requiring decision makers and others to maintain a dialogue—a deliberation—about the human impact on animal well-being, it is possible that societal and legal norms regarding the rights of other animals will gradually change.

WORKING WITH AND FOR ANIMALS: GETTING THE THEORETICAL FRAMEWORK RIGHT

MARTHA C. NUSSBAUM†

Friends of animals have lots to complain about and lots of work to do. To the familiar list of horrors—torture of animals in the meat industry, misery inflicted on puppies by puppy mills, the damages of research using animals, the manifold harms endemic to the confinement of apes and elephants in zoos, we have some further issues that have only become issues in the past few decades: depletion of whale stocks by harpooning, the confinement of orcas and dolphins in marine theme parks, the poaching of elephants and rhinos for the international black market, the illicit trafficking of elephants from Africa into U.S. zoos, the devastation of habitat for many large mammals through climate change.[1] New issues arise all the time. The world needs an ethical revolution, a consciousness raising movement of truly international proportions.

But bad behavior also needs law. No major crimes against sentient beings have been curbed by ethics alone, without the coercive force of law—although it typically takes an ethical movement to goad law into action. And so far, both in the U.S. and in the international community, law has been lagging behind the evolving ethical consciousness of humanity. Animals still lack standing under both U.S. and international law. They also lack any rights of ethical consideration.[2] All human animals are treated as persons and ends (no matter how immature the human is), but all non-human animals are treated as mere things, as property.[3] Law must find ways to make animals legal subjects and not mere objects.[4] We need to move toward a world in which human beings are truly Friends of Animals,[5] not exploiters or users.

To make progress, we need theoretical approaches that are sound in terms of reality, grappling with what we know about animals, and that also direct law in a useful fashion. In this Article I will examine two ex-

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1. *See* Jane Goodall, *Forward* to STEVEN M. WISE, RATTLING THE CAGE, at ix, x–xi (2000).
2. *See id.* at xii.
3. *See id.*
4. *See id.*
5. Wild Life Law Program, *Nussbaum to Activists: 'Let's Have Work and Hope,'* FRIENDS OF ANIMALS (Feb. 15, 2017), https://www.friendsofanimals.org/news/2017/february/nussbaum-activists-'let's-have-work-and-hope' (summarizing remarks by the author at an event co-hosted by Friends of Animals, a non-profit, international animal advocacy organization, and the University of Denver).

tremely influential approaches to animal entitlements in philosophy, both of which have implications for law and policy: the "So Like Us"[6] approach and the "Least Common Denominator"[7] approach. I shall argue that both are defective intellectually, and also in terms of strategy. A version of the Capabilities Approach, an approach to justice for both humans and other animals that I have developed over the years, does far better in directing ethical attention. Does it also do better in directing legal strategy?

THE "SO LIKE US" APPROACH

One prominent and influential approach to animal ethics and law seeks recognition of legal personhood, and some autonomy rights, for a specific set of animal species, on the grounds of their human-like capacities. This approach is associated, above all, with activist and author Steven A. Wise.[8] Wise is one of the most significant pioneers of animal law. His 2000 book *Rattling the Cage* took the field of animal ethics into law, with striking results.[9] His course on animal law at Harvard Law School was one of the first law school courses of its kind. And, as the leading figure in the 2016 documentary *Unlocking the Cage*, he eloquently describes to the film's many viewers the goals of the Nonhuman Rights Project, which he leads; the film follows his legal battles to win limited personhood rights for several chimpanzees being held in captivity.[10]

Wise's focus in the 2000 book was on chimpanzees and bonobos,[11] but by now he explicitly includes all four species of great apes, as well as elephants (presumably all three species) and whales and dolphins (presumably all species of both of those).[12] His argument rests heavily on claims about the similarity of these animals to human beings. They are, he says, self-conscious, they are self-directing, they have a theory of mind, they have culture, they are not "cabined by instinct," they are able to contemplate their own future. In general they are "really really smart."[13] Centrally, he holds that they are "autonomous creatures" who, for that reason, should have "autonomous lives."[14]

Wise is not a philosopher, and he does not explain which of the concepts of autonomy used by philosophers he has in mind. Since he also says that he thinks of chimpanzees as at the level of a five-year-old human child, it is not clear that he really should ascribe autonomy to them,

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6. *See generally* STEVEN M. WISE, RATTLING THE CAGE (2000) (using the "So Like Us" approach to argue for legal changes for animals).
7. *See infra* Section titled The Least Common Denominator Approach.
8. WISE, *supra* note 6.
9. *Id.*
10. UNLOCKING THE CAGE (Pennebaker Hegedus Films 2016).
11. WISE, *supra* note 6.
12. UNLOCKING THE CAGE, *supra* note 10.
13. *Id.*
14. *Id.*

if that means, as it typically does, the ability to criticize one's desires in the light of some higher-order principles, or, as Kant famously held, the ability to free oneself from the influence of religion and culture.[15] Probably he means some less exacting form of self-directedness, such as the ability to choose among alternatives. (But surely many other species of animals exercise choice!) In any case, as both book and film repeatedly emphasize, Wise thinks these species of animals are very like humans, and he makes that likeness the basis for his crusade to win them some limited legal rights.[16] It would surely be valuable for him to investigate the notion of autonomy further, since we do not think that five-year-old children should be emancipated from their parents, nor do we think that they have a right to an independent self-planned life (or other rights associated with that, such as the right to sexual consent, the right to decide on one's own medical treatment, and so forth). Nor does Wise actually maintain that autonomy rights entitle apes to life without some type of supervision or guardianship: he reassures courts that he is seeking only to have the badly treated chimps transferred to a different supervised setting, not to have them utterly freed.[17] It is never made clear why he thinks that guardianship is good for apes, and he presumably does not think that human guardianship is good for whales and elephants, although he does not comment on this. So the concept of autonomy and its implications for animal lives remain unclear in his conception. One hopes that Wise will clarify the notion of autonomy rights in further work.

By showing how like us animals are, Wise hopes to demonstrate, he says in the film, that the line typically drawn in law between humans and animals is irrational and needs rethinking.[18] If we think that children deserve some rights, albeit with some qualifications and limitations, we should grant that these species of animals also have rights. It is irrational and inconsistent to treat all humans as persons, bearing rights, and to treat all animals as like mere things. At this point Wise uses an analogy to slavery: just as law used to treat slaves as mere property, and we have now seen that this was morally heinous, so too we should realize that our current treatment of animals is morally heinous.[19] In the film the slavery analogy gets strong pushback from some of Wise's interlocutors, presumably because it can be read as suggesting, inappropriately, that African-Americans are like chimps, which is not the idea he means to con-

15. *See generally* J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY (1998) (providing the history of the idea of autonomy, Kant's view, and its influence on modern concepts); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988) (leading philosophical account in terms of higher-order desires).

16. *See* WISE, *supra* note 6; UNLOCKING THE CAGE, *supra* note 10.

17. UNLOCKING THE CAGE, *supra* note 10.

18. *Id.*

19. *Id.*

vey.[20] So he backs away from the analogy; but he does not back away from the core idea that we must make a transition in law from thinking of animals as mere things and property to seeing them as persons.[21] He repeatedly points out that corporations are given rights under law; the extension of rights to self-directing animals is surely an easier step than that![22]

Throughout both book and film, Wise presents lots of evidence that the core species of animals have human-like abilities of many types.[23] His central rhetorical strategy in the film is to show us chimpanzees and other apes doing things that the viewer will immediately recognize as human-like: using sign language, giving displays of empathy when shown a film of humans displaying emotions, and so forth.[24]

The idea that some animals are surprisingly like humans, and that this has implications for the way we should treat them, is not new. In 55 B.C. the Roman leader Pompey staged a combat between humans and elephants.[25] Surrounded in the arena, the animals perceived that they had no hope of escape.[26] According to Pliny, they then "entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation."[27] The audience, moved to pity and protest by their plight, rose to curse Pompey—feeling, writes Cicero, that the elephants had a relation of commonality (societas) with the human race.[28]

Not all religions and world-views have held that humans are a superior species. Buddhism and Hinduism have more generous views of the world of nature.[29] As Richard Sorabji shows, even in the Western tradition the humans-on-top view was not held by most of the ancient Greco-Roman schools of philosophy, most of whom refused to draw a sharp line between humans and other animals, and some of whom strictly prohibited meat-eating, along with all infliction of pain on animals.[30] But the ancient Greek and Roman Stoics, enormously influential both in antiquity and in the development of Christian ethics, did hold that non-human animals were mere brutes, without thought or emotion, while humans are

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20. *Id.*
21. *Id.*
22. *See id.*
23. *See id.*; WISE, *supra* note 6.
24. UNLOCKING THE CAGE, *supra* note 10.
25. GAIUS PLINIUS SECUNDUS, PLINY THE ELDER: THE NATURAL HISTORY BOOK VII 251 (Tyler T. Travillian ed., Bloomsbury Academic 2015) (n.d.) [hereinafter PLINY]; CASSIUS DIO, DIO'S ROMAN HISTORY 361 (Earnest Cary, trans., Harvard University Press 4th prtg. 1969) (n.d.).
26. *See* DIO, *supra* note 25, at 361, 363; RICHARD SORABJI, ANIMAL MINDS AND HUMAN MORALS 124 n.21 (1993) (quoting PLINY, *supra* note 25).
27. SORABJI, *supra* note 26, at 124 n.21 (quoting PLINY, *supra* note 25).
28. *Id.* at 124–25.
29. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 320 (2006) [hereinafter FRONTIERS OF JUSTICE].
30. *Id.* at 125.

quasi-divine, and that on that account we can use them as we wish.[31] Stoicism influenced Christianity, but so too did Judaism, which similarly held that the human being is special. Made in the image of God, the human is the only truly intelligent and spiritual being, and the only being to whom salvation is open.

This view is still the dominant view in Judaism and Christianity.[32] And it is the dominant view, as well, among moral philosophers whose intuitions have been formed in that tradition. A notable example is leading moral philosopher Richard Kraut, who, in an important paper on the notion of goodness holds that we must be able to say why human life is special, in order to justify our intuitions that it is all right to do medical experiments on animals but not on humans.[33] Kraut never proposes to criticize those intuitions, and I mildly suggest that he might want to do that![34]

Wise knows his audience, and he makes the shrewd guess that if he is to move the needle on animal rights he will have to begin where the audience is. He calls this beginning "the first salvo in a strategic war" and also talks of "kicking the first door open."[35] So he clearly isn't indifferent to the wider project of winning rights for all animals. And his close and determined attention to the capacities and deprivations of some species is surely commendable. Nonetheless, one might raise worries. The choice of a theoretical framework influences where we will be able to go. It is important to get the theory right for reasons of truth and understanding. And it is also important to get a strategy that starts us in the right direction, rather than pointing us down a blind alley.

What, then, might be some problems with Wise's strategy from the philosophical viewpoint? Most obviously, it validates and plays upon the old familiar idea of a scala naturae (ladder of nature) with us at the top. Some animals get in, but only because they are like us. The first door is opened, but then it is slammed shut behind us: nobody else gets in. Instead of the old line, we have a slightly different line, but it is not really all that different, and most of the animal world still lies outside in the dark domain of mere thinghood.

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31. *See id.*

32. There are dissident strands in both, and when Pope Francis told a little boy that his dead dog was in heaven, his remark, heretical and rapidly withdrawn, still picked up on something that many people like to believe. At the time of my adult bat mitzvah in 2008, I was told by our cantor that Israeli animal activists have rewritten the Kaddish, or prayer for the dead, in order to include prayer for dead animals. I considered using this version, although in the end I did not because it is one of the few prayers that Reform Jews learn by heart, and they would be very upset to encounter new Hebrew words.

33. *See* Richard Kraut, *What is Intrinsic Goodness?*, 105 CLASSICAL PHILOLOGY 450, 456 (2010).

34. *See* Martha Nussbaum, *Response to Kraut*, 105 CLASSICAL PHILOLOGY 463, 467 (2010).

35. UNLOCKING THE CAGE, *supra* note 10.

The idea of the ladder of nature is essentially a religious idea, whether in its Stoic form (where only humans partake in Zeus's rational plan for the universe) or in its Judeo-Christian form. It derives from anthropocentric religions, according to which God, imagined as rather like us only better, using speech, reasoning, and language, makes us special, like God, and then values us because we are Godlike. The idea of superiority is not drawn from looking at nature, and it does not correspond to what we see when we look at nature, if we can put aside our arrogance. What we see are thousands of different animal life-forms, all exhibiting a kind of ordered striving toward survival, flourishing, and reproduction. Life-forms don't line up to be graded on a single scale: they are just wonderfully different. If we want to play the rating game, let's play it fairly. We humans win the prize on the IQ and language parameters. And guess who invented those tests! But many animals are much stronger and swifter. Birds do vastly better on spatial perception and the ability to remember distant destinations. Most animals have a keener sense of smell. Our hearing is very limited: some animals (e.g., dogs) hear higher frequencies than we can and many (elephants, whales) hear lower frequencies.[36] We sing opera, birds sing amazing birdsong, whales sing whale songs. Is one "better?" To a lover of music that's like asking whether we should prefer Mozart or Wagner: they are so different that it is a silly waste of time to compare them on a single scale.

As for life-sustaining abilities: rats are far more successful reproducers and survivors; numerous animals from tubeworms to bowhead whales have greater individual longevity. Shall we ask about moral abilities? Well, we pride ourselves there, but we humans engage in depths of deliberate cruelty and torture known to no other animal species, and no other species makes systematic war against its own kind. Do we think we are the most beautiful? Jonathan Swift was persuasive when he depicted Gulliver, after years with the lovely horselike Houyhnhnms, finding the human shape and smell disgusting.[37] No other animal has such arrogance about its beauty. At the same time, no other animal hates itself and flees from itself.

In short, if we line up the abilities fairly, not prejudging in favor of the things we happen to be good at, many other animals "win" many different ratings games. But by this time the whole idea of the ratings game is likely to seem a bit silly and artificial. What seems truly interesting is to study the sheer differentness and distinctiveness of each form of life. Anthropocentrism is a phony sort of arrogance. How great we are! If only all creatures were like us, well, some are, a little bit. Rather than unsettling our thinking in a way that might truly lead to a revolutionary

36. *See* HAL WHITEHEAD & LUKE RENDELL, THE CULTURAL LIVES OF WHALES AND DOLPHINS 120–21 (2016)

37. JONATHAN SWIFT, GULLIVER'S TRAVELS 135–84 (6th ed. 2005).

embrace of animal lives, Wise just keeps the old thinking and the old line in place, and simply shifts several species to the other side.

The scala naturae is not just intellectually lazy and complacent: it is also dangerous in other ways. It discourages useful self-criticism. It leads to ugly projects in which humans imagine transcending their merely animal bodies, by casting aspersions on the smells and fluids of the body.[38] These projects are so often accompanied by attempts to subordinate some other group of human beings, on the grounds that they are the true animals.[39] Bad smell, contaminating physicality, and hypersexuality are imputed to some relatively powerless subgroup, as an excuse for violent types of subordination. One may trace these ideas in U.S. racism, in the Indian caste hierarchy, in misogyny everywhere, in homophobia.[40] Wise's strategy does nothing to undermine these baneful human practices; indeed it reinforces them with its line-drawing. When what we need is a wholly new way of seeing our bodies, it gives us the same old way, with a few minor adjustments.

Wise's approach, furthermore, cuts most of the animal kingdom adrift with no help from his interventions. He clearly doesn't want this result, but it's hard to know what his theory yields for the terrible suffering of pigs and chickens, for the loss of habitat by polar bears and dozens of other wild species. Or rather, it is not hard to know what he offers, but all too easy: he offers nothing. A wholly new approach would need to be invented once we move outside the special sphere of the species who are so like us. He gives us no idea what that new approach would be. What is totally lacking is wonder at the diversity of nature, love of its many distinctive forms of life.

There is a further disturbing consequence of the "so like us" approach: it leads to a focus on artificial performances that are not really characteristic of the species as it lives its life in the wild. Thus "Unlocking the Cage" spends a good deal of time on sign language, and it is indeed true, and impressive, that chimpanzees, bonobos, and gorillas can learn sign language.[41] But they don't use it when they are not living among humans. Indeed, although dolphins occasionally carry human-

38. *See generally* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) (critiquing the role that shame and disgust play in human beings' individual and social lives and, in particular, the law).

39. *See generally id.*

40. *See id.*; *see generally* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010) (arguing that disgust has long been among the fundamental motivations of those who are fighting for legal discrimination against lesbian and gay citizens). On December 16-18, 2016, the University of Chicago Center in Delhi, India, held a large conference on Prejudice, Stigma, and Discrimination to investigate the relationships among these types of disgust-subordination and yet others. The papers are planned for a volume to be edited by Zoya Hasan, Aziz Huq, Martha C. Nussbaum, and Vidhu Verma. Of particular interest for readers of the present paper will be Dipesh Chakrabarty's paper on the caste hierarchy, in which he argues that we must totally reimagine our relationship to nature.

41. UNLOCKING THE CAGE, *supra* note 10.

learned behavior with them back into the wild and teach it to other dolphins,[42] I am not aware of any case in which apes have done the same thing. It just isn't useful to them. And although Wise might have demonstrated the empathy and emotion of apes and elephants in many ways, as Frans De Waal has done for decades,[43] he instead dwells, in the film, on an example of empathy that is conveyed through the use of sign language.[44] A gorilla watches a movie in which a child is saying goodbye to its family, and makes the signs for sad and so forth. Again, using sign language to indicate emotion is something apes do for and to humans, not something they do among themselves—although among themselves they have, as De Waal repeatedly shows, plenty of ways of communicating emotion.[45] Wise presumably likes the sign language-empathy example because it helps him establish likeness to us. But it is a pet trick. It becomes very hard, in fact, to understand the rationale by which Wise condemns some taught ape tricks, such as the ape doing karate kicks, and yet loves and foregrounds the language tricks. Both are similar, it seems to me (assuming the karate was taught through positive reinforcement and not cruelty): parlor tricks that show something about the animal, but not something that lies at the heart of its form of life. Whether it is ethical to teach such tricks can surely be debated, and I'm sure Wise would defend the language trick for what it teaches us. But that's just it: what it teaches *us*, not what it does for and in the animal life.

Wise argues that we need to begin by focusing on only a few rights for a few species, because people will be terrified if the door is open to all sorts of rights for all sorts of creatures. Will my dog be able to sue me? Will I have to give up eating meat? But that all depends on what is being asked. Sure, if someone said all animals should be given the right to vote, people would go crazy. But Wise's approach also has to exercise caution. If Wise were asking that all apes would immediately be allowed to roam with no guardianship or supervision, people would also go crazy, so he insists that this is not what he is asking — a concession that complicates his demand for habeas corpus. Any proposal, then, can prove unacceptably radical if its demands are extreme. But a proposal that asks for a species-specific level of ethical consideration for a wide range of creatures need not do that. And people appreciate consistency and theoretical integrity. Sooner or later, people will wake up to the fact that Wise is playing bait and switch: likeness to humans for some creatures, some other as yet unannounced rationale for other creatures.

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42. *See* WHITEHEAD & RENDELL, *supra* note 36, at 120–21 (2016) (describing the example of a dolphin standing vertically on its tail).

43. *See generally* FRANS DE WAAL, GOOD NATURED (1996) (demonstrating all kinds of animals respond to social rules, help each other, share food, resolve conflict to mutual satisfactions, and even develop a crude sense of justice and fairness).

44. UNLOCKING THE CAGE, *supra* note 10.

45. *See* WAAL, *supra* note 43.

THE LEAST COMMON DENOMINATOR APPROACH

It is then with a certain relief that we turn, or return, to the theoretical approach to animal entitlements that has led the way, in the Western tradition, since the end of the eighteenth century: the Utilitarian approach, pioneered by Utilitarianism's founder, Jeremy Bentham,[46] and best known from the important work of Peter Singer. I have discussed the contributions and shortcomings of the Utilitarian approach to animals in quite a few publications, so here I must be brief.[47]

Bentham famously held that the salient ethical facts, and indeed the only salient ethical facts, are pleasure and pain.[48] He strongly insisted that pleasures and pains do not vary along any qualitative dimension, but only along several dimensions of quantity (of which duration and intensity are the most important).[49] The goal of each individual sentient being is, and ought to be,[50] the maximization of net pleasure. The goal of a rational society ought to be the maximization of net pleasure for all of society's members.

It is at this point that Bentham points out that given the salience of pleasure and pain, there is no good reason to exclude animals from the Utilitarian calculus. "The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?"[51] Bentham was keenly aware of animal suffering, and developed strong arguments against hunting and fishing for sport, as well as other cruel practices.[52] Peter Singer follows Bentham's line.[53]

What is undoubtedly valuable about the Benthamite approach is its emphasis on the terrible cruelty of human behavior to animals and the suffering it inflicts. Pointing to the commonality between humans and animals in respect of suffering, moreover, is to point to something clearly

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46. *See generally* Jadran Lee, Bentham on the Moral and Legal Status of Animals (June 2002) (unpublished Ph.D. dissertation, University of Chicago) (on file with ProQuest Information and Learning Company, Ann Arbor, MI).

47. *See generally* Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001) (critiquing WISE, *supra* note 6); FRONTIERS OF JUSTICE, *supra* note 29, at 325–407; Martha C. Nussbaum, *The Capabilities Approach and Animal Entitlements*, *in* THE OXFORD HANDBOOK OF ANIMAL ETHICS 228 (Tom L. Beauchamp & R. G. Frey eds., 2011) (rejecting the classical utilitarian approach to the ethics of animal treatment and proposes a theoretical approach); Martha C. Nussbaum & Rachel Nussbaum Wichert, *The Legal Status of Whales and Dolphins* (forthcoming 2017).

48. *See generally* JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. H. Burns & H. L. A. Hart eds., Oxford Univ. Press 1996).

49. *See generally id.*

50. Bentham notoriously leaves the move from "is" to "ought" undefended.

51. BENTHAM, *supra* note 48 (emphasis in original).

52. *See generally* Lee, *supra* note 46. Much of Bentham's work remains unpublished in an archive at University College, London, and is gradually being published; Lee was able to study some of the unpublished and also all of the recently published material.

53. *See generally* PETER SINGER, ANIMAL LIBERATION (1975) (arguing the interest of animals should be considered because of their ability to experience suffering).

relevant to animals themselves, and a salient fact about their lives. Chimpanzees can learn language but do not care much about it. All animals flee pain and give evidence of strong aversion to it.

Moreover, now that more of Bentham's work is becoming available, we are able to see that Bentham was undertaking what Steve Wise definitely does not undertake, and what I suggested we must undertake: a radical assault on the human-animal divide in Christian ethics and its ranking of lives and abilities, its puritanism about bodily pleasure, its relative indifference to bodily pain. Especially in the radical work *Not Paul But Jesus*, published in full only in 2013,[54] Bentham's insistence that pleasures differ only in quantity can be seen clearly as a radical assault on Victorian ideas of "higher" and "lower" pleasures, aimed at establishing the value of nonmarital and unconventional sexual relations and at decriminalizing homosexual sex. So Bentham is not being obtuse when he says all pleasures are one, he is being radical, and his radicalism leads him to an embrace of the body that offers a good basis for a restored attitude toward animals.

Still, there remain very serious problems with the Benthamite approach. The first and most obvious is its account of the social goal: the maximization of net pleasure. Bentham tells us little about how we should aggregate pleasures across creatures, and little about how quantities would be assigned to pleasure and pain. But on any plausible reading the calculus produces an aggregate figure, whether a total or an average, and it has no account of the permissible floor. Bentham was averse to the idea of rights, and that means that he offers us no account of the bare minimum beneath which a creature should not be permitted to fall. Everything depends on uncertain empirical calculations. On the average conception, according to which we are supposed to maximize average utility understood as net pleasure, egregious harms to animals will still be allowed by the view, so long as we can show that these harms raise the average pleasure in the world, and no pleasures are disqualified—not, for example, by the fact that they are malicious or sadistic. It is far from clear that the calculus gives us reasons to stop humans from inflicting torment on animals, since humans greatly enjoy those bad practices. The argument that this torment is unjustified rests on a fragile and uncertain empirical calculation. On the total conception, according to which we are supposed to maximize total utility, things are even more problematic: for we can add to the world's total by deliberately bringing into the world creatures, of whatever species, whose lives are extremely miserable, just so long as the lives exhibit a slim net balance of pleasure over pain. Meat-eating practices do result in the deliberate creation of millions of

54. JEREMY BENTHAM, NOT PAUL, BUT JESUS (London 1823); *see also* Martha C. Nussbaum, *Love from the Point of View of the Universe: Walt Whitman and the Utilitarian Imagination*, *in* POWER, PROSE, AND PURSE (Alison LaCroix, Saul Levmore & Martha C. Nussbaum eds.) (forthcoming) (under review at Oxford Univ. Press).

animals who would never have existed otherwise, and this could end up looking like a good thing under Utilitarianism, depending on how we measure pleasures and pains in those lives. In general, Benthamism supplies no account of urgent entitlements grounded in justice, and we badly need such an account to make sense of the human-animal relationship.

A second problem lies in Bentham's insistence in reducing quality to quantity. We get a very narrow account of what is important in animal (including human animal) lives: just pleasure and the avoidance of pain, and recall that Bentham insists that all pleasure is qualitatively similar. Thus there is no room for the special value of free movement, of companionship and relationships with other members of one's kind, of sensory stimulation, of a pleasing and suitable habitat. In this failing Benthamism converges with Wise's approach: both refuse to consider fully, and positively value, the many complex forms of life that animals actually lead. Pleasure and pain simply are not the only relevant issues when evaluating an animal's chances to flourish.

This problem would be less grave if deprivation of some aspect of its natural form of life always produced a commensurate pain. Then Bentham might be able to get to the correct conclusion, albeit by a defective route. It has long been argued that this is not the case for human beings: the familiar economic concept of "adaptive preferences" refers to the fact that humans who are deprived in some area often tailor their preferences and satisfactions to the reduced way of life they have known,[55] probably in order to avoid pointless longing and striving. Thus women who are brought up thinking that a "good woman" does not get a university education or participate in politics will very likely not feel pain at her exclusion from these things.[56] It takes a consciousness raising movement to get her to see what she is missing and why it could be important for her.[57] Unfortunately the same is very likely true for many animals. An animal raised in captivity cannot form an imaginative conception of a wild habitat, and thus cannot yearn or long for it. Nor can an animal cut off from characteristic social interactions with other members of its kind imagine what those interactions are like, or grieve for their absence. Ironically, then, if humans do only a little depriving the animal may be able to feel pain about it, and that pain will register in the Utilitarian calculus; but if humans deprive the animal in deeper and more fundamental ways, they may not even get to the point of missing what they don't know, and that pain will not register in the Utilitarian calculus.

55. *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT ch. 2, *Passion* (2000).

56. *See generally* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000) (explaining the concept and applying it to the lives of women in developing countries).

57. *See id.*

Finally, Bentham seems to think of pleasure as a feeling.[58] That feeling is typically produced by an activity: the pleasure of eating is produced by eating, the pleasures of friendship by friendship. But of course it might be produced in some other way. Philosopher Robert Nozick imagines an "experience machine": hooked up to that machine you would have the impression that you were eating, talking to your friends, and so forth, and you would have the enjoyment related to those pursuits—but without doing anything at all.[59] Nozick bets that most people would reject the experience machine, since being the author of their own actions is important to them, not just the experiences they have.[60] Surely the same is true of animals, and Wise is correct to emphasize the importance of agency. He just defines it too narrowly: most animals like doing things; being the author of their actions matters to them. The Utilitarian approach has a hard time accounting for this.[61]

Utilitarianism, then, has great advantages but also great problems.

RESPECTING THE DIVERSITY OF ANIMAL LIVES

Both of the approaches I have considered have a common problem: they reduce the complexity of animal species into an unhelpful simplicity. Wise levels up: reason is the thing, and look how many creatures have it. Singer and the other Utilitarians level down: pain is the thing, and all creatures have it and have it alike. What we need is the complexity of reality: an approach that looks at the whole of animal nature without a single linear ranking, one that focuses on our evil doing when we cause pain, but also on the complicated capacities of animals for many types of fascinating activity, the need of all animals for full and flourishing lives.

The Capabilities Approach (hereafter CA) was developed initially with only the human case in mind.[62] But it was developed using materials drawn from Aristotle, who advocated that we seek what is shared among all animals and seek a "common explanation" for the self-maintaining and self-reproducing striving that characterizes all animal lives.[63] So it is not surprising that it proved easy to extend it to the lives of animals.[64] The CA argues that the right thing to focus on, when asking how well a group of humans (or a nation) is doing, is to look not at average utility, and not simply at opulence (GDP per capita), but, rather, at what people

58. Not all agree: the Western philosophical tradition includes thinkers who see pleasure as an activity (Epicurus, Aristotle), and others who think that pleasure is closely linked to activity, "supervening" on activity (Aristotle again, since Aristotle has two different views).

59. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–45 (1974).

60. *Id.*

61. Of course one might invent a special pleasure and call it the pleasure of agency, but unless this pleasure is understood to be qualitatively, not just quantitatively, different from other pleasures, it will be difficult to capture the intuition contained in the example.

62. *See* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–18 (2011) [hereinafter CREATING CAPABILITIES].

63. *See* MARTHA C. NUSSBAUM, ARISTOTLE'S *DE MOTU ANIMALIUM* (1978).

64. *See* CREATING CAPABILITIES, *supra* note 62, at 18.

are actually able to do and to be.[65] The best approach focuses on people's substantial freedoms to choose things that they value.[66] The right question to ask is, "What are you able to do and be, in areas of importance in your life," and the answer to that question is the account of that person's "capabilities."[67] I have distinguished three different types of capabilities. First, there are **basic capabilities**, the innate equipment that is the basis for further development.[68] Second are **internal capabilities**, abilities of a person developed through care and nurture. Developing internal capabilities already requires social resources.[69] But a person might have these inside, so to speak, and still not be fully capable of choice and action. Such a person might, for example, be capable of political speech but denied the chance to act politically. So, the really important type of capability for a decent society is what I call **combined capabilities**, internal capabilities plus external conditions that make choice available.[70]

Thus far, capabilities specify a space of comparison, and that is the main use of the approach in Amartya Sen's work, as in the Human Development Reports of the United Nations Development Programme of which he was a leading architect.[71] But in keeping with my interest in theories of justice and in constitution-making, I have gone further, using the idea of capabilities to describe a partial approach to basic justice.[72] For that purpose, of course, we must get definite about content—as users of the approach comparatively do already in their choice of examples. I have proposed a list of ten capabilities that must be secured up to a minimum threshold level, if a nation is to have any claim to justice:

The Central Human Capabilities

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

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65. *See id.* at 18–19.
66. *Id.* at 18.
67. *See id.* at 18, 20.
68. *Id.* at 23.
69. *Id.* at 21.
70. *Id.* (characterizing the combined capabilities approach briefly). The same list of Central Capabilities appears in all my publications dealing with the approach.
71. *See id.* at 17.
72. *See id.* at 19–20.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason -- and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation.

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control over one's Environment.

A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others;

> having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.[73]

This list, humble and revisable, is an abstract template that can be further specified in accordance with a particular nation's history and material circumstances.[74]

Now let us turn to animals. As you can see, number 8 on the list already includes relationships with other species and the world of nature as a central political good. But that is certainly not enough. I have also urged adopting a similar list of capabilities as ethical goals for all animals.[75] In the human case, I justify the list by arguing that these opportunities are inherent in the notion of a life worthy of human dignity.[76] I then argue that dignity belongs to other animals as well: all are worthy of lives commensurate with the many types of dignity inherent in their many forms of life.[77] All animals, in short, should have a shot at flourishing in their own way.

In some concrete ways the human list is a bad fit: freedom of the press and employment opportunities have a place in human lives that they do not have in other animal lives. But if we simply focus on the large general categories, the list seems to be a good guide, which can then be specified further for each animal after a study of its form of life. If the human list is a template for constitution-making, so too is the list for each animal species: a written basis for an unwritten constitution for that species. It tells us the right things to look for, the right questions to ask.

Very generally, all animals deserve ethical consideration, meaning ethically informed concern for the types of lives they are trying to lead. The list directs our attention to a host of pertinent factors. What life span is normal for that species in the wild? What is the physical condition of a healthy animal? What human acts invade or impair the bodily integrity of that sort of animal? What types of movement from place to place are normal and pleasurable for that sort of animal? What types of sensory and imaginative stimulation does this animal seek, and what is it to keep that animal in an unacceptably deficient sensory environment? What is it for that sort of animal to live in crippling and intolerable fear or depression, or with a lack of bonds of concern? What types of affiliations does this animal seek in the wild, what sorts of groups, both reproductive and

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73. *Id.* at 33–34.
74. *See id.* at 36.
75. *See id.* at 158.
76. *See id.* at 36.
77. *See id.* at 161.

social, does it form? What types of communication does the animal engage in, using what sensory modalities? What is it for the animal to be humiliated and not respected? What is it for this animal to play and enjoy itself? Does the animal have meaningful relationships with other species and the world of nature? What types of objects does this animal use and need to control if it is to live its life?

Capability number 6, practical reason, pertains more to some animals than to others, in that some engage in more complicated strategies and plans. Perhaps that is what Wise means by autonomy.[78] But all animals direct their own course by their own powers of thought, whatever those are. Again, political participation seems not pertinent to nonhuman animals, but of course it is pertinent for them, just as for us: it is through politics that the conditions of life are agreed to, and someone who has no political standing has no voice in choices that govern his or her life. So too for animals: if they have no legal standing and no legal status that guarantees ethical consideration, then they have no voice in what happens to them. As Wise notes, beings and groups that cannot literally speak have been granted legal standing: humans with profound cognitive disabilities, young children, and corporations.[79] So it is clear that political participation can pertain to a creature even when its exercise of that capability must take place through forms of advocacy or surrogacy.

Each creature, then, deserves ethical consideration for what it is, and a kind of constitution that specifies what harms it should not be permitted to suffer—not in terms of its likeness to humans or its possession of some least-common-denominator property, but in terms of what it is itself, the form of life it leads.

What does this mean for law? One example may help carry our discussion further. For there is a happy harbinger of what may be a new era in law, in the form of a remarkable 2016 opinion by the U. S. Court of Appeals for the Ninth Circuit Court of Appeals. In *Natural Resources Defense Council, Inc. v. Pritzker*,[80] Ninth Circuit ruled that the U. S. Navy violated the law in seeking to continue a sonar program that impacted the behavior of whales.[81] To some extent the opinion is a technical exercise in statutory interpretation of the Marine Mammals Protection Act: the court says that the fact that a program has "negligible impact" on Marine Mammals does not exempt it from a separate statutory requirement, namely that it establish means of "effecting the least practicable adverse impact on" marine mammal species.[82] What is significant, and

78. UNLOCKING THE CAGE, *supra* note 10.
79. *Id.*
80. 828 F.3d 1125 (9th Cir. 2016).
81. *See id.* at 1142; *see generally* JOSHUA HORWITZ, WAR OF THE WHALES: A TRUE STORY (2015) (describing the sonar program in detail).
82. *Pritzker*, 828 F.3d at 1142.

fascinating, is that the argument relies heavily on a consideration of whale capabilities that the program disrupts:

> Effects from exposures below 180 dB can cause short-term disruption of abandonment of natural behavior patterns. These behavioral disruptions can cause affected marine mammals to stop communicating with each other, to flee or avoid an ensonified area, to cease foraging for food, to separate from their calves, and to interrupt mating. LFA sonar can also cause heightened stress responses from marine mammals, Such behavioral disruptions can force marine mammals to make trade-offs like delaying migration, delaying reproduction, reducing growth, or migrating with reduced energy reserves.[83]

The opinion does not give whales standing; no such radical move is necessary to reach the clear result that the program is unacceptable. But it does recognize whales as beings with a complex and active form of life that includes emotional well-being, affiliation, and free movement: in short, a variety of species-specific forms of agency.[84] The opinion goes well beyond Bentham, and it also eschews the anthropocentric approach. It is a harbinger, it is to be hoped, of a new era in the law of animal welfare.

83. *Id.* at 1130–31.
84. *See id.*

DIRECT MARKETING ASSOCIATION V. BROHL: STRANDED ON A PRECEDENTIAL ISLAND

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INTRODUCTION

Precedence is the guiding principle of American jurisprudence.[1] It is the foundational element of common law.[2] This adherence to past decisions, eloquently titled stare decisis, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on

1. *See, e.g.*, Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987) ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.") (italics in original).

2. *See, e.g.*, Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) ("[R]eliance on precedent is one of the distinctive features of the American judicial system.").

judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[3] However, stare decisis is not without its downfalls, particularly its inherent inflexibility. Inflexible adherence to outdated precedent can cause unjust outcomes, and there are limited ways to remove a precedent once it is in place—either the Supreme Court can overrule itself;[4] the legislature can write legislation nullifying the precedent;[5] or, in constitutional cases, the Constitution can be amended.[6]

Direct Marketing Association v. Brohl[7] involves the application of the dormant Commerce Clause doctrine to Colorado's efforts to improve use tax collection on sales by out-of-state retailers.[8] While taxation under the dormant Commerce Clause doctrine is a unique issue, this case reveals a more systemic issue. Using the Tenth Circuit's opinion in *Direct Marketing Association*, this Case Comment will argue that increasingly rapid change and a failure of the legislative check may begin to hinder the effectiveness of stare decisis. By chipping away at precedent that it cannot overturn, courts create a sea of "precedential islands," [9] or cases that are binding only on their exact factual scenarios. If more and more precedential islands arise, judicial decisions may become less predictable and consistent, thus decreasing judicial efficiency and increasing the number of possible traps for future courts and legal professionals to fall into.

Part I of this Comment gives a brief background of the underlying legal issue in this case—the dormant Commerce Clause doctrine and its applicability to taxation—as well as an overview of how precedent is removed in our system of government. Next, Part II summarizes the Tenth Circuit's decision in *Direct Marketing Association*. Finally, Part III utilizes the Tenth Circuit's distinction between *Quill Corp. v. North Dakota*[10] and *Direct Marketing Association* as an example of how a precedential island forms and discusses why these islands may increase in number and the possible implications of their proliferation: namely, the weakening of stare decisis.

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3. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

4. *See, e.g.*, Minturn v. Maynard, 58 U.S. 477 (1854), *overruled by* Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, (1991).

5. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

6. *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

7. Direct Mktg. Ass'n v. Brohl (*Direct Mktg. Ass'n IV*), 814 F.3d 1129 (10th Cir. 2016).

8. *Id.* at 1132.

9. *Id.* at 1151 (Gorsuch, J., concurring).

10. 504 U.S. 298 (1992).

I. BACKGROUND

A. Dormant Commerce Clause Jurisprudence

Direct Marketing Association's (DMA) claim before the Tenth Circuit is rooted in the dormant Commerce Clause, specifically in its applicability to state taxation.[11] The dormant Commerce Clause is not written into the Constitution, but derives from the Commerce Clause itself.[12] The Commerce Clause gives Congress the ultimate power to regulate interstate commerce; even though state and local governments can pass legislation regulating commerce, those governments can do nothing to stop Congress from preempting that legislation if it so chooses.[13] The notion of commerce, as well as commerce itself, has grown dramatically since the Constitution's drafting, prompting the judicial creation of the dormant (or negative) Commerce Clause doctrine in the early 1800s.[14] The doctrine arises from the idea that a grant of interstate commerce power to Congress implies a restriction of interstate commerce power on the states.[15] Therefore, if a state enacts a law or regulation that discriminates against or unduly burdens interstate commerce, the judiciary will use the dormant Commerce Clause doctrine to invalidate the action.[16] "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[17]

When applying a dormant Commerce Clause analysis, the focus is on "whether a state law improperly interferes with interstate commerce."[18] There are two ways a state law can interfere with interstate commerce: (1) by discriminating against interstate commerce or (2) by unduly burdening interstate commerce.[19] A state law that discriminates must pass the strictest scrutiny, only surviving if the state can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[20] A state law that burdens interstate commerce will only be invalidated if the burden imposed on interstate commerce clearly outweighs the local benefits of the law.[21]

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11. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132.
12. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 455–56 (4th ed. 2013).
13. *See* U.S. CONST. art. I, § 8, cl. 3.
14. *See Direct Mktg. Ass'n IV*, 814 F.3d at 1135.
15. *Id.*
16. *Id.* at 1136.
17. C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).
18. *Direct Mktg. Ass'n IV*, 814 F.3d at 1135.
19. *Id.* at 1136.
20. *Id.* (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)).
21. *See id.*

B. Colorado Sales and Use Taxes

Colorado has utilized sales and use taxes as a means of generating revenue since the mid-1930s.[22] Colorado residents are required to pay either sales tax or use tax on their purchases, but not both.[23] "A sales tax is imposed on retail transactions or purchases that occur within [Colorado]."[24] The Colorado Department of Revenue requires in-state retailers to calculate, collect, and remit sales tax.[25] Consequently, Coloradans are accustomed to paying sales tax—the state has a 98.3% sales tax compliance rate.[26]

Use tax, however, is slightly different. "A 'use' tax, sometimes referred to as a 'compensating' tax, taxes the privilege of using, storing, or otherwise consuming tangible personal property or services, usually at a rate equivalent to the sales tax."[27] "A use tax is designed to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices."[28] For example, a Colorado resident purchasing a $2,000 computer in Delaware, which has no sales tax, would save himself approximately $175 in sales tax. However, the way the tax system is set up, he would owe an equivalent use tax to the Colorado Department of Revenue. Generally, the requirement of calculating and remitting these use taxes falls to the purchaser.[29] The combination of these two taxes is meant to create a steady stream of revenue from all purchases made by Colorado residents, regardless of where the purchase occurred.[30] Nevertheless, even though they are legally required to do so, most Coloradans do not pay their use taxes[31]—the state has a 4% use tax compliance rate.[32]

C. The Dormant Commerce Clause Doctrine and Taxation

Over the past fifty years, jurisprudence specific to taxation under the dormant Commerce Clause doctrine has developed.[33] The Court ar-

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22. *Id.* at 1132.
23. *Id.*
24. 67B AM. JUR. 2D *Sales and Use Taxes* § 1 (2017).
25. *See* COLO. REV. STAT. §§ 39-26-101 to -129 (2016) (codification of Colorado's sales tax collection and remittance scheme).
26. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132 n.1.
27. *Sales and Use Taxes*, *supra* note 24, § 134.
28. *Id.*
29. COLO. REV. STAT. § 39-26-204(1)(a). There are a few instances when the collection of use tax falls to the retailer, but they are the exception. *Id.* § 39-26-204(2). Additionally, the use tax on items that the state requires to be registered, such as cars, is usually paid at the time of registration. *See id.* § 39-26-113.
30. *See Sales and Use Taxes*, *supra* note 24, § 134.
31. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132.
32. *Id.* at 1132 n.1.
33. *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756–57 (1967); *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 274 (1977).

ticulated a framework in 1977,[34] holding that a tax on an out-of-state entity will be upheld if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State."[35] The "substantial nexus" requirement is minimal "and is established if the taxed entity 'avails itself of the substantial privilege of carrying on business within the State,' but the Court has held that an entity lacking a physical presence within a state but mailing goods into it from outside is *not* connected to the state by such a nexus."[36]

The "physical presence" requirement was expressed in 1967, prior to the establishment of the modern framework. The Supreme Court, in *National Bellas Hess, Inc. v. Department of Revenue*,[37] addressed whether Illinois could require a Delaware-based mail-order business with no physical presence in Illinois to collect and remit use taxes on sales to Illinois customers.[38] The Court held that Illinois could not require Bellas Hess to collect use tax, stating that Illinois may not "impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."[39]

Although the Court did not reference *Bellas Hess* when first announcing the taxation framework in 1977,[40] the Court has since specifically noted that it did not overrule its holding.[41] Rather, "*Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."[42] *Bellas Hess*'s holding was integrated into the taxation framework as applied in *Quill Corp. v. North Dakota*.[43]

D. Quill Corp. v. North Dakota

Twenty-five years after *Bellas Hess*, the *Quill* Court used the proposition it established to create a bright-line rule.[44] The facts of *Quill* are the same as *Bellas Hess*: they "involv[ed] a State's attempt to require an out-of-state mail-order house that has neither outlets nor sales representa-

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34. *See* Complete Auto Transit, Inc., 430 U.S. at 279.
35. *Id.*
36. Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 268–69 (2017) (emphasis in original) (quoting Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207, 220 (1980) (internal quotations omitted))).
37. 386 U.S. 753 (1967).
38. *Id.* at 754–56.
39. *Id.* at 758.
40. *Complete Auto Transit, Inc.*, 430 U.S. at 274, 279.
41. Quill Corp. v. North Dakota, 504 U.S. 298, 311–12 (1992).
42. *Id.* at 311.
43. *Id.*
44. *Id.* at 317–18.

tives in the State to collect and pay use tax on goods purchased for use within the State."[45]

The Supreme Court of North Dakota "declined to follow *Bellas Hess* because 'the tremendous social, economic, commercial, and legal innovations' of the past quarter-century have rendered its holding 'obsolete.'"[46] While the Supreme Court "agree[d] with much of the state court's reasoning," it declined to come to the same conclusion.[47]

The Court determined that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate[d] that the *Bellas Hess* rule remain[ed] good law" and declined to overturn *Bellas Hess*.[48] The conviction in the Court's holding is belied by the opinion's conclusion, in which the Court stated: "[O]ur decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."[49]

Quill was decided in 1992, the same year AOL was released for Windows.[50] At that time, *Quill* protected the relatively small mail-order industry, which totaled only $180 billion. Throughout the next the twenty-five years the Internet grew exponentially, and *Quill*'s bright-line rule now protects a $3.16 trillion industry and is causing "a serious, continuing injustice" to the states.[51]

E. Removing Precedent

When courts want to remove precedent, they have traditionally had two options. Courts can either overrule their previous precedent or they can call, implicitly or explicitly, for legislative intervention.[52] Courts are hesitant to overrule themselves; a high threshold must be passed in order

45. *Id.* at 301.

46. *Id.* (quoting Quill Corp. v. North Dakota, 470 N.W.2d 203, 208 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992)).

47. *Id.* at 302.

48. *Id.* at 317 (italics in original).

49. *Id.* at 318.

50. David Lumb, *A Brief History of AOL*, FAST COMPANY (May 12, 2015, 1:15 PM), https://www.fastcompany.com/3046194/fast-feed/a-brief-history-of-aol.

51. Direct Mktg. Ass'n v. Brohl (*Direct Mktg. Ass'n III*), 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring).

52. *See, e.g.*, Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST (May 20, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html; *see also* Richard L. Hansen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. Cal. L. Rev. 205, 208 (2012); James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1092 (2001).

for this to happen.[53] In order for legislative intervention to be effective, the country must have a functioning legislature.

1. Judicial Overruling

It is not easy to overrule past precedent. "The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'"[54] "[S]*tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'"[55] It "ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[56] Stare decisis promotes "clarity, stability, and predictability in the law, efficiency, legitimacy, and fairness and impartiality."[57] Courts have overruled prior decisions only "where the necessity and propriety of doing so has been established."[58] This practice is rare, however, as "any departure from the doctrine of stare decisis demands special justification."[59] Since its inception in 1789 until 2010, the Supreme Court has explicitly overruled prior decisions 236 times, or approximately one per year.[60]

"The overruling of a precedent, despite its infrequency . . . represents a dramatic form of legal change."[61] The Court, therefore, addresses myriad informal factors when determining if a precedent should be overruled.[62] One factor that weighs heavily is the type of interpretation at play: constitutional or statutory.[63] As Justice Scalia stated, "[the Court has] long recognized that the doctrine of stare decisis has special force where Congress remains free to alter what we have done."[64] "Th[is] idea has long been advanced . . . because Congress has the power to pass new legislation correcting any statutory decision by the Court that Congress deems erroneous."[65] "The traditional justification for this informal rule is that Congress can alter an incorrectly interpreted statute by amending it. Revisions of a constitutional decision, however, generally

53. *See generally* Spriggs & Hansford, *supra* note 52; *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("We have held that any departure from the doctrine of stare decisis demands special justification.").

54. *Patterson*, 491 U.S. 164, 172 (1989) (quoting Welch v. Tex. Dep't of Highways and Pub. Transp., 438 U.S. 468, 494 (1978)).

55. *Id.* (quoting THE FEDERALIST, NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed. 1888)).

56. *Id.* (internal quotations omitted).

57. Spriggs & Hansford, *supra* note 52, at 1092 (internal citations omitted).

58. *Patterson*, 491 U.S. at 172.

59. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

60. S. DOC. NO. 112-9, at 2601–15 (2016).

61. Spriggs & Hansford, *supra* note 52, at 1092.

62. *See generally id.*

63. *See id.* at 1103.

64. Quill Corp. v. North Dakota, 504 U.S. 298, 319 (1992) (Scalia, J., concurring).

65. Spriggs & Hansford, *supra* note 52, at 1094.

require a constitutional amendment, and thus for most practical purposes only the Court can change a piece of constitutional doctrine."[66] Therefore, the Court has been more reluctant to overturn statutory precedent, assuming instead that "if the legislature does not alter the Court's interpretation of a statute, and thus silently acquiesces to it, this informal norm asserts the precedent should not be overruled."[67]

Not only must a precedent meet the Court's discerning eye, it must position itself before the Court to begin with. The only court that may overrule Supreme Court precedent is the Supreme Court itself. Therefore, in order to reevaluate a prior precedent, the Court must grant a petition for certiorari to a suitable case. Over the past thirty-five years, the Court's docket has dropped by 56%, from a high of 167 opinions in 1981 to 74 opinions in 2015.[68] While a small docket helps create some stability in law, the sharp decline in the Court's docket increases the burden for being heard.

2. Legislative Overruling

When the particularities of a case do not lend themselves to overruling past precedent, the Court has historically turned to the legislature to intervene.[69] Legislative intervention is one aspect of the separation of powers doctrine, creating a legislative check on the judicial system.[70] While Congress may not explicitly overturn Supreme Court opinions, it can create legislation that effectively nullifies Supreme Court precedent.[71] "The governing model of congressional-Supreme Court relations is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court's interpretations."[72]

However, the number of laws enacted by Congress has seen a significant downward trend since the early 1970s, falling from 772 in the 93rd Congress to 296 in the 113th Congress.[73] In particular, the number of overrides has fallen dramatically. Overrides have fallen "from an average of twelve overrides of Supreme Court cases in each two-year congressional term during the 1975-1990 period, to an average of 5.8 over-

66. *Id.*

67. *Id.* at 1094–95.

68. David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 151-53 (2010).

69. *See, e.g.*, Vance v. Ball State Univ., 133 S. Ct. 2434, 2466 (2013) (Ginsburg, J., dissenting) ("The ball is once again in Congress' court to correct the error into which this Court has fallen.").

70. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 518–21 (2009).

71. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (effectively nullifying the Court's opinion in *Ledbetter*).

72. Hansen, *supra* note 52, at 208; *see infra* note 79 and accompanying text.

73. *Statistics and Historical Comparison*, GOVTRACK (Oct. 30, 2016), https://www.govtrack.us/congress/bills/statistics.

rides for each term from 1991-2000, and to a mere 2.8 average number of overrides for each term from 2001-2012."[74]

Legislative override is an important tool in our system of government. For example, in 2007, the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co.*,[75] a gender pay discrimination case. The Court held that, while Ms. Ledbetter had "demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular," her claim was time-barred.[76] Justice Ginsburg's dissent, read from the bench,[77] attacked the majority for their "cramped interpretation of Title VII" and called for legislative intervention, stating, "[o]nce again, the ball is in Congress' court."[78]

Two years later, Congress passed the Lilly Ledbetter Fair Pay Act, clarifying the statute of limitations on gender pay discrimination claims and making it easier for such claims to be brought.[79] Through Congress, the people spoke up and corrected the injustice they saw. This is exactly how legislative overrides should work. As the rates of legislative overrides fall, "Supreme Court interpretations of federal statutes are now very likely to be final," and the people's voice within the government is likely to become quieter.[80]

F. Narrowing Precedent

The Court's high threshold for both accepting a petition for certiorari and overruling prior holdings, combined with a fast-paced world and an increasingly divided Congress, has severely limited the judicial system's ability to overturn precedent.[81] When faced with precedent that does not quite reach the exacting threshold required for overruling and a Congress that is divided and deadlocked, courts lean toward a third option: distinguishing, rather than overruling, prior precedent.[82] Distinguishing prior decisions narrows the impact of the prior precedent. As cases become narrower and narrower, without any hope for congressional intervention, we may begin to see an increase in "precedential is-

74. Hansen, *supra* note 52, at 209. The rate of overrides likely fell even more dramatically than the numbers indicate, as the 1991 term included the Civil Rights Act of 1991, a single law which nullified ten Supreme Court cases.

75. 550 U.S. 618 (2007).

76. *Ledbetter*, 550 U.S. at 659–60 (Ginsburg, J., dissenting).

77. Barnes, *supra* note 52, at 1 ("The decision moved Justice Ruth Bader Ginsburg to read a dissent from the bench, a usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women's rights.").

78. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

79. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

80. Hansen, *supra* note 52, at 224.

81. *See* discussion *infra* Section IV.

82. *See generally* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–67 (2014).

lands," or cases that are binding only on their exact factual scenario.[83] When courts are faced with precedent they cannot overrule and do not want to apply, they narrow the past precedent, chipping away at the coverage of the precedent.[84] As more and more courts chip away at the edges of a precedent, it becomes less and less applicable to cases at bar.[85] Eventually, the judicial system creates a precedential island: a precedent so narrow that it covers only its specific factual scenario. In creating these islands, it becomes more and more difficult to find a suitable case in which the Supreme Court can reexamine the necessity and propriety of keeping this precedential island on the books.[86]

II. *DIRECT MARKETING ASSOCIATION V. BROHL*

A. Facts and Procedural History

In an effort to address the low rate of use tax compliance,[87] the Colorado legislature passed a law (the Colorado Law) imposing a notice requirement on retailers that do not collect sales or use tax when selling to Colorado purchasers.[88] The Colorado Law went into effect on February 24, 2010.[89]

The Colorado Law imposes three obligations on non-collecting retailers.[90] The Colorado Law imposes three obligations on non-collecting retailers, including providing notice informing customers of their use tax obligations.[91] Failure to provide notices as required by the Colorado Law results in fines of five to ten dollars for each failure.[92]

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83. *Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); *see* Re, *supra* note 82, at 1867.

84. *See* Re, *supra* note 82, at 1863.

85. For example, the Court's 1944 decision in Korematsu v. United States, 323 U.S. 214, upheld the executive order creating Japanese internment camps; however, as this factual scenario has yet to arise again, this precedent is still on the books as good law. *See* Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. TIMES (Jan. 27, 2014), https://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html.

86. *Id.*

87. *Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1132 n.1 (10th Cir. 2016) (noting that the Colorado Department of Revenue estimates "the compliance rate of remote retail sales" from retailers not required to collect taxes at 4%. In contrast, the sales tax compliance rate is 98.3%).

88. COLO. REV. STAT. § 39-21-112(3.5)(c)(II) (2017); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5 (2017).

89. COLO. REV. STAT. § 39-21-112(3.5).

90. 1 CCR § 201-1:39-21-112.3.5 (explaining that a non-collecting retailer is defined as a "retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax").

91. Non-collecting retailers must: (1) "send a transactional notice to purchasers informing them that they may be subject to Colorado's use tax"; (2) "send Colorado purchasers who buy goods from the retailer totaling more than $500 an annual purchase summary with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes on those purchases"; and (3) "send the Department [of Revenue] an annual customer information report listing their customers' names, addresses, and total amounts spent." *Direct Mktg. Ass'n IV*, 814 F.3d at 1133 (citing COLO. REV. STAT. § 39-21-112(3.5)).

92. COLO. REV. STAT. § 39-21-112(3.5).

DMA is "a group of businesses and organizations that market products via catalogs, advertisements, broadcast media, and the Internet."[93] The members of DMA are non-collecting retailers and thus subject to the Colorado Law.[94] In 2010, DMA filed a suit against the Colorado Department of Revenue (the Department) in federal district court, claiming the Colorado Law discriminates against and unduly burdens interstate commerce, thus violating the dormant Commerce Clause doctrine.[95] The federal district court granted DMA's motion for summary judgment and enjoined the Department's enforcement of the Colorado Law.[96] The Department appealed to the Tenth Circuit.[97]

The Tenth Circuit held that the federal district court lacked jurisdiction to hear the case, per the Tax Injunction Act[98] (TIA).[99] The TIA removes the federal courts' jurisdiction in cases that would "enjoin, suspend or restrain the assessment, levy or collection" of state taxes.[100] The Tenth Circuit remanded the case with orders to dismiss the claims and dissolve the injunction.[101] After the Tenth Circuit denied a request for en banc review,[102] the federal district court dismissed the claims without prejudice and dissolved the injunction.[103] DMA brought two subsequent actions—a new suit against the Department in state district court and a petition for certiorari of the Tenth Circuit's decision.[104]

While the state district court rejected DMA's claim that the Colorado Law unduly burdened interstate commerce, it issued a preliminary injunction based on DMA's facial discrimination argument.[105] Four and a half months later, the U.S. Supreme Court granted certiorari review of the Tenth Circuit's decision.[106] The state district court subsequently stayed its proceedings, pending a ruling by the Supreme Court.[107]

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93. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132.

94. *Id.*

95. *Id.* at 1133–34.

96. *Id.* at 1134 (citing Direct Mktg. Ass'n v. Huber (*Direct Mktg. Ass'n I*), No. 10-cv-01546-REB-CBS, 2012 WL 1079175, at *10–11 (D. Colo. Mar. 30, 2012), *rev'd sub nom.* Direct Mktg. Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013), *rev'd*, 135 S. Ct. 1124 (2015)).

97. Direct Mktg. Ass'n v. Brohl (*Direct Mktg. Ass'n II*), 735 F.3d at 904, *rev'd*, 135 S. Ct. 1124 (2015).

98. Tax Injunction Act, 28 U.S.C. § 1341 (2012) ("[D]istrict courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

99. *Direct Mktg. Ass'n IV*, 814 F.3d at 1134.

100. 28 U.S.C. § 1341.

101. *Direct Mktg. Ass'n IV*, 814 F.3d at 1134.

102. *Id.* (citing Direct Mktg. Ass'n v. Brohl , No. 12-1175 (10th Cir. Oct. 1, 2013)).

103. *Id.*

104. *Id.*

105. *Id.* (citing Direct Mktg. Ass'n v. Colo. Dep't of Revenue, No. 13CV34855, at 1, 22–23 (Dist. Ct. Colo. Feb. 18, 2014)).

106. *Direct Mktg. Ass'n II*, 735 F.3d 904 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (2014).

107. *Direct Mktg. Ass'n IV*, 814 F.3d at 1134.

Approximately eight months later, the Supreme Court held that the Colorado Law addressed reporting requirements not taxation and therefore did not fall within the TIA's definition of "assessment, levy, or collection of any tax."[108] Thus, the suit was not barred from federal court by the TIA.[109] The case was reversed and remanded to the Tenth Circuit for further proceedings on the merits of DMA's dormant Commerce Clause claims.[110]

B. Opinion of the Court

Judge Scott Matheson authored the opinion of the court.[111] Judge Neil Gorsuch filed a separate concurring opinion.[112] The Tenth Circuit held that the Colorado Law neither discriminates against nor unduly burdens interstate commerce.[113] The court began by providing an overview of the dormant Commerce Clause doctrine.[114] It then distinguished *Quill Corp. v. North Dakota*, determining that the bright-line rule *Quill* recognized is limited to tax collection.[115] Finally, the court analyzed DMA's claims under the dormant Commerce Clause, finding neither undue burden nor discrimination.[116]

After briefly reviewing the history of the dormant Commerce Clause and its proper application, Judge Matheson expressly pointed out that the decision reached in this case "need not be final."[117] Judge Matheson explained that if the Colorado Law is upheld, Congress may preempt it with its own law; however, if the Colorado Law is struck down, Congress may expressly authorize it with its own law.[118] "In that sense, the judicial decision determines which party would need to go to Congress to seek a different result."[119]

1. Distinguishing *Quill*

As Judge Matheson succinctly stated, "The outcome of this case turns largely on the scope of *Quill*."[120] Judge Matheson referenced the numerous criticisms of *Quill*'s bright-line "physical presence" rule, including Justice Kennedy's concurrence in the opinion that remanded this case.[121] Justice Kennedy called *Quill* "a holding now inflicting extreme

108. 28 U.S.C. § 1341 (2012); *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1131 (2015).
109. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1132, 33.
110. *Id.* at 1134.
111. *Direct Mktg. Ass'n IV*, 814 F.3d at 1129.
112. *Id.* at 1147.
113. *Id.* at 1134.
114. *Id.*
115. *Id.*
116. *Id.* at 1147.
117. *Id.* at 1136.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 1137.

harm and unfairness on the States."[122] Judge Matheson expressly pointed out that, while never overruled, *Quill* has never been extended "beyond the realm of sales and use tax," and declined to do so in this case.[123]

DMA argued that *Quill* has been cited outside the context of sales and use tax in three separate Supreme Court opinions.[124] However, Judge Matheson quickly rejected this argument, as "these opinions merely describe points of law in *Quill* and do not actually extend its holding to other contexts."[125] He additionally cited to a Tenth Circuit case in which the court declined to apply the *Quill* rule to licensing and registration requirements imposed on out-of-state entities.[126] Judge Matheson concluded that *Quill*'s bright-line rule "applies narrowly to and has not been extended beyond tax collection" and therefore was inapposite in this case.[127]

2. DMA's Claims

The lower court's opinion granted summary judgment to DMA on their argument that the Colorado Law impermissibly discriminates against interstate commerce and their argument that the Colorado Law unduly burdens interstate commerce.[128] Judge Matheson addressed each in turn.

a. Impermissible Discrimination

The district court determined that the Colorado Law was discriminatory because "the combination of state law[129] and *Quill* guarantees that [the Colorado Law] applies only to out-of-state retailers."[130] After finding discrimination, the district court "subjected the law to strict scrutiny."[131] "The court concluded the Department failed to carry its burden on the discrimination analysis and granted summary judgment to DMA" based on that conclusion.[132]

Judge Matheson reviewed the district court's opinion *de novo*. First, Judge Matheson determined that the Colorado Law does not facially discriminate because the law's differential treatment is based on whether a retailer collects sales or use tax, not whether the retailer is out-of-state.[133] Because facial discrimination is not the only manner in which a law can

122. *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).
123. *Direct Mktg. Ass'n IV*, 814 F.3d at 1137.
124. *Id.* at 1138.
125. *Id.*
126. *Id.* (citing American Target Advert., Inc. v. Giani, 199 F.3d 1241, 1255 (10th Cir. 2000)).
127. *Id.* at 1139.
128. *Id.*
129. Colorado law requires that all retailers doing business in Colorado and selling to Colorado purchasers collect and remit sales tax. *See* COLO. REV. STAT. §§ 39-26-101 to -129 (2016).
130. *Direct Mktg. Ass'n IV*, 814 F.3d at 1140.
131. *Id.*
132. *Id.*
133. *Id.* at 1141–42.

discriminate against interstate commerce, Judge Matheson went on to address "the direct effect of the Colorado Law."[134]

Turning to the direct effect of the law, Judge Matheson rejected DMA's argument of discriminatory treatment.[135] He first rejected DMA's argument that *Quill* applies, as "*Quill* applies only to the collection of sales and use taxes, and the Colorado Law does not require the collection or remittances of sales and use taxes."[136] Then he rejected DMA's claim outright, reiterating that the Colorado Law is only discriminatory if it constitutes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter and thereby alters the competitive balance between in-state and out-of-state" businesses.[137] The tax collection requirement on in-state retailers creates a hefty burden.[138] DMA did not establish that this burden was outweighed by the reporting requirement of the Colorado Law and, thus, the Colorado Law has no discriminatory effect.[139]

b. Undue Burden

Even nondiscriminatory laws must not unduly burden interstate commerce.[140] When turning to the undue burden analysis, Judge Matheson noted that the district court decided the issue of undue burden under *Quill*'s "physical presence" rule, and DMA limited its argument similarly.[141] The district court found an undue burden, "concluding that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*."[142]

However, as Judge Matheson once again pointed out, "*Quill* is not binding in light of the Supreme Court and Tenth Circuit decisions construing it narrowly to apply only to the duty to collect and remit taxes."[143] After pointing out that *Quill* is not controlling five more times, Judge Matheson stated that "[b]ecause the Colorado Law's notice and reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*, this ends the undue burden inquiry."[144]

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134. *Id.* at 1142.
135. Before analyzing the direct effect, Judge Matheson rejects DMA's argument that nonadverse differential treatment between in-state and out-of-state entities violates the dormant Commerce Clause and its argument that the Colorado Law should be viewed in isolation. *Id.* at 1142–44.
136. *Id.* at 1144.
137. *Id.*
138. *Id.* at 1145.
139. *Id.*
140. *Id.*
141. *Id.* at 1146.
142. *Id.*
143. *Id.* at 1146–47.
144. *Id.* at 1147.

3. Conclusion

The majority found no dormant Commerce Clause violation and reversed the district court's grant of summary judgment, remanding for further proceedings consistent with its decision.[145] The Tenth Circuit concluded "by noting the Supreme Court's observation in *Quill* that Congress holds the 'ultimate power' and is 'better qualified to resolve' the issue of 'whether, when, and to what extent the States may burden interstate retailers with a duty to collect sales and use tax[].'"[146]

C. Concurring Opinion

Judge Gorsuch wrote a separate concurring opinion "only to acknowledge a few additional points that ha[d] influenced [his] thinking in this case."[147] He acknowledged that which has thus far only been hinted at: "At the center of this appeal is a claim about the power of precedent."[148]

The dormant Commerce Clause doctrine "might be said to be an artifact of judicial precedent," and it is on the precedential power one of "the most contentious of all dormant [C]ommerce [C]lause cases" that the instant case rests. [149] *Quill* has been criticized for many years, by scholars as well as Supreme Court justices.[150] However, as Judge Gorsuch reminded, "*Quill* remains on the books and [the court] is duty-bound to follow it."[151] Regardless of the Court's confidence (or lack thereof) in the decision itself, it is a Supreme Court decision that the Court may never overrule.[152]

After determining that *Quill* must be followed, Judge Gorsuch pondered "what exactly *Quill* requires of us."[153] There have been numerous interpretations of *Quill*, but "[m]ost narrowly, everyone agrees that *Quill*'s holding forbids states from imposing sales and use tax collection duties on firms that lack a physical presence in-state."[154] The reporting requirement imposed by the Colorado Law "doesn't go quite that far."[155] Colorado even "suggests that its statutory scheme carefully and consciously stops (just) short of what *Quill*'s holding forbids."[156]

Judge Gorsuch went one step further and stated that the court's "obligation to precedent obliges [it] to abide not only a prior case's holding,

145. *Id.*
146. *Id.*
147. *Id.* (Gorsuch, J., concurring).
148. *Id.* at 1148.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

but also to afford careful consideration to the reasoning (the 'ratio decidendi') on which it rests."[157] Judge Gorsuch emphasized that this consideration is particularly important when the prior decision "emanates from the Supreme Court."[158] It is the consideration of the court's *reasoning*, Judge Gorsuch explained, on which DMA's argument rests.[159] Judge Gorsuch summarized DMA's argument: the burdens imposed by the Colorado Law are "burdens comparable in their severity to those associated with collecting the underlying taxes themselves."[160] Judge Gorsuch disagreed with this analysis.[161]

When looking at the reasoning on which *Quill* rests, Judge Gorsuch clarified, it has very little to do with the burden of "laws commanding out-of-state firms to collect sales and use taxes."[162] Judge Gorsuch declared that "[I]t is instead and itself all about the respect due precedent, about the doctrine of stare decisis and the respect due a still earlier decision."[163] He concluded that it is "this distinction [that] proves decisive" in this case.[164]

In *Quill*, the Court decided to retain the physical presence rule established in *Bellas Hess*, "but did so only to protect the reliance interests that had grown up around it."[165] Judge Gorsuch stated that the *Quill* court went so far as the "expressly acknowledge[] that *Bellas Hess* very well might have been decided differently under contemporary Commerce Clause jurisprudence . . . ."[166] He pointed out that "The Court also expressly acknowledged that states can constitutionally impose tax and regulatory burdens on out-of-state firms that are more or less comparable to sale and use tax collection duties."[167] Judge Gorsuch determined that, as the *Quill* court called the distinction between regulatory burdens and collection burdens "artificial and formulistic," this court is "under no obligation to extend [*Bellas Hess*] to comparable tax and regulatory obligations."[168] He also pointed out the numerous lower courts that have held that *Quill* does not apply to regulatory duties.[169]

Judge Gorsuch went on to discuss another precedent that has "suffer[ed] as highly a distinguished fate,"[170] returning to 1922, when "the

157. *Id.*
158. *Id.* at 1148–49 ("Indeed, our court has said that it will usually defer even to the dicta (not just the ratio) found in Supreme Court decisions.").
159. *Id.* at 1149.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 1149–50.
170. *Id.* at 1150.

Supreme Court held baseball effectively immune from federal antitrust laws and did so reasoning that the 'exhibition[] of base ball' by professional teams crossing state lines 'didn't involve commerce among the States.'"[171] As Judge Gorsuch explains, even "though it has long since rejected the reasoning of [the case], the Supreme Court has still chosen to retain the holding itself."[172] It has done so "only out of respect for the reliance interests" that have risen up around the holding.[173] "And, of course, Congress has since codified baseball's special exemption."[174]

As Judge Gorsuch determined that *Quill* does not require the nullifying of the Colorado Law, he looked to "whether some other principle in dormant [C]ommerce [C]lause doctrine might."[175] DMA raised the discrimination argument, "[b]ut any claim of discrimination is easily rejected."[176] There is no evidence that the notice and reporting burdens on out-of-state retailers "compare unfavorably to the administrative burdens the state imposes on in-state" retailers.[177] "If anything, by asking [the court] to strike down Colorado's law, out-of-state mail order and internet retailers don't seek comparable treatment to their in-state brick-and-mortar rivals, they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity . . . ."[178]

Unfortunately, as Judge Gorsuch pointed out, it is actually this sort of competitive advantage that *Bellas Hess* and *Quill* create.[179] While the "mainstream of dormant commerce clause jurisprudence . . . is all about preventing discrimination between firms[,]" the jurisprudence stemming from *Bellas Hess* "guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume."[180] And, while it seems antithetical to conclude that *Quill* requires the court to remove this benefit, Judge Gorsuch believed it to be "entirely consistent with the demands of precedent."[181]

"After all, by reinforcing an admittedly 'formalistic' and 'artificial' distinction between sales and use tax collection obligations and other comparable regulatory and tax duties, *Quill* invited states to impose comparable duties."[182] Just as the *Quill* court upheld the *Bellas Hess* rule to protect the reliance interests that had grown up around it, this court

171. *Id.* (alteration in original) (quoting Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922)).
172. *Id.*
173. *Id.*
174. *Id.* (citing 15 U.S.C. § 26b (2012)).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 1150–51.
181. *Id.* at 1151.
182. *Id.*

reaffirms the outer limits of *Quill*, protecting the reliance interests of state legislatures such as Colorado's who are "find[ing] ways of achieving comparable results through different means."[183]

Judge Gorsuch concluded by stating, "[W]hile some precedential islands manage to survive indefinitely even when surrounded by a sea of contrary law, a good many others disappear when reliance interests never form around them or erode over time."[184]

III. ANALYSIS

A. The Formation of Quill*'s Precedential Island*

1. *Quill* Should Be Overruled

Change in this country is occurring at an exponential rate and *Quill* is a perfect example of this rapid movement. The rule from *Quill* came out of a world that was drastically different from today's world. Mail-order sales was a small industry in 1992, totaling only $180 billion.[185] In the time it took for *Quill* to be addressed again, the fledgling area it protected had evolved into a $3.16 trillion industry.[186] Brick-and-mortar stores have seen a steady decline in foot traffic every month for the last forty-eight months and in monthly sales for the last thirty-six months.[187] In a 2000 Pew Research Center survey, 22% of Americans had made online purchases; in a 2015 Pew Research Center survey, that percentage had increased to 79%.[188] "The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers."[189]

As Judge Gorsuch pointed out, "if it were ever thought that mail-order retailers were small businesses meriting (constitutionalized, no less) protection from behemoth brick-and-mortar enterprises, that thought must have evaporated long ago."[190] He pointed to "today's e-commerce retail leader, Amazon, [who] recorded nearly ninety billion dollars in sales in 2014 while the vast majority of small businesses rec-

183. *Id.*
184. *Id.*
185. *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).
186. *Id.* (Kennedy, J., concurring).
187. Andria Chang, *Holiday Sales Trends Heighten Brick-and-Mortar Woes*, EMARKETER (Jan. 6, 2017), https://www.emarketer.com/Article/Holiday-Sales-Trends-Heighten-Brick-and-Mortar-Woes/1014990.
188. Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, PEW RESEARCH CTR. (Dec. 19, 2016), http://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce.
189. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1135. (Kennedy, J., concurring).
190. *Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1151 n.1 (10th Cir.) (2016) (Gorsuch, J., concurring).

orded no online sales at all."[191] The pendulum has swung fully in the other direction. Far from ensuring out-of-state retailers do not bear an undue burden, the protection afforded to out-of-state retailers by *Quill*'s holding now equates to a "tax shelter."[192]

The rationale behind protecting out-of-state retailers is no longer applicable. Indeed, by significantly reducing state tax revenue, the holding in *Quill* is not just out-of-date, but "a serious, continuing injustice faced by Colorado and many other States."[193]

2. *Quill* Will Not Be Overruled Judicially

While dormant Commerce Clause doctrine decisions appear to be constitutional at first glance, they have significantly more in common with statutory decisions. The rationale behind stare decisis's stronger hold on statutory decisions arises from the ability of Congress to correct any judicial interpretation it finds erroneous.[194] This rationale applies just as strongly to decisions under the dormant Commerce Clause doctrine.

Because the Constitution gives the power to regulate interstate commerce to Congress, Congress has the ability to correct any judicial interpretation under the dormant Commerce Clause doctrine.[195] Therefore, unlike other constitutional interpretations, Congress would not need to invoke a two-thirds majority in Congress and garner support from three-quarters of state legislatures to enact a constitutional amendment in order to overrule the Court.[196] This view is further supported by looking at *Quill* itself, which upheld *Bellas Hess*'s dormant Commerce Clause doctrine ruling, but overturned its Due Process Clause ruling.[197] In doing so, the Court noted, "[W]hile Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, . . . it does not similarly have the power to authorize violations of the Due Process Clause."[198] Dormant Commerce Clause doctrine jurisprudence has many of its own idiosyncrasies; however, just as Congress can amend a statute it believes has been erroneously interpreted by the Supreme Court, Congress can write a statute sanctioning state legislation it believes the Supreme Court erroneously overturned. As such, decisions under the dormant Commerce Clause doctrine are imbued with the same "special force" of stare decisis as statutory decisions.

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191. *Id.*
192. *Id.* at 1150.
193. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1134 (Kennedy, J., concurring).
194. Hansen, *supra* note 52, at 208.
195. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 422–427 (1946).
196. U.S. Const. art. V.
197. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).
198. *Id.* at 305.

This "special force" of stare decisis alone makes it difficult to raise *Quill* above the threshold required for overruling. This is where the speed of change occurring in society throws a wrench into the system. Normally, the Court will wait for "the legal system [to] find an appropriate case for th[e] Court to reexamine" the existing precedent.[199] However, the holding in *Quill* became outdated faster than the legal system could provide an opportunity for the Court to address it. The case was contentious when it was heard, as evidenced by the eleven amicus curiae briefs filed urging the Court to uphold *Bellas Hess*'s rule, including DMA and the eight amici curiae who filed briefs urging *Bellas Hess*'s reversal, one of whom was joined by twenty-six states' attorneys general. The *Quill* opinion itself, while upholding *Bellas Hess*, expressly acknowledged "contemporary Commerce Clause jurisprudence might not dictate the same result were . . . [*Bellas Hess*] to arise for the first time today."[200] *Quill*'s holding was out-of-date before its ink dried.

Because courts are loathe to apply a case in a way that comes to an unjust outcome, the lower courts continue to narrow *Quill*.[201] While this may provide more just outcomes for the time being, as *Quill* becomes narrower the number of cases that would be appropriate vehicles for the Court to reconsider its overruling will diminish. With the minuscule rate at which the Supreme Court grants certiorari review and the shrinking number of appropriate cases, it is less and less likely that the opportunity will arise for *Quill* to be judicially overturned.

3. *Quill* Will Not Be Overruled Legislatively

The Supreme Court called for congressional intervention in *Quill*'s majority opinion, stating "that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."[202] "In this situation, it may be that the better part of both wisdom and valor is to respect the judgment of the other branches of government."[203] The following congressional session enacted 610 laws.[204] None addressed *Quill*.

The Tenth Circuit called for Congress to legislate over *Quill* in the instant case, quoting the majority's plea in *Quill*.[205] While Congress rarely overrules precedent, the average age of those few that Congress has overruled in the last twenty-five years is 5 years.[206] The first call for leg-

199. *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).
200. *Quill Corp.*, 504 U.S. at 311.
201. *See, e.g.*, Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1324 (9th Cir. 2015) (declining to extend *Quill* to cover resale royalties provided for by California statute).
202. *Quill Corp.*, 504 U.S. at 318.
203. *Id.* at 318–19 (citations omitted).
204. *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Oct. 30, 2016).
205. *See Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1147 (2016).
206. Hansen, *supra* note 52, at 252–55.

islative intervention was placed twenty-four years ago. It has gone unanswered.

Since that first call, Congress has become increasingly divided. Prior to 2000, the majority of legislative overrides were bipartisan.[207] Now "we see a new, but rarer, phenomenon, partisan overriding."[208] Partisan overrides are significantly more difficult, as they often require "an unusual set of events: a president, House, and Senate majority of the same party; a president with ample political capital; and enough crossover votes to beat a filibuster."[209] Congress was unable to legislate over *Quill* during a time when Congress enacted twice as many laws as it does today and had an easier time gaining the support needed for legislative overrides, and when *Quill* was at the prime age for overruling. It is unlikely that the second call will produce different results.

4. The Island of *Quill* is Formed

At least some members of the Supreme Court would like to address *Quill*.[210] However, it has yet to, and is unlikely to, encounter a case properly situated to overrule *Quill*. Furthermore, the Supreme Court's call to legislate in this area has remained unanswered. The Tenth Circuit used the only option it had left: it distinguished *Quill* from *Direct Marketing*, thus narrowing *Quill*'s holding. The majority opinion states thirteen separate times that *Quill* does not apply.[211] It is in this emphatic distinguishing that a precedential island is formed.

B. The Rise of Precedential Islands

As change in society increases at a rapid rate, precedent may become outdated quicker than the courts can overrule it. Division in the legislative branch may cause the Court's holdings to become the final word on statutory questions. While courts scramble to prevent unjust outcomes, the stability and predictability of stare decisis will slowly disappear. Stare decisis's promise "that bedrock principles are founded in the law rather than in the proclivities of individuals" will be broken.[212]

This is best illustrated by taking a deeper look at *Direct Marketing*'s procedural posture. When *Direct Marketing* reached the Supreme Court, it had already been refiled in state court and the Colorado Law was pre-

207. *Id.* at 209.
208. *Id.*
209. *Id.* at 238.
210. *See Direct Mktg Ass'n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) ("The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."); *see also* Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) (White, J., concurring in part and dissenting in part).
211. *See Direct Mktg. Ass'n IV*, 814 F.3d at 1134, 1136–37, 1139, 1144–47.
212. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

liminarily enjoined.[213] Therefore, there were two possible outcomes from the Supreme Court's decision: the case would be barred from federal courts and the injunction in state court would stand, or the case would not be barred from federal courts and would be remanded to the Tenth Circuit for a decision on the merits.

The Supreme Court's opinion is intriguing for two reasons. First, the Court appears to like the Colorado Law. During oral arguments, Justice Scalia seemed shocked that this law is one-of-a-kind and could not understand why other states have not taken similar measures.[214] Justice Kennedy wrote a concurring opinion stating what an injustice the continuation of *Quill* and *Bellas Hess* jurisprudence has played on Colorado and the states, an issue which had no relation to the jurisdictional question before the Court.[215] Upholding the Colorado Law would allow other states to follow suit and, thus, lessen the fiscal burden placed on the states as more and more retailers limit their presence to the Internet.

Even more interesting, though, is the rationale for remanding the case. The Supreme Court reversed the Tenth Circuit's holding based on reasoning barely mentioned in either parties' briefings; the reporting requirements did not fall within the definitions in the TIA. DMA's main argument was that "[c]hallenges . . . brought by non-taxpayers who contest neither their own tax liability, nor anyone else's, and which present none of the elements of the prototypical TIA case, are not barred."[216] Colorado's main argument was that because DMA was seeking "to enjoin and restrain the *methods* Colorado uses to assess and collect its sales and use taxes," DMA's suit was barred.[217] However, the Supreme Court ultimately held that TIA did not bar federal jurisdiction because the reporting requirements were not part of assessment, levy, or collection as defined under the Act.[218] It went one step further and held that the words "enjoin, suspend, or restrain" in the TIA "capture[]only those orders that stop (or perhaps compel) acts of 'assessment, levy and collection.'"[219]

The Court did not wish to send the case back to the court that had already preliminarily enjoined the Colorado Law. It did not want the Tenth Circuit to be bound by *Quill*. By basing its holding on the inapplicability of the TIA, the Court gave the Tenth Circuit an out. The emphatic statement that the Colorado Law was not a part of tax assessment, levy or collection, was all the reasoning needed to uphold the Colorado

213. Direct Mktg. Ass'n v. Colo. Dep't of Revenue, No. 13CV34855, at 1, 22–23 (Dist. Ct. Colo. Feb. 18, 2014) (order granting preliminary injunction).

214. Transcript of Oral Argument at 24, *Direct Mktg. Ass'n III*, 135 S. Ct. 1124 (2014) (No. 13-1032).

215. *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

216. Brief of Petitioner at 15, *Direct Mktg. Ass'n III*, 135 S. Ct. 1124 (2015) (No. 13-1032).

217. Brief of Respondent at 13, *Direct Mktg. Ass'n III*, 135 S. Ct. 1124 (2015) (No. 13-1032) (emphasis added).

218. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1133–34.

219. *Id.* at 1132.

Law. The Tenth Circuit was now free to distinguish *Quill*, which only applies to taxation, and find that the Colorado Law did not offend the dormant Commerce Clause doctrine. The Court shaped its unanimous opinion in a way that provided the outcome the nine Justices wanted. Instead of being "founded in the law," as promised by stare decisis, this case turned on "the proclivities of individuals."[220]

CONCLUSION

While the precedential island of *Quill* is, at this time, unique, the systematic factors that led to its creation are not. If the pace of the modern world increases, precedent will become outdated more quickly and more frequently. If the American public, and thus the legislature, becomes more divided, the ability of Congress to correct statutory interpretations will diminish. If the country's population grows and the number of petitions for certiorari increases, the percent of petitions the Court hears will decrease. Even if the Court disagrees with or wishes to clarify a precedent, the judicial system may move too slowly for an appropriate case to come before the Court. If these systematic factors remain, *Quill*, now a solitary island, may find itself with neighbors.

On December 12, 2016, the Supreme Court denied DMA's petition for certiorari.[221] As Justice Kennedy stated, this "case does not raise this issue in a manner appropriate for the Court to address it."[222] But will there ever be an appropriate case? If states continue to legislate around *Quill*, following in Colorado's footsteps, the Court may never have a chance to address *Quill*. Some may argue that this is exactly how precedent is supposed to function: that a precedential island forms and then, over time, the sea of certainty washes it away and it disappears. But if times change too quickly and the islands form too rapidly, it may be that the sea of certainty will disappear instead.

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220. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

221. Direct Mktg Ass'n v. Brohl, 2016 WL 4565072, at *1 (2016) (denying petition for certiorari).

222. *Direct Mktg Ass'n III*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

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"YOU'VE GOT MAIL!" DECODING THE BITS AND BYTES OF FOURTH AMENDMENT COMPUTER SEARCHES AFTER *ACKERMAN*

ABSTRACT

In the digital age, courts have been searching for rational solutions and definitions regarding computer searches that comport with current Fourth Amendment law, specifically the private search doctrine. Recently, in *United States v. Ackerman*, the U.S. Court of Appeals for the Tenth Circuit held that when a government entity or agent opens and examines emails previously unopened by private actors, they have conducted a "search" to which the Fourth Amendment applies. Although the ultimate holding is consistent with the Fourth Amendment's reasonable expectation of privacy doctrine, the Tenth Circuit offered a controversial alternative rationale rooted in the trespass-to-chattels doctrine. This alternative rationale has far-reaching implications, specifically regarding the viability of the private search doctrine as applied to computer searches.

This Comment first argues that courts should adopt a "file" approach in Fourth Amendment cases involving searches of computers rather than the previously proposed "physical device" and "human observation" approaches. A person who leaves a file open on a computer does not possess a reasonable expectation of privacy in the open file, but a person does possess a reasonable expectation of privacy in closed files. Secondly, this Comment argues that the reintroduction of the trespass-to-chattels limb of Fourth Amendment searches will practically extinguish the private search doctrine as applied to computers, unless courts adopt a different definition of "trespass," specifically a definition anchored in the unit of a computer file. The abstract concept of a computer file is analogous to the "metes and bounds" of physical property, and the data contained within the file is analogous to the property contained within said physical metes and bounds. Under both the reasonable expectation of privacy and trespass-to-chattels doctrines, focusing on the unit of a computer "file" is the most favorable approach. In short, opening a file on a computer should be considered a distinct search under the Fourth Amendment and therefore should require a distinct justification.

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INTRODUCTION

As technology continues to rapidly advance and become more integrated in our day-to-day lives, computer evidence will increasingly become more valuable and pertinent in both civil and criminal investigations. Computer forensic examination is now a common tool in almost all criminal investigations.[1] To support this tool, the Federal Bureau of Investigation (FBI) alone has over two hundred full-time computer forensic examiners.[2] However, computer forensic examination continues to generate unnecessary Fourth Amendment complications. Because most modern-day computers possess storage capacities from anywhere between 250 gigabytes to several terabytes,[3] the application of the Fourth Amendment becomes problematic. In light of their "immense storage capacit[ies]"[4] and ability to store and transport "millions of pages of text, thousands of pictures, or hundreds of videos,"[5] electronic devices are quantitatively different from physical spaces. Electronic records, unlike physical records, possess an "element of pervasiveness" because electronic records can be transferred among devices around the world in milliseconds whereas physical records cannot.[6] Furthermore, electronic de-

1. Josh Goldfoot, *The Physical Computer and the Fourth Amendment*, 16 BERKELEY J. CRIM. L. 112, 112 (2011).

2. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 131 (2010).

3. *See* Kim Komando, *How Much Computer Storage Do You Really Need?*, USA TODAY (Nov. 30, 2012, 7:51 AM), http://www.usatoday.com/story/tech/columnist/komando/2012/11/30/komando-computer-storage/1726835; Lucas Mearian, *With Tech Breakthrough, Seagate Promises 60TB Drives this Decade*, COMPUTERWORLD (Mar. 20, 2012, 11:58 AM), https://www.computerworld.com/article/2502838/data-center/with-tech-breakthrough--seagate-promises-60tb-drives-this-decade.html.

4. *See* Riley v. California, 134 S. Ct. 2473, 2489 (2014).

5. *See id.*

6. *Id.* at 2490 ("[A]n element of pervasiveness characterizes cell phones but not physical records.").

vices are qualitatively different than physical spaces because data stored on electronic devices may include "private information never found in a home in any form."[7] For example, consider an electronic device's persistent tracking of Global Positioning System (GPS) location data or artificial intelligence algorithms that determine a user's social profile and preferences. Such private information rarely exists in physical form in a home because displaying this information on a tangible medium requires printing tens of thousands of pages.[8]

The Fourth Amendment is heavily premised on physical objects and was drafted to regulate searches of homes and physical property.[9] Until the Warren Court, judicial interpretation of the Fourth Amendment protected only against physical intrusions on tangible things.[10] This purely physical conception of the Fourth Amendment's protections changed with the seminal decision of *Katz v. United States*,[11] where the Court replaced property-based theories with a two-part "expectation of privacy" test.[12] According to *Katz*, a search under the Fourth Amendment occurs when a governmental employee or agent of the government violates an individual's reasonable expectation of privacy.[13] However, because the Fourth Amendment applies only to governmental employees and agents, the Fourth Amendment is not triggered when private parties conduct searches.[14] The Supreme Court established the "private search doctrine" to regulate what law enforcement is allowed to see without complying with the strictures of the Fourth Amendment.[15] The private search doctrine allows police and law enforcement officials to reconstruct the private party search and see what the private party saw, but police and

7. *Id.* at 2491.

8. 1.4 gigabytes (GB) is equivalent to 105,000 pages. 5.8 GB is equivalent to 435,000 pages. 5,200 GB is equivalent to 390,000,000 pages. *See Data Volume Estimates and Conversions*, SDS DISCOVERY, http://www.sdsdiscovery.com/resources/data-conversions (last visited May 30, 2017); *see also* ERICSSON, ERICSSON MOBILITY REPORT: ON THE PULSE OF THE NETWORKED SOCIETY 2 (2016) (total monthly mobile data traffic per smartphone was 1.4 GB in 2015; total monthly mobile data traffic per mobile PC was 5.8 GB in 2015); *see also* International Data Corporation, *The Digital Universe in 2020: Big Data, Bigger Digital Shadows, and Biggest Growth in the Far East*, EMC (Dec. 2012), https://www.emc.com/leadership/digital-universe/2012iview/executive-summary-a-universe-of.htm (the digital universe will exceed 40 trillion GB, which is "5,200 GB for every man, woman, and child").

9. *See* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 290–92 (2005).

10. Olmstead v. United States, 277 U.S. 438, 466 (1928) (noting that no precedents permit the Fourth Amendment to apply as a viable defense in cases where no official search and seizure of the person, his papers, tangible material effects, or an actual physical invasion of property had occurred), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

11. 389 U.S. 347 (1967).

12. *Id.* at 353.

13. *Id.* at 360–61 (Harlan, J., concurring) (articulating the test commonly associated with *Katz*); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

14. United States v. Jacobsen, 466 U.S. 109, 113 (1984).

15. *Id.* at 115–16.

law enforcement may not exceed the scope of the private party search without triggering the Fourth Amendment.[16] A private search extinguishes an individual's reasonable expectation of privacy in the object searched;[17] once this has occurred, the Fourth Amendment does not prohibit governmental use of this non-private information.[18] By merely repeating the search, the government does not further infringe on a person's privacy.[19] Unsurprisingly, the private search doctrine's application to electronic devices has caused controversy within federal courts.[20]

Although this privacy rationale has been the touchstone of Fourth Amendment searches for almost fifty years, in 2012, *United States v. Jones*[21] supplemented the reasonable expectation of privacy doctrine by reintroducing the trespass doctrine.[22] If an individual does not have a reasonable expectation of privacy, a governmental employee or agent may still trigger a Fourth Amendment "search" by trespassing onto that individual's property in order to obtain information.[23] With regard to the private search doctrine, even though a police officer accurately repeated a prior private search, the police officer's repeated search would qualify as a "trespass" under *Jones* and therefore a distinct search under the Fourth Amendment. Thus, the prior private party search becomes irrelevant under a *Jones* trespass-to-chattels analysis, which inevitably challenges the continued viability of the private search doctrine as applied to computers.[24]

This Comment explores both the history and future of Fourth Amendment computer searches in light of the Tenth Circuit's recent ruling in *United States v. Ackerman*[25] and concludes by proposing a simple framework for administering the Fourth Amendment that preserves the private search doctrine regarding computers. This Comment will argue that by adopting a "file" framework for defining computer searches, both

16. *Id.* at 115–20.
17. *Id.* at 117.
18. *Id.*
19. *Id.* at 120.
20. *Compare* United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001) (holding that police did not exceed the scope of the private party's search by opening and viewing additional files on CDs), *and* Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012) (holding that police did not exceed scope of the private party's search after opening and searching previously unopened files on a zip drive), *with* United States v. Lichtenberger (*Lichtenberger II*), 786 F.3d 478, 491 (6th Cir. 2015) (holding that police exceeded the scope of the private party's search when files were opened on the same device that had not been searched earlier), *and* United States v. Sparks, 806 F.3d 1323, 1335 (11th Cir. 2015) (holding that police exceeded the scope of the private party's search when previously unopened images and a video were searched on the same device).
21. 565 U.S. 400 (2012).
22. *Id.* at 405–06 (citing Olmstead v. United States, 277 U.S. 438 (1928)) (discussing the trespass rule).
23. *Id.* at 407–08.
24. *See, e.g.*, Andrew MacKie-Mason, *The Private Search Doctrine After* Jones, 126 YALE L.J. F. 326, 330 (2017) ("[E]ven if a particular action passes *Jacobsen*'s test (and is thus not a search under *Katz*), it may still be a search under *Jones*.").
25. 831 F.3d 1292 (10th Cir. 2016).

the reasonable expectation of privacy prong and the trespass-to-chattels prong of Fourth Amendment searches will be satisfied.

Part I of this Comment traces the history of the Fourth Amendment's application to computers and details the significant differences between searching a computer and searching a physical space. Part I also summarizes the recent federal circuit split regarding the application of the Fourth Amendment's private search doctrine to computers. The Fifth Circuit[26] and the Seventh Circuit[27] both subscribe to the "physical device" approach: if a private party accessed even just one file on a computer, the entire computer was searched by that private party, and therefore, the police can access the entire computer without conducting a search to which the Fourth Amendment applies. By contrast, the Sixth Circuit[28] and Eleventh Circuit[29] both subscribe to a data or "file" approach: if a private party searched one file on a computer, only that file can be searched by the police. The latter decisions from the Sixth and Eleventh circuits trigger several questions about the file approach.[30] For example, if the private party only viewed one file on the computer, should the police be limited to searching only that single file, or should the police be allowed to search other files contained within the same folder? Is a folder a file? If a private party observed only part of a file on the screen, should the police be allowed to search the remaining contents of that file (e.g., scrolling through a Word document)? Part I of this Comment will also discuss the reintroduction of the trespass-to-chattels definition of a Fourth Amendment search and the implications of that paradigm shift for the private search doctrine.

Part II of this Comment provides a brief summary of the facts, opinions, and holdings of *Ackerman*. Part III first analyzes the Tenth Circuit's reasoning in *Ackerman*, with a particular emphasis on the alternative holding.[31] The last half of Part III endorses the file framework for administering the Fourth Amendment in computer searches. It explains why the file approach is superior to previously-considered approaches and also why the file approach is the most appropriate framework in light of *Ackerman*, *Jones*, and *United States v. Jacobsen*.[32] Furthermore, if courts continue to recognize property rights in data, applying the file approach

26. *Runyan*, 275 F.3d at 464.
27. Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012).
28. *Lichtenberger II*, 786 F.3d 478, 490–91 (6th Cir. 2015).
29. United States v. Sparks, 806 F.3d 1323, 1335 (11th Cir. 2015).
30. *See* Orin Kerr, *11th Circuit Deepens the Circuit Split on Applying the Private Search Doctrine To Computers*, WASH. POST (Dec. 2, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/02/11th-circuit-deepens-the-circuit-split-on-applying-the-private-search-doctrine-to-computers (noting that the deepening circuit split regarding the application of the private search doctrine to computers is ripe for Supreme Court review).
31. *See infra* text accompanying notes 211–14.
32. 466 U.S. 109 (1984).

to Fourth Amendment computer searches emerges as the preeminent logical framework.

I. BACKGROUND

The dawn of the digital age has produced a wide range of new Fourth Amendment complications.[33] Not only have courts been faced with privacy concerns regarding electronic devices, but they also have been forced to consider the ever-increasing storage capacities of computers and smartphones.[34] Section A details the history of Fourth Amendment jurisprudence, the Court's doctrine regarding information previously accessed by private parties, and its application to electronic devices. Section B focuses on the current federal circuit split regarding the contours of the private search doctrine's application to computers. Finally, Section C discusses the trespass-to-chattels doctrine under *Jones* and its impact on the private search doctrine under *Jacobsen*.

A. The Fourth Amendment in the Digital Age

The Fourth Amendment of the U.S. Constitution protects citizens from unreasonable searches and seizures of their "person, houses, papers, and effects."[35] Current Fourth Amendment jurisprudence defines a search in one of two ways. Since the Supreme Court's 1967 decision in *Katz*, a search occurs when a governmental employee or agent of the government violates an individual's reasonable expectation of privacy.[36] In 2012, the Supreme Court supplemented the *Katz* "reasonable expectation of privacy" doctrine by reintroducing the trespass doctrine.[37] Under the *Jones* trespass doctrine, a trespass into an individual's property constitutes a Fourth Amendment search.[38] Thus, even in the absence of a reasonable expectation of privacy, the government may still trigger the Fourth Amendment if it trespasses into a person's property.

One way the Fourth Amendment grants government agents the power to conduct reasonable searches is after receiving a proper warrant.[39] Besides a growing list of exceptions,[40] warrantless searches and

33. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2480 (2014) (analyzing constitutionality of searching cell phone data after arrest); United States v. Jones, 565 U.S. 400, 402 (2012) (analyzing whether attaching a GPS device to defendant's vehicle was a trespass under the Fourth Amendment); Kyllo v. United States, 533 U.S. 27, 29 (2001) (analyzing constitutionality of using a thermal imaging device from a public street to scan a private home).

34. *See Riley*, 134 S. Ct. at 2489 (discussing the ever-increasing storage capacities of electronic devices).

35. U.S. CONST. amend. IV.

36. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

37. United States v. Jones, 565 U.S. 400, 412 (2012).

38. *See id.*

39. *See id.* at 406–07.

40. *See* Arizona v. Gant, 556 U.S. 332, 351 (2009) (allowing a search incident to lawful arrest); *see also* Horton v. California, 496 U.S. 128, 130 (1990) (allowing a plain view exception to the Fourth Amendment); Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (allowing a search "when

seizures are unreasonable on their face.[41] When determining whether to exempt a search from the warrant requirement, courts have generally attempted to conduct a balancing assessment between an individual's privacy and the government's interest in gathering evidence.[42] However, these Fourth Amendment protections only apply to governmental entities or agents.[43] An unreasonable search or seizure conducted by a private individual is exempt from the aforementioned limitations unless the individual who conducted the search was acting under the direction of a government official or agent.[44] In *Jacobsen*, the U.S. Supreme Court articulated the private search reconstruction doctrine (private search doctrine).[45] Under the private search doctrine, when a private party's search violates a person's privacy, a government agent's warrantless search does not violate the Fourth Amendment if it simply replicates the same search already conducted by the private party.[46] The rationale is that a private search extinguishes an individual's reasonable expectation of privacy.[47] Furthermore, the private search doctrine allows a government official to conduct a follow-up search within the scope of the initial search;[48] however, if the government exceeds that scope, then its search will be in violation of the Fourth Amendment.[49]

Jacobsen involved a search of a package by a government agent after Federal Express (FedEx) employees intercepted and searched the same package upon noticing the presence of a suspicious white powder.[50] In addition to replicating the search conducted by the FedEx employees, a Drug Enforcement Agency (DEA) agent also tested the white powder and identified the powder as cocaine.[51] The FedEx employees only searched the package but did not test the white powder.[52] Based on the field test results from the DEA agent and other supporting evidence, the DEA obtained a warrant to search the addressee's home.[53] The DEA

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voluntary consent has been obtained"); Maryland v. Dyson, 527 U.S. 465, 466–67 (1999) (allowing a motor vehicle exception to the Fourth Amendment).

41. *Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . .").

42. Riley v. California, 134 S. Ct. 2473, 2484 (2014) ("[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'") (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

43. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (explaining that Fourth Amendment limitations only apply to governmental searches and seizures).

44. *Id.* (explaining that Fourth Amendment protections do not apply to unreasonable searches by private persons).

45. *Id.* at 117–18.

46. *Id.*

47. *Id.*

48. *Id.* at 115.

49. *See id.* at 117–18.

50. *Id.* at 111.

51. *Id.* at 111–12.

52. *Id.*

53. United States v. Jacobsen, 683 F.2d 296, 298 (8th Cir. 1982), *rev'd*, 466 U.S. 109 (1984).

subsequently found more incriminating evidence and arrested Jacobsen.[54] After denying Jacobsen's motion to suppress the evidence, the U.S. District Court for the District of Minnesota convicted Jacobsen of possession with intent to distribute cocaine and conspiracy to distribute cocaine.[55]

Jacobsen appealed the district court decision, and the U.S. Court of Appeals for the Eighth Circuit held that the DEA agents' field test of the white powder expanded the scope of the private search and thus required a warrant.[56] The Eighth Circuit reversed Jacobsen's convictions, and the Supreme Court granted certiorari.[57] The Court adopted the "virtual certainty" test, which states that to determine whether the government's search exceeded the scope of the initial private search, courts must conduct a balancing test between the amount of information the government stands to gain and the level of certainty regarding what they will find.[58] If the officer is "virtually certain[]" that nothing new will be discovered, then the government's search is within the scope of the initial search.[59] Applying the virtual certainty standard specifically to the DEA agents' field tests, the Court reasoned that the suspicious nature of the white powder made it "virtually certain" that it was some sort of contraband.[60] In short, the government's apparent search was no search at all for Fourth Amendment purposes because it compromised no "legitimate privacy interest."[61]

Since *Jacobsen*, courts have focused on the nature of the area being searched when applying the virtual certainty test.[62] For example, in *United States v. Allen*,[63] the U.S. Court of Appeals for the Sixth Circuit declined to extend the private search doctrine to a search of a motel room.[64] The Sixth Circuit distinguished its holding from *Jacobsen*, citing the material differences between a suspicious package and a motel room.[65] In balancing individual privacy interests with the government's interest in obtaining evidence, the court noted that the package in *Jacobsen* contained only contraband, whereas the motel contained numerous other personal possessions irrelevant to the search.[66]

More recently in *Riley v. California*,[67] the U.S. Supreme Court made an effort to protect data privacy.[68] After police pulled over defend-

54. *Id.*
55. *Id.*
56. *Id.* at 299–300.
57. *Jacobsen*, 466 U.S. at 112–13.
58. *Id.* at 119.
59. *Id.*
60. *Id.* at 124–25.
61. *Id.* at 123.
62. *See* United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997).
63. 106 F.3d 695 (6th Cir. 1997).
64. *Id.* at 699.
65. *Id.*
66. *Id.*
67. 134 S. Ct. 2473 (2014).

ant Riley for a minor traffic infraction, the police searched his phone, revealing gang-related content that tied Riley to a shooting that occurred weeks prior.[69] The government argued that permitting warrantless searches of cell phones incident to arrest could ultimately prevent destruction of evidence and aid law enforcement officers.[70] The Supreme Court rejected this argument, reasoning that cell phones represent an important privacy interest that must be protected because of the significant volumes of personal information contained within them.[71] To protect this privacy interest, the Court held that police officers must obtain a warrant before searching a cell phone.[72] The cellphone in *Riley* is akin to the motel room in the *Allen* case: They both contain numerous pieces of information that may be irrelevant to the search.[73]

To summarize, under the reasonable expectation of privacy definition of a Fourth Amendment search, a search occurs when "[t]he Government's activities . . . violate[] the *privacy* upon which [a person] justifiably relie[s]."[74] However, the Supreme Court has carved out an exception to this definition—the private search doctrine.[75] Under the private search doctrine, once a private party conducts an initial search, the government may repeat that search without triggering a Fourth Amendment "search."[76] With the development of new technology and exponentially increasing storage capacities, applying the private search doctrine to electronic devices has raised unforeseen difficulties and caused splintered decisions.

B. The Private Search Doctrine Circuit Split

Recent circuit court decisions regarding the private search doctrine as applied to computers have led to a circuit split.[77] The split among the circuit courts is rooted in disagreement over the appropriate measuring unit to apply when searching computers:[78] When a private party has

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68. *Id.* at 2494–95.

69. People v. Riley, No. D059840, 2013 WL 475242, at *1–2 (Cal. Ct. App. Feb. 8, 2013), *rev'd*, 134 S. Ct. 2473 (2014).

70. *Riley*, 134 S. Ct. at 2486.

71. *Id.* at 2494–95.

72. *Id.* at 2495.

73. *Compare* United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997) (remarking that a motel room contains several personal possessions that may be outside the scope of a private search), *with Riley*, 134 S. Ct. at 2494–95 (noting that cell phones may contain several "privacies of life" that may be outside the scope of a private search).

74. Katz v. United States, 389 U.S. 347, 353 (1967) (emphasis added).

75. *See* United States v. Jacobsen, 466 U.S. 109, 117–18 (1984).

76. *Id.*

77. *See supra* note 20 and accompanying text.

78. *Compare* United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001) (holding that the entire physical device was searched), *and* Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012) (holding that the entire physical device was searched), *with Lichtenberger II*, 786 F.3d 478, 491 (6th Cir. 2015) (holding that only the files opened were searched), *and* United States v. Sparks, 806 F.3d 1323, 1335 (11th Cir. 2015) (holding that only the files opened were searched), *and* United States v. Ackerman, 831 F.3d 1292, 1305–06 (10th Cir. 2016).

searched a file on a computer, what exactly has been searched? Has the entire computer been searched? Or has the visible part of the file on the screen only been searched? Or has the entire file itself been searched, regardless if it was displayed in its entirety on the screen? These questions are significant for computer searches, as the answers provide the extent to which government officials are allowed to search a computer absent a warrant after a private citizen has already searched the computer.

In 2001, in *United States v Runyan*,[79] the U.S. Court of Appeals for the Fifth Circuit considered the application of the private search doctrine to digital storage devices containing child pornography.[80] While in the process of moving her things out of the home pending a divorce with her husband, the wife of defendant Robert Runyan discovered CDs and zip disks[81] that contained pornographic images of minors.[82] She turned over the CDs and zip disks to the police, and Runyan was indicted on child pornography charges.[83] Runyan moved to suppress the evidence on the digital storage devices that the law enforcement personnel searched without a warrant.[84] However, the U.S. District Court for the Northern District of Texas denied his motion on the grounds that the police had not exceeded the scope of his wife's initial search.[85]

On appeal to the Fifth Circuit, the court assumed that a computer disk is a closed container in the context of analyzing a warrantless search under the Fourth Amendment.[86] Accordingly, when police officers examine more items of a container than were previously viewed during a private search, the officers do *not* exceed the scope of the initial search.[87] Thus, when the police officers searched the storage devices, they did not exceed the scope of the private search, even though they opened files on the storage devices previously unopened by Runyan's wife.[88] Here, the Fifth Circuit used a physical device measuring unit when reconstructing the private search: because the digital storage device had already been opened and examined to some extent by a private party, the police officers were free to reopen and search all the contents of the digital storage device.[89]

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79. 275 F.3d 449 (5th Cir. 2001).
80. *See id.* at 456.
81. *Zip Disk*, PC MAG.: ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/55217/zip-disk (last visited Mar. 30, 2017) (providing a definition of zip disk).
82. *Runyan*, 275 F.3d at 452–53.
83. *Id.* at 454–55.
84. *Id.* at 455.
85. *Id.*
86. *See id.* at 464 (treating the computer disk as a closed container).
87. *Id.* at 465.
88. *Id.* at 464–65.
89. *Id.*

Similarly, in 2012, in *Rann v. Atchison*,[90] the U.S. Court of Appeals for the Seventh Circuit held that a more thorough search of a zip drive did not exceed the scope of the previous private search.[91] Defendant Rann was charged with sexual assault and child pornography involving his then-fifteen-year-old daughter.[92] Rann's wife and daughter turned over to police a memory card and a zip drive containing pornographic images of the daughter and another minor.[93] It appeared to the court that Rann's wife had downloaded the images to the zip drive herself.[94] Even though Rann's wife only visibly searched through a few of the files on the zip drive she compiled, the court held that the police's more exhaustive follow-up search of the zip drive did not exceed the scope of the initial search.[95] The court reasoned that because the police were certain that nothing new would be discovered during the follow-up search, the scope of the follow-up search had not been exceeded.[96] Indeed, the court could not "imagine more conclusive evidence that [the defendant's daughter] and her mother knew exactly what the memory card and the zip drive contained."[97]

In 2015, in *United States v. Lichtenberger*,[98] the U.S. Court of Appeals for the Sixth Circuit declined to adopt the physical device (or "closed container") approach of the Fifth and Seventh circuits.[99] Instead, the Sixth Circuit held that police officers exceeded the scope of the prior private search by opening and examining files on the same physical device that the private party searched, but that may not have been viewed by the private party.[100] Defendant Lichtenberger's girlfriend suspected Lichtenberger of possessing child pornography on his computer.[101] Of her own volition, the girlfriend hacked into Lichtenberger's computer using a password recovery program and eventually discovered a folder containing child pornography.[102] The girlfriend contacted the police, and an officer arrived at the house and requested that the girlfriend show him what she had found.[103] The girlfriend "opened several folders and began

90. 689 F.3d 832 (7th Cir. 2012).
91. *Id.* at 838.
92. *Id.* at 834.
93. *Id.*
94. *Id.* at 837.
95. *Id.* at 838.
96. *Id.* (adopting the "substantial certainty" language used in *Runyan*).
97. *Id.*
98. 786 F.3d 478 (6th Cir. 2015).
99. *See* Orin Kerr, *Sixth Circuit Creates Split on Private Search Doctrine for Computers*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers (arguing that the Sixth Circuit took the correct approach).
100. *Lichtenberger II*, 786 F.3d at 490–91.
101. United States v. Lichtenberger (*Lichtenberger I*), 19 F. Supp. 3d 753, 755 (N.D. Ohio 2014), *aff'd*, 786 F.3d 478 (6th Cir. 2015).
102. *Id.*
103. *Id.*

clicking on random thumbnail images to show him."[104] A warrant was later obtained to search the entire computer, but in later criminal proceedings for possession and distribution of child pornography, Lichtenberger moved to suppress all evidence found on his computer because his then-girlfriend testified that she was not sure the files she showed the police officers were the exact same files she viewed during her private search.[105] Obviously, the same physical device had been searched, but it was not clear that the same files had been searched.[106]

The U.S. District Court for the Northern District of Ohio suppressed the evidence, finding that the private search doctrine did not apply.[107] The Sixth Circuit affirmed the district court's ruling, holding that the police officer exceeded the scope of the prior search because he viewed files that may have differed from those viewed by the private party.[108] Reiterating the concerns from *Riley v. California*,[109] the Sixth Circuit focused on the unique storage capabilities and inevitable privacy interests posed by digital storage devices, concluding that the "virtual certainty" threshold was not met due to the nature of the electronic device.[110] The Sixth Circuit reasoned that the police officer was not virtually certain of what he was to discover on Lichtenberger's computer because the files could not have been viewed without first clicking on them.[111] The Sixth Circuit further remarked that "[o]ther documents, such as bank statements or personal communications, could also have been discovered among the photographs."[112] In short, the Sixth Circuit created a split with the Fifth and Seventh circuits by rejecting the physical device unit of measurement and adopting a file or "data" unit of measurement.[113]

More recently, in *United States v. Sparks*,[114] the U.S. Court of Appeals for the Eleventh Circuit adopted the file or data unit of measurement, which brought the circuit split to 2–2 with regard to how the private search doctrine should apply to computers.[115] In *Sparks*, defendants Johnson and Sparks left their cellphone at a Wal-Mart where a Wal-Mart employee opened it and looked through its contents.[116] The employee found hundreds of disturbing images and videos of child pornography.[117]

104. *Id.*
105. *Lichtenberger II*, 786 F.3d at 481.
106. *See id.*
107. *Lichtenberger I*, 19 F. Supp. 3d at 758–59.
108. *Lichtenberger II*, 786 F.3d at 490–91.
109. 134 S. Ct. 2473, 2495 (2014) (focusing on the significant privacy interests at stake).
110. *Lichtenberger II*, 786 F.3d at 488 (citing *Riley*, 134 S. Ct. at 2489) (discussing unique privacy concerns posed by electronic devices).
111. *Id.* at 481, 489 (noting that the main folder was labeled "private" and sub-folders were "labeled with numbers not words").
112. *Id.* at 489.
113. *See id.* at 489–91.
114. 806 F.3d 1323 (11th Cir. 2015).
115. *See supra* notes 20, 78 and accompanying text.
116. *Sparks*, 806 F.3d at 1329.
117. *Id.* at 1330–31.

The employee told her fiancé, Widner, about the images and videos.[118] Widner searched through the phone, opening a few images and watching one video.[119] Widner then contacted the police, turned over the phone, and showed the officers what he had seen.[120] Subsequently, one of the police officers searched the entire phone—opening all the images to full size and watching a second video that Widner had not viewed.[121]

The Eleventh Circuit held that (1) the police officer who searched the entire phone did not exceed the scope of Widner's private search when he viewed the same images (including thumbnails) and one video that Widner had previously viewed; but (2) the police officer did exceed the scope of Widner's private search when he opened and viewed images and a second video that Widner had not watched.[122] They made this holding despite the fact that the second video was located within the same folder as the first video.[123] Although the "private search of the cell phone might have removed certain information from the Fourth Amendment's protections, it did not expose every part of the information contained in the cell phone."[124] Considering the "tremendous storage capacity of cell phones and the broad range of types of information that cell phones generally contain,"[125] the Eleventh Circuit adopted the file approach to the private search doctrine as applied to computers, deepening the circuit split.[126]

Currently, under the reasonable expectation of privacy definition, two circuit courts subscribe to the physical device framework,[127] which holds that a search of a single file on a computer means the entire computer has been searched. Two other federal circuit courts subscribe to a file framework,[128] which essentially holds that the opening of a file constitutes a distinct search. In light of the sharp division among these federal circuit courts, the private search doctrine in computer searches is ripe for Supreme Court review. In fact, in two of the four aforementioned federal circuit cases, petitions for a writ of certiorari were filed.[129] Both were denied.[130]

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118. *Id.*
119. *Id.*
120. *Id.* at 1331.
121. *Id.* at 1331–32.
122. *Id.* at 1335–37.
123. *Id.* at 1335.
124. *Id.* at 1336.
125. *Id.*
126. *See supra* note 20 and accompanying text.
127. *See* United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001); *see also* Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012).
128. *See Lichtenberger II*, 786 F.3d 478, 491 (6th Cir. 2015); *see also* United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015).
129. Rann v. Atchison, 133 S. Ct. 672 (2012); Sparks v. United States, 136 S. Ct. 2009 (2016).
130. *Atchison*, 133 S. Ct. at 672 (denying petition for certiorari); *Sparks*, 136 S. Ct. at 2009 (denying petition for certiorari).

C. *The Death of the Private Search Doctrine after* Jones

In 2012—forty-five years after *Katz* and twenty-eight years after *Jacobsen*—the U.S. Supreme Court rendered a landmark decision that has raised doubts concerning the viability of the private search doctrine. In *United States v. Jones*, the Court reintroduced the trespass test for what constitutes a Fourth Amendment search.[131] The Court held that the police officers' physical installation of a GPS device on defendant Jones' car was a trespass against Jones' personal effects.[132] This physical intrusion—or trespass—constituted a search per se.[133] The trespass test, revived by *Jones,* requires (1) trespass[134] on (2) a constitutionally protected area[135] (3) "conjoined with . . . an attempt to find something or to obtain information."[136] General Fourth Amendment scholarship teaches that courts utilized the trespass test throughout American history until the 1960s[137] when Justice Harlan's concurring opinion in *Katz v. United States* introduced the two-part expectation-of-privacy inquiry.[138] In the years following the *Katz* decision (in which electronic eavesdropping on a public telephone booth was held to be a search), the vast majority of search and seizure case law has shifted away from that approach founded on property rights and towards an approach based on a person's expectation of privacy.[139] According to Justice Scalia's majority opinion in *Jones*, the *Katz* reasonable-expectation-of-privacy test merely supplemented the pre-*Katz* trespass test.[140]

The reintroduction of the *Jones* trespass test jeopardizes the viability of *Jacobsen.*[141] In *Jacobsen*, the chemical testing of narcotics that resulted in the destruction of a "trace amount" of cocaine was not a search because it failed to reveal more significant information.[142] The reasoning in *Jacobsen* focused only on the reasonable expectation of privacy—the sole test to determine whether a government action was a search when the case was decided.[143] However, by applying the *Jones* trespass test, "the destruction of only a 'trace amount' of private proper-

131. United States v. Jones, 565 U.S. 400, 404–05 (2012); *see also* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 87–91 (2013).

132. *See Jones*, 565 U.S. at 404–05.

133. *Id.*

134. *Id.* at 406.

135. *See id.*

136. *Id.* at 408 n.5.

137. *See id.* at 405 ("[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.").

138. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining the subjective expectation of privacy and the objective expectation of privacy).

139. *Jones*, 565 U.S. at 406.

140. *See id.* at 409 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

141. *See* United States v. Ackerman, 831 F.3d 1292, 1307 (10th Cir. 2016) (noting that *Jacobsen* has an "uncertain status" after *Jones*).

142. United States v. Jacobsen, 466 U.S. 109, 123, 125–26 (1984).

143. *Id.* at 122. However, Justice Scalia most likely would have disagreed. *See Jones*, 565 U.S. at 409.

ty" may now be considered a trespass-to-chattels.[144] In fact, even though the defendant's reasonable expectation of privacy was exhausted when the FedEx employees initially opened the package, the government agents' replicated search of the package in *Jacobsen* would be considered a trespass under *Jones*. Under such a theory, the outcome in *Jacobsen* would have been different because destroying the trace amount of powder would have constituted a trespass and, therefore, a search for Fourth Amendment purposes. Ultimately, the property interests protected under *Jones* are more robust than the privacy interests protected under *Jacobsen* because a person's property rights are not eroded when a private party searches (i.e., trespasses) the property. Indeed, a prior private search is completely irrelevant to the *Jones* trespass inquiry.

In the context of computer searches, the private search doctrine's continuing role after *Jones* is questionable. Consider the following fact pattern. Suppose a private party accesses a defendant's computer while the defendant is away at work and uncovers incriminating files. The private party notifies the police, and a police officer arrives at the defendant's residence. The police officer asks the private party to recreate the search that the private party previously conducted so that the officer could view the incriminating files. Because the private party is now an actor under the direction of a police officer, the moment the private party physically touches the computer to begin recreating the prior search is arguably a trespass under *Jones*. Admittedly, under such a broad definition of trespass,[145] it is hard to imagine a scenario where the government's recreation of a prior private search of a computer does not amount to a trespass under *Jones*.

Although *Jones* does not explicitly overrule *Jacobsen*, it does limit the applicability of the private search doctrine to *Katz*-based reasonable-expectation-of-privacy searches.[146] As the *Jones* Court articulated, "Fourth Amendment rights do not rise or fall with the *Katz* formulation."[147] In brief, current Fourth Amendment jurisprudence now has two independent inquiries regarding the definition of a search. Under *Katz*, the sole question is whether the government action invaded an individual's reasonable expectation of privacy.[148] Under *Jones*, the inquiry is whether the government action constitutes a trespass on a constitutionally protected area for the purpose of gathering information.[149] As a result, cases involving government actions that did not constitute a search under *Katz* and *Jacobsen* may have constituted a search under *Jones*. With this

144. *Ackerman*, 831 F.3d at 1307–08.

145. *See Jones*, 565 U.S. at 425 (Alito, J., concurring) ("But under the Court's reasoning, [trivial contact with personal property] may violate the Fourth Amendment.").

146. *Id.* at 407–09 (noting that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test") (majority opinion).

147. *Id.* at 406.

148. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J. concurring).

149. *Jones*, 565 U.S. at 406–07.

background, the U.S. Court of Appeals for the Tenth Circuit decided *United States v. Ackerman.*

II. *UNITED STATES V. ACKERMAN*

A. Facts

AOL, Inc., implements "an automated filter designed to thwart the transmission of child pornography."[150] This image detection filtering process (IDFP) scans images sent, saved, or forwarded from an AOL email account.[151] Additionally, AOL possesses a database of hundreds of thousands of hash values corresponding to pictures meeting the definition of child sexual images.[152] A hash value is "a short string of characters generated from a much larger string of data (say, an electronic image) using an algorithm—and calculated in a way that makes it highly unlikely another set of data will produce the same value."[153] AOL's IDFP compares the images scanned from emails with the images in the database.[154] If a hash value match is detected, AOL captures the email and prevents the message from sending.[155] AOL also deactivates the user's email account and, pursuant to statutory requirement,[156] forwards the email with its attachments to the National Center for Missing and Exploited Children (NCMEC) through a tool called the CyberTipline.[157]

CyberTipline was launched in 1998 as a way for online users, members of the public, and internet service providers to report suspected child sexual exploitation.[158] Reports can be made online or through the hotline number.[159] Once a report is made with the NCMEC, an analyst opens the file to determine if it meets the definition of child sexual abuse images.[160] NCMEC then utilizes the internet protocol (IP) address and email address of the user to determine the geographic location of the user.[161] NCMEC then alerts law enforcement agents in that geographic area.[162]

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150. United States v. Ackerman, 831 F.3d 1292, 1294 (2016).
151. United States v. Ackerman, No. 13-10176-01-EFM, 2014 WL 2968164, at *1–2 (D. Kan. July 1, 2014), *rev'd*, 831 F.3d 1292, 1292 (10th Cir. 2016).
152. *Id.*
153. *Ackerman*, 831 F.3d at 1294; *see also* Richard P. Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 HARV. L. REV. 38, 38–40 (2005).
154. *Ackerman*, 2014 WL 2968164 at *2.
155. *Id.*
156. 18 U.S.C. § 2258A(h)(4) (2012); 42 U.S.C. § 5773(b)(P)–(Q) (2012).
157. *Ackerman*, 831 F.3d at 1294.
158. *CyberTipline*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., http://www.missingkids.org/cybertipline (last visited Mar. 30, 2017).
159. *Id.*
160. *See Ackerman*, 831 F.3d at 1294.
161. *See id.*
162. *See id.*

On April 22, 2013, AOL's IDFP detected a hash value match on one of defendant Ackerman's four outgoing email attachments.[163] The aforementioned process was triggered.[164] AOL forwarded a report to NCMEC with the four attached images.[165] An NCMEC analyst opened the email along with all four of the attachments.[166] No warrant was obtained by NCMEC.[167] NCMEC confirmed that all four images met the definition of child pornography and determined that the defendant's location was Kansas.[168] NCMEC then alerted law enforcement agents in the area, and a special agent obtained a warrant to search Ackerman's residence while Ackerman was at work, finding "multiple digital items that revealed the presence of child pornography."[169] A federal grand jury then indicted Mr. Ackerman on charges of possession and distribution of child pornography.[170]

B. Procedural History

The U.S. District Court for the District of Kansas rejected Ackerman's argument that the email and its attachments were "obtained through an illegal search and seizure"[171] and, therefore, denied Ackerman's motion to suppress the evidence.[172] The district court specifically rejected Ackerman's arguments to employ a three-part test from the First Circuit[173] and instead relied on the test the Tenth Circuit articulated in *United States v. Souza*[174]: "A search by a private person becomes a government search if the government coerces, dominates, or directs the actions of a private person conducting the search."[175] "To determine whether a search by a private person becomes a government search, there is a two-part inquiry: '1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.'"[176]

Because a law enforcement agent was not present when NCMEC conducted its search, the district court found that a law enforcement

163. United States v. Ackerman, No. 13–10176–01–EFM, 2014 WL 2968164, at *3 (D. Kan. July 1, 2014), *rev'd*, 831 F.3d 1292, 1292 (10th Cir. 2016).
164. *Ackerman*, 831 F.3d at 1294.
165. *Id.*
166. *Id.*
167. *Id.* at 1294–95.
168. *Id.* at 1294.
169. *Ackerman*, 2014 WL 2968164, at *4 (D. Kan. July 1, 2014), *rev'd*, 831 F.3d 1292, 1292 (10th Cir. 2016).
170. *Id.*
171. *Id.*
172. *Id.* at *10.
173. *Id.* at *6–7 (citing United States v. Keith, 980 F. Supp. 2d 33, 40 (D. Mass. 2013)).
174. United States v. Souza, 223 F.3d 1197 (10th Cir. 2000).
175. *Ackerman*, 2014 WL 2968164 at *5, *7 (citing *id.* at 1201).
176. *Id.* at *5 (quoting *Souza*, 223 F.3d at 1201).

agent did not direct NCMEC.[177] Furthermore, the district court held that NCMEC is a private, non-profit corporation.[178] Alternatively, the district court held that even if NCMEC was considered a government actor, NCMEC did not exceed the scope of AOL's initial search "in such a way that would be constitutionally significant."[179]

Two questions were on appeal to the Tenth Circuit.[180] First, "[D]oes NCMEC qualify as a governmental entity or agent?"[181] Second, if NCMEC does qualify as a governmental entity or agent, "did NCMEC simply repeat or did it exceed the scope of AOL's investigation?"[182]

C. Tenth Circuit Opinion

The U.S. Court of Appeals for the Tenth Circuit disagreed with the district court on both counts.[183] In the first section of the opinion, the Tenth Circuit concluded that NCMEC qualifies as the government for Fourth Amendment purposes.[184] Judge Gorsuch, writing for the court, relied on NCMEC's two authorizing statutes[185] and recent Supreme Court decisions[186] to support this argument.

Even if the Tenth Circuit was wrong in determining that NCMEC is a governmental entity, the court held that NCMEC acted as an agent for the government in this particular case.[187] Judge Gorsuch returned to the Tenth Circuit's two-part inquiry under *Souza*[188] but concluded that regardless of which circuit court test is applied, "it's hard to see how we could avoid deeming NCMEC the government's agent in this case."[189]

In the third part of the opinion, the Tenth Circuit held that if NCMEC is considered a government entity or agent, its actions still implicated the Fourth Amendment, specifically because the actions did not fall within the scope of the private search doctrine.[190] Judge Gorsuch initially pointed out that "[n]o one in this appeal disputes that email is a 'paper' or 'effect' for Fourth Amendment purposes, a form of communication capable of storing all sorts of private and personal details, from correspondence to images, video or audio files, and so much more."[191] However, because the district court assumed that Mr. Ackerman had a

177. *Id.* at *7, *10.
178. *Id.* at *8.
179. *Id.* at *8, *10.
180. United States v. Ackerman, 831 F.3d 1292, 1294–95 (2016).
181. *Id.* at 1295.
182. *Id.*
183. *Id.*
184. *Id.* at 1299.
185. *Id.* at 1296–97.
186. *Id.* at 1297–98 (drawing comparisons between NCMEC and Amtrak).
187. *Id.* at 1300–04.
188. United States v. Souza, 223 F.3d 1197, 1201 (10th Cir. 2000).
189. *Ackerman*, 831 F.3d at 1301–02.
190. *Id.* at 1304–08.
191. *Id.* at 1304.

reasonable expectation of privacy and decided to not analyze the Supreme Court's so-called "third-party doctrine,"[192] the Tenth Circuit declined to reach the broad issue of whether emails are protected under the Fourth Amendment.[193]

Nevertheless, the government argued on appeal that the private search doctrine compelled a ruling in its favor.[194] The Tenth Circuit rejected this argument, noting that "AOL never opened the email itself."[195] AOL only scanned the email and images, found a positive hash-value comparison on one of the attachments with its internal database, and forwarded the email and attachments to NCMEC.[196] Applying *Jacobsen*'s private search doctrine, the Tenth Circuit acknowledged that there was no virtual certainty that the email itself and the other three attachments contained child pornography.[197] "Indeed, when NCMEC opened Mr. Ackerman's email it could have learned any number of private and protected facts . . . ."[198] Because NCMEC's search "could have revealed something previously unknown about noncontraband items," a Fourth Amendment search exceeding the scope of the initial search took place.[199]

In Section B of the third part of the opinion, the Tenth Circuit reached the same conclusion regarding the private search doctrine, but under a different line of reasoning: the *United States v. Jones* trespass test.[200] Section B of the third part of this opinion, which was joined only by Judge Phillips and not Judge Hartz,[201] concluded that when NCMEC opened Ackerman's email message it constituted a physical intrusion or trespass into Ackerman's papers or effects under the *Jones* trespass test.[202] Not only did Judge Gorsuch call into question the continuing viability of *United States v. Jacobsen*,[203] but he also noted that "many courts have already applied the common law's ancient trespass to chattels doctrine to electronic . . . communications."[204] Simply stated, regardless of whether the court applies the *Jacobsen* and *Katz* reasonable-expectation-of-privacy standard or the *Jones* trespass-to-chattels test,

192. *Id.* at 1304–05.
193. *Id.*
194. *Id.* at 1305.
195. *Id.* at 1305–06.
196. *Id.* at 1306.
197. *Id.* at 1305–06.
198. *Id.* at 1306.
199. *Id.*
200. *Ackerman*, 831 F.3d at 1307–08.
201. *Id.* at 1294.
202. *Id.* at 1307–08.
203. *Id.* at 1307.
204. *Id.* at 1308 (citing eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1063, 1069–70 (N.D. Cal. 2000); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1019, 1027 (S.D. Ohio 1997); Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1565–67 (1996)).

the result is the same: "NCMEC conducted a 'search' when it opened and examined Mr. Ackerman's email."[205]

III. ANALYSIS

A. Ackerman's *Alternative Holding is Binding*

Briefly, Section B of the third part of the opinion is important not only for its "puzzling" and "far-reaching implications"[206] with regard to the *Jones* trespass test and the viability of *Jacobsen* and *Katz*,[207] but also because this section serves as an "alternative holding."[208] Alternative holdings are binding on the Tenth Circuit,[209] which means that the application of the *Jones* trespass test is no longer limited to what is generally considered physical and tangible property.[210]

B. *The* Jones *Trespass Test Applies to "Virtual"*[211] *Property*

United States v. Jones produced significant uncertainty among legal scholars regarding exactly what kind of test it creates.[212] The first Supreme Court case applying the *Jones* trespass test after *Jones* itself was *Florida v. Jardines*.[213] With Justice Scalia writing for the majority, the Court found that when the police officers were gathering information in the "curtilage of the house," they physically entered and intruded into a constitutionally protected area.[214] Some scholars have suggested that after *Jardines* the *Jones* trespass test only applies to the physical intru-

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205. *Id.*

206. *See* Orin Kerr, *Tenth Circuit: Accessing Email is a 'Search' Under the* Jones *Trespass Test*, WASH. POST (Aug. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/09/tenth-circuit-accessing-email-is-a-search-under-the-jones-trespass-test.

207. *See* discussion *supra* Section I.C and discussion *infra* Section III.B.

208. *See* Chinua Asuzu, JUDICIAL WRITING: A BENCHMARK FOR THE BENCH 134 (2016) ("Alternative holdings are separate and independent grounds for a decision.").

209. *See* Surefoot LC v. Sure Foot Corp., 531 F.3d 1236, 1243 (10th Cir. 2008) ("Alternative rationales such as this, providing as they do further grounds for the Court's disposition, ordinarily cannot be written off as *dicta*.").

210. United States v. Jones, 565 U.S. 400, 405 (2012) ("It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a *physical intrusion* would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." (citing Entick v. Carrington (1765) 95 Eng. Rep. 807 (K.B.)) (emphasis added). Even though the property is not limited to only physical and tangible assets, the trespass itself must be physical per *Jones*.

211. From a physics perspective, there is no such thing as "virtual" objects. All "virtual" electronic data is tangible because it exists in computer memory in the form of magnetic particles (i.e., electrons). *See, e.g.*, C. Claiborne Ray, *The Weight of Memory*, N.Y. TIMES (Oct. 24, 2011), http://www.nytimes.com/2011/10/25/science/25qna.html.

212. *See* Kerr, *supra* note 131, at 90–93; *see also* Marc J. Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 26–32 (2013); *see also* Susan Freiwald, The Four Factor Test (2013) (unpublished manuscript) (on file with the University of San Francisco); *see also* US v. Jones, *From Jones to Drones: How to Define Fourth Amendment Doctrine for Searches in Public*, YOUTUBE (June 24, 2012), https://www.youtube.com/watch?v=_pGCWZGdq08.

213. 133 S. Ct. 1409 (2013).

214. *Id.* at 1414.

sion of property, not virtual property.[215] However, if courts define electronic communications, such as emails and text messages, as an individual's papers or effects under the Fourth Amendment,[216] then a police officer who intrudes into those spaces without a warrant is intruding into a constitutionally protected area. Simply because emails, text messages, and other electronic forms of communications are not physically tangible in the sense that an individual cannot physically touch or hold them—absent printing the electronic communications on physical paper—does not mean that such electronic communications lack the necessary "physical" aspect of the *Jones* trespass test. For a computer, most electronic data is physically stored on a hard disk drive.[217] A traditional hard disk drive is a physical and tangible object comprised of a spinning disk or disks with magnetic coatings and heads that can read or write magnetic information.[218] These read-write heads[219] record binary numbers as a series of tiny physical areas on the disc that are magnetized either north or south (i.e., 0's and 1's).[220] "As the disk spins, a laser is either reflected or not reflected by a series of tiny mirrored sections on the disk."[221] Alternatively, a more modern solid-state drive (SSD) does not rely on moving parts or spinning disks, but instead relies on flash memory.[222] A charged electron corresponds to a "0," whereas an uncharged electron corresponds to a "1" in bit code.[223] Electrons are physical atoms that have mass.[224] Thus, when the government accesses electronic data, it physically intrudes on papers or effects under the Fourth Amendment because the government is obtaining information by physically extracting

215. *See* Orin Kerr, *What is the State of the* Jones *Trespass Test After* Florida v. Jardines*?*, VOLOKH CONSPIRACY (March 27, 2013, 2:56 AM), http://volokh.com/2013/03/27/what-is-the-state-of-the-jones-trespass-test-after-florida-v-jardines/ ("[P]erhaps the *Jones* test is not about the technicalities of trespass doctrine but rather about physical intrusion into property.").

216. *See* United States v. Ackerman, 831 F.3d 1292, 1307–08 (2016).

217. ANDREW S. TANENBAUM & HERBERT BOS, MODERN OPERATING SYSTEMS 281, 300 (4th ed. 2015) ("File systems are stored on disks.").

218. *Hard Disk*, PC MAG.: ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/44079/hard-disk (last visited Mar. 30, 2017).

219. *Read/Write Head*, PC MAG.: ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/50247/read-write-head (last visited Mar. 30, 2017).

220. *See id.*; *see also* Timothy Smithee, *How is Data Stored in a Computer?*, TECHWALLA, https://www.techwalla.com/articles/how-is-data-stored-in-a-computer (last visited Mar. 30, 2017); *see also* JAMES R. PARKER, PYTHON: AN INTRODUCTION TO PROGRAMMING Ch. 5 (Mercury Learning & Information, 2016) ("Magnets have two orientations; they have a North Pole and a South Pole. Current flowing one way will create a magnet in the disk that has a North Pole appearing before the South Pole, or an N-S mark. Current flowing the other direction through the head will create a magnet on the disk that has the South Pole appearing before the North Pole, or an S-N mark. One orientation, say N-S, will represent a binary number '1,' and the other (S-N) will represent a '0.' In this way, binary numbers can be written to the surface of the moving disk.").

221. *See id.*

222. Joel Hruska, *How Do SSDs Work?*, EXTREMETECH (May 3, 2017, 3:23 AM), https://www.extremetech.com/extreme/210492-extremetech-explains-how-do-ssds-work.

223. *Id.*

224. 1 electron = 9 x 10^{-31} kg. *Fundamental Physical Constants*, NIST REFERENCE ON CONSTANTS, UNITS, AND UNCERTAINTY, http://physics.nist.gov/cgi-bin/cuu/Value?me (last visited Mar. 30, 2017).

the binary data that is physically encoded onto a physical hard disk drive with magnetic coatings or electrons.

The U.S. Court of Appeals for the Seventh Circuit recently elaborated upon the *Jones* trespass test by establishing a two-part inquiry[225]: Triggering a *Jones* trespass requires (1) confirming "possession of the property in question" and (2) establishing "the ability to exclude others from entrance onto or interference with that property."[226] In the context of electronic data, the first step of the Seventh Circuit's inquiry poses an initial problem: if an individual's data is accessed on a government hard disk drive (e.g., a private party sends the data to the government on its own volition), who has possession of the property? By adhering to the aforementioned principles regarding the physical nature of electronic data, this problem is solved by recognizing property rights within data itself. Not only does this solution comport with the first step of the Seventh Circuit's inquiry, but it also agrees with the physical characteristics of the *Jones* test. An individual's copied data on a government-owned hard disk drive is still property of the individual under the data-rights theory. Furthermore, even if a court disregarded the physical properties of electronic data, such an interpretation does not vex the *Jones* test because accessing the data (i.e., the "property") still requires entrance into a physical space, such as a physical hard disk drive, random access memory (RAM), solid state drive, or memory chip commonly found in USB keys, SD cards, MP3 players, and cell phones.[227] Accessing data will always require physical intrusion into a physical space, regardless of how physically small that space may be.[228]

The second step in the Seventh Circuit's inquiry is easily satisfied in the context of electronic data. For example, a closed laptop computer would satisfy the second step because it is closed for the purpose of excluding others from opening the laptop and accessing the data therein. More robust examples of excluding others "from entrance onto or interference with" data include standard login passwords, two-factor authentication protocols,[229] fingerprint recognition, and verification codes.[230]

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225. United States v. Sweeney, 821 F.3d 893, 900 (7th Cir. 2016).

226. *Id.*

227. *See supra* text accompanying notes 217–30.

228. *See Magnetic Storage*, PC MAG.: ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/46497/magnetic-storage (last visited Mar. 13, 2017) ("In the digital world, information is recorded by writing tiny spots (bits) of negative or positive polarity on tapes and disks.").

229. *See Two-Factor Authentication*, PC MAG.: ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/53279/two-factor-authentication (last visited Mar. 30, 2017).

230. *See* Eric Griffith, *Two-Factor Authentication: Who Has It and How to Set It Up*, PC MAG. (Mar. 10, 2017), http://www.pcmag.com/article2/0,2817,2456400,00.asp.

In short, the *Jones* trespass-to-chattels standard[231] is not hindered when applied to virtual property because (1) electronic data is stored in physical spaces; (2) electronic data is only accessed by intruding into the physical area where the electronic data is stored; and (3) electronic data commands a physical property right within itself.

C. Applying Jones *to* Ackerman

Returning to *Ackerman*, Judge Gorsuch failed to explain why the elements of the *Jones* trespass-to-chattels tort were satisfied in this particular case.[232] Rather, he simply relied on an analogy between the ordinary postal system and email, assuming that the analogy speaks for itself.[233] Although email and regular mail are analogous,[234] the details of why the elements of trespass are satisfied in this case should be clarified. First, the test articulated by the Tenth Circuit states "that government conduct can constitute a Fourth Amendment search . . . when it involves a physical intrusion (a trespass) on a constitutionally protected space or thing ('persons, houses, papers, and effects') for the purpose of obtaining information."[235] Applying this standard to the facts and drawing from the aforementioned reasoning in Section B, Ackerman possessed a physical property right within the data of the email itself. Thus, although AOL copied the email with all of its data and forwarded it to NCMEC, Ackerman's property right in the data still existed. Furthermore, even though NCMEC supposedly stored Ackerman's email on its own physical storage device(s), Ackerman still retained a physical property right in the data itself. Next, NCMEC's act of opening Ackerman's email and thereby exposing his electronic data constituted a physical intrusion into a constitutionally protected space or thing, namely papers and effects. As previously mentioned, the act of opening electronic data requires a physical intrusion into a physical space on a physical memory device.[236] Thus, (1) possession of the property is established by finding a property right within the data itself, and (2) physical intrusion into that property is established by the act of impermissibly opening the email file that resides on a physical memory device containing the data, regardless if the suspect has physical possession of that particular memory device.

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231. United States v. Jones, 556 U.S. 400, 404–07 (2012).

232. *See* United States v. Ackerman, 831 F.3d 1292, 1307–08 (10th Cir. 2016).

233. *Id.* at 1308 ("[A] more obvious analogy from principle to new technology is hard to imagine . . . .").

234. *See* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1023 (2010).

235. *Ackerman*, 831 F.3d at 1307.

236. *See supra* text accompanying notes 217–30.

D. The File Approach and the Reasonable Expectation of Privacy

The majority of data located on a computer or other electronic device resides in a structure called a "filesystem."[237] A filesystem simply describes the way in which files are named and where they are placed logically for storage and retrieval among the hard disk drive, RAM, and external memory devices.[238] A file is simply a collection of data or information and serves as a computer's primary storage unit.[239] With this technical backdrop in mind, a simple framework for determining a person's reasonable expectation of privacy can be derived: When a file is opened on a computer, no reasonable expectation of privacy exists with regard to that opened file; when a file is closed on a computer, a reasonable expectation of privacy attaches with regard to that closed file. The file approach adequately comports with the reasonable expectation of privacy doctrine.

In the context of physical and tangible searches, a house is searched when a government agent enters it,[240] and a package is searched when a government agent opens it.[241] Individuals should have a reasonable expectation of privacy in their personal files just as individuals have a reasonable expectation of privacy in their home and packages. A person's data in a file is his or her private property and should be treated no differently than other privately sealed containers.[242] Since a person has a reasonable expectation of privacy in the contents of the container,[243] opening the container and seeing the contents constitutes a distinct Fourth Amendment search and violates the reasonable expectation of privacy. Applying these same foundational principles to computers, a closed file is analogous to a closed container, whereas an opened file is analogous to an opened container. Similarly, the act of double-clicking to open a previously unopened file is analogous to the act of physically opening a closed container. As demonstrated, the file approach accurately corresponds to the physical world notions of Fourth Amendment searches. "A computer is akin to a virtual warehouse of private information,"[244] and accordingly, a single file stored in a computer's hard drive is akin to a single container or box stored inside the warehouse. There is no reasonable expectation of privacy in an already-opened con-

237. TANENBAUM, *supra* note 217, at 264.
238. *Id.* at 42, 264.
239. *Id.* at 264.
240. *See* Wilson v. Layne, 526 U.S. 603, 610 (1999).
241. *See* United States v. Ross, 456 U.S. 798, 822–23 (1982).
242. *See* United States v. Blas, No. 90-CR-162, 1990 WL 265179, at *21 (E.D. Wis. Dec. 4, 1990) ("[A]n individual has the same expectation of privacy in a pager, computer or other electronic data storage and retrieval device as in a closed container . . . .").
243. *Id.*
244. Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 551–52 (2005).

tainer just as there should be no reasonable expectation of privacy in an already-opened file.

Alternative methodologies to the file approach yield imbalanced results. For example, consider the physical device approach, which states that once a single file has been searched on an electronic device, the entire electronic device no longer commands a reasonable expectation of privacy.[245] In the age of cloud technology and remote servers, a group of physical storage devices in a data warehouse can house files belonging to hundreds of millions of individuals.[246] Thus, absurd outcomes would be inevitable if looking at one file on a remote server meant that the entire server had been searched, and therefore, the government could analyze all the files stored on that server, allowing unrestricted access to potentially millions of documents belonging to other people. Such a problem is also compounded by the current debate as to whether cloud-based data even deserves Fourth Amendment protections initially.[247] As suggested in *Ackerman*[248] and previously proposed in Section C,[249] the Fourth Amendment should track the individual's data, not the physical device where the data is stored.

Although not as obvious as the physical device approach, concerns also exist with the human observation approach.[250] The human observation approach advocates that the scope of a computer search should be limited to "whatever information appears on the output device."[251] "Under this approach, scrolling down a word processing file to see parts of the file that were previously hidden is a distinct search of the rest of the file."[252] However, this would imply that the zone of a computer search could be oddly defined, for example, by the "zoom" tool for a document. Zooming out of the document would allow more pages of the document to be displayed on the screen, whereas zooming in to the document would allow less pages to be displayed. Similarly, the human observation standard yields odd results regarding pixilated images. A person could easily enhance a blurry image displayed on a screen by adjusting the image size (e.g., increasing screen resolution or pixel volume).[253] In both examples, the human observation standard is uncertain. In the document

245. *See supra* text accompanying notes 25–26, 127.

246. *See, e.g.*, Drew & Arash, *Celebrating Half a Billion Users*, DROPBOX BLOG (Mar. 7, 2016), https://blogs.dropbox.com/dropbox/2016/03/500-million.

247. *See* Aaron J. Gold, *Obscured by Clouds: The Fourth Amendment and Searching Cloud Storage Accounts Through Locally Installed Software*, 56 WM. & MARY L. REV. 2321, 2325 (2015); *see also* Ryan Watzel, Riley*'s Implications for Fourth Amendment Protection in the Cloud*, 124 YALE L.J.F. 73, 73–74 (2014).

248. *See supra* text accompanying notes 183–205.

249. *See supra* text accompanying notes 232–36.

250. *See* Kerr, *supra* note 244, at 556.

251. *Id.*

252. *Id.* at 556–57.

253. A similar issue arises when considering thumbnail images because thumbnails are usually smaller and less clear than full images. *See, e.g.*, *Lichtenberger II*, 786 F.3d 478, 480–81 (6th Cir. 2015) (addressing thumbnails, which are smaller versions of the file's images).

example, the government technically "observed" the document, but the extent of the observation was tied to the "zoom" tool. In the picture example, the government technically "observed" the picture, but the extent of the observation was tied to the resolution of the image. Such ambiguities will likely spawn unnecessary obstacles during litigation.

The best definition for the zone of a computer search is the file. As previously stated, individuals should have a reasonable expectation of privacy in their personal files. Using a file as the zone of a computer search eliminates several of the complications that accompany both the physical device approach and the human observation approach. Most importantly, the file approach comports with the reasonable expectation of privacy doctrine and is easy to apply: When a file is opened on a computer, no reasonable expectation of privacy exists with regard to that opened file; when a file is closed on a computer, a reasonable expectation of privacy attaches with regard to that closed file.

E. The File Approach and Trespass

When a file is opened on a computer, a series of complicated physical steps occur.[254] First, the filesystem code is invoked to read raw bytes from the disk and interprets those byte patterns as a tree of files and directories.[255] The filesystem then translates a user instruction such as "Open file X" into individual machine-readable input/output instructions.[256] The input/output instructions use the built-in capabilities of the processor chip[257] and the motherboard controller[258] to send and receive electrical signals on a wire going to the physical drive. On the other end of this wire, the disk's firmware[259] interprets the electrical signals and then accesses the physical data through methods such as spinning the platters[260] and moving the magnetic heads or reading a flash ROM cell.[261] The method necessary to access the desired data depends on the type of storage device housing the data.[262] Notwithstanding the type of storage device housing the data or where the data is located on that storage device, in order to access any type of data, a device must always execute physical actions of sending and receiving electrical signals.

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254. TANENBAUM, *supra* note 217, at 288.

255. *See id.*

256. *See id.* ("machine-readable" meaning bit code (i.e., 0's and 1's)).

257. *Id.* at 21 (describing the central processing unit as the "brain" of the computer).

258. *Id.* at 34 (motherboard contains low-level input/output software, "including procedures to read the keyboard, write to the screen, and do disk I/O, among other things").

259. *Id.* at 893 (software that is loaded on PCs by the manufacturer and "persists in memory").

260. *Id.* at 27 ("A disk consists of one or more metal platters that rotate at 5400, 7200, 10,800 RPM or more.").

261. *Flash Memory*, PC MAG.: ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/43272/flash-memory (last visited Mar. 30, 2017) (defining "flash memory" and noting their replacement of spinning platters).

262. *See* TANENBAUM, *supra* note 217, at 1025.

By using this technical foundation and recognizing a unique property right within data itself, a trespass of an electronic device should be defined by opening a file rather than broadly defined as any physical manipulation of the device (e.g., merely touching the device would constitute a trespass under *Jones*). Adopting this narrower definition of trespass produces two clear benefits. First, the private search doctrine as applied to computers can be preserved. A police officer who recreates the exact prior private search is no longer hindered by the "trivial"[263] nuances of physically touching a computer that would otherwise constitute a trespass under *Jones*.[264] Specifically, a police officer would be allowed to touch, scroll, and click on a computer during the recreation of the prior private search without triggering a trespass, as long as new files that were previously closed during the prior search are not opened.

Secondly, by focusing on the file as opposed to the physical device, a trespass can now occur even if the suspect's data is not accessed on the suspect's computer. Consider *Ackerman*: If a trespass was defined as a physical intrusion on the physical device, then the government's access of Ackerman's email would not technically be a trespass because AOL captured the email and forwarded that data to NCMEC.[265] NCMEC did not obtain a warrant to search through Ackerman's data,[266] but nonetheless, under a definition of trespass that only focuses on physical intrusions of the physical device, NCMEC would not have triggered a unique Fourth Amendment search under the trespass-to-chattels definition because it did not access the data on Ackerman's physical device. Conversely, this problem is solved by couching the definition of trespass in the unit of a computer file. Regardless of where the data was accessed, a trespass occurred the moment NCMEC opened Ackerman's files without a warrant.[267] The "chattel" that is trespassed is the data, not the electronic device where the data is stored.

A main critique of the file approach is that "much information stored on a computer does not appear in a file."[268] This is a baseless concern because the information on a computer that is technically not stored in a file *per se* is stored physically in magnetic strings of 0's and 1's on a disk.[269] In other words, the information not stored in a file cannot be read by humans without first converting that information into a file of some sort. Moreover, by adopting a broad definition of file,[270] a coherent ar-

263. *See* United States v. Jones, 565 U.S. 400, 425 (2012) (Alito, J., concurring) ("But under the Court's reasoning, [trivial contact with personal property] may violate the Fourth Amendment.").
264. *Id.* at 424–25 (Alito, J., concurring).
265. *See supra* text accompanying notes 150–70.
266. *See supra* text accompanying notes 150–70.
267. *See supra* text accompanying notes 150–70.
268. Kerr, *supra* note 244, at 557.
269. *See supra* text accompanying notes 217–30.
270. *See supra* text accompanying note 246.

gument could be made that the collection of physical information stored on a disk is still considered a file.

The Fourth Amendment trespass-to-chattels search doctrine as applied to electronic devices should be defined by files and not physical devices. A file is directly analogous to real property because the file structure itself represents the "fence" of the property, and the data contained within the file represents the land and other possessions contained within the fence. The conceptual framework is simple: opening a file is akin to crossing the fence of real property.[271]

F. The File Approach in Practice

Another reason for adopting the file approach is that the actions of opening and closing a file trigger clear physical movements within the hard drive of a computer that are corroborated by timestamp metadata.[272] When an analyst takes a mouse, clicks, and scrolls down the file to see parts of the file not previously exposed, no other files or information contained outside of the already-opened file are copied to the RAM,[273] and the standard metadata in the file is not altered.[274] Thus, maintaining the integrity of the human observation standard becomes problematic because few alternative sources of evidence exist to prove whether an analyst "scrolled through" or "zoomed in on" a document or image, especially without some type of "saved state" operation.[275] Additionally, adhering to a physical-device-based definition of trespass is also problematic because few alternative sources of evidence exist to prove whether or not an analyst touched a computer, opened a laptop, and scrolled through a document. Fortunately, the file approach is supplemented by several accountability mechanisms built-in to most electronic devices.[276] For example, a timestamp is recorded when a file is opened or

271. *See, e.g.*, *Lichtenberger II*, 786 F.3d 478, 480–81 (6th Cir. 2015) (illustrating that the act of clicking on a thumbnail to open the file constitutes a distinct search); *see also* United States v. Sparks, 806 F.3d 1323, 1330–31 (11th Cir. 2015) (concluding that an officer opening a previously unopened file is a distinct search).

272. TANENBAUM , *supra* note 217, at 956 ("The standard information field contains the file owner, security information, the timestamps needed . . . .").

273. *Id.* at 433 ("To scroll a window, the CPU (or controller) must move all the lines of text upward by copying their bits from one part of the video RAM to another.").

274. *See id.* at 271 (explaining that standard metadata attributes do not include state information).

275. *Id.* at 829 (describing the Android OS that provides a "saved state" operation and explaining that "[t]he saved state for an activity is generally small, containing for example where you are scrolled in an email message, but not the message itself, which will be stored elsewhere by the application in its persistent storage").

276. *See, e.g.*, Whitson Gordon, *How to Find Out if Someone's Secretly Been Using Your Computer*, LIFEHACKER (Jan. 5, 2012, 4:30 PM), http://lifehacker.com/5873538/how-to-find-out-if-someones-secretly-been-using-your-computer; *see also* Matthew Panzarino, *Paranoid? Here's How to Tell if Anyone Has Opened Your MacBook While You're Away*, NEXT WEB (Jan. 3, 2012), https://thenextweb.com/apple/2012/01/04/paranoid-heres-how-to-tell-if-anyone-has-opened-your-macbook-while-youre-away.

closed.[277] When a file is saved and closed, it is stored to a specific partition on the hard drive disk, which alters the metadata in the file.[278] In short, an analyst who double clicks to open a file is doing something fundamentally different than an analyst who simply scrolls through an already-opened file. The former's actions are far more ascertainable and concrete, whereas the latter's actions will result in frivolous uncertainties that lack other means of authentication. Using the file as the unit of measurement to define a computer search is the superior approach.

Most importantly, lawyers will be able to more adequately advocate these issues on behalf of their clients. Because courts will be analyzing the open/close timestamps of files on a storage device,[279] discovery and introduction of evidence is straightforward. Although law enforcement officers may still be able to testify about what they "opened" or what they "saw" during the reconstructive search, more weight should be given to the more objective evidence located on the storage devices. Additionally, the file approach removes many of the abstract technicalities of computer functionality because lawyers, judges, and analysts will only be concerned with whether a particular file was "open" or "closed." Under a human observation approach of the reasonable expectation of privacy definition,[280] many cases would require the consultation of technical experts to attempt to reconstruct the exact portions of the file that were exposed on the screen, even if those portions of the files were captured for only a nanosecond and no metadata record of them was retained. Fortunately, equipped with the more well-defined file standard, judges will be able to more adequately render appropriate decisions under both the reasonable expectation of privacy doctrine[281] and the trespass-to-chattels doctrine.[282] A possible bright-line rule emerges from the file approach that comports with both definitions of a Fourth Amendment search: As established by a timestamp and metadata analysis, accessing a file that is already-opened is not a Fourth Amendment search. However, opening a previously-closed file triggers a unique Fourth Amendment search in the absence of a warrant.

CONCLUSION

As technology continues to rapidly evolve, more complications will inevitably arise regarding the Fourth Amendment's application to computers and other electronic devices. Within the last two decades, two

277. TANENBAUM, *supra* note 217, at 271 ("The various times keep track of when the file was created, most recently ac[]cessed, and most recently modified.").

278. *Id.* at 272–73 ("A disk is written in blocks, and closing a file forces writing of the file's last block . . . .").

279. *See infra* text accompanying note 286.

280. *See supra* text accompanying notes 250–53.

281. *See supra* text accompanying notes 237–53.

282. *See supra* text accompanying notes 254–73.

circuit courts have adopted a concerning physical device approach,[283] whereas three other circuit courts have adopted a more stringent file approach.[284] The deepening split among the federal circuit courts with regard to the private search doctrine's application to computers makes this issue ripe for Supreme Court review in the imminent future. Moreover, the re-emergence of the *Jones*[285] trespass test further confounds existing Fourth Amendment doctrine. Thus, once the opportunity arises, it is imperative for the Supreme Court to articulate a viable and consistent framework that is flexible enough to adapt to the ever-changing digital landscape.

The file approach is the most viable, consistent, and flexible framework with regard to Fourth Amendment computer searches. All programs and human-readable data on a computer are contained in a file, from Microsoft Word documents (.DOC files) to JPEG images (.JPG files) to executable applications (.EXE files).[286] In fact, the architectural underpinnings of computer storage are built upon the concept of a file system.[287] Unless the underlying hardware of electronic devices and computers abruptly departs from the foundational file and file system data structures, the file approach to Fourth Amendment computer searches will remain a clear and steadfast framework for generations to come.

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283. *See* United States v. Runyan, 275 F.3d 449, 463–464 (5th Cir. 2001); *see also* Rann v. Atchison, 689 F.3d 832, 837 (7th Cir. 2012).

284. *See Lichtenberger II*, 786 F.3d 478, 491 (6th Cir. 2015); *see also* United States v. Sparks, 806 F.3d 1323, 1335 (11th Cir. 2015); *see also* United States v. Ackerman, 831 F.3d 1292, 1304–08 (10th Cir. 2016).

285. United States v. Jones, 565 U.S. 400, 406–07 (2012).

286. TANENBAUM, *supra* note 217, at 4 (noting that all operating systems contain files in order to avoid "having to deal with the messy details of how the hardware actually works").

287. *Id.* at 41 ("Another key concept supported by virtually all operating systems is the file system.").

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