THE CONSTITUTIONAL PUZZLE OF HABEAS CORPUS
Edward A. Hartnett

[pages 251–291]

Abstract: The U.S. Constitution has always protected habeas corpus. Yet when we consider the Suspension Clause together with three other constitutional principles, we find a constitutional puzzle. Pursuant to the Madisonian Compromise, inferior federal courts are constitutionally optional. Under *Marbury v. Madison*, Congress cannot expand the Supreme Court’s original jurisdiction beyond the bounds of Article III. Pursuant to *Tarble’s Case*, state courts cannot issue writs of habeas corpus to determine the legality of federal custody. There would seem to be a violation of the Suspension Clause, however, if neither the inferior federal courts, the Supreme Court, nor the state courts could issue writs of habeas corpus. This Article suggests that the apparent conflict among these constitutional principles can be resolved by the power of individual Justices of the Supreme Court to issue writs of habeas corpus.

AUTHORIZATIONS FOR THE USE OF FORCE, INTERNATIONAL LAW, AND THE CHARMING BETSY CANON
Ingrid Brunk Wuerth

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Abstract: Although international law has figured prominently in many disputes around actions of the U.S. military, the precise relationship between international law and the President’s war powers has gone largely unexplored. This Article seeks to clarify one important aspect of that relationship: the role of international law in determining the scope of Congress’s general authorizations for the use of force. In the seminal case of *Hamdi v. Rumsfeld*, the plurality opinion used international law to interpret the authorization by Congress for the use of force, but did so without adequate attention to the content or interpretive function of international law. This Article identifies and defends a better approach: courts should presume that general authorizations for the use of force do not empower the President to violate international law. Such a presumption is consistent with long-standing tools of statutory interpretation reflected in the *Charming Betsy* canon, maximizes the presumed preferences of Congress, advances separation of powers values, and promotes normative values that favor the use of international law as an interpretive tool.
Notes

(UN)LAWFULLY BEAUTIFUL: THE LEGAL (DE)CONSTRUCTION OF FEMALE BEAUTY

Stacey S. Baron

[pages 359–389]

Abstract: Beautiful women are more revered, more desirable, and often times more employable than average-looking women. Despite an ever-increasing awareness of women’s issues today, little progress has been made to reverse the objectification of women’s bodies. This Note asserts that various courts are helping deconstruct the idea that beautiful women should receive preferential treatment in the workplace, simply because they are beautiful. This Note contends that the law progressively is challenging social assumptions that favor traditionally beautiful women by telling employers that they can no longer demand a certain level of female attractiveness in certain contexts. By deemphasizing the general importance of the female body, the law implicitly is doing women of all shapes and sizes, races and skin tones, a favor immeasurable by any scale.

LIKE FAMILY: RIGHTS OF NONMARRIED COHABITATIONAL PARTNERS IN LOSS OF CONSORTIUM ACTIONS

Alisha M. Carlile

[pages 391–421]

Abstract: The organization of family life in American society has changed dramatically in recent decades. Changing societal morals and increases in divorce rates mean that fewer households are organized around the traditional nuclear family model. Courts have struggled to understand and classify these alternative family arrangements, and most have denied recovery in actions for loss of consortium by nonmarried cohabitants. This Note argues that changes in related areas of law and in the loss of consortium doctrine itself indicate that nonmarried cohabitants should be allowed to recover. Specifically, judicial understanding of the purpose of loss of consortium recovery has shifted, and nonmarried cohabitants have been allowed to recover in closely analogous actions such as negligent infliction of emotional distress. This Note proposes adoption of a standard similar to the one employed in negligent infliction of emotional distress actions. Such a standard provides a framework to determine whether damage to a relationship is severe enough to be compensable, while still providing adequate safeguards to prevent a wave of frivolous suits.
Abstract: In 1990, Congress enacted the Americans with Disabilities Act (the “ADA”) to eradicate discrimination against individuals with disabilities. In 2001, in PGA Tour, Inc. v. Martin, the U.S. Supreme Court interpreted the ADA to prohibit a professional golf association from denying a golfer with a disability the use of a golf cart during competitions, despite a rule requiring all competitors to walk the course. The Martin decision has sparked questions regarding the application of the ADA, including its application to the initial academic eligibility requirements of the National Collegiate Athletic Association (the “NCAA”). This Note examines the impact of the Martin decision on future ADA claims challenging the validity of the NCAA’s initial eligibility requirements. Specifically, after examining pre-Martin ADA claims against both the NCAA and academic institutions and comparing two courts’ interpretations of Martin, this Note argues that in future cases challenging the NCAA’s initial eligibility requirements, courts should interpret Martin to provide the NCAA as much deference as courts continuously have granted to academic institutions.
THE CONSTITUTIONAL PUZZLE OF HABEAS CORPUS

EDWARD A. HARTNETT*

Abstract: The U.S. Constitution has always protected habeas corpus. Yet when we consider the Suspension Clause together with three other constitutional principles, we find a constitutional puzzle. Pursuant to the Madisonian Compromise, inferior federal courts are constitutionally optional. Under Marbury v. Madison, Congress cannot expand the Supreme Court’s original jurisdiction beyond the bounds of Article III. Pursuant to Tarble’s Case, state courts cannot issue writs of habeas corpus to determine the legality of federal custody. There would seem to be a violation of the Suspension Clause, however, if neither the inferior federal courts, the Supreme Court, nor the state courts could issue writs of habeas corpus. This Article suggests that the apparent conflict among these constitutional principles can be resolved by the power of individual Justices of the Supreme Court to issue writs of habeas corpus.

Introduction

Even before the U.S. Constitution was amended to add the Bill of Rights, it protected habeas corpus, insisting that the “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹ Yet when we consider the Suspension Clause together with three other constitutional principles, we find a constitutional puzzle. Pursuant to the Madisonian Compromise, inferior federal courts are constitutionally optional. Although the Constitution requires a Supreme Court, it grants Congress the authority to decide whether there shall be inferior federal courts.² In addition, under Marbury v. Madison, Congress cannot expand the Supreme Court’s original jurisdiction beyond the

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¹ U.S. Const. art. I, § 9.
² See U.S. Const. art. III, § 1 (stating that “[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”).
cases allocated to it by Article III. As a result, the vast majority of cases within the scope of federal jurisdiction under Article III cannot be heard by the Supreme Court unless those cases are brought originally in some other court. Apart from the rather small number of “Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,” the Supreme Court cannot hear a case unless that case first has been brought in some other court. Finally, pursuant to *Tarble’s Case*, state courts lack authority to issue writs of habeas corpus to determine the legality of federal custody. A person in federal custody cannot secure release by use of a writ of habeas corpus issued from a state court.

Can these four principles coexist? Consider a case in which an individual is taken into custody by the federal executive and desperately wants to challenge the legality of that detention in court. And suppose that Congress exercised its power under the Madisonian Compromise not to create (or to abolish) inferior federal courts. The detainee obviously could not seek a writ of habeas corpus from non-existent courts. If the detainee were to petition the Supreme Court for a writ of habeas corpus, the Court constitutionally would be obligated under *Marbury* to dismiss the petition as outside its limited original jurisdiction. If the detainee were to seek habeas relief from a state court, *Tarble’s Case* would require that court to dismiss the petition. As a result, the detainee would find that there is no court with jurisdiction in habeas corpus. That is, even though Congress, the Supreme Court, and the state court all acted in compliance with the Constitution, the detainee would have nowhere to obtain a writ of habeas corpus, and in effect, the privilege of the writ of habeas corpus would be suspended. Are these four constitutional principles in hopeless conflict?

Wrestling with this constitutional puzzle is not simply an exercise in constitutional aesthetics or intellectual tidiness. As Professor Lucas Powe recently has suggested, we may be headed for a new constitutional order:

Instead of welfare reform being the characteristic statute and whether Alabama can be sued for not accommodating its disabled employees being the characteristic constitutional ques-

\[^{3}5\text{ U.S. (1 Cranch) 137, 173–74 (1803).}\]
\[^{4}\text{U.S. Const. art. III, § 2.}\]
\[^{5}\text{80 U.S. (13 Wall.) 397, 411–12 (1872).}\]
\[^{6}\text{Id.}\]
\[^{7}\text{See 5 U.S. (1 Cranch) at 174.}\]
tion, the USA Patriot Act might become the paradigmatic statute, and the availability of habeas corpus to individuals held in federal custody without being criminally charged might become the paradigmatic constitutional issue.\footnote{8}

In the October 2003 Term, the Supreme Court decided three habeas cases challenging executive detention.\footnote{9} One of the most striking things about the three decisions, however, is how little they decided and how much they left to future decisions.\footnote{10} In these circumstances, it is important to attempt to solve the constitutional puzzle of habeas corpus.

It is possible that the puzzle simply cannot be solved. Perhaps these four constitutional principles are in hopeless conflict, and one of the

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\footnote{9}{See Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715 (2004) (holding that the U.S. District Court for the Southern District of New York lacked jurisdiction because the immediate custodian of the petitioner was located in South Carolina); Rasul v. Bush, 124 S. Ct. 2686, 2699 (2004) (holding that federal habeas jurisdiction extends to Guantanamo Bay, Cuba); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (holding that due process requires that the petitioner, a citizen of the United States, be given an opportunity to contest the factual basis for his detention).}

\footnote{10}{See Erwin Chemerinsky, \textit{Unanswered Questions}, 7 \textit{Green Bag} 2d 323, 323–24 (2004). Indeed, Professor Erwin Chemerinsky has observed, [W]hat seems most distinctive about October Term 2003 was how much the Court left open—how many questions it left unanswered. Sometimes this was because the Court did not reach the merits of important legal issues, such as by dismissing on jurisdictional grounds . . . Jose Padilla’s claim that the Bush administration lacks authority to detain him as an enemy combatant. Sometimes the Court ruled narrowly because only a limited issue was before it, such as in the Court’s holding that the Guantanamo detainees have a right to be heard in federal court, but not addressing the question of what form of hearing they must be given.

. . . .

I cannot think of any recent Supreme Court Term where so much was left undecided. All of these issues now will be faced by the state courts and the lower federal courts. Ultimately, almost all of these questions will return to the Supreme Court in the years ahead for further clarification.

\textit{Id.} (footnotes omitted); see Neal K. Katyal, \textit{Executive and Judicial Overreaction in the Guantanamo Cases}, 2004 \textit{Cato Sup. Ct. Rev.} 49, 63 (predicting that “resistance will grow as it becomes clearer just how much the Court’s decisions left unresolved”); Jenny S. Martinez, \textit{Availability of U.S. Courts to Review Decisions to Hold U.S. Citizens as Enemy Combatants—Executive Power in War on Terror}, 98 \textit{Amer. J. Int’l L.} 782, 785 (2004) (stating that “the \textit{Hamdi} decision leaves open at least as many questions as it answers”); \textit{id.} at 786 (“[T]he status of prisoners detained by the United States as ‘enemy combatants’ in the broader ‘war on terrorism,’ rather than in Afghanistan, was left ambiguous.”).}
four must be jettisoned. Perhaps Congress is obligated, despite the Madisonian Compromise, to create inferior federal courts. Perhaps Marbury is wrong, and Congress can add to the Supreme Court’s original jurisdiction. Perhaps Tarble’s Case is wrong, and state courts are not forbidden constitutionally from determining the legality of federal custody. Perhaps the Suspension Clause does not protect against the elimination of habeas corpus, but only against its temporary suspension.

All of these possibilities have been suggested by others, and this Article discusses them below. This Article, however, suggests that it is possible for all four principles to coexist. Such coexistence is important, not because it is likely that Congress will abolish the inferior federal courts, and not simply because it acquits the Constitution (as currently interpreted by the judiciary) of internal inconsistency. More significantly, the ability of the four principles to coexist undermines any argument—or even any unarticulated sense subtly shaping interpretation—that one of the principles must be rejected because of the perceived inconsistency. In particular, it undermines the argument against the Madisonian Compromise based on Tarble’s Case and, perhaps most importantly today, undermines any argument that seeks to rely on the Madisonian Compromise, Marbury, and Tarble’s Case to contend that the Suspension Clause does not require the availability of habeas for those in federal executive custody. This Article contends that resolution to this apparent conflict lies in the power of individual Supreme Court Justices to issue writs of habeas corpus—a “power granted from 1789 to the present.”

I. THE PIECES OF THE PUZZLE

A. The Madisonian Compromise

Although the delegates to the Constitutional Convention agreed readily on the need for a federal judiciary in general, and a Supreme Court in particular, they disagreed about the need for inferior federal courts. Some proposed that the Constitution requires inferior federal courts; others argued that the Supreme Court should be the only fed-

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11 See infra notes 47–94 and accompanying text.
12 See infra notes 47–94 and accompanying text.
13 Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 314 n.4 (5th ed. 2003) (noting that the answer to the question whether this power involves original or appellate jurisdiction “rests in obscurity”).
eral court permitted by the Constitution. Ultimately, our Founders agreed to what has become known as the Madisonian Compromise and authorized Congress to decide whether inferior federal courts would or would not exist. As a result, Article III provides that “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” A complementary provision of Article I empowers Congress to “constitute Tribunals inferior to the supreme Court.” Thus, in accordance with the Madisonian Compromise, the existence of inferior courts is left to the discretion of Congress.

Congress has exercised the power to create inferior federal courts “from time to time.” For example, in the Judiciary Act of 1789, Congress divided the country into thirteen districts, and created a district court and a district judgeship for each district. At the same time, it created a circuit court for each district (other than the districts of Maine and Kentucky) consisting of two Justices of the Su-

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14 Michael Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 42.
15 1 The Records of the Federal Convention of 1787, at 104–05 (Max Farrand ed., rev. ed. 1937) (voting to create a Supreme Court and inferior courts); id. at 124–25 (voting to strike the reference to inferior courts); id. at 125 (voting to empower Congress to create inferior courts); see Fallon et al., supra note 13, at 6–9; Collins, supra note 14, at 42; Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1153–54 (1988).
16 U.S. Const. art III, § 1.
17 Id. at art. I, § 8. In a recent Article, Professor James Pfander notes that “most observers have assumed that the inferior tribunals to which Article I refers are precisely the same inferior courts in which Article III vests the judicial power of the United States” but argues against this general understanding. James Pfander, Article III Courts, Article I Tribunals, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 671–72 (2004).
18 Judiciary Act of Sept. 24, 1789, ch. 20, § 2, 1 Stat. 73, 73. Nine of the districts—the districts of New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, and Georgia—were coextensive with state lines. The other four districts were created by subdividing two states into two districts each. The state of Massachusetts contained both the district of Maine and the district of Massachusetts, while the state of Virginia contained both the district of Kentucky and the district of Virginia. No district courts were created for Rhode Island or North Carolina, as neither state had yet ratified the new Constitution.
preme Court and the local district judge. More than a century later, in 1891, Congress created the circuit courts of appeals.

Congress also has exercised the concomitant power to abolish courts it previously had created. For example, in 1911, Congress reorganized the federal court system and abolished the circuit courts that had existed since 1789. Thus, under the Madisonian Compromise, there need not be any inferior federal courts.

B. Marbury v. Madison: The Limited Original Jurisdiction of the Supreme Court

In Marbury v. Madison, William Marbury asked the Supreme Court to issue a writ of mandamus to Secretary of State James Madison, directing Secretary of State Madison to provide William Marbury with his commission as a justice of the peace. The Supreme Court interpreted section 13 of the Judiciary Act of 1789 to provide the Supreme Court with original jurisdiction to issue the prerogative writ of mandamus to federal officers such as Secretary of State Madison. It refused to issue the writ, however, reasoning that the mandamus sought by William Marbury called for an exercise of original jurisdiction, and that the Constitution bars any increase in the Supreme Court’s original jurisdiction beyond the narrow band of cases allocated to its original jurisdiction by Article III.

The Court explained that the “essential criterion of appellate jurisdiction, [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.” Applying this cri-
terion to the writ of habeas corpus, the Court concluded a few years later that habeas could be used as a method of exercising appellate jurisdiction, provided that the writ sought “the revision of a decision of an inferior court.” 28 When there is no decision of an inferior court to revise, however, the Supreme Court cannot issue the writ of habeas corpus as an exercise of appellate jurisdiction. 29 Moreover, under Marbury, unless the case falls within the narrow category of cases allocated to the Supreme Court’s original jurisdiction by Article III, it cannot issue the writ of habeas corpus as an exercise of original jurisdiction. 30

The terminology frequently used in this area is rather confusing: the appellate use of the writ of habeas corpus by the Supreme Court is often labeled “original,” with the word placed in quotation marks to indicate that it “is not ‘original’ in the sense that it issues in the exercise of the Court’s original jurisdiction,” 31 but rather in the sense that the habeas petition is “filed in the first instance” in the Supreme Court. 32 Although this terminology seems rather ingrained at this point, it is also rather unfortunate. A petition for a writ of certiorari is “filed in the first instance” in the Supreme Court, but no one calls it an “original” writ of certiorari for that reason. A writ of certiorari, a writ of habeas corpus, a writ of mandamus, a writ of error: all are simply mechanisms by which appellate jurisdiction can be implemented. The mere fact that some of them—including certiorari, habeas, and mandamus—also are used by some courts in the exercise of original jurisdiction does not justify dubbing some of them “original” when used to implement appellate jurisdiction.

Despite this unfortunate terminology, Marbury stands for the proposition that the Supreme Court cannot exercise genuinely original jurisdiction except in the rather limited set of cases allocated to its original jurisdiction by Article III. Taken together, the Madisonian Compromise and Marbury mean that there might be no federal court with original jurisdiction to issue a writ of habeas corpus to a federal

28 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 100–01 (1807).
29 See Dallin H. Oaks, The “Original” Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153, 155 (“Any legislation purporting to enlarge the Supreme Court’s original jurisdiction to issue a writ of habeas corpus beyond those cases specified in Article III, § 2 would, of course, be unconstitutional.”).
30 Ex parte Hung Hang, 108 U.S. 552, 553 (1883) (denying a petition for habeas and noting that “except in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party,” the Supreme Court only can issue habeas “for a review of the judicial decision of some inferior officer or court”).
31 Oaks, supra note 29, at 155.
executive official. The inferior federal courts might not exist, and the Supreme Court would constitutionally be barred from exercising jurisdiction over an application for habeas that did not seek the revision of a decision of an inferior court.

C. Tarble’s Case: The Inability of State Courts and Judges to Issue Habeas for Those in Federal Custody

If neither the Supreme Court nor inferior federal courts were available to issue writs of habeas corpus, one might expect that the state courts would be. Indeed, the conclusion of Henry Hart’s famous dialogue was that state courts “are the primary guarantors of constitutional rights, and in many cases may be the ultimate ones.”

In Ableman v. Booth, however, the Supreme Court held that state judges and state courts could not use habeas corpus to review the legality of detention ordered by federal judges and courts. The Court insisted that “it was not in the power of the State” to confer such judicial authority, because “no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent Government.” The Court held that a state could no more authorize its judges and courts to issue habeas for someone in federal custody than it could do so for someone held in another state by that other state.

Ableman was an antebellum case involving state resistance to the Fugitive Slave Act. Moreover, the Wisconsin Supreme Court, having freed Sherman Booth from federal custody after he had been convicted and sentenced by the federal district court, had gone so far as to direct its clerk to make no return to the writ of error issued by the U.S. Supreme Court. The rule established in Ableman, however, was

35 Id. The Court explained that if the application for habeas itself does not make clear that the person imprisoned is in custody under the authority of the United States, the state court or judge may issue the writ and the custodian should file a return making known his authority. Once the state court or judge learns that the custody is under the authority of the United States, it can proceed no further. Moreover, the custodian must not actually produce the prisoner, and must refuse obedience to any state process concerning the prisoner. Id. at 523.
36 Id. at 516.
37 Id. at 507.
38 Id. at 511–12.
not limited to the situation where the habeas petitioner had been placed in custody by a federal judicial order.

Instead, in *Tarble’s Case*, which involved the issuance of a writ of habeas corpus by a Wisconsin court commissioner seeking discharge from the U.S. military, the Supreme Court broadly posed the question before it as follows:

Whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government.\(^{39}\)

The Court concluded that the decision in *Ableman* “disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal.”\(^{40}\) Quoting *Ableman* extensively, the Court reiterated that state courts and judges could not be authorized to review the legality of federal detention.\(^{41}\) The opinion was expansive:

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other.\(^{42}\)

When *Tarble’s Case* is added to the Madisonian Compromise and *Marbury*, there might be no court, state or federal, with original jurisdiction to issue a writ of habeas corpus to a federal executive official. The inferior federal courts might not exist, the Supreme Court would be constitutionally barred from exercising jurisdiction over an application for habeas that did not seek the revision of a decision of an inferior court, and the state courts would be constitutionally barred from issuing habeas to test the legality of the federal custody. With neither the inferior federal courts nor state courts available, the Supreme

\(^{39}\) 80 U.S. (13 Wall.) 397, 402 (1872).
\(^{40}\) *Id.* at 403–04.
\(^{41}\) *Id.* at 407–08.
\(^{42}\) *Id.* at 407.
Court’s appellate jurisdiction likewise would be unavailable because there would be no inferior court judgment to subject to revision.

D. The Suspension Clause: The Requirement That Habeas Be Available Unless Validly Suspended

Article I, section 9, clause 2 of the Constitution provides that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”43 There is considerable dispute concerning the breadth of the Suspension Clause, including whether it protects habeas for those in state custody or for those detained pursuant to a judgment by a court of competent jurisdiction.44 The Supreme Court has stated, however, that at “the absolute minimum,” it protects the writ as it existed in 1789,45 and at “its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention.”46

If a person in the custody of a federal executive could not seek habeas relief from any court, state or federal, it certainly would appear to be a violation of the Suspension Clause. Thus, if the inferior federal courts do not exist, the Supreme Court cannot exercise original jurisdiction outside the cases allocated to its original jurisdiction by Article III, and the state courts cannot issue writs of habeas corpus

44 See, e.g., FALLON ET AL., supra note 13, at 1291 (“[The] Suspension Clause appears to have been directed only to detention under federal authority, as was the grant of habeas jurisdiction in the Judiciary Act of 1789. Only in 1867 did Congress extend access to the writ to all prisoners held under state authority.”); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 466 (1963) (noting the “black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction”); Rex A. Collings, Jr., Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 CAL. L. REV. 335, 345 (1952) (contending that “nothing in the historical background provides any indication that a prisoner convicted according to the course of the common law by a court of general criminal jurisdiction was ever entitled to the writ”); Jordan Steiker, Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?, 92 MICH. L. REV. 862, 924 (1994) (arguing that, taken together, the Suspension Clause and the Fourteenth Amendment require federal habeas review for convicted state prisoners).
45 INS v. St. Cyr, 533 U.S. 289, 301 (2001); cf. Felker, 518 U.S. at 663–64 (stating that “we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789”).
46 INS, 533 U.S. at 301; see Gerald L. Neuman, The Habeas Corpus Suspension Clause After INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002) (noting that, as improved by the Habeas Corpus Act of 1679, “the writ afforded a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds”).
for those in federal custody, so it would seem that the Suspension Clause is violated. Is the U.S. Constitution simply self-contradictory?

II. AVOIDING THE CONFLICT BY DENYING ONE OF ITS ELEMENTS

It is possible, of course, to avoid the conflict among these four constitutional principles by denial. That is, if one denies any of the elements creating the conflict, the conflict evaporates. Indeed, sometimes the conflict itself is used as a lever in order to deny one of the elements.

A. Rejecting the Madisonian Compromise

Some scholars claim that, despite the Madisonian Compromise, Congress is constitutionally obligated to create inferior federal courts. On one variant of this argument, the Madisonian Compromise simply has outlived its usefulness and should be discarded. Another variant builds on a passage in *Martin v. Hunter’s Lessee*, in which Justice Joseph Story suggested that because the Supreme Court’s original jurisdiction is limited, and because there are cases over which the state courts cannot exercise jurisdiction (thereby precluding resort to the Supreme Court’s appellate jurisdiction), Congress is “bound to create some inferior courts.” Advocates of this

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47 See Fallon et al., supra note 13, at 331–37. Most broadly, it has been argued that the “ordain and establish” language of Article III requires Congress to create inferior federal courts. See 1 Julius Goebel, Jr., The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 246–47 (1971); cf. Collins, supra note 14, at 126 (noting that Julius Goebel is persuasive that this language prohibits Congress from appointing state courts as federal courts, but that simply because federal courts “had to be separate, if created, does not suggest also that they had to be created”).

48 See Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 533 (1974) (stating that the “[a]bolition of the lower federal courts is no longer constitutionally permissible”). But see Fallon, supra note 15, at 1217 n.350 (describing Theodore Eisenberg’s view as implausible and noting that it “generally has not been accepted [even] by other scholars in the Nationalist tradition”).

49 See 14 U.S. (1 Wheat.) 304, 331 (1816). Both variants of the position that Congress must create inferior federal courts are quite different from the position that the power of Congress to create inferior courts and to make exceptions to the Supreme Court’s appellate jurisdiction must work in tandem, so that all cases and controversies (or just all cases) within the federal judicial power must be allocated to either the Supreme Court or some inferior court. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 260–61 (1985) (arguing that federal jurisdiction, in either original or appellate form, must be available for all “cases” but not for all “controversies” listed in Article III, so that if (but only if) Congress excepts certain “cases” from the Supreme Court’s jurisdiction, it must create inferior federal courts to hear those “cases”); Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementa-
position rely heavily on *Tarble’s Case* to demonstrate that there are cases over which state courts cannot exercise jurisdiction.\(^{50}\) On this view, the Madisonian Compromise was premised on the availability of state courts to hear federal claims. Once that premise is undermined, and there are federal claims that cannot be heard by state courts, inferior federal courts are required.\(^{51}\) In other words, the principle of *Tarble’s Case* requires the rejection, in part, of the Madisonian Compromise.

**B. Rejecting Marbury v. Madison**

Another way to avoid the conflict among the four principles is to deny the correctness of *Marbury v. Madison*’s holding that Congress lacks the authority to expand the Supreme Court’s original jurisdiction. Article III allocates some cases to the Supreme Court’s original jurisdiction and some to its appellate jurisdiction, and then empowers Congress to make exceptions to the Supreme Court’s appellate jurisdiction.\(^{52}\) Might not this mean that Congress can transfer cases from the Supreme Court’s appellate jurisdiction to its original jurisdiction?\(^ {53}\)

As Professor William W. Van Alstyne put it, *Marbury* could have held that “the Article III grant of Supreme Court original jurisdiction is an irreducible minimum; and . . . [that] Congress may supplement that jurisdiction by excepting cases otherwise within the appellate jurisdic-


\(^{51}\) See id. at 104–05. Martin H. Redish and Curtis E. Woods do not limit their argument to the habeas context, but argue more broadly that state courts lack the authority (whether by mandamus, habeas, or injunction) “to control directly the acts of federal officers,” and that due process requires an independent judicial resolution of a constitutional claim. *Id.* at 76, 93.

\(^{52}\) U.S. Const. art. III, § 2, cl. 2.

\(^{53}\) See *Fallon et al.*, supra note 13, at 272–73.
risdiction.” Similarly, Professor Robert Clinton suggests that *Marbury* may have been wrong, in that the Exceptions Clause “may also have been intended to include congressional power to reallocate the constitutionally structured appellate jurisdiction by authoring the Supreme Court to exercise that jurisdiction in original form.”

Occasionally, authors imply that, despite the distinction between original and appellate jurisdiction drawn by *Marbury* and *Ex parte Bollman*, the Supreme Court’s so-called “original” habeas jurisdiction is available in cases that do not involve the revision of another court’s decision. Of course, the Supreme Court’s appellate jurisdiction is not limited to revising the decisions of other Article III courts. Although the precise limits of what counts as a “court” subject to the Supreme Court’s appellate jurisdiction is subject to some dispute, and even a

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54 William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 33. Professor Van Alstyne adds that the Court could have added that the “only way in which Congress may create exceptions to the Court’s appellate jurisdiction is by means of adding such cases to its original jurisdiction.” *Id.*

55 Clinton, *Guided Quest*, supra note 49, at 778; see Louise Weinberg, *Our Marbury*, 89 Va. L. Rev. 1235, 1297, 1380 (2003) (arguing against the constitutionality of adding to the Supreme Court’s original jurisdiction and raising concerns about Congress using “jurisdiction-packing” to overwhelm the Court); cf. *Fallon et al.*, supra note 13, at 345 n.26 (noting that a broad usage of the term “courts” is “necessarily fuzzy at the borders, due to the practical and conceptual difficulty of distinguishing non-Article III courts from administrative agencies or other bodies charged with applying fact to law”); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 465 (1989) (noting that modern day critics of *Marbury* have never “attempted to develop this point beyond merely posing the question” and arguing that if they had “they would have been disappointed”).

56 See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2226 n.130 (2003) (stating that if Congress had not created any lower federal courts, “it presumably could have vested this ‘original’ jurisdiction in the Supreme Court alone” without discussing, or even mentioning, *Marbury v. Madison* or *Ex parte Bollman*); cf. Pfander, *supra* note 17, at 723–24 (noting the “lingering confusion” over the extent to which *Marbury* limits the Supreme Court’s power “to review the work of an Article I tribunal” and suggesting that it “poses a threat . . . most pointedly in cases where the court below is (like a court martial) not a court of record and the process of review contemplates active judicial factfinding and the entry of judgment”).

57 See, e.g., *United States v. Jones*, 119 U.S. 477, 480 (1886) (upholding appellate jurisdiction to review decision of the Court of Claims); *Martin*, 14 U.S. (1 Wheat.) at 304 (upholding appellate jurisdiction to review decision of the state court).

58 See, e.g., *Everett v. Truman*, 334 U.S. 824, 824 (1948) (denying leave to file a petition for writ of habeas corpus for “relief from sentences upon the verdicts of a General Military Government Court at Dachau, Germany,” with four Justices finding a lack of jurisdiction, four Justices urging that leave to file be granted and the case set for argument, and one Justice (Justice Robert Jackson) not participating); see also 16B *Charles Alan Wright et al., Federal Practice and Procedure* § 4005, at 101 (2d ed. 1996) (“There is a major
certain kind of military tribunal may count as a “court,” to treat any official who decides to restrain someone as a “court” would be inconsistent with Marbury: if an official who makes a decision to restrain a person is thereby a “court,” so too is a person who makes a decision to withhold a document from a person. Although Charles Lee, arguing in William Marbury’s behalf, advocated a conception of appellate jurisdiction sufficiently broad to reach that case, the Court rejected that argument, concluding that “the essential criterion of appellate jurisdiction, [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause” and that to issue mandamus “to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper.”

In Ex parte Quirin, counsel for Nazi saboteurs sought leave to file a petition for a writ of habeas corpus directly with the Supreme Court. The Supreme Court called a special term and scheduled the matter for oral argument. Before oral argument, however, counsel also filed a habeas petition in the district court. While oral argument in the Supreme Court was proceeding, counsel perfected an appeal to the court of appeals from the district court’s denial of relief. The Supreme Court denied leave to file the habeas petition, but granted certiorari before judgment in the court of appeals to review the decision of the district court. It appears that counsel for the saboteurs originally thought that they could seek habeas directly in the Supreme Court without first seeking relief in an inferior court until Justice Owens Roberts reminded them of Marbury.

theoretical uncertainty as to the nature of the tribunals whose action is so far judicial that initial revisory jurisdiction qualifies as ‘appellate.’”).

59 See Fallon et al., supra note 13, at 316–18 (discussing Hirota v. MacArthur, 338 U.S. 197 (1948) (per curiam); Everett, 334 U.S. at 824). Compare Solorio v. United States, 483 U.S. 435, 436 (1987) (exercising jurisdiction to review a decision of the U.S. Court of Military Appeals without discussing this jurisdictional issue), with In re Yamashita, 327 U.S. 1, 8 (1946) (stating that “the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court”).

60 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147–48 (1803).
61 Id. at 175.
62 317 U.S. 1, 5 (1942).
63 Id. at 19.
64 Id. at 19–20.
65 Id.
66 See id. at 19–20, 48. As Professor Robert E. Cushman quipped, the Supreme Court’s “jurisdiction caught up with the Court just at the finish line.” Robert E. Cushman, Ex parte Quirin et al.—The Nazi Saboteur Case, 28 Cornell L.Q. 54, 58 (1942).

67 Boris I. Bittker, The World War II German Saboteurs’ Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction, 14 Const. Comment. 431,
C. Rejecting or Downgrading Tarble’s Case

There is no shortage of scholars who reject *Tarble’s Case* or who seek to cabin it. Moreover, just as *Tarble’s Case* is deployed by some to deny the principle of the Madisonian Compromise, others deploy the Madisonian Compromise or the Suspension Clause to deny the principle of *Tarble’s Case*.

Professor Daniel J. Meltzer, for example, “happily” treats *Tarble’s Case* “as unsound insofar as it suggests that the Constitution precludes state court habeas jurisdiction against federal officials,” because the Madisonian Compromise “is a basic structural feature of the Constitution.”68 Instead, he suggests that *Tarble’s Case* be viewed “as a sub-constitutional one, resting on the existence (and implied exclusivity) of federal court habeas jurisdiction.”69

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441 n.21 (1997); see Cushman, *supra* note 66, at 57 (stating that “[r]eview by the Supreme Court of what the Military Commission was doing was rather clearly not an exercise of the Court’s appellate jurisdiction”); cf. Wheeler Lumber Bridge & Supply Co. v. United States, 281 U.S. 572, 576–77 (1930) (explaining that although “[e]arly and long continued usage” treats certification of a distinct question of law as an exercise of appellate jurisdiction, the Supreme Court has “uniformly ruled” that it would not entertain certifications of the whole case “for otherwise it would be assuming original jurisdiction withheld from it by the Constitution”); *Ex parte Barry*, 43 U.S. (1 How.) 65, 65–66 (1844) (dismissing a petition for a writ of habeas corpus claiming that the petitioner’s infant daughter was being detained unlawfully by the child’s grandmother, and holding that it involved the exercise of original jurisdiction); *White v. Turk*, 37 U.S. (12 Pet.) 238, 239 (1838) (finding no jurisdiction because the certificate “brings the whole cause before this court; and if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction”).

68 Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2567 (1998). Professor Meltzer concedes “that there is much language in the decision to support the view that the Constitution itself precludes state courts from exercising habeas jurisdiction to challenge the legality of detention at the behest of federal officials.” Id. at 2567 n.160; see Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385, 1406 (1964) (noting that he would “cheerfully accept” a conclusion that state courts can issue habeas corpus); John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 Geo. L.J. 2513, 2514 n.4 (1998) (describing himself as “one of many Tarble skeptics” and stating that “Congress’s power to exclude cases from state court comes only from its power to put them exclusively in federal court, and that the Constitution of its own force does not keep any case out of state court that could be brought in the federal system”); Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 84 (1981) (noting that if Congress were to abolish the lower federal courts, *Tarble’s rule* would be critical, but “then the implications of the article III compromise make it wrong”).

69 Meltzer, supra note 68, at 2567 n.160. Indeed, even Martin H. Redish and Curtis E. Woods may retreat to viewing *Tarble’s Case* as sub-constitutional. See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. Rev. 143, 157–61 (1982) (suggesting that *Tarble’s Case* be read as depending on an inference of congressional intent); Redish & Woods, supra note 50, at
P. Waxman and Professor Trevor W. Morrison similarly contend that because of the Madisonian Compromise, *Tarble’s Case* should not be read as a constitutional decision. \(^{70}\) Instead, they contend, “a better reading of *Tarble’s Case* is that it reflects the Court’s conclusion that Congress had invested only the federal courts with habeas jurisdiction to review the legality of federal detention” and that “to permit a state court to exercise jurisdiction would conflict with the federal statutory scheme established by Congress.” \(^{71}\) For those who seek to downgrade *Tarble’s Case* from a constitutional decision to a subconstitutional one, the case can be conceptualized as involving either statutory interpretation or a federal common law of state-federal relations. \(^{72}\)

Professor George Rutherglen agrees with these critics that the “square holding” of *Tarble’s Case* “must be qualified” in that the “door to the state courts could be closed only if the door to the federal courts remained open.” \(^{73}\) He points to the Suspension Clause, arguing that without this qualification, the result could be a “suspension of the writ of habeas corpus.” \(^{74}\)

**D. Eviscerating the Suspension Clause**

The principle that the Suspension Clause guarantees habeas corpus for those in federal executive detention (unless validly suspended in accordance with the Suspension Clause itself) has not escaped criticism. To the contrary, Justice Antonin Scalia has argued that the Suspension Clause does not “guarantee any content to (or even existence of) the writ of habeas corpus.” \(^{75}\) On this view, although the Suspension Clause limits the power of Congress to “temporarily withh[o]ld operation of the writ,” it in no way restricts congressional power to alter permanently its content, just as the Equal Protection Clause guards “against unequal application of the laws, without guaranteeing any par-

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\(^{70}\) Waxman & Morrison, *supra* note 56, at 2226.

\(^{71}\) *Id.* at 2227.


\(^{73}\) George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2d 397, 400 (2002).


ticular law which enjoys *that* protection.”\textsuperscript{76} That is, the Suspension Clause does not bar the “permanent repeal of habeas jurisdiction.”\textsuperscript{77}

Although Justice Scalia does not himself explicitly do so, one might bolster his argument by contending that the Suspension Clause cannot be understood to require the availability of any habeas remedy, given the Madisonian Compromise, the limitation on the Supreme Court’s original jurisdiction recognized in *Marbury*, and *Tarble’s Case*. That is, just as the Madisonian Compromise and the Suspension Clause are used against *Tarble’s Case*, and vice versa, the Madisonian Compromise, *Marbury*, and *Tarble’s Case* could be used together to support a narrow view of the Suspension Clause.\textsuperscript{78}

Although all of these methods succeed in eliminating the conflict among the four principles, they “solve” the constitutional puzzle in the same way that one “solves” a jigsaw puzzle with scissors. To clip off the Madisonian Compromise and to insist that inferior federal courts are constitutionally required would be to discard a central element of our constitutional architecture that is reflected in the debates of the Constitutional Convention, and the text of the Constitution, and that is fixed by more than two centuries of practice.\textsuperscript{79} To slice the holding of *Marbury* out of our constitutional jurisprudence would not only reject what “has ever since [*Marbury*] been accepted as fixing the construction of this part of the Constitution,” but also deface, if not destroy, a constitutional icon.\textsuperscript{80}

\textsuperscript{76} *Id.* at 338 (Scalia, J., dissenting).

\textsuperscript{77} *See id.* at 341 n.5 (Scalia, J., dissenting). Although Justice Antonin Scalia in this footnote states that such permanent repeal is not “unthinkable,” the context demonstrates that he does not believe it would be unconstitutional. *See id.* (Scalia, J., dissenting).

\textsuperscript{78} *See Fallon et al., supra* note 13, at 1291 (“A claimed right to habeas review in federal court bumps up against the constitutional understanding (already accepted by the Constitutional Convention when the Suspension Clause was adopted) that it was for Congress to decide whether to create lower federal courts at all.”); *cf.* Neuman, *supra* note 74, at 1033 (noting that if Congress abolished the lower federal courts “the remedial question would become more difficult but that is not the world in which we live”).

\textsuperscript{79} *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97 (1868) (noting that if “the question were a new one, it would, perhaps, deserve inquiry” whether Congress could add to the Supreme Court’s original jurisdiction, particularly in habeas corpus, but that *Marbury* had fixed the contrary construction); *see* Amar, *supra* note 55, at 467–78 (explaining the correctness of *Marbury*’s conclusion regarding the Supreme Court’s original jurisdiction).
Trimming the traditional view of the Suspension Clause so as to authorize Congress simply to eliminate the privilege of the writ of habeas corpus would come close to lopping that clause from the Constitution. Professor Gerald L. Neuman finds Justice Scalia’s interpretation so surprising that he wonders if it “may be an error to take [it] seriously.”

Justice Scalia’s interpretation of the Suspension Clause, for example, would leave the people in the Northwest Territory with less protection from such restriction on their liberty than before the ratification of the Constitution. The Northwest Ordinance guaranteed that the “inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus,” and promised that this guarantee would inure to “the people and States in the said territory, and forever remain unalterable, unless by common consent.”

Indeed, it would leave the people of the United States less protected from lawless executive detention than British subjects in 1679.

It is true, as Justice Scalia emphasized in *INS v. St. Cyr*, that federal courts lack inherent authority to issue writs of habeas corpus and only can exercise such authority when authorized by Congress. But to conclude from this premise that there is no constitutional obligation to make habeas available for those in federal custody depends on

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81 Neuman, *supra* note 46, at 562. Professor Neuman nevertheless proceeds to provide ample reason to reject Justice Scalia’s interpretation. *Id.* at 570–87. It bears emphasis, however, that when armed with habeas jurisdiction, Justice Scalia insists that an American citizen detained within the territorial jurisdiction of a federal court either must be prosecuted criminally or released. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660, 2671, 2673 (2004) (Scalia, J., dissenting). Indeed, in such circumstances, Justice Scalia has a robust conception of the Suspension Clause:

If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

82 *Id.* at 2672 (Scalia, J., dissenting).

83 See *Habeas Corpus Act of 1679*, 31 Car. 2, c. 2 (Eng.), *reprinted in Neil H. Cogan, Contexts of the Constitution* 679, 679–86 (1999); see also *Yerger*, 75 U.S. (8 Wall.) at 96 (noting the “remarkable anomaly” that would result if the Supreme Court “had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares [British courts] to possess”).

84 533 U.S. at 340 (Scalia, J., dissenting).

an equation (unfortunately one all too frequently made by the Supreme Court) of the Constitution with what the Supreme Court says and does in the name of the Constitution. Simply because the judiciary lacks authority to enforce a constitutional obligation does not mean that there is no constitutional obligation at all.

If our judge-focused contemporary legal culture makes it difficult to see this point, consider the constitutional obligation of Congress to provide for the establishment of the Supreme Court itself. There is little doubt of this constitutional requirement, but if Congress failed to do so, no group of “judges” could declare themselves the Supreme Court of the United States and start exercising that court’s jurisdiction.

The obligation to provide for the privilege of the writ of habeas corpus is parallel to the obligation to provide for the establishment of the Supreme Court. Consider in this light Chief Justice John Marshall’s famous statement about the obligation imposed by the Suspension Clause on the first Congress:

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of habeas corpus.

Chief Justice Marshall’s reasoning applies equally to the constitutional obligation of Congress to provide for the establishment of the Su-

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87 See U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court . . . .”); see also Neuman, supra note 46, at 581 (noting other examples where “constitutional guarantees are dependent on legislative action for their implementation”).

88 Bollman, 8 U.S. (4 Cranch) at 95; see, e.g., William F. Duker, A Constitutional History of Habeas Corpus 172 n.126 (1980) (describing Chief Justice John Marshall’s thesis as “the habeas clause imposed an obligation on Congress to empower the courts with habeas jurisdiction”).
Concededly, cutting Tarble's Case down to size would not be quite so dramatic.90 Yet even Tarble's Case is hardly an isolated relic. It shares connections with the rejection of state court power to issue writs of mandamus to federal officials91 and the longstanding doubts regarding state court power to issue injunctions to federal officials.92 It has considerable support in the original understanding and early practice.93 Finally, it is consonant with—although certainly not logically entailed by—the recent resurgence of judicially enforced federalism.94

89 See Neuman, supra note 46, at 581 (stating that Bollman “at most . . . supports the proposition that some constitutional violations cannot be judicially remedied”).
90 Indeed, a rejection of Tarble’s Case as a constitutional holding would temper considerably the problems of the narrow reading of the Suspension Clause. So coupled, if Congress eliminated federal habeas for those in federal custody, state courts could issue habeas for those in federal custody, unless habeas had been validly suspended by the federal government.
92 See Fallon et al., supra note 13, at 442 (noting the “uncertainty about the capacity of state courts to issue injunctions against federal officials”); Arnold, supra note 68, at 1393–97 (discussing the cases addressing whether state courts have the power to issue injunctions to federal officials); Redish & Woods, supra note 50, at 105. This Article does not address the extent (if any) to which the Constitution requires remedies other than habeas corpus, which is the only remedy explicitly mentioned in the text. Compare Harrison, supra note 68, at 2516–27 (suggesting that the only constitutionally required remedy is nullity), with Meltzer, supra note 68, at 2559 (rejecting John Harrison’s claim and arguing that the Constitution firmly requires remedies that are adequate to keep government generally within the bounds of law). There is reason to doubt that mandamus relief is constitutionally required: Marbury itself gives reason to doubt, given the denial of mandamus relief by the Supreme Court and the unlikelihood that it would have been available in any other court at the time. See Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329–30 (1938) (finding withdrawal of power of federal courts to issue injunctions in labor disputes unexceptional). Compare Susan Low Bloch, The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?, 18 Const. Comment. 607, 617 (2001) (claiming that there is “good reason to believe Marbury and his colleagues would have prevailed in the Circuit Court”), with Richard H. Fallon, Jr., Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension, 91 Cal. L. Rev. 1, 52 n.271 (2003) (claiming that “it seems highly doubtful that the Court, in the politically charged atmosphere of 1803, would have upheld the authority of the D.C. courts to order mandamus relief for William Marbury against James Madison”). If there are other constitutionally required remedies that are unavailable in state court, in the inferior federal courts, and in the Supreme Court, then some solution other than the power of individual Justices to issue habeas would have to be found to solve the resulting conundrum.
Nevertheless, my point here is not so much to defend each of the four principles, but rather to determine whether they all can coexist. Thus far, we have seen only how various critics have chosen among the conflicting principles, not reconciled them. The next step is to seek a reconciliation.

III. Solving the Conflict: The Habeas Power of Individual Justices of the Supreme Court

From 1789 until today, individual Justices of the Supreme Court have been authorized to issue writs of habeas corpus.95 The Judiciary Act of 1789 provided “that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.”96 Significantly, the Judiciary Act of 1789 did not unambiguously give the Supreme Court itself the power to issue writs of habeas corpus

(1999) (suggesting, through the use of a fictional 1997 decision, the considerable problems that might have resulted if Tarble’s Case had been decided the other way).

Critics of Tarble’s Case also should consider the possibility of state courts issuing other prerogative writs to federal officials, such as prohibition from a state court to a federal district judge, or certiorari from a state court to a federal court of appeals, or quo warranto in a state court to determine who is the legal President of the United States. See generally Hartnett, supra note 85 (discussing the need for statutory authorization for the U.S. Supreme Court to issue prerogative writs).

To be sure, denial of state court power to issue habeas to federal officials is not precisely parallel to judicially enforced limitations on the scope of federal power. Nevertheless, one who interprets the Constitution to bar Congress from requiring state legislatures to enact particular laws, as in New York v. United States, or from requiring state executives to enforce federal law, as in Printz, might readily conclude that it similarly bars state courts from issuing habeas to federal officials. See Printz, 521 U.S. at 935; New York v. United States, 505 U.S. 144, 188 (1992). Moreover, one who adheres to Hans v. Louisiana, and refuses to treat it as less than a constitutional decision, might readily adhere to Tarble’s Case and refuse to treat it as less than a constitutional decision. See Seminole Tribe v. Florida, 517 U.S. 44, 54, 64 (1996); Hans v. Louisiana, 134 U.S. 1, 15–16 (1890).

95 See Fallon et al., supra note 13, at 314 n.4 (noting that the power of a single Justice to issue a writ of habeas corpus is “a power granted from 1789 to the present”); see also Eric Freedman, Just Because John Marshall Said It, Doesn’t Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789, 51 Ala. L. Rev. 531, 575–85 (2000) (emphasizing the importance of the power of individual judges to issue writs of habeas corpus, while criticizing the decision in Ex parte Bollman); Neuman, supra note 74, at 970 (noting that the difficulty of determining the meaning of the privilege of the writ of habeas corpus based on eighteenth-century practice is “enhanced by the fact that writs were often issued by individual judges acting in chambers, rather than as courts”).

96 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.
(except as ancillary to a case otherwise before the court).\textsuperscript{97} Instead, it was the freestanding grant of habeas power to the individual Justices that led the Court to conclude that the Court itself had this power.\textsuperscript{98}

Chief Justice Marshall, writing for the Court in \textit{Ex parte Bollman}, found “much force” in the argument that “[C]ongress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled.”\textsuperscript{99} He added,

It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the \textit{supreme} court the power to award the great writ of \textit{habeas corpus}, there could be none which would induce them to withhold it from \textit{every} court in the United States: and as it is granted to \textit{all} in the \textit{same sentence} and by the \textit{same words}, the

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\textsuperscript{97} \textit{Id.} (providing that “all the before-mentioned courts of the United States, shall have power to issue writs of \textit{scire facias}, \textit{habeas corpus}, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law”). The ambiguity is whether the restrictive clause (“which may be necessary for the exercise of their respective jurisdictions”) modifies the entire list of writs (“\textit{scire facias, habeas corpus}, and all other writs”) or only the last item on the list (“all other writs”). \textit{See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807)} (noting that the “only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus as are necessary to enable the courts of the United States to exercise their respective jurisdictions”); \textit{James E. Pfander, Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1479–83 (2000)} (arguing that the test of necessity applies only to “all other writs” and not to the named writs, but noting that Chief Justice Marshall “largely based his conclusion in favor of the Court’s power to grant the ‘great writ’ of habeas corpus on an additional collection of structural considerations”). The current version of this All Writs Act is 28 U.S.C. § 1651 (2000). \textit{See Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33 (2002)} (confirming that the All Writs Act “does not confer jurisdiction”).

\textsuperscript{98} \textit{See Bollman, 8 U.S. (4 Cranch) at 96–97}. The opinion noted that Justice Samuel Chase doubted the authority of the Court to issue habeas, but agreed that either of the Justices could and that Justice William Johnson “intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not.” \textit{Id. at 75 n.1}.

\textsuperscript{99} \textit{Id. at 96}.
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sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.  

Indeed, even Justice William Johnson, dissenting in *Bollman*, emphasized that he was “not disputing the power of the individual judges who compose this court to issue the writ of *habeas corpus*. This application is not made to us as at chambers, but to us as holding the supreme court of the United States . . . .”

This vesting of power in individual Justices and judges to grant writs of habeas corpus is not some fluke of the Judiciary Act of 1789. When Congress expanded the reach of federal habeas corpus in 1833 and in 1842, it again vested the power in individual Justices and judges, rather than explicitly in the courts. When Congress extended federal habeas still further in 1867, it explicitly conferred habeas power on the federal courts, but continued to confer that power on individual Justices and judges as well.

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100 *Id.*

101 *Id.* at 107 (Johnson, J., dissenting). Justice Johnson explained,

> We may in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion.

*Id.* (Johnson, J., dissenting).


103 See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86; Fallon et al., *supra* note 13, at 1288; see also Duker, *supra* note 88, at 191–92 (suggesting that perhaps one purpose of the 1867 Act may have been to overcome the “lingering doubt about the power of the courts under the 1789 statute, and the enactment of 1833 and 1842 [which] clearly pertained only to individual judges”). In a provision that confirms the distinction between the Supreme Court and an individual Justice, the 1867 Act provided for an appeal in a habeas case from “the final decision of any . . . justice . . . to the circuit court of the United States for the district in which said cause is heard.” Act of Feb. 5, 1867, § 1, 14 Stat. at 386; see Rev. Stat. §§ 763, 765 (1875) (providing for appeal from “the final decision of any . . . justice . . . upon an application for a writ of habeas corpus” to “the circuit court for the district in which the cause is heard”); George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 411–12 (1953) (noting that under the Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, circuit courts were given appellate jurisdiction over habeas decisions by individual Justices). The appellate jurisdiction of circuit courts over the habeas decisions of individual Justices appears to have been eliminated, along with all other appellate jurisdiction of the circuit courts, upon the creation of the circuit courts of appeals in 1891. See Act of Mar. 3, 1891, ch. 517, § 4, 26 Stat. 826, 827 (providing that “no appeal . . . shall hereafter be
This basic framework, empowering both federal courts and federal judges individually to issue writs of habeas corpus, remains in force. Today, the basic federal habeas statute provides that “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”\(^\text{104}\)

Moreover, the power of individual judges to issue writs of habeas corpus has historical roots still deeper than the Judiciary Act of 1789. In reaction to the refusal of British judges to issue a writ of habeas corpus on behalf of Francis Jenkes because the writ could not be issued out of term,\(^\text{105}\) the Habeas Corpus Act of 1679 specifically em-
powered individual judges to issue habeas.  

William Blackstone explained, “This is a high prerogative writ, and therefore by the common law issuing out of the court of kings’s bench not only in term-time, but also during the vacation. . . . If it issues in vacation, it is usually returnable before the judge himself who awarded it.”

As the remainder of this Part demonstrates, this power of individual Justices to issue writs of habeas corpus solves the conflict among the Madisonian Compromise, *Marbury v. Madison*, *Tarble’s Case*, and the Suspension Clause.

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106 See *Habeas Corpus Act of 1679*, 31 Car. 2, c. 2 (Eng.), reprinted in *Neil H. Cogan, Contexts of the Constitution* 679, 680 (1999); 3 *William Blackstone, Commentaries* *n*135–36 (explaining that the “famous habeas corpus act . . . which is frequently considered as another *magna carta* of the kingdom” was in response to the refusal to issue habeas for Francis Jenkes in vacation); *Duker, supra* note 88, at 185 (noting that the “Habeas Corpus Act of 1679 solved problems such as those of Jenkes by empowering” individual judges and Justices to issue habeas in vacation and that the Judiciary Act of 1789 did likewise “by empowering the justices of the Supreme Court and judges of the district courts to issue the writ in chambers, as well as when assembled as a court”); cf. *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 31–51 (H. L. 1758), reprinted in *3 The Founders’ Constitution* 313, 317 (Philip B. Kurland & Ralph Lerner eds., 1987) (concluding that the Habeas Corpus Act’s provision for action by a judge in vacation was “not meant to give a power which they did not exercise before, but to reduce an unsettled, informal, vague practice, into a formal regular system, as to the bailing for bailable offenses, and to correct the abuse of any power which they had in fact exercised”), available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s3.html (last visited Mar. 15, 2005); 2 *Henry Hallam, The Constitutional History of England* 175–78 (Garland Publ’g 1978) (1846) (referring to Francis Jenkes and stating that the Habeas Corpus Act made clear that a single judge could issue the writ during the vacation, but questioning how much the matter of Francis Jenkes contributed to the passage of the Act).

107 3 *Blackstone, supra* note 106, at *131; see, e.g., Wyeth v. Richardson, 76 Mass. (10 Gray) 240, 241–42 (1857) (Shaw, C.J.) (noting that the power to issue habeas in vacation “is a special power, conferred by statute, to be used by a judge as judge, not as a court; though if the court is in session when the writ is returned, the judge may adjourn the case into court”); 2 *Debates in the Convention of the Commonwealth of Massachusetts on the Adopting of the Federal Constitution*, The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 108–09 (Jonathan Eliot ed., 2d ed. 1996), reprinted in *3 The Founders’ Constitution* 328 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of Judge Sumner) (noting, in discussing the Suspension Clause, that when a person is imprisoned, “he applies to a judge of the Supreme Court; the judge issues his writ to the jailer, calling upon him to have the body of the person imprisoned before him”), available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s10.html (last visited Mar. 15, 2005); 1 St. George Tucker, Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia app. at 290–92 (reprint 1969) (1803), reprinted in *3 The Founders’ Constitution* 329 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting that judges in Virginia may issue the writ in vacation), available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s12.html (last visited Mar. 15, 2005).
A. Consistency with the Madisonian Compromise

Under the Madisonian Compromise, although the existence of the inferior courts is subject to Congress’s discretion, the establishment of the U.S. Supreme Court is not. The Supreme Court is constitutionally obligatory; Congress must provide for its establishment.\textsuperscript{108} As the Supreme Court once put it, “[s]o long, therefore, as this Constitution shall endure, this tribunal must exist with it.”\textsuperscript{109}

The Constitution does not set the size of the Supreme Court, and Congress has varied its size over the years.\textsuperscript{110} Nevertheless, because there must be a Supreme Court, it must have judges or Justices, even if Congress does not create any lower federal courts. The power of Supreme Court Justices to issue writs of habeas corpus, as they have from 1789 until today, presents no conflict with the Madisonian Compromise.

B. Consistency with Tarble’s Case

Tarble’s Case, like Ableman v. Booth before it, concluded that “no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government.”\textsuperscript{111} Tarble’s Case, however, stands as no impediment to individual Justices of the Supreme Court issuing writs of habeas corpus to determine the legality of federal custody.

Moreover, both Ableman and Tarble’s Case themselves illustrate that individual judges long have been given the power to issue writs of habeas corpus. The state involvement in Ableman began with an individual justice of the Wisconsin Supreme Court issuing a writ of habeas corpus returnable before himself.\textsuperscript{112} The Ableman Court spoke of the

\begin{itemize}
\item \textsuperscript{108} U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court . . . .”).
\item \textsuperscript{109} Ableman v. Booth, 62 U.S. (21 How.) 506, 521 (1858).
\item \textsuperscript{110} See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (setting the number of Justices at six); Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89 (setting the number at five upon the next vacancy); Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (repealing the Judiciary Act of 1801 before any vacancy occurred); Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794, 794 (setting the number at ten); Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209, 209 (setting the number at seven); Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44 (setting the number at nine). However small Congress makes the Supreme Court, it must, at the very least, create one federal judgeship, both because at least one judge is necessary for there to be a Supreme Court, and because the Constitution specifically requires that there be a Chief Justice. See U.S. Const. art. I, § 3 (providing that when the President is impeached, the Chief Justice shall preside at the Senate trial).
\item \textsuperscript{111} Tarble’s Case, 80 U.S. (13 Wall.) 397, 405 (1872) (quoting Ableman, 62 U.S. (21 How.) at 515–16).
\item \textsuperscript{112} 62 U.S. (21 How.) at 508, 513.
\end{itemize}
limitation on both state judges and courts, referring to the two as a couplet more than half a dozen times. Similarly, state involvement in Tarble’s Case began with a court commissioner issuing a writ of habeas corpus returnable before himself at his office. Tarble’s Case also repeatedly spoke of both state judges and courts.

C. Consistency with the Suspension Clause

If the individual Justices of the Supreme Court have the power to issue writs of habeas corpus to determine the legality of those in federal custody, the privilege of the writ has not been suspended. Seeking the writ from an individual Justice may be less convenient—for both the petitioner and the Justice—than seeking it from a local federal district judge or, for that matter, from a local state judge. Nonetheless, so long as there is a set of judicial officers with the power to issue the writ, it is difficult to claim that habeas corpus has been suspended.

D. Consistency with Marbury

The key question, then, is whether the exercise of habeas jurisdiction by individual Justices of the Supreme Court is consistent with Marbury’s limitation on the Supreme Court’s jurisdiction. Although it may seem odd, at first blush, to conclude that the individual Justices

113 Id. at 515 (“judges and courts”); id. at 515–16 (“judges or courts”); id. at 523 (“court, or judge”); id. (“court or judge”); id. (“judge or court”); id. at 524 (“judge or court”); id. (“judge or court”).

114 See 80 U.S. (13 Wall.) at 398.

115 Id. at 404 (“State court, or by a State judge”); id. at 409 (“State judges and State courts”); id. (“judge or court”); see id. at 402 (“any judicial officer of a State”); see also id. at 411 (stating that “it is for the courts or judicial officers of the United States” to release a party who is illegally imprisoned under the authority of the United States); id. (declaring that federal “courts and judicial officers are clothed with the power to issue the writ of habeas corpus”); cf. Robb v. Connolly, 111 U.S. 624, 637–38 (1884) (recognizing “the authority of a state court, or one of its judges, upon writ of habeas corpus,” to test the legality under federal law of state custody).

116 See Neuman, supra note 74, at 975–76 (observing that it is conceivable that the Suspension Clause be read as “self-enforcing once the federal courts had been brought into existence,” but that “it might not have been self-evident which federal courts or judges should have jurisdiction to issue the writ, given the likelihood that the Suspension Clause does not require that they all must”).

Perhaps if the number of judicial officers empowered to issue habeas were so small compared to the number of detainees seeking habeas that relief effectively was denied, one might conclude that habeas effectively had been suspended. Because neither the number of such detainees nor the number of Justices is fixed by the Constitution, however, this possibility does not mean that the Suspension Clause necessarily requires that state courts and judges or inferior federal courts and judges also have the power to issue habeas corpus.
may exercise original jurisdiction when the Supreme Court itself cannot, this is the correct conclusion. As Professor William Duker once put it, the “Constitution specifically limits the original jurisdiction of the Court, though the individual justice in chambers or on circuit is subject to no such limit.”

As discussed above, the law has long distinguished between the acts of an individual judge and the acts of a court, particularly with regard to the issuance of habeas corpus. A major contribution of the Habeas Corpus Act of 1679 was its clarification that an individual judge had the power and obligation to issue habeas even when the court was not in session. Moreover, both state and federal law in this country have long empowered individual judges, including individual Justices of the Supreme Court, to issue habeas.

In addition, under the Judiciary Act of 1789, Justices of the Supreme Court spent most of their time exercising original jurisdiction that would have been forbidden to the Supreme Court itself. This is what circuit riding involved, which is why both Chief Justice John Jay and Justice Samuel Chase questioned its constitutionality. Yet as

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117 See Letter from Chief Justice John Jay to President George Washington (Apr. 3, 1790), reprinted in 3 Joseph Story, Commentaries on the Constitution of the United States § 1573, at 437, 440 n.1 (Fred B. Rothman & Co. 1999) (1833) (noting that “it would appear very singular, if the constitution was capable of being so construed, as to exclude the court, but yet admit the judges of the court”); see also Amar, supra note 55, at 469 n.124 (noting that this letter may never have been sent).

118 Duker, supra note 88, at 165 n.89; see Robert L. Stern et al., Supreme Court Practice 759 (8th ed. 2002) (noting that although the Court’s original jurisdiction is limited, the “individual Justices are not so limited”).

119 See supra notes 95–107 and accompanying text.


121 Individual Justices also are empowered to set bail as an original matter. See 18 U.S.C. §§ 3041, 3141 (2000); Felleman & Wright, supra note 104, at 989 & n.50 (describing this as “a rare instance in which the power of the individual Justice exceeds that of the Court as a whole” and noting that Marbury’s limitation of the Supreme Court’s original jurisdiction “apparently does not extend to individual Justices, who traditionally rode circuit and sat in original cases”).

122 See Letter from Chief Justice John Jay to President George Washington (Apr. 3, 1790), reprinted in 3 Joseph Story, Commentaries on the Constitution of the United States § 1573, at 437, 440 n.1 (Fred B. Rothman & Co. 1999) (1833) (presuming that the constitutional limit on the Supreme Court’s original jurisdiction applies to its judges as well and therefore that Supreme Court Justices constitutionally could not be judges of the circuit courts). Justice Chase wrote the following to Chief Justice Marshall:

It appears to me, that Congress cannot, by Law, give the Judges of the Supreme Court, original Jurisdiction of the same Cases of which it expressly gives them appellate Jurisdiction. . . . The Constitution intended that the Judges of
early as 1803, the Supreme Court considered the constitutionality of circuit riding too well settled to be reconsidered.\textsuperscript{123}

In the particular context of habeas corpus, although the Justices of the Supreme Court in \textit{Bollman} disagreed on whether the Court itself could issue the writ, there was no dispute that the individual Justices could do so.\textsuperscript{124} Justice Johnson implored that it be “remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of habeas corpus. This application is not made to us as at chambers, but to us as holding the supreme court of the United States . . . .”\textsuperscript{125}

Indeed, perhaps the most famous and controversial writ of habeas corpus ever issued in the United States—the one defied by President Abraham Lincoln—was issued by Chief Justice Roger Taney in

\begin{quote}
the Supreme Court should not have \textit{original} Jurisdiction, but only in the few Cases enumerated.
\end{quote}


\textsuperscript{123} Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (stating that “the question is at rest, and ought not now to be disturbed”). For the same reason, the constitutionality of permitting the judges of courts, not simply the courts themselves, to issue writs of habeas corpus and thereby to exercise the “judicial power of the United States” vested in courts by Article III, should be treated as settled. Indeed, as we have seen, the ability of individual judges to issue habeas not only has been part of our law since the Judiciary Act of 1789, but also is rooted in British practice and the Habeas Corpus Act of 1679. \textit{See supra} notes 95–107 and accompanying text; \textit{see also}, e.g., Vt. Agency of Natural Res. v. United States \textit{ex rel. Stevens}, 529 U.S. 765, 777 (2000) (treating historical practice in both Great Britain and the United States as “well nigh conclusive” in deciding that \textit{qui tam} actions are “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process” (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 102 (1998) (internal quotation marks omitted))). Justice Felix Frankfurter famously explained,

\begin{quote}
The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.
\end{quote}


\textsuperscript{124} \textit{See Bollman}, 8 U.S. (4 Cranch) at 96; \textit{id.} at 107 (Johnson, J., dissenting).

\textsuperscript{125} \textit{Id.} at 107 (Johnson, J., dissenting); \textit{cf.} Letter from Chief Justice John Jay to President George Washington (Apr. 3, 1790), \textit{reprinted in 3 Joseph Story, Commentaries on the Constitution of the United States} § 1573, at 437, 440 n.1 (Fred B. Rothman & Co. 1999) (1833) (finding “the distinction between a court and its judges . . . far from . . . illegal or unconstitutional,” but nevertheless rejecting the idea that “the judges of the Supreme Court may also be judges of inferior and \textit{subordinate} courts”).
his capacity as an individual Justice to determine the legality of a detention by military authorities during the Civil War.\textsuperscript{126} Chief Justice Taney explained that “[t]he petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there.”\textsuperscript{127} Chief Justice Taney did not make the writ returnable in Washington, however, but instead “resolved to hear it in [Baltimore] as obedience to the writ . . . would not withdraw General Cadwalader . . . from the limits of his military command.”\textsuperscript{128} Although he directed the clerk of the Circuit Court for the District of Maryland to issue the writ, he also directed that the writ be returnable

\textsuperscript{126} Ex \textit{parte} Merryman, 17 F. Cas. 144, 144–45 (C.C.D. Md. 1861) (No. 9487). Although the report of the decision in Federal Cases—a compilation not published until 1894—includes a caption denoting the case as one decided by the Circuit Court for the District of Maryland in its April 1861 term, the reproduction of the original opinion is captioned, “Before the Chief Justice of the Supreme Court of the United States, at Chambers.” SamuE Tyler, MemoIR of Roger Brooke Taney app. at 646 (1872). This is the caption used by Chief Justice Roger Taney himself. See Carl B. Swisher, \textsc{The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period} 1836–64, at 848 & n.25 (1974) (referring to a draft in Chief Justice Taney’s long-hand and noting that Chief Justice Taney labeled his opinion “Before the Chief Justice of the Supreme Court of the United States at Chambers”); see also Michael Stokes Paulsen, \textsc{The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation}, 15 \textsc{Car- dozo L. Rev.} 81, 90 n.27 (1993) (noting that some scholars have erroneously treated Merryman as a circuit court case, but concluding that it actually involved Chief Justice Taney as an individual Justice). Two contemporary reports denominate the case as decided in chambers, not in the April 1861 term of the Circuit Court for the District of Maryland, although they also denominate it as decided in the Circuit Court. See \textit{Ex \textit{parte} Merryman, AM. L. REG. \& U. PA. L. REV.}, 1861, at 524 (providing caption “In the United States Circuit Court, Chambers, Baltimore, Maryland. Before Taney, Chief Justice”); 3 W. L. Monthly 461, 461 (1861) (providing caption “U.S. Circuit Court—At Chambers. Baltimore, Md. . . . Before Hon. Roger B. Taney, Chief Justice of the United States.”). At the conclusion of the proceedings before him, Chief Justice Taney ordered “all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the District of Maryland,” an order that scarcely would have been necessary if the proceedings actually had been conducted in that Circuit Court, but which may help to explain why the case frequently has been thought of as one before that Circuit Court. Merryman, 17 F. Cas. at 153; see STERN ET AL., supra note 118, at 755 (noting that in-chambers opinions of Supreme Court Justices “have been printed at the end of the volumes of the United States Reports since Vol. 396 in 1969”); SWISHER, supra, at 847 (noting that “at that time and for many years thereafter opinions written at chambers were not usually printed in official reports”); id. at 849 n.26 (noting that although the Federal Cases citation to Merryman refers to the Circuit Court for the District of Maryland, this “is not to be taken as an admission on the part of the Chief Justice that the case was disposed of in that court” and that “[h]e continued to treat it as a decision by the Chief Justice at chambers”).

\textsuperscript{127} Merryman, 17 F. Cas. at 147; see Tyler, supra note 126, at app. at 640–41 (reproducing the petition addressed “To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States” and praying that the writ of habeas corpus issue, commanding General George Cadwalader “to produce your petitioner before you, Judge as aforesaid”).

\textsuperscript{128} Merryman, 17 F. Cas. at 147.
“before me, Chief Justice of the Supreme Court of the United States,” not before the Circuit Court, and this is how the writ issued.\textsuperscript{129} The return was similarly addressed “[t]o the HON. ROGER B. TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BALTIMORE, MD.,” not to the U.S. Circuit Court for the District of Maryland, and the attachment that Chief Justice Taney ordered to issue against General George Cadwalader for contempt in refusing to produce John Merryman was likewise made returnable “before me.”\textsuperscript{130} When the U.S. Marshal for the District of Maryland, who attempted to serve the writ of attachment, certified that he was refused admission to Fort McHenry, he certified this fact “to the HONORABLE ROGER B. TANEY, Chief Justice of the Supreme Court of the United States,” not to the Circuit Court for the District of Maryland.\textsuperscript{131} Indeed, Chief Justice Taney himself explained that District Judge William F. Giles was not sitting with him because it was not a session of the Circuit Court but rather a proceeding before the Chief Justice at chambers.\textsuperscript{132}

If there was any doubt about the constitutional power of an individual Justice to exercise original jurisdiction in cases outside the Supreme Court’s own original jurisdiction, surely President Lincoln and his Attorney General would have raised the argument, particularly given the far-reaching arguments they did make.

President Lincoln himself asserted that the President had the power, without congressional authorization, to suspend habeas and intimated that, even if this constitutional interpretation were wrong, he was nonetheless right to violate the Constitution, asking, “are all the laws, \textit{but one}, to go unexecuted, and the government itself go to pieces, lest that one be violated?”\textsuperscript{133} Attorney General Edward Bates

\textsuperscript{129} See Tyler, supra note 126, at app. at 642 (reproducing order that the writ be issued “by Thomas Spicer, clerk of the Circuit Court of the United States in and for the District of Maryland,” returnable “before me, Chief Justice of the Supreme Court of the United States”); id. (reproducing the writ itself, commanding General Cadwalader “to be and appear before the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States,” and “receive whatsoever the said Chief Justice shall determine upon concerning you on this behalf”).

\textsuperscript{130} Id. at 642, 643 (reproducing the return); id. at 644 (reproducing the order for attachment).

\textsuperscript{131} Id. at 644–45 (reproducing the certification).

\textsuperscript{132} Swisher, supra note 126, at 846–47; Carl Brent Swisher, Roger B. Taney 551 (1935). Judge William Giles, however, had sat with Chief Justice Taney during the proceeding of the previous day. Swisher, supra note 126, at 846.

\textsuperscript{133} President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in 4 The Collected Works of Abraham Lincoln 421, 430–31 (Roy P. Basler ed.,
issued a nineteen page opinion supporting the President’s power to arrest suspected insurgents and to refuse to obey a writ of habeas corpus issued by a court or a judge. He contended that the President was “above all other officers, the guardian of the Constitution—its preserver, protector, and defender,” answerable to “no other human tribunal” than the “high court of impeachment.” Neither objected to Chief Justice Taney’s action on the ground that he could not issue an original writ of habeas corpus because of the limitations on the Supreme Court’s original jurisdiction.

The authors of the leading federal courts text ask, “[d]oes the power of a single Justice of the Supreme Court to issue a writ of habeas corpus . . . involve original or appellate jurisdiction?” The an-

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134 Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 74–92 (1861!)
135 Id. at 82.
136 Id. at 91. In addition to declaring that a court could not issue an order to the President to submit to the court’s judgment, Attorney General Edward Bates also claimed that an order could not issue against the President’s subordinates. Id. at 85–86. If this is correct, it is difficult to see how habeas for federal prisoners would ever be available. See REHNQUIST, supra note 133, at 44 (noting that Attorney General Bates’s opinion “would persuade only those who were already true believers”); cf. Paulsen, supra note 86, at 290 (stating that unless habeas has been suspended, presidents must obey writs of habeas corpus).
137 To the contrary, Attorney General Bates relied on Bollman for the proposition that habeas is always “in the nature of an appeal,” and asserted that “it will hardly be seriously affirmed, that a judge, at chambers, can entertain an appeal, in any form, from a decision of the President of the United States—and especially in a case purely political.” 10 Op. Att’y Gen. at 86–87. Although Bollman states that “[t]he decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature,” in context, the statement is referring to judicial decisions that an individual shall be imprisoned, not all decisions to imprison. See 8 U.S. (4 Cranch) at 101. Although an executive official must interpret and apply the law in particular situations, to treat all judicial examination of the legality of executive conduct as appellate would constitute a rejection of Marbury, for it would mean that the mandamus sought in that case should have been characterized as appellate because it sought review of Secretary of State James Madison’s decision to withhold William Marbury’s commission. See 5 U.S. (1 Cranch) 137, 147–48 (1803) (presenting argument of Charles Lee).
138 FALLON ET AL., supra note 13, at 314 n.4.
swer to this question “rests in obscurity” because the question itself is flawed. It contains an implicit assumption that the answer must be the same for all exercises of habeas power by an individual Justice.

But this assumption is simply wrong. Just as *Marbury* makes clear that the writ of mandamus can be used as a means of exercising *either* original or appellate jurisdiction, *Bollman* makes clear that the writ of habeas corpus can be used as a means of exercising *either* original or appellate jurisdiction. For both prerogative writs, the essential criterion is whether the particular case involves revision of another court’s judgment—if so, appellate jurisdiction is involved, and if not, original jurisdiction is involved.\(^{140}\)

\(^{139}\) *See id. But see* Fay v. Noia, 372 U.S. 391, 407 (1963) (stating that “the habeas jurisdiction of the other federal courts and judges, including the individual Justices of the Supreme Court, has generally been deemed original”).

\(^{140}\) *Bollman*, 8 U.S. (4 Cranch) at 100–01; *Marbury*, 5 U.S. (1 Cranch) at 175. In one rather confusing opinion, the Supreme Court held that it lacked jurisdiction to review an extradition decision by a district judge in chambers, writing broadly that the Supreme Court could “exercise no power, in an appellate form, over decisions made at his chambers by a justice of this court, or a judge of the District Court.” *In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847). *See generally John T. Parry, The Lost History of International Extradition Litigation*, 43 Va. J. Int’l L. 93 (2002) (discussing *Metzger*, its possible interpretations, and its progeny, in detail).

*Metzger* might be read as limited to the extradition context, where a district judge can be understood to be exercising a non-judicial “special authority.” *See* 46 U.S. (5 How.) at 191; *see also* 18 U.S.C. § 3184 (providing that “any justice or judge of the United States” as well as certain magistrates and state judges, but not any courts, may conduct extradition proceedings); LoDuca v. United States, 93 F.3d 1100, 1105 (2d Cir. 1996) (reasoning that “[p]resumably, the Court was describing the role of the district judge rather than the place of his decision-making, since the Court later noted that the judge was exercising ‘a special authority’ for which no provision existed regarding the appealability of his decision”); *In re Mackin*, 668 F.2d at 125, 129 (Friendly, J.) (tracing the inability to appeal extradition orders to *Metzger’s* conclusion that an extradition judge exercises a special authority and holding that such an order is not a final decision of a “district court” subject to appeal under 28 U.S.C. § 1291 (2000)). *But see* Parry, *supra*, at 160–64 (criticizing Judge Friendly’s approach).

*Metzger* also might be read to reflect a view that the Supreme Court lacked statutory authorization to review in-chamber decisions. *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313–14 (1810) (construing Acts of Congress granting the Supreme Court appellate jurisdiction as impliedly excepting all other cases). Read this way, however, *Metzger* is difficult to reconcile with the proposition that the Supreme Court’s “appellate jurisdiction by habeas corpus extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress.” *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 99 (1868); *see* Oaks, *supra* note 29, at 165 (discussing *Metzger* and Yerger); cf. *Stern et al.*, *supra* note 118, at 787 (noting that the Court “has jurisdiction, on motion, to review and reverse the action of an individual Justice with respect to a stay application”).

*Metzger* also might stand for the proposition that because appellate jurisdiction involves the revision of another court’s judgment and an individual judge in chambers is not holding court, an in-chambers decision itself cannot be, as a constitutional matter, the predicate for
When the Supreme Court’s own jurisdiction is at issue, it is important to decide whether the particular case involves original or appellate jurisdiction because the Court’s constitutionally permissible original jurisdiction is limited. For that reason, whether an individual Justice may refer a petition for habeas corpus to the full court depends on whether the jurisdiction at issue is original or appellate. It was in this context that the Supreme Court addressed the proper characterization of the habeas jurisdiction of individual Justices.

In *In re Kaine*, an alleged fugitive from Great Britain was brought before a U.S. Commissioner pursuant to an extradition treaty and was ordered committed. The U.S. Circuit Court, District Judge Samuel R. Betts presiding, refused a writ of habeas corpus, and Thomas Kaine presented a petition for a writ of habeas corpus to Justice Samuel Nelson at chambers. Justice Nelson granted the writ, but rather than making a final disposition, ordered that the case be heard “before all the Justices of the Supreme Court in bank, at the commencement of the next term” keeping Thomas Kaine in the custody of a marshal until then. Upon argument before the Supreme Court, the Court assumed that Justice Nelson’s action involved original jurisdiction, and therefore concluded that his attempted transfer to the full court was invalid. However *Metzger* is interpreted, it does nothing to call into question the power of individual Justices of the Supreme Court to exercise original jurisdiction by issuing writs of habeas corpus.

The exercise of the Supreme Court’s appellate jurisdiction. *See* 46 U.S. at 191 (stating that the question of jurisdiction arises because the district judge acted “at his chambers, and not in court”); *id.* at 189 (stating that “it is said” that *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795), involved “an original exercise of jurisdiction by the [Supreme] court, as it does not appear that the district judge was holding a court at the time of the commitment” on a charge of treason, but noting that the issue of jurisdiction was not considered); *id.* at 180 (noting the argument of Coxe, counsel for petitioner, that “this court has held, that, in awarding this writ, it does so in the exercise of appellate and not original jurisdiction, and that a doubt has been expressed whether, this being a proceeding before the district judge at chambers, this court can exercise any revisory power over it”).

However *Metzger* is interpreted, it does nothing to call into question the power of individual Justices of the Supreme Court to exercise original jurisdiction by issuing writs of habeas corpus.

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141 *See* 55 U.S. (14 How.) 103, 103–04 (1852).

142 *Id.* at 104. For the decision of the Circuit Court, see *In re Kaine*, 14 F. Cas. 84 (C.C.S.D.N.Y. 1852) (No. 7598). For the decision of Justice Samuel Nelson in chambers adjourning the case to the full Supreme Court, see *In re Kaine*, 14 F. Cas. 82 (C.C.S.D.N.Y. 1852) (No. 7597a).

143 *Kaine*, 55 U.S. (14 How.) at 116–17 (Catron, J.); *id.* at 131 (Nelson, J., dissenting). Four of the eight participating Justices concluded that the Supreme Court could issue habeas in the exercise of its appellate jurisdiction to revise the judgment of the Circuit Court and denied relief on the merits. *Id.* at 116–17 (Catron, J., joined by McLean, Wayne, and Grier, JJ.). Three other Justices agreed that the Court itself could use habeas in the exercise of its appellate jurisdiction to revise the decision of the Circuit Court, but con-
Even Justice Nelson stated that he was “inclined to concur with [his] brethren, that [they] cannot entertain jurisdiction . . . upon [his] allowance of the writ and adjournment of the proceedings to be heard in this court,” based on his view that because the Court’s appellate power cannot be exercised by individual Justices at chambers, the “proceedings before [him], at chambers . . . must undoubtedly be regarded as an original proceeding, and not in the exercise of an appellate power.”

In *Ex parte Clarke*, however, the Court upheld the power of an individual Justice to refer a habeas matter to the full Court. Augustus Clarke, a member of the city council of Cincinnati, was convicted in a U.S. Circuit Court for failing to perform certain duties involving a federal election and presented a petition for a writ of habeas corpus to Justice William Strong. Justice Strong granted the writ, “returnable forthwith before himself, at the Catskill Mountain House.” Upon the return, Justice Strong postponed the hearing of the case into the full Court until its next term.

The government objected that this procedure was invalid under *Kaine*, a point that the Court “considered . . . with some care.” The Court explained that the “ground taken” in *Kaine* was that “the writ had been issued by [Justice Nelson] in virtue of his original jurisdiction.”

But in this case, however it may have been in that, it is clear that the writ, whether acted upon by the justice who issued

cluded on the merits that the Circuit Court should have ordered the petitioner discharged from custody. *Id.* at 134, 148 (Nelson, J., dissenting, joined by Taney, C.J., and Daniel, J.).

Justice Benjamin Curtis, speaking for himself, emphasized the difference between the individual Justice and the Court, stating that an individual Justice “in vacation, at his chambers, has no power to grant a writ of habeas corpus out of this court” because only the full Court could do so, and that an individual Justice similarly lacks power “to make such a writ returnable before himself, and then adjourn it into term.” *Id.* at 118. He therefore agreed with every other Justice that the Court could not act under Justice Nelson’s writ. *Id.* Nonetheless, he rejected the conclusion, accepted by every other Justice, that the Court could issue habeas in the exercise of its appellate jurisdiction, concluding that the cause of Thomas Kaine’s commitment was not the act of the Circuit Court, but instead the act of the Commissioner, and therefore the petition called for an exercise of original jurisdiction. See *id.* at 126. The Court entered an order denying the writ and dismissing the petition. *Id.* at 148; see Neuman, *supra* note 74, at 998–1001 (discussing *Kaine*).

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145 100 U.S. 399, 400–02 (1879).
146 *Id.*
147 *Id.* at 402.
148 *Id.*
149 *Id.*
150 *Clarke*, 100 U.S. at 402.
it, or by this court, would in fact require a revision of the action of the Circuit Court by which the petitioner was committed, and such revision would necessarily be appellate in character. This appellate character of the proceeding attaches to a large portion of cases on habeas corpus, whether issued by a single judge or by a court.\(^\text{151}\)

Significantly, the Court added that the appellate feature is “no objection to the issue of the writ by the associate justice, and is essential to the jurisdiction of this court.”\(^\text{152}\) That is, although the power of the Court itself to issue habeas, whether directly or on referral from an individual Justice, depends on whether the particular case involves original or appellate jurisdiction, an individual Justice has the power to grant habeas whether the particular case involves original or appellate jurisdiction. Put slightly differently, the power of an individual Justice to issue a writ of habeas corpus is both original and appellate: appellate if the particular case involves the revision of another court’s judgment, and original if the particular case does not.

In \textit{Kaine}, the Court assumed that individual Justices could not exercise the appellate power of the Court itself, and did not discuss whether the individual power vested in Justices might, in some cases, properly be characterized as appellate. In \textit{Clarke}, by contrast, the Court was untroubled by the prospect of individual Justices exercising appellate power via habeas, noting that an individual Justice can issue habeas “in any part of the United States where he happens to be,” and can “undoubtedly . . . dispose[] of the case himself,” although if “the case is one of which this court also has jurisdiction,” and is “of great moment and difficulty,” the Justice may postpone the case to the whole Court.\(^\text{153}\)

\(^\text{151}\) Id. at 402–03. Between \textit{Kaine} and \textit{Clarke}, the Court decided \textit{Yerger} and clarified the following:

[I]n all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of \textit{certiorari}, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

\textit{Yerger}, 75 U.S. (8 Wall.) at 103. In doing so, the Court explicitly rejected the contrary position taken by Justice Curtis in \textit{Kaine}. Id. at 100.

\(^\text{152}\) \textit{Clarke}, 100 U.S. at 403.

\(^\text{153}\) Id. Justice Joseph Bradley, the author of the \textit{Clarke} opinion, denied a writ of habeas corpus sought by the assassin of President James Garfield and explained,
Although both cases wrestled with the interaction between the power of an individual Justice to grant habeas and the limitation on the Supreme Court’s original jurisdiction, neither case suggested the least doubt that an individual Justice could exercise original habeas jurisdiction, notwithstanding the constitutional limitations on the Supreme Court’s own original jurisdiction. This is dramatically illustrated by the aftermath of the Kaine case: even though at least seven Justices, including Justice Nelson himself, already had stated that his power as an individual Justice in that case involved the exercise of original jurisdiction, he nevertheless subsequently exercised that jurisdiction to discharge Thomas Kaine from custody.\textsuperscript{154}

Later developments have called into doubt Clarke’s robust view of an individual Justice’s power to take action that effectively decides an appeal unilaterally.\textsuperscript{155} For example, although individual Justices are empowered by statute to grant stays pending certiorari,\textsuperscript{156} they are quite reluctant to do so when it effectively would decide the case on the merits.\textsuperscript{157} Similarly, although individual Justices are empowered by

\textit{In re Guiteau} (1882) (Bradley, J., in chambers), reprinted in 1 A Collection of in Chambers Opinions, at xiv, xv (Cynthia Rapp ed., 2004); see Sacco v. Massachusetts (1927) (Holmes, J., in chambers), reprinted in 1 A Collection of in Chambers Opinions 16, 16 (Cynthia Rapp ed., 2004) (noting that if the proceedings leading to the conviction “were void in a legal sense . . . no doubt I might issue a habeas corpus . . . simply as anyone having authority to issue the writ might do so”).

\textsuperscript{154} See \textit{Ex parte Kaine}, 14 F. Cas. 78, 82 (C.C.S.D.N.Y. 1853) (No. 7597) (Nelson, J., in chambers). Judge Nelson observed that, given the Court’s jurisdictional determination, the “case before me . . . necessarily remained for a final hearing at chambers.” \textit{Id.} at 79–80. Note, too, that four Justices in \textit{Kaine} had refused habeas relief on the merits and Justice Nelson’s views on the merits had attracted only two other votes, yet Justice Nelson, as an individual Justice, ordered Thomas Kaine discharged. \textit{Id.} at 82.

\textsuperscript{155} See Rapp, supra note 104, at 183 n.5 (referring to a 1944 letter from the Clerk’s Office as indicating “that although a Justice might have the power to grant a petition of habeas corpus, it was a well-established practice that such applications would be considered by the full Court”). It would appear that Cynthia J. Rapp is referring only to habeas petitions calling for the exercise of appellate jurisdiction, for she makes no attempt to explain how the Court could entertain an application for habeas that called for the exercise of original jurisdiction beyond the cases allocated to the Supreme Court’s original jurisdiction by Article III.


\textsuperscript{157} See Cousins v. Wigoda, 409 U.S. 1201, 1206 (1972) (Rehnquist, J., in chambers); Stern \textit{et al.}, supra note 118, at 798 (citing Cousins, 409 U.S. at 1206 and noting that one
statute to grant bail, that power has been questioned in situations where a certiorari petition to review a lower court’s decision regarding bail is pending.

When confronted with a case seeking “habeas corpus relief by way of injunction,” Justice William Douglas once stated that “apart from granting stays, arranging bail, and providing for other ancillary relief, an individual Justice of this Court has no power to dispose of cases on the merits.” He went on to add that “[i]t may be that in time [the Suspension Clause] will justify the issuance of a writ of habeas corpus by an individual Justice,” but that the point “has never been decided.” Although this statement has sometimes been cited, even by the illustrious Professor Charles Alan Wright, for the proposition that “[w]hether an individual justice of the Supreme Court may issue the writ is an open question,” it should not be read this broadly. Individual Justices are empowered by statute to issue habeas corpus, as both Professor Wright and Justice Douglas recognized.

factor considered in stay applications is a “concern that to grant a stay would effectively be to determine the case on the merits, a power not otherwise vested in the individual Justices”).


See Bandy v. United States, 82 S. Ct. 11, 13 (1961) (Douglas, J., in chambers) (declining to grant bail in such a situation because to do so would make the petition for certiorari moot); Stack v. Boyle, 342 U.S. 1, 4 n.2 (1951) (leaving open the question of “the power of a single Justice or Circuit Justice to fix bail pending disposition of a petition for certiorari in a case of this kind”); see also Blodgett v. Campbell, 508 U.S. 1301, 1303-04 (1993) (O’Connor, J., in chambers) (noting, in the context of an application to vacate an order of the court of appeals remanding a case to the district court, that it apparently would exceed the authority of a Circuit Justice to vacate or to reverse a court of appeals’s order, other than one concerning interim relief); Stern et al., supra note 118, at 760 (noting that because a pretrial bail decision may be appealed and reviewed on certiorari, “a Circuit Justice may well be quite reluctant to grant bail pending trial because this would appear to be tantamount to deciding the merits of such an appeal unilaterally”).


Id.


See United States ex rel. Norris v. Swope, 72 S. Ct. 1020, 1021 (1952) (Douglas, J., in chambers) (noting that “an individual Justice . . . has the power to grant the writ”); In re Johnson (1952) (Douglas, J., in chambers), reprinted in 1 A COLLECTION OF IN CHAMBERS OPINIONS 67, 69 (Cynthia Rapp ed., 2004) (noting that the “power to issue the writ [of habeas corpus] is given to a Justice”); Wright, supra note 162, at 229 (noting that “[e]ither the Supreme Court or a justice thereof may issue the writ”). Indeed, Justice William Douglas once went so far as to state that “[w]hat courts may do is dependent on statutes, save as their jurisdiction is defined by the Constitution. What federal judges may do, however, is a distinct question. . . . [The Suspension Clause] must mean that [habeas] issuance . . . is an implied power of any federal judge.” Parisi v. Davidson, 405 U.S. 34, 48 (1972) (Douglas, J., concurring in the judgment) (citation omitted).
ing that the Suspension Clause may someday be interpreted to justify the issuance of habeas by individual Justices, surely Justice Douglas was not suggesting that the longstanding statutory power of individual Justices to grant habeas was somehow unconstitutional. At most, *Locks v. Commanding General* stands for the proposition that, just as an individual Justice should not use the power to grant a stay or bail effectively to displace the Supreme Court’s appellate jurisdiction, so too an individual Justice may not use habeas corpus effectively to displace the Supreme Court’s appellate jurisdiction.¹⁶⁴

Yet even if *Locks* is read this broadly, and Clarke’s view of the *appellate* power of individual Justices to grant habeas is rejected completely, there remains no constitutional impediment to an individual Justice exercising *original* jurisdiction and issuing writs of habeas corpus as they have been empowered to do since 1789.

**Conclusion**

The Madisonian Compromise, *Marbury v. Madison*, *Tarble’s Case*, and the Suspension Clause can all coexist. There is no need to reject, to downgrade, or to weaken any of them. There is no need to reject the Madisonian Compromise because of *Tarble’s Case* and the Suspension Clause, nor to weaken the Suspension Clause because of the Madisonian Compromise, *Marbury*, and *Tarble’s Case*.

At the outset, this Article posited a situation in which someone detained by the federal executive sought to challenge the legality of his detention, but could not turn to the inferior federal courts because they did not exist, could not turn to the Supreme Court because of *Marbury*, and could not turn to the state courts because of *Tarble’s Case*. Even though no one—not Congress, not the Supreme Court, and not the state courts—could be faulted for violating the Constitution, might it be that the privilege of the writ would be unavailable? We can now say that there is some place to which the detainee could go, the chambers of any Justice of the Supreme Court,

¹⁶⁴ See Norris, 72 S. Ct. at 1021 (noting that although an individual Justice has the power to grant the writ, it would not be appropriate, absent a showing of exceptional circumstances, to do so until the petitioner “exhausts his remedies by certiorari to this Court”).

No matter how one interprets *Locks*, it would be a mistake to rely too heavily upon it as authority. Justice Douglas specifically noted that the issue he raised was “not briefed or argued in the papers which have been submitted,” that the “shortness of time (less than one day) allowed [to him] for consideration of the application [did not] permit [him] even to explore ” it, and that his decision was “without prejudice to any future ruling,” and was based “solely on the narrow compass of the authorities submitted.” *Locks*, 89 S. Ct. at 32.
and that there is no constitutional impediment to the exercise of habeas power by an individual Justice.

Moreover, by defending the Suspension Clause, the argument in this Article bolsters the longstanding interpretive canon that statutes should be construed, when possible, to preserve the availability of habeas. Indeed, it adds another layer: even if a statute clearly removes habeas jurisdiction from courts, it might not remove it clearly from individual Justices.

But what if Congress were clearly and unambiguously to close this door, too? If the arguments made in this Article are correct, then if Congress was to make no provision at all for habeas corpus, it would stand in violation of the Suspension Clause. Although this Article does not contend that individual Justices have an inherent power to issue writs of habeas corpus, nor that they could issue such writs without congressional authorization, Congress could not defend its failure to make any provision for habeas by pointing to the Madisonian Compromise, _Marbury_, and _Tarble’s Case_, because it had another option: far from having to create inferior federal courts, or to challenge _Marbury_ or _Tarble’s Case_, it simply could have empowered individual Justices to issue writs of habeas corpus.

Some may think that, absent an argument for an inherent power in individual Justices to issue habeas corpus, there is no difference between the situation we confronted at the outset of the Article and the one we can see now: in either case, the federal detainee cannot obtain habeas relief unless Congress has granted habeas jurisdiction either to inferior federal courts or to individual Justices. But there is an important difference: in the earlier situation, it appeared impossible to find a constitutional violation of the Suspension Clause without jettisoning an existing constitutional principle; now we can.

This insight not only should shape judicial interpretation of statutes, but also—because constitutional interpretation matters to Congress, the President, and the citizenry, as well as to judges—this insight should affect the statutes that get enacted. Congress should

165 See INS v. St. Cyr, 533 U.S. 289, 298 (2001) (noting the “longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction”). Almost seven score years ago, the Supreme Court stated,

The general spirit and genius of our institutions has tended to the widening and enlarging of the _habeas corpus_ jurisdiction of the courts and judges of the United States . . . . We are not at liberty to except from [the Supreme Court’s appellate jurisdiction through the use of habeas] any cases not plainly excepted by law.

_Ex parte_ Yerger, 75 U.S. (8 Wall.) 85, 102 (1868).
always feel “with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity.”\textsuperscript{166}

\textsuperscript{166} \textit{Ex parte} Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).
AUTHORIZATIONS FOR THE USE OF FORCE, INTERNATIONAL LAW, AND THE CHARMING BETSY CANON

INGRID BRUNK WUERTH*

Abstract: Although international law has figured prominently in many disputes around actions of the U.S. military, the precise relationship between international law and the President’s war powers has gone largely unexplored. This Article seeks to clarify one important aspect of that relationship: the role of international law in determining the scope of Congress’s general authorizations for the use of force. In the seminal case of Hamdi v. Rumsfeld, the plurality opinion used international law to interpret the authorization by Congress for the use of force, but did so without adequate attention to the content or interpretive function of international law. This Article identifies and defends a better approach: courts should presume that general authorizations for the use of force do not empower the President to violate international law. Such a presumption is consistent with long-standing tools of statutory interpretation reflected in the Charming Betsy canon, maximizes the presumed preferences of Congress, advances separation of powers values, and promotes normative values that favor the use of international law as an interpretive tool.

Introduction

The relationship between international law and the President’s wartime authority under the U.S. Constitution is an important but largely unexplored subtext in many post-September 11, 2001 legal disputes. Examples include the detentions of Yaser Hamdi and Jose Padilla as “enemy combatants,” military trials for Guantanamo de-

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tainees, and allegations of torture at Abu Ghraib prison. Critics charge that the Executive Branch violated both international law and the U.S. Constitution, while the George W. Bush administration has defended its actions in part on the grounds that they come within the President’s power as Commander in Chief.\(^1\) Government lawyers have also appealed to international law to justify an expansive view of the President’s power as Commander in Chief.\(^2\) For their part, lower courts have invoked international law in confusing ways as they seek

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to demarcate the constitutional authority of the President during war. In the U.S. Supreme Court’s landmark decision in *Hamdi v. Rumsfeld*, citation to international law by both the habeas petitioner and the government met with some success—all nine Justices made at least passing reference to international law in interpreting the scope of the President’s wartime power.

This Article seeks to clarify one aspect of the relationship between international law and the courts’ construction of the President’s war powers—the role of international law in determining the scope of Congress’s general authorization for the use of force. This use of international law was important to the Supreme Court’s opinions in *Hamdi*, which considered a general authorization by Congress for the President to use force; the authorization did not explicitly include detentions. The four-Justice plurality opinion used international law in part to interpret the authorization as including the detention of “enemy combatants,” but only until the cessation of hostilities. The plurality opinion relied on international law but failed to explain in full its connection to the authorization provided by Congress, or to distinguish among different interpretive uses and different kinds of international law. Justice Clarence Thomas appeared to reject the plurality’s use of international law outright, at least insofar as it limited the authority of the President, and four other Justices disagreed with the use of international law in the *Hamdi* case itself, but left open whether international law might be relevant in future cases. The *Hamdi* opinions thus create substantial confu-
ession about the role of international law in interpreting general authorizations by Congress for the President to use force.

The lack of clarity around this use of international law is particularly troubling for two principle reasons. First, congressional authorization is a key factor in determining the scope of the President’s war powers. For all nine of the Justices in *Hamdi*, the presence or absence of congressional authorization was important in determining the lawfulness of the President’s actions. The U.S. Court of Appeals for the Second Circuit’s decision in another detention case, *Padilla v. Rumsfeld*, also turned on congressional authorization, as have recent decisions by district courts. The importance of congressional authorization in these cases builds on the Court’s seminal opinion in *Dames & Moore v. Regan* and Justice Robert Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, in which the views of Congress, gleaned from a variety of sources, were critical to the construction of

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10 See, e.g., Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (granting habeas relief to civilians tried by military commissions that exceeded congressional authorization); *In re Yamashita*, 327 U.S. 1, 11, 25 (1946) (denying habeas relief when trial by military commission was specifically authorized by federal statute); Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (reasoning that “we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did”); Hirabayashi v. United States, 320 U.S. 81, 91–93 (1943) (upholding conviction of American citizen of Japanese ancestry for violating an Act of Congress that made it a misdemeanor to disregard knowingly restrictions authorized by an Executive Order of the President); *Ex parte Quirin*, 317 U.S. 1, 35, 48 (1942) (denying habeas relief where trial by military commission was specifically authorized by federal statute); The Paquete Habana, 175 U.S. 677, 708, 711 (1900) (invalidating a seizure of property that lacked explicit statutory or presidential authorization and that violated the law of nations); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (granting habeas relief to petitioner whose trial by military commission during the Civil War violated an Act of Congress); The Prize Cases, 67 U.S. (2 Black) 635, 670–71 (1862) (reasoning that because Congress had retroactively blessed the forfeitures, the Court did not have to decide whether such act was “necessary under the circumstances”); Brown v. United States, 12 U.S. (8 Cranch) 110, 129 (1814) (holding that the President lacked the power to confiscate certain property absent specific congressional authorization).

11 See infra notes 74–129 and accompanying text.

12 352 F.3d at 718–24 (concluding that Jose Padilla’s detention lacked congressional authorization), rev’d on other grounds, 124 S. Ct. 2711 (2004); id. at 728–30 (Wesley, J., concurring in part and dissenting in part) (concluding that Congress had authorized Padilla’s detention).


the President’s foreign affairs powers.\textsuperscript{16} As congressional authorization gains importance, the tools used to construe the scope of that authorization do as well.\textsuperscript{17} The confusion that \textit{Hamdi} generates about international law thus makes it difficult for the lower courts to resolve cases effectively, for the President to know the scope of his own authority, and for Congress to predict how courts and the President will interpret its authorizations for the use of force.

Second, there is general disagreement around the value of international law as an interpretive norm in a number of different contexts. The Supreme Court has made recent, highly controversial references to international and comparative sources to interpret the Eighth\textsuperscript{18} and Fourteenth Amendments,\textsuperscript{19} and courts have long used international law to interpret statutes, even those that do not explicitly refer to it.\textsuperscript{20} The justification for and scope of such use is also the subject of disagreement.\textsuperscript{21} Some of the general criticisms leveled

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\item \textsuperscript{17} See Curtis A. Bradley & Jack L. Goldsmith, \textit{Congressional Authorization and the War on Terrorism}, 118 Harv. L. Rev. (forthcoming 2005) (manuscript at 2–5, on file with author) (arguing that the Authorization for Use of Military Force should receive more attention from scholars in part because courts have generally resolved war powers cases based on congressional authorization and avoided questions about the President’s constitutional power as Commander in Chief).
\item \textsuperscript{20} See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
\end{itemize}
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against the interpretive value of international law include the claims that its use lacks textual antecedent and may not reflect the intent of Congress or the Framers, that norms developed in whole or in part outside of the United States have little interpretive value, and that the variety of sources in international law do little to constrain the courts’ decision making.\(^\text{22}\) Unfortunately, the plurality’s loose reliance on international law in \textit{Hamdi} is open to some of these very criticisms.

Part I of this Article introduces the controversy surrounding the use of international law to interpret statutes and the Constitution.\(^\text{23}\) Part II analyzes the opinions in \textit{Hamdi} and shows that the plurality relied on international law to interpret the scope of Congress’s authorization without proper regard for its source, content, or interpretive function, and concludes that this use of international law does not effectively serve the interpretive purposes discussed in Part I.\(^\text{24}\)

Part III argues that international law has significant interpretive value if it is used by the courts to limit the scope of congressional authorization to those actions by the President that do not violate international law.\(^\text{25}\) Part III first considers the following potential justifications for using international law: (a) the text of the authorization (or legislative history) invites recourse to international sources, (b) international law is relevant in construing the intent of Congress in passing the authorization, and (c) the application of international law advances certain separation-of-powers values.\(^\text{26}\) The last two justifications are considered through the lens of the \textit{Charming Betsy} canon, pursuant to which the courts construe acts of Congress to avoid violations of international law whenever possible.\(^\text{27}\) Although the context in which the canon is generally invoked is different in significant respects from the one presented here, the basis for the canon and the debate it has engendered nonetheless provide a useful framework in which to consider the interpretive use of various kinds of international law.

\begin{itemize}
\item \(^{22}\) See infra notes 33–63 and accompanying text.
\item \(^{23}\) See infra notes 33–63 and accompanying text.
\item \(^{24}\) See infra notes 64–135 and accompanying text.
\item \(^{25}\) See infra notes 136–275 and accompanying text.
\item \(^{26}\) See infra notes 136–245 and accompanying text.
\item \(^{27}\) See \textit{Charming Betsy}, 6 U.S. (2 Cranch) at 118.
\end{itemize}
As Part III illustrates, however, there are strong reasons to think that this use of international law both reflects the preferences of Congress and serves to foster separation of powers.\textsuperscript{28} The participation of the political branches in the development of international humanitarian law, the formal and informal commitments made by the Executive Branch to follow that law during armed conflict, the long-standing nature of the \textit{Charming Betsy} canon, and other factors all provide sound reasons for the courts to conclude that general authorizations for the use of force do not embrace violations of international law by the President.\textsuperscript{29} Moreover, this use of international law arguably promotes separation of powers by seeking specific authorization from Congress for certain violations of international law rather than leaving that decision in the hands of the courts or the President.\textsuperscript{30}

Finally, Part III concludes by revisiting the \textit{Hamdi} case, and explains how the analysis laid out above would have strengthened the plurality’s opinion and better advanced many of the interpretive functions of international law set forth in Part I.\textsuperscript{31} Using two treaties as examples, this Part also considers how such a presumption would work with respect to various sources of international law and particular problems that might arise in those contexts.\textsuperscript{32}

\section{I. The Interpretive Role of International Law}

The basic principles of international law are well known, but a brief review is nonetheless helpful to set the context for the discussion that follows. Treaties are international agreements; in our constitutional framework they require approval of the President and a super-majority of the Senate.\textsuperscript{33} Self-executing treaties have effect as domestic law without any implementing legislation. Non-self-executing treaties are binding internationally, but require further legislative action to become directly enforceable by U.S. courts.\textsuperscript{34} Customary international law is based on consistent practices that states follow out of a sense of legal obligation.\textsuperscript{35} The status of customary international

\begin{itemize}
\item \textsuperscript{28} See infra notes 136–275 and accompanying text.
\item \textsuperscript{29} See infra notes 136–202 and accompanying text.
\item \textsuperscript{30} See infra notes 203–245 and accompanying text.
\item \textsuperscript{31} See infra notes 246–275 and accompanying text.
\item \textsuperscript{32} See infra notes 246–275 and accompanying text.
\item \textsuperscript{33} U.S. Const. art. II, § 2.
\item \textsuperscript{34} \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 111(3) (1987).
\item \textsuperscript{35} Id. § 102(2).
\end{itemize}
law in our domestic legal system is contested—some argue that it is federal law that binds the states and provides a basis for the jurisdiction of the federal courts, others argue that it is not, and still others take an intermediate position.\textsuperscript{36} It is well settled, however, that the political branches can override treaties and customary international law as matters of domestic law if they choose to do so—a later-in-time statute, for example, can abrogate an earlier treaty or customary obligation.\textsuperscript{37} Comparative law refers generally to the practices of foreign countries that are not binding on other countries as law.\textsuperscript{38}

International law can, of course, serve as a binding norm that provides the rule of decision in domestic litigation;\textsuperscript{39} this use of international law has provoked controversy over the past two decades.\textsuperscript{40} To


\textsuperscript{38} Although this Article touches on issues related to the use of foreign sources in general, its focus is on international law. Some argue that a sharp distinction between international and comparative law is descriptively inaccurate and normatively unattractive, and that U.S. courts should make broad use of both as “transnational law,” particularly in the human rights context. See Harold Hongju Koh, \textit{International Law as Part of Our Law}, 98 Am. J. Int’l L. 43, 52–54 (2004). This Article focuses on international law, in part because that is what the Supreme Court appeared to do in the \textit{Hamdi v. Rumsfeld} decision, and in part because there are particularly strong reasons to use certain types of international law to interpret the scope of congressional authorization for the use of force. See \textit{infra} notes 74–121 and accompanying text (discussing \textit{Hamdi} plurality opinion); \textit{infra} notes 164–275 and accompanying text (discussing reasons to use international law to interpret congressional authorization for the use of force).


\textsuperscript{40} Examples include the scope and meaning of the Alien Tort Statute and whether courts should enforce customary international law as binding on the President. See, e.g., Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2754–69 (2004) (discussing the scope of the Alien Tort Statute); id. at 2769–76 (Scalia, J., concurring in part and concurring in the judgment) (disagreeing with the Court’s interpretation of the Alien Tort Statute). See generally Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (addressing customary international law);
some extent, however, it may be fair to say that the interpretive use of international law is now taking center stage, with disagreement about its application arising in both constitutional and statutory interpretation.\(^41\) Justifications for the interpretive use of international law in both contexts fall into the following two very general (and somewhat overlapping) categories:\(^43\) (1) international law serves to interpret text or otherwise maximize the preferences of the Framers (constitutional or statutory), and (2) it promotes a broad range of normative values, such as enhancing the international stature of the United States.

Debate around the first use of international law focuses on the extent to which it fairly captures the meaning of text or maximizes the intent of the drafters.\(^44\) To the extent that it does, there seems to be

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\(^42\) See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–99 (1993); *id*. at 812–22 (Scalia, J., dissenting) (disagreeing with the Supreme Court’s construction of the Sherman Act based on principles of international law); Prinicz v. Federal Republic of Germany, 26 F.3d 1166, 1173–75 (D.C. Cir. 1994) (holding that the defendant had not waived its sovereign immunity under a federal statute); *id*. at 1180–82 (Wald, J., dissenting) (arguing that the statute should be read in light of nonderogable norms of international human rights law); see also Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1154 (7th Cir. 2001) (discussing this issue at length). For additional discussion of the use of international law in statutory interpretation, see sources cited supra note 21.

\(^43\) International sources may also serve a functional role by providing a way to evaluate empirical claims. See, e.g., Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting); Koh, supra note 38, at 46.

\(^44\) In the context of constitutional interpretation, proponents of comparative and international sources argue that language in the Constitution that implicitly refers to a community standard, such as “cruel and unusual,” and “due process,” make modern international sources relevant. Koh, supra note 38, at 46. They also observe that jurists traditionally have looked outside the borders of the United States when interpreting the scope of the Constitution. *Id*. at 45; see also Diane Marie Amann, *Guantanamo*, 42 Colum. J.
widespread agreement as to its interpretive value. In the context of statutory interpretation—which bears the closest relationship to interpreting the scope of authorizations by Congress for the use of force—courts use international law when it is explicitly incorporated by the statute. Courts also construe statutes to avoid violations of international law “where fairly possible” under the Charming Betsy canon, and they generally presume that statutes do not apply extraterritorially, particularly where doing so might conflict with international law. Some argue that the latter two uses of international law may fail, at least in part, to reflect congressional intent, and that the canons must be justified, if at all, on other grounds.


45 See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int’l L. 57, 57–58 (2004) (arguing against the use of international sources in constitutional interpretation in part because they fail to fit within traditional interpretive methods, including text); Ramsey, *supra* note 19, at 71 (criticizing the use of international practice and opinion in *Lawrence v. Texas* and *Atkins v. Virginia*, but noting that “[i]nternational sources are obviously relevant to the scope of the Constitution’s structural provisions defining the international powers of the U.S. government”); Steinhardt, *supra* note 21, at 1185–86 (answering criticisms of the canon based in part on the ground that its use captures the intentions of Congress).

46 In this situation, of course, the relationship between international law and the text of the enactment is clear. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 26–38 (1942) (interpreting the “law of war” as used in the Articles of War); see also 18 U.S.C. § 1651 (2000) (criminalizing piracy as defined by the law of nations); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (1994) (abrogating foreign sovereign immunity for cases in which “rights in property taken in violation of international law are in issue”). International law is also used in statutory interpretation when legislative history provides reason to do so, or when the statutory language appears to refer to a term of art under international law. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 435–40 (1987) (interpreting the Refugee Act in part based on the definition of the term “refugee” in treaties to which the United States was a party).

47 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

48 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255 (1991) (Aramco) (superseded by statute at 42 U.S.C. § 2000e(f) (1994)) (stating that “[w]ithout clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law”).

49 See Jonathan Turley, “When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 655–60 (1990) (arguing that the courts should reverse the presumption against extraterritoriality in part because it no longer reflects the intentions of Congress); see also Bradley, *supra* note 21, at 517–23 (arguing that some uses of the Charming Betsy canon may fail to capture the intentions of Congress); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int’l L. 85, 112–20 (1998) (arguing that some justifications for the presumption against extraterritoriality fail to capture the intentions of Congress); *infra* notes 181–202 and accompanying text.
The wide range of normative goals that may be advanced by the interpretive use of international and comparative law is also the subject of debate and criticism. Some argue that using international sources strengthens transnational norms themselves,\(^50\) promotes the ability of the United States to influence the development of those norms,\(^51\) increases U.S. compliance with international law,\(^52\) enhances the ability of the United States to protect its own interests abroad,\(^53\) may elicit clear preferences from law makers,\(^54\) and promotes separation of powers.\(^55\) Critics focus on the development of international law in part outside the United States.\(^56\) They also argue that the content of international law (particularly that of customary international law) is indeterminate and amorphous,\(^57\) leaving too much discretion in the hands of judges rather than lawmakers.\(^58\) Finally, and related to

\(^{50}\) Koh, supra note 38, at 53–54 (stating that “domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law, not simply to promote American aims, but to advance the broader development of a well-functioning international judicial system”).

\(^{51}\) Amann, supra note 44, at 285, 307–08 (noting that the use of international norms in constitutional interpretation enhances the legitimacy of the Supreme Court’s decisions both inside and outside the United States); Neuman, supra note 19, at 87 (“The Supreme Court has been a prestigious source of individual rights doctrines and argumentation in the global community. But if the Court insists on the exceptional character of its rights conceptions . . . then it will undermine the bases of its influence.”).

\(^{52}\) Steinhardt, supra note 21, at 1127–29.


\(^{54}\) See Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2235–48 (2002) (defending the presumption against extraterritoriality as a tool for eliciting legislative preferences and suggesting that the presumption in favor of international law may serve the same function).

\(^{55}\) Bradley, supra note 21, at 532–33 (justifying the Charming Betsy canon based in part on its promotion of separation of powers); Dodge, supra note 49, at 120–24 (evaluating the separation-of-powers rationale for the presumption against extraterritoriality); Steinhardt, supra note 21, at 1129–34 (discussing the separation-of-powers basis for the canon).

\(^{56}\) Aleinikoff, supra note 53, at 104–06; Turley, supra note 21, at 205.

\(^{57}\) Sampson, 250 F.3d at 1154 (referring to the “chameleon qualities” of customary international law); Phillip Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 715–16 (1986) (describing some understandings of customary international law as amorphous and in flux); Young, supra note 36, at 385 (explaining that “it is very difficult to actually determine whether a given norm satisfies the traditional requirements for customary international law”). Contra Steinhardt, supra note 21, at 1186–87 (emphasizing the fact-dependent nature of customary international law); Beth Stephens, The Law of Our Land, Customary International Law as Federal Law After Erie, 66 Fordham L. Rev. 393, 455 (1997) (emphasizing the limited number of customary international law norms).

\(^{58}\) See Turley, supra note 21, at 265 (arguing that because there are so many sources of international law, the presumption in favor of international law can trump rival interpretive methods in virtually every case); see also Edward T. Swaine, The Local Law of Global Anti-
all of the foregoing, critics object to international law even when used as an interpretive (rather than rule-of-decision) norm, on the grounds that it is counter-majoritarian and antidemocratic.

Although some of these problems may be especially acute in the context of interpretive canons, the plurality opinion in *Hamdi v. Rumsfeld* itself illustrates some of these difficulties. In general, it failed to provide a convincing link between congressional intent and its use of international law. Moreover, by not distinguishing among various kinds of international law, or various interpretive uses, the opinion left open the potential use of a very broad range of interpretive sources for a very broad set of purposes. The plurality’s use of international law also undermines, or at least fails to serve, many of the normative values outlined above. Its failure to focus on the content and context of international law, for example, and its lack of attention to potential violations of international law could actually serve to retard the development of international law and degrade the international stature of the United States.
II. INTERNATIONAL LAW AND INTERPRETIVE PITFALLS:  
**Hamdi v. Rumsfeld**

Yaser Hamdi, an American citizen, was captured in Afghanistan in 2001 and eventually transferred to a naval brig in Charleston, South Carolina, where he was detained by the U.S. government as an “enemy combatant.” A habeas petition challenged his detention, and the U.S. Court of Appeals for the Fourth Circuit held that the President had the power to detain Hamdi because he was captured in a “zone of active combat operations.”

The Supreme Court issued four separate opinions in *Hamdi v. Rumsfeld*, none of which commanded a majority. The plurality opinion, authored by Justice Sandra Day O’Connor and joined by Chief Justice William Rehnquist as well as Justices Anthony Kennedy and Stephen Breyer, concluded that Congress had authorized the President to detain U.S. citizens as “enemy combatants,” but that due process entitled Hamdi to a hearing to confirm the factual basis for the detention.

The plurality found congressional authorization for detentions, including those of U.S. citizens, based on the September 2001 Authorization for the Use of Military Force (the “AUMF”), which permitted the President to use “all necessary and appropriate force” against persons who “planned, authorized, committed, or aided the terrorist attacks.”

Justice Thomas agreed that Congress had authorized the detention

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65 Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003) (reversing district court’s order directing the government to produce information and ordering Hamdi’s petition dismissed), vacated and remanded, 124 S. Ct. 2633 (2004). The Fourth Circuit denied rehearing en banc. *Hamdi*, 337 F.3d at 340 (en banc) (denying rehearing). Judges Luttig, Motz, King, and Gregory voted to grant rehearing en banc; Judges Luttig and Motz filed dissenting opinions. *Id.*

66 *Hamdi*, 124 S. Ct. at 2635 (O’Connor, J., plurality opinion).

67 *Id.* at 2639–40 (O’Connor, J., plurality opinion); see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF in part provides the following:

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

*Id.* § 2(a), 115 Stat. at 224.
(providing the fifth vote for this conclusion), but disagreed that a hearing was required.\textsuperscript{68}

Justice David Souter, joined by Justice Ruth Bader Ginsburg, concluded that the AUMF did not authorize the detention of Hamdi and that the President otherwise lacked the authority to detain him, but nonetheless joined Justice O’Connor’s opinion ordering a hearing (providing the fifth and sixth votes for this conclusion).\textsuperscript{69} In part, Justice Souter relied on the language of a 1971 federal statute providing that “no citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress.”\textsuperscript{70} Although the plurality found that the AUMF satisfied this statute, Justice Souter disagreed.\textsuperscript{71} Justice Antonin Scalia, joined by Justice John Paul Stevens, concluded that only by suspending the writ of habeas corpus could Congress authorize the detention of U.S. citizens, but that in any event Congress had not provided any specific authorization for the detentions.\textsuperscript{72}

Thus, congressional authorization for the detentions was the fulcrum upon which the Supreme Court opinions turned; it was this issue that divided the Court five to four. In fact, the five Justices who found sufficient congressional authorization explicitly disavowed reaching any conclusions about the scope of the President’s plenary power as Commander in Chief.\textsuperscript{73} International law, in turn, played an important role in how the various opinions interpreted the scope of congressional authorization.

\textsuperscript{68} Hamdi, 124 S. Ct. at 2674–75 (Thomas, J., dissenting).
\textsuperscript{69} Id. at 2652–53 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
\textsuperscript{70} Id. (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing 18 U.S.C. § 4001(a) (1971)).
\textsuperscript{71} Id. at 2653–59 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
\textsuperscript{72} Id. at 2671–72 (Scalia, J., dissenting).
\textsuperscript{73} Hamdi, 124 S. Ct. at 2639 (O’Connor, J., plurality opinion) (noting, and refusing to reach, government’s argument that the President has plenary authority and thus needs no congressional authorization for Hamdi’s detention); id. at 2679 (Thomas, J., dissenting) (same). To the extent that the plurality found the President’s authority limited by the scope of congressional authorization, however, it must have concluded implicitly that the President lacked the requisite plenary authority. For example, the plurality concluded that the President lacked the authority to detain individuals indefinitely because Congress had not authorized such detentions; if the President had plenary authority, however, he could have taken the action even without authorization by Congress. See Sarah Cleveland, Our International Constitution (manuscript at 73, on file with author) (discussing international law and constitutional interpretation in the Hamdi opinion). It is unclear whether the plurality thought that indefinite detentions violate 18 U.S.C. § 4001(a) (although this seems implicit from their opinion), or whether the plurality thought that such detentions just lacked congressional authorization.
A. Justice O’Connor’s Plurality Opinion

The plurality reached its conclusion about the scope of the AUMF in three steps, and international law played a role at each stage. The plurality concluded first that the detention of “enemy combatants” was so fundamental and accepted an incident to war as to come within Congress’s authorization for the use of “necessary and appropriate force” in the AUMF. The opinion directly cited only one source for this conclusion, *Ex parte Quirin.* In *Quirin,* the Court upheld the trial by military commission of a U.S. citizen charged with violating the law of war based on a federal statute providing such trials for those who “by the law of war may be triable by such military commissions.” The language in *Quirin* to which the *Hamdi* plurality cited discusses at length the law-of-war distinction between lawful and unlawful combatants; this distinction was important in *Quirin* because unlawful combatants were subject to trial by military commission. The plurality then cited three other sources for the purposes of military detention—a post-Civil War treatise on military law by William Winthrop, a 1946 decision by the U.S. Court of Appeals for the Ninth Circuit, and a recent law review article quoting from the Nuremberg tribunals that followed World War II. All three relied on international law. Based on these four sources the plurality concluded that detention is a “fundamental and accepted” incident of war.

74 The plurality defined “enemy combatant” narrowly (for the purposes of this case) as someone who was part of (or supporting) hostile forces in Afghanistan and who engaged in “armed conflict against the United States.” *Hamdi,* 124 S. Ct. at 2639 (O’Connor, J., plurality opinion) (quoting Brief for Respondents at *3, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 724020).
75 *Hamdi,* 124 S. Ct. at 2640 (O’Connor, J., plurality opinion).
76 *Id.* (O’Connor, J., plurality opinion) (citing 317 U.S. 1, 28 (1942)).
77 The term “law of war” refers to a subset of international law that governs both the lawful use of force (“jus ad bellum”) and the rules governing conduct during war (“jus in bello”). “Jus in bello” is also termed “international humanitarian law.” See Steven R. Ratner, *Jus Ad Bellum and Jus in Bello After September 11,* 96 Am. J. Int’l L. 905, 905–06 (2002).
78 *Quirin,* 317 U.S. at 27–28. The *Quirin* opinion refused to consider what authority the President would have had absent congressional authorization. *Id.* at 29; see also A. Christopher Bryant & Carl Tobias, *Quirin Revisited,* 2003 Wis. L. Rev. 309, 326–30 (2003) (analyzing the opinion and emphasizing its narrow scope).
79 See *Quirin,* 317 U.S. at 28–31; *infra* notes 87–101 and accompanying text.
80 *Hamdi,* 124 S. Ct. at 2640 (O’Connor, J., plurality opinion) (citing In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (2d ed. 1920); and Yasmin Naqvi, *Doubtful Prisoner of War Status,* 84 Int’l L. Rev. Red Cross 571, 572 (2002) (quoting Nuremberg Military Tribunal, Judgment and Sentences, Oct. 1, 1946, reprinted in 41 Am. J. Int’l L. 172, 229 (1947))).
81 *Id.* (O’Connor, J., plurality opinion).
Second, the plurality reasoned, there is “no bar” to the United States detaining its own citizens as enemy combatants, and therefore the AUMF authorized such detentions. The plurality cited two authorities for this proposition—a discussion in *Quirin* concluding that U.S. citizenship does not preclude status as an enemy belligerent or an unlawful combatant, and the Lieber Code from the Civil War directing that captured rebels be treated as “prisoners of war.” On this basis, the plurality reached the conclusion central to the case: the AUMF authorized the detention of citizens, thus meeting the requirements of the 1971 statute, codified at 18 U.S.C. § 4001(a). Finally, the plurality reasoned that “indefinite detention” for the purposes of interrogation was inconsistent with the law of war and thus not authorized by the AUMF. The following discussion analyzes each of these three conclusions in detail, considering in particular the reliance of the plurality on international law.

1. Detention as a “Fundamental Incident” of War

The plurality relied directly on *Quirin* for its conclusion that the detention of enemy combatants is a “fundamental” and “accepted”

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82 Id. at 2640–41 (O’Connor, J., plurality opinion).
83 Id. at 2640 (O’Connor, J., plurality opinion) (citing *Quirin*, 317 U.S. at 37–38). The full passage from *Quirin* reads as follows:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

*Quirin*, 317 U.S. at 37–38.
84 *Hamdi*, 124 S. Ct. at 2640 (O’Connor, J., plurality opinion) (citing Francis Lieber, *War Dep’t, Gen. Order No. 100, Instructions for the Government of Armies of the United States in the Field* para. 153 (1863), *reprinted in 2 Francis Lieber, Miscellaneous Writings* 273 (1881)).
85 Id. at 2641 (O’Connor, J., plurality opinion). The opinions by Justices Souter and Scalia disagreed with this conclusion. Id. at 2653–59 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); id. at 2671–72 (Scalia, J., dissenting).
86 Id. at 2641–42 (O’Connor, J., plurality opinion).
87 Id. at 2640 (O’Connor, J., plurality opinion) (citing 317 U.S. at 28). In addition to the difficulties with the plurality’s reliance on *Quirin* discussed below, there are other, more general reasons to treat the *Quirin* precedent with great care. The opinion itself was drafted months after the Supreme Court’s order was issued, and six of the eight petitioners had already been executed. See Bryant & Tobias, *supra* note 78, at 330. In addition, the Court had an extraordinarily difficult time drafting an opinion to justify its order, id. at 323–26, and the Justices had been inappropriately pressured by President Franklin Roose-
part of war, and it relied on other sources to explain the purposes of military detention. There are significant problems, however, with both Quirin and the other sources.

a. Ex Parte Quirin

Quoting from Quirin, the plurality reasoned that “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”88 The “important incident[s] of war” language from Quirin refers to those who violate the law of war. It does not explicitly mention detention; instead, it refers to the power to “seize and subject to disciplinary measures.”89

A page and a half later, the Quirin opinion used the second phrase quoted by the plurality, “universal agreement and practice,” in the following context: “By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.”90 Neither distinction makes the point for which the Hamdi plurality cited this language—detention is a fundamental part of warfare. Quirin does note in dicta that both law-

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88 Hamdi, 124 S. Ct. at 2640 (O’Connor, J., plurality opinion) (quoting Quirin, 317 U.S. at 28).

89 The relevant language in Quirin is as follows:

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.

90 317 U.S. at 28–29.

91 317 U.S. at 30–31 (citation omitted). Although the plurality opinion cited only to page 28 of Quirin for this point, the language “universal agreement and practice” actually appears on page 30. Hamdi, 124 S. Ct. at 2640 (O’Connor, J., plurality opinion); Quirin, 317 U.S. at 30. The omitted citation refers to the following authorities:


Quirin, 317 U.S. at 30 n.7.
ful and unlawful combatants may be detained, and that unlawful combatants may be tried by military commissions.\textsuperscript{91} Again, however, the authorities cited in support (international law treatises and practice manuals from other countries)\textsuperscript{92} do not mention detentions; they focus on the distinction between lawful and unlawful combatants.\textsuperscript{93} This distinction tracks the authorization that Congress provided for the trial of those who “by the law of war may be triable by such military commissions.”\textsuperscript{94}

There are at least three problems with this reliance on \textit{Quirin}. First, it provides weak support for the plurality’s conclusion—\textit{Quirin} itself considered only military trials and detention in anticipation of such trials, for which Congress had provided specific authorization based on the law of war. Not surprisingly, the sources upon which \textit{Quirin} relied have little direct bearing on detention itself.

Second, the law of war distinction emphasized in \textit{Quirin} between lawful and unlawful combatants undermines the plurality’s reasoning. The plurality reached no conclusion as to Hamdi’s combatant status;

\textsuperscript{91} See \textit{Quirin}, 317 U.S. at 31.

\textsuperscript{92} See \textit{id.} at 31 n.8. The \textit{Quirin} opinion cited the following authorities:


\textit{Id.}


\textsuperscript{94} \textit{Quirin}, 317 U.S. at 27–28.
it did not decide, in other words, whether he was a lawful or unlawful combatant, although the government has treated him as an unlawful combatant. This may seem to matter little, if indeed both lawful and unlawful combatants may be detained, with lawful combatants protected as prisoners of war and unlawful combatants detained without such protections. But detention as a lawful combatant during World War II (when Quirin was decided) meant that international law provided an extensive set of regulations governing the terms of that detention. Detention as an unlawful combatant at that time meant that one fell largely outside the protections of the law of war and was at the “mercy” of one’s captors; this system was designed to protect ci-

95 Hamdi, 124 S. Ct. at 2649 n.2. Hamdi did not argue that he qualified for prisoner-of-war status. Instead, he argued that the Geneva Conventions entitled him to a hearing. See Cleveland, supra note 73 (manuscript at 73). The point here is not necessarily that the Supreme Court should have decided his entitlement to prisoner-of-war status, but instead that absent such a determination many of the sources relied upon by the plurality are of questionable relevance to the scope of the AUMF.


97 The Hague Regulations and the 1929 Geneva Convention provided protections only for those who qualified as prisoners of war; others fell outside the scope of these treaties. Hague Regulations, supra note 96; 1929 Geneva Convention, supra note 96; see BATY & MORGAN, supra note 93, at 172, 195–96 (noting that the unlawful combatant “exposes himself to the certainty” of death because he is not entitled to the protections of the law of war and further noting that spies are unprotected by international law and are “to be shot”); HALL, supra note 93, § 135, at 351–53 (noting that for universally-recognized acts of unlawful belligerency prisoners “may be abandoned without hesitation to the fate which they deserve” and that death may be appropriate even for less well-recognized unlawful acts,
villians and other belligerents by providing incentives for combatants to properly identify themselves.\(^{98}\) Thus, the plurality, by reference to *Quirin*, relied on international law, but that law (as it existed during World War II) provided no affirmative sanction for, or regulation of, the detention of unlawful combatants. This body of law was used to justify the detention of Hamdi as an unlawful combatant, but such detention would have fallen largely outside its purview.

International humanitarian law has changed dramatically since World War II, and this leads to the third problem with the plurality’s reliance on *Quirin* and the law of war. The law of war, particularly the Geneva Conventions of 1949,\(^{99}\) now provides greater protections to a much larger group of prisoners than it did during World War II.\(^{100}\)

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\(^{98}\) As one author explained shortly after the end of World War II, “International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponent.” Thus, such belligerents “do not benefit from any comprehensive scheme of protection.” Major Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 Brit. Yearbook of Int’l L. 323, 343 (1951).


\(^{100}\) The most significant changes to the types of protected persons include those provided by Article 3 (which is common to all four of the 1949 Geneva Conventions), the Fourth Geneva Convention, and Articles 43, 45, and 75 of Protocol I. Common Article 3 expanded the type of conflict to which basic international humanitarian protections applied by providing minimum protections to certain persons detained in “armed conflict not of an international character.” First Geneva Convention, supra note 99, art. 3, 6 U.S.T. at 3116–18; Second Geneva Convention, supra note 99, art. 3, 6 U.S.T. at 3220–22; Third
Again, the difficulty in *Hamdi* is that the government has not admitted that any of these protections apply to his detention.\(^\text{101}\) It is one thing

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\(^{101}\) See Memorandum from President George W. Bush, to National Security Advisors 1 (Feb. 7, 2002) (stating that “common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees” in part because the “relevant conflicts are international in scope”), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf (date released June 22, 2004). *Contra* *Jinks*, *supra* note 97, at 399–405, 421–22 (arguing that Common Article 3 protects unlawful combatants in international disputes); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int’l L.J. 503, 512–13 n.29 (2003) (arguing that Common Article 3 protects prisoners like Hamdi). Citizens of the United States like Hamdi, who are detained by the U.S. government, fall outside the definition of a protected person under the Fourth Geneva Convention. Fourth Geneva Convention, *supra* note 99, art. 4, 6 U.S.T. at 3520 (protecting those who “at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party . . . of which they are not nationals”). Although Part II of the Fourth Geneva Convention appears to apply without regard to nationality, it is unclear that any of the protections in that Part apply to detention. *See id.* art. 13, 6 U.S.T. at 3526–28. The United States has also suggested that the Fourth Geneva Convention applies only to “civilian non-combatants.” *See* Press Release, Office of the Press Secretary, The White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Mar. 15, 2005). *Contra* *Jinks*, *supra* note 97, at 381–86 (concluding that the Fourth Geneva Convention applies to unlawful combatants). The United States is not a party to Protocol I and has specifically objected to its expanded protections of certain kinds of combatants. *See* Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 Akron L. Rev. 531, 534 (1986) (“It bears stressing that the essence of humanitarian law is the distinction between combatants and non-combatants. And the essence of terrorism is the negation of the distinction. Protocol I in effect blesses the negation.”); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Va. J. Int’l L. 109, 127–34 (1985) (arguing against according combatant status to guerrillas or others “not identifiable as part of a readily distinguishable military unit”). The United States, however, has suggested that it may view Article 75 as customary international law. *See* *Jinks*, *supra* note 97, at 431 n.359. It has not suggested, however, that it is bound by such law in its treatment of Hamdi. At times
to reason that Congress authorized the President to detain in ways affirmatively sanctioned and regulated (and thus also limited) by the law of war; it is quite another to rely on some law-of-war authorities to support the claim of congressional authorization for a detention that purportedly falls outside the scope of those authorities.

b. Other Sources

The plurality opinion in *Hamdi* cited three sources that describe the purpose of military detention, again to support the proposition that detention is a “fundamental” part of warfare. The only case, *In re Territo*, involved an American citizen captured while fighting for Italy during World War II and detained as a prisoner of war.\(^{102}\) The Ninth Circuit’s language in *Territo* discussing the purpose of detention is unsupported by any other authority.\(^{103}\) Moreover, the detention of

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102 156 F.2d at 143.

103 The sentence in *Territo* to which the *Hamdi* plurality cited reads in full as follows: “The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely [FN1] and in time exchanged, repatriated [FN2] or otherwise released.” *Hamdi*, 124 S. Ct. at 2640 (O’Connor, J., plurality opinion); *Territo*, 156 F.2d at 145. *Territo* does cite purported support for the proposition that prisoners must be treated humanely. Footnote 1 cites “Floury, Prisoner of War, p. 15; Hall Int. Law, pp. 490–497; Oppenheim Int. Law, Vol. II, pp. 216–218; Rex v. Shiever, 97 Eng. Repts. 551. As to Prisoners of War, see Hyde Int. Law, Sec. 675, p. 1859.” The referenced pages in William Edward Hall’s *International Law* appear irrelevant. See *Hall*, supra note 93, §§ 204–207, at 490–97. The relevant pages in Professor Oppenheim’s *International Law: A Treatise* discuss at length when a neutral acquires enemy status under international law; page 216 does not state that punitive measures are not permitted against such persons. See *Oppenheim*, supra note 93, § 88, at 216–18. Section 675 of Professor Hyde’s *International Law: Chieﬂy as Interpreted and Applied by the United States* (which is not on page 1859) discusses situations under which people lose their “belligerent qualifications,” and thus their right to treatment as prisoners of war. See *Hyde*, supra note 93, § 675, at 344–45. People in an occupied territory who rise up against the occupier, for example, are not so entitled and may “suffer death” if captured. The Eng-
Hamdi differs from that of Territo in a significant way that bears particularly on the scope of the AUMF. Territo was detained pursuant to the 1929 Geneva Convention, a treaty ratified by the President and a supermajority of the Senate. Not only did his detention thus fall within a carefully structured international legal framework, but the President and the Senate had also specifically considered and authorized the terms of that detention when they approved the 1929 treaty. Hamdi, however, was not detained pursuant to a treaty, and the terms and conditions of his detention thus lacked the imprimatur of any prior Senate and presidential authorization.

The citations by the plurality to works by Yasmin Naqvi and William Winthrop underscore this loose approach to international law. Winthrop’s Military Law and Precedents, originally published after the Civil War, has become an important reference work for American courts and commentators. The section from which the plurality quoted cites manuals of international law, but it is unclear whether the plurality viewed the work as a guide to nineteenth-century American practice or as a reflection of international norms and why either is probative of modern practice. The discussion in Naqvi is devoted entirely to the treatment of prisoners of war.

One might argue that the references to international law in this part of the plurality’s opinion are only indirect, and that they are important because they have become incorporated into Executive

lish case from 1759, Rex v. Shiever, considered the detention of a Swedish man. 97 Eng. Rep. 551, 551–52 (1759). Sweden was neutral, but the prisoner had been caught in the service of a French privateer and the court held that he was properly held as a prisoner of war. Id. These sources say little about either the purposes or conditions of detention, although they do outline ways in which neutrals attain enemy status. Footnote 2 cites only to sources that govern prisoners of war.

104 See Territo, 156 F.2d at 144.
105 See U.S. Const. art. II, § 2.
106 See, e.g., Loving v. United States, 517 U.S. 748, 761 (1995) (citing Winthrop, supra note 80, for the history of military justice); United States ex rel Toth v. Quarles, 350 U.S. 11, 15 n.8 (1955) (citing Winthrop, supra note 80, as a leading authority on military law); Madsen v. Kinsella, 343 U.S. 341, 346–47 n.9 (1952) (citing Winthrop, supra note 80, on the history and scope of military commissions); Quirin, 317 U.S. at 32–33 n.10, 35–36 n.12 (citing Winthrop, supra note 80, for the history of military commissions and to interpret the law of war); Caldwell v. Parker, 252 U.S. 376, 386 (1920) (citing Winthrop, supra note 80, to interpret the Articles of War); Carter v. McClaughry, 183 U.S. 365, 386 (1902) (citing Winthrop, supra note 80, for “military usage and procedure”).
107 This discussion in Winthrop’s Military Law and Precedents cited to “Manual, Laws of War, Part II—of Prisoners of War” published in 1880 by the Institute of International Law, and to the Lieber Code used by Union forces during the Civil War. See Winthrop, supra note 80, at 788.
108 Naqvi, supra note 80, at 572.
Branch practice or U.S. case law, not because they have anything to do with international law. There are several difficulties with this argument, however. First, if these sources are important only as guides to U.S. practice, then the plurality opinion is remarkably weak. It is hard to see how *dicta* from a 1942 Supreme Court case (that involved military trials) and *dicta* from a 1946 Ninth Circuit case (that involved only detention of prisoners of war), coupled with a law review article from the International Red Cross and a Civil War-era treatise, could possibly show that detention is part of Executive Branch practice or a “fundamental incident of war” in 2004. Instead, these sources support the plurality’s opinion in part because they, in turn, reflect international law and practice, as the plurality opinion makes clear with its references to the “law of war.”

Second, because the key question is the scope of authorization by Congress, it is difficult to see why the Hague and 1929 Geneva Conventions are relevant based only on their citation in *Territo*—a Ninth Circuit opinion from 1946—rather than based on their status as treaties under the Supremacy Clause, or based on the agreement of the Senate and President to the norms included in those treaties. Finally, to argue that the plurality refers to these international norms because they are already part of U.S. case law leads to the odd conclusion that the use of international sources is frozen, and the Court may rely only on those that it has already cited. Of course, the plurality opinion in *Hamdi* itself undermines such a conclusion by citing the 1949 Geneva Conventions, concluded after *Quirin* and *Territo*—this leaves open the question of how exactly those Conventions are relevant, and whether manuals illustrating foreign practice (like those upon which *Quirin* relied) should have equal weight.

2. “No Bar” to Detentions of U.S. Citizens

The weaknesses in the plurality’s approach become even more acute when it considers the following critical question about congressional authorization: does the AUMF authorize the detention of *U.S. citizens*? Here, the plurality drew explicitly from the law of war, reasoning (based on *Quirin* and the Lieber Code) that it provides “no bar” to the detention of U.S. citizens. Although the preceding part of the

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109 See *Hamdi*, 124 S. Ct. at 2640–41 (O’Connor, J., plurality opinion).

110 *Id.* at 2640–41 (O’Connor, J., plurality opinion). The full passage from *Quirin* reads as follows:
plurality opinion used international law to determine what activities are “fundamental” to war, this discussion used international law not to show that detaining one’s own citizens is “fundamental” to the conduct of war, but to show that it is not foreclosed by the law of war.\textsuperscript{111}

In terms of interpreting the text of the AUMF, the difference is important. In the latter situation, the law of war is used to enhance the scope of authorization to embrace everything that is not specifically prohibited by the law of war; the former reads the authorization to embrace only conduct that qualifies as “fundamental” to waging war. Unlike the detention of armed combatants in general, it is hard to see how the detention of one’s own citizens is a “fundamental incident” of international armed conflict.\textsuperscript{112} This is a far broader

\begin{quote}
Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.
\end{quote}

317 U.S. at 37–38.

\textsuperscript{111} See Hamdi, 124 S. Ct. at 2640–41 (O’Connor, J., plurality opinion).

\textsuperscript{112} The laws governing the conduct of war, or \textit{jus in bello}, developed largely around international conflict and were designed to mitigate the harms inflicted by one country on the nationals of another country. See Christopher Greenwood, \textit{Historical Development and Legal Basis}, in \textit{The Handbook of Humanitarian Law in Armed Conflict} 1, 11 (Dieter Fleck ed., 1995) (“For the most part, humanitarian law does not attempt to regulate a state’s treatment of its own citizens.”). For example, although international law generally affords lawful combatants protection from criminal prosecution (for their lawful use of force), international law does not prevent a nation from criminally prosecuting its own citizens for treason (or other crimes) when they take up arms against it. Green, supra note 99, at 119–20 (noting that deserters “are entitled to receive from the soldiers capturing them the same treatment as any other captive” although under national law they may be tried for treason); Howard S. Levine, \textit{Prisoners of War in International Armed Conflict} 74–76 (1977) (arguing that any detainee should be protected by international law regardless of nationality, but that the Detaining Power can charge him with treason under its municipal law and “try him in accordance with the guarantees contained in the relevant provisions of the Convention”); Oppenheim, supra note 93, § 86, at 213 (indicating that “traitorous subjects” who “fight in the armed forces of the enemy” cannot claim the privileges of the law of war; instead “[t]hey may be, and always are, treated as criminals”). There is even some question as to whether the Third Geneva Convention applies at all when a country detains one of its own nationals. Both Terra\textit{to} and Justice Souter’s opinion in Hamdi suggest that it does. See Hamdi, 124 S. Ct. at 2457–60 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); Terra\textit{to}, 156 F.2d at 145 (interpreting the 1929 Geneva Convention). In its brief in Hamdi, the government argued that the Third Geneva Convention did not protect Hamdi but did not mention this argument. See Respondents’ Brief at *22–24, Hamdi (No. 03-6696). Nevertheless, there are some good reasons to think that the Third Geneva Convention does not protect people detained by governments of which they are nationals. See Amann, supra note 1; Jinks, supra
use of international law that potentially invites reliance on a wide variety of sources. Indeed, the only evidence the plurality cited to support reading the AUMF to include such detentions is that the law of nations posed “no bar” to this interpretation, coupled with the purposes of detention itself.

3. No Authorization for “Indefinite Detention”

The plurality’s last use of international law was the most explicit, and it worked to limit the scope of the AUMF. Directly relying on four treaties and one law review article, the plurality concluded that the AUMF did not authorize “indefinite detention for the purpose of interrogation.” Here, in contrast to the earlier references to international sources, the plurality limited its sources to treaties to which the United States is a party, and did so to avoid what might have been a direct conflict between the scope of the AUMF and international law.

The difficulty with the plurality’s analysis is that it ignored the content of international law itself, as well its status in the domestic legal system and the participation of the political branches in developing or approving such law. For example, the plurality failed to note that the United States is a party to all four of the treaties upon which it relied. It also failed to consider whether those treaties are self-

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note 97, at 421–22 n.302. Although modern international law provides some protections to people detained by their own governments, see supra note 107, this does not show that such detentions are a “fundamental incident” of war. The detention of Confederate citizens pursuant to the Lieber Code during the Civil War does not change this conclusion; Congress had already suspended the writ of habeas corpus. See Hamdi, 124 S. Ct. at 2672 n.5 (Scalia, J., dissenting). In any event, because the Confederate states were the enemy in that conflict, detention of their citizens merely suggests that detention itself was an integral part of that war; it does not suggest that the detention of U.S. citizens is fundamental in armed conflicts against foreign entities.

113 Justice Scalia criticized the majority’s conclusion on this point, concluding that Congress did not authorize the detentions of a citizen with the AUMF, citing in part “the statutory prescription that ‘[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.’” Hamdi, 124 S. Ct. at 2671 (Scalia, J., dissenting) (quoting 18 U.S.C. § 4001(a) (2000)). He pointed out that some of the plurality’s authorities are irrelevant because they do not “address the detention of American citizens.” Id. at 2671 n.5 (Scalia, J., dissenting).

114 Id. at 2641 (O’Connor, J., plurality opinion).


116 See supra note 101.
executing and have direct effect as domestic law without any implementing legislation,\textsuperscript{117} and it did not discuss whether either of these features was relevant in using the treaties to interpret the AUMF. Furthermore, the treaties cited generally govern the treatment of prisoners of war,\textsuperscript{118} but the plurality nowhere concluded that Hamdi is a prisoner of war. Perhaps the plurality meant to suggest that the difference between prisoners of war and others does not matter for purposes of detention, but this is problematic because the four conventions are devoted largely to establishing who qualifies as a prisoner of war and setting forth special rules governing their treatment. The plurality did not, in other words, cite to any authority that prohibits indefinite detention of non-prisoners of war.\textsuperscript{119} There are, in fact, international norms that may bar such detention,\textsuperscript{120} but they are not among the sources that the plurality cited.\textsuperscript{121}

B. Justice Thomas’s Dissenting Opinion: More Expansive Congressional Authorization

Justice Thomas joined the plurality in concluding that the AUMF authorized Hamdi’s detention, but he did not use international law to


\textsuperscript{118} See \textit{supra} note 96. Article 3 of the Third Geneva Convention may provide some protections for unlawful combatants, see \textit{Jinks}, \textit{supra} note 97, at 403–09, but the President denies that Article 3 applies to Hamdi’s detention. See \textit{supra} note 100.

\textsuperscript{119} One might argue that Article 3 of the Third Geneva Convention prevents indefinite detention of certain non-prisoners of war because it prohibits “cruel treatment” and the “passing of sentences” without “previous judgment pronounced by a regularly constituted court.” Third Geneva Convention, \textit{supra} note 96, art. 3(1)(a), (d), 6 U.S.T. at 3320. Even if this argument is plausible, it was not advanced by the plurality, and Article 3 does not, according to the Bush administration, apply to Hamdi’s detention.


\textsuperscript{121} The plurality reasoned that the AUMF authorized detention for the duration of hostilities, based on “longstanding law-of-war principles,” but also concluded that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.” \textit{Hamdi}, 124 S. Ct. at 2641 (O’Connor, J., plurality opinion). This suggests that if the type of conflict involved is unlike the one that generated the law of war, the plurality might not view the law of war as supporting the government’s interpretation of the AUMF. One difficulty with this point is that it would seem to apply to other parts of the plurality’s opinion—why, for example, do limitations on the treatment of prisoners of war apply even to those who may not qualify as prisoners of war? Moreover, the standard of deviation that the plurality suggests—“practical circumstances” that are “entirely unlike” those contemplated by the law of war—is a very difficult one to apply.
reach that conclusion. Instead, Justice Thomas emphasized that Congress and the President, not the courts, have primary control over national security issues, and that broad authorizations of authority to the President by Congress do not imply a denial of specific powers not explicitly enumerated by Congress.\textsuperscript{122} He also suggested the problem, discussed above, that the plurality’s reasoning that the AUMF does not authorize unlimited detentions was based only on treaties that apply to prisoners of war.\textsuperscript{123} Justice Thomas left open the possibility that international law could be used to expand, but not limit, the scope of congressional authorization for the President’s actions.\textsuperscript{124}

C. Opinions of Justices Scalia and Souter: No Congressional Authorization

Four Justices concluded that the AUMF did not provide congressional authorization for the detention of Hamdi. Although all four concluded that international law did not support the plurality’s interpretation of the AUMF, none took a clear position on the use of international law to construe authorizations for the use of force in future cases. Justice Souter, joined by Justice Ginsburg, reasoned in part that Hamdi’s detention may violate Article 5 of the Third Geneva Convention, which requires a “competent tribunal” to determine combatant status.\textsuperscript{125} On this basis, Justice Souter rejected the plurality’s conclusion that the law of war authorized Hamdi’s detention and that the AUMF should be interpreted accordingly.\textsuperscript{126}

Justice Scalia, joined by Justice Stevens, also concluded that the AUMF did not authorize the detentions, although Justice Scalia rea-

\textsuperscript{122} Id. at 2675–80 (Thomas, J., dissenting). Justice Thomas also relied on \textit{Moyer v. Peabody}, which interpreted an 1897 act of the Colorado legislature. \textit{See id.} at 2679 (Thomas, J., dissenting) (citing \textit{Moyer v. Peabody}, 212 U.S. 78, 84 (1909)).

\textsuperscript{123} Id. at 2679 (Thomas, J., dissenting) (“I do not believe that we may diminish the Federal Government’s war powers by reference to a treaty and certainly not to a treaty that does not apply.”). The “treaty that does not apply” seems to be the Third Geneva Convention, which Justice Thomas apparently concluded does not apply based on the government’s argument that the President conclusively determined that Hamdi is not a prisoner of war. \textit{See id.} at 2679, 2685 n.6 (Thomas, J., dissenting).

\textsuperscript{124} Elsewhere in his opinion Justice Thomas suggested that consistency with the law of war may strengthen the President’s assertion of authority, at least “to the extent that the laws of war show that the power to detain is part of a sovereign’s war powers.” \textit{Id.} at 2685 (Thomas, J., dissenting). This is a potentially powerful and important argument, but it is not related to the use of international law to construe the scope of congressional authorization.

\textsuperscript{125} Id. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing Third Geneva Convention, \textit{supra} note 96, art. 5, 6 U.S.T. at 3324).

\textsuperscript{126} The plurality opinion did not explicitly respond to Justice Souter’s conclusions regarding Article 5 of the Third Geneva Convention. \textit{See supra} note 95 and accompanying text.
soned that congressional authorization short of suspending the writ of habeas corpus would not make the detentions constitutional in any event.\textsuperscript{127} Justice Scalia rejected the majority’s reliance on international law in part because the sources cited by the plurality did not address the detention of U.S. citizens.\textsuperscript{128} Justice Scalia, like Justice Souter, rejected the plurality’s use of international law to interpret the AUMF as authorizing Hamdi’s detention, but he took no clear position on the broader question of whether international law might serve to construe general use of force resolutions in other cases.\textsuperscript{129}

D. Conclusion

The plurality’s opinion has the following three analytical weaknesses: a failure to distinguish among different types of international law, a lack of attention to the content of international law, and a failure to distinguish among different interpretive uses of international law. First, the plurality did not distinguish among different types of international law, although the different sources seem to vary widely in their relationship to the AUMF. For example, treaties, the terms of which have already been considered and approved by the President and the Senate and which actually apply to the detention, would provide a particularly strong basis for determining the scope of authorization by Congress.\textsuperscript{130} The \textit{Hamdi} plurality, however, invoked treaties without deciding whether or not they applied, seemed to employ outdated treatises on equal footing, and failed to clarify whether the Geneva and Hague Conventions are self-executing.

The plurality also failed to focus on the content of international law. For example, it cited the Hague and Geneva Conventions for the “clearly established principle of the law of war that detention may last no longer than active hostilities.”\textsuperscript{131} These sources, however, establish

\textsuperscript{127} \textit{Hamdi}, 124 S. Ct. at 2671–72 (Scalia, J., dissenting).

\textsuperscript{128} \textit{Id.} at 2671–72 n.5 (Scalia, J., dissenting). The opinion distinguishes \textit{Territo} and \textit{Quirin} on the grounds that those cases involved citizens who (unlike Hamdi) were “conceded to have been members of enemy forces.” \textit{Id.} at 2670 nn.3–4 (Scalia, J., dissenting).

\textsuperscript{129} Confusing matters somewhat is Justice Scalia’s observation that although “captivity may be consistent with the principles of international law” this “does not prove that it also complies with the restrictions that the Constitution places on the American Government’s treatment of its own citizens.” \textit{Id.} at 2671–72 n.5 (Scalia, J., dissenting). Because this language appears in a discussion of whether Congress authorized the detentions, it is unclear whether it suggests that international law is inapplicable in that context, or whether it is inapplicable as a tool of direct constitutional interpretation.

\textsuperscript{130} See supra notes 102–105 and accompanying text.

\textsuperscript{131} \textit{Hamdi}, 124 S. Ct. at 2641 (O’Connor, J., plurality opinion).
this principle for prisoners of war, and the plurality did not conclude that Hamdi qualified as such.132 Moreover, if Hamdi is entitled to prisoner-of-war status, the United States is in violation of its treaty obligations, but the plurality appeared to ignore this possibility entirely, reasoning instead that its conclusion was “based on longstanding law-of-war principles.”133 This disregard for whether the United States is in violation of its treaty obligations suggests not respect, but instead a disdain for the binding nature of international law.134

The plurality also did not distinguish among the different interpretive roles that international law can play in construing congres-
sional authorization for the President’s actions. \(^{135}\) Some actions of the President may be prohibited by international law, others may be affirmatively sanctioned by international law, and still others fall largely outside of international law. Thus, by asking generally what constitutes a “fundamental incident” of war, the Court obscured the fact that Hamdi falls outside many of the legal regimes put in place by the very international legal sources upon which the opinion depends.

All told, the plurality’s direct and indirect recourse to international law is flawed. Although the detention even of U.S. citizens as enemy combatants may be a fundamental incident of armed conflict, the plurality’s analysis falls short of demonstrating this conclusion. The plurality opinion potentially permits a broad and open-ended use of many international legal sources (binding on the United States or not), without sufficient attention to the actual content of international law or the participation of the political branches in its development, and with little effort to link meaningfully its analysis to the text of the AUMF or any other measure of congressional intent. As a result, the plurality opinion is open to the argument that its use of international sources leaves too much discretion to judges; that it fails to provide meaningful guidance for Congress, the President, or the lower courts; and that it does not advance the development of transnational norms or enhance the international position of the United States.

### III. Congressional Authorization and Violations of International Law

This Part explores in detail one potential use of international law suggested by the *Hamdi v. Rumsfeld* opinion, and addresses some of the problems identified above. \(^{136}\) The plurality opinion in *Hamdi* concluded that Congress had not authorized “indefinite detention for the purpose of interrogation” in the AUMF because the Third Geneva

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\(^{136}\) This analysis does not foreclose other potential uses of international law in construing the AUMF, if such uses also avoid the pitfalls discussed above. In particular, this Part does not consider whether the AUMF should be interpreted in a way consistent with international law, as opposed to an interpretation that disfavors violations of international law. For example, one might ask whether the AUMF authorizes the President to detain prisoners of war. Although such detention is fully consistent with the Third Geneva Convention (assuming that its conditions are met), international law does not *require* such detention.
Convention, the 1929 Geneva Convention, and the Hague Conventions require the release of prisoners after the “conclusion of peace” or end of “active hostilities.” The plurality did not conclude, however, that these conventions actually applied to Hamdi’s detention. Justice Thomas, however, suggested that international law should not be used to limit the scope of authorization for the use of force by Congress. There are strong reasons to conclude that general authorizations for the use of force should not be interpreted to empower the President to violate international law. Therefore, if Hamdi’s detention conflicts with those laws, the courts should presume that the AUMF does not grant such authority to the President. The point is not that the plurality reached the wrong conclusion, but that by focusing more specifically on whether the international norms actually applied to this detention, the plurality would have better linked its conclusion to the presumed intentions of Congress and better promoted separation-of-powers values.

The first Section of this Part considers the use of international law based on the text of the AUMF, concluding that the text may support a general recourse to international law as an interpretive tool and that there are some cases that may support this use of international law. Neither the text of the authorization nor the cases, however, provide any clear basis upon which to distinguish among various uses and sources of international law. The following Section considers the interpretive value of international law through the well-established canon of statutory construction that seeks to avoid violations of international law. The final Section revisits the plurality’s opinion in Hamdi, considering how this canon of statutory construc-

138 See id. at 2679 (Thomas, J., dissenting). In one respect, the approach advanced here is similar to that used by Justice Souter, who examined the Third Geneva Convention in far greater detail than did the plurality and concluded that the government had failed to demonstrate that Hamdi’s detention comported with its requirements because it had not afforded him an Article 5 hearing. Justice Souter, however, used this reasoning to conclude that the government could not rely on international law to support its position. Under the analysis here, however, if Hamdi’s detention conflicts with international law this does not just prevent the government from relying on international law to support an expansive view of the President’s power in this case; it also means that the courts should presume that the AUMF does not authorize such detentions. The analysis presented here is, moreover, somewhat different from that advanced by Justice Souter, and this Article leaves open the more general question of whether consistency with international law is an appropriate tool for interpreting the AUMF. See supra note 136.
139 See infra notes 143–163 and accompanying text.
140 See infra notes 143–163 and accompanying text.
141 See infra notes 164–245 and accompanying text.
tion could apply based on claims that Hamdi’s detention violated the Third Geneva Convention and the International Covenant on Civil and Political Rights (the “ICCPR”).142

A. The AUMF: Text and Legislative History

The plurality appears to have used international law in part because the text of the AUMF, coupled with the historical practice of the United States, invites the use of international law as an interpretative tool. Or, to use language that the plurality did not, one might argue that international law can help determine the plain meaning of the text of the AUMF as understood by an ordinary speaker of English,143 or to provide context that illuminates the terms used in the AUMF.144

The phrase “all necessary and appropriate force” as used in the AUMF might invite recourse to international law for several reasons, at least if it is equated with an authorization to conduct war or “armed conflict” between states.145 The development of laws and customs of war regulating the conduct of belligerents has been a focus of international law for centuries.146 As a result, there is a well-developed and sophisticated network of treaties, customary international law, and treaties setting forth the rules and regulations governing the conduct of war.147 The United States has been an active, and at times leading, participant in the development of jus in bello.148

Moreover, considered in context, the AUMF clearly contemplated the use of force against foreign states, groups, and individu-

142 See infra notes 246–275 and accompanying text.
145 This is the language used by the Geneva Conventions, which apply the law of war to armed conflicts between states, even absent formal declarations of war. First Geneva Convention, art. 3, supra note 99, 6 U.S.T. at 3116–18; Second Geneva Convention, art. 3, supra note 99, 6 U.S.T. at 3220–22; Third Geneva Convention, art. 3, supra note 96, 6 U.S.T. at 3318–20; Fourth Geneva Convention, art. 3, supra note 99, 6 U.S.T. at 3518–20. The term “war” is no longer as significant under international law as it once was. See Green, supra note 99, at 43–44; Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 Am. J. Int’l L. 1, 3 (2004).
146 See Green, supra note 99, at 20–52.
147 See supra note 99 (naming some of the most important modern treaties on international humanitarian law); see also Green, supra note 99, at 20–52 (same); Greenwood, supra note 112, at 1–38 (describing the history and contemporary scope of international humanitarian law).
148 See infra notes 185–195 and accompanying text.
als, perhaps inviting the use of international sources in a way that a purely domestic act of Congress would not. Thus, even though the relevant language of the AUMF is not a defined term under international law, these sources might nonetheless serve as a guide to the commonly understood meaning of “necessary and appropriate force,” and provide useful interpretive context.

There is arguably some limited support for this approach in Supreme Court cases involving the scope of the President’s powers when Congress has authorized the use of force through a declaration of war. In Brown v. United States, for example, the Court considered the Executive Branch’s authority to seize enemy property in the United States during a declared war. Reasoning that under the law of nations the state of war itself did not vest enemy property in the foreign sovereign, Chief Justice Marshall concluded that a general declaration of war was not sufficient; Congress had to specifically authorize the seizure of property.

In more recent cases, the Court has generally depended on specific, statutory authorization for the President’s actions; where the Court found such authorization lacking, it held the President’s actions unlawful. In these cases, the Court did not turn to the general

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149 Section 2(b)(1) of the AUMF also provides that it is “specific statutory authorization” within the meaning of the War Powers Resolution, and section 2(a) and that the use of force is authorized to “prevent any future acts of international terrorism.” Authorization for Use of Military Force, §§ 2(a)−(b)(1), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (emphasis added); see David Abramowitz, The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism, 43 Harv. Int’l L. J. 71, 75 (2002) (noting that the language of the AUMF does not include the word “abroad” in reference to the use of force, but arguing that such language was probably unnecessary because of the reference to the War Powers Resolution).

150 12 U.S. (8 Cranch) 110, 123 (1814).

151 Id. at 129; see The Paquete Habana, 175 U.S. 677, 710 (1900) (explaining that the issue in Brown was whether the British property “could lawfully be condemned as enemy’s property . . . without a positive act of Congress” and that the Chief Justice “relied on the modern usages of nations” in “showing that the declaration of war did not, of itself, vest the Executive with authority to order such property to be confiscated”); see also David Golove, Military Tribunals, International Law, and the Constitution: A Francian-Madisonian Approach, 35 N.Y.U. J. Int’l L. & Pol. 363, 383–84 (2003) (discussing the Brown case and the limitations imposed by the law of war on the President’s authority).

152 See, e.g., Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (granting habeas relief to petitioners whose military trials exceeded the scope of congressional authorization under the Hawaii Organic Act); Ex parte Endo, 323 U.S. 283, 302–04 (1944) (granting habeas relief to petitioner whose detention was authorized neither by federal statute nor by executive order). A possible exception is Madsen v. Kinsella, in which the Supreme Court appeared to suggest in places that the statute in question did not authorize the military trial of a dependent wife of a U.S. soldier, but elsewhere suggested that the statute was satisfied. 343 U.S. 341, 354–55 (1952) (stating that “[t]he ‘law of war’ in that connection includes at
authorization for the use of force (such as a declaration of war) coupled with international law to uphold the President’s actions. Similarly, in *Ex parte Quirin*, the Court’s reliance on the Articles of War as providing specific authorization for the military commissions was problematic because the President had failed to comply with certain requirements imposed by the statute. Finding congressional authorization by virtue of the declaration of war would have solved this problem, and the Court could have relied on consistency with international law to reach this conclusion, but it did not do so. The World War II era cases used international law largely to interpret statutes that specifically referenced it, or (less clearly) to set the scope of the President’s constitutional power, rather than to interpret the scope of a general authorization for the use of force.

least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government,” suggesting that the statute was satisfied). In suggesting that the President’s authority did not come from the statute, the Court stated the following:

> In the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.

*Id.* at 348. Where the Court has found congressional authorization, by contract, it has generally upheld the contested action. *See*, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 104–05 (1943) (upholding detention authorized by both Congress and the President).

153 The Articles of War required submission of the commission’s decision to the Judge Advocate General’s Office for review, but President Franklin Roosevelt’s order made himself the sole reviewing authority. *See* G. Edward White, *Felix Frankfurter’s “Soliloquy” in Ex Parte Quirin*, 5 GREEN BAG 2d 423, 429–31 (2002).

154 The problem with this, as Justice Hugo Black reasoned, was that if the President was not bound by the Articles of War, he might have the power “to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves.” *Id.* at 431 (quoting Letter from Justice Hugo Black to Chief Justice Harlan Fiske Stone (Oct. 2, 1942) (Hugo L. Black Papers, Library of Congress) (further citation omitted)); *see* Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison’s War*, 98 Nw. U. L. REV. 1567, 1575 n.60 (2004) (discussing Quirin’s reliance on the Articles of War rather than the declaration of war).

155 Several cases, for example, interpreted the language of Article 15 of the Articles of War, which provided that the Articles “shall not be construed as depriving military commissions . . . of concurrent jurisdiction . . . in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions.” 10 U.S.C. § 821 (2000); *see*, e.g., *Madsen*, 343 U.S. at 350–55; *In re Yamashita*, 327 U.S. 1, 19–20 (1946); *Ex parte Quirin*, 317 U.S. 1, 26–28 (1942).

156 *See*, e.g., Johnson v. Eisentrager, 339 U.S. 763, 769–73, 781 (1950) (holding that enemy aliens detained abroad after conviction by military tribunal lacked the constitutional right to petition U.S. courts for writs of habeas corpus, relying in part on the international
Comparing the AUMF to other congressional authorizations for the President to use force does not substantially clarify the appropriate role of international law in interpreting the AUMF. A history of explicit reference to international law in such authorizations, for example, might make significant the absence of such language in the AUMF. There is no clear pattern, however, of explicit references to international law in congressional authorizations for the use of force.\footnote{See, e.g., Declaration of War Against Germany, S.J. Res. 1, 65th Cong., Pub. Res. No. 1, ch. 1, 40 Stat. 1 (1917). The 1917 Declaration of War Against Germany stated the following: \begin{quote}
[T]he President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.
\end{quote}
Id.; see Declaration of War Against Japan, S.J. Res. 116, 77th Cong., Pub. L. No. 77-328, 55 Stat. 795 (1941) (resembling the 1917 Declaration of War Against Germany); see also Gulf of Tonkin Resolution, H.R.J. Res. 1145, 88th Cong., Pub. L. No. 88-408, 78 Stat. 384 (1964) (providing Congress’s support for “the determination of the President to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression”). Congress included a reference to international law when, in 1991, it authorized the President to use force against Iraq to “achieve implementation of [United Nations] Security Council Resolutions.” Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a), 105 Stat. 3, 3 (1991). The Authorization for Use of Military Force Against Iraq Resolution of 2002 includes similar language. Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002); see infra note 159.} Moreover, although the AUMF is arguably a very broad authorization for the use of force, it is not as broad as the Bush administration sought, and its language and scope are generally consistent with other such authorizations.\footnote{Bradley & Goldsmith, supra note 17, at 39–41.}

Notably, the subsequent resolution in 2002 concerning Iraq authorized the President to use “the Armed Forces of the United States as \textit{he determines} to be necessary and appropriate” in order to defend national security and enforce United Nations Security Council resolutions.\footnote{§ 3(a), 116 Stat. at 1501 (emphasis added). The full text of section 3(a) of the Authorization for Use of Military Force Against Iraq Resolution of 2002 reads as follows:
\begin{quote}
The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq.
\end{quote}
Id.} The AUMF, conversely, uses the phrase “necessary and ap-
propriate force” without the “he determines” language. This comparison suggests that the 2002 Iraq authorization gives greater authority to the President to determine what is “necessary and appropriate,” arguably leaving a greater role for the courts to use a variety of sources to determine what constitutes “necessary and appropriate” under the 2001 AUMF.\footnote{The AUMF does use the phrase “he determines,” but not in reference to what force is “necessary and appropriate.” See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). Instead, it uses that phrase in reference to determining the appropriate target of the force—“those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” Id.} Although these differences in language may suggest differences in how much weight to accord the President’s own interpretation of the scope of authorizations for the use of force, they do not clarify how the courts should use international law to interpret such authorizations.

The legislative history of the AUMF also provides little guidance as to how it should be interpreted specifically with respect to international law. A few remarks from members of Congress suggest that the AUMF was \textit{not} intended to authorize violations of international law,\footnote{147 Cong. Rec. H5638, H5644 (daily ed. Sept. 14, 2001) (statement of Rep. Roukema) (emphasizing that force should be used not just for retaliation, but also to defend the rule of international law); \textit{id.} at H5653 (statement of Rep. Barr) (arguing that Congress should declare war to give “the President the tools, the absolute flexibility he needs under international law and The Hague Convention to ferret these people out”); \textit{id.} at H5673 (statement of Rep. Clayton) (noting that Congress would monitor the President’s use of force to make sure it is “in accordance with international laws”); \textit{id.} at H5675 (statement of Representative Jackson) (stating that “we must . . . affirm the principles that came under attack on September 11—respect for innocent life and international law”).} and there are no floor statements to the contrary. These are poor sources for statutory interpretation, however, and the AUMF was passed without any conference reports, which might have provided better tools of interpretation.\footnote{See Abramowitz, supra note 149, at 71.} Furthermore, one staff member involved in drafting the AUMF commented that although the language was designed to comply with international law forbidding retaliation, international law was otherwise a secondary consideration for those who wrote the AUMF.\footnote{Id. at 75 n.16.}

Neither the text, nor the cases, nor the legislative history described above fully explain how international law should be used to interpret the scope of the AUMF. The following section explores and defends one such use of international law: general authorizations for
the use of force, such as the AUMF, do not authorize violations of international law by the President.

B. Through the Charming Betsy Lens

The Charming Betsy canon provides that when “fairly possible,” courts will construe statutes or acts of Congress so as not to conflict with “international law or with an international agreement of the United States.”\textsuperscript{164} The canon derives its name from Chief Justice Marshall’s 1804 opinion for a unanimous Supreme Court in Murray v. Schooner Charming Betsy.\textsuperscript{165} That case considered whether the schooner’s owner had violated the Nonintercourse Act of 1800, which prohibited trade with France.\textsuperscript{166} The Act applied to “any person or persons resident within the United States, or under their protection.”\textsuperscript{167} The Charming Betsy’s owner argued in part that because he was a Danish citizen, applying the Act to him would violate principles of neutrality under international law.\textsuperscript{168} The Court reasoned that “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains” and concluded that the Act did not apply to the owner because he was not under the diplomatic protection of the United States.\textsuperscript{169}

1. Applying the Charming Betsy Canon

The plurality opinion in Hamdi did not identify the Charming Betsy canon, nor did it express particular concern about violations of international law; instead, the opinion discussed the limitation it imposed based on international law—no indefinite detentions—as simply based on “long-standing law-of-war principles.”\textsuperscript{170} The canon, despite the difficulties discussed below, nevertheless provides some good initial reasons to construe a general authorization for the use of force to avoid a conflict with international law.

\textsuperscript{165} 6 U.S. (2 Cranch) 64 (1804).
\textsuperscript{166} Id. at 107. This principle of interpretation is even older than the case from which it takes its name. SeeBradley, supra note 21, at 485–86.
\textsuperscript{167} Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800).
\textsuperscript{168} Charming Betsy, 6 U.S. (2 Cranch) at 107.
\textsuperscript{169} Id. at 118. The language in the Charming Betsy case (“if any other construction remains”) is thus stronger than the language of the Restatement (Third) of the Foreign Relations Law of the United States (“where fairly possible”).
\textsuperscript{170} Hamdi, 124 S. Ct. at 2641 (O’Connor, J., plurality opinion).
First, the canon itself is a long-standing, well-established interpretative device that courts employ in many different contexts. Courts have cited customary international law, as well as treaties, as the basis for applying the Charming Betsy canon. If courts generally construe acts of Congress to avoid conflict with international law, they should accordingly refuse to interpret the term “all necessary and appropriate”.


172 See Hoffmann-La Roche, 124 S. Ct. at 2366 (invoking the canon based on international comity); Rossi, 456 U.S. at 32 (applying canon based on a sole executive agreement); McCulloch, 372 U.S. at 20–22 (applying canon to avoid the “‘delicate field of international relations’” (citation omitted) without specifying specific sources of international law); Chew Heong v. United States, 112 U.S. 536, 549 (1884) (applying cannon based on a treaty); Kim Ho Ma, 257 F.3d at 1114 (applying canon based both on customary international law and on the ICCPR, a non-self-executing treaty); see also Bradley, supra note 21, at 483 (observing that the Charming Betsy canon presumably applies to all international obligations of the United States); cf. Steinhardt, supra note 21, at 1179–82 (arguing that the canon should apply based both on various kinds of international law and on norms that have not achieved the status of law). The Supreme Court recently considered the ICCPR and noted that it “did not itself create obligations enforceable in the federal courts.” Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004). Elsewhere, the opinion remarked that “the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.” Id. at 2763 (citing 138 Cong. Rec. H8071 (1992)). This language might be read broadly to suggest that non-self-executing treaties (at least those in the area of international human rights law) should not provide the basis for the Charming Betsy canon because employing the canon involves, at least in a broad sense, “interpreting and applying” such law. But the question in Sosa v. Alvarez-Machain was whether the international norm supplied a private cause of action under the Alien Tort Statute, and in the quoted passage the Court was explaining its general hesitation to conclude that it did. Id. at 2762–64. In Hamdi, by contrast, the federal habeas statute provides the right of action, and the international norm is not employed as a rule of decision, but instead as a method of construing the scope of congressional authorization for the use of force. Justice Breyer, who joined this section in Sosa, went on to reason that the Charming Betsy canon might apply in this case, based on “notions of comity,” without recognizing any tension between the canon and the majority’s opinion. See id. at 2782 (Breyer, J., concurring in part and concurring in the judgment).
“militate force” as embracing the violation of international law by the President.

Second, the canon is bolstered by another related, interpretive canon. Courts typically assume that Congress does not intend to repeal domestic law by implication;\(^ {173}\) they should accordingly hesitate to construe Congress as authorizing the President to violate U.S. law absent more specific language than that found in the AUMF.\(^ {174}\) This interpretative canon would apply to self-executing treaties, which qualify as domestic law under the Supremacy Clause.\(^ {175}\)

Third, the canon provides some concrete limits on what sorts of international legal materials are relevant—subject to some limitations discussed below, only international agreements binding on the United States and international norms so well-entrenched that nations are legally obligated to follow them as customary international law would serve as interpretive sources.\(^ {176}\) Although this does not solve problems associated with defining the scope of customary international law itself, it at least limits the courts largely to these norms. Moreover, international humanitarian law offers a particularly well-defined body of treaty and custom-based norms,\(^ {177}\) much of which is incorporated into U.S. and foreign practice.\(^ {178}\) This has the dual advantage of providing


\(^ {174}\) See Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?, 90 CORNELL L. REV. 97, 130–31 (2004) (noting that many violations of the Geneva Conventions are crimes under U.S. law and concluding that it is “difficult to sustain a claim that Congress impliedly repealed various provisions of the U.S. penal code and the Uniform Code of Military Justice with a single, sweeping resolution”).


\(^ {176}\) When applying the canon based on “international comity,” the Supreme Court has sometimes used sources that do not clearly qualify as binding under customary international law. See Steinhardt, supra note 21, at 1146–52. As discussed below, there is a strong argument that courts should apply the canon to avoid potential violations of international law, which leaves somewhat more discretion in the hands of the courts, but also enjoys many advantages. See infra notes 246–256 and accompanying text.

\(^ {177}\) See Jinks, supra note 97, at 374–75 n.30 (arguing that international humanitarian law is more detailed, better incorporated into domestic law, and has a better-enforcement regime than international human rights law); see also Derek Jinks, September 11 and the Law of War, 28 YALE J. INT’L L. 1, 2 (2003) (indicating that the laws of war offer a “widely-accepted” and “fully articulated normative framework”); supra note 147 and accompanying text (indicating that a body of treaties, customary international law, and treatises sets forth the rules and regulations governing the conduct of war).

\(^ {178}\) See Greenwood, supra note 112, at 33–37 (describing the incorporation of international humanitarian law into German law and practice); Jinks, supra note 97, at 376–77, n.44 (describing the incorporation of the Third Geneva Convention into national military manuals of the United States, Canada, and the United Kingdom); infra 197–201 and accompanying text.
a clearer background norm against which Congress can authorize the use of force as well as providing some limits on the scope of relevant norms that courts can employ.

One might argue that unlike a statute, the AUMF is an explicit grant of authority to the Executive Branch, and thus the canon simply does not apply. Under one variation of this argument, the AUMF authorizes the President to do anything that he finds appropriate. Eight of the nine Justices rejected this approach in *Hamdi*, however, by limiting the scope of the AUMF contrary to the views of the President. Another variation of this argument is that the AUMF should be interpreted as authorizing the President, not Congress, to make decisions about particular violations of international law. The canon itself suggests that this argument is incorrect for the reasons given above, as do the factors discussed in the following discussion, including a more specific analysis of the likely intent of Congress, the text of the Constitution, and other separation-of-powers considerations.

2. Objections Based on Congressional Intent

The *Charming Betsy* canon is frequently justified based on the presumed intentions of Congress, yet some have questioned whether that presumption is accurate, particularly in the context of international

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179 See *supra* notes 66–72 and accompanying text.
180 See *infra* notes 181–245 and accompanying text.
181 There are many debated grounds for discounting “congressional intent” when interpreting congressional enactments. See generally *Scalia*, *supra* note 143; *Easterbrook*, *supra* note 144. Yet every commentator to consider the *Charming Betsy* canon at length concludes that, at least to some extent, it is properly based on the presumed intentions of Congress. See *Bradley*, *supra* note 21, at 533; *Steinhardt*, *supra* note 21, at 1185–86; *Swaine*, *supra* note 58, at 717–18 n.365; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 115 cmt. a (1987) (stating that “[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States”); *cf.* *Turley*, *supra* note 21, at 269 (arguing that the canon should be replaced by case-by-case consideration of each statute to evaluate the likely intent of Congress among other considerations). More importantly, the courts seem to employ the canon because they believe that it maximizes the preferences of Congress. See, e.g., *F. Hoffman-La Roche*, 124 S. Ct. at 2366 (“This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.”); *Rossi*, 456 U.S. at 31–32 (reasoning that “if Congress intended [a particular outcome] it must have intended to repudiate [certain] executive agreements,” then applying the *Charming Betsy* canon to counter this interpretation); *Chew Heong*, 112 U.S. at 540 (indicating that courts should not doubt that treaty compliance and the “honor of the government and the people of the United States” were “present in the minds of [members of Congress] when the legislation in question was enacted”).
human rights.\textsuperscript{182} Professor Curtis Bradley, for example, has argued that we have “fairly specific evidence” of the views of the political branches with respect to customary international law in the human rights area.\textsuperscript{183} Citing the failure of the United States to ratify many human rights treaties and the substantial reservations it has made to others,\textsuperscript{184} Professor Bradley questions the empirical claim that the political branches actually wish to comply with customary international law. Whatever force this argument might have in the human rights context, however, it does not apply with respect to international humanitarian law.

First, as a general matter, the United States has long been a leader in the development of the law of war, including international humanitarian law.\textsuperscript{185} The Lieber Code, adopted as law by the Union during the Civil War, were the “first modern codification of the law of

\textsuperscript{182} Bradley, supra note 21, at 520–23. Among the potential reasons to discount the \textit{Charming Betsy} canon is that America’s strength as a superpower may make compliance with international law less urgent today than it was when the canon first developed. \textit{Id.} at 492, 519. The continued vitality of the canon undercuts this argument as a general matter; in any event, this reasoning has less force with respect to the rules of warfare where the United States may fear immediate reprisals against its military personnel. The capture by Iraq of U.S. troops and the U.S. insistence that they be treated according to the rules of war provides one illustration. \textit{See} Amann, supra note 44, at 285. A final possible reason to discount the canon, at least in the \textit{Hamdi} case itself, is that international tension and discord are unlikely to result from the military’s treatment of its own citizens as opposed to foreign nationals. This consideration should not, however, defeat the application of the canon. First, international law is increasingly concerned with how nations treat their own citizens. Second, the canon, even as a function of congressional intent, is not designed solely to avoid international discord. \textit{See} \textit{Restatement (Third) of the Foreign Relations Law of the United States} §§ 114, 115 cmt. a (explaining the \textit{Charming Betsy} rule as a function of congressional intent without suggesting any limitation based on fear of retaliation or international diplomatic fallout). In any event, it seems unlikely that in authorizing the use of force Congress intended that the treatment of U.S. citizens would fall \textit{below} the international standards for the treatment of foreign combatants, so there is good reason to apply an intent-based version of the canon here, even apart from concerns about international tensions.

\textsuperscript{183} Bradley, supra note 21, at 520.

\textsuperscript{184} \textit{Id.} at 520–21 nn.242–45 (discussing the ICCPR in particular).

armed conflict,” and they became the basis for many similar codes of wartime conduct, as well as future treaties to which the United States is a party. Since 1916, the Articles of War have referred to “offender or offenses that by the law of war may be lawfully triable by such military commissions,” forcing the Supreme Court to interpret the law of war in cases including *Ex parte Quirin* and *In re Yamashita*. The United States is also a party to the major conventions governing international humanitarian law, and played a leading role in initiating and drafting many of them. Although the United States has refused to become a party to Protocols I and II to the Geneva Conventions, it has recognized that much of Protocol I and all

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186 See *Green*, * supra* note 99, at 29 n.63.

187 See *id*. at 29–30 (discussing the role of the Lieber Code in the Civil War and concluding that “[t]he rules embodied in the Lieber Code were so consistent with accepted practice that . . . between 1870 and 1893 similar manuals or codes were issued by Prussia, 1870; The Netherlands, 1871; France, 1877; Russia 1877 and 1904; Servia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893”).


189 317 U.S. at 27–36; *see supra* notes 88–98 and accompanying text.

190 327 U.S. at 13–15 (analyzing whether charges that the general failed to control his troops and prevent brutal atrocities violated law of war, including norms derived from the Hague Conventions); *id*. at 31–40 (Murphy, J., dissenting) (finding it “impossible to agree that the charge . . . stated a recognized violation of the laws of war”).

191 See *supra* note 99.


193 In addition to the failure to ratify Protocols I and II to the Geneva Conventions, *see supra* note 99, one could also cite the failure of the United States to sign the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507. *See generally Jodi Preusser Mustoe, Note, The 1997 Treaty to Ban the Use of Landmines: Was President Clinton’s Refusal to Become a Signatory Warranted?,* 27 GA. J. INT’L COMP. L. 541 (1999). But Presidents George H.W. Bush and William J. Clinton took extensive actions to achieve compliance with the treaty and its goals, including a legislative moratorium on landmine production (passed during the George H.W. Bush administration but later repealed under the Clinton administration) and the allocation of significant funds to remove landmines internationally. *See Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. REV. 623, 657–62 (1998). Moreover, during the wars in Afghanistan and Iraq, the George W. Bush administration did not use landmines. The International Campaign to Ban Landmines reported in September 2002 that in Afghanistan “there were reports of limited use of mines and booby-traps by Taliban and Al-Qaeda fighters, as well as the Northern Alliance” but “there were no instances of use of antipersonnel mines by the United States or coalition forces.” *Int’l Campaign to Ban Landmines, Landmine Monitor Report 2002: Toward a Mine-Free World* 6 (2002), *available at http://www.*
of Protocol II codify customary international law,\textsuperscript{194} and U.S. military manuals on international law often track the language of Protocol I.\textsuperscript{195} There is little basis for any general claim that the political branches do not wish to comply with international humanitarian law.

Second, the Executive Branch has consistently reiterated its commitment to follow the law of war, both custom and treaty-based. From the famous blockade ordered by President Abraham Lincoln at the outset of the Civil War that generated \textit{The Prize Cases}, to the seizure of Cuban fishing vessels during the Spanish-American War, to the military trials of World War II, to U.S. conduct in the Persian Gulf War, Presidents have made explicit their desire to comport with the law of war.\textsuperscript{196}


\textsuperscript{196} \textit{Quirin}, 317 U.S. at 12; \textit{Paquete Habana}, 175 U.S. at 712 (quoting presidential declaration of blockade in pursuance of law of nations); Abraham Lincoln, \textit{Proclamation of Blockade Against Southern Ports}, Apr. 19, 1861 (announcing blockade in pursuance of the law of nations); \textit{U.S. Dep’t of Defense, Conduct of the Persian Gulf War: Final Report to Congress} 33 (1992) (describing U.S. compliance with the Geneva Conventions during the Persian Gulf War); Colonel James P. Terry, \textit{Operation Desert Storm: Stark Contrasts in Compliance with the Rule of Law}, 41 \textit{Naval L. Rev.} 83, 84–95 (1993) (describing U.S. compliance with international law during the Persian Gulf War); see also Golove, \textit{supra} note 151, at 378–94 (detailing the “long and laudable tradition of the U.S. military in guiding its conduct strictly in accordance with the requirements of international law,” citing examples from the Revolutionary War, armed conflict with France in 1790s, the War of 1812, the Mexican-American War, the Civil War, the Spanish-American War, World War I, and World War II).
This remains true today, with the Bush administration defending its treatment of detainees around the world as consistent with international law.\textsuperscript{197} Although this administration has advanced controversial opinions about the scope of the Geneva Conventions,\textsuperscript{198} it has not denounced or repudiated its intentions to comply with international humanitarian law.\textsuperscript{199} With respect to Operation Iraqi Freedom, for example, a Joint Chiefs of Staff directive explicitly requires the application of law of war obligations “during all stages of operational planning and execution of joint and combined operations.”\textsuperscript{200} In addition, the Department of Defense requires all branches of the armed forces to comply with the law of war in conducting military operations and related activities.\textsuperscript{201} The consistent commitment by the Executive

\textsuperscript{197} See, e.g., Transcript, U.S. Dep’t of Defense, Briefing on Detainee Operations, \textit{supra} note 2 (stating that “our policies are treating the detainees entirely consistent with the framework of the Geneva Convention”); Transcript, U.S. Dep’t of Defense, Briefing on Geneva Convention, EPW’s and War Crimes (Apr. 7, 2003) [hereinafter Transcript, U.S. Dep’t of Defense, Briefing on Geneva Convention], http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html (last updated Apr. 7, 2003). W. Hays Parks stated the following:

 Let me talk a little bit about DOD policies and the conflict in Iraq. The United States and coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva conventions I have identified. These plans are integrated into current operations.

\textsuperscript{198} See, e.g., Memorandum from John Yoo & Robert J. Delahunty, Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, General Counsel, U.S. Dep’t of Defense 1–2 (Jan. 9, 2002) (discussing the application of treaties and laws to al Qaeda and Taliban detainees and concluding that the Geneva Conventions do not apply to detainees from the war in Afghanistan).

\textsuperscript{199} See, e.g., Press Release, U.S. Dep’t of Defense, \textit{supra} note 2 (“[T]he law of war permits the detention of enemy combatants for the duration of the conflict. It permits this detention without the use of a review process. Nonetheless, the Department of Defense has decided as a matter of policy to institute this review process.”); \textit{see also supra} note 197.

\textsuperscript{200} \textbf{CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM § 4(b) (Mar. 25, 2002). The law of war definition includes “treaties and international agreements to which the United States is a party, as well as applicable customary international law.” Id. § 5(a).}

Branch to comply with international law supports the view that Congress would assume that the courts and the President would interpret its authorization as extending only to those actions that do not violate the law of war.

Third, treaties reflect limitations to which the Senate at least has already given its formal advice and consent. The Senate itself and the President, for example, have previously considered and approved the limitations on the use of force that are codified in treaties such as the Geneva Conventions. Moreover, in approving such treaties, the Senate has considered the scope of appropriate force in the same context (in one sense) as it arises in the following case: defining and limiting the actions that the U.S. military is permitted to take. This is a separate argument from the desire to avoid repeal of domestic law, which would apply only to self-executing treaties. Here, the point is that the limitation on the use of force is one that the Senate has already considered and approved, and this point applies to non-self-executing as well self-executing treaties.

In summary, there are excellent reasons based on the presumed intentions of Congress to apply the *Charming Betsy* canon in interpreting general authorizations for the use of force by Congress. Potential objections about the use of customary international law as an interpretive norm are at least partially answered by the role that the United States has played in the development of international humanitarian law, the clear commitment of the Executive Branch to comply with that law, and the (at least relatively) well-defined content of this branch of customary international law.

3. Objections Based on Separation of Powers

The promotion of separation of powers is sometimes advanced as another basis for the *Charming Betsy* canon. The roles of the three branches differ somewhat, however, when courts consider a statute and when they consider authorizations for the use of force, and these differences could make the *Charming Betsy* canon inapplicable in the latter situation. If courts construe an ambiguous civil statute to conflict with international law, generally they risk putting the nation
in violation of international law without the clear intent of either of the political branches to do so.\textsuperscript{204} Phrased differently, to the extent the canon is based on separation-of-powers concerns, it may be designed at least in part to prevent courts from construing statutes to create a violation of international law unintended by either Congress or the President.\textsuperscript{205} In considering the scope of Congress’s authorization for the use of force, however, the preferences of the President are clear; it is the President’s actions that are under judicial scrutiny. The question is thus whether the canon is designed simply to disable the courts in favor of action by either the Congress or the Executive Branch, or whether it also reflects a preference for legislative (as opposed to presidential) action that violates international law.

The U.S. Court of Appeals for the Ninth Circuit explicitly recognized this issue in \textit{United States v. Corey}, a case involving the extraterritorial application of a federal criminal statute.\textsuperscript{206} The defendant argued that application of the statute to his conduct abroad would violate international law and that under the \textit{Charming Betsy} canon the court should refuse this interpretation.\textsuperscript{207} The panel rejected this argument on the grounds that concurrent jurisdiction did not violate international law.\textsuperscript{208} In dicta, however, Judge Alex Kozinski also reasoned that the concerns underlying the \textit{Charming Betsy} canon “are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch of our government” and that “we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law

\textsuperscript{204} This is not generally true of criminal statutes, however, where the government brings the action and thus has made the decision that the benefits of interpreting the statute in violation of the law of nations outweigh the risks; some have resisted application of the canon in the criminal context for these reasons. \textit{See, e.g.}, United States v. Corey, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000). It is not necessarily true of civil statutes either because the government can and frequently does brief the court on the questions before it, ensuring that the court reaches its decision fully informed of the government’s views on the case. In \textit{Hoffman-La Roche, Ltd. v. Empagran}, for example, the government filed an amicus brief in an antitrust suit brought by private purchasers of vitamins against private manufacturers and distributors. \textit{See} 124 S. Ct. at 2369.

\textsuperscript{205} \textit{Bradley, supra} note 21, at 526 (stating that “by requiring Congress to decide expressly whether and how to violate international law, the canon reduces the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President”); \textit{Steinhardt, supra} note 21, at 1132 (noting that the canon might be based on concerns about the United States speaking with “one voice” in foreign affairs issues, including the “prospect of embarrassing the executive branch”).

\textsuperscript{206} \textit{Corey}, 232 F.3d at 1177–79.

\textsuperscript{207} \textit{See id.} at 1169.

\textsuperscript{208} \textit{Id.} at 1179.
and determined that it serves the interests of the United States.”

This suggests that the separation-of-powers values upon which the canon is based make it inapplicable when the court is evaluating the President’s own actions.

The historical use of the canon, however, provides a somewhat different picture. Judge Kozinski supported his reasoning with the observation that the Supreme Court had never invoked the canon against the government in a case to which it was a party.210 This is incorrect—in 1913, the Supreme Court ruled against the United States in *MacLeod v. United States*, a case involving the collection of duties in occupied territory.211 The United States imposed the duties on the *Venus*, a vessel bound for Cebu, an island held by local forces who collected their own duties from the vessel.212 The government claimed that a subsequent act of Congress had ratified its actions.213 The Court disagreed, explaining that international law permitted the collection of tariff duties only in places under the occupation and control of the United States, which did not include Cebu.214 The Court

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209 *Id.* at 1179 n.9.
210 *Id.* Judge Kozinski also characterized the *Charming Betsy* case itself as involving a “private dispute,” but this is not entirely accurate. On the one hand, the vessel was seized by a captain in the U.S. Navy, pursuant to an act of Congress that made commerce with France illegal, and in accordance with an order by the President directing naval officers to “do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies.” *Charming Betsy*, 6 U.S. (2 Cranch) at 78. Thus, the case stands on somewhat different footing than a purely private dispute. On the other hand, the captain stood to gain financially from the capture, and the government was not a party to the litigation. After losing in the lower court, the captain sought assistance from the federal government, which apparently paid for the bond necessary to appeal the case. See Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 Am. J. Legal Hist. 1, 9–10 (2001). Eventually, Congress ordered the captain compensated from federal funds after he lost the case before the Supreme Court; one argument advanced for his compensation from the Senate was that he acted as an agent of the federal government and had no discretion to disobey the orders given to him. *Id.* at 18–19. One commentator has noted that the 1805 bill signed by President Thomas Jefferson to compensate the captain was “the first time that Congress ever indemnified a public officer for a service-related judgment.” *Id.* at 19.
211 229 U.S. 416, 435 (1913).
212 *Id.* at 418–19.
213 *Id.* at 423–24.
214 In support, the Supreme Court cited the Hague Convention of 1899, which provides in part that “‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself.’” *Id.* at 426 (quoting the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 42, 32 Stat. 1803, 1 Bevans 247, 259). The Court also cited various sources to show that the insurgents at Cebu had established a de facto government, including John Bassett Moore’s *Digest of International Law* and prior practice of the U.S. Executive Branch. *Id.* at 428–30.
thus concluded that the statute did not authorize the actions of the military collector, reasoning—without citing the Charming Betsy case\textsuperscript{215}—that “it should not be assumed that Congress proposed to violate the obligations of this country to other nations.”\textsuperscript{216}

The Court has applied the same reasoning (again without citing the Charming Betsy canon) against the government in cases involving U.S. treaty obligations. In Chew Heong v. United States, the Court interpreted a federal statute to permit a former Chinese resident of the United States to reenter the country.\textsuperscript{217} This interpretation was consistent with U.S. treaty obligations, but contrary to the views of the Executive Branch. The Court emphasized that repeal of a treaty involves “question[s] of good faith with the government or people of other countries.”\textsuperscript{218} Thus, Chew Heong and other cases like it suggest that at

\begin{itemize}
\item The Court has since cited MacLeod for the Charming Betsy principle. Lauritzen, 345 U.S. at 578.
\item MacLeod, 229 U.S. at 434. The paragraph reads in full as follows:

\begin{quote}
The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.
\end{quote}

\textit{Id.} Although the Supreme Court also based this interpretation on a proclamation by the President, that proclamation did not explicitly reference the law of war; instead it used the term “occupation,” \textit{see id.} at 420, which the Court construed in light of international law. \textit{Id.} at 425–26, 432. Thus, the Court used international law not only to construe a statute contrary to the views of the United States, but also to construe a Presidential Proclamation contrary to the views of the government.

\item 112 U.S. 536, 560 (1884); \textit{see also} Steinhardt, \textit{supra} note 21, at 1154–56 (arguing that the Supreme Court used the Charming Betsy canon (without citing it) to defeat the government’s interpretation of a statute in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).

\item Id. at 549. The Supreme Court construed the statute so as to not abrogate the treaty, contrary to the government’s interpretation. It reasoned that

\begin{quote}
the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.
\end{quote}

\textit{Id.} at 540. Thus, the foreign policy implications of the issue were much on the mind of the Court, but it still refused to defer to the Executive Branch.
least with respect to treaties, courts have a preference for legislative rather than executive decisions.\textsuperscript{219}

In a more recent case in which the government made its views known through an amicus brief, \textit{Hartford Fire Insurance Co. v. California},\textsuperscript{220} the majority of the Court construed the statute at issue in a manner consistent with the government’s position without citing the \textit{Charming Betsy} canon. The dissent, however, authored by Justice Scalia and joined by Justices O’Connor, Kennedy, and Thomas relied on the canon extensively to interpret the statute contrary to the views of the United States, without suggesting any potential conflict.\textsuperscript{221} Lower courts, too, have used the canon to defeat the government’s interpretation of a statute.\textsuperscript{222} Even when using the canon to interpret a statute in harmony with the executive’s views, courts do not simply discount the canon in deference to the government’s position.\textsuperscript{223} The actual use of

\textsuperscript{219} See, e.g., \textit{Cook v. United States}, 288 U.S. 102, 118–22 (1933) (construing a re-enacted Tariff Act to avoid abrogating or modifying an earlier treaty, contrary to the interpretation afforded the Act by the Executive Branch); \textit{United States v. Payne}, 264 U.S. 446, 447–49 (1924) (construing a subsequent Act of Congress in harmony with an earlier treaty and contrary to the views of the Executive Branch). These cases, like \textit{Chew Heong}, do not cite the \textit{Charming Betsy} canon. They apply the same reasoning, however, by construing statutes to avoid conflict with international law in cases involving treaty obligations. See \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 114 reporters’ note 1 (1987) (citing \textit{Chew Heong} and \textit{Cook} as applications of the \textit{Charming Betsy} canon); Detlev F. Vagts, \textit{The United States and Its Treaties: Observance and Breach}, 95 Am. J. Int’l Law 313, 322–23 (2001) (citing \textit{Chew Heong} as an application of the canon); Bradley, \textit{supra} note 21, at 488 n.48 (citing \textit{Cook} and \textit{Chew Heong} as applications of the canon).

\textsuperscript{220} 509 U.S. 764 (1993).

\textsuperscript{221} Id. at 815–20 (Scalia, J., dissenting); see also Kenneth W. Dam, \textit{Extraterritoriality in an Age of Globalization: The Hartford Fire Case}, 1993 Sup. Ct. Rev. 289, 325 n.124 (describing the government’s amicus brief, which argued that application of the statute “would not frustrate British policy,” a conclusion that the dissent implicitly rejected).

\textsuperscript{222} See, e.g., \textit{Allegheny}, 367 F.3d at 1348 (interpreting the Tariff Act of 1930 against the Commerce Department in part based on a ruling of the World Trade Organization (the “WTO”)); \textit{Kim Ho Ma}, 257 F.3d at 1114–15 (interpreting the Immigration and Nationality Act against the Immigration and Naturalization Service); \textit{FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson}, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (interpreting FTC Act against the FTC); \textit{Palestine Liberation Org.}, 695 F. Supp. at 1464–72 (reading the Anti-Terrorism Act of 1987 in conformance with the United Nations Headquarters Agreement and denying an injunction sought by the government to close down the observer mission of the Palestine Liberation Organization at the United Nations Headquarters); \textit{The Over The Top}, 5 F.2d 838, 842–44 (D. Conn. 1925) (dismissing a libel brought by the United States in part because the government’s interpretation of the statute might contravene a treaty between the United States and Great Britain); cf. \textit{Commodity Futures Trading Comm’n v. Nahas}, 738 F.2d 487, 493–95 (D.C. Cir. 1984) (interpreting the Commodity Exchange Act against the Commodity Futures Trading Commission).

\textsuperscript{223} See, e.g., \textit{Hoffman-La Roche}, 124 S. Ct. at 2362, 2366–68. In \textit{Hoffman-La Roche}, the government’s amicus brief detailed the foreign policy problems associated with applying
the canon thus suggests a preference for a legislative, rather than purely executive, decision to violate international law. This is true both because the courts refuse to automatically defer to the executive, even when its views are clear and those of Congress are not, and because courts occasionally use the canon to defeat the interpretation offered by the government.

This conclusion is supported by the Supreme Court’s application of a related canon, the presumption against extraterritorial application of statutes, directly counter to the government’s position.\(^{224}\) The Court has applied the presumption against extraterritorial application of U.S. law to defeat an agency’s interpretation of a statute.\(^{225}\) Indeed, in one case the Court reasoned that “[f]or us to run interference in such a delicate field of international relations there must be present

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224 Some maintain that the presumption against extraterritoriality is entirely distinct from the presumption in favor of international law. Hartford Fire Ins., 509 U.S. at 815 (Scalia, J., dissenting) (describing the two as “wholly independent”); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 264 (1991) (Aramco) (Marshall, J., dissenting) (same). The Supreme Court has elsewhere suggested that the presumption against extraterritoriality is based on the desire to avoid “international discord,” Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (quoting Aramco, 499 U.S. at 248), as well as on other factors, including the “commonsense notion that Congress generally legislates with domestic concerns in mind.” Id. at 204 n.5; see Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 174 (1993) (“We have recently held, however, that the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations.”).  

225 See Aramco, 499 U.S. at 248; see also Turley, supra note 21, at 221 (describing this opinion as upholding a very strong presumption that “maximizes the role of the legislative process in resolving controversial matters”); id. at 219 n.172 (noting that although some rules defer to the Executive Branch, the “presumption against extraterritoriality defers to the legislative branch”).
the affirmative intention of the Congress clearly expressed” because Congress “alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.”226

A somewhat analogous question arises in the relationship between the Charming Betsy canon and the deference afforded to agency interpretations of statutes under Chevron USA v. National Resources Defense Council.227 When the agency interpretation of a statute is entitled to deference, and when that interpretation would violate international law, courts must resolve the conflict between the two interpretive tools. Were the preferences of the Executive Branch enough to defeat the canon, however, there would be no conflict—the agency interpretation would control under either Chevron or Charming Betsy. Lower courts, however, generally have not concluded that Chevron automatically trumps the Charming Betsy canon. Instead they have often used the two interpretive canons in tandem;228 in cases of conflict, courts have taken varying approaches.229 The Supreme Court has not

226 Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957); see also McCulloch, 372 U.S. at 22 (reasoning that Congress “alone has the facilities necessary to make fairly such an important policy decision” and concluding that arguments urging another interpretation should be directed to Congress (quoting Benz, 353 U.S. at 147)).
228 See, e.g., Warren Corp. v. EPA, 159 F.3d 616, 623–24 (D.C. Cir. 1998) (using the Charming Betsy canon to conclude that the agency’s interpretation of the statute was reasonable under Chevron); Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581–82 (Fed. Cir. 1995) (reversing the Court of International Trade and deferring to the Department of Commerce’s interpretation of the statute in part because it was consistent with the international obligations of the United States); see also Lawrence R. Walders & Neil C. Pratt, Trade Remedy Litigation—Choice of Forum and Choice of Law, 18 ST. JOHN’S J. LEGAL COMMENT 51, 68–73 (2003) (describing the courts’ efforts to reconcile the two interpretive approaches in the context of international trade); cf. Luigi Bormioli Corp. v. United States, 304 F.3d 1362, 1365–66, 1368 (Fed. Cir. 2002) (reasoning that the language of the statute was clear, and there was no reason to consider Chevron deference, in part because the government’s reading of the statute was consistent with international law). In another case in which Chevron deference and Charming Betsy pointed toward the same result, the U.S. Court of Appeals for the Fifth Circuit refused to defer to the Department of Agriculture and rejected the Department’s reliance on the canon. Miss. Poultry Ass’n, Inc. v. Madigan, 992 F.2d 1359, 1367 (5th Cir. 1993) (refusing to use the canon based on the General Agreement on Tariffs and Trade (“GATT”) and rejecting the Department’s reading of the statute).
229 See Allegheny, 367 F.3d at 1343, 1348 (holding, based in part on the Charming Betsy canon and a decision of the WTO, that the language of the statute spoke directly to the issue in question and that the agency’s interpretation was due no deference under Chevron); Timken Co. v. United States, 354 F.3d 1334, 1342–44 (Fed. Cir. 2004) (deferring to the Commerce Department’s interpretation of the statute, and refusing to apply the Charming Betsy canon in part because the WTO ruling in question was distinguishable); Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334, 1343–45 (Ct. Int’l Trade 1999)
considered a direct conflict between the two and has sent somewhat mixed signals about the relationship between the canons.\textsuperscript{230}

The foregoing discussion shows at the very least that the views of the Executive Branch do not automatically defeat the canon. This is true apparently even in the context of \textit{Chevron} deference, where the reasons to defer are strong, in part because the preferences of the Executive Branch are expressed through the formal mechanisms of a federal agency.\textsuperscript{231} Thus although interpretation of the AUMF does not involve \textit{Chevron} deference,\textsuperscript{232} the courts’ reluctance to discard the \textit{Charming Betsy} canon (and the presumption against extraterritoriality)
when faced with *Chevron*, suggests that the canon should apply in construing the AUMF, even if it runs contrary to the views of the President. It also suggests that the canon has functioned not only to disable the courts in favor of either of the political branches, but that it also reflects some preference for legislative rather than executive decision making.

Other considerations also provide reasons, beyond the descriptive analysis above, to prefer legislative rather than executive decisions to violate international law in the context of interpreting the AUMF. For example, the Executive Branch is often correctly said to have particular expertise with respect to international law and to represent the nation in foreign affairs.\(^{233}\) This might suggest that the *Charming Betsy* canon should not apply in this context, because the courts should defer to any decision of the President that might violate international law rather than seeking more explicit authorization from Congress.\(^{234}\) The text of the Constitution, however, undermines this argument by vesting Congress—rather than the President—with much of the authority to make decisions regarding international law, particularly in the context of war. These specific, textual grants of authority undermine broader, non-textual arguments about the President’s superiority in all areas of foreign affairs and national defense.

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\(^{233}\) *Hamdi*, 124 S. Ct. at 2675 (Thomas, J., dissenting) (reasoning that “[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations” and citing the President’s virtues of speed, decisiveness, and secrecy); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964) (“[T]he Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, . . . but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates.”); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 32 (2d ed. 1996); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 687–88, 702 (2000); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 Cal. L. Rev. 851, 873–77 (2001) (reviewing Frances Fitzgerald, *Way out There in the Blue: Reagan, Star Wars and the End of the Cold War* (2000)).

\(^{234}\) Cf. *Sale*, 509 U.S. at 188 (“Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”); Restatement (Third) of the Foreign Relations Law of the United States § 112, cmt. c (1987); Bradley, supra note 233, at 687–88, 702, 708–09 (arguing that the expertise of the Executive Branch is one basis on which to defer to its interpretation of customary international law, as well as some statutes and treaties).
The Constitution, in Article I, section 8, grants to Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” All three were both defined terms at international law and integrally related to the conduct of war. For example, letters of marque and reprisal were permitted under certain circumstances by the law of nations; they empowered the seizure of foreign subjects or property, and their use was considered a limited form of hostilities short of war. Under British precedent, it was the executive who issued such letters, but the U.S. Constitution lodges this authority with Congress. The power of Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations” provides another example (although one less directly connected to war).

235 U.S. Const. art. I, § 7, cl. 11.
238 See Lewittes, supra note 237, at 1173. One commentator has also emphasized that Congress, not “the discretion of a commanding officer,” controls the right to capture and confiscate property during war. Wharton, supra note 236, § 217.
239 U.S. Const. art. I, § 7, cl. 10.
240 Many examples of the exercise of this power, however, are connected to war. A nineteenth-century commentator, for example, provided the following two “[i]llustrations
because failure to punish individuals guilty of such crimes could also put the United States in violation of the law of nations.\textsuperscript{241} The Commander-in-Chief power may have lodged some power to violate international law in the hands of the President, but under eighteenth-century international law there were far fewer norms governing the actual conduct of battle than there are today.\textsuperscript{242}

Applying the canon to construe the scope of congressional authorization for the President’s actions does no violence to separation-of-powers principles for another reason. If constitutional text puts the power in question squarely in the President’s hands (under the Commander-in-Chief Clause, for example), then this tool of construction is unnecessary, because the scope of authorization by Congress is not relevant. If Congress directly speaks to the issue, the canon does not apply. It is only in play to the extent that the President’s authority is at least partly a function of congressional authorization and to the extent that the scope of such authorization is unclear. Aside from the modest preference for legislative action described above, the \textit{Charming Betsy} canon can also serve a separation of powers function if it accurately reflects congressional intent by keeping delegations of congressional power to those that Congress actually intended (or would have intended) to authorize. It also serves separation-of-powers values if it does a good job of eliciting preferences from Congress\textsuperscript{243} and if it provides a bright-line rule against which Congress can make future authorizations and against which the President can take action.\textsuperscript{244}

of the exercise of this power”: the “neutrality laws,” which forbid the “fitting out and equipping of armed vessels, or the enlisting of troops, for either of two belligerent powers with which the United States is at peace”; and “the laws which prohibit the organizing within the country of armed expeditions against friendly nations.” HENRY CAMPBELL BLACK, \textit{HANDBOOK OF AMERICAN CONSTITUTIONAL LAW} 197 (St. Paul, West Pub’g Co. 1895).


\textsuperscript{242} See \textit{Green, supra} note 99, at 28–53 (tracing the history and sources of law of armed conflict).

\textsuperscript{243} See Elhauge, \textit{supra} note 54, at 2238–46. Elhauge emphasizes that some canons can be justified as effectively eliciting preferences from Congress, but to do so they should favor the parties with the weakest access to the congressional agenda. In Hamdi’s case, such a justification would suggest that the party urging compliance with international law should be favored over the President, who has particularly good access to Congress. See \textit{infra} note 244.

\textsuperscript{244} Cf. Finley v. United States, 490 U.S. 545, 556 (1989) (stating that “[w]hat is of paramount importance is that Congress be able to legislate against a background of clear
In summary, under one separation-of-powers perspective, application of the *Charming Betsy* canon to interpret general authorizations for the use of force is unnecessary because one of the political branches—the President—has already decided in favor of the action in question. But neither does application of the canon keep the decision for the courts, another potential separation-of-powers value. Instead, it disables the courts, but favors a legislative over an executive decision to violate the norm in question. There are some reasons to think that the history of the *Charming Betsy* and other canons supports a modest preference for the legislature, and the text of the Constitution also provides some grounds on which to favor legislative decisions regarding the violation of international law during war. The canon also operates in a context that minimizes separation-of-powers problems because it leaves the ultimate decision about violating international law with the political branches, it does not apply if the President’s actions fall within his plenary authority under the Constitution, and it works to maximize the preferences of Congress.

Error costs are a potential reason not to employ the canon. Applying the canon will push courts toward construing congressional authorization narrowly, and the courts may err on the side of denying to the President power that Congress intended to confer. Particularly during war, these error costs might be too high to justify the canon. Several considerations suggest that this is not true, however. First, the Executive Branch appears to have the best chance of securing legislation from Congress to correct any errors by the courts. See Elhauge, *supra* note 54, at 2238 (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 348 tbl.7 (1991)). The flurry of legislation that followed the September 11, 2001, attacks provides strong evidence of the President’s power to control the legislative agenda in times of war. See Bryant & Tobias, *supra* note 16, at 386–91 (2002) (describing part of the legislative agenda in September and October of 2001, including the Senate’s suspension of its normal operating procedures in the days after September 11, 2001, in order to expedite the President’s requests); *Events of Sept. 11 Spur Revised Custody Procedures, Altered Legislative Landscape*, 78 Interpreter Releases 1493, 1493–95 (Sept. 24, 2001) (describing changes to the legislative agenda immediately following the attacks of September 11, 2001); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1276–77 (2002) (noting that after September 11, 2001, Congress functioned “with much more than all deliberate speed. In record time, it considered and enacted a broad array of laws, many of them in almost precisely the form sought by the President”). Mr. Hamdi, however, is less likely to secure corrective action by Congress. Second, decisions that must be made quickly, and that respond immediately to an armed threat or armed attack, may fall within the President’s plenary authority as Commander in Chief.

The courts do have to make a determination as to whether the President’s action violates (or potentially violates) international law. See *infra* notes 246–256 and accompanying text. The point here is that to the extent that the canon is animated by the concern that courts might interpret a statute to violate international law without the explicit authorization of Congress, it is appropriate to apply it in this context.
C. Hamdi Revisited

This Section returns to the plurality’s opinion in *Hamdi*, and considers how the *Charming Betsy* canon would have functioned based on the claim that the detention violated the Third Geneva Convention and the ICCPR. These examples illustrate that by applying the canon the plurality would have made a better use of international law—one that is more carefully linked to the intentions of Congress, serves separation-of-powers functions, and promotes some normative goals. In considering these examples, this Section also addresses two additional questions about the canon. The discussion of the Third Geneva Convention considers the extent to which courts should decide difficult questions of international law in applying the canon, and the discussion of the ICCPR considers the application of a non-self-executing human rights treaty as the basis for the canon.

1. The Third Geneva Convention

Consider first the plurality’s conclusion that the AUMF did not authorize Hamdi’s detention beyond “the cessation of active hostilities,” based in part on Article 118 of the Third Geneva Convention. The plurality reached this conclusion relying on the “law of war,” but it did so (as Justice Thomas suggested) without actually deciding whether Hamdi was entitled to the protection by this term of the Third Geneva Convention, and without citing any customary international law that would otherwise protect him. This problematic reference to international law is poorly linked to the text of the AUMF or the presumed intent of the drafters; in one sense it also shows a disregard for the binding norms of international law. Applying the *Charming Betsy* canon, by contrast, would serve both functions. The Geneva Conventions provide a particularly robust basis for the canon; they are long-standing treaties incorporated into current U.S. military practice, to which the executive has repeatedly said it will adhere.

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246 Third Geneva Convention, supra note 96, art. 118, 6 U.S.T. at 3406. The plurality also cited to the 1899 and 1907 Hague Conventions and the 1929 Geneva Convention, all three of which have been largely superseded by the Geneva Conventions of 1949. See *Hamdi*, 124 S. Ct. at 2641 (O’Connor, J., plurality opinion); supra note 96. This Section puts aside the question of whether the Third Geneva Convention applies to detainees who are nationals of the detaining power. See supra note 112.

247 See supra notes 114–121 and accompanying text.

This application of the canon raises an additional separation-of-powers consideration, however. The protection against indefinite detention in the Third Geneva Convention only applies if Hamdi qualifies as a prisoner of war, or is entitled to an Article 5 hearing (and is thus entitled to prisoner-of-war protections unless and until the hearing determines otherwise). In this situation, the Court must make some determination about the content of international law to apply the canon; to this extent, it is not just deferring to Congress for more specific direction on questions of international law.

There are three potential approaches to this problem—not employ the canon (and avoid the question), apply the canon to avoid a possible violation of international law, or decide the issue of entitlement to prisoner-of-war status. Deciding among these approaches depends upon the interpretive value of the presumption on the one hand, and the difficulty in (or costs associated with) determining whether the executive’s actions violate international law on the other. In this case, the interpretive value of the presumption is high, making the first approach unattractive (unless other interpretive tools clearly resolve the question). The second approach makes use of the canon, but avoids any decision about the content of international law, except that a violation is possible, which avoids what (in some cases) might be a difficult decision about international norms. It does so, however,


See supra notes 191–198 and accompanying text. Jus in bello norms that the United States has acknowledged are part of customary international law also serve as a strong basis for application of the canon. See, e.g., supra notes 194, 200.

Third Geneva Convention, supra note 96, art. 118, 6 U.S.T. at 3406 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”). Article 4 sets out the criteria for prisoner-of-war status, id. art. 4, 6 U.S.T. at 3320–22, and Article 5 provides that should “any doubt arise” as to whether a prisoner meets the requirements of Article 4, “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Id. art. 5, 6 U.S.T. at 3322–24. It bears repeating that Hamdi did not argue that he was entitled to prisoner-of-war status, supra note 95, and his briefs make only passing reference to the international materials cited by Justices O’Connor and Souter. See Brief for Petitioners at *16–17, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 378715. This confirms that the relationship between international law and the scope of the AUMF is uncertain, and that using the Charming Betsy canon in this context would provide some much-needed clarity.

See Bradley, supra note 21, at 531–32; Turley, supra note 21, at 238.
at the risk of denying the President some power that he might enjoy if the court fully analyzed the international norm in question. Here, however, the issue the court must decide is simply the entitlement to an Article 5 hearing—which still leaves the ultimate decision as to entitlement to prisoner-of-war status up to those conducting the hearing (generally military personnel),\textsuperscript{252} not the court. In this case, the third approach is probably best.

Nevertheless, the best default rule is probably to construe general authorizations for the use of force to avoid a potential conflict with the Third Geneva Convention. This approach is most consistent with the historical use of the canon, which has not traditionally involved answering difficult questions of international law.\textsuperscript{253} The risk of under-enforcement is mitigated by the factors considered above,\textsuperscript{254} as well as the (admittedly limited) deference afforded to the executive as to the content of international law.\textsuperscript{255} The risk is also limited by the Supreme Court’s obligation to scrutinize international law carefully enough to conclude that there is real risk of a violation and by the relatively well-defined set of norms embraced by international humanitarian law.\textsuperscript{256}


\textsuperscript{253} See, e.g., Romero v. Int’l Terminal Operating Co., 358 U.S. 354, 382–83 (1959) (applying the canon based in part on the “relevant interests of foreign nations” and the “legitimate concern of the international community”); Charming Betsy, 6 U.S. (2 Cranch) at 118 (interpreting statute to avoid conflict with international law, but not clearly identifying the legal obligation in question); Spector, 356 F.3d at 646–47 (applying canon to avoid “stark likelihood” of violating international law); see also Swaine, supra note 58, at 715–17 (defending what he calls “compound avoidance-avoiding”); cf. Aramco, 499 U.S. at 255 (employing the presumption against extraterritoriality to avoid “difficult issues of international law”).

\textsuperscript{254} See supra note 233–244 and accompanying text. For example, the canon only applies when the scope of authorization is unclear, Congress can override the courts’ interpretation, and the President has good access to the legislative agenda, especially during times of national security crises. Supra note 244. Also, the canon is used in this context to avoid potential conflicts with international law, not to make binding interpretive decisions that violate international law. Cf. Bradley, supra note 21, at 531–32 (observing that the canon invokes international law primarily to avoid conflicts, not to give “independent, affirmative effect” to international law).

\textsuperscript{255} See infra note 270–275 and accompanying text (discussing deference to the Executive Branch regarding the content of international law).

\textsuperscript{256} See supra notes 147, 177.
2. International Covenant on Civil and Political Rights


Because the ICCPR is not self-executing, courts cannot directly enforce it absent implementing legislation.\footnote{See Restatement (Third) of the Foreign Relations Law of the United States § 111(3) (1987).} The ICCPR could nonetheless serve as an interpretive norm (because it is not being used as a directly enforceable right), but if the non-self-executing declaration also reflects a preference against the domestic courts interpreting the ICCPR in any context at all,\footnote{Cf. Sosa, 124 S. Ct. at 2763 (“Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”); supra note 172.} this would suggest at least that it does not make a good basis for the Charming Betsy canon.

There are several reasons, however, to reject this view. First, it would have the effect of elevating customary international law and
sole executive agreements over non-self-executing treaties as an interpretive norm,\textsuperscript{261} despite the formal participation of the President and Senate in negotiating and ratifying all treaties. Second, the courts have not suggested that the canon turns on this distinction. Third, the Supreme Court has repeatedly interpreted treaties without deciding whether or not they are self-executing.\textsuperscript{262} Finally, because courts have failed to clarify fully how to distinguish between self-executing and non-self-executing treaties,\textsuperscript{263} this distinction would undermine the clarity of the canon and provide less guidance for Congress about how its authorizations for the use of force will be interpreted.

The ICCPR also lies outside the law of war, providing the other potential objection for using it in this context. In contrast to the Geneva Conventions, for example, the ICCPR is not incorporated into U.S. military practice, the Executive Branch has not publicly committed itself to adhering specifically to the ICCPR during armed conflict, and in general international human rights norms may be less well-defined than international humanitarian law.\textsuperscript{264} Nonetheless, the ICCPR is a treaty and thus received the approval of a supermajority of the Senate, and the ICCPR itself has a derogation procedure for times of “public emergency” that threaten national security,\textsuperscript{265} meaning that the text of the ICCPR explicitly contemplates application of the treaty in such situations. Indeed, the ICCPR permits derogation from the provision that Hamdi’s detention is said to violate—the prohibition against arbitrary detention.\textsuperscript{266} That the treaty makers explicitly determined how it would apply in times of national security crises (and a

\textsuperscript{261} See \textit{Hoffman-La Roche}, 124 S. Ct. at 2366 (interpreting a statute to “avoid unreasonable interference with the sovereign authority of other nations” because “[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow” (citing the \textit{Charming Betsy} canon)); \textit{Rossi}, 456 U.S. at 32 (applying the canon based on an executive agreement, not a treaty).

\textsuperscript{262} See Carlos M. Vazquez, \textit{The Four Doctrines of Self-Executing Treaties}, 89 Am. J. Int’l L. 695, 716 (1995) (“In countless cases, the vast majority of those raising treaty-based claims, the Court has resolved the case without even mentioning the self-execution issue.”).

\textsuperscript{263} Id. at 716 n.99 (discussing the doctrine’s “problematic status” and the Court’s failure to “address . . . the doctrine in many years despite the glaring need for clarification”).

\textsuperscript{264} See Jinks, \textit{supra} note 97, at 374–75 n.30.

\textsuperscript{265} ICCPR, \textit{supra} note 257, art. 4(1), 999 U.N.T.S. at 174 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation . . . .”).

\textsuperscript{266} Id. art. 4(2) (“No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”). The prohibition against arbitrary detention is found in Article 9. \textit{Id.} art. 9(1), 999 U.N.T.S. at 175.
supermajority of the Senate agreed) suggests that all other things being equal, the AUMF should be construed to avoid violations of the ICCPR, even during national emergencies.

Some cases may present difficult interpretive questions—for example, the precondition for derogation (a “public emergency which threatens the life of the nation and the existence of which is officially proclaimed”) is not well suited to judicial determination. In other words, the interpretive value of the ICCPR is lower to begin with, and here the costs of deciding whether there is a potential violation of international law are high. In the Hamdi case itself, however, there is no need to determine whether the preconditions for derogation are met, because the President has not taken the necessary steps to derogate from the terms of the treaty. Moreover, the substantive term prohibiting arbitrary detention is one that the U.S. courts and international tribunals have considered in a number of cases. On balance, in this situation, the courts should construe the AUMF to avoid a potential conflict with the ICCPR’s ban on arbitrary detention.

All in all, this discussion suggests that in the context of international human rights law the canon may be easier to overcome, and that the following factors are relevant in determining whether it

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267 Id. art. 4(1), 999 U.N.T.S. at 174.

268 The Covenant requires the following:

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

ICCPR, supra note 257, art. 4(3), 999 U.N.T.S. at 174. Although the United States has not taken this step, the United Kingdom has. Citing the September 11 attacks and the U.N. Security Council Resolutions condemning them as threats to international peace and security, the United Kingdom submitted an extensive letter to the Secretary General detailing the security threat to the United Kingdom and describing the precise government actions that might derogate from Article 9 of the ICCPR, and their temporal limitations. See Derogation Notification, Dec. 18, 2001, http://www.unhchr.ch/html/menu3/b/treaty5.asp.htm (last visited Mar. 15, 2005).

269 See, e.g., Kim Ho Ma, 257 F.3d at 1114 (applying the Charming Betsy canon to avoid a conflict with the ICCPR’s prohibition on arbitrary detention); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383–84 (9th Cir. 1998) (concluding that plaintiff’s detention did not violate ICCPR’s ban on arbitrary detention); cf. Sosa, 124 S. Ct. at 2767–69 (holding that the ICCPR did not create a private right of action because it is not self-executing and further holding that customary international law based on the ICCPR did not create a right of action for short-term detentions); Vuollane v. Finland, U.N. Human Rts. Comm’n, 35th Sess., Communication No. 265/1987, U.N. Doc. ICCPR/C/35/D/265/1987 (1989) (finding Finland had violated ICCPR’s ban on arbitrary detention).
should apply: the participation of the political branches in the development of the norm in question (and their continued commitment to that norm), the extent to which it was intended to apply during times of armed conflict, and the specificity of the norm in question. If these considerations show that the action under consideration may violate well-defined requirements of international law to which the political branches have assented, and from which derogation is not permitted, courts should hesitate to read a general authorization for the use of force as embracing it.

Finally, this discussion raises an analytically distinct but important question as to the proper deference to afford the Executive Branch in determining the content of international law. This issue has been discussed in some detail elsewhere, but several considerations bear mention here. First, the inevitable functional arguments about the President’s unique ability to understand international problems associated with foreign affairs and national defense must be considered in conjunction with the text of the Constitution, which explicitly lodges with Congress many powers directly related to both international law and the conduct of war. Article III of the Constitution also explicitly extends the judicial power of the United States to cases that arise under treaties; federal courts thus would seem to be fully empowered to interpret them. Second, it bears repeating that if the President is exercising his own authority as Commander in Chief (or some other power granted by the Constitution), then the canon is not in play at all. Third, affording the President very limited deference as to the content of international law is supported by the reasoning of six Justices in the Hamdi case, two of whom made clear and four of whom suggested that the President is due no particular deference even regarding the content of international law, at least when it is used to construe the scope of congressional authorization for the use of force.


271 Yoo, supra note 233, at 864.

272 See supra notes 233–242 and accompanying text.


274 Thomas H. Lee, The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States, 104 COLUM. L. REV. 1765, 1846 (2004) (noting that “treaty interpretation” as the “domestic law of the United States” is a “quintessentially judicial function”).

275 See Hamdi, 124 S. Ct. at 2650 (O’Connor, J., plurality opinion); id. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
Conclusion

Congressional authorization for the President’s actions plays a crucial role in the courts’ construction of the President’s war and foreign affairs powers. When Congress authorizes the use of force generally—either by resolution or by declaring war—international law can serve as an important tool in determining the scope of that authorization. Both human rights activists and government lawyers have employed international law in this way, the former arguing that authorizations are limited by international law and the government arguing that the President’s actions are authorized if they are consistent with international law.

In *Hamdi*, the U.S. Supreme Court had the opportunity to clarify the appropriate use of international law in this context, but it failed to do so. It used international law to construe the scope of congressional authorization, but without careful consideration of the source, content, or interpretive function of the legal norms upon which it relied. As a result, it is difficult to understand exactly how those sources are linked to the interpretation of Congress’s authorization, and it is difficult to predict how the Court will use international law in future cases. This only contributes to the general confusion regarding the use of international law to interpret the Constitution and acts of Congress.

There are, however, better ways of approaching international law, and this Article has supplied one example. By presuming that general authorizations for the use of force do not include actions that violate international law, courts could better link their use of international law to the intentions of Congress and serve separation of powers in several different ways. Such an approach would likely also advance many of the normative goals sometimes associated with domestic application of international law, including the development of a robust system of transnational norms and the enhancement of the role of the United States in their development.
(UN)LAWFULLY BEAUTIFUL: THE LEGAL (DE)CONSTRUCTION OF FEMALE BEAUTY

Abstract: Beautiful women are more revered, more desirable, and often times more employable than average-looking women. Despite an ever-increasing awareness of women’s issues today, little progress has been made to reverse the objectification of women’s bodies. This Note asserts that various courts are helping deconstruct the idea that beautiful women should receive preferential treatment in the workplace, simply because they are beautiful. This Note contends that the law progressively is challenging social assumptions that favor traditionally beautiful women by telling employers that they can no longer demand a certain level of female attractiveness in certain contexts. By deemphasizing the general importance of the female body, the law implicitly is doing women of all shapes and sizes, races and skin tones, a favor immeasurable by any scale.

Introduction

The 2003 California Court of Appeal case, Yanowitz v. L’Oreal USA, Inc., invigorated the debate about the importance of beauty and the pervasiveness of appearance and sex discrimination in the workplace.¹ Although this decision addressed a claim of unlawful retaliation under California’s Fair Employment and Housing Act (“FEHA”), the first prong of the court’s analysis invoked protections against sex discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”).² The controversial conclusion made by this court was that an

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¹ See 131 Cal. Rptr. 2d 575, 582 (Ct. App. 2003). Compare, e.g., Elizabeth M. Adamitis, Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment, 75 Wash. L. Rev. 195, 219, 223 (2000) (arguing for statutory protection of physical appearance because of the harmful, unfair, discriminatory effects in which appearance bias results), with, e.g., James J. McDonald, Jr., Civil Rights for the Aesthetically-Challenged, 29 Employee Rel. L.J. 118, 127–28 (2003) (arguing that legally protecting personal appearance is an unacceptable extension of civil rights law that may encourage employers to favor unattractive applicants to avoid “lookism lawsuits”).

² See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); Cal. Gov’t Code § 12940(h) (West 1992) (making it unlawful for an employer to terminate an employee who has opposed practices prohibited by California’s Fair Employment and Housing Act (“FEHA”) or filed a complaint, testified, or assisted a person in any proceeding under FEHA); Yanowitz, 131 Cal. Rptr. 2d at 585–90, 587 n.5. In Yanowitz, the plaintiff asserted an unlawful retaliation claim in violation of FEHA because she herself was terminated for not firing an unattractive employee, which the court deemed to be a protected activity. 131 Cal. Rptr. 2d at 585–90. The pivotal question was whether the plaintiff engaged in a pro-
employer’s order to fire a female cosmetic associate for “not being hot enough” was an act of sex discrimination—a conclusion that evidences the law’s growing willingness to protect women who may not meet society’s rigorous standards of physical attractiveness.3

By holding that a male executive may not insist on the termination of a female associate who was not sexually appealing to him, this decision raises critical questions for many employers who prefer to hire aesthetically pleasing employees.4 For example, how far can employers go when using physical attractiveness as an employment requirement, and can employers require their female employees to be “hot” or “sexy”? Legal commentary has argued both for and against this proposition.6 Recently, scholars even have suggested that local legislation prohibiting appearance discrimination is a possible means of addressing the problems arising from our “lookist” culture.7 Such growing attention to issues of “lookism” in the law indicates that this topic is noteworthy, although it is not new.8

When courts addressed the airline industry’s systemic patterns of only hiring attractive, thin flight attendants in the late 1970s and early 1980s, attention surrounding the issue of appearance discrimination became amplified.9 Similarly, this debate generated scrutiny of the news reporting and hotel industries for requiring their female employees to meet certain criteria of beauty and femininity.10 As the service industries expanded during the 1980s, however, and a culture of
consumerism began to define American life, a social obsession with looking at and commercializing the female body exploded. The use of the female body as a consumer artifact became popular, and the technology of modern image production continually recreated the image of the perfect body, providing evidence of a consumer society built on visual stimulation and male economic agency. Attention, therefore, increasingly turned to the regulation of female appearance in the workforce because the growing consumer society demanded the specularization of women. The litigation surrounding such beauty requirements adopted by certain industries helped formulate a legal response to appearance discrimination, a response that has underlying meaning for many women whose looks concern them.

The Yanowitz case highlights modern day pressures women feel to be beautiful. This Note focuses on the contention that the law need not be criticized so severely for perpetuating harmful notions of female beauty. Rather, the evolution of appearance law exemplified by Yanowitz evidences glimmers of hope for dealing with such harmful social stereotypes. Although Glamour and Maxim magazines may not be following suit in proffering divergent forms of female beauty, a judicial and statutory trend is emerging that potentially could help women redefine what is an acceptable and attractive form of personal appearance.

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11 See Alan Hyde, Bodies of Law 111–12 (1997).
12 Id. at 116.
13 See, e.g., Craft, 766 F.2d at 1209; Hyde, supra note 11, at 115–17.
14 See infra notes 58–216 and accompanying text.
15 See 131 Cal. Rptr. 2d at 586.
16 See infra notes 58–310 and accompanying text.
17 See 131 Cal. Rptr. 2d at 588; Debra L. Gimlin, Body Work: Beauty and Self-Image in American Culture 8–9 (2002) (arguing that as women engage in exhaustive body work trying to attain the perfect female body, they have the ability to transform cultural meanings about ideologies of beauty); Naomi Wolf, The Beauty Myth: How Images of Beauty Are Used Against Women 9–11 (1991) (arguing that as women become more powerful, influential, and capable of transforming society, ideals of female beauty become more rigid and unattainable, resulting in a form of female disempowerment that has women starving themselves to death and consuming their lives with self-loathing as opposed to self-production); Reena N. Glazer, Women’s Body Image and the Law, 43 Duke L.J. 113, 115–17 (1993) (arguing that laws criminalizing the exposure of women’s breasts reinforce the ideas that the female body must be hidden in shame, and that women’s desires about how to present their bodies need strict male regulation).
18 See 131 Cal. Rptr. 2d at 588; see also Steven Greenhouse, Going for the Look, but Risking Discrimination, N.Y. Times, July 13, 2003, at A12 (accusing the popular clothing store Abercrombie & Fitch of actively seeking out and giving hiring preferences to sleek, sexy, white, attractive sales associates); Erin Schneweis, Top-Selling Female Magazines Exploit Female Body, Not Unlike Maxim Magazine, Kansas State Collegian (Apr. 7, 2000), at http://www.kstatecolle-
This Note explores a modern legal trend to protect varying forms of “femininity” or female beauty under Title VII and the Americans with Disabilities Act (the “ADA”). The end result of this trend is a noteworthy break from social constructions that narrowly define female beauty, helping to foster social acceptance of more diversified forms of female appearances. Instead of focusing on how the law perpetuates negative female body images, this Note exposes the positive results for women flowing from appearance-based litigation.

Part I of this Note reviews the role of beauty in society, examining how many women continuously struggle to attain an ideal form of beauty. This Part lays out a foundation for why and how women feel the way they do about their bodies, highlighting the problems many women face because of the social pressures to be beautiful. Part II focuses on how the law historically has approached issues related to the physical appearance of women in the workforce, providing a discussion of appearance discrimination under (1) the liberty protections of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, (2) Title VII, and (3) the ADA. Because these areas of the law implicitly address the issue of women’s body image, they provide a background as to how the law relates to the subject. Part III provides a two-fold analysis of the case law. It analyzes how the law both reflects and influences popular images of female beauty. In addition, it argues that the law is moving in a positive direction when it comes to defining diverse forms of female beauty, implicitly sending the important message to women that their bodies need not conform to the traditional ideal form. This Note contends that such a trend is...
good for women because it helps deconstruct the social value placed on their bodies.\textsuperscript{29}

I. THE ROLE OF BEAUTY IN SOCIETY

Across the United States, many young girls and grown women alike wake up each morning, look in the mirror, and ask the fateful question, “Am I thin enough yet?”\textsuperscript{30} The statistics are striking: seventy-five percent of all women feel that they are fat, eighty-one percent of ten-year-olds are afraid of being fat, and two out of five women would trade three to five years of life to achieve their ideal body weight.\textsuperscript{31} Such negative body image perceptions do not result just from a woman’s natural, innate tendencies, but rather spring from a variety of sources.\textsuperscript{32} Historically, social convention, capitalism, and male desire have all operated conjunctively to impact how women feel about and act towards their bodies.\textsuperscript{33} Together, these influences create an image of the beautiful body that is, for many women, a physical impossibility.\textsuperscript{34}

The ideal female form is a thinly structured, large-breasted body.\textsuperscript{35} Scholars like Naomi Wolf argue that society alienates women from their bodies and their sexuality.\textsuperscript{36} Furthermore, psychologists contend that a woman has a strong need to pursue and preserve her beauty because a woman’s body image is at the core of who she is.\textsuperscript{37} As current social commentary reflects, many American women consequently respond to these social pressures by engaging in a form of war with their bodies.\textsuperscript{38} As a result, they often develop unhealthy eating disorders, and possess low self-esteem.\textsuperscript{39} Such physical and mental deficiencies overly influence the excessive amounts of time and

\textsuperscript{29} See Yanowitz, 131 Cal. Rptr. 2d at 588; cf. Gimlin, supra note 17, at 9 (noting that “group forces,” such as commercial interest and professional preferences, influence women’s body image); infra notes 217–310 and accompanying text.


\textsuperscript{32} See HESSE-BIBER, supra note 30, at 30.

\textsuperscript{33} See id. at 31–32.

\textsuperscript{34} See id. at 50.

\textsuperscript{35} See id. at 28–29 (arguing that the Barbie doll provides young girls with a false conception of what a beautiful female body looks like).


\textsuperscript{38} See Smith, supra note 36, at 56–57.

\textsuperscript{39} Id.
money they spend on attempts to achieve the ideal form of female beauty. Sociologists argue that this is time and money that could be spent doing more economically, professionally, and socially productive activities. To understand how the law intersects with these societal pressures and women’s resulting body image, one first needs to understand the origins of the idea and obsession with beauty.

Historically, beauty is a virtue that reflects notions of goodness, purity, and honesty. Society considers a beautiful person more desirable on various levels—for example, in cultural, sexual, and professional arenas—and this bias influences women more than men. Because of its physical basis in the human body, corporeal beauty often overpowers other personal characteristics in any interaction of first impression. Researchers claim that a physically attractive appearance is the most powerful trait a person can possess, opening doors to interpersonal relationships and even jobs that others may not have. Similarly, researchers even suggest that a person’s degree of physical attractiveness may explain more accurately instances of disparate treatment in society than other characteristics like race or sex. In short, a person’s physical appearance quite possibly is his or her most influential characteristic.

This striking importance of beauty in society is one reason why self-esteem correlates to how physically attractive a woman feels. Naomi Wolf argues that images of the “impossibly beautiful” barrage young women today, more so than they did in the past. Because of

40 See Hesse-Biber, supra note 30, at 38–39.
41 See id. at 26.
43 Id. at 230–33.
44 See id. at 226.
46 See id. at 207–11.
47 See id. at 218 (arguing that attention to race and sex considerations in American criminal law is widespread, whereas physical appearance discrimination is largely ignored).
48 See id. at 194–97.
49 See Gimlin, supra note 17, at 8–9 (emphasizing the complexities of American women who continually must negotiate their identities through constructions of beauty).
50 See Wolf, supra note 17, at 16–17; Greene, supra note 37, at 56–57 (highlighting in a review of Naomi Wolf’s book The Beauty Myth that the beauty myth acts as a form of social coercion upon women who have found themselves liberated by feminism because the myth propels the idea that a woman is her body and her body is not good enough, and makes women anxious, insecure, and vulnerable by barraging them with images of physical perfection).
these highly sexualized, physically stunning images, women often find themselves trying to achieve higher and higher levels of physical beauty. As a result, beauty may be oppressive to women because its endless pursuit forces women to engage in self-destructive bodily harm, such as excessive dieting, exercising, bingeing, or purging. Furthermore, women who rely so strongly on personal beauty as a means of manipulating power from men also find themselves in destructive and oppressive positions. In a power-driven social system such as ours, women often use their beauty to get what they want from men, yet they may still find themselves being controlled by male notions of the beautiful female body.

In sum, being and becoming beautiful is a common preoccupation of many women today, who often take extreme measures to attain such a preferred status. As Part II discusses, when these women enter the workforce, they not only take these preoccupations with them, but also find their employers to be preoccupied with the same notions of physical appearance and beauty. Policies and procedures that reflect such beauty stereotypes implicitly create appearance discrimination in the workplace.

II. Personal Appearance Discrimination in the Workplace

Many employers reinforce stereotypical norms of beauty in their hiring practices, using a person’s level of attractiveness as an important employment criterion. One survey of employers even found physical appearance to be the single most important factor in the hiring-decision process. Unsurprising to even a casual observer, employers are likely to want their employees to conform to the culture of the organization, which often requires meeting certain standards of dress or appearance. Some economists argue that an attractive work-

51 See Hesse-Biber, supra note 30, at 11.
52 See id. at 14.
53 See Gehrke, supra note 42, at 243.
54 Id. at 246–47.
55 See id. at 237–38.
56 See, e.g., Yanowitz v. L’Oreal USA, Inc., 131 Cal. Rptr. 2d 575, 586 (Ct. App. 2003); infra notes 58–216 and accompanying text.
57 See Yanowitz, 131 Cal. Rptr. 2d at 586; infra notes 220–310 and accompanying text.
58 See Yanowitz, 131 Cal. Rptr. 2d at 586; Vo, supra note 7, at 342.
59 Vo, supra note 7, at 342.
60 See id. at 342–43; Davis Bushnell, Personal Image as Business Strategy, BOSTON GLOBE, Mar. 21, 2004, at G1 (showing that appearance is emerging as an important issue in the workplace, that employees with a sharp appearance can stand out with employers and hir-
force equals a more productive workforce, and therefore taking appearance into consideration is a wholly justifiable hiring practice.\(^{61}\) Similarly, if a customer values an employee’s appearance, then an employer argues that it serves as a legitimate ground for job qualification.\(^{62}\) Such employers assert that an attractive, female workforce positively impacts profitability.\(^{63}\) Given this socioeconomic importance of physical beauty, the following discussion addresses the legal contexts through which courts have addressed workplace appearance.\(^{64}\)

Part II.A explores appearance discrimination under the liberty Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.\(^{65}\) In such cases, plaintiffs claim that personal liberty is infringed upon by appearance-related regulations.\(^{66}\) Next, Part II.B discusses appearance discrimination under Title VII’s protection against sex discrimination.\(^{67}\) The related case law focuses on instances when private employers seek to impose both grooming regulations and standards of attractiveness on employees.\(^{68}\) Part II.C examines legal protection for appearance discrimination under federal disability laws, most notably the ADA.\(^{69}\) The discussion focuses on instances of obesity discrimination as related to female appearance issues.\(^{70}\) Lastly, Part II.D briefly discusses certain state and local statutes that address appearance discrimination more specifically than other areas of the law.\(^{71}\)


\(^{62}\) See Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303 (N.D. Tex. 1981). Defendant airline argued that physical appearance was an essential characteristic in hiring flight attendants because its marketing campaign had been based on female sex appeal. *Id.*

\(^{63}\) See *id.* at 303–04.

\(^{64}\) See *infra* notes 72–216 and accompanying text.

\(^{65}\) See U.S. Const. amend. XIV, § 1; *infra* notes 72–103 and accompanying text.

\(^{66}\) See *infra* notes 72–103 and accompanying text.


\(^{68}\) See *infra* notes 104–166 and accompanying text.

\(^{69}\) See Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213; *infra* notes 167–202 and accompanying text.

\(^{70}\) See *infra* notes 167–202 and accompanying text.

\(^{71}\) See *infra* notes 203–216 and accompanying text.
A. Legal Protection Under the Due Process Clause of the Fourteenth Amendment

Employers often attempt to regulate what employees wear and how they may appear in the workplace.72 Such policies often include the regulation of hair length, dress code requirements, and mandatory makeup application.73 When employees challenge such practices, a popular, but frequently unsuccessful, avenue for challenging such policies is under the constitutional guarantee of liberty contained in the Due Process Clause of the U.S. Constitution.74

The U.S. Supreme Court has offered minimal protection against governmental interference in personal appearance choices under the Fourteenth Amendment.75 The Due Process Clause of the Fourteenth Amendment requires that no person shall be deprived of life, liberty, or property without due process of law.76 This substantive Due Process Clause provides that in some cases, excessive governmental regulation of appearance may be an impermissible intrusion upon liberty.77 Nevertheless, the liberty interest receives little favorable consideration from courts because such an interest must be balanced against the public employer’s interest.78 In most instances, the public employer’s interest prevails, which allows managerial decisions to control the acceptability of physical appearances.79

For instance, in 1976, in Kelley v. Johnson, the U.S. Supreme Court upheld hair grooming standards for police officers against the plaintiff’s claim that the regulation unconstitutionally intruded upon his liberty by unduly restricting his activities.80 The officer in Kelley chal-

72 See, e.g., Carroll v. Talman Fed. Sav. & Loan Ass’n, 604 F.2d 1028, 1029 (7th Cir. 1979) (holding that an employer’s dress policy requiring women to wear uniforms and men to wear business casual clothes qualifies as sex discrimination).
73 See, e.g., Kelley v. Johnson, 425 U.S. 238, 239–40 (1976) (pertaining to hair length and hair style regulations for police officers); Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1554 (11th Cir. 1987) (pertaining to make-up requirements for women); Carroll, 604 F.2d at 1029 (requiring women to wear work uniforms).
74 U.S. CONST. amend. XIV, § 1 (stating that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law”).
76 U.S. CONST. amend. XIV, § 1.
77 See, e.g., Kelley, 425 U.S. at 249 (Powell, J., concurring).
78 See id. at 246–47; Klare, supra note 75, at 1402.
79 Klare, supra note 75, at 1402.
80 425 U.S. at 248 (noting that police department regulations prohibited beards and goatees and required hair to conform to a certain length).
lenged the police department’s regulation of facial hair.\textsuperscript{81} The Court held that forced similarity in police officer appearance was rationally related to public safety because the grooming standards would make the officers uniformly recognizable to the public and would increase the force’s esprit de corps.\textsuperscript{82} The Court determined that both of these ends were ample justification for the regulation.\textsuperscript{83}

The Court opined that the defendant county should be afforded deference in organizing its police force.\textsuperscript{84} More specifically, in carrying out its law enforcement and public safety duties, the defendant county could adopt employment policies it deemed most efficient.\textsuperscript{85} The hair-length regulation was not considered in isolation, but rather in the context of how the defendant county chose to organize itself structurally.\textsuperscript{86} Given that the primary responsibility of police officers is the safety of people and property and that all police forces set rules regarding organized dress, the Court did not find a regulation to groom oneself in a particular manner to be an arbitrary deprivation of liberty.\textsuperscript{87}

Also in 1976, in \textit{Tardiff v. Quinn}, the First Circuit Court of Appeals addressed a liberty claim relating to the socio-legal expectation of female physical appearance, upholding a governmental actor’s regulation of female clothing.\textsuperscript{88} In \textit{Tardiff}, a public high school official fired a teacher because he disapproved of her short skirt.\textsuperscript{89} The plaintiff teacher argued that the termination for wearing a short skirt violated her liberty interest.\textsuperscript{90} The trial court found that the teacher’s outfit was within reasonable limits, was not lewd, and was similar to outfits worn by other professional women.\textsuperscript{91} The court further found that her clothing did not have an adverse or startling effect on her students or her ability to teach effectively.\textsuperscript{92} Despite its findings, the trial court failed to reach the question of whether the teacher’s termination violated her Fourteenth Amendment right to liberty.\textsuperscript{93} The First Circuit Court of Appeals sustained

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} at 239–40.
\item \textsuperscript{82} See \textit{id.} at 248.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 246.
\item \textsuperscript{85} See \textit{Kelley}, 425 U.S. at 246.
\item \textsuperscript{86} \textit{Id.} at 247.
\item \textsuperscript{87} \textit{Id.} at 248.
\item \textsuperscript{88} 545 F.2d 761, 764 (1st Cir. 1976).
\item \textsuperscript{89} \textit{Id.} at 762.
\item \textsuperscript{90} \textit{Id.} at 763.
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Tardiff}, 545 F.2d at 763.
\end{itemize}
the plaintiff’s termination, finding that the government’s interest in approving a public school teacher’s image and in assuring productivity through proper dress sufficiently outweighed the plaintiff’s interest in being free to choose her clothing.94 Furthermore, the First Circuit determined that the plaintiff’s clothes could have negatively impacted her ability to teach.95 Here, the government’s managerial discretion and public policies prevailed over the plaintiff’s personal liberty to define her style and appearance.96 The First Circuit did not consider the invasion of the plaintiff’s freedom of choice in personal appearance to be so irrational or motivated by bad faith as to constitute a violation of Fourteenth Amendment liberty guarantees.97

Both Kelley and Tardiff present unsuccessful attempts to apply substantive due process liberty protections to appearance-based litigation.98 Decided in the mid-1970s, these two cases rejected the plaintiffs’ claims that government-propounded appearance regulations compromised their liberty interests.99 In effect, this liberty theory offered little protection to government workers harmed by alleged appearance discrimination.100 The liberty argument, however, can be used only in cases involving an employer that is a state actor.101 As a result, plaintiffs seeking to address appearance discrimination against private employers had to develop a more applicable and effective legal argument.102 The next Section discusses this evolution by examining the application of Title VII sex-discrimination protection to cases involving appearance issues.103

94 Id. at 764.
95 See id. at 763.
96 See id.
97 See id.
98 See Kelley, 425 U.S. at 248; Tardiff, 545 F.2d at 764.
99 See Kelley, 425 U.S. at 248; Tardiff, 545 F.2d at 764.
100 See Kelley, 425 U.S. at 248; Tardiff, 545 F.2d at 764.
101 See Kelley, 425 U.S. at 248; Tardiff, 545 F.2d at 764.
102 See Kelley, 425 U.S. at 248; Tardiff, 545 F.2d at 764.
103 See Kelley, 425 U.S. at 248; Tardiff, 545 F.2d at 764; supra notes 104–166 and accompanying text.
B. Legal Protection Under Title VII of the 1964 Civil Rights Act: Sex Discrimination

When a party raises a claim of appearance discrimination, the individual may be afforded protection under Title VII. This statute makes it unlawful to discriminate based on sex or gender in employment. Generally, when an appearance issue is litigated under Title VII, it arises for one of two reasons: (1) a plaintiff is challenging an employer’s rule that unfairly regulates appearance, such as mandatory uniforms or makeup application for women, or (2) an employer has required an attractive or beautiful appearance as a condition of employment.

1. Employer Grooming Regulations

In cases where employers regulate employee grooming, courts may afford substantial deference to managerial discretion in framing workplace dress codes. Nevertheless, because one goal of the Civil Rights Act of 1964 was to address gender discrimination and even to help break down some of the negative stereotypes affecting women, employers cannot impose unequal grooming standards for men and women. Such behavior constitutes sex discrimination.

For example, in 1979, in Carroll v. Talman Federal Savings & Loan Ass’n, the Seventh Circuit Court of Appeals held that an employer’s policy requiring women to wear a uniform, but allowing men to wear customary business attire, constituted sex discrimination. The court reasoned that this dress policy resulted in disparate treatment because no business necessity existed for subjecting employees who all perform the same functions to different dress codes based on sex. Further, the court determined that such a policy reinforced notions of women having a less professional status than men because society

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104 See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (finding a Title VII sex discrimination violation because being female is not a bona fide occupational qualification for the job of flight attendant).


106 Carroll, 604 F.2d at 1029; Yanowitz, 131 Cal. Rptr. 2d at 586.

107 See infra notes 108–117 and accompanying text; see also Klare, supra note 75, at 1432–33 (arguing that such discretion generally reinforces sexist social norms of how women should dress and look).

108 See Carroll, 604 F.2d at 1032–33; Klare, supra note 75, at 1416.

109 See, e.g., Carroll, 604 F.2d at 1032–33.

110 Id.

111 Id. at 1032.
generally views uniformed workers as less professional.\textsuperscript{112} Implicitly, it reasoned that both men and women should be able to make appearance decisions for themselves in this particular work environment.\textsuperscript{113} The court refused to endorse a code that exhibited the gender stereotype that women cannot exercise sound judgment in choosing business attire and need a uniform to aid them.\textsuperscript{114}

Title VII also may be used to address the gender stereotype that women are sexual beings who can be exploited for the pleasure of men.\textsuperscript{115} For instance, requiring women to wear sexually provocative clothing easily may subject them to verbal or sexual harassment, yet it remains a common practice in many bars and restaurants.\textsuperscript{116} Requiring women to look or dress a certain way may or may not be an acceptable employment policy, depending on how justified the policy is for the advancement of business.\textsuperscript{117}

For instance, in 1981, in \textit{EEOC v. Sage Realty Corp.}, the United States District Court for the Southern District of New York found that a policy requiring women to wear a revealing uniform was unlawful because of its sexually exploitive nature.\textsuperscript{118} In that case, the plaintiff was a lobby attendant who had to wear a uniform that she found too short and too revealing of her thighs and buttocks.\textsuperscript{119} The court found that, but for her gender, the plaintiff would not be required to wear a uniform that subjected her to sexual harassment.\textsuperscript{120} Because the defendant did not offer any legitimate, nondiscriminatory explanations for the uniform, the court would not accept the uniform policy as reasonable.\textsuperscript{121} Recognizing the correlation between skimpy uniforms and sexual harassment, the court refused to allow employers to encourage such abuse.\textsuperscript{122}

Both \textit{Carroll} and \textit{Sage} apply Title VII sex discrimination protection to cases involving appearance regulations.\textsuperscript{123} Decided in the late 1970s and early 1980s, these cases limited an employer’s ability to

\textsuperscript{112} \textit{Id.} at 1033.
\textsuperscript{113} See \textit{id}.
\textsuperscript{114} See \textit{Carroll}, 604 F.2d at 1032–33.
\textsuperscript{117} See \textit{id.} at 611.
\textsuperscript{118} \textit{Id}.
\textsuperscript{119} \textit{Id.} at 604.
\textsuperscript{120} \textit{Id.} at 607.
\textsuperscript{121} \textit{Sage}, 507 F. Supp. at 608–09.
\textsuperscript{122} See \textit{id.} at 611.
\textsuperscript{123} See \textit{Carroll}, 604 F.2d at 1033; \textit{Sage}, 507 F. Supp. at 611.
mandate certain codes of dress, most notably for women. They preceded opinions in the mid-1980s, which addressed an employer’s ability to mandate specific levels of attractiveness—again, most notably for women. The following discussion examines this precise context.

2. Employer Standards of Attractiveness

Discrimination claims based on an employer’s desire for an “attractive” or “sexy” employee also may be litigated under Title VII. This preference creates an implicit “attractiveness” requirement for many jobs. Employers generally prefer beautiful women to unattractive women, a common preference that can be applied to society at large. Scholars agree that attractive people have an automatic advantage in the workplace in finding employment and advancing their careers. Furthermore, a court is likely to validate the claim that employers may engage in appearance discrimination when an employee’s appearance serves as a bona fide occupational qualification that is reasonably necessary for the normal operations of a business.

The litigation involving the airline industry’s attempts to impose strict beauty requirements on female flight attendants exemplifies the limits of claiming such an occupational qualification. For example, in 1981, in Wilson v. Southwest Airlines Co., the United States District Court for the Northern District of Texas held that female sex appeal was not a necessary qualification for performing the primary business duties of an airline attendant. The defendant airline employed a marketing strategy of femininity, love, and sex appeal to attract male clientele. To promote its image of “spreading love all over Texas,”

124 See Carroll, 604 F.2d at 1033; Sage, 507 F. Supp. at 611.
125 See Carroll, 604 F.2d at 1033; Sage, 507 F. Supp. at 611; see infra notes 127–166 and accompanying text.
126 See infra notes 127–166 and accompanying text.
127 See, e.g., Wilson, 517 F. Supp. at 296–97.
128 See id. at 296.
129 Klare, supra note 75, at 1421; see also Note, Facial Discrimination: Extending Handicap Law to Discrimination on the Basis of Physical Appearance, 100 Harv. L. Rev. 2035, 2040 (1987) (noting that people in American society have a visceral dislike for all things and people unattractive and that unattractive people generally are treated worse than those considered attractive).
130 See Klare, supra note 75, at 1421.
131 See Craft v. Metromedia, Inc., 766 F.2d 1205, 1213, 1215–17 (8th Cir. 1985); infra notes 147–153 and accompanying text.
132 See, e.g., Wilson, 517 F. Supp. at 303.
133 Id.
134 Id. at 294.
the defendant dressed its female employees in high boots and revealing hot pants.\textsuperscript{135} The airline claimed that female sex appeal was a bona fide occupational qualification that was necessary to fulfill its promise of bringing passengers airborne with love.\textsuperscript{136} The airline argued that it could hire only sexy, attractive, female flight attendants because only they would personify the sexy image of its marketing campaign.\textsuperscript{137}

The \textit{Wilson} court disagreed.\textsuperscript{138} It rejected this claim, contending that sex appeal had no bearing on how a woman or a man performed the primary duties of being a flight attendant.\textsuperscript{139} The court did not find this requirement to be one of business necessity, but rather one of business convenience.\textsuperscript{140} It characterized the contention that business success relied on the sexy female image as “speculative at best.”\textsuperscript{141} It further found that the defendant adopted the female image “at its own discretion, to promote a business unrelated to sex.”\textsuperscript{142} The court implicitly rejected the idea that female sexuality can be exploited as a marketing tool simply because of male preferences for attractive women.\textsuperscript{143}

Despite this holding, employers still may be able to impose “attractiveness” requirements if the same standards are applied equally to men and women.\textsuperscript{144} For example, the \textit{Wilson} court explained that being a woman could be a bona fide occupational qualification for the position of a Playboy bunny because female sexuality and attractiveness furthered the purpose of the business—to entice male customers.\textsuperscript{145} In certain instances, therefore, female sex appeal and a beautiful appearance are sustainable, acceptable employment qualifications.\textsuperscript{146}

Under this theory, in 1985, in \textit{Craft v. Metromedia, Inc.}, the Eighth Circuit Court of Appeals dismissed a sex discrimination case against a

\begin{flushleft}
\textsuperscript{135} \textit{Id.} at 294–95. \\
\textsuperscript{136} \textit{Id.} at 293. \\
\textsuperscript{137} \textit{Wilson}, 517 F. Supp. at 293. \\
\textsuperscript{138} \textit{Id.} at 302. \\
\textsuperscript{139} \textit{Id.} \\
\textsuperscript{140} \textit{Id.} at 303; \textit{see also} \textit{Diaz}, 442 F.2d at 388 (noting that discrimination based on sex is valid only for business necessity, not business convenience). \\
\textsuperscript{141} \textit{Wilson}, 517 F. Supp. at 303. \\
\textsuperscript{142} \textit{Id.} \\
\textsuperscript{143} \textit{See id.} \\
\textsuperscript{144} \textit{See Craft}, 766 F.2d at 1209–10 (8th Cir. 1985); \textit{see also} Katharine T. Bartlett, \textit{Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality}, 92 \textit{Mich. L. Rev.} 2541, 2544 (1994) (noting that courts rationalize appearance requirements by reference to social and community norms that simply reinforce and legitimize gender stereotypes). \\
\textsuperscript{145} \textit{Wilson}, 517 F. Supp. at 301. \\
\textsuperscript{146} \textit{See id.}
\end{flushleft}
news station that demoted a female anchor because of negative reactions to the anchor’s physical appearance. The court rejected the female anchor’s argument that the station’s appearance standards were based on stereotypical characterizations of the sexes, and that standards of attractiveness were applied more strictly to women than to men. It held that the employer could rely on sex stereotypes of beautiful women given the conservative market in Kansas City and the technical matters of lighting and color coordination. The court then concluded that the appearance requirements were not unduly burdensome to women and that the requirements were not guided by stereotypical notions of female roles and appearances. Such standards were the product of professional and technical considerations, making them reasonable business qualifications. Consequently, the court decided that the employer had a “legitimate need” to address the plaintiff’s growing indifference to the type of image that the station wanted her to display. Relying on a dependable market survey, the court found that the station made a reasonable decision in removing the plaintiff from her news anchor position.

Recently, in 2003, in Yanowitz v. L’Oreal USA, Inc., the California Court of Appeal addressed the issue of appearance discrimination in the context of Title VII, holding that an order to fire a female employee for not meeting a male executive’s standards of sexual desirability constituted sex discrimination. The plaintiff was a manager of a cosmetics counter who refused to terminate an employee because her boss did not find the employee physically attractive enough. The manager explained to the plaintiff that he did not think the woman was “good looking enough” for the position and told her to “get me somebody hot.” When the plaintiff refused this order, the manager pointed to a young blonde and said, “God damn it, get me one that looks like that.” The manager allegedly preferred fair-

147 766 F.2d at 1215–16.
148 Id. at 1213, 1216.
149 Id. at 1215.
150 Id. at 1215–16.
151 Id.
152 Craft, 766 F.2d at 1217.
153 Id.
154 131 Cal. Rptr. 2d at 588.
155 Id. at 586.
156 Id.
157 Id. at 582.
skinned blondes, and the female employee was darker skinned.\textsuperscript{158} The plaintiff never carried out the order and lost her job as a result.\textsuperscript{159} The trial court analyzed this behavior as an act of sex discrimination, questioning whether a male executive could order a woman to be terminated for not hiring women who were sexually appealing to him when the same appearance standards did not apply to male employees.\textsuperscript{160}

The appellate court reversed the trial court’s decision, holding that a clear order to fire a female employee for failing to meet the male manager’s personal standards for sexual attractiveness amounted to sex discrimination.\textsuperscript{161} The appellate court contended that the evidence allows for an inference that the executive would not have ordered the firing of a male employee because a man’s physical attractiveness would not have been an issue.\textsuperscript{162} Implicitly, this case establishes a potential cause of action for appearance discrimination under Title VII.\textsuperscript{163}

Plaintiffs often seek to assert Title VII sex discrimination protections when employers mandate certain levels of attractiveness, just as they do in cases involving employer grooming regulations.\textsuperscript{164} Wilson and Yanowitz exemplify an application of this protection; Craft exemplifies a rejection of this protection.\textsuperscript{165} The next Section moves away from sex discrimination protection and discusses how disability case law addresses appearance issues.\textsuperscript{166}

\section*{C. Legal Protection Under Federal Disability Laws}

Employees who find themselves victims of appearance discrimination also may be able to seek relief under the ADA.\textsuperscript{167} If an appearance trait qualifies as a disabling condition, the victim of appearance discrimination may be afforded legal protection.\textsuperscript{168} The definition of

\begin{itemize}
\item\textsuperscript{158} Id. at 586.
\item\textsuperscript{159} Yanowitz, 131 Cal. Rptr. 2d at 586.
\item\textsuperscript{160} See id.
\item\textsuperscript{161} Id. at 588.
\item\textsuperscript{162} Id.
\item\textsuperscript{163} McDonald, supra note 1, at 127; see Yanowitz, 131 Cal. Rptr. 2d at 587 n.5, 588.
\item\textsuperscript{164} Compare supra notes 107–126 and accompanying text (addressing employer grooming regulations), with supra notes 127–163 and accompanying text (addressing Title VII sex discrimination).
\item\textsuperscript{165} See Craft, 766 F.2d at 1215–16; Wilson, 517 F. Supp. at 303; Yanowitz, 131 Cal. Rptr. 2d at 588.
\item\textsuperscript{166} See infra notes 167–196 and accompanying text.
\item\textsuperscript{167} Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000).
\item\textsuperscript{168} Id. § 12102(2); Adamitis, supra note 1, at 200.
a disability under the ADA is a mental or physical impairment that creates a substantial limitation of a major life activity.\textsuperscript{169} The statute allows an individual to have a record of impairment or simply be perceived as being impaired.\textsuperscript{170}

Appearance discrimination claims that rely on the ADA often deal with obese individuals.\textsuperscript{171} Certainly, obese people generally do not fit the norm of American beauty.\textsuperscript{172} In comparison to those of average weight, obese individuals earn less money, are less likely to marry, and are subject to more discrimination in the workplace.\textsuperscript{173} Despite this discrimination, to have a cause of action under the ADA, obese people first must show that obesity is a disability.\textsuperscript{174} To claim that obesity is a disability, individuals must prove that obesity substantially limits a major life activity, such as walking, talking, or working.\textsuperscript{175} Alternatively, individuals must show that others regard them as being limited in a significant life activity.\textsuperscript{176}

Courts, however, have not applied a consistent standard to determine whether obesity qualifies as a disability.\textsuperscript{177} In 1993, in \textit{Cassista v. Community Foods, Inc.}, the Supreme Court of California held that an obese woman was not disabled because her excessive weight condition did not affect a basic bodily system or inhibit a major life activity.\textsuperscript{178} After a health food store refused employment to an obese woman because of the management’s concerns about her heavy weight, the woman sued for employment discrimination.\textsuperscript{179} Here, the court held

\textsuperscript{169} 42 U.S.C. § 12102(2)(A)–(C).

\textsuperscript{170} Id. § 12102(2)(B)–(C).

\textsuperscript{171} Adamitis, \textit{supra} note 1, at 201; see Peter J. Perroni, Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals: The First Circuit Tips the Scales of Justice to the Overweight, 30 New Eng. L. Rev. 993, 994–1004 (1996) (providing relevant background on obesity discrimination under the Americans with Disabilities Act (the “ADA”)).


\textsuperscript{173} Perroni, \textit{supra} note 171, at 993.

\textsuperscript{174} 42 U.S.C. § 12112(a); see also Kimberly B. Dunworth, Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?, 24 Golden Gate U. L. Rev. 523, 531 (1994) (noting that the majority of cases considering weight-based discrimination do not consider obesity to be a disability).

\textsuperscript{175} 42 U.S.C. § 12102(2)(A).

\textsuperscript{176} Id. § 12102(2)(C).

\textsuperscript{177} Compare, e.g., Cook v. R.I., Dep’t of Mental Health, Retardation & Hosps., 10 F.3d 17, 26 (1st Cir. 1993) (holding that an obese woman was not disabled), with, e.g., Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1153 (Cal. 1993) (holding that an obese woman was disabled).

\textsuperscript{178} 856 P.2d at 1154.

\textsuperscript{179} Id. at 1145, 1149–50 (explaining that the plaintiff brought her claim of handicap discrimination under California’s FEHA, which was modeled after the ADA and forbids employment discrimination based on disability); \textit{see} \textsc{Cal. Gov’t Code} § 12940(h) (West 1992).
that weight, unrelated to a physiological, systematic disorder, does not constitute a handicap or disability.\textsuperscript{180} As such, obesity to be protected under the law, an employee must show some physiological basis for the weight problem.\textsuperscript{181} The court contended that the plaintiff did not provide any evidence that she suffered from, or that the employer regarded her as suffering from, a form of physiologically induced obesity.\textsuperscript{182} The fact that the plaintiff considered herself to be a healthy, fit individual aside from her weight problem helped the court conclude that she did not demonstrate an actual or perceived physical handicap.\textsuperscript{183} Rather, the court concluded that her obesity was a “transitory or self-imposed condition” which she could alter voluntarily, as opposed to a condition that was immutable or irreversible.\textsuperscript{184}

Conversely, in 1993, in \textit{Cook v. Rhode Island, Department of Mental Health, Retardation \& Hospitals}, the First Circuit Court of Appeals held that an overweight person could be protected statutorily as disabled.\textsuperscript{185} Unlike any previous decision before it, this case represented a groundbreaking step in addressing the pervasive problem of weight-based appearance discrimination.\textsuperscript{186} In this case, the plaintiff applied for employment at a mental health facility.\textsuperscript{187} Her routine pre-hire physical indicated that she was morbidly obese.\textsuperscript{188} The defendant health facility claimed that this condition jeopardized her ability to evacuate patients in the event of an emergency and left her susceptible to various health risks.\textsuperscript{189} The plaintiff claimed that the defendant refused to hire her because of her perceived disability, and she sued for disability discrimination.\textsuperscript{190}

Relying on a perceived disability theory, the court held that obesity may be categorized as a disability entitled to protection under

\textsuperscript{180} \textit{Cassista}, 856 P.2d at 1154.
\textsuperscript{181} \textit{Id.} at 1153.
\textsuperscript{182} \textit{Id.} at 1154.
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{See id.} at 1152.
\textsuperscript{185} 10 F.3d at 26.
\textsuperscript{186} \textit{See Cook}, 10 F.3d at 24; Perroni, \textit{supra} note 171, at 1018.
\textsuperscript{187} \textit{Cook}, 10 F.3d at 20.
\textsuperscript{188} \textit{Id.} at 20–21.
\textsuperscript{189} \textit{Id.} at 21.
federal law. The court rejected the argument that obesity should not receive disability protection because it is a voluntary, mutable characteristic, noting that numerous conditions, which often may be caused or exacerbated by voluntary conduct, receive disability protection. Furthermore, the court held that sufficient evidence existed to prove that obesity was caused by a permanent condition—a dysfunctional metabolism. Finding the plaintiff to be otherwise qualified for the position, the court decided that an employer cannot refuse to hire someone merely because the individual possesses an obesity handicap. Perceived inability to function in a certain context due to the possession of either a perceived or real handicap was not a sufficient ground for an unfavorable employment hiring decision. The employer’s decision must be objectively reasonable, and given that the plaintiff’s duties would be similar to those she had performed positively in the past, the appellate court determined that the lower court’s finding was unreasonable, and the action was unlawfully discriminatory.

Both Cook and Cassista address appearance issues through the invocation of disability law. These two courts assume varying approaches in the classification of obesity as a disability. They offer examples of another legal theory that claimants can utilize in seeking redress for appearance discrimination.

The legal theories that this Part has examined thus far—constitutional liberty, sex discrimination, and disability discrimination—do not focus explicitly on appearance discrimination. Rather, they address it implicitly through broader legal protections. Some state

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191 Cook, 10 F.3d at 24.
192 Id. (listing heart disease, alcoholism, and cancer from cigarette smoking as examples of conditions that receive disability protection despite their potential to be caused or exacerbated by voluntary conduct).
193 Id.
194 Id.
195 Id.
196 See Cook, 10 F.3d at 27.
197 See Cook, 10 F.3d at 24; Cassista, 856 P.2d at 1154; supra notes 167–196 and accompanying text.
198 See Cook, 10 F.3d at 24; Cassista, 856 P.2d at 1154; supra notes 167–196 and accompanying text.
199 See Cook, 10 F.3d at 24; Cassista, 856 P.2d at 1154; supra notes 167–196 and accompanying text.
200 See supra notes 72–196 and accompanying text.
201 See supra notes 72–196 and accompanying text.
and local governments, however, address the issue through specific appearance discrimination statutes.\textsuperscript{202}

D. State and Local Statutes Prohibiting Appearance-Based Discrimination

A limited number of jurisdictions have laws banning appearance-based discrimination.\textsuperscript{203} For example, the District of Columbia enacted a statute prohibiting employment discrimination and included personal appearance as a protected category.\textsuperscript{204} This statute defines personal appearance as the “outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to hair style and beards.”\textsuperscript{205} In 1986, in \textit{Atlantic Richfield Co. v. District of Columbia Commission on Human Rights}, the District of Columbia Court of Appeals upheld a finding of personal appearance discrimination in violation of this appearance discrimination law.\textsuperscript{206} In this case, an employer criticized a female employee for her provocative clothing.\textsuperscript{207} Because the employee’s appearance was similar to her colleagues and the company had not enacted a dress code or any other physical appearance standards, the court held that sufficient evidence in the record existed to justify a finding of appearance discrimination.\textsuperscript{208}

Other jurisdictions that seek to curb appearance discrimination include the state of Michigan and the city of Santa Cruz, California.\textsuperscript{209} Michigan bans appearance discrimination based on height and weight.\textsuperscript{210} Santa Cruz, California likewise bans discrimination based on physical characteristics that result from events beyond a person’s control, including physical mannerisms.\textsuperscript{211} As a result, state and local appearance statutes like those mentioned above provide yet another avenue for addressing instances of appearance discrimination.\textsuperscript{212}

\textsuperscript{202} See infra notes 203–212 and accompanying text.
\textsuperscript{203} Adamitis, supra note 1, at 209.
\textsuperscript{204} D.C. Code Ann. § 2-1402.11(a) (2001).
\textsuperscript{205} Id. § 2-1401.02(22).
\textsuperscript{206} 515 A.2d 1095, 1100–01 (D.C. 1986).
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} See SANTA CRUZ, CAL., PROHIBITION AGAINST DISCRIMINATION ch. 9.83 (1995);
\textsuperscript{210} MICH. COMP. LAWS § 37.2202 (2004).
\textsuperscript{211} SANTA CRUZ, CAL., PROHIBITION AGAINST DISCRIMINATION ch. 9.83.
\textsuperscript{212} See supra notes 203–211 and accompanying text.
In sum, when faced with an instance of appearance discrimination, a victim may have a cause of action under the Due Process Clause of the U.S. Constitution, Title VII, the ADA, or state and local statutes that provide additional protection against appearance discrimination.\textsuperscript{213} Liberty arguments do not fare well against the government’s legitimate need to regulate appearances.\textsuperscript{214} Sex discrimination and disability discrimination claims may offer some protection for victims of appearance discrimination, though this protection often is implicit or peripheral.\textsuperscript{215} State and local statutes offer the most explicit form of protection against appearance discrimination.\textsuperscript{216}

III. Analysis: The Favorable Impact of Appearance Discrimination Law on the Female Body

The law is moving in a positive direction for women as it begins to proffer the idea that women need not meet certain standards of beauty.\textsuperscript{217} Implicitly, this signals to women that their bodies need not conform to one ideal form in order to be beautiful, and also that a positive body image need not be constrained by man’s demand for the perfect female body.\textsuperscript{218} Such a trend is good for women because it helps deconstruct the social and economic value placed on their bodies, while deemphasizing the importance of physical perfection.\textsuperscript{219}

A. How the Law Reflects Conceptions of Female Beauty

The legal discourse on appearance issues implicitly reflects social constructions of female beauty.\textsuperscript{220} Society compels many women to become obsessed with their personal appearance and the physical attainment of beauty.\textsuperscript{221} Women’s obsession with beauty perpetuates their subordinate status in society.\textsuperscript{222} It exposes them to male habits of

\textsuperscript{213} See \textit{supra} notes 72–211 and accompanying text.
\textsuperscript{214} See \textit{supra} notes 72–103 and accompanying text.
\textsuperscript{215} See \textit{supra} notes 104–199 and accompanying text.
\textsuperscript{216} See \textit{supra} notes 203–211 and accompanying text.
\textsuperscript{217} See \textit{infra} notes 220–310 and accompanying text.
\textsuperscript{218} See \textit{infra} notes 220–310 and accompanying text; \textit{cf.} WOLF, \textit{supra} note 17, at 10 (noting that although women today have more legal and economic power than ever before, they actually feel worse physically about themselves than their “unliberated grandmothers”).
\textsuperscript{219} See \textit{infra} notes 220–310 and accompanying text.
\textsuperscript{220} See, \textit{e.g.}, Craft v. Metromedia, Inc., 766 F.2d 1205, 1216 (8th Cir. 1985); Yanowitz v. L’Oreal USA, Inc., 131 Cal. Rptr. 2d 575, 586 (Ct. App. 2003); McDonald, \textit{supra} note 1, at 118.
\textsuperscript{221} See HESSE-BIBER, \textit{supra} note 30, at 28–29 (noting the pervasive impact of the media on women’s body image).
\textsuperscript{222} Gehrke, \textit{supra} note 42, at 238.
exploitation as well as to the dangers inherent in the beauty industry.\textsuperscript{223} The messages women receive at young ages from these sources include the idea that a woman’s role in life is to be beautiful, and that women should become beautiful at any painstaking cost.\textsuperscript{224} Despite the liberating efforts of the modern women’s movement, society at large still determines a woman’s self worth by her ability to attract a man.\textsuperscript{225} Likewise, the law contributes to and often reflects this impulse in its treatment of appearance discrimination cases.\textsuperscript{226}

In cases where an employer may need to take personal appearance into consideration as a business necessity, the employer may assert a bona fide occupational qualification.\textsuperscript{227} Yet such a rule can place women in precarious situations because justifying a type of discrimination based on social affinity for the beautiful may impact adversely those who cannot meet such strict aesthetic standards.\textsuperscript{228} Consequently, such discrimination can have negative effects on a woman’s perception of self worth, making her increasingly preoccupied with her body, her weight, and her degree of physical attractiveness.\textsuperscript{229} Given this culture of bodily obsession in which images of thin, beautiful women permeate everyday life, the law often reflects the ingrained and unchallenged idea that women must conform to traditional notions of beauty and physical appearance.\textsuperscript{230} Such traditional norms are thoroughly sexist and patriarchal.\textsuperscript{231}

Although in 1976, the U.S. Supreme Court addressed the grooming requirements of a male police officer in \textit{Kelley v. Johnson}, the decision illustrates how the law favors socially ingrained standards of appearance, intimating that a pattern needs to be followed to sustain social order.\textsuperscript{232} This case exemplifies the law’s readiness to subvert personal autonomy and appearance diversity.\textsuperscript{233} Such a tendency certainly has a more significant impact on women than men given the social importance of female appearance.\textsuperscript{234}

\begin{footnotesize}
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\item \textsuperscript{223} \textit{Id.} at 237–38.
\item \textsuperscript{224} \textit{See id.}
\item \textsuperscript{225} \textbf{Hesse-Biber}, \textit{supra} note 30, at 13.
\item \textsuperscript{226} \textit{See, e.g., Craft}, 766 F.2d at 1217 (holding that a news station was justified in terminating a news anchor for not meeting attractiveness standards).
\item \textsuperscript{227} \textit{See} \textit{Diaz v. Pan Am. World Airways, Inc.}, 442 F.2d 385, 386 (5th Cir. 1971).
\item \textsuperscript{228} \textit{See Adamitis, supra} note 1, at 213–14.
\item \textsuperscript{229} \textit{See Glazer, supra} note 17, at 115–16.
\item \textsuperscript{230} \textit{See, e.g., Craft}, 766 F.2d at 1217.
\item \textsuperscript{231} \textit{See} \textit{Klare, supra} note 75, at 1420.
\item \textsuperscript{232} \textit{See} \textit{425 U.S. 238, 248} (1976).
\item \textsuperscript{233} \textit{See id.}
\item \textsuperscript{234} \textit{See Hesse-Biber, supra} note 30, at 29.
\end{itemize}
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that the law reinforces idealized notions of beauty—forms of appearance that do not and cannot represent reality for many women.235

In 1976, in Tardiff v. Quinn, the First Circuit Court of Appeals offered an example of how physical appearance stereotypes imbue the law.236 In this case, the First Circuit found a school’s concern with the short length of a teacher’s skirt to be reasonable.237 The government’s managerial discretion prevailed over the plaintiff’s sense of personal liberty to define her style and appearance.238 In effect, the court stifled the teacher’s creativity and definition of personal beauty by finding in favor of the school.239 It insisted on reinforcing socially normative behavior.240

Furthermore, the government employer, a public school department official, never explained the effects of skirt length on professional productivity.241 The court implicitly showed great deference to stereotypical social norms of what is an acceptable form of dress for a school teacher.242 When the law reinforces socially normative behavior or appearances, whether conservative dress standards for a school teacher or large breasts for Playboy bunnies, it reminds women that they need to meet certain preordained standards of appearance in order to be accepted and successful in society.243 Placing so much emphasis on female appearance only makes women increasingly obsessed with their bodies and their beauty, lessening the importance of other personal characteristics like intellect or economic potential.244

In contrast to Tardiff, in 1979, the Seventh Circuit Court of Appeals, in Carroll v. Talman Federal Savings & Loan Ass’n, recognized how simple regulations like dress codes can subtly perpetuate sexism.245 In holding that an employer cannot mandate uniforms for women without requiring the same for men, this court combated a culture of sexism that reflects the idea that women are not capable of choosing appropriate clothes to wear to work.246 This case provided a strong

235 See Craft, 766 F.2d at 1217.
236 See 545 F.2d 761, 761–63 (1st Cir. 1976).
237 See id.
238 Id.
239 See id. at 763.
240 See id. at 764. At the time of this case in 1976, socially normative behavior for female school teachers was to wear longer length skirts. See id.
241 See Tardiff, 545 F.2d at 763–64.
242 See id.
243 See id.
244 See Wolf, supra note 17, at 10.
245 See Carroll v. Talman Fed. Savings & Loan Ass’n, 604 F.2d 1028, 1032 (7th Cir. 1979).
246 See id.
message to women—one that said that their appearances need not be prescribed through rules, but rather should be defined through personal choice and autonomous decision making, an important objective for the attainment of an equal society.\(^{247}\)

Despite this strong message, Title VII permits the equal application of grooming or appearance standards to both sexes because Title VII only requires that male and female employees be treated in an equal manner.\(^{248}\) Because social norms decide what are acceptable behavior and appearances, the law reinforces the dominant form of female beauty.\(^{249}\) When a social custom or practice is widely accepted, such as the objectification of the female body, these patriarchal, hetero-sexist sensibilities are not challenged.\(^{250}\) Therefore, the encouragement and perpetuation of gender inequality results because employers are allowed to require employees to engage in socially accepted behavior, so long as they require all employees to do so.\(^{251}\)

Employers encourage the perpetuation of bodily perfection and obsession when they set strict grooming or physical attractiveness standards.\(^{252}\) Employer regulations of personal appearance often reinforce sexist notions of how women should look and dress because they demand a certain type of physical appearance.\(^{253}\) Additionally, when employers set standards of attractiveness for female employees, they can perpetuate a normative culture that values a particularized form of female physical beauty and sex appeal over female intellectual and practical skills.\(^{254}\) Given the heightened sensitivity to female exploitation in the workforce and growing concerns about sexual harassment today, the law may offer more protection to women who face sexually exploitative treatment in the workforce as opposed to the more subtle form of exploitation through grooming regulations.\(^{255}\)

In 1982, in Wilson v. Southwest Airlines Co., the United States District Court for the Northern District of Texas bravely challenged the
socially accepted desire to sexualize women. The court was not willing to uphold an employer’s female-only hiring policy that demanded that its airline attendants display a certain degree of sexiness or attractiveness. The effect that this decision has on feminist sensibilities related to women’s body images is noteworthy. In holding that female sex appeal was not necessary for ordinary business operations, the court focused on job performance and business purpose and not on the female body and sex appeal. In striking down its female-only hiring policy, the court did a great service for both men and women. In opening up employment opportunities to men, this court also implicitly told women that they did not have to exploit their bodies in order to perform the functions of airline attendants. In effect, this court combated the popular marketing strategy of using female sex appeal for the attainment of market success. It recognized that the temptation of employers to use sex as a marketing tactic is real and widespread. It also recognized that women specifically would benefit from a legal ban on such exploitative behavior.

Although a sexualized market culture may be pleasing to many men (and women, too), the Wilson decision lends support to the idea that it is not intrinsically good for women, either physically or psychologically. Branding sex appeal or an attractive physical appearance as an employment qualification or business necessity tells women that they have to look a certain way to be professionally successful. It makes them use their bodies for economic gain, diminishing the importance of intelligence and skill level. Given the harmful effects such exploitation has on women and their body images, this court did a service for women by disallowing physical sex appeal to be a bona fide employment qualification for flight attendants.

256 See Wilson, 517 F. Supp. at 303.
257 See id.
258 See id.
259 See id. at 301.
260 See id. at 303.
261 See Wilson, 517 F. Supp. at 302.
262 See id. at 303.
263 See id.
264 See id.
265 See id. at 304.
266 See Wilson, 517 F. Supp. at 304.
267 See id.
268 See id. at 302.
Despite the holding in Wilson, the court still recognized certain instances where appearance standards can be justified as a business necessity. Such exceptions may continue to have harmful effects on women’s self-image because they still allow for the exploitation of the female body—just so long as a business necessity justifies such exploitation. Furthermore, because women are often held to stricter standards of beauty and physical attractiveness than men, the law implicitly resists opportunities to help reverse the effects of a society obsessed with “beautiful” women. In this way, the law accepts and reinforces the social norm that physical beauty is natural, favored, and even beyond the law’s control.

In 1985, the Eight Circuit Court of Appeals in Craft v. Metromedia, Inc. offered a good example of this assertion. The court took a predictable approach to the problem of the high demand on female appearance and levels of attractiveness by reinforcing normative conceptions of beauty. This case, in which the court upheld the employer’s decision to terminate a female news anchor because of her unfavorable physical appearance, demonstrates how the law reinforces what women should look like. Implicitly, the case exemplifies how personal appearance discrimination encompasses judgments about women’s bodies and personas. It evidences how ingrained, traditional notions of beauty affect employment opportunities by permitting criteria that often are unrelated to fundamental job performance, yet are viewed as a natural part of women’s being and employability. Because employers are given the opportunity to frame attractiveness as a bona fide occupational qualification, they possess a certain degree of leeway in requiring attractiveness or sex appeal in female employees. Demanding such physical capabilities can be damaging to women’s self-esteem because it does not help them foster a diverse conception of what constitutes a beautiful body.

269 Id. at 304.
270 See id. at 301.
271 See Craft, 766 F.2d at 1215–16; Adamitis, supra note 1, at 209.
272 See Craft, 766 F.2d at 1215–16; Adamitis, supra note 1, at 209.
273 See 766 F.2d at 1215–16.
274 See id.
275 See id.
276 See id.; Klare, supra note 75, at 1415.
277 See Craft, 766 F.2d at 1216.
279 See Hesse-Biber, supra note 30, at 58.
The *Craft* court could have taken a bold step and rejected the social affinity for beautiful women, but it refused to do so. Rather, it strengthened a social norm that says that beauty is a female trait that is natural, expected, and valued. It reinforced socially accepted ideas of what a female news anchor should look like, including how she should dress and how young she should be. The court saw nothing wrong with the status quo beautification of women, and likewise did nothing to help rectify the dangers associated with a culture obsessed with beautiful girls.

B. Redefining Female Beauty and Body Image Through the Law

The preceding discussion emphasizes how the law reflects social stereotypes of female beauty for women and why this is bad for women. In measuring themselves against such standards, many women often are left feeling not good enough, not beautiful enough, and not worthy enough for certain jobs or relationships. Yet as states and localities recognize the harmful effects of appearance discrimination, legislation protecting the aesthetically challenged offers a possible remedy. These local statutes evidence that at least some jurisdictions see value in remedying the harmful effects of appearance discrimination.

In addition, as appearance issues become more widely publicized in the media and academia, more victims of appearance discrimination may file lawsuits against employers who use hiring practices that favor the beautiful. A statement made by the Equal Employment Opportunity Commission suggests that many more lawsuits addressing appearance issues lie ahead because of the emerging idea that the chance to make a living should not be restricted to models and movie

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280 See *Craft*, 766 F.2d at 1215–17.
281 See id.
282 See id.
283 See id.
284 See supra notes 217–283 and accompanying text.
285 See *Gehrke*, supra note 42, at 233.
286 See supra notes 203–212 and accompanying text.
287 See supra notes 203–212 and accompanying text.
288 See *McDonald*, supra note 1, at 121–22, 129 n.13 (citing EEOC v. R.H.P Mgmt., No. 03-RR-502-1 (N.D. Ala. filed Mar. 7, 2003), which is a pending lawsuit against McDonald’s for refusing to hire a woman with a port wine birthmark on her face); see also Morley Safer, CBSNEWS.com, *The Look of Abercrombie & Fitch*, at http://www.cbsnews.com/stories/2003/12/05/60minutes/main587099.shtml (Nov. 24, 2004) (accusing Abercrombie & Fitch of hiring only attractive, young, white people).
stars, but rather should be given to all people with the requisite talent and abilities.\textsuperscript{289} Implicitly, this heightened sensitivity to appearance discrimination is beneficial for women because it will help break down and challenge the historic value placed on the physical attractiveness of their bodies.\textsuperscript{290} By accepting more diverse forms of appearance and extending civil rights through appearance law, women may come to understand more readily that they do not have to conform to one specific body type and that many forms of beauty can and do exist.\textsuperscript{291} In effect, they may be able to focus their energies away from bodily preoccupation and towards more socially and economically productive endeavors.\textsuperscript{292}

Two recent cases offer support for the contention that the law is beginning to foster more positive and diverse body images for women: the First Circuit Court of Appeals’ 1993 decision in \textit{Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals}, and the California Court of Appeal’s 2003 decision in \textit{Yanowitz v. L’Oreal USA, Inc.}\textsuperscript{293} Given the resistance of the market and media to physical appearance diversification, these decisions are bold steps for the courts.\textsuperscript{294} These two courts should be applauded for the implicit messages that they send to women—your body does not have to define the entire person you are; your body is not everything.\textsuperscript{295} Furthermore, employment opportunities, success, and happiness should not be reserved for those who meet certain physical standards of beauty.\textsuperscript{296}

In \textit{Cook}, the First Circuit Court of Appeals sought to rectify the injustice suffered by an obese woman whose job application was denied due to her weight.\textsuperscript{297} As many women struggle with weight issues, this case exemplifies a cutting-edge sensitivity to a form of prejudice


\textsuperscript{290} See id.

\textsuperscript{291} See id.

\textsuperscript{292} See Wolf, \textit{supra} note 17, at 16.

\textsuperscript{293} See \textit{Cook v. R.I., Dep’t of Mental Health, Retardation & Hosp.s.}, 10 F.3d 17, 27–28 (1st Cir. 1993); \textit{Yanowitz}, 131 Cal. Rptr. 2d at 588.

\textsuperscript{294} See \textit{Cook v. R.I., Dep’t of Mental Health, Retardation & Hosp.s.}, 10 F.3d 17, 27–28 (1st Cir. 1993); \textit{Yanowitz}, 131 Cal. Rptr. 2d at 588; see also Safer, \textit{supra} note 288 (reporting on Abercrombie & Fitch’s employment preferences for “all-American” salespeople, especially “Caucasian, football-looking, blond hair, blue-eyed males”).

\textsuperscript{295} See \textit{Cook}, 10 F.3d at 27–28; \textit{Yanowitz}, 131 Cal. Rptr. 2d at 588.

\textsuperscript{296} See \textit{Yanowitz}, 131 Cal. Rptr. 2d at 588.

\textsuperscript{297} See 10 F.3d at 27–28.
that is both dangerous and wrong.\textsuperscript{298} This opinion helps fight the socially accepted belief that obesity is always a voluntary and mutable characteristic.\textsuperscript{299} It challenges traditional assumptions about what a woman must look like, and it values a woman’s ability to work over her ability to be sexually attractive.\textsuperscript{300} In this way, this watershed opinion helps women, many of whom struggle with their weight in a variety of contexts, feel more accepted and protected under the law.\textsuperscript{301} This opinion raises social awareness about appearance discrimination, letting women know that the law will not allow physical appearance to determine who they are and what they can achieve.\textsuperscript{302}

Furthermore, in Yanowitz, where an employer wanted an employee terminated for not being good looking enough, the California Court of Appeal refused to tolerate the employer’s desire to have only sexually attractive employees working for him.\textsuperscript{303} Inferring that a male employee’s physical attractiveness would not have been an issue, the court would not allow discrimination against women based on sexual desirability.\textsuperscript{304} This opinion is also a positive step forward for addressing issues related to female bodily obsession and exploitation, practices that perpetuate notions of women as sex symbols and objects of desire.\textsuperscript{305} Just because society accepts a certain type of behavior as normal does not mean that such behavior is healthy, fair, or practical.\textsuperscript{306} When the law recognizes the harm done to women’s bodies

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  \item \textsuperscript{298} See id.
  \item \textsuperscript{299} See id.
  \item \textsuperscript{300} See id.
  \item \textsuperscript{301} See id.
  \item \textsuperscript{302} See Cook, 10 F.3d at 27–28.
  \item \textsuperscript{303} See 131 Cal. Rptr. 2d at 588.
  \item \textsuperscript{304} See id.
  \item \textsuperscript{305} See id. But see McDonald, supra note 1, at 127–28. James McDonald argues against the extension of civil rights to the aesthetically challenged. McDonald, supra note 1, at 127–28. His discussion rejects the idea that appearance should become protected, highlighting definitional difficulties of terms such as “hot” or “ugly.” Id. at 127. It contends that national standards of attractiveness would have to be developed through rulemaking and common law. Id. McDonald is outraged by the idea that beauty contest judges could find new livelihoods as experts in appearance litigation, and that employers would have to hire a certain quota of “ugly” employees. Id.
  \item \textsuperscript{306} Cf. Cass R. Sunstein, The Partial Constitution 41–43 (1993). Cass Sunstein argues that the U.S. Supreme Court in Plessy v. Ferguson conceived of segregation as a state of nature—a pre-political condition that merely reflected the desires and customs of people. Id. at 41 (discussing generally 163 U.S. 537 (1896)). Segregation, therefore, could not be changed by the law or challenged from the standpoint of justice. Id. Given the subsequent history of segregation, the error in this argument is apparent. See id. at 41–43. Yet if one conceives of the modern favoritism for beautiful people as a natural, pre-political condi-
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and psyches through the perpetuation of traditional female stereotypes, it does a great service to them by attempting to challenge such stereotypes. An opinion like *Yanowitz* is just one of the many ways that our society can help women gain more positive self-images, allowing them to accept their bodies for what they are and have more fulfilling lives because of the development of this more positive self-image. The law should continue to applaud and to strengthen this trend, which discourages restrictions on weight, appearance, and physical beauty. In this way the law can contribute to the deconstruction of stereotypes that keep women intensely concerned, and too often debilitated by, their physical appearance.

**Conclusion**

Physical appearance discrimination reflects the preference society has for beautiful women. Taken to an extreme, this tendency toward beauty and physical appearance can have harmful effects on women’s body image and self-esteem. Because appearance often affects employment opportunities, the legal treatment of appearance discrimination issues has important consequences for women in particular.

The airline and news reporting industries began the debate about appearance issues by insisting upon sexy, attractive female employees. In the absence of specific appearance discrimination laws, victims often framed their claims of appearance discrimination in terms of sex discrimination. From the 1970s until now, courts have exhibited an increasing willingness to protect women from appearance discrimination, producing a legal trend that is good for women and their body images.

This trend helps deconstruct socially normative behavior that emphasizes the importance of female beauty and physical appearance. Social favoritism of the beautiful is not healthy or productive for women. With cases like *Yanowitz v. L’Oreal USA, Inc.* raising awareness about and protection for appearance discrimination in the workforce, women may begin to realize that being sexy and beautiful is not a prerequisite for success. The end result should be a strong body of law that breaks from social norms and that provides protection for those whom society considers physically undesirable.

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307 See *Yanowitz*, 131 Cal. Rptr. 2d at 588.
308 See id.
309 See id.; Glazer, *supra* note 17, at 147.
310 See *Yanowitz*, 131 Cal. Rptr. 2d at 588.
LIKE FAMILY: RIGHTS OF NONMARRIED COHABITATIONAL PARTNERS IN LOSS OF CONSORTIUM ACTIONS

Abstract: The organization of family life in American society has changed dramatically in recent decades. Changing societal morals and increases in divorce rates mean that fewer households are organized around the traditional nuclear family model. Courts have struggled to understand and classify these alternative family arrangements, and most have denied recovery in actions for loss of consortium by nonmarried cohabitants. This Note argues that changes in related areas of law and in the loss of consortium doctrine itself indicate that nonmarried cohabitants should be allowed to recover. Specifically, judicial understanding of the purpose of loss of consortium recovery has shifted, and nonmarried cohabitants have been allowed to recover in closely analogous actions such as negligent infliction of emotional distress. This Note proposes adoption of a standard similar to the one employed in negligent infliction of emotional distress actions. Such a standard provides a framework to determine whether damage to a relationship is severe enough to be compensable, while still providing adequate safeguards to prevent a wave of frivolous suits.

Introduction

Nonmarital cohabitation is a growing trend in American society and has increased rapidly in the past few decades.\(^1\) Since 1977, the number of cohabitating couples has more than quadrupled.\(^2\) This rapid increase in cohabitation and the corresponding decline in marriage rates have been described as two of the most significant social changes of our time.\(^3\)

The increased incidence of nonmarital cohabitation represents a watershed demographic shift in how people organize their intimate and familial relations.\(^4\) Indeed, cohabitational relationships account for 12% of all current unions and 31% of all unions for individuals

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2 Id.
4 See id.
between the ages of nineteen and twenty-four. The trend of cohabitation is remarkable not only for the number of couples engaging in such relationships, but also because of the percentage of people who participate in a cohabitational relationship at some point during their lives. The percentage of women who have been involved in a heterosexual cohabitational relationship at some point in their lives rose from 33% in 1987 to 45% by 1995. Therefore, nearly half of the population now engages in these relationships, which were once atypical and perceived by many as immoral.

The law has not kept pace with changing attitudes toward non-marital cohabitation. Courts seem particularly hesitant to allow cohabitational partners to recover in tort actions, such as loss of consortium. The loss of consortium claim allows spouses and other family members of a person who suffers a tortious injury to bring suit against the tortfeasor. This action provides recovery for the damage to their relationship resulting from the injury to the direct victim. Throughout most of American and English legal history, this action was only available to husbands. But over the past fifty years, courts’ under-

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5 Larry L. Bumpass & Hsien-Hen Lu, Trends in Cohabitation and the Implications for Children’s Family Contexts in the United States, 54 POPULATION STUD. 29, 32 (2000). Cohabitation can serve several purposes based on the values and goals of the participants. See generally Larry L. Bumpass & James A. Sweet, National Estimates of Cohabitation, 26 DEMOGRAPHY 615 (1989); Larry L. Bumpass et al., The Role of Cohabitation in Declining Rates of Marriage, 53 J. MARRIAGE & FAM. 920 (1991). Commonly, it is seen as a sort of “trial marriage” where individuals live together for a relatively short period of time as a test of compatibility before ultimately marrying. See Bumpass et al., supra, at 920. For others, cohabitation is a substitute for marriage. See id. Some cohabitating couples reject the gender roles that they perceive as being part and parcel of marriage, while others simply desire a less formal means of commitment. See id. at 921.

6 See Bumpass & Lu, supra note 5, at 31.

7 Id. at 32.

8 Id.


10 See Elden, 758 P.2d at 586; Feliciano, 514 N.E.2d at 1096. But see Reep v. Comm’r of the Dep’t of Employment & Training, 593 N.E.2d 1297, 1301 (Mass. 1992) (allowing non-married cohabitational partners the same rights as married spouses to unemployment insurance when they relocate with their partners).


12 Fernandez, 968 P.2d at 782.

13 See Hitaffer, 183 F.2d at 813.
standing of loss of consortium has changed. Consequently, courts have broadened the class of potential plaintiffs considerably. Despite the recent willingness to consider the emotional harm suffered by plaintiffs other than spouses, the great majority of courts have clung to a bright-line no marriage/no recovery rule which has excluded non-married cohabitational partners. Some argue that the rule limiting recovery only to married partners is arbitrary and leads to unjust results.

Given the rise of nonmarital cohabitation, it is not difficult to envision scenarios where the bright-line no marriage/no recovery rule for loss of consortium creates potentially unjust results. Consider a hypothetical set of neighbors, two heterosexual couples living next door to each other. The individuals in Couple A, an unmarried man and woman, have been in a committed relationship for nearly a decade and purchased their house together nearly five years ago. They are involved in every aspect of each other’s lives, and a year ago, they adopted a child. A second couple, Couple B, lives next door in a house owned by a woman who recently eloped after a two-month whirlwind romance. Her new husband moved in a few weeks ago. One day, as both men are walking across the street to check the mail, they are both struck by a negligent driver who sped through the...
neighborhood. Both men were grievously injured, and have trouble carrying on with daily life and relating to their partners. There can be little doubt that the woman in Couple A suffers as much, if not more, emotional harm and damage to her long-standing relationship than the woman in Couple B, who had hardly begun to build a life with her new spouse. But, the woman in Couple B would be allowed to recover for the emotional harm she suffered, while her neighbor would be turned away by the courts. One can imagine other compelling scenarios in which the long-term partner of an injured individual suffers terrible emotional injuries but is denied recovery because the couple had not yet married or had chosen not to marry.

This Note examines social and legal trends in order to determine whether the current understanding of loss of consortium actions is in step with social reality. Part I explores the history of the loss of consortium action. Specifically, it examines the altered understanding of the action in the marital context, current trends which have extended recovery to other family members, and the refusal of most courts to allow nonmarried cohabitational partners to recover. Part II discusses the expansion of tort recovery for nonmarried cohabitational partners. The related tort action for negligent infliction of emotional distress, which in several states has been found to include cohabitational partners, is explored as a useful model for extending recovery in loss of consortium actions. A recent New Mexico case extending recovery in loss of consortium actions is also examined. Finally, Part III argues that legal and social trends indicate that loss of consortium claims should be broadened to include nonmarried cohabitational partners and criticizes common policy reasons cited for denying recovery.

24 See Elden, 582 P.2d at 582–83.
25 See id.
26 See id.
27 See id.
28 See id.
29 See infra notes 223–234 and accompanying text.
30 See infra notes 36–135 and accompanying text.
31 See infra notes 36–135 and accompanying text.
32 See infra notes 136–211 and accompanying text.
33 See infra notes 141–178 and accompanying text.
34 See infra notes 184–211 and accompanying text.
35 See infra notes 212–313 and accompanying text.
I. The History of the Loss of Consortium Claim

A. Origins of the Claim

Over the past several decades, judicial interpretation of the loss of consortium claim has changed dramatically. Courts have abandoned traditional property-based theories of recovery. The modern understanding of the claim allows for damages based on harm to more intangible relational interests like love, affection, and companionship. This evolution in the interests protected by the loss of consortium action enabled wives to recover when their husbands were injured and ultimately lead to an even broader expansion of the class of plaintiffs allowed to bring loss of consortium claims.

Loss of consortium is an old but controversial cause of action. The claim evolved from older common law loss of services actions. These actions allowed a master to recover when a tortfeasor injured his servant, making the servant less able to perform duties. The courts reasoned similarly that because husbands were entitled to services from their wives, a husband should be allowed to recover when injury to his wife made her less able to fulfill her duties.

Upon marriage, men assumed property interests in their wives. Wives lost all legal identity and in many respects became chattel belonging to their husbands. Lack of education for women and tremendous societal pressure meant that subservience was socially in-

38 See, e.g., Hitaffer, 183 F.2d at 814; Fernandez, 968 P.2d at 782–83.
39 See Hitaffer, 183 F.2d at 813; Ferriter, 413 N.E.2d at 696; Fernandez, 968 P.2d at 782–83.
40 See, e.g., West v. City of San Diego, 353 P.2d 929, 934 (Cal. 1960) (eliminating the traditional right of husbands to sue for loss of consortium on the ground that it was irrational and discriminatory to distinguish between husbands and wives, who were not allowed to recover). Later cases established the right of both husbands and wives to recover for loss of consortium. See Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 675 (Cal. 1974).
42 Martin, supra note 41, at 1468–69.
43 See Montgomery, 101 N.W.2d at 230.
44 Comment, supra note 41, at 914–25.
45 See Montgomery, 101 N.W.2d at 230.
grained, and courts ensured that it was also legally enforceable.46
Women also lost all rights to their property upon marriage.47 As Hen-
rici de Bracton, a famous early English legal commentator, notes, a
wife “has nothing which is not her husband’s.”48 Inherent in this un-
derstanding of the marital relationship was the idea that a wife owed
certain immutable duties to her husband, such as labor inside and
outside the home, all tasks relating to housekeeping, sexual services,
and all child-rearing responsibilities.49 When his property interests in
his wife were damaged, the husband had the right to sue for recov-
ery.50 Because women had no similar property-like interests in their
husbands, they had no right to bring suit for loss of consortium.51

As time passed and societal values changed, courts recognized
that loss of consortium claims encompassed not only material services
from the wife, but also damage to less tangible aspects of the marital
relationship like affection and companionship.52 Over time, damage
to the marriage relationship became the primary ground for recov-
ery.53 This shift in emphasis toward protecting the relational interests
in the marriage, rather than protecting property interests in a wife,
made exclusion of wives from loss of consortium claims logically unsound.54 Courts were slow, however, to overturn the old common law
document.55

Not until the Court of Appeals for the District of Columbia de-
cided the landmark case of Hitaffer v. Argonne Co. in 1950 did a court
allow a wife to recover for loss of consortium for injuries to her hus-
band.56 Lucia Hitaffer brought an action for loss of consortium against
her husband’s employer, claiming the company’s negligence caused his
injury on the job that subsequently interfered with her relational inter-
ests in the marriage.57 The court overruled a district court decision

46 See id.
47 See id.
48 5 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 423 (Sir Travers
49 See Montgomery, 101 N.W.2d at 229–30.
50 Montgomery, 101 N.W.2d at 230; Comment, supra note 41, at 915.
51 Hitaffer, 183 F.2d at 813; Montgomery, 101 N.W.2d at 230.
52 See Hitaffer, 183 F.2d at 814; Martin, supra note 41, at 1469.
53 See Martin, supra note 41, at 1469.
54 Hitaffer, 183 F.2d at 813.
55 See, e.g., Rodriguez, 525 P.2d at 675. The right of wives to sue for loss of consortium
was first established in a federal case in 1950. Hitaffer, 183 F.2d at 813. But many states
barred wives from suing well into the 1970s. Rodriguez, 525 P.2d at 675.
56 183 F.2d at 813.
57 Id. at 812.
dismissing the suit for failure to state a cause of action.\textsuperscript{58} The court found that aside from outmoded justifications behind most of the early common law decisions, it was “unable to disclose any substantial rationale on which we would be willing to predicate a denial of a wife’s action for loss of consortium.”\textsuperscript{59}

Consortium thus came to encompass far more than the bare material services that originally provided the grounds for recovery.\textsuperscript{60} The court reasoned that in addition to material services, love, affection, and sexual relations combined to form the basis for recovery in loss of consortium actions.\textsuperscript{61} Under this idea of consortium, a wife has interests in the relationship that are identical to those of her husband, and thus, should be allowed to recover on an equal basis.\textsuperscript{62} The ability of wives to recover for loss of consortium heralded the abandonment of the anachronistic idea that the action provided recovery for pecuniary losses in the form of services.\textsuperscript{63} This shift established that loss of consortium actions protect the relational interests in the marriage.\textsuperscript{64}

**B. Extension of Loss of Consortium Claims to Children and Other Family Members**

The recognition that consortium claims protect relational interests led several courts to extend recovery beyond spouses to include others who experience damage to their relationship when a person suffers a tortious injury.\textsuperscript{65} Siblings, grandparents, and children of the direct victim have been allowed to recover in several states.\textsuperscript{66} Although the reasoning underlying the expansion of the group of plaintiffs who can bring loss of consortium actions could logically transcend familial relationships, the majority of courts have continued to draw clear lines based on blood and legal relationships.\textsuperscript{67}

\textsuperscript{58} Id.
\textsuperscript{59} Id. at 813.
\textsuperscript{60} See id. at 814.
\textsuperscript{61} Hitaffer, 183 F.2d at 814.
\textsuperscript{62} See id. at 818.
\textsuperscript{63} See id. at 814.
\textsuperscript{64} See id.
\textsuperscript{65} See, e.g., Ferriter, 413 N.E.2d at 696 (allowing child recovery); Fernandez, 968 P.2d at 782 (allowing grandparent recovery); Leavy v. Yates, 142 N.Y.S.2d 874, 876 (Sup. Ct. 1955) (allowing sibling recovery).
\textsuperscript{66} See, e.g., Ferriter, 413 N.E.2d at 696 (allowing child recovery); Fernandez, 968 P.2d at 782 (allowing grandparent recovery); Leavy, 142 N.Y.S.2d at 876 (allowing sibling recovery).
\textsuperscript{67} See Fernandez, 968 P.2d at 784.
Several states have recognized that children can recover for loss of consortium when a parent suffers negligently caused injuries. When the Supreme Judicial Court of Massachusetts decided *Ferriter v. Daniel O’Connell’s & Sons, Inc.* in 1980, it became one of the first state courts to recognize that children have an independent claim for damage to their relationship when their parent sustains an injury. Michael Ferriter was injured during the course of his employment when a two hundred pound load of lumber fell from a crane, striking him in the neck and head. He was paralyzed from the neck down. His wife and two children sued for loss of consortium. The court reasoned that although the common law was silent on the issue of whether children had a protected right in the relationship with their parent, parents have long been entitled to recover when a tortfeasor injures their child, thus depriving them of the love and companionship that characterizes the parent-child relationship. Because children generally enjoy the same rights to protection and to legal redress as other members of society, it was anomalous to hold that a parent could recover for damage to the parent-child relationship but a child could not. Therefore, the court held that Mr. Ferriter’s children should be allowed to state a claim for loss of consortium if they could show dependence on the injured parent.

Later cases in Massachusetts further refined the doctrine of loss of parental consortium and addressed what made a child “dependent” for purposes of the action. Dependence was not a matter of economic reliance. Instead, it related to the child’s reliance on the injured parent for management of their physical needs and for emotional guidance and support. Thus, in extending the ability to sue for loss of consortium, courts explicitly relied on the emotional harm suffered by the child as a result of damage to the relationship with the

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69 413 N.E.2d at 696.
70 Id. at 691.
71 Id.
72 Id.
73 See *Ferriter*, 413 N.E.2d at 696.
74 Id.
75 Id.
77 Barbosa, 537 N.E.2d at 104.
78 Id.
parent, not on antiquated concepts of loss of services or support legally due to the child.\textsuperscript{79}

Siblings and grandparents of an injured child have also been allowed to recover for damage to their relational interests.\textsuperscript{80} In 1955, the New York Superior Court held in \textit{Leavy v. Yates} that the twin of an eight-year-old boy killed in a car accident could sue for loss of his brother’s “companionship, affection, and guidance.”\textsuperscript{81} Additionally, some states have held that grandparents can recover for loss of consortium when their grandchildren suffer negligently caused injuries.\textsuperscript{82} For example, in 1998, in \textit{Fernandez v. Walgreen Hastings Co.}, the New Mexico Supreme Court allowed recovery for a grandmother who served as a caretaker for her twenty-two-month-old granddaughter.\textsuperscript{83} She watched helplessly as the child died from suffocation due to a wrongly filled prescription.\textsuperscript{84} In allowing the grandmother to recover for loss of consortium, the court stated that her damages flowed from the close and unique emotional relationship with the victim, not her family title.\textsuperscript{85} The extension of recovery to siblings and grandparents further indicates that the nature of the relationship shared by the victim and person seeking recovery, not the legal relationship of the parties or duties owed, is the key factor in determining who can recover.\textsuperscript{86}

The recognition in earlier cases that loss of consortium should focus on damage to intangible interests like love, affection, and guidance made this expansion in who can recover possible.\textsuperscript{87} Nonetheless, it appears that courts were motivated both by the nature of the injured

\textsuperscript{79} See id.
\textsuperscript{80} See, e.g., \textit{In re Estate of Finley}, 601 N.E.2d 699, 702 (Ill. 1992) (allowing sibling recovery); Louisville & N.R. Co. v. Whisenant, 58 So. 2d 908, 912 (Miss. 1952) (allowing sibling recovery); \textit{Fernandez}, 968 P.2d at 782–83 (allowing grandparent recovery); \textit{Leavy}, 142 N.Y.S.2d at 876 (allowing sibling recovery).
\textsuperscript{81} 142 N.Y.S.2d at 876.
\textsuperscript{82} \textit{Fernandez}, 968 P.2d at 784; Anderson v. United States, 731 F. Supp. 391, 400 (D.N.D. 1990) (applying North Dakota law).
\textsuperscript{83} 968 P.2d at 784.
\textsuperscript{84} Id. at 776–77.
\textsuperscript{85} Id. at 782–83. This very progressive view as to the nature of the relationship providing the basis for a claim for loss of consortium has recently led New Mexico to become the first state to recognize loss of consortium for nonmarried cohabitants who share a significant relational interest. See discussion of \textit{Lozoya v. Sanchez}, 66 P.3d 948, 955 (N.M. 2003), infra notes 184–211 and accompanying text.
\textsuperscript{86} See \textit{Ferriter}, 413 N.E.2d at 696; \textit{Fernandez}, 968 P.2d at 782–83.
\textsuperscript{87} See \textit{Hitaffer}, 183 F.2d at 814.
relationship and by administrability concerns.\footnote{See, e.g., Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (stating that the need for a bright-line rule was an important factor in the decision of the case).} Courts may also have accepted expansion of recovery to this class of potential plaintiffs because bright-line delineations based on blood and familial ties brought some clarity and limitations to an otherwise open-ended test.\footnote{See id.}

C. Loss of Consortium Claims for Nonmarried Cohabitants

Despite recent expansion of the class of persons able to recover for loss of consortium, courts have held with near unanimity that nonmarried cohabitational partners cannot recover for loss of consortium, regardless of the nature and significance of their relationship to the victim.\footnote{See, e.g., Trombley v. Starr-Wood Cardiac Group, PC, 3 P.3d 916, 923 (Alaska 2000); Elden, 758 P.2d at 586; Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987).} In denying recovery, courts often rely on a similar set of policy rationales, such as the interest in promoting marriage, the difficulty in administering a more open-ended rule, and the need to limit the consequences for negligent acts.\footnote{See, e.g., Trombley, 3 P.3d at 923; Elden, 758 P.2d at 586; Feliciano, 514 N.E.2d at 1096.} These rationales can be explored through discussion of an influential case, \textit{Elden v. Sheldon}, decided by the California State Supreme Court in 1988.\footnote{758 P.2d at 582.}

In \textit{Elden}, the court decided that nonmarried cohabitants could not sue for loss of consortium.\footnote{Id. at 588–90 (overruling Butcher v. Superior Court, 188 Cal. Rptr. 503, 503 (Cal. Ct. App. 1983)).} Richard Elden was riding in a vehicle driven by his long-time cohabitational partner, Linda Eberling, when they were struck by a car negligently driven by Robert Sheldon.\footnote{Id. at 582.} Elden sustained serious personal injuries as a result of the accident.\footnote{Id.} Eberling was thrown from the car and died a few hours later from her injuries.\footnote{Elden, 758 P.2d 582–83.} Elden brought suit against Sheldon for his own injuries.\footnote{Id.} He also brought actions for loss of consortium and for negligent infliction of emotional distress to a bystander stemming from witnessing the fatal injuries to his cohabitational partner.\footnote{Id. at 582–83.} He alleged in his complaint that he shared a stable and significant relationship with Eberling that was equivalent to the marital relationship.\footnote{Id. at 583.
relationship was deemed sufficient to allow for recovery under a standard developed in a lower court case, *Butcher v. Superior Court of Orange County*.100

The California Supreme Court overturned the *Butcher* standard and rejected Elden’s claims for bystander negligent infliction of emotional distress and loss of consortium.101 Although each claim has distinct elements, the court reasoned that both actions rose or fell based on whether Elden shared a sufficient relationship with Eberling to recover, and largely compressed the reasoning for both actions into a single discussion.102 The court reasoned that although the two shared an emotional relationship, Elden’s legal relationship to Eberling was insufficient to provide a basis for recovery.103

Like courts in other states, the *Elden* court was concerned about the foreseeability of harm to a person who was not the spouse of the direct victim.104 Although conceding that rates of nonmarital cohabitation had indeed increased, and thus the possibility of a tort victim having a cohabitational partner was not entirely unexpected, the court held that a legal relationship between the two was required to meet the judicial definition of foreseeability.105 Similarly, most other states have held that cohabitational partners could not recover for loss of consortium in large part because the relationships and resulting emotional harm were not foreseeable to the tortfeasor.106 These courts reason that marriage, as opposed to cohabitation, is the oldest and most dominant pattern of establishing a familial relationship in our society.107 Because the majority of people marry, a tortfeasor who injures an individual should also foresee collateral injuries to that person’s spouse, children, and other family members.108 In contrast, cohabitation is a comparatively new social development.109 The court reasoned that because cohabitation occurs less frequently than traditional mar-

100 188 Cal. Rptr. at 505. In *Butcher*, Paul and Cindy Forte had lived together for nearly twelve years. *Id.* They financially supported one another, filed joint tax returns, and had joint savings and checking accounts. *Id.* They also had two children together. *Id.* The court held that their relationship was both stable and significant, and thus could provide grounds for recovery for loss of consortium. *Id.* at 512.

101 *Elden*, 758 P.2d at 590.

102 See *id.* at 589–90.

103 See *id.* at 588–90.

104 See, e.g., *Trombley*, 3 P.3d at 923; *Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

105 See *Elden*, 758 P.2d at 588.

106 See, e.g., *Trombley*, 3 P.3d at 923; *Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

107 *Trombley*, 3 P.3d at 923; *Feliciano*, 514 N.E.2d at 1096.

108 See *Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

109 See *Elden*, 758 P.2d at 585–86.
riage, it is often harder to generalize about the emotional investment in these relationships than in marital relationships. Consequently, traditional tort principles requiring that tortfeasors only be held liable for the foreseeable consequences of their wrongful or negligent acts require that cohabitational partners be denied recovery.

In addition to concerns about the foreseeability of emotional injury, the *Elden* court relied on several other policy justifications to prevent cohabitational partners from recovering for negligent infliction of emotional distress and loss of consortium. Primarily, the court expressed concern about the impact on marriage, the administrability of a rule allowing recovery, and the need to limit liability for tortfeasors.

First, the court noted that the state has a strong interest in the marriage relationship and can seek to promote it. It observed that marriage is a socially productive institution. Marriage promotes individual happiness and well-being, and also acts as an important building block of society, promoting stability and beneficial values. The law affords it special protection for this reason. Furthermore, marriage is a combination of legally defined benefits and accompanying burdens. Only if a couple is willing to undertake the responsibilities entailed in the marital relationship should they be entitled to the corresponding benefits. The court viewed the extension of the right to recover for negligent infliction of emotional distress and loss of consortium as undermining the important state interest in marriage. If people are able to obtain benefits similar to those accompanying marriage without actually being married, the court reasoned that they would be less likely to enter into marriage, thus weakening this very important social institution.

Second, the court discussed the difficulties inherent in administering a law that allowed recovery for nonmarried cohabitational

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110 See id. at 587–88.
111 *Id.* at 588.
112 *Id.* at 586–87.
113 *Id.* at 586–88.
114 *Elden*, 758 P.2d at 587.
115 *Id.* at 586.
116 *Id.*
117 *Id.*
118 *Id.* at 587.
119 See *Elden*, 758 P.2d at 587.
120 See *id.* at 586.
121 See *id.*
partners.\textsuperscript{122} Courts would need to inquire into the emotional attachment of the victim and the plaintiff in order to determine if it was sufficiently parallel to a marital or other familial relationship to allow recovery.\textsuperscript{123} Because such an inquiry would necessarily focus largely on intangible factors, it would be difficult to develop a uniform, objective standard that could be easily applied.\textsuperscript{124} The court rejected the “stable and significant” standard articulated in the \textit{Butcher} case.\textsuperscript{125} In addition, in order to determine who was entitled to recover, courts would have to undertake an inquiry into matters like sexual fidelity, economic ties, and emotional commitment.\textsuperscript{126} The court saw this as an undesirable intrusion into private life.\textsuperscript{127}

Finally, in denying the plaintiff’s claims, the \textit{Elden} court discussed the need to limit potential liability for tortfeasors by not opening up a new, large class of potential plaintiffs.\textsuperscript{128} The court acknowledged that compelling reasons exist for extending recovery, thereby giving legal recognition to close emotional relationships.\textsuperscript{129} Such relationships may provide as much support and affection as familial relationships, and emotional harm resulting from injury to one’s partner can be great.\textsuperscript{130} Nevertheless, the court was motivated by the desire for a bright-line limitation.\textsuperscript{131} Failure to enact such a limitation would result in an unreasonable extension of the scope of liability, which would have a negative impact on society as a whole.\textsuperscript{132}

\textsuperscript{122} \textit{Id.} at 587.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Elden}, 758 P.2d at 587.
\textsuperscript{125} \textit{See id.} at 589.
\textsuperscript{126} \textit{Id.} at 587.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.} at 588.
\textsuperscript{129} \textit{Elden}, 758 P.2d at 588.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{See id.} The holding in \textit{Elden} took some by surprise, given the court’s previous holding in \textit{Marvin v. Marvin}. \textit{See Elden}, 758 P.2d at 590 (citing Marvin v. Marvin, 557 P.2d 106, 106 (Cal. 1976)). In \textit{Marvin}, the court held that a nonmarried cohabitational partner was entitled to payment in compensation for her services during the relationship and ongoing support after its termination in order to restart her career. 557 P.2d at 106. The court recognized contractual and equitable remedies available to cohabitational partners. \textit{Id.} at 110. The court distinguished \textit{Elden} from \textit{Marvin} on the grounds that although parties are free to bind themselves contractually and forgo marriage, such arrangements cannot be binding on third parties and do not necessitate the same level of recognition by the state. \textit{See Elden}, 758 P.2d at 590.
Elden represents the approach taken by the majority of state courts in denying recovery to nonmarried cohabitational partners.\textsuperscript{133} Most courts that have addressed the issue rely on very similar policy rationales to justify denial of recovery.\textsuperscript{134} Namely, they cite the legitimate state interest in marriage, administrability concerns, and the need to limit the consequences of tortious acts to those plaintiffs who are foreseeable.\textsuperscript{135}

II. Expansion of Tort Rights for Cohabitational Partners

A. A Parallel Tort: Negligent Infliction of Emotional Distress

Nearly all courts have denied recovery to nonmarried cohabitants for loss of consortium, but a growing number of courts have been willing to allow recovery for negligent infliction of emotional distress.\textsuperscript{136} These two tort actions are closely related and are very often brought at the same time.\textsuperscript{137} Although associated with loss of consortium, recovery for negligent infliction of emotional distress is meant to compensate for the emotional shock caused when a person actually witnesses the injury of a loved one, not for the later harm to the relationship.\textsuperscript{138} Despite the differences in what is compensated by each action, recovery in both actions is limited to those who have a close relationship to the direct victim.\textsuperscript{139} Thus, the expansion in recent years of the class of people who can recover for negligent infliction of emotional distress may have important implications for loss of consortium actions.\textsuperscript{140}

In 1993, in Dunphy v. Gregor, the Supreme Court of New Jersey handed down a landmark opinion on the issue of bystander recovery


\textsuperscript{134} See, e.g., Trombley, 3 P.3d at 923; Feliciano, 514 N.E.2d at 1096.

\textsuperscript{135} See, e.g., Trombley, 3 P.3d at 923; Feliciano, 514 N.E.2d at 1096.


\textsuperscript{137} See, e.g., Elden v. Sheldon, 758 P.2d 582, 582–83 (Cal. 1988). In fact, the court in Elden v. Sheldon relied on the same policy arguments to reject both the loss of consortium and negligent infliction of emotional distress claims. Id. at 589. The court dealt with loss of consortium separately only in a brief section of the opinion, seemingly for the purpose of expressly overruling Butcher v. Superior Court of Orange County. Id. at 589–90.

\textsuperscript{138} See Dunphy, 642 A.2d at 374; Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 777 (N.M. 1998).

\textsuperscript{139} See Dunphy, 642 A.2d at 374; Fernandez, 968 P.2d at 777.

\textsuperscript{140} See Elden, 758 P.2d at 589–90.
for negligent infliction of emotional distress. The court allowed a woman to recover for emotional distress she suffered from witnessing the death of her fiancé and cohabitational partner. Eileen Dunphy and Michael Burwell became engaged in 1988 and began living together. In September of 1990, the couple responded to a call for help from a friend who was stranded on a highway with a flat tire. As Burwell changed the tire on the side of the road, he was struck by a car negligently driven by the defendant, James Gregor, and was dragged along the road for nearly 250 feet. Dunphy, who had been standing just a few feet away, rushed to his side and attempted to wipe away the blood and dirt from his wounds. He died in the hospital a few hours later. Dunphy filed a claim for emotional distress she suffered as a result of seeing Burwell fatally injured.

The court noted that the requirements for a bystander to recover for negligently inflicted emotional distress are the following: (1) death or serious injury of another caused by the defendant’s negligence, (2) marital or intimate familial relationship between the plaintiff and the injured person, and (3) observation of the death or injury at the scene of the accident. The relationship of the bystander to the direct victim is important because the presence of deep emotional ties, which usually accompany marital and family relationships, ensures that the distress suffered by the bystander is genuine and worthy of compensation. But the court also emphasized that it is the presence of these emotional bonds that provides the basis for recovery, and that the legal status of the relationship should not be used as a proxy.

The court found that intimate, familial-type relationships can exist outside traditional legal definitions of the family. To determine

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141 642 A.2d at 380.
142 Id.
143 Id. at 373.
144 Id.
145 Id.
146 Dunphy, 642 A.2d at 373.
147 Id.
148 Id. Dunphy did not file a claim for loss of consortium, so the court never reached the issue of whether her relationship with Burwell would also have satisfied the requirements for that cause of action. Id.
149 Dunphy, 642 A.2d at 373. These requirements are derived from the California case of Dillon v. Legg and are widely followed in many states. See 441 P.2d 912, 914 (Cal. 1968); see, e.g., Clohessey v. Bachelor, 675 A.2d 852, 855 (Conn. 1996); Zell v. Meek, 665 So. 2d 1048, 1051 (Fla. 1995); Roberts v. Bruns, 387 N.W.2d 140, 143 (Iowa 1986).
150 See Dunphy, 642 A.2d at 374.
151 See id. at 377.
152 See id.
whether such a relationship exists, the court considered a variety of factors, including its duration, degree of mutual dependence, extent of common contributions to life together, and the extent and quality of shared experiences.\textsuperscript{153} The court reasoned that people who enjoy this type of stable, enduring, familial-type relationship have a cognizable interest in the relationship and in the continued emotional support that they derive from it.\textsuperscript{154} Thus, they should be entitled to recover when they witness an accident resulting in serious bodily harm or death of their cohabitational partner.\textsuperscript{155} Based on the facts of the case, the court found that Eileen Dunphy shared this sort of close, familial-type relationship with her fiancé, Michael Burwell, and suffered severe emotional injuries upon witnessing his injury and subsequent death.\textsuperscript{156} Therefore, it ruled that she should be allowed to state a claim for emotional distress even though she was not considered a legal family member.\textsuperscript{157}

The New Jersey court criticized the California State Supreme Court’s decision in \textit{Elden v. Sheldon}, and rejected the creation of a bright-line rule.\textsuperscript{158} The court stated that the creation of a rigid rule that allows all married couples to recover, but denies recovery to all nonmarried couples regardless of the significance of their relationship and depth of emotional injuries, is a perversion of the principles of tort law.\textsuperscript{159} The court stated that tort law instead requires analysis of the duty owed, which turns on the particular facts of the situation at hand.\textsuperscript{160} Further, the court reasoned that application of bright-line rules is administratively simple, but can lead to grossly unfair results.\textsuperscript{161} The court noted that “to foreclose such a plaintiff from making a claim based upon emotional harm because her relationship with the injured person does not carry a particular label is to work a potential injustice, not only in this case but also in too many others.”\textsuperscript{162}

The New Jersey court similarly rejected several other rationales often given to deny cohabitants the right to recover for negligent

\begin{footnotesize}
\textsuperscript{153} Id. at 378.  
\textsuperscript{154} Id. at 380.  
\textsuperscript{155} Dunphy, 642 A.2d at 380.  
\textsuperscript{156} See id. at 377.  
\textsuperscript{157} Id. at 380.  
\textsuperscript{158} Id. at 376.  
\textsuperscript{159} See id.  
\textsuperscript{160} See Dunphy, 642 A.2d at 376.  
\textsuperscript{161} See id. at 378.  
\textsuperscript{162} Id.  
\end{footnotesize}
infliction of emotional distress to a bystander.\textsuperscript{163} First, the court reasoned that the increasing incidence of nonmarital cohabitation makes it foreseeable that victims of negligent acts could share close emotional ties with someone to whom they are not married.\textsuperscript{164} Such a person could suffer severe emotional injuries as a result of witnessing the injury to a partner.\textsuperscript{165} Liability for negligent acts depends on whether a duty is owed, and duty, in turn, depends on foreseeability.\textsuperscript{166} Because a cohabitational relationship is foreseeable, a negligent actor owes a duty to the cohabitational partner and can be liable to such a partner for emotional injuries.\textsuperscript{167}

Second, the \textit{Dunphy} court noted that courts are adequately equipped to make determinations about the nature and quality of the relationship between cohabitational partners.\textsuperscript{168} Similar determinations are required in loss of consortium cases, in which the court must assess the quality of a marital relationship in order to award appropriate damages.\textsuperscript{169} Courts have proven that they are capable of such an inquiry and can assess “the realities, not simply the legalities, of relationships to assure that resulting emotional injury is genuine and deserving of compensation.”\textsuperscript{170}

Third, the court reasoned that an examination of the nature of the relationship would not require undue probing into the private details of the relationship.\textsuperscript{171} Details of the relationship would need to be examined even if the couple were married, and such examination is no more problematic in the context of cohabitation than in the marital context.\textsuperscript{172} Finally, the court rejected the notion that extending recovery to include cohabitational partners would somehow hurt the state’s goal of promoting marriage.\textsuperscript{173} Realistically, the decision to marry is not motivated by the ability to have standing to bring a tort action, and the extension of this cause of action would not otherwise change the preferential status granted to marriage under the law.\textsuperscript{174}

\begin{footnotes}
\item[163] \textit{Id.} at 379.
\item[164] See \textit{id.} at 377.
\item[165] \textit{Dunphy}, 642 A.2d at 377.
\item[166] \textit{Id.} at 376.
\item[167] \textit{Id.} at 380.
\item[168] \textit{Id.} at 378.
\item[169] \textit{Id.}
\item[170] \textit{Dunphy}, 642 A.2d at 378.
\item[171] \textit{Id.} at 378–79.
\item[172] \textit{Id.} at 379.
\item[173] \textit{Id.}
\item[174] \textit{Id.}
\end{footnotes}
In 1995, in *Richmond v. Shatford*, a Massachusetts Superior Court went even further than the New Jersey court’s holding in *Dunphy*, finding that a woman who lived with, but who was not engaged to, her cohabitational partner could recover for the emotional distress she suffered upon witnessing the injury to her partner when he was hit by a car.\(^{175}\) Like the *Dunphy* court, the judge in *Richmond* reasoned that recovery for a bystander bringing a claim of negligent infliction of emotional distress is premised on a flexible understanding of reasonable foreseeability, not a bright-line no marriage/no recovery rule.\(^{176}\) If a person has a close familial or similar relationship with the direct victim, it is reasonably foreseeable that the person will suffer emotional injury as a result of the negligent act.\(^{177}\) The foreseeability of such an injury is only reinforced by the growing number of couples who engage in cohabitational relationships in modern society.\(^{178}\)

Although courts have been nearly unanimous in denying cohabitational partners the right to recover for loss of consortium, several courts have allowed such recovery for negligent infliction of emotional distress, even in the face of similar policy concerns.\(^{179}\) Both actions often arise from the same underlying facts, and both limit recovery to those who share a close familial-like relationship to the direct victim.\(^{180}\) Therefore, the expansion of those who can bring negligent infliction of emotional distress claims may indicate that it is also time to revisit the question of who can recover in loss of consortium actions.\(^{181}\)

**B. Extension of Loss of Consortium Actions to Nonmarried Cohabitants**

Although courts have by and large refused to recognize the right of nonmarried cohabitants to recover for loss of consortium, changes in the understanding of consortium, the increasing recognition of cohabitational relationships in parallel areas of tort law, and evolving social attitudes about such relationships indicate that courts may need

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175 *Richmond*, 1995 WL 1146885, at *3.
176 *Id.*
177 See *Id.*
178 See *Id.*
179 See *id.* at *4.* One scholar suggests that this somewhat logically inconsistent result is an attempt by courts to create a compromise position that would allow recovery to a partner who does indeed suffer emotional harm, but that would not give the relationship the same full legal recognition as marriage. Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 *Notre Dame L. Rev.* 1435, 1461 (2001)
180 See *Dunphy*, 642 A.2d at 373–74; *Fernandez*, 968 P.2d at 777.
181 See *Dunphy*, 642 A.2d at 373–74; *Fernandez*, 968 P.2d at 777.
to reconsider earlier decisions that denied recovery. Recently, one state supreme court has allowed a nonmarried cohabitational partner to recover for loss of consortium.

In 2003, in *Lozoya v. Sanchez*, the New Mexico Supreme Court became the first state to recognize the right of a nonmarried cohabitant to recover for loss of consortium. *Lozoya* brought a claim for loss of consortium stemming from the injuries sustained by Ubaldo Lozoya in a car accident caused by the defendant’s negligence. Lozoya and Ubaldo had been together for over thirty years and had three children together. They lived in a home they had jointly purchased, and filed joint tax returns, but were never formally married.

Sarah Lozoya testified that after the accident Ubaldo became depressed and could not socialize or engage in other normal activities with her because he was plagued by constant pain. The defendant moved to dismiss the claim on the grounds that Sarah could not state a claim for loss of consortium because she and Ubaldo were not married.

The court held that claims for loss of consortium are not limited to married spouses. The court noted that New Mexico was one of the last states to recognize a claim for spousal loss of consortium. Unlike the evolution of this cause of action in other states, recognition in New Mexico was always premised on a determination of whether it was foreseeable that a particular plaintiff would suffer injury as a result of the actions of the tortfeasor, not on the legal relationship between the direct victim and the plaintiff. If it is foreseeable that the person would sustain emotional injury due to the damage to their relationship, a duty of care is owed to that person. Therefore, a nonmarried cohabitant may recover for loss of consor-

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183 *Lozoya*, 66 P.3d at 951.
184 Id.
185 Id.
186 Id. at 952.
187 Id. The court noted that although the plaintiff’s relationship appears to satisfy the traditional requirements of common law marriage, such unions are not recognized in New Mexico. *Id.* at 956.
188 *Lozoya*, 66 P.3d at 952.
189 Id. at 950–51.
190 Id. at 951.
191 Id. at 953.
192 Id. at 955.
193 See *Lozoya*, 66 P.3d at 953–54.
tium due to the injuries sustained by the other partner from the negligent act. Given recent societal trends indicating the increasing prevalence of cohabitation, it is foreseeable that a victim of a negligent act could have a significant relationship with another person that does not fit within the traditional understanding of family.

The New Mexico Supreme Court held that although a legal relationship between the plaintiff and direct victim indicates that close emotional ties are likely to be present, it does not form an independent basis for recovery. The court reasoned that action for loss of consortium protects an individual’s relational interests, not an individual’s legal interests. The basis for compensation is the harm to the plaintiff’s ability to share the same kind of emotional connection with the person injured, rather than harm to other status-based rights inherent in marriage. The court warned that using legal status as a substitute for an evaluation of the relationship between the parties leads to imprecise results. It may include people who remain married despite leading totally separate lives, yet exclude people who have a significant relationship with another person and who suffer just as much as one experienced in a committed marital relationship. A better approach focuses on determining whether the emotional harm is foreseeable, thus creating a duty of care. The court also cited approvingly the New Jersey court’s rejection of a bright-line rule in Dunphy.

Like the Dunphy court, the New Mexico Supreme Court reasoned that judges and juries have frequently been called upon to assess the quality of relationships in order to determine compensation. No particular difficulties are created by making this determination in the context of loss of consortium claims. Further, the court rejected arguments that extending recovery for loss of consortium to nonmarried cohabitants will lead to a manipulation of the scheme of benefits and burdens that accompany marriage, or will otherwise damage the

194 Id. at 951.
195 See id. at 957.
196 Id. at 954.
197 Id. at 955.
198 See Lozoya, 66 P.3d at 955.
199 Id.
200 Id.
201 See id. at 953.
202 Id. at 955 (citing Dunphy, 642 A.2d at 374).
203 See Lozoya, 66 P.3d at 955.
204 Id.
state interest in promoting marriage. Sarah and Ubaldo had a long and caring relationship and showed a willingness to accept all of the essential responsibilities of marriage. The court also again emphasized that consortium does not depend on legal status. Ability to bring the cause of action is not a benefit of marriage, but instead a method for compensating those who have suffered significant harm to their relational interests.

After establishing that nonmarried partners can recover for loss of consortium, the court looked to the standard developed by the Dunphy court for measuring close familial relationships in the related action of negligent infliction of emotional distress. In determining whether a sufficient relationship exists, the New Mexico Supreme Court considered the duration of the relationship, exclusivity, degree of mutual dependence, cohabitation, and the extent and nature of shared experiences. Further, the court reasoned that although New Mexico does not give legal effect to common law marriage, a presumption in favor of recovery for loss of consortium arises when a couple can prove the traditional elements of common law marriage, that is, mutual consent or agreement to marry followed by mutual assumption of accompanying obligations.

III. Denying Nonmarried Cohabitants the Right to Recover for Loss of Consortium Is out of Step with Societal Changes and Judicial Precedent in Other Areas of Tort Law

Many state courts last addressed the issue of cohabitant recovery for loss of consortium nearly two decades ago. At that time, they

205 See id. at 956.
206 See id. at 952.
207 Id. at 956.
208 Lozoya, 66 P.3d at 956.
209 Id. at 955.
210 Id. at 957.
211 Id. at 956.
212 See, e.g., Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988). The Supreme Judicial Court of Massachusetts recently revisited the issue of recovery for cohabitational partners and held that such claims should still be barred. Fitzsimmons v. Mini Coach of Boston, Inc., 799 N.E.2d 1256, 1257 (Mass. 2003). This decision, however, was handed down after the landmark decision of Goodridge v. Department of Public Health, which extended the right to marry to homosexual couples. 798 N.E.2d 941, 948 (Mass. 2003). Given this vast expansion in the right to marry, the court reasoned it is logical to deny rights to those who make an active choice not to marry. See Fitzsimmons, 799 N.E.2d at 1257.
faced a very different legal and social backdrop.\textsuperscript{213} The social trend
toward cohabitation was somewhat less marked and was of uncertain
durability.\textsuperscript{214} Similarly, the legal trends surrounding the cause of ac-
tion were unclear.\textsuperscript{215} First, although the majority of courts had already
adopted the view that loss of consortium protected relational interests
rather than property-based rights, they had yet to consider how far
those interests extended.\textsuperscript{216} Most had yet to decide whether others
like children, siblings, and grandparents could recover.\textsuperscript{217} Second,
courts had not yet allowed nonmarried cohabitants to recover for
negligent infliction of emotional distress.\textsuperscript{218} This closely related tort
also examines the nature of the relationship between the plaintiff and
the direct victim and has important implications for loss of consor-
tium actions.\textsuperscript{219} Third, in denying recovery to nonmarried cohabi-
tants, many courts expressed a variety of policy-based concerns.\textsuperscript{220}
Judges feared that allowing recovery would somehow damage the in-
stitution of marriage or open the floodgates to a wave of plaintiffs
who shared only an insignificant relationship to the direct victim.\textsuperscript{221}
Time and the expansion of recovery to nonmarried persons in other
torts has proven that most of these concerns are unwarranted or can
be addressed through the creation of proper standards.\textsuperscript{222}

A. Changing Social Attitudes Favor Recognition of Nonmarital Cohabitation
Relationships in Tort Law

A review of demographic statistics and sociological literature
confirms that nonmarital cohabitation has increased substantially in
the past twenty years.\textsuperscript{223} Although already a pronounced trend by the
1980s, it was still a fairly novel and somewhat controversial living ar-
rangement.\textsuperscript{224} There was a substantial increase in the number of

\textsuperscript{213} See supra notes 19, 65–89 and accompanying text.
\textsuperscript{214} See supra note 19 and accompanying text.
\textsuperscript{215} See supra notes 65, 76–79, 82–86 and accompanying text.
\textsuperscript{216} See supra notes 56–64 and accompanying text.
\textsuperscript{217} See supra notes 65–89 and accompanying text.
\textsuperscript{219} See id. at 374.
\textsuperscript{220} See Elden, 758 P.2d at 586–88; Feliciano v. Rosemar Silver Co., 514 N.E. 1095, 1096
(Mass. 1987).
\textsuperscript{221} See Elden, 758 P.2d at 586–88; Feliciano, 514 N.E. at 1096.
\textsuperscript{222} See Dunphy, 642 A.2d at 376; Lozoya v. Sanchez, 66 P.3d 948, 955–56 (N.M. 2003).
\textsuperscript{223} See supra note 19 and accompanying text.
\textsuperscript{224} See supra note 19 and accompanying text. In fact, the government only started esti-
mating the number of cohabitating couples for vital statistic purposes in 1977, and even
women who had at some point engaged in a cohabitational relationship between 1987—around the time when many of the cohabitant loss of consortium cases were decided—and 1995.225 Now nearly half of all adult American women between the ages of nineteen and forty-four cohabitate at some point during their lives.226 Such a large increase in the number of people who participate in these relationships indicates that this once novel way of structuring relationships has become a normal, accepted practice.227

In addition to the sheer statistical growth of cohabitation, there has also been a change in social attitudes.228 Once regarded as “living in sin,” cohabitation is now considered by many to be a normal phase in relationships.229 It is often a late stage of courtship or similarly serious phase for couples who do not ultimately marry.230 These demographic and social changes represent a major shift in our society.231 To a large extent, courts are struggling to bring legal doctrines in line with social reality.232 Attempts to graft outmoded common law notions about relationships on to this new social reality have led to unfair and inconsistent results.233 It is time that courts take notice of these fundamental changes by fashioning flexible standards that recognize the

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225 See Bumpass & Lu, supra note 5, at 32. Between 1987 and 1995, the number of women who had participated in a cohabitational relationship jumped from 33% to 45%. Id.
226 Id.
227 See id.
228 See Bumpass & Sweet, supra note 5, at 615–16.
229 See Bumpass et al., supra note 5, at 920.
230 See id. One very high profile example of the growing social acceptance of nonmarital cohabitation can be seen in the relationship between Prince Charles and Camilla Parker Bowles. Prince Pays for Camilla’s Bedroom to Be Furnished, TIMES (London), June 27, 2003, http://www.timesonline.co.uk/article/0,,2-726982,00.html (last visited Mar. 15, 2005). When the Prince moved into his new residence at Clarence House, it was announced that Camilla Parker Bowles would also take a room in the Royal Household. Id. This announcement, which at one time would have provoked a firestorm of controversy, created only a minor stir among the British public. Id.
231 See Goldstein & Kenney, supra note 3, at 507.
232 See, e.g., Elden, 758 P.2d at 586–88 (noting the increased prevalence of nonmarital cohabitation, but declining to extend recovery); Richmond v. Shatford, No. CA 941249, 1995 WL 1146885, at *3 (Mass. Super. Ct. Aug. 8, 1995) (holding that a nonmarital cohabitational relationship satisfied the familial or other relationship requirement needed to ground recovery); Lozoya, 66 P.3d at 957 (holding that the widespread acceptance of nonmarital cohabitation meant that emotional injuries to a cohabitational partner are not remote and unexpected).
233 See Elden, 758 P.2d at 585–86.
important role of cohabitational relationships in the lives of millions of Americans.\textsuperscript{234}

B. Changing Understandings of the Interests Protected by Loss of Consortium Actions and the Expansion of Individuals Allowed to Bring Claims Support Inclusion of Nonmarried Cohabitants as Potential Plaintiffs

In addition to these substantial societal changes, there have been significant legal changes in the doctrine of loss of consortium.\textsuperscript{235} The early common law roots of loss of consortium, grounded in concepts of property law, have been thoroughly discredited.\textsuperscript{236} Recovery is no longer limited to husbands whose pecuniary interest in the services of their wives suffers damage,\textsuperscript{237} nor is recovery predicated merely on status.\textsuperscript{238} In extending recovery to wives, courts expressly stated that recovery instead covered harm to less tangible interests, like love, affection, and companionship.\textsuperscript{239} This bundle of interests has been called “relational interests.”\textsuperscript{240} Once damage to relational interests became the basis for loss of consortium actions, recovery for a broader class of plaintiffs became possible.\textsuperscript{241} Others who shared an important relationship with the direct victim, such as grandparents and children, were gradually allowed to bring this cause of action as well.\textsuperscript{242} Extension of the right to recover to this group of individuals destroyed the argument that recovery was somehow tied to vestigial notions of the rights and status that flowed from traditional English marriage laws.\textsuperscript{243} The emotional harm suffered, not the legal duties between the plaintiff and the victim, provides the basis for recovery.\textsuperscript{244}

Based on this understanding of loss of consortium, nonmarried cohabitants should also be allowed to bring claims.\textsuperscript{245} Increasing numbers of people choose to organize their intimate relations in this

\textsuperscript{234} See Dunphy, 642 A.2d at 378.
\textsuperscript{235} See supra notes 52–55, 65–89 and accompanying text.
\textsuperscript{236} See Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950).
\textsuperscript{237} Id.
\textsuperscript{238} Lozoya, 66 P.3d at 954; Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 782 (N.M. 1998).
\textsuperscript{239} Lozoya, 66 P.3d at 955; Martin, supra note 41, at 1469.
\textsuperscript{240} See supra notes 68–75, 80–86 and accompanying text.
\textsuperscript{241} See supra notes 68–75, 80–86 and accompanying text.
\textsuperscript{242} See supra notes 68–75, 80–86 and accompanying text.
\textsuperscript{243} See Hitaffer, 183 F.2d at 813; Fernandez, 968 P.2d at 782–83.
\textsuperscript{244} Lozoya, 66 P.3d at 955.
\textsuperscript{245} See id. at 951.
Cohabitants often have deep emotional ties to one another and frequently plan to marry in the future or have made a similar long-term commitment. Because an action for loss of consortium is meant to compensate people when they suffer losses in important relationships due to tortious injury, it seems reasonable that cohabitants whose legitimate expectations are overturned by the negligent acts of a third party should be able to seek compensation for these losses.

Courts should not be deterred by the fact that nonmarital cohabitation is not a legally recognized status. Loss of consortium is no longer based in marital status and related to the duties that flow from that status. In cases like Fernandez v. Walgreens Hastings Co., the court focuses its analysis on the emotional ties between grandmother and the deceased granddaughter, rather than analyzing the legal relationship between them. Courts should follow the trend created by cases that extend loss of consortium actions to siblings, grandparents, and children, and examine the emotional ties between the plaintiff and direct victim.

C. Expansion of Recovery in a Closely Parallel Tort Indicates That Nonmarried Cohabitants Should Also Be Able to Bring Claims for Loss of Consortium

The significant doctrinal changes in the related tort of negligent infliction of emotional distress also signal that recovery for loss of consortium should be extended to nonmarried cohabitants. In the period since most courts denied the loss of consortium claims, several landmark cases have extended recovery in this closely associated action to nonmarried cohabitants. These cases bear directly on the issue of whether nonmarried cohabitants should be able to sue for loss of consortium.
The tort of negligent infliction of emotional distress is analogous to loss of consortium. Both allow a person other than the direct victim to recover for the emotional distress suffered due to the tortious act. Both limit recovery to those who have a close relationship with the direct victim. The main difference between the two actions is that the plaintiff actually needs to witness the tortious act to recover for negligent infliction of emotional distress. This limitation on recovery, coupled with a relationship requirement, may make courts more willing to extend recovery in this tort because it provides an additional restriction on what some perceive as an open-ended test. But this is an unpersuasive distinction between the two actions. The requirement that a plaintiff actually witness the tortious injury is meant to limit the type of emotional harm that can ground recovery for emotional distress. It is a distinct requirement, not a further check on the relationship requirement. Its purpose is to ensure that the plaintiff genuinely suffered the type of intense emotional shock that is compensable under the cause of action, rather than just the normal anguish one experiences when a loved one is injured. It is not meant, however, to limit the types of relationships that are legally sufficient to allow recovery. Therefore, the relationship requirement in negligent infliction of emotional distress claims is a useful parallel for determining who can recover for loss of consortium.

Several courts have found that nonmarried cohabitants often share close emotional relationships similar to those in more traditional family settings. These relationships can be significant enough for the partner of the direct victim to suffer lasting emotional harm when the other is injured. If this injury is foreseeable, principles of tort

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256 See supra notes 137–139 and accompanying text.
257 See Dunphy, 642 A.2d at 374; Fernandez, 968 P.2d at 777.
258 See Dunphy, 642 A.2d at 374; Fernandez, 968 P.2d at 777.
260 See supra notes 67–74, 80–86 and accompanying text.
261 See Lozoya, 66 P.3d at 953; Fernandez, 968 P.2d at 782.
262 Fernandez, 968 P.2d at 777.
263 See id.
264 See id.
265 See id.
266 Lozoya, 66 P.3d at 955 (citing Dunphy, 642 A.2d at 955).
267 See Richmond, 1995 WL 1146885, at *3; Dunphy, 642 A.2d at 380.
268 Dunphy, 642 A.2d at 380. Courts have developed useful and well-reasoned multifactor tests to examine the significance of the relationship between nonmarried cohabitants. Id. at 378. For example, New Jersey looks to the degree of mutual dependence, extent of common contributions to a joint life together, duration of relationship, extent and quality
law require that the plaintiff be compensated for emotional harm.\textsuperscript{269} The comparison between recovery in negligent infliction of emotional distress and loss of consortium is instructive because both look to the relationship between the plaintiff and the direct victim in order to determine whether the emotional injury is severe enough to permit recovery.\textsuperscript{270} It is logically inconsistent to hold that the cohabitational relationship is significant enough to meet the requirements of the first tort, but not the requirements of the closely related second tort.\textsuperscript{271}

D. Policy Concerns Advanced by Courts to Justify Denial of Recovery Are Surmountable

In denying recovery for loss of consortium to cohabitational partners, most courts seem to be less moved by the principles and logic advanced in earlier cases, and instead, focus more on the potential fallout of allowing recovery.\textsuperscript{272} These policy-based rationales fall into two broad categories.\textsuperscript{273} The first relates to how the courts approach the concept of foreseeability and the need to limit consequences of negligent acts by creating bright-line categorizations.\textsuperscript{274} The second category of concerns centers on more prudential concerns such as the potential harm to the institution of marriage, institutional competency of the courts, and fear of opening the floodgates to a tidal wave of new tort cases.\textsuperscript{275}

1. Foreseeability and Bright-Line Categorizations

The most frequent concern expressed by courts in loss of consortium claims is that emotional harm to a cohabitant is somehow less foreseeable than to a spouse of the direct victim.\textsuperscript{276} Therefore, they reason that it is unfair to hold a tortfeasor liable for these damages because there can be no duty to an unforeseeable plaintiff.\textsuperscript{277} First, it is important to note that the doctrine of foreseeability in actions like

\begin{itemize}
\item \textsuperscript{269} See supra notes 158–162 and accompanying text.
\item \textsuperscript{270} See supra notes 137–139 and accompanying text.
\item \textsuperscript{271} See Regan, supra note 179, at 1461.
\item \textsuperscript{272} See Elden, 758 P.2d at 586.
\item \textsuperscript{273} See supra notes 104–111, 114–131 and accompanying text.
\item \textsuperscript{274} See supra notes 104–111 and accompanying text.
\item \textsuperscript{275} See supra notes 114–131 and accompanying text.
\item \textsuperscript{276} See Elden, 758 P.2d at 586.
\item \textsuperscript{277} See id.
\end{itemize}
this is something of a legal fiction.\textsuperscript{278} For example, a tortfeasor who hits a woman crossing the street probably has no idea if she has a spouse, a long-term partner, or children.\textsuperscript{279} Even if the actor did have this kind of knowledge, it is unlikely that it would influence the actor’s behavior.\textsuperscript{280} The actor would not try harder to swerve knowing that the woman is married and that there might be a higher damage award.\textsuperscript{281} Second, demographic statistics show that the rate of non-marital cohabitation has significantly increased since many of the most influential loss of consortium cases were decided.\textsuperscript{282} Although courts might have doubted the prevalence of these relationships twenty years ago (and thus the foreseeability of cohabitants as potential plaintiffs), this is no longer the case.\textsuperscript{283}

Another key policy justification advanced by courts in denying recovery to nonmarried cohabitants is the need to circumscribe potential liability for tortfeasors by creating bright-line categorizations.\textsuperscript{284} Courts have held that the flexible standards suggested by plaintiffs to assess the significance of a given relationship fail to provide sufficient certainty.\textsuperscript{285} But as pointed out by the New Jersey State Supreme Court in \textit{Dunphy v. Gregor}, tort law has another overriding goal to provide compensation to victims of tortious acts.\textsuperscript{286} When courts resort to bright-line categorizations, they abandon their mandate to sort out which plaintiffs have real, cognizable injuries.\textsuperscript{287} In the context of loss of consortium claims, bright-line categories can prevent those who suffer serious harm from receiving compensation.\textsuperscript{288} Moreover, they provide a windfall to the tortfeasor who would otherwise have to pay for the harm caused.\textsuperscript{289}

\begin{footnotes}
\item[278] See \textit{Dunphy}, 642 A.2d at 376; \textit{Lozoya}, 66 P.3d at 953.
\item[279] See \textit{Elden}, 758 P.2d at 582.
\item[280] See \textit{id}.
\item[281] See \textit{id}.
\item[282] See supra note 19 and accompanying text.
\item[283] See supra note 19 and accompanying text.
\item[284] See, e.g., \textit{Elden}, 758 P.2d at 588; \textit{Feliciano}, 514 N.E.2d at 1096.
\item[285] See, e.g., \textit{Elden}, 758 P.2d at 588; \textit{Feliciano}, 514 N.E.2d at 1096.
\item[286] See 642 A.2d. at 378.
\item[287] See \textit{id}.
\item[288] See \textit{id}.
\item[289] See \textit{id}.
\end{footnotes}
2. Prudential Concerns About Expansion of Recovery to Nonmarried Cohabitational Partners

Although concerns about foreseeability and the need to limit the liability of a tortfeasor dominate the reasoning of most opinions denying recovery, several other important policy considerations are consistently advanced. First, courts fear that recognition of claims by nonmarried cohabitants will harm the state interest in promoting marriage. Second, they express a fear that judges will not be able to fashion and juries will not be able to apply a reliable test to measure the significance of the relationship. This in turn could spawn a flood of suits brought by people who are only peripherally connected to the direct victim. Finally, some courts have expressed the concern that determinations of the significance of a relationship would involve inquiries into highly private matters that should remain free from judicial scrutiny.

Contrary to these concerns, allowing nonmarried cohabitants to recover will not harm the state’s interest in promoting marriage. It is highly unlikely that a couple will make such a momentous decision such as whether or not to marry based on the increased ability to recover in tort suits. Couples will be more motivated by issues of love, personality, and long-term compatibility. Also, although some critics claim that extending recovery to nonmarried cohabitants grants them rights without corresponding responsibilities, this is not the case for recovery in loss of consortium actions. Providing compensation for loss of consortium is different than extending other benefits typically attendant to marriage like health insurance coverage and tax deductions. Although those are truly benefits, or extras given to people solely because they choose to marry, damages awarded in a successful loss of consortium action are compensation for an actual injury suffered. Further, the ability to recover cannot be obtained

290 See Elden, 758 P.2d at 586–88; Feliciano, 514 N.E.2d at 1096; supra notes 276–289 and accompanying text.
291 See, e.g., Elden, 758 P.2d at 586–88; Feliciano, 514 N.E.2d at 1096.
292 See id. at 586–88.
293 See id. at 587.
294 See id. at 587.
295 See Lozoya, 66 P.3d at 955.
296 See id.
297 See id.
298 Id. at 956; Regan, supra note 179, at 1460.
299 See Lozoya, 66 P.3d at 956; Regan, supra note 179, at 1460.
300 See Lozoya, 66 P.3d at 956.
simply by marrying.\textsuperscript{301} The injury has already occurred, and subsequent marriage cannot give retroactive standing.\textsuperscript{302}

In addition, determining the significance of a relationship is not beyond the institutional competency of judges or juries.\textsuperscript{303} The tests developed by the Dunphy and Lozoya courts provide useful frameworks on which to draw.\textsuperscript{304} Both tests look to a mix of objective factors, such as the degree of financial dependence, length of relationship, and other less tangible factors that are still within the ability of a jury to determine based on common life experience.\textsuperscript{305} Further, courts have proven that they are capable of making these sorts of inquiries in other contexts.\textsuperscript{306} The court must ask many of the same types of questions when a married person sues for loss of consortium in order to assess the quality of the relationship and the resulting harm to the marital relationship.\textsuperscript{307} Additionally, time has shown that this more flexible approach will not open the floodgates to frivolous suits.\textsuperscript{308} In the ten years since Dunphy, New Jersey courts have not been inundated with cases of individuals attempting to recover for trivial relational interests.\textsuperscript{309} Nor has New Mexico experienced a surge in cases since Lozoya was decided.\textsuperscript{310}

Finally, allowing nonmarried cohabitants to recover for loss of consortium by demonstrating the significance of their relationship and documenting the resulting harm will not represent an unwanted judicial intrusion into highly private matters.\textsuperscript{311} It is important to remem-

\textsuperscript{301} See id.
\textsuperscript{302} See id.
\textsuperscript{303} See id. at 955 (citing Dunphy, 642 A.2d at 378).
\textsuperscript{304} See id. at 957; Dunphy, 642 A.2d at 378.
\textsuperscript{305} See Lozoya, 66 P.3d at 957; Dunphy, 642 A.2d at 378.
\textsuperscript{306} Dunphy, 642 A.2d at 378.
\textsuperscript{307} Id.
\textsuperscript{310} See, e.g., Murphy v. Bitsoih, 320 F. Supp. 2d 1174, 1205 (D.N.M. 2004) (denying recovery to live-in girlfriend of victim because she did not meet the relational test set forth in Lozoya); Fitzjerrell v. City of Gallup ex rel. Gallup Police Dep’t, 79 P.3d 836, 838 (N.M. Ct. App. 2003) (determining whether adult siblings of deceased can recover for loss of consortium). Since Lozoya was decided, only two reported cases have drawn on its reasoning to determine eligibility for loss of consortium recovery. See Murphy, 320 F. Supp. 2d at 1205; Fitzjerrell, 79 P.3d at 838.
\textsuperscript{311} See Dunphy, 642 A.2d at 378.
ber that a plaintiff can choose whether or not to initiate a tort action.\textsuperscript{312} A plaintiff with deep concerns regarding a court’s inquiry into the plaintiff’s private life would simply elect not to sue the tortfeasor.\textsuperscript{313}

**Conclusion**

Nonmarried cohabitants should be allowed to bring loss of consortium claims when their relational interests are damaged by a tortious injury to their partner. Courts have abandoned the original construction of the loss of consortium doctrine which allowed recovery only for pecuniary damage to property-like interests in one’s wife. The class of those allowed to bring claims for loss of consortium has gradually expanded to include wives, siblings, children, and grandparents. This expansion was made possible by the recognition that loss of consortium protects the emotional well-being that people derive from their relationships.

Similarly, nonmarried cohabitants have an interest in the emotional well-being that they derive from family-like relationships. Increasingly, people are turning to this once non-traditional form of organizing their intimate family relationships. Courts should take notice of this changing social reality and fashion fair, appropriate remedies to compensate cohabitants when they suffer harm to their relational interests.

The importance of the emotional ties between cohabitants has been recognized in a closely analogous context, the tort of negligent infliction of emotional distress. Courts have recognized that nonmarried cohabitants can suffer real and lasting emotional harm when they witness the negligent injury of their cohabitational partner. Both loss of consortium and negligent infliction of emotional distress limit recovery to those who have a close family or family-like relationship to the direct victim. Therefore, cases like *Dunphy v. Gregor*, which extend recovery to cohabitants, also provide a useful framework for courts to draw on in extending loss of consortium actions.

Finally, the policy concerns about extending loss of consortium actions raised by many courts are unwarranted. Expanding recovery to cohabitants will not unduly increase the liability of tortfeasors, nor damage the state interest in marriage. Moreover, it will not lead courts into unfamiliar territory in assessing the significance of cohabitational

\textsuperscript{312} See id. at 373. Eileen Dunphy chose not to bring a loss of consortium claim, instead filing only a negligent infliction of emotional distress claim. Id.

\textsuperscript{313} See id.
relationships. Allowing cohabitants to recover for loss of consortium will, however, avoid unjust situations, and allow those who suffer genuine emotional injuries to receive compensation.

Alisha M. Carlile
THE NCAA’S INITIAL ELIGIBILITY REQUIREMENTS AND THE AMERICANS WITH DISABILITIES ACT IN THE POST-PGA TOUR, INC. V. MARTIN ERA: AN ARGUMENT IN FAVOR OF DEFERENCE TO THE NCAA

Abstract: In 1990, Congress enacted the Americans with Disabilities Act (the “ADA”) to eradicate discrimination against individuals with disabilities. In 2001, in PGA Tour, Inc. v. Martin, the U.S. Supreme Court interpreted the ADA to prohibit a professional golf association from denying a golfer with a disability the use of a golf cart during competitions, despite a rule requiring all competitors to walk the course. The Martin decision has sparked questions regarding the application of the ADA, including its application to the initial academic eligibility requirements of the National Collegiate Athletic Association (the “NCAA”). This Note examines the impact of the Martin decision on future ADA claims challenging the validity of the NCAA’s initial eligibility requirements. Specifically, after examining pre-Martin ADA claims against both the NCAA and academic institutions and comparing two courts’ interpretations of Martin, this Note argues that in future cases challenging the NCAA’s initial eligibility requirements, courts should interpret Martin to provide the NCAA as much deference as courts continuously have granted to academic institutions.

Introduction

For many Americans, college athletics conjure images of school pride, “March Madness” tournament pools, and New Year’s Day bowl games.1 Despite these positive images, however, college athletics often are marred by controversy, at the center of which is frequently the National Collegiate Athletic Association (the “NCAA”), the independent

authority that regulates intercollegiate athletics. In fact, the NCAA continuously has faced criticism regarding the academic standards for student-athletes. On the one hand, some critics have argued that colleges and universities take advantage of student-athletes, exploiting them for entertainment without concern for their educations. On the other hand, some have charged that the NCAA’s academic standards discriminate against certain student-athletes with learning disabilities. As a result, the criticism continues, the NCAA bars some student-athletes from attending the college of their choice and, consequently, may preclude them from earning a college degree or participating in intercollegiate sports.

Although much litigation has arisen from this debate, the question of the role of academics in college athletics remains unclear, especially in light of a recent U.S. Supreme Court opinion applying the Americans with Disabilities Act (the “ADA”) to a sport—golf. In 2001, in *PGA Tour, Inc. v. Martin*, the Supreme Court ruled in favor of a professional golfer with a disability, holding that the ADA required the Professional Golf Association (the “PGA”) to allow the plaintiff to use a golf cart in its tournaments, despite a rule requiring all golfers to walk. That decision sparked controversy regarding the extent to which courts should involve themselves in the realm of professional sports. More importantly, however, *Martin* marks one of the most comprehensive treatments of Title III of the ADA. Although *Martin* is

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3 See Weston, *supra* note 2, at 1068–69.

4 Id.

5 Id. at 1123.

6 See id. at 1122–23.


8 532 U.S. at 690.


10 See 532 U.S. at 664–65, 674, 680, 690.
a landmark case in ADA jurisprudence, the extent to which *Martin* will affect future ADA litigation remains unclear.\(^{11}\) Most nebulous, perhaps, is the effect that *Martin* will have on the NCAA—particularly the impact of *Martin* on future ADA cases in which student-athletes with learning disabilities challenge the NCAA’s academic requirements.\(^{12}\)

Even prior to the *Martin* decision, a number of student-athletes with learning disabilities challenged the NCAA in actions involving Title III of the ADA.\(^{13}\) In those cases, the student-athletes alleged that some of the NCAA’s academic standards discriminated against them in violation of Title III by denying them full athletic eligibility.\(^{14}\) Although the courts deciding those cases differed in parts of their analyses, most of the courts agreed that the ADA did not require the NCAA to modify its initial eligibility requirements.\(^{15}\) Since the Supreme Court announced its decision in *Martin*, however, no court has reached the issue of the application of *Martin* to claims involving ADA challenges to the NCAA’s initial eligibility requirements, and thus the extent to which *Martin* will affect such cases remains unclear.\(^{16}\)

This Note argues that in future litigation involving the NCAA’s initial academic eligibility requirements, courts should follow the Title III analysis that the Supreme Court set out in *Martin*.\(^{17}\) In doing so, however, courts should provide the same deference to the NCAA’s professional judgment as to whether a requested modification would fundamentally alter the nature of its privileges and services as they provide to other academic institutions.\(^{18}\) Courts should provide such deference because, unlike the walking rule at issue in *Martin*, the initial eligibility requirements are academic, and not athletic, in nature.\(^{19}\) Therefore, courts should defer to the NCAA’s judgment as to

\(^{11}\) See id.

\(^{12}\) See id.


\(^{14}\) E.g., *Cole*, 120 F. Supp. 2d at 1066; *Tatum*, 992 F. Supp. at 1116; *Ganden*, 1996 WL 680000, at *1, *5.


\(^{16}\) See supra notes 7–15 and accompanying text. A Westlaw search conducted on March 7, 2005, revealed no case law on Title III claims pertaining to the NCAA’s initial eligibility requirements.

\(^{17}\) See 532 U.S. at 688–89.


\(^{19}\) Compare *Martin*, 532 U.S. at 690 (discussing the relevance of the walking rule to the game of golf), with *Doe*, 2003 WL 22097782, at *8 (discussing academic requirements).
whether a requested modification would lower its academic standards in the same way that courts repeatedly have deferred to the judgments of other academic institutions in similar cases.\textsuperscript{20}

Part I of this Note provides background on the ADA.\textsuperscript{21} It first discusses the statute itself and then outlines the Supreme Court’s interpretation of the ADA in \emph{Martin}.\textsuperscript{22} Part II of this Note discusses the NCAA.\textsuperscript{23} In addition to explaining the NCAA’s goals as the regulatory body in charge of intercollegiate athletics, Part II explains the NCAA’s initial eligibility requirements for incoming student-athletes.\textsuperscript{24} Part II also describes Title III claims involving the NCAA’s initial eligibility requirements that courts resolved before the Supreme Court announced the \emph{Martin} decision.\textsuperscript{25} Part III compares two courts’ interpretations of the \emph{Martin} decision.\textsuperscript{26} One case discussed in Part III involves a Title III claim filed against the NCAA resulting from one of its academic requirements.\textsuperscript{27} The other case, which involves a Title III claim filed against a private school, illustrates an application of \emph{Martin} that called for some deference toward the school’s professional judgment.\textsuperscript{28} Part IV outlines additional cases in which courts have deferred to the professional judgment of academic institutions.\textsuperscript{29} Part V provides an analysis of the application of \emph{Martin} to future Title III claims involving the NCAA’s initial eligibility requirements.\textsuperscript{30} It concludes that Title III applies to the NCAA and suggests that in future cases, courts should provide the same deference to the NCAA that they afford to other academic institutions when applying the \emph{Martin} standard to Title III claims.\textsuperscript{31}

\textsuperscript{21} See infra notes 32–84 and accompanying text.
\textsuperscript{22} See infra notes 32–84 and accompanying text.
\textsuperscript{23} See infra notes 85–154 and accompanying text.
\textsuperscript{24} See infra notes 87–129 and accompanying text.
\textsuperscript{25} See infra notes 130–154 and accompanying text.
\textsuperscript{26} See infra notes 155–207 and accompanying text.
\textsuperscript{27} See infra notes 163–187 and accompanying text.
\textsuperscript{28} See infra notes 188–207 and accompanying text.
\textsuperscript{29} See infra notes 208–224 and accompanying text.
\textsuperscript{30} See infra notes 225–304 and accompanying text.
\textsuperscript{31} See infra notes 248–304 and accompanying text.
I. The Americans with Disabilities Act: The Statute, the U.S. Supreme Court’s Interpretation of Its Requirements in PGA Tour, Inc. v. Martin, and the Debate Surrounding the Decision

Aimed at eliminating discrimination against individuals with disabilities, the ADA has exerted its influence in many areas of American society, including athletics. In fact, athletes with disabilities at all levels, from interscholastic to professional, have used the ADA to request waivers of athletic rules that would otherwise prevent them from participating in sports. The results of those cases have been mixed, depending mostly on the circumstances of the plaintiffs, the athletic programs, and the nature of the requested waivers. One fact seems clear, however—athletic governing bodies can no longer unreasonably discriminate against athletes with disabilities.

A. Summary of the ADA

In 1990, Congress enacted the ADA to protect individuals with disabilities from discrimination. Having found that individuals with disabilities continually had faced unnecessary discrimination, Congress stated that a purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” To that end, Congress granted individuals with disabilities a private right of action against specified public and private entities that unfairly discriminate against them. Additionally, Congress broadly defined “disability” for the purposes of the ADA as having, having “a record” of having, or “being regarded as


35 See Martin, 532 U.S. at 688–91.


37 Id. § 12101(a)–(b)(1).

38 Id. § 12188 (providing remedies available under 42 U.S.C. § 2000a-3(a)).
having” “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.”

In addition to defining key terms and stating the statute’s purpose, Title I of the ADA prohibits employers from discriminating against qualified employees with disabilities on the basis of their disabilities. Similarly, Title II of the ADA prevents public entities—state and local governments and their agencies—from denying a qualified individual with a disability that entity’s privileges or benefits or otherwise discriminating against that individual because of disability. Titles IV and V of the ADA pertain to telecommunications services and address other miscellaneous provisions.

Title III of the ADA is the section under which most plaintiffs bring claims against athletic governing bodies. Title III prohibits places of public accommodation from discriminating against or providing unequal benefits to individuals with disabilities, including using eligibility requirements that “screen out or tend to screen out” individuals with disabilities. Specifically, Title III states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” Although private clubs and religious organizations are exempt from coverage under Title III, the ADA’s definition of places of public accommodation includes private entities serving as places of public gathering and public recreation, such as parks, schools, and gymnasia.

Title III also requires places of public accommodation to make reasonable modifications to policies or procedures necessary for an

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39 Id. § 12102(2).
40 Id. § 12112. A “qualified individual with a disability” is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Id. § 12111(8).
41 42 U.S.C. §§ 12131–12132. The U.S. Court of Appeals for the Sixth Circuit found Title II unconstitutional in particular circumstances but that decision is not relevant to this Note. See Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 810–11 (6th Cir.), cert. denied, 537 U.S. 812 (2002).
45 Id. § 12182(a).
46 Id. § 12181.
individual with a disability to access the entity’s goods or services, unless
the entity can show that such an accommodation “would fundamentally
alter the nature of such goods, services, facilities, privileges, advantages,
or accommodations.”

Put differently, the plaintiff bears the burden of proving (1) that a requested modification would be necessary for the individual with a disability to access the place of public accommodation’s goods or services and (2) that the requested modification would be reasonable under the circumstances. After the plaintiff has provided prima facie evidence as to those two issues, the entity may assert the affirmative defense that the requested modification would not be reasonable, and therefore not required by Title III, because it would fundamentally alter the nature of its goods or services.

B. The ADA as Applied to Professional Golf: PGA Tour, Inc. v. Martin

In 2001, in PGA Tour, Inc. v. Martin, the U.S. Supreme Court applied the ADA to professional athletics and ruled that the ADA protected a qualified golfer with a disability’s access to professional golf tournaments and that his use of a golf cart would not fundamentally alter the nature of the tournaments despite a rule requiring all golfers to walk the course. At the heart of the case was Casey Martin, a talented golfer suffering from a degenerative circulatory disorder that caused atrophy in his right leg, extreme pain, and a risk of additional injury when he walked. Therefore, because Martin’s disability “‘substantially limit[ed]’” walking, a “‘major life activit[y],’” he qualified as an individual with a disability protected by the ADA. Despite his disability, Martin had an accomplished golf career, winning amateur and collegiate tournaments and earning admission into the PGA’s professional golf tournaments.

The PGA, defendant in the suit, is a nonprofit organization that sponsors professional golf tournaments conducted on annual tours. The PGA holds its tournaments at golf courses that it leases and operates for the duration of the specific events. The “hard card,” the golf

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47 Id. § 12182(b)(2)(A)(ii).
48 See id.
50 532 U.S. at 664, 676–91.
51 Id. at 667–69.
52 Id. at 668 & n.7 (quoting 42 U.S.C § 12102).
53 Id. at 667–68.
54 Id. at 665.
55 Martin, 532 U.S. at 665.
rules that govern PGA tours, requires golfers to walk the courses during most tournaments.\textsuperscript{56} Although Martin requested that the PGA waive that rule for him, the PGA refused, and thus Martin filed suit under Title III of the ADA, seeking a waiver of the PGA’s walking rule.\textsuperscript{57}

In response to Martin’s complaint, the district court granted him a preliminary injunction that allowed him to use a golf cart for certain competitions.\textsuperscript{58} The U.S. Court of Appeals for the Ninth Circuit affirmed, finding that the golf courses were places of public accommodation and that providing Martin with the use of a cart would not fundamentally alter the nature of the tours, but rather would simply provide him access to a competition that his disability would otherwise have prevented him from entering.\textsuperscript{59}

Following the Ninth Circuit’s decision, the Supreme Court granted certiorari in part to resolve a circuit split involving the application of Title III to professional golf.\textsuperscript{60} Specifically, just one day after the Ninth Circuit ruled in Martin’s favor in 2000, in \textit{Olinger v. United States Golf Ass’n}, the U.S. Court of Appeals for the Seventh Circuit denied a golfer with a disability’s request for a waiver of a professional golf association’s walking rule.\textsuperscript{61} In \textit{Olinger}, the court assumed, without deciding, that Title III applied to the U.S. Golf Association but denied the plaintiff’s modification request because it would fundamentally alter the nature of the competition by removing stamina as a quality to be tested in the tournament.\textsuperscript{62}

The Supreme Court resolved the split first by holding that Title III applied to the PGA.\textsuperscript{63} The Court noted that the PGA’s tours occurred on golf courses—places of public accommodation specifically mentioned in Title III—and that the PGA leased and operated the golf courses during its competitions.\textsuperscript{64} Therefore, the Court held that Title III prohibited the PGA as an operator of places of public ac-

\textsuperscript{56} Id. at 666–67. Golfers are permitted to use golf carts during qualifying rounds and on the Senior PGA Tour, which is limited to players fifty years old or older, though most of the competitors prefer to walk. \textit{Id.} at 667.
\textsuperscript{57} Id. at 669.
\textsuperscript{58} Id. at 672.
\textsuperscript{59} Id. at 672–73.
\textsuperscript{60} \textit{Martin}, 532 U.S. at 674.
\textsuperscript{61} \textit{Olinger v. United States Golf Ass’n}, 205 F.3d 1001, 1007 (7th Cir. 2000); \textit{see Martin}, 532 U.S. at 674.
\textsuperscript{62} 205 F.3d at 1005–07.
\textsuperscript{63} \textit{Martin}, 532 U.S. at 676–77.
\textsuperscript{64} Id.
commodation from discriminating against an individual with a disability in the full enjoyment of its facilities and privileges.\textsuperscript{65}

Having found that Title III applied to the PGA, the Court next ruled that the PGA discriminated against Martin in a manner prohibited by Title III by not providing him with a reasonable and necessary modification—that is, by disallowing him to ride in a golf cart.\textsuperscript{66} The Court explained that Title III requires an individual inquiry into the circumstances of the case to determine whether the requested modification would be necessary and reasonable under the circumstances without constituting a fundamental alteration.\textsuperscript{67} The PGA did not contest that Martin’s use of a golf cart would constitute a reasonable modification necessary for him to participate in its tournaments.\textsuperscript{68} Rather, the PGA raised the affirmative defense that Title III did not require the requested modification to the walking rule because it would fundamentally alter the nature of the competition.\textsuperscript{69}

To analyze the PGA’s fundamental alteration defense, the Court announced a two-pronged test.\textsuperscript{70} The Court reasoned that the requested modification could constitute a fundamental alteration in two ways.\textsuperscript{71} First, the modification could alter an aspect of the game so essential that even if the modification applied to all participants, the result would be unacceptable.\textsuperscript{72} Second, a modification to a rule, even one peripheral to the game, could fundamentally alter a competition by providing to the golfer with a disability a competitive advantage

\textsuperscript{65} Id. Responding to the PGA’s argument that Title III did not apply to its tours because professional golfers were not members of the class of clients and customers that Title III protects, but rather more closely resembled the class of employees that Title I protects, the Court held that Title III applied to the PGA because it offered at least two “privileges” to the public—playing in and watching its competitions. \textit{Id.} at 679–80. The Court thus reasoned that competitors in the PGA’s tournaments were as much “clients or customers” of the PGA as spectators and thus protected by Title III because members of the public may enter the tournaments through open qualifying rounds and a qualifying tournament, admission to which required only letters of recommendation and a fee. \textit{See id.}

\textsuperscript{66} \textit{Id.} at 682–91.

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} Martin, 532 U.S. at 682.

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.} at 682–83. If Martin’s affliction simply made walking difficult or painful, using a golf cart would be a reasonable, but possibly unnecessary, accommodation. \textit{See id.} at 682. Although the parties resolved that question by not contesting the reasonableness or necessity of the golf cart, that illustration shows that courts must conduct a factual inquiry into the nature of the disability, and presumably, the nature of the requested modification. \textit{See id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.}
over the other competitors.73 Applying the facts of the Martin case to that test, the Court concluded that Martin’s use of a cart would not fundamentally alter PGA tournaments in either of those ways, and thus would not be an unreasonable modification.74

To reach that conclusion, the Court first held that the walking rule was peripheral to the rules of golf, explaining that walking was not such a fundamental aspect of golf that allowing Martin to ride in a cart would be unacceptable.75 The Court reviewed various rules of golf—both modern and historic—and ultimately found that walking was not an indispensable feature of golf.76 Specifically, the Court noted that the historic rules of golf did not mention a walking requirement, even after the advent of golf carts, and that the PGA’s own rules permitted competitors in the PGA Senior Tour to ride in carts during PGA-sponsored competitions.77

Second, the Court rejected the PGA’s argument that because its tournaments represented the highest level of competitive golf in which most competitors were essentially of equal skill level, any advantage that one player received would provide that player with a competitive advantage.78 Rather, the Court responded that guaranteeing equal conditions for all competitors would be impossible and that walking the course produced such a low level of fatigue that it had little impact on those conditions.79 Most importantly, the Court stressed the specific facts related to Martin’s situation.80 Because of his disability, the Court reasoned, even with the cart, Martin endured more fatigue as a result of his disorder than the able-bodied competitors did walking.81 Therefore, permitting Martin to ride in a cart would not provide him with a competitive advantage.82 Rather, the Court held that that modification simply would remove the barrier to his competing in the PGA that his disability had created, precisely the outcome that the ADA envisioned.83 Having found, therefore, that

73 Martin, 532 U.S. at 682–83. This Note refers to these two alternative ways of finding a fundamental alteration as a single two-prong test, the “two-pronged fundamental alteration test.” See id.
74 Id. at 683.
75 Id. at 683, 689.
76 Id. at 683–86, 689.
77 Id. at 683–86.
79 Id. at 687.
80 See id. at 688–90.
81 Id. at 690.
82 See id.
83 Martin, 532 U.S. at 688–90.
Martin’s use of a golf cart would not fundamentally alter the game of golf, the Supreme Court concluded that the ADA required the PGA to allow Martin to use a golf cart in its competitions.84

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ITS ACADEMIC REQUIREMENTS, AND LITIGATION ARISING FROM THE REQUIREMENTS

The NCAA is the most prominent sports governing body that promulgates both athletic and academic requirements for student-athletes.85 It has been subject to much ADA litigation in the past, and it likely will face additional Title III claims in light of the Supreme Court’s decision in PGA Tour, Inc. v. Martin.86

A. Background on the NCAA

The NCAA is a voluntary association composed of approximately 1200 colleges and universities divided among three divisions for the purpose of administering intercollegiate athletics.87 The NCAA’s main duties include establishing and enforcing rules that govern intercollegiate athletics and overseeing programs aimed at serving its purposes and goals.88 The primary goal of the NCAA is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”89 To that end, the NCAA strives to balance encouraging intercollegiate athletic competition and ensuring that student-athletes receive high-quality college educations.90 Thus, the NCAA requires that student-athletes

84 Id. at 674, 691.
88 Nat’l Collegiate Athletic Ass’n, supra note 85.
89 Id.
90 Id.
both maintain amateur status and remain in good academic standing at the member schools in which they are enrolled.91

The NCAA additionally requires that incoming student-athletes meet specific academic requirements to be eligible to participate in NCAA-sponsored sports.92 Originally, the NCAA prohibited its member institutions from providing athletic scholarships to those student-athletes that the schools predicted—based on high school grade point average (the “GPA”) or standardized test scores—would not achieve a minimum 1.6 GPA during their freshman years in college.93 After several highly publicized cases of member-institution abuse of that standard, however, the NCAA implemented Proposition 48.94 Proposition 48 stiffened the eligibility requirements to include a minimum high school GPA in core courses in conjunction with minimum standardized test scores.95 Although the NCAA subsequently has amended the specific requirements, since implementing Proposition 48, the NCAA has continued to employ initial eligibility requirements consisting of a minimum high school GPA, a minimum number of core courses, and a minimum standardized test score.96

1. Initial Eligibility Requirements

The initial eligibility requirements aid the NCAA in determining whether an incoming student-athlete will be able to succeed academically in college while handling the demands of participating in college athletics.97 The NCAA Initial Eligibility Clearinghouse (“Clearinghouse”), with the approval of the Executive Committee, certifies whether student-athletes have met their initial eligibility requirements.98 The initial eligibility requirements include high school

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91 Nat’l Collegiate Athletic Ass’n, 2003–2004 NCAA Division I Manual 125 (2003), available at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf. While participating in a member school’s athletic program, a student-athlete must be enrolled in a full-time program aimed at attaining a baccalaureate degree and must be in good academic standing while taking at least twelve semester or quarter hours of study to be eligible to compete in NCAA events. Id. at 130.


93 Id. at 148.

94 Id.

95 Id.

96 Nat’l Collegiate Athletic Ass’n, supra note 91, at 127; Baker & Connaughton, supra note 92, at 148–50.


98 Nat’l Collegiate Athletic Ass’n, supra note 91, at 138.
graduation, a minimum GPA in thirteen core courses, and a minimum standardized test score on either the American College Testing Assessment (the “ACT”) or the Scholastic Aptitude Test (the “SAT”).

The core courses cover various subjects and must be taught at or above a school’s regular academic level. Remedial and special education classes thus do not qualify as core courses, though the NCAA may exempt student-athletes with learning disabilities from this requirement. The Initial Eligibility Index, a sliding scale that pairs standardized test scores with GPAs, establishes the minimum GPA and test scores. The higher the GPA in core courses, the lower the minimum standardized test requirement and vice versa.

Depending on an incoming student-athlete’s level of completion of the initial eligibility requirements, the NCAA grants the following three statuses: qualifier, partial-qualifier, and non-qualifier. The highest status of eligibility is that of qualifier. Student-athletes who meet the requirements of qualifier status are eligible for athletic-based financial aid and may practice and compete during their first year in college. A partial-qualifier may receive athletic-based financial aid and may practice with the college team, but may not participate in NCAA competitions during their first year. Non-qualifiers are not eligible to receive athletic financial aid and may not practice or compete during their first year. Furthermore, neither non-qualifiers nor partial-qualifiers may participate in more than three seasons of any sport, unless by the beginning of their fifth year (fourth season), they have received baccalaureate degrees, or for stu-
dent-athletes with learning disabilities, they have completed eighty percent of the work required for their designated degree programs.\footnote{Id.}

2. Modifications of the Initial Eligibility Requirements for Student-Athletes with Disabilities

Although all student-athletes must meet the same initial eligibility requirements, the NCAA may provide some accommodations to student-athletes with learning disabilities.\footnote{Nat’l Collegiate Athletic Ass’n, Frequently Asked Questions on Students with Disabilities, at http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/disabilities (last updated Feb. 25, 2004).} To be eligible for such accommodations, student-athletes must present some proof of the disability.\footnote{Id.} Students who have done so may then use courses for students with disabilities that the Clearinghouse has designated as core courses, use approved core courses that the student-athlete has completed before enrolling in college (including courses the student takes the summer after high school graduation), and use SAT and ACT test scores earned during a nonstandard administration to satisfy the initial eligibility requirements.\footnote{Id.}

The NCAA’s Academics/Eligibility/Compliance Cabinet determines whether the courses a student-athlete with a learning disability takes qualify as core courses on the basis of confirmation forms issued to the student-athlete’s high school.\footnote{Id.} Specifically, courses that appear to be taught below the regular academic level may count as core courses for students with disabilities if the student-athlete’s high school principal submits a letter stating that the courses in question are substantially similar to Clearinghouse-approved core courses, both “qualitatively and quantitatively.”\footnote{Id.}

If, despite those accommodations, the student-athlete does not meet qualifier status, the NCAA may grant an initial eligibility requirement waiver.\footnote{See id. at 147.} The NCAA Subcommittee on Initial Eligibility Waivers considers waiver requests and may grant a waiver based on a student-athlete’s overall academic record.\footnote{Id.} To make that determination, the NCAA may consider such factors as the extent to which the

\footnote{Id.}
\footnote{Nat’l Collegiate Athletic Ass’n, supra note 91, at 145.}
\footnote{Id.}
\footnote{Id. at 147.}
\footnote{Id.}
student’s disability contributed to the failure to meet the eligibility requirements, the student’s individualized education plan, the student’s overall academic record and standardized test performance, accommodations for the disability that were available and used by the student, and any other factor to help assess the student’s preparedness to succeed in college.\textsuperscript{117} Based on that review, the Subcommittee may provide an initial eligibility requirement waiver granting the student-athlete partial-qualifier or qualifier status.\textsuperscript{118}

3. Consent Decree Involving the Initial Eligibility Requirements and the Foundation of the NCAA’s Policy Modifications for Student-Athletes with Learning Disabilities

The NCAA’s initial eligibility requirement modifications for student-athletes with learning disabilities stem in part from a consent decree with the U.S. Department of Justice (the “DOJ”).\textsuperscript{119} In response to several individuals’ complaints that the NCAA’s initial eligibility requirements violated Title III, the DOJ investigated the allegations.\textsuperscript{120} The NCAA engaged in good faith negotiations with the DOJ to remedy the alleged violations, and in May 1998, without admitting any ADA violations or agreeing that it was subject to Title III, the NCAA entered into a consent decree with the DOJ.\textsuperscript{121} Although the consent decree self-terminated in May 2003, the NCAA’s current policies regarding initial eligibility requirement modifications for student-athletes with learning disabilities continue to reflect the decree’s terms.\textsuperscript{122}

During the negotiation process with the DOJ, the NCAA revised some of its policies for student-athletes with learning disabilities.\textsuperscript{123} Specifically, the NCAA agreed to accept course work completed after high school graduation—but before college enrollment—to count towards core course credit, and it revised its policy to allow students to initiate the waiver request process themselves.\textsuperscript{124}

\textsuperscript{117} Nat’l Collegiate Athletic Ass’n, supra note 110.
\textsuperscript{118} See Nat’l Collegiate Athletic Ass’n, supra note 91, at 147.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.; see, e.g., Nat’l Collegiate Athletic Ass’n, supra note 91, at 145.
\textsuperscript{123} Consent Decree, supra note 119.
\textsuperscript{124} Id. Previously, member institutions had to initiate the waiver process on behalf of the student-athlete. Id.
The consent decree also required the NCAA to implement additional changes. First, the NCAA agreed to propose to its committees changes to its bylaws so that a designation of “special education” or “remedial” in a course title would not automatically disqualify that course from being a core course. Second, the NCAA agreed to propose to its committees that student-athletes with learning disabilities, who are unable to meet the initial eligibility requirements, be able to earn an additional year of athletic eligibility under certain conditions. Third, the NCAA agreed that its committees responsible for hearing initial eligibility requirement waiver requests for Divisions I and II would be composed of experts in the field of learning disabilities. Fourth, the NCAA agreed to employ an ADA liaison, to publish its revised standards, and to report its progress to ensure continued compliance with the ADA.

B. Pre-Martin Title III Cases Involving the NCAA’s Initial Eligibility Requirements

In addition to the complaints that led to the consent decree, several student-athletes who did not attain qualifier status sued the NCAA under Title III of the ADA. The plaintiffs alleged that the initial eligibility requirements discriminated against student-athletes with learning disabilities because of their disabilities, and thus they requested injunctions allowing them to participate in intercollegiate athletics. Although the courts in those cases disagreed somewhat on whether and to what extent an initial eligibility requirement waiver would fundamentally alter the nature of the NCAA’s privileges and services, they generally agreed that Title III applied to the NCAA and that some modifications to the NCAA would constitute fundamental alterations of its program.

125 Id.
126 Id.
127 Id.
128 Consent Decree, supra note 119.
129 Id.
131 See, e.g., Cole, 120 F. Supp. 2d at 1067; Ganden, 1996 WL 680000, at *1, 5.
First, the courts that reached the question whether Title III applied to the NCAA suggested that it could. The courts reasoned that the NCAA operated a place of public accommodation, and thus was subject to Title III because it maintained significant control over its member institutions’ athletic facilities. Specifically, the courts reasoned that the NCAA controlled the facilities not only because the NCAA leased them for tournaments, but also because it regulated the way in which student-athletes could train, controlled ticket and concessions prices and broadcasting rights, and governed which teams could play in each facility.

Second, most of the courts concluded—or at least assumed without deciding—that the ADA does not and should not require the NCAA to abandon its initial eligibility requirements. Rather, the courts granted the NCAA some deference, suggesting that the initial eligibility requirements assisted the NCAA in achieving its goal of fostering student athletics. For example, in 2000, in *Cole v. National Collegiate Athletic Ass’n*, the U.S. District Court for the Northern District of Georgia stated that Title III “does not require an institution to ‘lower or to effect substantial modifications of standards to accommodate a handicapped person.’” Furthermore, the court found that because the initial eligibility requirements were necessary to the

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136 *Cole*, 120 F. Supp. 2d at 1070 (assuming without deciding that Title III did not require the NCAA to abandon its initial eligibility requirements); *Bowers*, 974 F. Supp. at 466–67 (holding that abandonment of the initial eligibility requirements would constitute a fundamental alteration and that waiver process itself constituted a reasonable modification); *Ganden*, 1996 WL 680000, at *16 (holding that requested waiver would fundamentally alter the nature of the NCAA’s programs and services). Other courts did not reach the question of whether the requested modification would constitute a fundamental alteration, but they nonetheless indicated that the modification would have been reasonable. *Tatum*, 992 F. Supp. at 1123 n.5 (stating in a footnote that requiring the NCAA to accept untimed standardized test scores would not fundamentally alter the nature of its programs, though not reaching the question directly because the plaintiff was found not to be disabled); *Butler v. Nat’l Collegiate Athletic Ass’n*, No. C96-1656D, 1996 WL 1058233, at *6 (W.D. Wash. Nov. 8, 1996) (unpublished opinion) (not reaching the question of whether the requested modification would constitute a fundamental alteration, but in conducting preliminary injunction analysis, finding that granting a waiver for the plaintiff would not harm the NCAA).
138 120 F. Supp. 2d at 1070 (quoting Pottgen v. Mo. State High Sch. Activities Ass’n, 40 F.3d 926, 930 (8th Cir. 1994) (quoting Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 398–99 (1979)) (internal quotations omitted)).
accomplishment of the NCAA’s interest of ensuring that student-athletes were prepared to succeed in their academics and did not simply attend college to play sports, granting a waiver to the plaintiff who did not meet the requirements would not constitute a reasonable accommodation under Title III.\textsuperscript{139} The court also suggested that deference to the NCAA Waiver Subcommittee’s decisions would be appropriate and stated that the ADA did not require the NCAA to abandon its academic requirements for any athlete because doing so would not be a reasonable accommodation.\textsuperscript{140}

Similarly, in 1996, the U.S. District Court for the Northern District of Illinois in \textit{Ganden v. National Collegiate Athletic Ass’n}, found that the plaintiff’s requested modification of the initial eligibility requirements would constitute a fundamental alteration.\textsuperscript{141} The court began the fundamental alteration analysis by noting that the eligibility requirements served an important interest for the NCAA, namely ensuring that student-athletes were prepared for the academic aspects of college.\textsuperscript{142} For student-athletes with learning disabilities, the initial eligibility requirements not only served that purpose, but they also ensured through the waiver process that the NCAA provided those student-athletes with individualized consideration, as Title III requires.\textsuperscript{143} The court reasoned that removing the core course requirement for the plaintiff would fundamentally alter the nature of the NCAA requirements by requiring the NCAA to accept courses with little substantive similarity to accepted core classes and by denying the NCAA a mode of determining the student-athlete’s academic potential.\textsuperscript{144} Similarly, lowering the minimum GPA for the plaintiff would fundamentally alter the NCAA’s requirements by removing “the NCAA’s primary objective tool to determine a student’s academic capabilities.”\textsuperscript{145} That, the court held, was not the result that Title III envisioned.\textsuperscript{146} Rather, the court noted that although a situation may ex-

\begin{footnotes}
\item[139] Id.
\item[140] Id. at 1071–72. Indeed, the court noted that “[a]bandoning the eligibility requirements altogether for this or any athlete is unreasonable as a matter of law and is not required by the ADA.” Id. at 1071.
\item[141] See 1996 WL 680000, at *15.
\item[142] Id.
\item[143] Id.
\item[144] Id.
\item[145] Id. at *16.
\item[146] \textit{Ganden}, 1996 WL 680000, at *16.
\end{footnotes}
ist that would warrant the NCAA’s lowering of its GPA requirement, such a modification generally would be unreasonable.\textsuperscript{147}

Additionally, in 1997, in \textit{Bowers v. National Collegiate Athletic Ass’n}, the U.S. District Court for the District of New Jersey denied a student-athlete with a learning disability a preliminary injunction requiring the NCAA to grant him qualifier status because he failed to demonstrate a likelihood of establishing that the NCAA’s initial eligibility requirements discriminated against him in violation of the ADA by screening out student-athletes with learning disabilities.\textsuperscript{148} The court first noted that the NCAA provided accommodations for student-athletes with learning disabilities through the waiver process and by allowing high school principals to demonstrate that special education courses qualitatively and quantitatively provided students with the same knowledge as accepted core courses.\textsuperscript{149} The court then suggested that the plaintiff was attempting to remove the core course requirement instead of simply seeking a modification.\textsuperscript{150} That result would be unreasonable under the ADA, the court reasoned, because the ADA required only that the NCAA modify its requirements, not abandon them altogether.\textsuperscript{151} Furthermore, the court added that the initial eligibility requirements were necessary to accomplish the NCAA’s goals of maintaining intercollegiate athletics as an integral part of the collegiate program and ensuring that student-athletes progressed academically.\textsuperscript{152} The court also noted that the core course requirements allowed the NCAA to evaluate whether student-athletes would be able to handle the demands of both college academics and athletics.\textsuperscript{153} Following that reasoning, the court held that a complete abandonment of the core course requirement would fundamentally alter the nature of the NCAA’s program and that the NCAA’s waiver process constituted a reasonable modification for student-athletes with learning disabilities in satisfaction of the ADA’s requirements.\textsuperscript{154}

\textsuperscript{147} \textit{Id.} The court added, however, that not every waiver of the initial eligibility requirements would fundamentally alter the NCAA’s purpose, and thus the NCAA was not completely insulated from claims that it violated Title III. \textit{See id.} at \#15.

\textsuperscript{148} 974 \textit{F. Supp.} at 467.

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.} at 466.

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 466–67.

\textsuperscript{153} \textit{Bowers}, 974 \textit{F. Supp.} at 466–67.

\textsuperscript{154} \textit{Id.} at 467.
III. APPLICATION OF THE MARTIN STANDARD: TWO DIFFERING APPROACHES

Although the courts that decided Title III cases involving the NCAA’s initial eligibility requirements had begun to develop a pattern for analyzing those claims, it is unclear how courts will decide similar cases in light of the U.S. Supreme Court’s 2001 decision in PGA Tour, Inc. v. Martin. The confusion stems from the fact that the Supreme Court recited two versions of the correct analysis of Title III claims in the Martin decision. In its analysis in Martin, the Supreme Court examined whether the requested modification was reasonable and necessary, and yet would not fundamentally alter the nature of the PGA’s services. The Court then announced the two-pronged fundamental alteration test, which asks whether the modification would alter the nature of the competition to the extent that it would be unacceptable even if provided to all competitors, or whether the modification would provide one competitor with an unfair advantage.

Later in the Martin opinion, however, the Supreme Court restated the analysis for Title III claims. The second version of the analysis requires courts to ask only whether the requested modification is reasonable and necessary and would not constitute a fundamental alteration, but it does not require the two-pronged fundamental alteration test. It is thus unclear whether the Court intended the two-pronged fundamental alteration test to be a required part of Title III analysis in future claims. Furthermore, in applying Martin to subsequent Title III claims, some courts have followed the two-pronged fundamental alteration test, but others have not.

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156 See 532 U.S. at 682–83, 688.
157 Id. at 682.
158 Id. at 682–83.
159 Id. at 688.
160 See id.
161 See Martin, 532 U.S. at 682, 688.
A. Matthews v. National Collegiate Athletic Ass’n: One Court’s Attempt at Applying Martin to the NCAA

In 2001, in Matthews v. National Collegiate Athletic Ass’n, the U.S. District Court for the Eastern District of Washington followed the standards the U.S. Supreme Court set out in Martin, including the two-pronged fundamental alteration test. In Matthews, the court granted, in part, the request of a student-athlete with a learning disability for summary judgment involving a waiver to one of the NCAA’s academic requirements. One of the NCAA’s continuing eligibility requirements, the 75/25 rule, required all NCAA student-athletes to complete seventy-five percent of their annual required credit hours during the regular academic year. Per the NCAA bylaws, however, student-athletes with learning disabilities could request waivers to that rule. Although the NCAA previously had granted the plaintiff waivers to the 75/25 rule, the NCAA declined to grant an additional waiver. Rather, the NCAA declared him academically ineligible, claiming that the student-athlete required the waiver not because of his learning disability, but because of his lack of effort.

To analyze the plaintiff’s claim, the court first decided that the NCAA was subject to Title III of the ADA. Discussing several courts’ Title III analyses, the court in Matthews held that Title III applied to the NCAA based on the NCAA’s large degree of control over students’ access to the arena of college athletics. Furthermore, the court indicated that the ADA generally protected the plaintiff in Matthews because he was disabled under the statute’s definition and because the NCAA’s disqualification of him was a result of his disability.

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164 Id. at 1231. The court dismissed the claim with prejudice as moot because the plaintiff was completing his fourth and final year of eligibility during the pendency of the case. Id. at 1213, 1228.
165 Id. at 1215. Put differently, the 75/25 rule prohibits student-athletes from completing more than twenty-five percent of their required annual credit hours during summer semesters. Id. The NCAA implemented the 75/25 rule in 1992 after some member institutions expressed concern that some student-athletes were taking reduced course loads during the school year and excessively using summer school courses to maintain their academic eligibility. Id.
166 Id.
167 Id. at 1216.
168 Matthews, 179 F. Supp. 2d at 1216.
169 Id. at 1223.
170 Id. at 1219–22 (discussing Martin, Cole, Tatum, Bowers, and Ganden); see supra notes 133–135 and accompanying text.
171 Matthews, 179 F. Supp. 2d at 1224.
Having found Title III of the ADA applicable, the Matthews court next conducted a Title III analysis. 172 The court first required the plaintiff to show the existence of a reasonable modification of a rule that would enable the plaintiff to participate in the specified activity. 173 After the plaintiff met that burden, the court continued, the defendant must then show that the requested modification would fundamentally alter the nature of its program or activity. 174 The court next cited Martin for the proposition that in evaluating what would constitute a reasonable modification, courts should focus on the individual circumstances of the case instead of simply determining whether a blanket waiver of the requirement would constitute a fundamental alteration. 175 Specifically, the Matthews court noted that Martin stated that a rule peripheral to the nature of a service or activity could be waived in certain instances without fundamentally altering the nature of that service or activity. 176 Finally, the court cited Martin’s two-pronged fundamental alteration test—that a modification of certain rules may constitute a fundamental alteration if it would affect an essential aspect of the program such that it would be unacceptable even if applied to all participants or if the modification would provide an unfair advantage to one participant. 177

Applying that standard, the court held that a waiver of the 75/25 rule for the plaintiff would not constitute a fundamental alteration of the NCAA’s programs. 178 First, the court noted that the NCAA previously had granted the plaintiff two academic waivers, including a waiver of the 75/25 rule. 179 The court highlighted the difference between Matthews and cases involving the initial eligibility requirements in which the NCAA had never granted waivers. 180 Second, the court added that the NCAA adopted the 75/25 rule long after it had established its purpose and had begun regulating college athletics. 181 Third, because the plaintiff had exceeded some of the NCAA’s other academic requirements, the court held that a waiver of the 75/25 rule

\[\text{References:}\]

172 Id. at 1224–27.
173 Id. at 1225.
174 Id.
175 Id. (citing Martin, 532 U.S. at 682–83).
176 Matthews, 179 F. Supp. 2d at 1225 (citing Martin, 532 U.S. at 682–83).
177 Id. (citing Martin, 532 U.S. at 682–83).
178 Id. at 1226.
179 Id.
180 Id.
181 Matthews, 179 F. Supp. 2d at 1226.
would not have frustrated the NCAA’s purpose of fostering academic achievement for student-athletes.\footnote{182}

The court used those findings in applying the \textit{Martin} two-pronged fundamental alteration test.\footnote{183} As for the first prong, the court held that although completely abandoning the NCAA’s academic requirements would compromise the NCAA’s purpose, a waiver of the 75/25 rule, even if provided to all athletes, would not alter an essential aspect of the NCAA’s purpose.\footnote{184} The court based its decision on the facts that the NCAA had numerous other bylaws to ensure student-athletes’ academic achievement and that neither football (the plaintiff’s sport) nor college courses of study require students to complete seventy-five percent of their coursework during the regular school year.\footnote{185} Addressing the second prong, the court held that providing the plaintiff with a waiver would not result in him gaining any unfair advantage, but rather would simply permit him to participate in intercollegiate athletics.\footnote{186} Therefore, applying the individualized inquiry standard from \textit{Martin}, the \textit{Matthews} court found that granting the plaintiff a waiver to the 75/25 rule would not fundamentally alter the NCAA’s purpose.\footnote{187}

\section*{B. Doe v. Haverford School: A Differing Approach to Applying Martin}

Although the \textit{Matthews} court followed the two-pronged fundamental alteration test, another court followed the U.S. Supreme Court’s alternate annunciation of the \textit{Martin} standard, and thus did not follow the two-pronged test.\footnote{188} In 2003, the U.S. District Court for the Eastern District of Pennsylvania in \textit{Doe v. Haverford School}, interpreted the Supreme Court’s Title III standard from \textit{Martin} in an ADA case involving a private school.\footnote{189} In \textit{Doe}, a high school student with a learning disability at The Haverford School filed for a preliminary injunction requiring Haverford to modify its academic requirements pursuant to the ADA.\footnote{190} Despite repeated waivers of Haverford’s aca-
demic requirements, the plaintiff, who suffered from sleep disorders, failed to complete the required coursework to advance to the twelfth grade and thus requested additional modifications.\(^{191}\)

To evaluate the Title III claim, the court interpreted the \textit{Martin} standard to require an individualized inquiry into the circumstances of the case and noted that three requirements must be met before a court should obligate an entity to provide the requested modification.\(^{192}\) First, the modification must be reasonable.\(^{193}\) Second, it must be necessary for the individual with a disability.\(^{194}\) Third, the requested modification must not fundamentally alter the nature of the entity’s services.\(^{195}\) The school did not challenge the necessity of the requested modifications; therefore, the only questions before the court were whether the modifications were reasonable and whether they would not fundamentally alter the nature of the school’s services.\(^{196}\)

Regarding reasonableness, the court found that the plaintiff did not demonstrate likely success on the merits.\(^{197}\) The court noted that courts generally deferred to the decisions of academic institutions because those institutions were in the best position to evaluate a request in light of their academic standards.\(^{198}\) Therefore, the court added, as long as a school rationally reached a justifiable conclusion that the modifications would not be reasonable, courts generally should defer to that decision.\(^{199}\) In \textit{Doe}, the court noted that Haverford already had accommodated the plaintiff with a series of modifications and that any rejections of additional modifications reasonably could be justified to preserve the school’s academic standards.\(^{200}\)

Although the court found the requested modifications unreasonable, even if the plaintiff could meet his burden of proving reasonableness, the court added that the requested modifications would

\(^{191}\) Id. at *1–3. The requested modifications included extra time to complete past-due coursework, a requirement that his teachers be available to him during the summer to answer any questions about his unfinished work, and a transcript that would not contain any failing grades for one school year. Id. at *5–6.

\(^{192}\) Id. at *5–6 (citing \textit{Martin}, 532 U.S. at 688).

\(^{193}\) Id. at *5.

\(^{194}\) \textit{Doe}, 2003 WL 22097782, at *5.

\(^{195}\) Id.

\(^{196}\) Id.

\(^{197}\) Id. at *5–8.

\(^{198}\) Id. at *8.


\(^{200}\) Id. at *7.
fundamentally alter the nature of Haverford’s services, and thus would not be required by Title III.\textsuperscript{201} Again, the court deferred to the judgment of the school, noting that schools must consider the feasibility, cost, and possibility of alternative means of accommodating the student in reaching their decisions.\textsuperscript{202} Using that standard, the court validated Haverford’s determination that the requested modifications would fundamentally alter its academic programs.\textsuperscript{203}

Furthermore, the court rejected the plaintiff’s claim that the modifications would not fundamentally alter the nature of Haverford’s services because the school previously had provided similar modifications.\textsuperscript{204} The court rejected the argument not only because of a change in the plaintiff’s circumstances (namely, that he had an increased amount of outstanding work), but also because the statute did not convert prior modifications into required reasonable modifications in the future.\textsuperscript{205} That reasoning, the court explained, would provide a disincentive for entities covered by Title III to accommodate individuals with disabilities—even in situations not required by the ADA—for fear of having to continue such modifications indefinitely.\textsuperscript{206} As a result, the court concluded, the ADA’s purpose of integrating individuals with disabilities into society would be hindered.\textsuperscript{207}

IV. COURTS’ TRADITIONAL DEFERENCE TO THE JUDGMENT OF ACADEMIC INSTITUTIONS

The U.S. District Court for the Eastern District of Pennsylvania, in 2003 in \textit{Doe v. Haverford School}, was not the first court to defer to the professional judgment of an academic institution regarding the reasonableness of a requested modification.\textsuperscript{208} Rather, numerous other

\textsuperscript{201} Id. at *8.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at *8–9.
\textsuperscript{204} \textit{Doe}, 2003 WL 22097782, at *8–9.
\textsuperscript{205} Id.
\textsuperscript{206} See id.
\textsuperscript{207} See id.
courts, including the U.S. Supreme Court, have held that such deference is warranted.209

For example, in 1979, in Southeastern Community College v. Davis, the U.S. Supreme Court recognized the need to balance the rights of an individual with a disability with the rights of academic institutions to maintain their academic integrity.210 In that case, the defendant school denied the plaintiff, who suffered from a hearing disability, admission into a nursing program because of her disability.211 The U.S. Supreme Court found that the defendant’s refusal to modify its nursing program for the plaintiff was not unlawfully discriminatory.212 Rather, the Court accepted the college’s statements that its purpose was to train nursing professionals and that the plaintiff could not participate in the school’s program without lowering its standards.213 Deferring to the school, the Court thus held that there is “no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.”214

Similarly, in 1999, in Zukle v. Regents of the University of California, the U.S. Court of Appeals for the Ninth Circuit upheld a medical school’s decision to dismiss a student with a disability who had not met several requirements.215 Noting that academic institutions deserve courts’ deference, the Zukle court pointed to precedent that noted that courts have a limited ability to evaluate academic standards.216 In particular, contrasted to the experience of education experts, courts are ill-equipped to evaluate whether a student potentially could meet the standards of a particular school, and the Zukle court, therefore, adopted a standard for reviewing cases questioning the decisions of academic institutions.217 The standard recognizes that the courts are final arbiters of those decisions but notes that courts should grant judicial deference to schools so long as schools’ academic deci-

210 442 U.S. at 412–14. Davis involved a claim arising from § 504 of the Rehabilitation Act. Id. at 400; see 29 U.S.C. § 794 (2000 & West Supp. 2002). Analysis of rights and obligations created by the ADA, however, are almost identical to those set forth in the Rehabilitation Act. Zukle, 166 F.3d at 1045 n.11.
211 Davis, 442 U.S. at 400–02.
212 Id. at 413.
213 Id.
214 Id.
215 166 F.3d at 1043–46, 1047–48. Zukle involved a Title II ADA claim because the defendant was a government agency. Id. at 1045.
216 Id. at 1047.
217 Id. at 1047–48.
sions are sound and not solely implemented for the purpose of denying an education to individuals with disabilities. The court further held that such deference is equally warranted to an academic institution’s determination that a reasonable accommodation would not be available.

Additionally, in 1998, the U.S. Court of Appeals for the First Circuit indicated that deference to the professional judgment of an academic institution that attempted to suspend a student with serious behavioral problems was warranted in *Bercovitch v. Baldwin School, Inc.* In that case, which involved a Title III claim filed against a private school, the court held that the district court had erred in not following the professional judgment of the academic institution as to the reasonableness of the requested modifications. The *Bercovitch* court noted that the record did not indicate any evidence of intentional discrimination or stereotyping on the part of the school. Thus, the court deferred to the school’s decision that the requested modifications involving exemptions to the school’s disciplinary code were unreasonable because they would fundamentally alter the nature of its programs. The court further urged future courts examining similar cases to exercise caution in substituting the judgment of the court for that of a school.

V. Analysis of the Application of *PGA Tour, Inc. v. Martin* to Future Litigation Involving the NCAA’s Initial Eligibility Requirements

The cases involving Title III of the ADA and the NCAA’s initial eligibility requirements decided before the U.S. Supreme Court’s 2001 decision in *PGA Tour, Inc. v. Martin* and the cases applying varied interpretations of the *Martin* standard indicate that courts should be careful in applying the *Martin* standard to the NCAA’s initial eligibility requirements. Because a stringent interpretation of *Martin* may not be

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218 *Id.*
219 *Id.* at 1048.
220 See 133 F.3d at 153.
221 *Id.* (citing Wynne v. Tufts Univ. Sch. of Med., 976 F.3d 791, 795 (1st Cir. 1992)).
222 *Id.*
223 See *id.* at 152–54.
224 *Id.* at 153.
required and because such an interpretation would drastically hinder the NCAA’s ability to achieve its purpose of integrating college athletics and academics, courts should provide the NCAA the same level of deference in evaluating Title III requests for modifications to the NCAA’s initial eligibility requirements that they provide to schools.\textsuperscript{226}

A. Applying Title III of the ADA to the NCAA

The threshold question in determining the extent to which the Martin decision will impact the NCAA’s initial eligibility requirements is whether Title III applies to the NCAA.\textsuperscript{227} Based on prior litigation involving ADA claims against the NCAA, the Martin decision, and the overall purpose of the ADA, the answer appears clear that the NCAA is subject to Title III because the NCAA maintains control over places of public accommodation—athletic facilities.\textsuperscript{228} Assuming Title III does apply to the NCAA, the more poignant question is how to apply the Martin standard to questions involving the NCAA’s initial eligibility requirements.\textsuperscript{229}

B. Differentiating Matthews from Future Initial Eligibility Requirement Cases

In 2001, in Matthews v. National Collegiate Athletic Ass’n, the only case involving an ADA claim against the NCAA’s academic requirements decided since the U.S. Supreme Court released the Martin decision, the U.S. District Court for the Eastern District of Washington did not distinguish between athletic and academic rules, but rather directly applied the Martin standard, including the two-pronged fundamental alteration test.\textsuperscript{230} Using that standard, the court held that a


\textsuperscript{227} See, e.g., 42 U.S.C. § 12101(b) (2000) (including private entities in its liberal definition of public accommodation for the purposes of Title III); Martin, 532 U.S. at 675–80 (holding that Title III applied to the PGA because it operated places of public accommodation); Matthews, 179 F. Supp. 2d at 1219–23 (holding that Title III applies to the NCAA because the NCAA exercises control over the facilities); Tatum v. Nat’l Collegiate Athletic Ass’n, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (holding that Title III applies to the NCAA because the NCAA maintains control over the facilities).


\textsuperscript{229} See Matthews, 179 F. Supp. 2d at 1224–27 (citing Martin, 532 U.S. at 682–83).
waiver to a continuing academic eligibility requirement for a qualified student-athlete with a disability would not constitute a fundamental alteration of the NCAA’s purpose and policies.\textsuperscript{231}

Although the Matthews court applied the Martin standard as the Supreme Court had articulated it, the Martin standard should not apply as directly to other NCAA academic rules, namely, its initial eligibility requirements, because the application of the two-pronged fundamental alteration test in the academic setting hinders the NCAA’s ability to control its academic goals.\textsuperscript{232} For example, assume a qualified student-athlete with a disability brings suit against the NCAA for failure to grant a waiver of its initial eligibility requirements and that the NCAA does not dispute that a waiver would be a reasonable and necessary modification for that student-athlete.\textsuperscript{233} Following the Martin two-pronged standard, once the NCAA asserts that the modification would fundamentally alter its nature, the court next would need to analyze whether such a modification would alter an aspect of the NCAA so fundamental that the modification would be unacceptable even if provided to all student-athletes or would provide the student-athlete with an unfair advantage.\textsuperscript{234}

Regarding the first inquiry of whether a requested modification would be unacceptable even if applied to all student-athletes, the NCAA would always fail because the initial eligibility requirements would be deemed peripheral.\textsuperscript{235} Although the NCAA could differentiate the initial eligibility requirements from the peripheral 75/25 rule because they are the only way to evaluate incoming students (whereas the 75/25 rule is one of many continuing academic standards), given the Court’s narrow reading of what is essential in Martin and the similarities between the initial eligibility requirements and the 75/25 rule that the Matthews court previously had found to be nonessential, that argument most likely would fail for several reasons.\textsuperscript{236}

First, the NCAA regularly has provided student-athletes with initial eligibility requirement waivers.\textsuperscript{237} A waiver of initial eligibility re-

\textsuperscript{231} Id.


\textsuperscript{233} See, e.g., Cole, 120 F. Supp. 2d at 1063–67.

\textsuperscript{234} See 532 U.S. at 682–83.

\textsuperscript{235} See infra notes 236–242 and accompanying text.

\textsuperscript{236} See Martin, 532 U.S. at 689; Matthews, 179 F. Supp. 2d at 1226–27.

quirements would no more constitute a fundamental alteration to the NCAA than a waiver of the walking rule for the PGA because, like the rules of golf that do not always require walking, the NCAA does not always require student-athletes to meet the initial eligibility requirements.238 Second, as the Matthews decision noted, the NCAA had declared its mission to integrate academics and athletics long before it implemented certain aspects of its academic requirements.239 Again, in the same way that the official rules of golf did not specifically forbid the use of carts, the NCAA rules, at least at their inception, did not require the initial academic eligibility requirements, which themselves have changed several times.240 Finally, following the Matthews approach, because none of the rules of NCAA-sponsored sports requires any academic standards and because the NCAA member institutions may not necessarily require the same academic standards as the NCAA for admission, a waiver of the initial eligibility requirements would be no more offensive than a general waiver of the 75/25 requirement, which the Matthews court found acceptable.241 Therefore, because the NCAA cannot differentiate its rules and waivers from those of the PGA and because the Matthews court concluded that a continuing eligibility requirement was not fundamental, the NCAA likely cannot prevail on the first prong of the Martin fundamental alteration test.242

Similarly, as for the second inquiry, assuming that the requested core course or test score/GPA modifications were reasonable and necessary, the modification would never provide the student-athlete with an unfair advantage.243 Rather, like the golf cart for Martin, an initial eligibility requirement waiver would simply mitigate whatever obstacles to meeting qualifier status the student-athlete’s learning disability had caused.244

Therefore, the result of following the Matthews court’s interpretation of the Martin decision as requiring the two-pronged fundamental alteration test for academic questions would be to deprive the NCAA of its affirmative defense to claims of reasonableness.245 Consequently,

238 See Martin, 532 U.S. at 686–88; Blayden & Pemberton, supra note 237, at 48.
239 Matthews, 179 F. Supp. 2d at 1226.
240 See Martin, 532 U.S. at 684–85; Baker & Connaughton, supra note 92, at 147–50.
241 See Matthews, 179 F. Supp. 2d at 1226–27.
242 See id.
243 See id.
244 See Martin, 532 U.S. at 690; Matthews, 179 F. Supp. 2d at 1227.
245 See Matthews, 179 F. Supp. 2d at 1226–27.
the NCAA would need to succeed in showing that a modification would be either unreasonable (for a reason other than that the modification would fundamentally alter its nature) or unnecessary for that student. 246 Alternatively, the NCAA could simply honor every request for an initial eligibility requirement waiver from a student-athlete with a learning disability, regardless of whether the requested modification would be harmful to the NCAA’s academic mission. 247 In that way, following the Martin standard as stringently as the Matthews court would essentially remove the initial eligibility requirements for at least some students (namely those student-athletes with learning disabilities for whom a waiver would be reasonable and necessary), which is the precise outcome that several courts explicitly have denounced. 248 Furthermore, such a limitation on the NCAA’s ability to regulate incoming student-athletes would substantially impair its ability to achieve its goals of ensuring that student-athletes succeed academically, as well as athletically. 249

C. Following the Doe Approach Allows the NCAA to Protect Its Mission

Rather than differentiating its initial eligibility requirements from its 75/25 rule, the NCAA should base future arguments on the 2003 U.S. District Court for the Eastern Division’s decision, Doe v. Haverford School. 250 In that case, the court interpreted the Martin standard to require the following three inquiries: (1) whether the modification is reasonable, (2) whether the modification is necessary for the individual, and (3) whether the modification would fundamentally alter the nature of the services provided by the entity. 251 The Doe court did not divide the requirement that the modification not fundamentally alter the nature of the services into the two-pronged fundamental alteration test that the Martin decision created. 252

246 See id.
247 See id.
248 See id.; see also Cole, 120 F. Supp. 2d at 1071–72 (stating that Title III does not require the NCAA to abandon its initial eligibility requirements); Ganden v. Nat’l Collegiate Athletic Ass’n, No. 96 C 6953, 1996 WL 680000, at *15, *16 (N.D. Ill. Nov. 21, 1996) (unpublished opinion).
251 Id. at *5.
252 See Doe, 2003 WL 22097782, at *5; see also Martin, 532 U.S. at 682–83 (discussing two-pronged test).
This interpretation of the Martin decision’s standard has merit. Because the U.S. Supreme Court granted certiorari to reconcile a circuit split involving the Title III claims of golfers with disabilities against golf associations, it is arguable that the Court intended the two-pronged fundamental alteration test to apply to only professional golf or similar competitions. Specifically, in announcing the two-pronged analysis, the Court used language specific to the PGA, although more neutral language was available—”[i]n theory, a modification of petitioner’s golf tournaments might constitute a fundamental alteration in two different ways.” In contrast, later in the decision, the Court restated its interpretation of Title III’s requirement without any reference to sports or the two-pronged fundamental alteration test:

To comply with this command [that places of public accommodations make reasonable accommodations for individuals with disabilities], an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.

Furthermore, the Court outlined the second version of the standard in a portion of the opinion discussing Title III generally, but it mentioned the two-pronged fundamental alteration standard only in the portion discussing Martin’s claim against the PGA specifically.

In Doe, the court did not apply the two-pronged test when considering whether the requested modifications would constitute a fundamental alteration. Rather, the Doe court cited pre-Martin cases involving ADA claims brought against academic institutions. Doe thus illustrates that Martin did not necessarily override all previous Title III precedent, but rather simply confirmed the three-part inquiry that courts had followed in conducting Title III analyses. At the most basic level, therefore, the NCAA should argue in future Title III actions involving its initial eligibility requirements that the stan-

253 See 532 U.S. at 682–83, 688.
254 See id. at 674.
255 Id. at 682. A more neutral way of introducing the standard would be to simply delete the words “of petitioner’s golf tournaments.” See id.
256 Id. at 688.
257 Id. at 682–83, 688.
258 2003 WL 22097782, at *5.
259 Id.
dards used by the courts in the pre-\textit{Martin} Title III cases involving the initial eligibility requirements continue to be valid.\textsuperscript{261}

Furthermore, if courts were to follow the \textit{Doe} interpretation of the \textit{Martin} standard in future cases involving the NCAA’s initial eligibility requirements, the result would be comparable to the outcomes of pre-\textit{Martin} initial eligibility cases, in which the NCAA succeeded with a defense of fundamental alteration.\textsuperscript{262} Without having to adhere to the narrow inquiry of the two-pronged fundamental alteration test, courts would have more leeway in evaluating whether the modification would fundamentally alter the NCAA’s academic purpose, and thus courts could ask questions more tailored to that purpose.\textsuperscript{263} Thus, courts could continue to provide some deference to the NCAA so that it could continue to maintain its academic standards.\textsuperscript{264}

Even if courts follow the \textit{Doe} interpretation of the \textit{Martin} standard in future Title III claims involving the NCAA’s initial eligibility requirements, the NCAA is not guaranteed victory.\textsuperscript{265} For example, during a preliminary injunction analysis, one pre-\textit{Martin} court determined that the NCAA would lose little by granting a waiver to a student-athlete with a learning disability.\textsuperscript{266} Furthermore, cases in which the NCAA prevailed arose out of preliminary motions, and therefore future litigation that concludes in a trial may not dictate the same result.\textsuperscript{267} Therefore, in future litigation, the NCAA should request the same level of deference that courts continually afford to schools and other academic institutions, as recently outlined in \textit{Doe}.\textsuperscript{268}

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\bibitem{266} \textit{Butler}, 1996 WL 1058233, at *6.
\bibitem{268} See 2003 WL 22097782, at *4–9. Ruling in favor of The Haverford School, the \textit{Doe} court held that courts should afford the same level of deference to schools as to what constitutes a fundamental alteration as they would in determining whether a modification would be reasonable. \textit{Id.} at *8. Although schools are not without restraints in reaching that decision—namely, they must consider feasibility, cost, and alternative means to achieve the modification—the court noted that courts generally will not substitute their judgment for

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D. The NCAA Deserves the Same Deference Courts Have Afforded to Other Academic Institutions

Although the reasons for providing deference to academic institutions outlined in Doe should dictate similar deference towards the NCAA’s decisions, in the past, courts have not afforded the NCAA the same level of deference that they have accorded to schools.\(^{269}\) At least one scholar espouses a lesser standard of deference towards the NCAA by categorizing the NCAA’s purpose as regulating intercollegiate athletics and claiming that the NCAA may not have the expertise to determine whether a student-athlete with a learning disability can perform academically in college.\(^{270}\) Specifically, it is argued that even taking into account the experts participating in the individual inquiry during the waiver request process, because the NCAA assessments are measured against the standards that the NCAA created—and which may be more rigorous than those of a member institution—the NCAA has the sole discretion to prevent a student-athlete with a learning disability from receiving a college education.\(^{271}\)

Such criticism is misplaced, however.\(^{272}\) First, characterizing the NCAA’s purpose as regulating intercollegiate athletics diminishes the importance of academics in intercollegiate athletics.\(^{273}\) In doing so, this approach ignores that the NCAA’s purpose is to integrate college academics and athletics.\(^{274}\) Indeed, the NCAA’s emphasis on academics is what prevents collegiate athletics from becoming essentially an amateur league for professional sports.\(^{275}\) Furthermore, it is precisely because the member institutions, the same schools to which courts have afforded such deference, were not all upholding their own academic standards with regard to student-athletes that the NCAA intervened and implemented academic requirements.\(^{276}\) In fact, since the NCAA implemented its academic requirements, the NCAA has found that

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\(^{269}\) Compare id. at *4–9 (according deference to a school), with Matthews, 179 F. Supp. 2d at 1226–27 (demonstrating less deference to the NCAA).

\(^{270}\) See, e.g., Weston, supra note 2, at 1120–21.

\(^{271}\) See infra notes 273–304 and accompanying text.

\(^{272}\) See Weston, supra note 2, at 1120.

\(^{273}\) See Nat’l Collegiate Athletic Ass’n, supra note 85.

\(^{274}\) See id.

\(^{275}\) See id.

\(^{276}\) See Baker & Connaughton, supra note 92, at 147–50.
academic achievements of its student-athletes have improved. Furthermore, in the same way that a college’s inclusion of moral and ethical values in its mission statement does not automatically diminish its stated academic purpose, the NCAA’s simultaneous regulation of athletics does not automatically diminish its stated academic purpose. Therefore, to provide the NCAA with a lower level of deference than courts afford to academic institutions improperly ignores the fact that the NCAA, like schools, holds academics as central to its purpose.

Additionally, courts should defer to the NCAA’s judgment because, like schools, the NCAA has expertise in the area of academic requirements. Courts traditionally have deferred to the judgment of academic institutions because those institutions are in the best position to evaluate academic requirements. In that regard, the NCAA is no different from schools. The DOJ’s consent decree required the NCAA to install a team of experts on learning disabilities trained to evaluate student-athletes’ waiver applications. Furthermore, the NCAA has recorded an improvement in student-athlete academic performance after the implementation of the initial eligibility requirements. That improvement illustrates that the initial eligibility requirements, at least, have achieved their intended effect.

Furthermore, it is irrelevant that the NCAA’s initial eligibility requirements do not exactly match the admissions standards for all academic institutions. First, because participation in college athletics increases the number of responsibilities of student-athletes, the NCAA has determined that to succeed as a student while bearing the burdens of an athlete, most student-athletes must meet a minimum level

277 See Nat’l Collegiate Athletic Ass’n, The NCAA and Academic Reform, at http://www.ncaa.org/releases/currentTopics/academicReform.html (last visited Mar. 15, 2005). The NCAA considers its initial eligibility requirements a success because “[t]he overall graduation rates of student-athletes have risen faster than those for the student body as a whole and the graduation rate for African-American males has dramatically increased over their counterparts in the student body.” Id. The NCAA admits, however, that for some groups of student-athletes—namely, African-American male basketball players—the academic success levels continue to concern the NCAA. Id.


279 See Weston, supra note 2, at 1120–21.

280 See Consent Decree, supra note 119.


282 See id. at *4–9.

283 See Consent Decree, supra note 119.

284 See Nat’l Collegiate Athletic Ass’n, supra note 277.

285 See id.

286 See Weston, supra note 2, at 1120–21.
of academic aptitude, namely the minimum initial eligibility requirements. Second, predicting a student’s academic progress, regardless of the specific standards, is difficult, and the NCAA, like colleges and universities, can evaluate student-athletes only on criteria such as their high school performance and accepted standardized test scores. Furthermore, because such calculations cannot always predict a student’s potential achievement, the NCAA’s experts conduct individual inquiries into a student-athlete’s circumstances and, upon finding that the student-athlete could perform academically at the college level, may waive the initial eligibility requirements. Therefore, not only does the NCAA use the same criteria as most colleges and universities to judge a student-athlete’s potential college academic performance, but it also goes beyond that evaluation to allow for individualized inquiries.

Finally, assuming that the NCAA has the same level of expertise as most colleges in evaluating a student-athlete’s potential academic performance, allegations that the NCAA may prevent a student from attending the college of the student’s choice are both incorrect and misplaced. The claim is incorrect because the NCAA does not prevent any student from attending college. By deeming student-athletes non-qualifiers, it may prevent some student-athletes from participating in intercollegiate athletics and receiving athletic-based financial aid during their first years. Those restrictions, however, do not prevent those students from attending the college without participating in athletics. Nor do they prevent colleges or private sources from providing the same students with other forms of aid or scholarships that are distinct from athletic scholarships. Furthermore, students deemed non-qualifiers during their first years may qualify to compete in intercollegiate athletics during the remainder of their college careers—including a possible fifth year of college that

289 See Nat’l Collegiate Athletic Ass’n, supra note 91, at 145.
290 See id.
291 See Weston, supra note 2, at 1120–21.
292 See Nat’l Collegiate Athletic Ass’n, supra note 91, at 148.
293 See id.; see also Denbo, supra note 132, at 202–03 (discussing the argument that student-athletes should not be allowed to participate in sports during their first years of college).
294 See id.
295 See id.
would provide a fourth year of athletic eligibility—if they show academic accomplishment.\textsuperscript{296}

Additionally, the claim is misplaced because it criticizes the NCAA for actions in which colleges regularly engage.\textsuperscript{297} Specifically, the NCAA’s classification of a student-athlete as a non-qualifier because of a lack of academic achievement is no different than a college denying a prospective student admission for the same reason.\textsuperscript{298} For example, assuming a student meets the NCAA’s initial eligibility requirements, but fails to meet a college’s admissions requirements, the college admissions office makes the final decision on whether the student may attend that college.\textsuperscript{299} Criticism has not centered on the admissions office’s judgment simply because it makes the final decision on admissions.\textsuperscript{300} Therefore, as long as the NCAA makes its decision in an equally as reasoned way as a college admissions office, the fact that it has the last word on its initial eligibility requirements should not warrant any less judicial deference than would be afforded to a college.\textsuperscript{301}

Consequently, because the NCAA shares the same purpose as academic institutions—namely, maintaining academic integrity—and because the NCAA maintains a level of expertise in college academic performance commensurate with many colleges, courts should give the NCAA the same level of deference they afford to academic institutions when evaluating Title III claims.\textsuperscript{302} Courts, thus, should use the \textit{Doe} court’s interpretation of the \textit{Martin} standard, ignoring for the purposes of the evaluation the two-pronged fundamental alteration test.\textsuperscript{303} In that way, the NCAA can protect its mission to maintain both its academic and athletic standards while continuing to make reasonable and necessary modifications for individuals with disabilities.\textsuperscript{304}

\textbf{Conclusion}

The ADA provides student-athletes with learning disabilities a right to demand reasonable modifications to the NCAA’s initial eligi-
bility requirements. That right is not without limits, however. The ADA itself provides that places of public accommodation are not required to implement modifications that would fundamentally alter the nature of their services. Furthermore, courts, including the U.S. Supreme Court in *PGA Tour, Inc. v. Martin*, have repeatedly recognized the importance of that limitation on the scope of Title III. Most noticeably, perhaps, courts have allowed academic institutions to prevail with that defense, commenting that many modifications could undermine the scholastic integrity of such institutions. Because the NCAA, like most schools, maintains a goal of high academic achievement, courts should provide the NCAA with the same level of deference they provide to schools. Only then can the NCAA achieve its goal of integrating academics and athletics, and only then can the NCAA ensure that intercollegiate athletics maintain their place in American culture.

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