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TAKING STATE PROPERTY RIGHTS OUT OF FEDERAL LABOR LAW

Jeffrey M. Hirsch

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Abstract: The National Labor Relations Board’s current analysis of union organizers’ right to access employer property relies heavily on an employer’s right to exclude under state property law. If the employer possesses this right, an attempt to exclude organizers is generally lawful; if the employer lacks this right, the attempt is unlawful. This scheme makes little sense doctrinally, as an employer’s property interests are usually irrelevant to the issue that should be the Board’s primary concern—whether the removal of union organizers interferes with employees’ federal labor rights. I propose eliminating consideration of state property rights from right-to-access cases. Instead, the Board should focus on whether the manner in which an employer excludes organizers chills employee rights, while property issues—such as a trespass claim against organizers—should be determined by state courts. The proposal includes presumptions to guide employer conduct, providing clarity for all parties, better protecting employees’ labor rights, and freeing the Board from its struggles with state property law.

EVIDENCE SCHOLARSHIP RECONSIDERED: RESULTS OF THE INTERDISCIPLINARY TURN

Roger C. Park
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Abstract: Evidence scholarship has developed a permanent interdisciplinary aspect, involving a variety of different disciplinary themes. These include: the psychology of witnesses and factfinders, forensic science, theories of probability and proof, feminist perspectives on evi-
dence law, and the law and economics perspective. After first assessing the status of traditional doctrinal scholarship, we review each of the major interdisciplinary braids, compare them, and evaluate their relative contributions. We conclude by developing a thesis about the utility of different types of evidence scholarship, arguing that interdisciplinary evidence scholarship is more promising and useful to the extent that it helps to explain or advance the truth-seeking function of trials, rather than to posit or seek extrinsic effects of rules that traditionally have been understood as protecting the accuracy of verdicts.

NOTES

LEAVING NO CHILD BEHIND (EXCEPT IN STATES THAT DON’T DO AS WE SAY): CONNECTICUT’S CHALLENGE TO THE FEDERAL GOVERNMENT’S POWER TO CONTROL STATE EDUCATION POLICY THROUGH THE SPENDING CLAUSE

Nicole Liguori

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Abstract: The No Child Left Behind Act of 2001 (“NCLB”) conditions the states’ receipt of federal education funds on, among other things, the creation of testing schemes for elementary school students and the posting of test results. Although NCLB threatens the states’ constitutional power to set education policy, two provisions of the law could potentially alleviate this threat: (1) an “unfunded mandates” provision prohibiting federal officers from requiring the states to spend funds not provided by NCLB, and (2) a provision allowing the U.S. Secretary of Education (the “Secretary”) to waive provisions of NCLB at a state’s request. These provisions, however, have not circumscribed the federal government’s role to the satisfaction of some states, prompting Connecticut, a state whose own policies conflict with NCLB’s testing requirements, to file the first state NCLB lawsuit against the federal government. This Note argues that Connecticut’s claims that the Secretary’s administration of these two provisions violates the Spending Clause are valid. This Note then focuses on the Spending Clause’s prohibition of conditions that require a state to violate any other provision of the Constitution, arguing that NCLB, as it is currently administered by the Secretary, may force Connecticut and other states to violate the Equal Protection Clause.
Abstract: In most states, juveniles may receive the sentence of life without the possibility of parole when convicted in adult court. Scientific research has shown, however, that the brains of juveniles are different from those of adults. Citing this research, the U.S. Supreme Court held in the 2005 case of Roper v. Simmons that sentencing juveniles to the death penalty violates the Eighth Amendment due to their reduced culpability. Applying the reasoning of Roper, this Note argues that sentencing juveniles to life without parole violates the Eighth Amendment on its face. In the alternative, it argues that the sentence violates the Eighth Amendment as applied in certain cases. In addition, this Note presents policy arguments for the abolition of the sentence by state and federal legislatures.
TAKING STATE PROPERTY RIGHTS OUT OF FEDERAL LABOR LAW

JEFFREY M. HIRSCH*

Abstract: The National Labor Relations Board’s current analysis of union organizers’ right to access employer property relies heavily on an employer’s right to exclude under state property law. If the employer possesses this right, an attempt to exclude organizers is generally lawful; if the employer lacks this right, the attempt is unlawful. This scheme makes little sense doctrinally, as an employer’s property interests are usually irrelevant to the issue that should be the Board’s primary concern—whether the removal of union organizers interferes with employees’ federal labor rights. I propose eliminating consideration of state property rights from right-to-access cases. Instead, the Board should focus on whether the manner in which an employer excludes organizers chills employee rights, while property issues—such as a trespass claim against organizers—should be determined by state courts. The proposal includes presumptions to guide employer conduct, providing clarity for all parties, better protecting employees’ labor rights, and freeing the Board from its struggles with state property law.

INTRODUCTION

Imagine that you are the manager of a restaurant located, along with several other businesses, on the first floor of a high-rise building. One afternoon, just before a shift change, several members of a local union stand on the sidewalk near the entrance to the restaurant and distribute flyers to employees encouraging them to join the union. The handbilling is peaceful and does not block the entrance. In the past, the owner has emphasized that solicitors are not welcome and you are confident that union organizing would not be an exception. What should you do?

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If you are a typical manager, you would immediately tell the organizers to leave and, if they refuse, pursue other means—such as calling the police or security personnel—to stop the organizing. By doing so, however, you put your employer at risk of violating the National Labor Relations Act (the “Act” or the “NLRA”).  

Currently, the only way of knowing whether a violation occurred is to wait for the National Labor Relations Board (the “Board” or the “NLRB”) to resolve the dispositive issue in almost all such cases: whether the employer had a state property right to exclude the organizers. But even if you were one of the rare managers who was aware of that rule, it often would provide little help when faced with organizing activity. You must know whether your employer or the building owner controls or owns the sidewalk. Although the lease likely would provide the answer, few managers would have immediate access to that document. If the building owner controls the sidewalk, you could ask her to remove the organizers, but her right to do so is not clear. For instance, even if the building owner built, maintains, and even owns the sidewalk, she may have obtained the property from the city with conditions requiring public access. Or, as is likely, there may be a public right-of-way on the sidewalk. Yet, different states allow varying degrees of control and public access over such easements.

These questions are not far-fetched. Rather, they signify a fairly common set of issues in Board right-to-access cases. Not surprisingly, the Board—whose official expertise is solely the administration of the NLRA—is not well-suited to decide issues of state property law. The result is delay, poor administration of the NLRA, and possible interference with state property rights. Therefore, this Article proposes a rule that eliminates the issue of state property law from the Board’s right-to-access cases and, instead, focuses on the manner in which the employer tried to remove the organizers. In short, the Board no longer would consider state property rights. Instead, it would presume that an employer’s peaceful request to stop organizing activity on what appears to be its property is lawful, and presume that any action

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2 See NLRB v. Calkins, 187 F.3d 1080, 1088 (9th Cir. 1999); Snyder’s of Hanover, Inc., 334 N.L.R.B. 183, 185 (2001).
3 Moreover, state property law may limit property owners’ ability to exclude organizers under theories such as consent or privilege. See Restatement (Second) of Torts §§ 10, 892A (1965).
going beyond such a request violates the NLRA.\footnote{See infra notes 159–78 and accompanying text.} This change would provide both organizers and employers clarity in understanding the consequences of their actions. Moreover, the proposal would allow for better enforcement of federal labor rights and eliminate a source of federal encroachment on state property law.

Although concern for property interests vis-à-vis government regulation has been strong for several decades,\footnote{As early as 1965, Professor William Gould—prior to becoming NLRB Chairman—noted that, although “subject to reasonable use in other areas of the law, curiously the concept of property rights has become a rallying cry in the field of labor law” that traditionally provided “an absolute defense against those who would engage in union activity.” William B. Gould, Union Organizational Rights and the Concept of “Quasi-Public” Property, 49 Minn. L. Rev. 505, 509 (1965).} the U.S. Supreme Court’s 2005 public use decision in \textit{Kelo v. City of New London}\footnote{See generally 545 U.S. 469 (2005).} set off a storm of popular criticism indicating that this concern may be growing.\footnote{See Tresa Baldas, \textit{States Ride Post-\textit{Kelo} Wave of Legislation}, Nat’l L.J., Aug. 1, 2005, at 7 (describing development in various states to prevent use of eminent domain for private development, in response to popular criticism of \textit{Kelo}).} That potential growth is significant, as attempts to protect property rights already have imposed substantial limits on the enforcement of various areas of law, particularly labor.\footnote{As stated by Professor Cynthia Estlund, “[t]he history of labor law has been, in large measure, the history of property rights.” Cynthia L. Estlund, \textit{Labor, Property, and Sovereignty After Lechmere}, 46 Stan. L. Rev. 305, 306 (1994); see supra note 6.} In a series of Supreme Court holdings, private property rights were used to circumscribe the Board’s ability to protect federal labor rights.\footnote{See \textit{Lechmere, Inc. v. NLRB}, 502 U.S. 527, 537–38 (1992); \textit{NLRB v. Babcock & Wilcox Co.}, 351 U.S. 105, 112–14 (1956); \textit{Republic Aviation Corp. v. NLRB}, 324 U.S. 793, 801 (1945). See \textit{infra} notes 17–107 and accompanying text for a discussion of these cases.} Ironically, however, the Board’s attempt to follow this Court precedent harms property interests through the delay and inexpert judgments that one would expect from a federal labor agency’s interpretation of state law.\footnote{See infra notes 86–155 and accompanying text.}

The problem with the Board’s current analysis is more prevalent and serious than one might imagine. Many employers have worksites that are on or near property that they do not fully control; for instance, a mall employer may lack control over nearby walkways and parking lots, as well as the store property itself.\footnote{See Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd., 257 F.3d 937, 942–43, 946 (9th Cir. 2001) (holding that employer lacked right to exclude from sidewalk that it built on its private property, based on terms of agreement with city to widen road in front of casino); \textit{UFCW v. NLRB} (Farm Fresh), 222 F.3d 1030, 1034–37 (D.C. Cir. 2000) (noting that employer’s no-solicitation rule applied to entrances of mall stores with different leases} Moreover, states have widely
differing laws regulating the use of certain types of property. 13 Pennsylvania, for example, allows public use of a public right-of-way only to the extent that the activity is expressly authorized by the relevant municipality, and permits an abutting landowner to exclude any unauthorized activity. 14 In contrast, New Jersey affirmatively provides the limited right to enter private property to gain access to employees residing there. 15 California courts currently are unable to agree on the extent to which the state permits union access to private property. 16 In sum, the complexity of state property law has bewildered the Board, which focuses on federal labor law. Perhaps more importantly, the complexity has created grave uncertainty for both employers and organizers, who cannot know whether their actions will violate the NLRA until the culmination of years of confusing and protracted litigation.

This Article’s proposal seeks to eliminate that confusion by removing state property law issues from the Board’s docket. Even under the Court’s current right-to-access jurisprudence, an employer’s state property rights are generally distinct from federal labor interests. Thus, the proposal intends to shift the Board’s attention away from state property law to where it belongs: the effect of an employer’s exclusion of organizers on its employees’ ability to exercise their rights under the NLRA. The Board’s failure to distinguish these two distinct rights of employers and employees has led to the quagmire in which it now finds itself. The proposal would free the Board, and federal courts of appeals, from the burden of having to delve into state property law issues, in which neither possesses expertise. It also would provide states better control over

providing varying levels of control, and positing that state would recognize “something akin to an implied easement of necessity” for lessee/employer); Weis Mktgs., Inc., 325 N.L.R.B. 871, 883–84 (1998) (concluding that Pennsylvania law does not give employer right to exclude union picketers because it had right to use common areas), enforcement denied in relevant part, 265 F.3d 239 (4th Cir. 2001); Victory Mktgs., Inc., 322 N.L.R.B. 17, 20, 21 (1996) (finding picketing near mall parking lot entrance properly halted where “record [did] not clearly establish whether the handbillers were standing on public or private property”); O’Neill’s Mktgs., Inc., 318 N.L.R.B. 646, 649–50 (1995) (concluding that employer lacked right to exclude under state law, despite maintenance of parking lot under lease), enforced in relevant part, 95 F.3d 733 (8th Cir. 1996). Other examples include entrances or driveways to a worksite that are subject to some public use. See Johnson & Hardin Co. v. NLRB, 49 F.3d 237, 239 (6th Cir. 1995) (discussing union handbilling on state property over which employer possessed easement).

13 See, e.g., Waremart Foods v. NLRB, 354 F.3d 870, 874 (D.C. Cir. 2004); Snyder’s of Hanover, Inc. v. NLRB, 39 F. App’x 730, 734 (3d Cir. 2002); State v. Shack, 277 A.2d 369, 374–75 (N.J. 1971).

14 See infra notes 117–123 and accompanying text.

15 Shack, 277 A.2d at 374–75.

16 See infra notes 133–152 and accompanying text.
their own property law, while conserving valuable Board and federal court resources. Further, the proposal would drastically lessen the uncertainty for both employers and organizers in right-to-access cases. Under the proposal, the parties would likely know ex ante whether the Board would find their conduct permissible, rather than remaining uncertain pending litigation. The result would be right-to-access disputes that are more peaceful and less likely to infringe employees’ NLRA rights, and thus, less litigation.

Part I of this Article discusses the current right-to-access scheme’s development and critiques the Board’s interpretation of Supreme Court precedent. Part II describes the proposal and its presumptions’ application to typical factual scenarios. Finally, Part III shows why Board enforcement of the proposal would not constitute an unconstitutional taking.

I. CURRENT RIGHT-TO-ACCESS ANALYSIS

The NLRB’s current right-to-access analysis has developed from the 1956 U.S. Supreme Court decision in NLRB v. Babcock & Wilcox Co. Subsequent cases, in particular the Supreme Court decision in Lechmere, Inc. v. NLRB, analyzed organizers’ right to access employer property under the theory that nonemployee labor interests were inferior to employee interests in a majority of circumstances. However, the NLRB has struggled to apply Lechmere’s employee/nonemployee distinction. Where nonemployee organizers seek access, the NLRB now relies on whether an employer has a state private property right entitling it to exclude nonemployee labor organizers. This current analysis makes little sense practically or doctrinally, as it requires a federal agency specializing in labor law to determine complicated state property law issues and it focuses on property rights more than warranted under Lechmere.

A. The Road to Lechmere

The starting point for the Board’s current right-to-access analysis is the U.S. Supreme Court’s 1956 decision in Babcock. At issue in Babcock were employer refusals to allow nonemployee union organizers to distribute literature in company parking lots. The NLRB had con-

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18 Id. at 106. Although this Article refers to “nonemployees” as individuals who are not employees of the targeted employer, the NLRA protects “any employee,” including employees of a union or nontargeted employer. See 29 U.S.C. § 152(3) (2000); see also Eastex,
cluded that the refusals violated section 8(a)(1) of the NLRA by “unreasonably impeding” employees’ right to self-organization. The Supreme Court reversed, holding that the employer’s private property rights trumped the union’s organizational rights.

The Board had found that the refusals to allow distribution of union literature were unlawful because the workplace was the most effective location for employees to receive information necessary to choose freely whether to organize. That finding was based on the Supreme Court’s Republic Aviation Corp. v. NLRB line of cases, which held that employers generally cannot restrict discussion of self-organization among employees during non-work time. The 1945 Republic Aviation decision was one of the earliest Supreme Court cases addressing the tension between employees’ federal labor rights and employers’ right to control use of their property. Although, under certain circumstances, the exercise of labor rights trumped property rights under Republic Aviation and its progeny, employers’ property interests fared much better in Babcock eleven years later.

The Babcock Court rejected the Board’s reliance on Republic Aviation, holding that its limitations on employers’ property interests did not apply to nonemployee conduct. Although employees had a di-

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19 Babcock, 351 U.S. at 106. Section 7 of the NLRA protects employees’ right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Those rights are enforced through section 8(a)(1), which provides that “[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise” of their section 7 rights. Id. § 158(a)(1). An employer violates section 8(a)(1) when its conduct tends to interfere with, restrain, or coerce employees in the exercise of their section 7 rights. See Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1006 (9th Cir. 1995).


21 Id. at 107. The exclusions were made pursuant to non-solicitation policies that were not enforced solely against unions. Id.

22 Id. at 110, 113 (citing Le’Tourneau Co., 54 N.L.R.B. 1253, 1262 (1944), aff’d sub nom. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Peyton Packing Co., 49 N.L.R.B. 828, 843–44 (1943)); see also Teletech Holdings, Inc., 333 N.L.R.B. 402, 403 (2001) (“A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful.”). Exceptions always have been made for production or disciplinary reasons. See Babcock, 351 U.S. at 110.

23 See Estlund, supra note 9, at 307 & n.6, 347 (citing commentators and noting that Republic Aviation essentially created an employee forum at work, as long as discussion did not occur on work time and in work areas).

24 See Babcock, 351 U.S. at 112–13; supra note 22 and accompanying text.

25 Babcock, 351 U.S. at 111, 113 (citing NLRB v. Seamprufe, Inc., 222 F.2d 858, 860 (10th Cir. 1955); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147, 150 (6th Cir. 1948))
rect right—a right that the Act explicitly grants to them—to discuss self-organization at their workplace, nonemployee union organizers did not.\textsuperscript{26} The only right nonemployee organizers possessed was a “derivative” right to discuss unionization with employees.\textsuperscript{27} A derivative right is not expressly protected by the Act and exists only as a means to foster employees’ exercise of their direct rights; in Babcock, the union had a derivative right to inform employees about self-organization, a prerequisite for employees’ exercise of their direct right to choose freely whether to pursue collective representation.\textsuperscript{28}

Despite its acknowledgement of the derivative right to communicate with employees, the Court severely limited organizers’ ability to exercise that right in the face of employer resistance.\textsuperscript{29} According to the Court, an employer’s exclusion of nonemployee organizers from employer property is permissible if “reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and the employer’s notice or order does not discriminate against the union by allowing other distribution.”\textsuperscript{30}

This rule, by itself, could have struck an equal balance between labor rights and property interests, but the Court’s definition of a reasonable alternative favored the latter.\textsuperscript{31} In particular, the Court—dis-

\textsuperscript{26} Babcock, 351 U.S. at 113.

\textsuperscript{27} Id. (“The right to self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.”); see Gould, supra note 6, at 512–13 (describing importance of union-employee contact at workplace). But see R. Wayne Estes & Adam M. Porter, Babcock/Lechmere Revisited: Derivative Nature of Union Organizers’ Right of Access to Employers’ Property Should Impact Judicial Evaluation of Alternatives, 48 SMU L. Rev. 349, 354–56 & n.3 (1995) (citing and supporting criticism of Babcock’s employee/nonemployee distinction).

\textsuperscript{28} Babcock, 351 U.S. at 113.

\textsuperscript{29} Id. at 112.

\textsuperscript{30} Id. at 112; see Jay Gresham, Note, Still as Strangers: Nonemployee Organizers on Private Commercial Property, 62 Tex. L. Rev. 111, 115–22 (1983) (describing development of reasonable alternatives analysis). Previously, an employer could not exclude organizers from its property if, for example, the property was an in-store public restaurant and the organizing activity was only an “incident to the normal use of” the restaurant. See Montgomery Ward & Co., 288 N.L.R.B. 126, 127 (1988). The Board, however, has overruled that precedent as unsustainable under Lechmere, Inc. v. NLRB, 502 U.S. 527, 537–38 (1992). See Farm Fresh, Inc., 326 N.L.R.B. 997, 999 (1998) (overruling Montgomery Ward and rejecting dissent’s argument that it survives Lechmere because it was based on the antidiscrimination exception to employer’s right to exclude), petition for review granted on different grounds sub nom. UFCW v. NLRB (Farm Fresh), 222 F.3d 1030 (D.C. Cir. 2000).

\textsuperscript{31} See Babcock, 351 U.S. at 111–12.
agreeing with the Board—held that contacting employees in public and at their homes through the telephone, letters, and meetings were reasonable alternatives to worksite communications.\(^{32}\) Because these alternate methods were available to the union, the employer could lawfully stop the parking lot distributions.\(^{33}\)

The Court acknowledged that the alternatives available to the union in Babcock provided a close question because the balance between employers’ property rights and employees’ organization rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other.”\(^{34}\) Nonetheless, the Court suggested that its concern for employees’ rights did not extend far.\(^{35}\) In noting that the plants at issue were close to “well-settled” communities, the Court expressly recognized nonemployees’ right to access employer property only in the very limited circumstances in which both the workplace and employees’ living quarters were beyond the union’s reach—such as a remote logging camp.\(^{36}\)

For several decades following Babcock, the NLRB attempted to reconcile the Court decision with its right-to-access analysis.\(^{37}\) Finally, in its 1988 decision in Jean Country,\(^{38}\) the Board settled upon a test that it believed to be consistent with Babcock. The Board read Babcock and intervening Supreme Court decisions\(^{39}\) as requiring the accommodation of both property and labor rights to reflect the strength of the two interests in a given case.\(^{40}\) The test, therefore, balanced “the degree of impairment of the [employees’] Section 7 right if access should be denied” with “the degree of impairment of the [employer’s] private property right if access should be granted.”\(^{41}\) Thus, if the prop-

\(^{32}\) Id. at 111.

\(^{33}\) Id. at 112.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Babcock, 351 U.S. at 113; see William B. Gould, The Question of Union Activity on Company Property, 18 Vand. L. Rev. 73, 102–03 (1964) (providing early analysis of the “reasonable efforts” inquiry).

\(^{37}\) See Fairmont Hotel Co., 282 N.L.R.B. 139, 140–42 (1986); Estlund, supra note 9, at 316–19 (discussing post-Babcock development of Board law).


\(^{39}\) See Hudgens v. NLRB, 424 U.S. 507, 522 (1976) (holding that accommodation between section 7 and property rights “may fall at differing points along the spectrum depending on the nature and strength of the respective . . . rights asserted in any given context”); Cent. Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972) (holding that Board’s role is to seek proper accommodation between section 7 rights and private property rights).

\(^{40}\) Jean Country, 291 N.L.R.B. at 12, 14.

\(^{41}\) Id. The Board also emphasized that the Court had extended its Babcock rule to right-to-access cases that involved non-organizational activity. Id.
Taking State Property Rights out of Federal Labor Law

Property is not generally open to the public, then an employer’s attempt to exclude will be more likely lawful.\textsuperscript{42} Moreover, a significant factor in determining the impairment of labor rights was the “availability of reasonably effective alternative means” of reaching the intended audience.\textsuperscript{43} According to the Board, the availability of newspapers, the radio, or television would constitute reasonable alternatives to direct contact only in exceptional cases.\textsuperscript{44}

The \textit{Jean Country} test reflected the Board’s regular practice of balancing employee and employer interests.\textsuperscript{45} The balance struck by the \textit{Jean Country} test, however, was short-lived. In its 1992 decision in \textit{Lechmere}, the U.S. Supreme Court eliminated virtually any notion of balance by deeming nonemployee labor interests inferior to employer property rights in all but the most extraordinary circumstances.\textsuperscript{46}

In \textit{Lechmere}, a union attempted to organize the employees of a retail store located in an open shopping mall.\textsuperscript{47} After a full-page newspaper advertisement elicited little response, organizers placed handbills on cars parked in the mall lot most used by the store’s employees.\textsuperscript{48} The mall owner immediately told the organizers to leave, citing its no-solicitation and handbilling rule.\textsuperscript{49} After their subsequent handbilling attempts prompted the same response, the organizers moved to a nearby strip of public land and distributed handbills to cars entering and exiting the parking lot before the mall opened and after it closed.\textsuperscript{50} The handbilling, in addition to contacting employees via the state’s license plate database, yielded only one employee-signed card seeking union representation.\textsuperscript{51}

The NLRB, acting on the union’s unfair labor practice charge alleging that the mall owner unlawfully barred the organizational activity from its property, applied the \textit{Jean Country} test and found a viola-

\textsuperscript{42} Id. at 14, 16.
\textsuperscript{43} Id. at 14; see id. at 13 (discussing other factors, such as the section 7 right at issue, type of property at issue, identity of target audience, possibility of affecting neutral employers, dilution of message, and costs of alternative means).
\textsuperscript{44} \textit{Jean Country}, 291 N.L.R.B. at 13 (citing NLRB v. United Aircraft Corp., 324 F.2d 128, 130 (2d Cir. 1963) (emphasizing superiority of direct contact and noting high costs of media alternatives)).
\textsuperscript{46} 502 U.S. at 537–38.
\textsuperscript{47} Id. at 529–30.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 530 & n.1.
\textsuperscript{50} Id. at 530.
\textsuperscript{51} \textit{Lechmere}, 502 U.S. at 530.
tion of section 8(a)(1) of the Act.⁵² The U.S. Court of Appeals for the First Circuit enforced the Board’s order.⁵³ The Supreme Court reversed, however, holding that the Jean Country test was impermissible under the NLRA.⁵⁴

Although the Court recognized that nonemployee organizers possessed derivative section 7 rights,⁵⁵ it emphasized Babcock’s distinction between employees’ right to discuss unionism among themselves and nonemployee attempts to inform employees about unionism.⁵⁶ According to the Court, under Babcock, “an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property” unless no reasonable alternatives are available to the organizers.⁵⁷ Despite acknowledging its own line of cases citing Babcock’s emphasis that both employee and employer rights should be accommodated,⁵⁸ the Court held that this precedent did not curb “Babcock’s holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible.”⁵⁹

The Lechmere Court’s interpretation of Babcock struck down the Board’s Jean Country balancing test.⁶⁰ Where, as in Republic Aviation, an employer attempts to prevent employee-only discussions, the Court conceded the Board’s authority to balance employees’ right to discuss unionization against an employer’s right to control use of its property.⁶¹ Where communication with nonemployees is involved, however, “the Board [is] not permitted to engage in that same balancing.”⁶² Rather, the Lechmere Court construed Babcock as proscribing any balancing or accommodation of nonemployees’ derivative right to

⁵² Lechmere, Inc., 295 N.L.R.B. 92, 94, 98–99 (1988) (concluding also that attempts to exclude union from public property were unlawful), enforced, 914 F.2d 313 (1st Cir. 1990), rev’d, 502 U.S. 527 (1992).
⁵³ Lechmere, 914 F.2d at 325.
⁵⁴ Lechmere, 502 U.S. at 538.
⁵⁵ Id. at 532.
⁵⁶ Id. at 533, 537; see supra notes 25–28 and accompanying text; see also infra note 67.
⁵⁷ Lechmere, 502 U.S. at 533–34.
⁵⁸ Id. at 534–35 (citing Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978); Hudgens, 424 U.S. at 521–22 (“The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and the strength of the respective § 7 rights and private property rights asserted in any given context.”); Cent. Hardware, 407 U.S. at 544; Babcock, 351 U.S. at 112 (holding that accommodation of different rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other”)).
⁵⁹ Lechmere, 502 U.S. at 534.
⁶⁰ Id. at 538.
⁶¹ Id. at 537.
⁶² Id.
contact employees as long as reasonable alternatives exist—“[i]t is only where access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees’ and employers’ rights.”

*Lechmere* has become the foundation for all subsequent right-to-access cases, in part because of its reaffirmation that nonemployees have a derivative right to discuss unionization with employees. More important, however, is its conclusion that this derivative right is vastly inferior to employees’ direct right to discuss unionization. The *Lechmere* Court’s stated rationale for this disparity was simply that employee activity is fundamentally different from nonemployee conduct. The Court’s failure to explain this distinction further is not surprising, as it is a difficult holding to defend.

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63 Id. at 537–38 (stating also that “reasonable” means anything that did not require “extraordinary feats to communicate with inaccessible employees”). In the face of *Lechmere*’s broad construction of reasonable means, others have noted that most alternatives are often vastly inferior to direct contact with employees at work. See, e.g., Estes & Porter, *supra* note 27, at 363–66; Estlund, *supra* note 9, at 332; Robert A. Gorman, *Union Access to Private Property*, 9 Hofstra Lab. L.J. 1, 22–23 (1992); Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. NLRB—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 Hofstra Lab. L.J. 65, 101 (1994). Moreover, one of the major alternatives cited in *Lechmere*—obtaining employee information from license plates—is now illegal under the federal Driver’s Privacy Protection Act of 1994. See 18 U.S.C. § 2724(a) (2000) (stating that it is generally unlawful to “knowingly obtain[] . . . personal information, from a motor vehicle record”); Susan J. McGolrick, *Judge Rules UNITE HERE Violated Law by Using Cintas Workers’ Vehicle Records*, 173 Daily Lab. Rep. (BNA) A-9 (2006) (discussing class action suit against union for obtaining home addresses from employee license plates). Eliminating that option further undermines *Lechmere*’s conclusion that alternative means, such as signs in a nearby public area or advertisements, would be sufficient to communicate with workers of a particular employer. *See Lechmere*, 502 U.S. at 540.

64 See *Lechmere*, 502 U.S. at 532; *see also* ITT Indus., Inc. v. NLRB, 251 F.3d 995, 997 (D.C. Cir. 2001) (holding that derivative access rights result “entirely from on-site employees’ § 7 organizational right to receive union-related information”).

65 See *Lechmere*, 502 U.S. at 532.

66 Id.

67 See Zmija, *supra* note 63, at 101 (criticizing employee/nonemployee distinction). The Board, pre-*Lechmere*, distinguished workers who were on an employer’s property pursuant to a working relationship from individuals who were “strangers to the property.” *See S. Servs., Inc.*, 300 N.L.R.B. 1154, 1155 (1990) (concluding that subcontractor’s employee could not be barred from principal employer’s property), *enforced*, 954 F.2d 700 (11th Cir. 1992). But *see* New York New York, LLC v. NLRB, 313 F.3d 585, 589 (D.C. Cir. 2002) (questioning continued viability of *Southern Services* after *Lechmere*’s “express reaffirmation of the employee/nonemployee distinction”). *New York New York* stated that the distinction works because section 7 provides employees with a limited property right to engage in organizational activity on their employer’s property. 313 F.3d at 589. That right to organize means that employees are not trespassers; nonemployees, however, lack that right and are considered trespassers. *Id.* This begs the question, however, of why section 7 provides employees, but not nonemployees, that right. *See infra* notes 72–81 and accompanying text.
The difference cannot be whether a trespass occurred, for both employee and nonemployee organizers can be trespassers. Nor can the distinction rely on employees’ regular access to the employer’s worksite, as nonemployees possess similar access to employer property regularly open to the public. One might think, given the context and reasoning of Babcock, that the distinction is based on derivative versus direct rights. The Board’s post-Lechmere cases, however, make clear that nonemployee activity, even if directly protected by the NLRA, receives less protection vis-à-vis property rights than employee activity.

Lechmere did not address whether its analysis applied to non-organizational union activity in which, unlike organizing, unions have a direct right to engage, such as area standards, recognition, or publicity picketing. The Board ultimately concluded that Lechmere ap-
plied to virtually all nonemployee activity, even conduct that is directly protected.\footnote{73} According to the Board, the choice between the \textit{Lechmere} or \textit{Republic Aviation} analyses is based solely on whether employees or nonemployees were being excluded, no matter whether they were exercising a direct or derivative right.\footnote{74} This conclusion rested on the Board’s view that, given \textit{Lechmere}’s refusal to protect nonemployee organizers, it would be incongruous to require greater access for nonemployees engaged in non-organizational activity less respected by the NLRB.\footnote{75} Thus, under the Board’s analysis, nearly all protected employee activity is shielded from employer interference pursuant to \textit{Re-}

\footnote{73} See O’Neil’s Mks. v. UFCW, 95 F.3d 733, 737 (8th Cir. 1996); \textit{Leslie Homes}, 316 N.L.R.B. at 125, 127. The construction industry often presents a special case. The use of subcontractors may limit a private property owner’s ability to restrict union access more than usual—for example, where a union representative is trying to contact members who are working for a subcontractor at the site. See Wolgast Corp. v. NLRB, 349 F.3d 250, 256–57 (6th Cir. 2003); \textit{see also} Roger D. Hughes, 344 N.L.R.B. No. 49, slip op. at 12 (Mar. 31, 2005) (stating that coercive employer conduct against unions interferes with rights of unrepresented employees, “even if those individuals’ interests are not congruent with, and even may be antithetical to, the interest of the [represented employees]”) (internal quotation marks omitted).

\footnote{74} Metro. Dist. Council v. NLRB, 68 F.3d 71, 75 (3d Cir. 1995); \textit{Leslie Homes}, 316 N.L.R.B. at 129; see UFCW v. NLRB (\textit{Oakland Mall II} and \textit{Loehmann’s Plaza II}), 74 F.3d 292, 298–99 (D.C. Cir. 1996) (explicitly rejecting derivative versus direct rights distinction); Estlund, \textit{supra} note 9, at 323–25, 350–52 (arguing that \textit{Republic Aviation} should apply to union conduct directly protected by the Act).

\footnote{75} \textit{Leslie Homes}, 316 N.L.R.B. at 129 (stating that \textit{Sears}, 436 U.S. at 206 & n.42, suggests that nonemployee area standards picketing is less favored than nonemployee organizational activity). The D.C. Circuit, in an opinion written by Judge Edwards, agreed with this analysis. See \textit{Oakland Mall II}, 74 F.3d at 293–94 (holding, in consumer boycott and area standards picketing cases, that “[u]nder established caselaw, it would make no sense to hold that nonemployees have a greater right of access when attempting to communicate with an employer’s customers than when attempting to communicate with an employer’s employees”). \textit{Oakland Mall II} reflects a hierarchy under which nonemployees’ interest in communicating with customers is considered weaker than the nonemployees’ interest in communicating with employees. \textit{Id.} at 298 & n.5. Indeed, some courts have expressed doubt whether \textit{Babcock}’s discrimination exception applies to nonemployees engaged in non-organizational activity. See \textit{Cent. Hardware}, 407 U.S. at 545 (stating that “the principle of accommodation announced in \textit{Babcock} is limited to labor organization campaigns”); \textit{Babcock}, 351 U.S. at 112; Be-Lo Stores v. NLRB, 126 F.3d 268, 284 (4th Cir. 1997) (citing Cleveland Real Estate Partners v. NLRB, 95 F.3d 457, 465 (6th Cir. 1996); \textit{Oakland Mall II}, 74 F.3d at 300). \textit{But see} Stephanie Goss John, \textit{Oakland Mall, Ltd.: A Further Limitation of Union Access to Private Property}, 57 La. L. Rev. 361, 375 (1996) (criticizing extension of \textit{Lechmere} to non-organizational activity); \textit{Zmija}, \textit{supra} note 63, at 127–28 (same).
Nonemployee conduct, whether directly or derivatively protected, is subject to employer interference under the *Lechmere* scheme. By refusing to focus on derivate versus direct rights, the Board has put itself in a logical bind. The Board is constrained by the Court’s statement that it gives directly protected nonemployee conduct, such as publicity picketing, less weight than nonemployee organizational activity. Yet, derivative/direct analysis would give the “weaker” non-organizational conduct, though a direct right, more protection against employer property interests than derivative, organizational activity. Rather than questioning the efficacy of this hierarchy rationale, the Board embraced a circular logic under which nonemployee organizational activity has little protection because it is a derivative right, and directly protected nonemployee conduct also lacks protection because the hierarchy places it below organizational activity. There may be good reasons for this employee/nonemployee analysis, but the Board has yet to express any.

This failure is all the more frustrating because the employee/nonemployee distinction is increasingly problematic in the modern workforce. The growing use of contractors, telecommuters, and other novel work relationships blurs the distinction between employees and nonemployees, particularly where access to property is at issue. Yet, no matter its justification, the employee/nonemployee

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76 For a discussion of the confusion created by off-duty employees, see infra note 83 and accompanying text.
77 See *Lechmere*, 502 U.S. at 532.
78 *Sears*, 436 U.S. at 206 & n.42.
79 See supra note 75 and accompanying text.
80 The hierarchy theory does not fit well with *Lechmere*. If *Lechmere* was based upon a hierarchy of rights, *Jean Country*’s balancing test—which expressly considered the strength of the section 7 interests at stake—should have been appropriate. Instead, *Lechmere* held that no balancing was required because the union’s derivative rights were satisfied as long as reasonable alternatives existed. See *Lechmere*, 502 U.S. at 537–38. Moreover, although organizing activity is obviously a primary concern of the NLRA, the basis provided for the hierarchy distinction—that area standards, recognition, and publicity activity were recognized later than organizational activity—makes little sense. The date a right was recognized under the Act should not govern the respective strength of that right.
81 See *Hudgens*, 424 U.S. at 521–22 n.10 (distinguishing nonemployee organizing from *Republic Aviation* employee activity because, under the former, “employer’s management interests rather than his property interests were . . . involved,” and this “difference is ‘one of substance’” (quoting *Babcock*, 351 U.S. at 113)).
82 See infra note 83 and accompanying text.
83 For example, although a telecommuter may clearly be an employee, should she receive the same right to access a worksite as nontelecommuters? Also, should a contractor who works alongside other employees at a site be given the same access rights? See *New York
distinction is undeniably the basis for post-*Lechmere* right-to-access cases. The distinction’s significance is critical because it suggests that the Board’s primary consideration in right-to-access cases should be determining whether excluded organizers are employees, not the extent of the employer’s property interests under state law. The Board’s current analysis, however, has proved otherwise.

**B. The Board’s Current Analysis**

The Board’s struggle to apply *Lechmere* has led to a right-to-access analysis that makes little sense doctrinally or practically. The Board’s approach generally consists of a single inquiry: did the employer possess a state private property right that entitled it to exclude the non-employee organizers? For most cases, if the employer possessed such a right, no violation of the NLRA occurred. If the employer lacked that right, then it automatically violated section 8(a)(1).

It makes little sense, however, to require the Board and reviewing federal courts of appeals to rest their decisions on an often complicated area of state law. The Board’s expertise does not encompass state property issues and its treatment of those issues bears out that reality. The resulting delay and frequently inadequate analysis harms both the federal labor interests at stake and state property interests. Even beyond these practical concerns, the current analysis appears wrong as a matter

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84 *New York*, 313 F.3d at 590 (holding that such an issue is uncertain because “[n]o Supreme Court case decides whether a contractor’s employees have rights equivalent to the property owner’s employees . . . because their worksite, although on the premises of another employer, is their sole place of employment”). Off-duty employees are another source of confusion. Currently, an employer is able to restrict off-duty employees’ access only with respect to the inside of a facility or other working areas, where the restriction is clearly disseminated to employees, applies to all activities, and is justified by valid business reasons. *See Teletech Holdings*, 333 N.L.R.B. at 404; Tri-County Med. Ctr., 222 N.L.R.B. 1089, 1089 (1976). In contrast to nonemployee organizers, the Board considers off-duty employees, even those who do not work at the site in question, to have a nonderivative right to access the property. *See First Healthcare*, 336 N.L.R.B. at 648; *accord ITT Indus.*, 413 F.3d at 72–73. An employer’s property concerns will be given more weight, however, where the off-duty employee works at a different site. *First Healthcare*, 336 N.L.R.B. at 650.

85 *See supra* notes 64–77 and accompanying text.

86 This Article generally refers to excluded activity as organizational. Although other nonemployee conduct may be involved and similarly analyzed, organizational activity is more common. *See supra* notes 72–81 and accompanying text.

87 *See Calkins*, 187 F.3d at 1088; *Snyder’s of Hanover*, 334 N.L.R.B. at 185.

88 *See Calkins*, 187 F.3d at 1088; *Snyder’s of Hanover*, 334 N.L.R.B. at 185.

89 *See infra* notes 108–155 and accompanying text.
of law. Although ostensibly derived from *Lechmere*, the scheme runs counter to the analytical underpinnings of that decision.\(^\text{90}\) The proposal of this Article attempts to reconcile the right-to-access inquiry with *Lechmere* while also mitigating these practical concerns.\(^\text{91}\)

The Board’s response to *Lechmere* was to create a strict dichotomy.\(^\text{92}\) Where nonemployee organizers are engaged in activity on property that the employer controls, *Lechmere* applies.\(^\text{93}\) In those circumstances, virtually any attempt by the employer to remove the organizers will be lawful, as long as reasonable alternatives to reach employees exist and the employer does not discriminatorily enforce its no-solicitation policy.\(^\text{94}\) The initial question for the Board, therefore, is whether state law gives the employer the right to remove the organizers from the property at issue.\(^\text{95}\)

The importance of this state law issue is heightened by the other side of the dichotomy. If the organizers are on property over which the employer lacks a right to exclude—a situation that *Lechmere* did not address—the Board has determined that the *Lechmere* analysis does not apply.\(^\text{96}\) Thus, virtually any attempt by the employer to remove organizers from such property automatically will be unlawful.\(^\text{97}\)

The significance of this analysis is its requirement that the Board address state property law in every case. That determination, moreover, is almost always dispositive.\(^\text{98}\) The Board’s interpretation of a

\(^{90}\) See 502 U.S. at 532–35.

\(^{91}\) See id.

\(^{92}\) See *Bristol Farms*, 311 N.L.R.B. at 438 (discussing when *Lechmere* applies).

\(^{93}\) See id.

\(^{94}\) See *Lechmere*, 502 U.S. at 537–38 (discussing reasonable alternatives); *Babcock*, 351 U.S. at 112 (noting discrimination as exception to employer authority to exclude nonemployee organizers); *Bristol Farms*, 311 N.L.R.B. at 438.

\(^{95}\) See *Bristol Farms*, 311 N.L.R.B. at 438; *Johnson & Hardin Co.*, 305 N.L.R.B. 690, 690 (1991).

\(^{96}\) *Calkins*, 187 F.3d at 1088. Even where the employer fails to show that it possesses a right to exclude, however, there are instances where the removal of nonemployee organizers does not violate the NLRA—for example, where the organizers are blocking access to the employer’s retail store or causing traffic problems. See *CSX Hotels, Inc. v. NLRB*, 377 F.3d 394, 400–01 (4th Cir. 2004) (justifying exclusion based on traffic problems); *Victory Mktgs.*, 322 N.L.R.B. at 20–21 (justifying exclusion based on traffic blockage and impeding customers’ entry and exit).

\(^{97}\) See *Calkins*, 187 F.3d at 1088 (“Where state law does not create [an interest allowing the employer to exclude organizers], access may not be restricted consistent with Section 8(a)(1).”).

\(^{98}\) See *O’Neil’s Mktgs.*, 95 F.3d at 738–39 (citing *Johnson & Hardin*, 305 N.L.R.B. 690, enforced, 49 F.3d 237 (6th Cir. 1995)) (stating that “*Lechmere* leaves undisturbed previous Board holdings that an employer lacking the right to exclude others from certain property violates section 8(a)(1) when it removes section 7 actors from those areas”); *Bristol Farms*,
lease, construction of a state’s treatment of public rights-of-way, or factual determination of where the organizers were standing will either trigger *Lechmere* and make the employer’s attempt to exclude lawful, or evade *Lechmere* and make the exact same attempt unlawful. This analysis is frustrating for the parties, as they cannot reasonably predict, ex ante, the Board’s determination of the state law issue.

In addition to the practical concerns raised by the Board’s reliance on state law, its current dichotomy makes little sense under *Lechmere*. The problem does not lie with *Lechmere*’s holding that employers can restrict access as long as reasonable alternative means to communicate with employees exist. Rather, the difficulty arises with the Board’s categorical refusal to acknowledge the logic of this holding—if the existence of reasonable alternatives satisfies nonemployee organizers’ derivative right to contact employees, then that right is satisfied no matter where organizing activity is located when the employer tries to stop it. The derivative-right analysis should be the same whether the organizers are standing on property that the employer controls or on property, such as the public grassy strip in *Lechmere*, over which the employer lacks control. Simply put, if reasonable alternatives exist that satisfy the organizers’ derivative rights, no employer attempt to exclude them can infringe that right under *Lechmere*.

The Board’s continued insistence that employers automatically violate section 8(a)(1) by excluding organizers from property over which they lack a right to exclude under state law purports to respect both state property law and federal labor law. In practice, however, neither interest is served. To be sure, property rights were a major concern of *Lechmere*. Yet if one takes seriously the Court’s statement that “[section] 7 simply does not protect nonemployee union organizers *except* in the rare case where” reasonable alternatives

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311 N.L.R.B. at 437–38 (concluding that it is “beyond question” that, under *Lechmere*, an employer’s exclusion of organizers from public or private property over which it lacks a state right to exclude violates section 8(a)(1)).

99 See 502 U.S. at 537–38.

100 See id.

101 See id. at 540.

102 See *O’Neil’s Mktgs.*, 95 F.3d at 738–39; *Bristol Farms*, 311 N.L.R.B. at 437–38. The analysis reflects the Board’s view that *Lechmere* is applicable only where there is a conflict between employer property interests and labor rights. See *Indio Grocery Outlet*, 323 N.L.R.B. 1138, 1141 (1997), *enforced sub nom.* NLRB v. Calkins, 187 F.3d 1080 (9th Cir. 1999). As shown, however, *Lechmere* limited the scope of the union’s derivative right—and, therefore, an employer’s ability to interfere with that right—even where employer property interests are not present.

103 502 U.S. at 533–35, 537.
are unavailable, the Board’s analysis is incorrect. Where section 7 does not protect union organizing, any employer interference with that activity is, by itself, lawful—no matter its location.

This Article concedes that Lechmere holding and argues that the Board, instead of looking to state property law, should focus on whether the manner in which an employer excludes organizing activity interferes with employees’ right to choose freely whether to pursue collective representation. This proposal more accurately reflects Lechmere and avoids the myriad problems associated with the current practice of making an employer’s state property rights dispositive. Indeed, the proposal would eliminate state law from the Board’s analysis of right-to-access cases. The Board’s past treatment of state property law shows that this change would benefit significantly the enforcement of federal labor rights, the administration of the Board and federal courts’ adjudicatory processes, and the independence of state property law.

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104 Id. at 537.

105 This concession is not an endorsement. Because Lechmere is likely to remain controlling precedent for the foreseeable future, this Article accepts it as settled law; however, the decision, particularly its extraordinarily broad view of “reasonable alternatives,” has been widely criticized. See id. at 542–44 (White, J., dissenting) (arguing that Babcock’s definition of reasonable efforts was not limited to remote logging camp situations); Estes & Porter, supra note 27, at 363–66 (criticizing holding that employee notice of organizational campaign satisfies derivative right); Estlund, supra note 9, at 332 (arguing that effective organizing requires worksite communication with employees); Gorman, supra note 63, at 12 (stating that “the Babcock & Wilcox Court did not at all state that the [reasonable alternatives] standard was well-nigh impossible to satisfy, as the Court now portrays it in Lechmere”); Zmija, supra note 63, at 113–16 (criticizing Lechmere’s reasonable-alternatives test). But see Michael L. Stevens, Comment, The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation, 41 Emory L.J. 1317, 1340–47 (1992) (arguing that Lechmere properly rejected Jean Country’s balancing approach and reasonable-alternatives analysis).

106 The Board, on occasion, has suggested that it would consider the effect of the employer excluding organizing activity on employees’ general section 7 rights, but its analyses ultimately fail to provide any consideration of non-derivative rights. See Home Depot, U.S.A., Inc., 317 N.L.R.B. 732, 733 (1995) (stating issue as “whether the rights of employees were affected by the actions taken by” employer, but finding no effect wholly because employer possessed right to exclude organizer, employer did not deny employees access to union information, and employer did not discriminatorily apply no-solicitation rule).

107 The proposal would not leave union organizers without recourse. Rather, it would require the Board to look not to state property law, but to whether the employer’s attempt to remove the union infringed on employees’ labor rights. See infra notes 156–290 and accompanying text.
C. *The Board’s Difficulties with State Property Law*

Although the Board’s task in applying *Lechmere* is not enviable,\(^{108}\) its designation of state property law as the dispositive issue makes little sense. The Board’s expertise is solely in federal labor law and does not include the vagaries of over fifty different property regimes. It is not surprising, therefore, that Board resolution of these cases is much slower than other unfair labor practice decisions.\(^{109}\) The following two cases illustrate the reason for this delay, as well as the possibility of federal interference with state property law.

First, in *Snyder’s of Hanover, Inc.*, a 2001 Board decision which the Third Circuit declined to enforce, the employer’s attempt to exclude union organizers from a public right-of-way located next to the entrance of its snack-food plant was at issue.\(^{110}\) Before arriving at the plant, the organizers called the state Department of Transportation and local township—both of which confirmed that the organizers could distribute handbills from the right-of-way.\(^{111}\) Subsequently, as the organizers distributed handbills to employees from the right-of-way, the employer demanded that the organizers leave and, after they refused, called the police.\(^{112}\) The responding officer contacted an assistant district attorney, who stated that the organizers had a right to handbill in the right-of-way as long as they were peaceful and did not interfere with traffic.\(^{113}\)

The union subsequently filed an unfair labor practice charge with the Board alleging that the employer violated section 8(a)(1) by prohibiting organizers from handbilling on the right-of-way and by

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\(^{108}\) See Estlund, *supra* note 9, at 341.

\(^{109}\) The Board consistently takes substantially longer to decide *Lechmere*-related unfair labor practice cases than other unfair labor practice cases. The median number of days from the filing of the charge to a Board decision in *Lechmere* cases compared to all Board unfair labor practice cases (including *Lechmere* cases) over the most recently reported ten-year period is as follows: Fiscal Year 2004 (865 median days for *Lechmere* cases; 690 median days for all cases); FY2003 (1132 *Lechmere*, 647 all); FY2002 (812 *Lechmere* (only one case); 889 all); FY2001 (1502 *Lechmere*, 1144 all); FY2000 (1351 *Lechmere*, 878 all); FY1999 (1128 *Lechmere*, 747 all); FY1998 (1212 *Lechmere*, 658 all); FY1997 (928 *Lechmere*, 557 all); FY1996 (943 *Lechmere*, 591 all); FY1995 (1725 *Lechmere*, 586 all); FY1994 (755 *Lechmere*, 503 all). 59–69 NLRB Ann. Rep. (1995–2005).


\(^{111}\) *Snyder’s of Hanover*, 334 N.L.R.B. at 185.

\(^{112}\) Snyder’s of Hanover, Inc. v. NLRB (*Snyder’s of Hanover II*), 39 F. App’x 730, 731–32 (3d Cir. 2002).

\(^{113}\) Id. at 732.
calling the police to remove them. At first, this appeared to be an easy case; the organizers were told by government officials that they could handbill in a public right-of-way. Thus, the employer seemed to lack a property interest sufficient to invoke *Lechmere* which, under the Board’s current analysis, meant that the attempt to stop the handbilling was unlawful. What developed during litigation, however, reveals how state property law issues can be far more complex than they first appear—and why those issues are best left to state courts rather than a federal agency specializing in labor law.

As the employer itself initially failed to realize, Pennsylvania’s treatment of the public’s right to use a right-of-way is counter-intuitive. In Pennsylvania, a landowner owns to the middle of an abutting street, “subject only to an easement of public use.” The scope of that easement is defined entirely by the relevant municipality’s authorization of a given use by the public. Any use not expressly permitted by the municipality may be stopped by the landowner. In *Snyder’s*, the Board had found that the employer’s attempt to stop the handbilling was unlawful because it had failed to provide any evidence of the scope of the municipality’s authorization of public use on the easement and thereby failed to satisfy its burden to show that it possessed a right to exclude. The Third Circuit—via a panel including then-Judge Alito—disagreed, holding that the employer did not bear the burden of proving what the municipal code permitted, and that the court’s interpretation of the code showed no express authorization for union handbilling on public rights-of-way.

The convoluted nature of this analysis illustrates the difficulties encountered by the Board and courts when they have to examine

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114 *Snyder’s of Hanover*, 334 N.L.R.B. at 183; *see infra* note 166 (discussing whether calling police still violates the NLRA). The union also charged the employer with unlawfully engaging in surveillance of employees receiving the handbills; the Third Circuit enforced the Board’s finding that the surveillance violated section 8(a)(1). *See Snyder’s of Hanover II*, 39 F. App’x at 735–37; *infra* notes 218–230 and accompanying text (discussing surveillance).

115 *Snyder’s of Hanover*, 334 N.L.R.B. at 185.

116 *See Bristol Farms*, 311 N.L.R.B. at 438; *supra* notes 86–107 and accompanying text.

117 *Snyder’s of Hanover*, 334 N.L.R.B. at 187 n.8 (noting that employer raised this issue after the initial hearing).

118 *Id.* at 183 n.4 (quoting City of Philadelphia v. Street, 63 Pa. D. & C.2d 709 (1974)).

119 *Id.* at 187 n.8; *accord* 46 S. 52nd St. Corp. v. Manlin, 157 A.2d 381, 386 (Pa. 1960).


121 334 N.L.R.B. at 184.

122 *Snyder’s of Hanover II*, 39 F. App’x at 734.
state property law. Indeed, the issue in Snyder’s was more complicated than either the Board or the Third Circuit acknowledged, as neither addressed whether the express permission to handbill given to the organizers by local and state officials constituted “authorization” under Pennsylvania law.123

Moreover, as the Third Circuit noted, Pennsylvania’s expansive view of landowners’ control over public rights-of-way also raised constitutional concerns.124 Accurately noting that the Board did not address this constitutional issue,125 the Third Circuit used this omission to justify its own avoidance of the issue.126 These omissions alone aptly demonstrate why state property law should not be resolved in federal labor cases. A serious constitutional right was at stake—whether a municipality can allow a landowner to stop expressive activity in a public right-of-way—yet the Board was unable, and the court unwilling, to address the issue.127 The Third Circuit’s decision, in particular, was troubling, for it willingly approved interference with organizers’ expressive activity pursuant to a rule about which it had obvious constitutional misgivings.128 Eliminating state property law from the Board’s analysis would produce a far better outcome. Under the proposal here,129 the Board would have examined only whether the employer’s actions chilled employees’ labor rights; any attempt to invoke or challenge Pennsylvania’s public rights-of-way rule would be determined by a state court that presumably would not be hesitant to entertain the constitutional issue.

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123 See 334 N.L.R.B. at 184.
125 What the court failed to recognize was that the Board could not address the issue, as it lacks the power to declare laws unconstitutional. See Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302, 304 (3d Cir. 1982) (citing Califano v. Sanders, 430 U.S. 99, 109 (1977)) (“We agree with the Board that it has no authority to rule on constitutional questions . . . .”); see also Johnson v. Robison, 415 U.S. 361, 368 (1974).
126 Snyder’s of Hanover II, 39 F. App’x at 734. The court was not warranted in avoiding an issue that the Board could not address. See Overstreet v. United Bhd. of Carpenters, 409 F.3d 1199, 1209 (9th Cir. 2005) (holding that “because constitutional decisions are not the province of the NLRB . . . the tasks of evaluating the constitutional pitfalls of potential interpretations of the Act and of interpreting the Act to avoid those dangers are committed de novo to the courts”).
127 See Snyder’s of Hanover II, 39 F. App’x at 734; Tressler Lutheran, 677 F.2d at 304.
128 See Snyder’s of Hanover II, 39 F. App’x at 733–34.
129 See infra notes 156–290 and accompanying text.
A further issue in *Snyder’s* illustrates another complication in the Board tackling state property law—possible disputes over property boundaries. Although the employer was named “Snyder’s of Hanover” and stated throughout the litigation that its plant was in Hanover Township, it argued for the first time in its reply brief to the court that its plant was actually in Penn Township. The almost comical nature of this issue should not obscure the serious concern that it raises. If the dispositive property boundaries in a case are so confusing that the landowner itself is perplexed, we cannot expect an agency that specializes in federal labor law to accurately and efficiently resolve the matter. Enforcement of the NLRA and Pennsylvania property law would have been far better served had a Pennsylvania court, not the Board, delved into these complicated state law issues.

The extraordinarily limited ability to use a public right-of-way in Pennsylvania sharply contrasts with the broad right to access certain private property in California. In particular, California’s prohibition against landowners barring uninvited expressive activity on private property that is generally open to the public provides further support for the elimination of state law questions from federal labor cases. This rule was implicated in the Board’s 2001 decision in *Walmart Foods*, where, to an even greater degree than *Snyder’s*, the Board’s current analysis led to a significant federal intrusion into state property law.

At issue in *Walmart* was whether California law provided an employer the right to exclude union handbilling in front of its supermarket. Organizers, standing in the employer’s parking lot, distributed handbills to customers urging them to boycott the store. The employer responded by asking the organizers to leave and calling the

130 Compare Reply Brief on Behalf of Petitioner at 6 n.2, *Snyder’s of Hanover II*, 39 F. App’x 730 (No. 01-2702), 2001 WL 34545824, at *n.2, with Brief on Behalf of Petitioner at 4, *Snyder’s of Hanover II*, 39 F. App’x 730 (No. 01-2702). The court took judicial notice of the fact that the facility was in Penn Township. *Snyder’s of Hanover II*, 39 F. App’x at 733.

131 *Snyder’s of Hanover II*, 39 F. App’x at 734 n.1 (stating that Board possessed “specialty in labor law only . . . [but] issues of labor law are intricately tied to issues of state law . . . [and] the Board routinely plies its hand at interpreting state law, an area of law in which it has no expertise,” yet holding that, unlike foreign law, Board should not require parties to prove state law as issue of fact).

132 See supra notes 110–131 and accompanying text; infra notes 133–152 and accompanying text.


135 *Walmart*, 337 N.L.R.B. at 289.

Acting on the union’s subsequent section 8(a)(1) charge, the Board found that the employer’s conduct was unlawful because it lacked a right to exclude under California property law. The basis for that finding was state court decisions holding that landowners could not unreasonably bar expressive activity in privately-owned shopping areas.

The D.C. Circuit’s initial review of the Board’s decision noted that these cases were based on either a California statute, the California Constitution, or the federal Constitution. The problem, according to the court, was that an intervening U.S. Supreme Court decision had undermined the federal constitutional rationale, and that subsequent California appellate courts had cast doubt on whether state law protected expressive activity on property near private, stand-alone stores. The D.C. Circuit, therefore, certified to the California Supreme Court two questions: (1) whether California law permitted the employer to prevent expressive activity in its parking lot and walkways; and (2) if the employer generally possessed that right, whether California law carved out an exemption allowing union expressive activity related to a labor dispute with the landowner.
Given California’s own confusion, the D.C. Circuit’s desire for clarification was understandable, but ultimately fruitless. The California Supreme Court refused to accept the certification, thereby forcing the federal court to make its own determination of state property law.\textsuperscript{143} The D.C. Circuit concluded that the primary California Supreme Court decision cited by the Board relied on a state anti-labor injunction statute, rather than the state constitution’s protection of expressive activity.\textsuperscript{144} Because two U.S. Supreme Court decisions had since ruled that special exemptions for labor picketing violated the First Amendment of the U.S. Constitution, the D.C. Circuit concluded that this state decision “cannot reflect current California law.”\textsuperscript{145} Thus, according to the D.C. Circuit, California no longer gave special protection to expressive activity occurring on property owned by the targeted employer.\textsuperscript{146}

The D.C. Circuit then rejected the Board’s argument that California generally limited a landowner’s right to restrict expressive activity on its property.\textsuperscript{147} According to the court, the California Supreme Court decision supporting that argument was based on a federal constitutional interpretation that the U.S. Supreme Court later abandoned.\textsuperscript{148} Particularly interesting was the D.C. Circuit’s reliance on two California appellate courts that came to the same conclusion,\textsuperscript{149} despite a Ninth Circuit decision to the contrary.\textsuperscript{150}

\textsuperscript{143} See Waremart II, 354 F.3d at 871. Unlike in Waremart II, the D.C. Circuit recently was successful in certifying a similar question to the California Supreme Court. See News Release, Judicial Council of Cal., Admin. Office of the Courts, Summary of the Cases Accepted During the Week of August 14, 2006 (Aug. 17, 2006) (announcing California Supreme Court’s acceptance for review of Fashion Valley Mall, LLC v. NLRB, Case No. S144753), available at http://www.courtsinfo.ca.gov/courts/supreme/summaries/WS081406.PDF; see also Fashion Valley Mall, LLC v. NLRB, 451 F.3d 241, 246 (D.C. Cir. 2006) (holding that whether employer’s antiboycott rule violated the NLRA depends on whether the rule violated state law).

\textsuperscript{144} Id. at 874 (holding that Sears relied on the Moscone Act).

\textsuperscript{145} Id. at 875 (citing Carey v. Brown, 447 U.S. 455, 466 (1980); Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 93 (1972)) (“We believe that if the meaning of the Moscone Act came before the California Supreme Court again, it would either hold the statute unconstitutional or construe it to avoid unconstitutionality.”).

\textsuperscript{146} See Waremart II, 354 F.3d at 875.

\textsuperscript{147} Id.

\textsuperscript{148} Id. (citing Hudgens, 424 U.S. at 518–21; In re Lane, 457 P.2d at 565).

\textsuperscript{149} Waremart II, 354 F.3d at 875 (citing Albertson’s, 131 Cal. Rptr. 2d at 735; Trader Joe’s, 86 Cal. Rptr. 2d at 450).

\textsuperscript{150} Waremart II, 354 F.3d at 875–76 (citing NLRB v. Calkins, 187 F.3d 1080, 1089–93 (9th Cir. 1999)). The D.C. Circuit also rejected the application of Robins because, unlike the shopping center there, the Waremart supermarket—a stand-alone store—could not constitute a traditional public forum. See Waremart II, 354 F.3d at 876.
Regardless of one’s view of the substance of the D.C. Circuit’s interpretation of California law, the analysis itself is disturbing. The Board’s decision in Waremart involved an initial construction of state law by a federal agency with expertise solely in labor law.¹⁵¹ That interpretation was reversed by a federal court that overruled a state supreme court decision based in large part on the holdings of two state appellate courts—even though the federal appeals court that hears most California federal cases ruled the other way.¹⁵² It is hard to imagine a worse method to analyze state property law, yet this process is essentially required by the Board’s current right-to-access scheme.¹⁵³ Most worrisome is the fact that federal agencies and courts, rather than state courts, are resolving ambiguities in state law.¹⁵⁴ Thus, the Board’s reliance on state law causes not only delay and unnecessary variance in the enforcement of federal labor rights, but also inexpert federal interference with state law.¹⁵⁵

This Article’s proposal would improve this situation drastically by having the Board and federal courts look solely to federal labor issues, while leaving state property questions to state courts. There is little, if any, benefit from federal interpretation of state property law, particularly when originated by the Board. Moreover, federal labor policy suffers when its enforcement varies depending on geography. No labor policy is served by having an identical action considered lawful in some states, yet unlawful in others. The proposal would remove that inconsistency, thereby strengthening both the enforcement of federal labor policy and the autonomy of state property law.

¹⁵¹ See Waremart, 337 N.L.R.B. at 289.
¹⁵² Waremart II, 354 F.3d at 875–76; Calkins, 187 F.3d at 1089–93. Waremart II also raises the threat that federal courts will limit state attempts to protect labor speech. See Aron Fischer, Comment, Is the Right to Organize Unconstitutional?, 113 YALE L.J. 1999, 2002 (2004) (“Taken at face value, the D.C. Circuit’s reasoning would seem to invalidate all state laws expanding the rights of nonemployee organizers.”); cf. Estlund, supra note 9, at 309 (citing Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991)) (arguing that, under Lechmere, NLRA cases may override state limits on landowners’ right to exclude).
¹⁵³ See supra note 12 (citing complicated state property law issues); see also Corp. Interiors, Inc., 340 N.L.R.B. 732, 745 (2003) (concluding that employer unlawfully removed union picketers from public easement near employer’s office, because agreement with city to maintain area did not include right to exclude).
¹⁵⁴ See Waremart II, 354 F.3d at 875–76; Waremart, 337 N.L.R.B. at 289.
¹⁵⁵ See supra notes 143–154 and accompanying text.
II. The New Paradigm: How—Not Where—the Employer Excludes

Under the NLRB’s right-to-access dichotomy, employer interference with nonemployee activity on property that the employer controls is almost always lawful.\textsuperscript{156} If the activity is non-trespassory, virtually all employer interference is unlawful.\textsuperscript{157} The rationale of the U.S. Supreme Court in \textit{Lechmere, Inc. v. NLRB}, however, belies that framework. Under \textit{Lechmere}, employer interference with organizing activity never violates nonemployees’ derivative rights, unless the interference is discriminatory or eliminates all reasonable means to communicate with employees.\textsuperscript{158} Accordingly, this Article’s proposal deems nonemployees’ derivative rights satisfied wherever reasonable alternatives exist.

Although a substantial modification of the Board’s current analysis, the proposal is consistent with both \textit{Lechmere} and the Board’s reliance on the employee/nonemployee distinction. It also would respect \textit{Lechmere}’s intent to protect employers’ property interests where organizers have other means of achieving their goal. Most important, it would eliminate the Board’s ineffective forays into state property law. Instead, the Board would concentrate on the issue it should have been addressing all along—whether the manner in which an employer tried to stop nonemployee activity infringed employees’ rights under the NLRA.

A. Presumptions of Interference

With few exceptions,\textsuperscript{159} the Board has not examined regularly whether the manner in which an employer attempts to exclude nonemployee activity tends to chill employee rights. This omission is curious, as it is easy to imagine that an employer’s exclusion of organizers would often hinder employees’ willingness to seek collective representation. Indeed, a major shortcoming of \textit{Lechmere} is its failure to acknowledge that virtually all exclusions negatively impact employees’ section 7 rights in some fashion.\textsuperscript{160} Recognizing \textit{Lechmere} as control-

\textsuperscript{156} See \textit{supra} notes 93–94 and accompanying text.
\textsuperscript{157} See \textit{supra} notes 96–97 and accompanying text.
\textsuperscript{158} See Waldbaum, Inc. v. United Farm Workers, 383 N.Y.S.2d 957, 975 (Sup. Ct. 1976) (holding that union’s picketing targeting one employer in shopping mall had no reasonable alternative location to the area in front of employer’s store); \textit{supra} notes 96–107 and accompanying text; \textit{infra} notes 233–247 and accompanying text.
\textsuperscript{159} See \textit{infra} note 204 and accompanying text.
\textsuperscript{160} See Estlund, \textit{supra} note 9, at 330–33.
ling law, however, the proposal would accept its disregard of the deriv-
vate infringement of employee rights caused by an employer’s elimi-
nation of an important source of information about collective repre-
sentation. Yet, the proposal here attempts to address the possible
direct impact on section 7 rights left untouched by _Lechmere_—where
the employer’s exclusion interferes with employees’ willingness to
pursue unionization.

Section 8(a)(1) prohibits any action by the employer that tends
to coerce, restrain, or interfere with employees’ section 7 right of self-
organization.161 The central question for determining such a violation
is whether the employer’s conduct tends to be coercive; the existence
of animus or intended coercion is irrelevant.162 Given the lack of a
good-faith defense, as well as employees’ economic dependence on
their employer, it is safe to assume that certain attempts to bar orga-
nizing activity would tend to make an employee reasonably believe
that a decision to unionize would be met with harsh consequences.163

The question, then, is what type of exclusionary conduct would
tend to interfere improperly with employees’ rights? The Board ad-
dresses this kind of issue regularly and is well-equipped to do so in
right-to-access cases. Although the Board could use a case-by-case
analysis, it seems far better to provide the parties, especially employ-
ers, with clear guidelines.164 Employers then would no longer face the
unenviable choice of either allowing what may be a trespass on its
property or attempting to protect its perceived property interest by
risking a violation of the NLRA. Thus, instead of a case-specific analy-
sis, the proposal creates a set of presumptions to guide employer and
union conduct.165

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161 See _Retlaw Broad. Co. v. NLRB_, 53 F.3d 1002, 1006 (9th Cir. 1995).
162 The Supreme Court has long held that a “violation of [section] 8(a)(1) alone . . .
    presupposes an act which is unlawful even absent a discriminatory motive.” _Textile Work-
    ers Union of Am. v. Darlington Mfg. Co._, 380 U.S. 263, 269 (1965); _accord Retlaw Broad._,
    53 F.3d at 1006 (holding that an “[a]nti-union motive is not required” under section 8(a)(1)).
163 See _supra_ note 70.
164 See _Zmija_, _supra_ note 63, at 117–18 (describing costs of ambiguity under NLRB v.
    Babcock & Wilcox Co., 351 U.S. 105 (1956)). Indeed, things have not improved much
    since Professor Gould, writing before he became NLRB Chairman, emphasized that par-
    ties need deliverance from the “morass” of no-solicitation rulings and that, “[m]ore than
    anything else, the law must have clarity and a practical appreciation for the parties’ needs.”
    Gould, _supra_ note 36, at 146.
165 The Board frequently uses such presumptions, which courts have readily accepted.
    Indeed, an excellent example is employee solicitations on employer property. See _supra_
    note 22 and accompanying text.
First, the Board should deem presumptively lawful any action by the employer that does not go beyond simply and peacefully requesting that nonemployees stop organizing on property that, from the employees’ perspective, is clearly or questionably under the employer’s control. Asking law enforcement to remove the organizers would typically constitute such a request.\textsuperscript{166}

The rationale for this presumption is that the Board should not police the parties’ conduct as long as the dispute remains simply a question of control and use of the property.\textsuperscript{167} Organizers, however, could justify Board action by rebutting the presumption—showing, for example, that employees would view a nominally peaceful request as coercive or threatening because of a recent pattern of unlawful employer resistance to unionism.\textsuperscript{168} Similarly, an employer could an-

\textsuperscript{166} Although calling the police to remove organizers could easily chill employee rights, recent Supreme Court decisions have limited the Board’s ability to regulate employers’ First Amendment right to redress the government. See Bill Johnson’s Rests., Inc. v. NLRB, 461 U.S. 731, 744–45 (1983) (holding that Board could enjoin state lawsuit only if it lacked a reasonable factual or legal basis); see also BE&K Constr. Co. v. NLRB, 536 U.S. 516, 536–37 (2002) (clarifying this standard). These cases also may restrict the Board’s ability to find an unfair labor practice based on a call to the police. Indeed, despite suggestions by the Board that calling the police is not covered by Bill Johnson’s, the Board’s General Counsel has begun treating such calls as protected by the First Amendment. Compare Corp. Interiors, Inc., 340 N.L.R.B. 732, 745 (2003) (finding unfair labor practice for calling police to remove union from public easement), and In re Wild Oats Mkts., Inc., 336 N.L.R.B. 179, 182 (2001) (stating that, if employer “had called the police to request [the union’s] removal, the Board would have found [it] in violation of Section 8(a)(1)”), with Advice Memorandum from NLRB to U.S. Postal Service, Case 30-CA-15830(P) (Mar. 24, 2003) (on file with author) (stating that calling police is covered by Bill Johnson’s). Therefore, the proposal would treat a call to the police as presumptively lawful unless it is without basis. Cf. Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 785 (9th Cir. 2001) (permitting state tort claims for false imprisonment, false arrest, and malicious prosecution based on calls to police); Johnson & Hardin Co. v. NLRB, 49 F.3d 237, 242–43 (6th Cir. 1995) (filing of criminal trespass charges against union lawful because of genuine issue of material fact on merits of trespass suit). This issue, however, is unlikely to be resolved soon, as it raises significant questions about the Board’s ability to enforce the Act and the treatment of First Amendment conduct in different contexts. Compare Bill Johnson’s, 536 U.S. at 744–45 (permitting lawsuit against union unless it lacks reasonable factual or legal basis), with Roger D. Hughes, 344 N.L.R.B. No. 49, slip op. at 3 n.4 (Mar. 31, 2005) (finding call to police to be unlawful because employer did not have “good faith, albeit erroneous, belief” that union misconduct had occurred). Moreover, the Board’s treatment of this issue further indicates why its current right-to-access analysis does not work. The Board has previously found calls to police to be lawful if the employer had control over the property and unlawful if it lacked control. See Corp. Interiors, 340 N.L.R.B. at 745. Yet, whether subsequent litigation determines that the employer had a state right to exclude says little about the reasonableness of the employer’s call to the police.

\textsuperscript{167} See NLRB v. Calkins, 187 F.3d 1080, 1087–88 (9th Cir. 1999).

\textsuperscript{168} See infra note 210 and accompanying text.
swer that union violence or interference with business justified a stronger response.\textsuperscript{169}

The other side of this presumption is that any actions by the employer that go beyond a peaceful request would be viewed as coercive. Conduct such as threats, harassment, and violence assumedly inform employees that the employer’s concern extends beyond its property interests and that attempts to unionize will result in harmful consequences.\textsuperscript{170} The employer could rebut this presumption by showing that extra measures were needed to respond, for example, to organizers who refused to stop blocking traffic or harassing customers. Like its traditional section 8(a)(1) interference analysis, the Board would resolve such questions by looking for hostile conduct by either party, discriminatory exclusions by the employer, and other relevant factors.

This scheme would apply no matter what the employer’s state property interests turn out to be. If organizers are on a public right-of-way that is arguably under the employer’s control, the Board’s analysis would be the same, regardless of how a state court would ultimately resolve the trespass issue. In short, the Board would remain focused solely on whether the employer behaved in a way that tended to infringe employees’ labor rights, and leave the state trespassory issue to state courts. There is simply no reason for the Board to delve into complicated state law to determine whether the NLRA has been violated.

The location of the organizing, however, would not be totally irrelevant. The presumption analysis would apply where organizing occurs on property over which the employer clearly, or questionably, has a right to exclude. Alternatively, if the organizing takes place on property that employees would clearly view as outside the employer’s control—for instance, a public park near the worksite—any employer attempt to exclude would be presumptively unlawful. In such instances, the employer’s conduct likely would send the message to employees that its aim is to interfere with union activity, not to protect its property interests. Importantly, the determination whether the property is clearly not under the employer’s control will be based solely on reasonable employees’ viewpoints, not state property law.

This scheme covers the entire spectrum of employer control over property. Employees’ belief that an employer clearly lacks control

\textsuperscript{169} See infra notes 194–197 and accompanying text.
\textsuperscript{170} Indeed, the Board has found that such conduct can violate section 8(a)(1) even if it was not witnessed by employees. See Hughes, 344 N.L.R.B. No. 49, at 3 (citing, in case involving threats and physical attack on picketers, Corp. Interiors, 340 N.L.R.B. at 739–41; Bristol Farms, Inc., 311 N.L.R.B. 437, 439 (1993)).
over property would create a presumption against the lawfulness of employer interference; conversely, where the employer clearly controls the property, the presumption would favor the employer. In the remaining middle ground—where the employer’s control is less certain—the employer again would enjoy a presumption of lawfulness for all peaceful attempts to stop organizing. This middle ground may, depending on the circumstances, provide a benefit over current law for one of the parties. For instance, there will be some peaceful employer interference on property in this middle ground that the proposal would deem presumptively lawful, but that the Board currently would regard as unlawful if it ultimately found no right to exclude under state law. Similarly, if the employer engaged in coercive interference on property that is later determined to be under its control, the proposal would treat the interference as presumptively unlawful, though the Board currently would find the same conduct to be lawful.

This difference is not as extreme as it may appear, for the Act has long proscribed even good-faith employer conduct that tends to infringe employees’ labor rights.171 The proposal merely seeks to correct the Board’s omission in not regularly looking at the issue of the employer’s conduct. Indeed, the Board has sporadically found that an employer’s exclusion of nonemployee organizers unlawfully chilled employee rights.172 The proposal would merely regularize that inquiry and, much like the U.S. Supreme Court in Republic Aviation Corp. v. NLRB, create a presumption that employer conduct extending beyond a peaceful request for nonemployees to stop organizing, or for government assistance, tends to interfere with employee rights.173

A major benefit of the proposal is that the Board would no longer have to examine state property law and instead would focus on what it does best—examining whether conduct tends to interfere with rights protected under the Act. A hypothetical case where an em-

171 See supra note 162 and accompanying text.
172 See Cent. Hardware Co., 181 N.L.R.B. 491, 492 (1970) (holding it unlawful to expel, in employees’ presence, organizers who acted solely as store customers because expulsion was motivated by “antiunion considerations”), enforcement denied in relevant part, 439 F.2d 1321 (8th Cir. 1971), vacated, 407 U.S. 539 (1972); Heck’s, Inc., 156 N.L.R.B. 760, 761 (1966); Marshall Field & Co., 98 N.L.R.B. 88, 104 (finding violation based on employer “forcibly” removing organizers from public gathering in employees’ presence), enforced in relevant part, 200 F.2d 375 (7th Cir. 1952).
173 Cf. Estlund, supra note 9, at 333 (“[A]n employer’s power to single out union organizers for exclusion . . . demonstrates the employer’s near-dictatorial power over the workplace, power it can use to keep the agents of unions, and perhaps unionization itself, at bay.”).
ployer peacefully asks union organizers to vacate a public easement over which employees generally believe the employer has a right to exclude illustrates the proposal’s superiority over the current analysis. Even if state law ultimately reveals that the employer did not have a right to exclude, the employer’s request would not chill employee rights because employees would tend to view the employer’s conduct as a reasonable attempt to protect its property interest. If the employer tried to stop the organizing through harassment and violence, however, employees would tend to feel that their rights were being threatened, even where the employer had a right to exclude. The proposal would take these realities into account, in contrast to the current analysis, which would mechanically find that the employer violated the Act in the former instance, but acted lawfully in the latter.

This improvement also exists where employees reasonably believe that organizers are on public property. Even if that belief is incorrect, an employer’s exclusion of organizers from that area is likely to have a deleterious effect on employees’ freedom to choose collective representation. This analysis, moreover, creates little hardship for an employer, which has a great deal of control over employees’ perceptions of its property. Any employer that wants to protect its ability to exclude peacefully nonemployees from property it controls needs only ensure that its employees are aware of that control.

The benefit to the parties of ex ante clarity should not be underestimated. Forcing parties to act based on guesses as to the future consequences of their actions may chill the exercise of legitimate labor and property rights. Further, Board delay in resolving property disputes may prompt harmful self-help measures, particularly where time-sensitive organizing is involved.

174 See supra notes 110–113 and accompanying text (describing organizers who were told by government officials that they could solicit on public right-of-way abutting employer’s plant, though state property law suggested that employer had right to exclude over right-of-way).

175 Posting no-solicitation signs, or similar information, presumably would be sufficient. Of course, an employer could take advantage of this rule by posting no-solicitation signs on property over which it lacks a right to exclude. A union could counter such an attempt by using the property and informing employees that the signs are wrong. Similarly, the Board could find that an employer violates the Act by knowingly misleading employees about its property rights. To avoid the Board having to delve into property issues on even a peripheral matter, if such a violation were permitted it would have to be limited to the rare situations where the employer was able to deceive employees about an unambiguous property issue.

176 One state justice has described the potentially violent risk of delay and self-help in right-to-access cases:
The proposal recognizes that employer conduct beyond a peaceful request is likely to undermine the NLRA. Allowing such activity weakens the Act’s ability to lessen labor strife and its resulting impact on commerce. Moreover, non-peaceful employer exclusions directly threaten the Act’s fundamental protection of employees’ freedom to choose whether to seek collective representation. The Board’s failure to address regularly these concerns ignores the full impact of nonpeaceful attempts to stop organizing activity—attempts that “cause . . . employees to weigh the possibility of incurring reprisals or other hostile employer reaction before undertaking to exercise their rights secured by the Act.” The proposal does not make the same omission.

1. What Is Presumptively Lawful Conduct?

It is difficult to characterize precisely when an employer’s request for organizers to leave will be peaceful enough to trigger the Board’s presumption of lawfulness. The Board would have significant leeway in establishing the boundaries for this presumption; therefore, the following suggestions are merely a possible starting point for its analysis.

The employer’s request in *Montgomery Ward & Co. v. NLRB* is an archetype of presumptively lawful conduct. There, the employer attempted to remove union organizers who were meeting employees in the employer’s public cafeteria. Store managers told the organizers that they were trespassing and violating the store’s no-solicitation policy, and said that if the organizers did not leave, they would call the

[Riesbeck Food Mkt., Inc. v. UFCW, 404 S.E.2d 404, 413 (W. Va. 1991) (Nelly, J., dissenting) (arguing against preemption of state trespass claims because of risks from Board delay).]

[A] possibility, of course, is for the employer to go out and hire some very large and very mean lads to persuade the picketers in the good old-fashioned way that they had made a mistake coming on private property. Justice Powell referred to this as “self-help”, and labor lawyers sometimes refer to it as the “ungood” way of handling picketers. In fact, nine out of ten labor lawyers of my acquaintance advise their business clients that beating up picketers with baseball bats, particularly when the Union reciprocates by dynamiting the employer’s premises, can create the mother of all labor disputes.

178 NLRB v. H.R. McBride, 274 F.2d 124, 127 (10th Cir. 1960) (holding that employer violated section 8(a)(1) by physically assaulting and verbally abusing pickets).
179 See *Montgomery Ward & Co. v. NLRB* (*Montgomery Ward II*), 692 F.2d 1115, 1118 (7th Cir. 1982).
180 Id. at 1117–18.
Taking State Property Rights out of Federal Labor Law

The lawfulness of this conduct is complicated under the current scheme, as it requires the Board to determine whether, under state law, the employer had a right to exclude the organizers from property open to the public. The proposal’s analysis would be far simpler. No matter the ultimate determination of the employer’s state property rights, the peaceful demand that the organizers leave would be presumptively lawful, particularly given the employer’s stated belief that the organizers’ violation of the no-solicitation policy constituted a trespass. Under such circumstances, reasonable employees would not tend to view the request as chilling their freedom to pursue collective activity because it appears to be the employer’s property. The only remaining question for the Board would be a possible union rebuttal. For example, the union could challenge the no-solicitation policy’s validity or, if valid, claim that the employer enforced the policy in a discriminatory manner.

A union also could rebut the presumption of lawfulness by pointing to circumstances showing that employees reasonably would tend to view the employer’s ostensibly innocuous conduct as threatening. Common rebuttal factors of this type would include evidence of the employer’s open union animus, contemporaneous unfair labor practices, the timing of the employer’s actions, and treating the union activity more harshly than other, similar conduct. An employer, for instance, may build a fence around its property which has the effect of preventing access by nonemployee organizers. The fence, by itself, raises no labor law concerns and would be presumptively lawful. The circumstances leading to the erection of the fence, however, may belie that presumption. If the fence suddenly appeared after a union organizing campaign began, the Board would be justified in finding interference with employees’ rights. Similarly, if employer comments sug-

181 Id. at 1118–19.
182 See id. at 1124–28 (holding that no-solicitation policy was too broad and noting that the trespass question depended on employer’s view of organizers’ activity in public cafeteria); supra note 30.
183 See Montgomery Ward II, 692 F.2d at 1122 (holding that employer discriminatorily enforced policy, which tended to “coerce[], restrain[], and interfere[] with the exercise of protected rights”).
184 See infra notes 208–210, 231–247 and accompanying text.
185 See, e.g., Four B Corp. v. NLRB, 163 F.3d 1177, 1183–84 (10th Cir. 1998) (holding that employer’s new no-solicitation policy—“hastily implemented in the face of the Union’s organizing effort”—was unlawful discrimination); NLRB v. Vill. IX, Inc., 723 F.2d 1360, 1366 (7th Cir. 1983) (holding that no-distribution rule created in response to organizing campaign was unlawful); Mini-Togs, Inc., 304 N.L.R.B. 644, 651 (1991) (concluding that, in response to organizing campaign, employer unlawfully prohibited nonemployees
gested that the fence was intended to keep out union organizers,\textsuperscript{186} it would impact employee rights in a manner that a fence intended to stop a rash of burglaries would not. Although there are numerous other scenarios that would rebut a presumption of lawfulness, the underlying question always focuses on whether the employer’s seemingly unthreatening conduct would tend to interfere with employee rights.

This analysis promotes behavior by both organizers and employers that serves the Act’s objectives to promote industrial peace and protect employees’ freedom to choose whether to organize.\textsuperscript{187} Where employer attempts to stop organizing are done in a limited and peaceful fashion on property over which it at least questionably has control, the effect on union organizing and other labor rights is small or non-existent. Employees would view such conduct, absent countervailing circumstances, as an attempt to protect property interests rather than an attack on unionization. Moreover, organizers who believe they are on property out of the employer’s control simply could refuse to leave with the knowledge that more strident employer attempts to stop the organizing presumptively would violate the Act.\textsuperscript{188} Finally, as it can do currently, an employer could press the property law issue through a state trespass claim—in response, for example, to organizers’ rejection of a peaceful request to leave.\textsuperscript{189}

These paths best promote the interests of the NLRA and state property law. Where the crux of a dispute is control of property, the state should resolve the issue; if the dispute centers on the infringement of employee rights, the NLRB is the best forum. The Board’s current scheme, however, requires it to decide the state property law issue, even where the case ultimately fails to implicate federal labor policy.\textsuperscript{190} In particular, under \textit{Lechmere}, federal labor rights are not at stake where an employer exercises its state property interests in a manner that does not tend to chill employees’ labor rights.\textsuperscript{191}

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\bibitem{186} The section 8(a)(1) violation still is not dependent on the employer’s intent; rather, expressions of the employer’s motive are relevant only to the extent that they affect how a reasonable employee would tend to view the situation. See \textit{supra} notes 161–162 and accompanying text.
\bibitem{188} Employer attempts to remove organizers from property that is obviously out of its control will be unlawful. See \textit{supra} notes 166–171 and accompanying text.
\bibitem{189} See \textit{infra} note 302 and accompanying text.
\bibitem{190} See \textit{supra} notes 92–98 and accompanying text.
\end{thebibliography}
Board should leave such disputes where they belong—in courts of the state from which the property rights originate.\footnote{192 This argument is consistent with the NLRA’s role in right-to-access cases. As noted by the Ninth Circuit, the U.S. Supreme Court has explained that:

employers may exclude union organizers in deference to state common law, but not because the NLRA itself restricts access. “The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superceded by the NLRA, nothing in the NLRA expressly protects it.”

Calkins, 187 F.3d at 1087–88 (internal citation omitted) (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 n.21 (1994)). Like the Court, the proposal attempts to prevent NLRA interference with state property law.}\footnote{193 Repeated requests for the union to leave, especially where law enforcement has confirmed the union’s right to continue, can be viewed as unlawful harassment. Cf. CSX Hotels, Inc., 340 N.L.R.B. 819, 820 (2003) (concluding that employer’s repeated requests that police remove union organizers showed that its concern was stopping union, not traffic problems), enforcement denied, 377 F.3d 394 (4th Cir. 2004).

194 For example, increased limits on union activity may be appropriate if it disturbs hospital patients. See Beth Isr. Hosp. v. NLRB, 437 U.S. 483, 501–02 (1978); NLRB v. S. Md. Hosp. Ctr., 916 F.2d 932, 935 (4th Cir. 1990).

195 See CSX Hotels, Inc. v. NLRB, 377 F.3d 394, 400–01 (4th Cir. 2004) (holding that call to police was lawful because of traffic hazard); Victory Mkt., 322 N.L.R.B. 17, 20–21 (1996) (justifying exclusion based, in part, on traffic blockage). But see supra note 193.\footnote{196 See Victory Mkt., 322 N.L.R.B. at 20–21 (justifying exclusion based, in part, on interference with customers’ entry and exit); Estlund, supra note 9, at 334, 352 (citing conduct that interferes with customers, creates safety hazards, or undermines security).\footnote{197 See infra note 204 and accompanying text.}}

2. What Is Presumptively Unlawful Conduct?

The proposal defines presumptively unlawful activity as any conduct that goes beyond a peaceful request for organizers to leave.\footnote{193 Repeated requests for the union to leave, especially where law enforcement has confirmed the union’s right to continue, can be viewed as unlawful harassment. Cf. CSX Hotels, Inc., 340 N.L.R.B. 819, 820 (2003) (concluding that employer’s repeated requests that police remove union organizers showed that its concern was stopping union, not traffic problems), enforcement denied, 377 F.3d 394 (4th Cir. 2004).

194 For example, increased limits on union activity may be appropriate if it disturbs hospital patients. See Beth Isr. Hosp. v. NLRB, 437 U.S. 483, 501–02 (1978); NLRB v. S. Md. Hosp. Ctr., 916 F.2d 932, 935 (4th Cir. 1990).

195 See CSX Hotels, Inc. v. NLRB, 377 F.3d 394, 400–01 (4th Cir. 2004) (holding that call to police was lawful because of traffic hazard); Victory Mkt., 322 N.L.R.B. 17, 20–21 (1996) (justifying exclusion based, in part, on traffic blockage). But see supra note 193.\footnote{196 See Victory Mkt., 322 N.L.R.B. at 20–21 (justifying exclusion based, in part, on interference with customers’ entry and exit); Estlund, supra note 9, at 334, 352 (citing conduct that interferes with customers, creates safety hazards, or undermines security).\footnote{197 See infra note 204 and accompanying text.}}

Because that definition covers a broad range of circumstances, the following are merely examples of actions that the Board would deem presumptively unlawful under the proposal. The examples are not exclusive; rather, they are intended to illustrate the type of employer conduct that represents a threat to employees’ labor rights.

An employer, of course, could rebut the presumption that its attempt to stop organizing activity was unlawful. Typical rebuttals include special characteristics of the property at issue,\footnote{194 For example, increased limits on union activity may be appropriate if it disturbs hospital patients. See Beth Isr. Hosp. v. NLRB, 437 U.S. 483, 501–02 (1978); NLRB v. S. Md. Hosp. Ctr., 916 F.2d 932, 935 (4th Cir. 1990).\footnote{195 See CSX Hotels, Inc. v. NLRB, 377 F.3d 394, 400–01 (4th Cir. 2004) (holding that call to police was lawful because of traffic hazard); Victory Mkt., 322 N.L.R.B. 17, 20–21 (1996) (justifying exclusion based, in part, on traffic blockage). But see supra note 193.\footnote{196 See Victory Mkt., 322 N.L.R.B. at 20–21 (justifying exclusion based, in part, on interference with customers’ entry and exit); Estlund, supra note 9, at 334, 352 (citing conduct that interferes with customers, creates safety hazards, or undermines security).\footnote{197 See infra note 204 and accompanying text.}} organizing that causes safety problems\footnote{195 See CSX Hotels, Inc. v. NLRB, 377 F.3d 394, 400–01 (4th Cir. 2004) (holding that call to police was lawful because of traffic hazard); Victory Mkt., 322 N.L.R.B. 17, 20–21 (1996) (justifying exclusion based, in part, on traffic blockage). But see supra note 193.\footnote{196 See Victory Mkt., 322 N.L.R.B. at 20–21 (justifying exclusion based, in part, on interference with customers’ entry and exit); Estlund, supra note 9, at 334, 352 (citing conduct that interferes with customers, creates safety hazards, or undermines security).\footnote{197 See infra note 204 and accompanying text.}} or harms the employer’s business,\footnote{196 See Victory Mkt., 322 N.L.R.B. at 20–21 (justifying exclusion based, in part, on interference with customers’ entry and exit); Estlund, supra note 9, at 334, 352 (citing conduct that interferes with customers, creates safety hazards, or undermines security).\footnote{197 See infra note 204 and accompanying text.}} and violence.\footnote{197 See infra note 204 and accompanying text.}

Moreover, if employees view the property in question as clearly under the employer’s control, organizers’ resistance to a peaceful and non-
discriminatory attempt to remove them may warrant some additional measures by the employer.198

A useful guide in assessing the type of conduct that would commonly trigger the presumption of unlawfulness is the Board’s 2003 decision in Corporate Interiors, Inc.199 This case involved a union campaign to organize workers by, among other things, picketing on a public easement in front of the employer’s office.200 The Board determined that the employer, a construction contractor, lacked a right to exclude picketers from the easement.201 That finding governed most of the Board’s analysis of whether the employer’s numerous attempts to stop the union organizing were lawful.202 The wide range of employer conduct in Corporate Interiors—including threats, harassment, and surveillance—provides an excellent illustration of why, in right-to-access cases, the Board should regularly address possible interference with employees’ rights, instead of looking to state property law.203

a. Threats

One of the most obvious forms of employer resistance to organizing activity is the use of threats. Indeed, even currently, the Board typically recognizes that threats, particularly involving violence, are serious enough to infringe employees’ freedom to choose whether to unionize.204

Corporate Interiors provides several examples of such threats.205 For instance, the Board, disagreeing with the administrative law judge, found that the employer violated section 8(a)(1) because its threat to “blow [the picketer’s] head off” if he did not leave reasonably tended

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198 For example, otherwise unlawful surveillance might be justified in such a situation. See infra notes 218–230 and accompanying text.
199 340 N.L.R.B. at 745–49.
200 Id. at 734–35, 745 (noting employer’s arrangement with city to maintain easement area).
201 Id. at 745.
202 See id.
203 See id. at 745–49.
204 Actual violence is plainly illegal as well. See Vill. IX, 723 F.2d at 1365 (assaulting union leafletter near employees); H.R. McBride, 274 F.2d at 126–27 (physically assaulting and verbally abusing picketers); Batavia Nursing Inn, 275 N.L.R.B. 886, 889 (1985) (punching union representative in front of employees as election ballots were to be counted); Kelco Roofing, 268 N.L.R.B. 456, 459 (1983) (bumping repeatedly union agent soliciting employees for authorization cards); Martin Arsham Sewing Co., 244 N.L.R.B. 918, 922 (1978) (hitting union agent during strike with employees watching).
205 340 N.L.R.B. at 746.
to “interfere with the free exercise of employee rights.”206 Such extreme threats, however, are not necessary to invoke the presumption of unlawfulness. Milder comments—like the Corporate Interiors official who, while talking to employees about the union, stated that “[o]ne of these days I’m going to snap and when I do, I don’t know what is going to happen”207—also may chill employee rights.

These comments are exactly the sort of behavior that the Act was intended to prevent, and they should be considered unlawful, absent a satisfactory rebuttal by the employer.208 Yet, the Board’s current right-to-access analysis frequently ignores such threats if it determines that the employer had a right to exclude the organizers.209 The organizers’ presence on the employer’s private property, however, does not reduce the likelihood that employees would tend to believe that they would be a target of the official “snapping” should they seek to unionize.

Similarly, an employer trying to stop organizing activity could more directly threaten employees by stating or implying that contact with organizers would be met with negative employment consequences. Such threats, although not violent, are aimed at work conditions and are clearly the type of conduct that the NLRA seeks to eliminate.210 Ac-

206 Id. at 732 (quoting Unbelievable, Inc., 323 N.L.R.B. 815, 816 (1997)). The administrative law judge (the “A.L.J.”) had found that the comment was lawful because it was directed to another company official, not a union picketer or employee. Id. The Board appropriately disagreed, concluding that a threat of violence against a union picketer, made in the presence of employees, tended to interfere with employees’ rights, no matter the officials’ intent. Id.; see supra note 162 and accompanying text (noting that intent is not a necessary element of a section 8(a)(1) violation). This issue implicates the Board’s “small-plant doctrine,” which recognizes that most employees of a plant with less than 100 employees will hear about, and have their rights chilled by, threats and other coercive conduct that they did not personally witness. See Schaeff, Inc. v. NLRB, 113 F.3d 264, 267 n.8 (D.C. Cir. 1997); Hughes, 344 N.L.R.B. No. 49, at 3 (finding violations based on employer’s actions against union “without reference to whether these actions were witnessed by any of the employer’s statutory employees”).

207 See Corp. Interiors, 340 N.L.R.B. at 746. The Board did not address the A.L.J.’s finding that this comment was not serious enough to constitute an unlawful threat. Id. at 732–33 n.6, 746.


209 See supra notes 177–178 and accompanying text; infra note 214.

210 The Court has long held that an employer violates section 8(a)(1) by stating or implying that opting for collective bargaining would cost the employees existing benefits. See NLRB v. Gissel Packing Co., 395 U.S. 575, 618–19 (1969). In determining the threatening nature of such statements, the Board looks to the context in which the statement was made. See UAW v. NLRB, 834 F.2d 816, 822 (9th Cir. 1987). For example, other unfair labor practices may make a seemingly innocuous statement appear threatening to employees. See id. (holding that other section 8(a)(1) violations are relevant in determining whether employees would tend to view employer’s statement as threat); accord Allegheny
Accordingly, any employer attempt to stop organizing activity—even on property under its control—that directly or implicitly threatens organizers or employees should be presumptively unlawful.

b. Harassment

Similar to threats, but often viewed as less serious, is the harassment of organizers attempting to contact employees. For example, on several occasions during the *Corporate Interiors* dispute, the employer turned on the sprinkler system or aimed a hose at the union organizers.\(^{211}\) The employer also spread horse manure where the organizers were picketing and allegedly drove a car at them.\(^{212}\)

Although the Board found that these harassing acts violated section 8(a)(1), the basis for that finding aptly illustrates the need to change the current analysis.\(^{213}\) The Board found the use of sprinklers to be unlawful because it was an attempt to remove the organizers from an area over which the employer had no right to exclude—not because the harassment infringed employee rights.\(^{214}\) Because the organizers in *Corporate Interiors* had numerous alternative means to contact employees, the employer’s harassment could not infringe the organizers’ derivative right to communicate with employees.\(^{215}\) Thus, it should not matter whether the employer had a state law right to exclude the organizers—either way, they possessed no federal labor right to contact employees from that particular location. Yet, the Board’s decision suggests that had the organizing been on property that the employer controlled, the Board would have regarded the harassment as lawful.\(^{216}\) This makes little sense if the Board is focused on the infringement of derivative rights, and is an excellent example of why the current scheme poorly serves the NLRA. Moreover, regard-

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\(^{211}\)*Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1365 (D.C. Cir. 1997) (finding unlawful coercion because of context in which statement was given).

\(^{212}\)340 N.L.R.B. at 746–47. Although the employer argued that it frequently watered the area pursuant to its agreement to maintain the easement, testimony showed that the employer turned off the sprinklers when it called the police to the scene. *Id.* at 747.

\(^{213}\)“Id.” at 747. Depending on the manner in which the employer was driving, this could be considered violence or a threat of violence, rather than harassment. In *Corporate Interiors*, it appears that the employer did not intend to hit the picketers; rather, it merely wanted to move them out of the way. *Id.*

\(^{214}\)*Id.*; see *Marshall Field*, 98 N.L.R.B. at 103–04 (finding section 8(a)(1) violation based on employer “forcibly” removing organizers because it evidenced improper attempt to exclude), enforced in relevant part, 200 F.2d 375 (7th Cir. 1952).

\(^{215}\)See *supra* notes 99–105 and accompanying text.

\(^{216}\)*See Corp. Interiors*, 340 N.L.R.B. at 745.
less of where the organizers were located, a typical employee would view these acts as a clear signal that pursuing union representation would not be a wise career choice.

Instead of state property law, the Board’s concern should be whether the harassment affected the employees’ freedom to exercise their labor rights. Under the proposal, this type of harassment would trigger a presumption that the employer unlawfully interfered with employees’ rights. Any reasonable employee, for example, would consider spraying water or spreading manure near organizers as an unnecessary provocation if the employer was merely attempting to protect its property interests. The employer, therefore, should bear the burden of rebutting the presumption that employees would tend to view its conduct as targeting organizing activity and chilling their freedom to pursue unionization.\footnote{The employer could argue, hypothetically, that employees reasonably believed that the property was clearly the employer’s and that the union had resisted peaceful requests to leave recently sodded ground that had to be watered.} Absent such evidence, the Board should find that harassment of union organizers violates section 8(a)(1).

c. Surveillance

Another major source of presumptively unlawful activity is an employer’s surveillance, or impression of surveillance, of employees’ interaction with organizers. In safeguarding employees’ freedom to choose whether to unionize, the Board has long been sensitive to the dangers posed by employer conduct that may lead employees to fear that special efforts are being taken to monitor their involvement in protected activity.\footnote{See Nat’l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (holding that photographing or videotaping protected activity has tendency to intimidate employees); Belcher Towing Co. v. NLRB, 726 F.2d 705, 708 (11th Cir. 1984) (holding that, although surveillance is not per se unlawful, it has “natural, if not presumptive, tendency to discourage [union] activity”); Corp. Interiors, 340 N.L.R.B. at 746 (concluding that, absent proper justification, photographing or videotaping employees has “tendency to intimidate employees and plant a fear of reprisal”); Cook Family Foods, Ltd., 311 N.L.R.B. 1299, 1301 (1993), enforcement denied on other grounds, 47 F.3d 809 (6th Cir. 1995).} Accordingly, absent sufficient justification, an employer’s observance of employees engaged in protected activity, or making an impression of such observance, will normally interfere with employees’ labor rights.\footnote{See Snyder’s of Hanover, Inc. v. NLRB, 39 F. App’x 730, 736–37 (3d Cir. 2002) (watching employees take handbills); NLRB v. CWI of Md., Inc., 127 F.3d 319, 325–26 & n.3 (4th Cir. 1997) (impression of surveillance); U.S. Steel Corp. v. NLRB, 682 F.2d 98, 101–02 (3d Cir. 1982); Ingram Book Co., 315 N.L.R.B. 515, 518 (1994).}
As the Board noted in *Corporate Interiors*, however, the lawfulness of employer surveillance will often depend on whether the organizers are trespassing or the employer has an objective basis for believing that the organizers will trespass.220 This is due to a generally available defense that the employer can satisfy with evidence that it conducted the surveillance to establish a valid trespass claim.221 Mirroring the current right-to-access analysis, this trespassing defense is tied to the Board’s determination of state property law.222 In *Corporate Interiors*, therefore, the Board’s conclusion that the organizers were not trespassing meant that the employer’s surveillance was unlawful.223 The corollary is that a Board determination that the organizers were trespassing signifies that the surveillance would be valid.224 This is illogical, for the question whether the organizers were trespassing under state law says nothing about the surveillance’s effect on employees.225 The proposal, therefore, would make all surveillance presumptively unlawful, as employees will tend to view such conduct,226 no matter where it occurs, as an attempt to monitor and interfere with their participation in organizing activity.227

An employer may attempt to rebut this presumption. Under current Board law, employers can justify surveillance where there is a reasonable threat of union violence or other misconduct that would affect

220 Compare *Corp. Interiors*, 340 N.L.R.B. at 746 (“The Board has . . . recognized that the taking of pictures or videotaping to document trespassory activity for the purpose of making out a trespass claim is an acceptable justification.”), *with NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 701 (7th Cir. 1976) (holding that “anticipatory photographing of peaceful picketing in the event something might happen does not justify an employer’s conduct”).


222 *Corp. Interiors*, 340 N.L.R.B. at 746.

223 Id. (suggesting that reasonable basis for believing that trespass may occur could justify surveillance).

224 See id.

225 See Mike Yurosek & Son, 229 N.L.R.B. 152, 152 n.3 (1977) (stating that employer’s right to exclude is not relevant to the surveillance issue), rejected as dictum by *Hoschton Garment*, 279 N.L.R.B. at 567.

226 Surveillance requires more than the mere incidental observations that occur when an employer asks organizers to leave or engages in its normal work routine. Videotaping, photographing, or posting someone to watch the organizing, however, would be considered surveillance. See *supra* notes 219–220.

227 See *Nat’l Steel*, 156 F.3d at 1271 (holding that section 8(a)(1) violation depends on tendency to coerce, regardless of actual impact); *Colonial Haven*, 542 F.2d at 701 (holding that actual coercion is unnecessary for section 8(a)(1) violation; rather, “it is the tendency to interfere or coerce which is determinative”).
the employer’s business. Moreover, some employer surveillance may be easier to defend where the organizing is on property that, from the employees’ perspective, clearly belongs to the employer. For example, organizing activity inside a store—like other unusual activity—would be expected to trigger some observation by the employer and would be unlikely to coerce employees. In contrast, organizing in a more remote area, such as a distant parking lot, would be less likely to warrant similar monitoring and employees may view surveillance there as a signal of employer hostility against unionization. Similarly, if the employer asks organizers to leave property that is arguably under its control and they refuse, employees likely would view the employer’s documentation of the possible trespass as an attempt to protect its property rights, not to chill their own labor rights. Observations beyond that needed for a trespass claim, however—for instance, videotaping for an extended period of time, using more intrusive means than previously employed for non-union trespassers, or adopting other measures that employees would reasonably view as excessive—would be insufficient to rebut the presumption.

The Board’s approval of coercive surveillance, based on its post hoc determination that a questionable state trespass claim was valid, yields improper results and avoids the real issue at stake in these cases. The proposal would correct this problem by focusing solely on employees’ reasonable perceptions of the surveillance, rather than state property law. Also, the proposal would permit a defense for employer monitoring of organizing activity in certain circumstances. Under this defense, an employer may engage in limited surveillance to protect against conduct that employees reasonably, albeit mistakenly, perceive as a debatable trespass. The surveillance, however, must be targeted only to the possible trespass, and must not occur in a context in which

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228 See Nat’l Steel, 156 F.3d at 1271 (holding that “reasonable, objective justification,” such as legitimate security interests, gathering evidence for legal proceeding, or reasonable anticipation of misconduct, will mitigate tendency to coerce). Explaining to employees why the surveillance is necessary will be an important part of this rebuttal. Cf. Teletech Holdings, Inc., 333 N.L.R.B. 402, 403 (2001) (concluding that employer must clarify for employees a facially overbroad no-distribution rule to rebut presumption of unlawfulness).

229 See infra notes 231–247 and accompanying text. Moreover, if the surveillance occurs in a context that suggests more sinister motives, such as contemporaneous unfair labor practices, the rebuttal will likely fail. See supra note 210.

230 For example, observations accompanied by an increase in security could undermine an employer’s rebuttal. Cf. 6 W. Ltd. Corp. v. NLRB, 237 F.3d 767, 779 (7th Cir. 2001) (holding that increased security was lawful because of reliable information about past union disturbances).
employees would tend to believe that the observations were interfering with their labor rights.

d. Discrimination

An employer that exercises its right to exclude in a discriminatory fashion—such as having a no-solicitation rule that applies only to union conduct—has presented special difficulties for the Board. The Supreme Court’s 1956 decision in NLRB v. Babcock & Wilcox Co. long-ago noted discrimination, along with the lack of reasonable alternatives to reach employees, as an exception to its broad grant of employer authority to exclude nonemployee organizers.\(^\text{231}\) Discrimination, however, is a markedly different concern than the lack of reasonable alternatives.

Although discrimination is an obvious target for Board regulation, the current practice of making it a categorical exception to the Babcock/Lechmere framework ill-serves the Board’s ability to prevent truly harmful discrimination. Rather than considering why discriminatory exclusions should be unlawful, the Board and courts have struggled to come up with a definition of discrimination that automatically triggers the exception.\(^\text{232}\) A far better approach would involve a more disciplined analysis that focuses on the labor law consequences of actions purported to be discriminatory. Therefore, instead of myopically determining whether a disparate exclusion policy qualifies as a categorical “exception,” the proposal treats discrimination as a potential signal to employees that collective activity is not favored by their employer.

The problems in addressing discriminatory exclusions result from Babcock, which carved out an exception to an employer’s right to remove organizers where it “discriminate[s] against the union by allowing other distribution.”\(^\text{233}\) The Court never explained the basis for this exception\(^\text{234}\) and the two main possibilities under the Board’s current analysis are unsatisfying.

One rationale states that an employer’s refusal to allow labor organizing, while permitting other solicitations, so weakens its property in-

\(^{231}\) 351 U.S. 105, 112 (1956).

\(^{232}\) See infra notes 233–239 and accompanying text.

\(^{233}\) See Babcock, 351 U.S. at 112; accord Lechmere, 502 U.S. at 535. The discrimination exception also applies to non-organizing activity such as area standards and publicity picketing. See Deborah L. Stein, Note, Keep Off the Grass: Prohibiting Nonemployee Union Access Without Discriminating, 73 N.Y.U. L. Rev. 2029, 2047–49 (1998) (citing such cases).

\(^{234}\) See Stein, supra note 233, at 2049–54.
terests that they no longer trump the organizer’s derivative right to communicate with employees.\textsuperscript{235} Doctrinally, this is nonsense. Whether organizers’ derivative rights are satisfied has nothing to do with the employer’s property interests.\textsuperscript{236} Moreover, discriminatory access is perfectly consistent with the enforcement of an employer’s property interests; deciding to whom to grant access is an important right associated with property ownership.\textsuperscript{237} Thus, unequal access does not diminish an employer’s property interests.

The other reasoning is based on an employer’s union animus. This explanation, however, is no more defensible than the property rights rationale. Under \textit{Babcock}, an employer’s discriminatory exclusion is a violation of section 8(a)(1), which does not rely on intent.\textsuperscript{238} Quite simply, whether an employer’s discriminatory exclusion is motivated by good faith or by virulent hatred against unionization should not matter under section 8(a)(1). The proposal recognizes this important point.

Under the proposal, an employer’s discriminatory exclusion of organizers—even from property that is clearly the employer’s or where the organizers have reasonable alternatives for reaching employees—would be presumptively unlawful. That presumption does not rely on the employer’s property interests or motives. Rather, illegality is presumed because barring organizing from the property, while allowing other types of solicitation, tends to interfere with employees’ rights. To be sure, such discrimination is often accompanied by an employer’s union animus, but even where it is not, the discrimination will tend to inform employees that negative consequences will follow if they pursue collective representation. This analysis is

\textsuperscript{235} \textit{Cf. Be-Lo Stores v. NLRB}, 126 F.3d 268, 284 (4th Cir. 1997). The court in \textit{Be-Lo Stores} stated that:

\begin{quote}
Because nonemployees’ claims to access to an employer’s private property are at their nadir when the nonemployees wish to engage in protest or economic activities, as opposed to organizational activities, we seriously doubt, as do our colleagues in other circuits, that the \textit{Babcock} \& \textit{Wilcox} disparate treatment exception, post-\textit{Lechmere}, applies to nonemployees who do not propose to engage in organizational activities.
\end{quote}

\textit{Id.} (internal citation omitted) (citing Cleveland Real Estate Partners v. NLRB, 95 F.3d 457, 465 (6th Cir. 1996)).

\textsuperscript{236} \textit{See Estlund, supra} note 9, at 322; \textit{Stein, supra} note 233, at 2051 (noting that \textit{Lechmere} appeared to forbid balancing of property interests against derivative rights).

\textsuperscript{237} \textit{See Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 435 (1982).

\textsuperscript{238} \textit{See Textile Workers Union}, 380 U.S. at 269; \textit{Stein, supra} note 233, at 2053–54; \textit{see also} Zmija, \textit{supra} note 63, at 126 (stating that discrimination also may violate section 8(a)(3), which requires finding that employer had anti-union motive).
consistent with section 8(a)(1)’s concern for the effect on employees no matter the employer’s intent, and does not make the mistake of tying a violation to the employer’s property interests.\textsuperscript{239}

The proposal would allow for a variety of definitions of discrimination while also providing assistance in choosing the most appropriate definition. The Board and courts have struggled to define discrimination, providing wildly differing interpretations, including: giving access to all groups but unions;\textsuperscript{240} allowing only work-related or isolated charitable solicitations;\textsuperscript{241} allowing all charitable solicitations;\textsuperscript{242} and favoring one union over another or allowing distributions by employers, but not unions.\textsuperscript{243} An employer’s facially neutral no-solicitation rule also may be deemed unlawful if it was adopted for a discriminatory purpose.\textsuperscript{244}

\textsuperscript{240} See Sandusky Mall Co., 329 N.L.R.B. 618, 620 (1999) (concluding that “an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation”), enforcement denied in relevant part, 242 F.3d 682 (6th Cir. 2001); Victory Mktgs., 322 N.L.R.B. at 23–24 (finding discrimination where employer excluded union, but allowed gift-wrapping fundraisers, Salvation Army solicitations, auto sales, circus fliers, Chamber of Commerce information, and heart and cancer fund solicitations).
\textsuperscript{241} See Four B Corp., 163 F.3d at 1183; Lucille Salter Packard Children’s Hosp. at Stanford v. NLRB, 97 F.3d 583, 588–90 (D.C. Cir. 1996) (holding that excluding unions while allowing employee fringe-benefit program solicitations was not discriminatory, but permitting solicitations about home and automobile insurance, child and family services, and credit union membership was discriminatory); Be-Lo Stores, 318 N.L.R.B. 1, 10–12 (1995), enforcement denied in relevant part, 126 F.3d 268 (4th Cir. 1997).
\textsuperscript{242} See 6 West Ltd., 237 F.3d at 780 (holding that employer did not discriminate by allowing “innocent” employee solicitations for Girl Scout cookies, Christmas ornaments, and other purposes that “can be seen as beneficial to all employees,” but not allowing union solicitation by employees); Lucille Salter, 97 F.3d at 587 n.4 (noting that frequent charitable solicitations may provide basis for discrimination finding); NLRB v. Pay Less Drug Stores Nw., Inc., 57 F.3d 1077, 1077 (9th Cir. 1995) (Table).
\textsuperscript{243} See Cleveland Real Estate Partners, 95 F.3d at 464–65; Stein, supra note 233, at 2046. The Board has applied its non-acquiesce policy to the Sixth Circuit’s narrow interpretation of discrimination by refusing to follow Cleveland Real Estate Partners. See Sandusky Mall, 329 N.L.R.B. at 620–21 & n.10; cf. Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 320 (7th Cir. 1995) (suggesting “discrimination” depends on whether other activities with similar “character” as unions are permitted).
\textsuperscript{244} See Youville Health Care Ctr., 326 N.L.R.B. 495, 495 (1998) (finding presumptively valid no-solicitation rule to have violated section 8(a)(1) because it was created in response to employees’ protected activity); Gould, supra note 36, at 118–19 (proposing rule that looks to whether employer had previously announced solicitation limits). Such cases may blur the line between violations of section 8(a)(1), which do not focus on intent, and section 8(a)(3), which requires a finding of intent. See 29 U.S.C. § 158(a)(1), (3) (2000); supra note 162 and accompanying text. If, from the employees’ point of view, the employer creates a rule in apparent response to protected activity, the rule will violate section 8(a)(1) no matter the employer’s actual motive. Cf. Youville, 326 N.L.R.B. at 495 (stating
These conflicting views derive largely from the Board and courts’ differing appreciation of employers’ property interests. Yet, as noted, discriminatory access is entirely consistent with the lawful exercise of property rights.\(^{245}\) The proposal, therefore, focuses only on whether the discrimination tended to infringe employees’ labor rights. That focus also should shape the boundaries of unlawfully discriminatory exclusions—in particular, exclusions that tend to chill employees’ rights. An appropriate rule would regard an employer’s refusal to allow union access, while permitting access to any other group—even charities—as presumptively unlawful discrimination.\(^{246}\) Absent an employer’s rebuttal, this disparate treatment would tend to interfere with employees’ rights by sending them the message that the employer is not concerned about solicitations generally, but instead is targeting union messages.\(^{247}\)

Although the Board’s current discriminatory exclusion scheme, almost uniquely among right-to-access issues, does not require an examination of state law, it has been illogical and confusing.\(^{248}\) The proposal would not fully resolve the differing interpretations of discrimination. It would assist that determination, however, by providing a far more consistent framework that turns the Board’s attention to where it should have been all along—determining whether the employer’s disparate exclusion tends to infringe employee rights.

**B. Preemption**

By keeping labor matters before the Board and property questions in state court, the proposal would implicate the issue of labor

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\(^{245}\) See supra note 237 and accompanying text.

\(^{246}\) See supra notes 239–240 and accompanying text. Despite this recommendation, the proposal could incorporate any interpretation of “discrimination.” See supra notes 240–243 and accompanying text.

\(^{247}\) For example, the policy at issue in *American Postal Workers Union v. NLRB* not only prohibited all commercial and charitable solicitations, but also expressly proscribed solicitations either for or against unionization. 370 F.3d 25, 28–29 (D.C. Cir. 2004). Maintaining a general no-solicitation policy that also includes union solicitations helps protect against employees believing that union discussions are singled out. If, however, the employer’s policy targeted only union solicitations—even if it required neutrality—it would have been far more likely to violate the Act. Prohibiting only union material, even in an ostensibly neutral manner, sends a signal to employees that union activity is disfavored. See id. at 28.

\(^{248}\) See supra notes 231–247 and accompanying text.
preemption. The Board’s current analysis, which fails to maintain the dichotomy between the federal and state interests, has made the preemption question especially confusing. Although the proposal does not dramatically alter the preemption analysis, it does simplify it under many circumstances.

Labor preemption of state trespass claims is governed by the U.S. Supreme Court’s 1978 decision in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters.* Under traditional *Garmon* preemption, the NLRA will generally preempt state lawsuits in two situations. First, preemption will occur when the suit involves conduct that is clearly protected or prohibited by the NLRA. Second, preemption will occur when the lawsuit involves conduct that is arguably protected or prohibited where there is a danger to national labor policy in allowing a state, rather than the Board, to examine the issue. The Court in *Sears,* however, modified this analysis by holding that there is a substantive difference between preemption of state trespass claims directed at conduct that is *prohibited,* as opposed to *protected,* by the NLRA.

*Sears* made clear that no significant conflict existed between a federal claim that union activity was prohibited by the NLRA and a state claim that the union was trespassing under state law; preemption of the trespass claim is not warranted in such a case because that claim is completely independent of the NLRA issue. What is less clear is whether the state and federal claims are distinct where the potential NLRA violation is an employer’s response to an alleged trespass. The better outcome would hold that unfair labor practice charges against the employer will not preempt a state trespass claim.

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250 Id.


253 *Sears,* 436 U.S. at 187–88 & n.11 (citing *Garmon,* 359 U.S. at 244–45). The second major type of preemption is called *Machinists* preemption, a “dormant preemption” that precludes state regulation where the Act intends parties to engage freely in economic conflict. See *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 366 (4th Cir. 1991) (citing *Lodge 76, Int’n Ass’n of Machinists v. Wis. Employment Relations Comm’n,* 427 U.S. 132, 144 (1976)) (holding that broad state exemption for labor-related trespass was preempted under *Machinists*).

254 436 U.S. at 188–90.

255 Id. at 185–86 (citing NLRA claims under section 8(b)(4)(D) and 8(b)(7)).
Especially given *Lechmere*’s concern for state property interests, it makes little sense for a federal labor claim that relies entirely on state property law to preempt a state trespass claim. Federal labor preemption seeks to prevent state litigation from interfering with a unified federal labor policy; where that policy hinges solely on state property law, such interference is non-existent.

The only occasion when state resolution of a trespass claim would conflict with federal labor law is where the union argues that the NLRA protects otherwise trespassory conduct. Absent such a claim, an unfair labor practice charge that challenges an employer’s exclusion of organizing activity should not preempt the employer’s state trespass claim against the union. This allows the claims to be heard in their appropriate forums—the Board determines the federal labor issue and state courts address the state property question.

In spite of this logic, courts have suggested that an NLRA charge against an employer will preempt a claim involving a traditional state area of regulation such as trespass. The influence of those cases is unclear, particularly after the Supreme Court’s recent holding that a federal statute’s express preemption rule—which blocks differing state suits that impose obligations—will not preempt state suits that impose obligations.

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256 See *Lechmere*, 502 U.S. at 533–35, 537.


258 This would occur where the union argues that no reasonable alternative means to contact employees exist. Cf. *Radcliffe*, 254 F.3d at 786 (holding that “because the Board ordinarily leaves to the State the question whether nonemployee union activity may be conducted on the employer’s property,” and there is little risk of interference with NLRA’s enforcement, state claims for false arrest, false imprisonment, and malicious prosecution will not be preempted); *Calkins*, 187 F.3d at 1094–95 (rejecting employer’s claim that NLRA, post-*Lechmere*, preempts state laws that prevent employers from excluding union activity, because such laws are not inconsistent with NLRA).

259 See *Imondi v. Bar Harbor Airways*, No. 81-0136, 1983 WL 2036, at *5–6 (D. Me. June 1, 1983) (stating, in Railway Labor Act case, that NLRA would preempt state malicious prosecution for trespass claim, even where reasonable-alternatives exception does not provide union right of access). *Imondi* was based in part on the questionable conclusion that malicious prosecution is not a state concern that is “deeply rooted in local feeling and responsibility.” Compare *Imondi*, 1983 WL 2036, at *6, and Geske & Sons, Inc., 317 N.L.R.B. 28, 53 (1995) (concluding that state claims for trade libel and tortious interference with contractual relations and prospective advantage were preempted by NLRA because Board, which filed complaint, may find that state action would hinder federally-protected union activity), with *Radcliffe*, 254 F.3d at 785 (holding that false arrest, false imprisonment, and malicious prosecution are “deeply rooted” state interests), and Pa. Nurses Ass’n v. Pa. State Educ. Ass’n, 90 F.3d 797, 803 (3d Cir. 1996) (holding that trespass is a “deeply rooted” state interest and not preempted).
tions at least equivalent to the federal requirements. That holding suggests a view that is unlikely to justify preemption of a state trespass claim where the federal labor question turns on state property law.

To the extent that confusion exists, the proposal would simplify the issue. Because the Board would not look to state property law, there would be no potential for conflict between state and federal law. It also would eliminate the argument that warrants preempting state trespass claims because union access to an employer’s property is a central interest of the NLRA and the Court “has gone to some lengths to state exactly what [it] entails.” Under the proposal, the NLRA would be unconcerned with the possibility that the union was trespassing. Rather, the proposal recognizes the consistency in a state court determining that union activity constituted a trespass under state law, and the Board finding that the employer’s attempt to remove the union violated the NLRA. Accordingly, absent a union claim that it is entitled to access under the reasonable-alternatives exception, an unfair labor practice charge based on an employer’s exclusion should not preempt a state trespass claim.

The analysis changes, however, where the labor claim is based not on prohibited conduct, but on federally protected activity—such as union organizers defending a trespass claim by arguing that they had a right to access under the reasonable-alternatives exception. The NLRA will generally preempt state trespass claims where clearly protected labor activity is at issue; yet the validity of a reasonable-alternatives claim is rarely, if ever, clear ex ante. Thus, prior to Sears, preemption of a state trespass suit that involved a reasonable-alternatives defense was a murky question.

Because this defense initially requires an examination of federal labor law to determine whether reasonable alternatives existed, Sears

261 Bates is only the most recent in a somewhat tortured series of federal preemption cases involving state law, particularly in the area of torts. Thus, the long-term impact of Bates is unclear. See generally Jennifer S. Hendricks, Preemption of Common Law Claims and the Prospects for FIFRA: Justice Stevens Puts the Genie Back in the Bottle, 15 DUKE ENVTL. L. & POL’Y F. 65 (2004) (discussing pre-Bates FIFRA preemption).
262 The exception is a reasonable-alternatives claim. See infra note 265 and accompanying text.
264 See Sears, 436 U.S. at 198.
265 If no other reasonable alternative means to communicate with workers exist, the NLRA gives organizers a derivative right to access an employer’s property, which also serves as a trespassing defense. See supra note 63 and accompanying text.
266 See supra note 253 and accompanying text.
recognized that preemption may be required to avoid state interference with a matter that is generally within the Board’s exclusive jurisdiction.\textsuperscript{267} Under \textit{Sears}, therefore, a Board complaint alleging that an employer unlawfully excluded organizers that lacked reasonable alternative means to contact employees will preempt the employer’s state trespass action.\textsuperscript{268}

Board procedures, however, further complicate the analysis. The union in \textit{Sears} never invoked the Board’s jurisdiction by filing an unfair labor practice charge; instead, it raised its reasonable-alternatives claim only as a defense to the state trespass suit.\textsuperscript{269} Yet as \textit{Sears} emphasized, an employer is unable to invoke the Board’s jurisdiction to determine whether the NLRA provided the union with a right to access.\textsuperscript{270} According to the Court, it is inappropriate to preempt an employer’s state trespass action based on a defense that the union refused to raise before the Board, as it would deprive the employer of an opportunity to have the issue heard at all.\textsuperscript{271} Preemption will be warranted only where the union filed a charge with the Board and alleged that the lack of reasonable alternatives gave it a right to access the employer’s property.\textsuperscript{272} If the Board ultimately agrees with the un-

\begin{footnotes}
\textsuperscript{267} \textit{Sears}, 436 U.S. at 200–01.
\textsuperscript{268} \textit{Id.} at 207. \textit{Sears} did not answer whether preemption is triggered by a union charge raising the reasonable-alternatives defense, or whether the Board must first issue a complaint—which requires a finding that prima facie evidence of a violation exists. \textit{Compare id.} at 209 (Blackmun, J., concurring) (arguing that “the logical corollary of the Court’s reasoning is that” once union files charge, state trespass claim is preempted until Board refuses to issue complaint or rules against union), \textit{with id.} at 214 (Powell, J., concurring) (arguing that filing charge is not enough to preempt state cases, but leaving open whether Board’s issuance of complaint would suffice). The Board has avoided conflict by stating that, in cases implicating arguably protected activity, “preemption does not occur in the absence of Board involvement in the matter, and . . . upon the Board’s involvement, a lawsuit directed at arguably protected activity is preempted.” Makro, Inc. (\textit{Loehmann’s}), 305 N.L.R.B. 663, 669–70 (1991) (defining “involvement” as issuing complaint); \textit{accord Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1179 (D.C. Cir. 1993)} (approving \textit{Loehmann’s} because it was more conservative than \textit{Sears} majority, which “strongly suggested that the union’s filing of an unfair labor practice charge is sufficient in and of itself to trigger preemption”); Hillhaven Oakland Nursing Ctr. v. Health Care Workers Union, 49 Cal. Rptr. 2d 11, 18 & n.9 (Ct. App. 1996). Many courts have suggested that filing a charge with the Board is sufficient to initiate preemption. \textit{See Davis Supermarkets, 2 F.3d} at 1179; \textit{Reisbeck Food Mkts. v. UFCW, 404 S.E.2d 404, 410–11 (W. Va. 1991)} (citing cases). Even if the Board issues a complaint, however, a union’s obstructive or violent conduct—issues that touch deeply rooted local responsibility—will not be preempted. \textit{See Reisbeck, 404 S.E.2d} at 411–12.
\textsuperscript{269} 436 U.S. at 200–02.
\textsuperscript{270} \textit{Id.}
\textsuperscript{271} \textit{Id.} at 202.
\textsuperscript{272} \textit{See id.} at 200–02.
\end{footnotes}
ion, the employer’s exclusion was unlawful and preemption will continue.273 If the Board rejects the union’s argument, the union loses its federal right-of-access defense and the employer can then pursue a state trespass claim.274

The proposal maintains Sears’s preemption analysis where union organizers raise a reasonable-alternatives claim. However, the proposal would clarify the preemption question where organizers challenge the manner in which an employer tried to stop organizing activity. Unlike the confusion wrought by the Board’s current analysis of an exclusion through the prism of state property law, the proposal’s elimination of the state law issue would obviate any question of preemption. This would allow the state to resolve whether the organizers were trespassing and the Board to address the manner in which an employer excluded the organizers. The dichotomous jurisdiction encourages behavior that advances both state and federal interests. Allowing states to address trespass claims quickly, and without the Board interference that currently may occur, discourages trespassing by organizers. Similarly, permitting the Board to remedy unlawful employer conduct without getting bogged down in state law promotes the exercise of property interests in a manner that respects employees’ labor rights. The result should be fewer trespasses and fewer coercive attempts to stop organizing activity.275

C. A New Conception of Unions’ Derivative Rights

One incident in Corporate Interiors nicely distills the proposal’s advantages over the current scheme. At issue was the union’s attempt to communicate with employees working on a roof.276 The union obtained permission from the general contractor to be on the roof, but

273 See id. at 202.
275 State claims under the proposal also would coincide with state anti-labor injunction laws that mirror the federal Norris-LaGuardia Act. See 29 U.S.C. §§ 101–115 (2000); N.Y. LAB. LAW § 807 (2002). Although many state laws, like the Norris-LaGuardia Act, prohibit injunctions against union organizing, an employer generally can seek to enjoin a union from trespassing while engaging in such activity. See Sears, 436 U.S. at 185 (emphasizing that employer’s attempt to obtain state injunction against trespass may proceed if it targeted only the location of union’s picketing and “asserted no claim that the picketing itself violated any state or federal law”); Waldbaum, Inc. v. United Farm Workers, 383 N.Y.S.2d 957, 968 (Sup. Ct. 1976) (holding that, under state anti-labor injunction statute, “[w]here illegal acts have been committed in the course of [otherwise lawful and protected] picketing . . . injunctive relief may be warranted” if statute’s procedural requirements are satisfied).
276 340 N.L.R.B. at 749.
the employer later told union organizers that they would have to leave because the access ladder needed to be removed.277

Currently, the dispositive issue is whether the employer had a property interest that allowed it to exclude others from the roof.278 That makes little sense. If employees were aware that the employer had a legitimate reason to remove the ladder—a safety concern, for instance—there should be no violation of the Act. Absent circumstances that would lead employees to view the removal as threatening, or show that the union had no other reasonable means to communicate with employees, there were simply no labor interests at stake. Conversely, if the Board found that the employer lacked a right to exclude under its current analysis, the employer automatically would have committed an unfair labor practice.279 This forces the employer to choose whether to enforce its arguable property rights or do nothing in order to avoid risking an NLRA violation—a decision made more difficult by the fact that the property determination generally will take several years of litigation to resolve.280

The proposal would eliminate this dilemma. By looking to the circumstances of the removal, rather than the employer’s state property rights, the test focuses on the pertinent issue in right-to-access cases—the effect of the employers’ removal of organizers on employees’ labor rights. If employees would tend to perceive legitimate reasons for the removal, no NLRA violation exists. If, however, the employees had reason to believe that the removal was an attempt to target unionization,281 a section 8(a)(1) violation would be warranted.

Because employers no longer would face the uncertain choice of either allowing what may be a trespass or risking an unfair labor prac-

277 Id.
278 Id.
279 In Corporate Interiors, the Board found that the employer lacked a right to exclude the union because the general contractor gave the union permission to be on the roof; thus, the employer violated section 8(a)(1). Id.
280 The current analysis’s focus on state property rights also forces unions farther away from the targeted business—for instance, encouraging picketing at a mall entrance, rather than near the targeted store. This may enmesh neutral employers into the labor dispute if customers think that the dispute involves the entire mall. See Jean Country, 291 N.L.R.B. 11, 18 (1988).
281 For example, Corporate Interiors involved numerous contemporaneous unfair labor practices, the employees apparently knew that the union had permission to be on the roof, and, after the union organizers left, the employer stated: “The only reason the ladders were taken was to get those fucking union guys off the roof.” 340 N.L.R.B. at 749. Each of those factors, alone, would be sufficient to support a finding that the employer’s conduct would tend to infringe employee rights.
tice, the proposal would allow them to pursue property rights claims as long as employees' labor rights are not chilled. A union, in turn, has a strong incentive to ensure ex ante that it engages in organizing activity without trespassing. That certainty allows the union simply to refuse an employer’s request to stop because it is assured that further attempts by the employer to interfere with the organizing will violate the Act. Moreover, when the union organizes on property over which control is unclear, it is likely to keep its activity peaceful and unobtrusive, because such conduct could be met at most by an equally unthreatening response by the employer. This should reduce labor tensions—a major goal of the Act.

Although an employer still would be able to pursue its trespass claim, the inquiry would take place where it belongs—in state court, not before the Board. It makes no sense to require a federal agency specializing in labor law to resolve state property issues. Moreover, under Lechmere, where organizers have reasonable alternatives to reach employees and the employer’s attempt to remove the organizers is peaceful, the dispute does not implicate federal labor concerns. The issue, instead, is purely a question of state property law. Consequently, allowing state courts to resolve the dispute without Board involvement would protect states’ interest in enforcing their own property laws and remove a frustrating and delay-ridden area from the Board’s docket.

The proposal also has advantages over other suggested alternatives to the current system. Professor Cynthia Estlund, for example, has argued that the Lechmere analysis should be replaced with a “good reasons” test. Her test would use essentially a Republic Aviation analysis for both employee and nonemployee activity on employer property. Although sensible, her test would require an explicit reversal of Lechmere, which is not a realistic possibility in the near future. Moreover, Estlund’s test would apply only where the employer pos-

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282 See supra notes 250–275 and accompanying text.
283 See supra notes 176, 187 and accompanying text.
284 See 502 U.S. at 540.
285 Estlund, supra note 9, at 309.
286 Id. at 309, 348–49 (arguing that, to exclude protected activity from its private property, employer should be required to show “that the speakers’ presence or activity would actually interfere with continuing production, the delivery of services, physical safety or security of individuals on the premises, or to provide other substantial functional justifications”); see also Sarah Korn, Note, Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers, 94 YALE L.J. 374, 384, 393 (1984) (arguing for rule that focuses on employer’s legitimate managerial interests).
sessed a right to exclude; she would maintain the current analysis where the employer lacks that right. 287 Her test, therefore, still suffers from the ills of the Board’s reliance on state property law. 288

To be sure, the proposal would create more uncertainty in cases where the property rights issue is clear. Yet, the questions raised in such cases are the Board’s forte—unlike state property rights inquiries. More important, the current regime ignores the effect that an employer’s exclusion of organizers may have on employees’ freedom to exercise their labor rights. The proposal avoids that shortcoming by protecting employees from interference by even well-meaning employers.

Finally, the proposal may be implemented without changes to either the NLRA or Supreme Court precedent. That the Board has not made a consistent policy of addressing the effect of employers’ conduct on employees does not mean that it cannot do so. The Board’s authority to examine whether employer conduct tends to infringe employee rights is well-established. 289 Indeed, the proposal’s focus on employee rights is more consistent with the NLRA and Lechmere than the current analysis. 290 In the end, this easily implemented change would provide better enforcement of federal labor rights and state property law, while eliminating a significant administrative problem for the Board and federal courts.

III. DOES UNION ACCESS CONSTITUTE A TAKING?

The Board’s right-to-access cases have long raised the issue whether federal labor rights risk unconstitutionally taking employers’ property. 291 Particularly, where the Board determines that the Act provides organizers a right to access employer property, the threat of a taking is pronounced. 292 Even while expanding the scope of takings, however, the U.S. Supreme Court has been careful to exclude labor

287 Estlund, supra note 9, at 343–44.
288 In Estlund’s defense, the Board’s reliance on state property law, and the problems associated with the analysis, were not necessarily apparent immediately after Lechmere.
289 See supra note 19.
290 See supra notes 105–107 and accompanying text.
right-to-access cases. The proposal here would not alter those holdings.

Although granting access to organizers obviously limits an employer’s absolute authority over its property, takings jurisprudence always has acknowledged that not all regulation of property must be compensated. Indeed, property ownership rarely grants unfettered control, especially where other rights are at issue; as the Court emphasized in *NLRB v. Babcock & Wilcox Co.*, “[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights.” It is far from clear, therefore, that takings considerations are relevant in right-to-access cases.

The proposal would do nothing to alter the current right-to-access scheme’s treatment under takings law. The most likely prospect of finding a physical taking remains the same under either analysis: where the Board requires unauthorized, nonemployee access to employer property because no other reasonable alternatives to communicate with employees exist. Although property rights frequently trump other rights, the NLRA’s limited right-of-access requirement provides an exception under takings law. Federal supremacy, alone, should make NLRA restrictions on state property rights uncontroversial. Moreover, it has never been the case that ownership provided unlimited rights over property. Indeed, labor access rights are but one of many limitations on owners’ autonomy over their property.

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293 See infra note 311 and accompanying text.
295 351 U.S. at 112. Moreover, as Chairman Gould noted, Justice Frankfurter long ago emphasized that property rights do not control the right-to-access issue. Leslie Homes, Inc., 316 N.L.R.B. 123, 131 (1995) (Gould, Chairman, concurring) (citing Marsh v. Alabama, 326 U.S. 501, 511 (1946) (Frankfurter, J., concurring) (reversing Jehovah’s Witness’s criminal trespass conviction in company town)); see also Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945) (holding that “[i]nconvenience or even some dislocation of property rights . . . may be necessary in order to safeguard the right to collective bargaining”) (internal quotation marks omitted); State v. Shack, 277 A.2d 369, 373 (N.J. 1971) (“A man’s right in his real property of course is not absolute.”).
296 See supra notes 6–9 and accompanying text.
297 See Estlund, supra note 9, at 311.
298 See, e.g., Winget v. Winn-Dixie Stores, Inc., 130 S.E.2d 363, 367 (S.C. 1963) (holding, in nuisance case, that “[a]n owner of property even in the conduct of a lawful business thereon is subject to reasonable limitations”).
299 Numerous statutes, regulations, and common-law doctrines limit a property owner’s right to exclude without constituting a taking. See, e.g., *Thunder Basin*, 510 U.S. at 217 n.21 (noting that mining regulations may justify limits on private property interests); Joseph William Singer, *Introduction to Property* 34–39, 45–85 (2d ed. 2005) (discussing common-law and legislative public accommodation limitations); Richard R.B.
Soon after its enactment, the NLRA was interpreted to require unauthorized access to employer property under certain conditions.\textsuperscript{300} Some states incorporated these rulings by defining property rights as lacking a right to exclude where labor law grants access.\textsuperscript{301} In California, for example, it is a misdemeanor to refuse to leave private property following the owner’s request, except where state or federal labor law permits access to the property.\textsuperscript{302}

Perhaps reflecting this history, as well as the fact that the reasonable-alternatives exception was its own invention, the Supreme Court has expressly stated that the Board’s current right-to-access analysis does not constitute a taking.\textsuperscript{303} Importantly, nonemployee access under this rule is temporary and is not permitted to interfere with the owner’s, or its invitees’, use of the property.\textsuperscript{304} As the Court has emphasized, intrusion is allowed only to the limited extent necessary to help employees exercise their right to communicate with organizers during a representational campaign.\textsuperscript{305} Thus, access under the reasonable-alternatives exception is rare and the “yielding of property rights it may require is both temporary and minimal.”\textsuperscript{306}

The limited nature of organizers’ right to access is vital to the conclusion that it does not run afoul of the Fifth Amendment’s re-
strictions on permanent, physical intrusions.\textsuperscript{307} The Supreme Court made this point clear in its 1980 decision in \textit{PruneYard Shopping Center v. Robins}, in which it upheld a state prohibition against excluding expressive activity from shopping centers open to the public because, in part, the invasion of property was temporary.\textsuperscript{308} Although the proposal here would apply to public and non-public property,\textsuperscript{309} the temporary nature of the access is crucial. Even where organizers seek access to a worksite that is closed to the public—for instance, a remote logging camp—the need to protect employees’ labor rights easily fits under well-established law allowing limited, temporary intrusions onto private land.\textsuperscript{310} Indeed, shortly after \textit{PruneYard}, the Court expressly distinguished NLRA-mandated access and permanent physical intrusions, stating that the latter constituted takings but labor access rights did not.\textsuperscript{311}

Organizer access also fails to constitute a taking under the \textit{Penn Central} regulatory takings test: it does not deprive the owner of all economic use of the property, the economic impact of access is low, its interference with reasonable investment-backed expectations is not significant, and the character of the Board’s grant of access is confined to very limited circumstances.\textsuperscript{312} Moreover, the economic use of

\textsuperscript{307} See \textit{Loretto}, 458 U.S. at 426, 435, 438 (holding that placing permanent cable boxes on apartment building was a taking); \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 178 (1979) (holding that permanent public access requirement for a pond connected to navigable water was a taking).

\textsuperscript{308} 447 U.S. 74, 83–84 (1980).

\textsuperscript{309} \textit{PruneYard} downplayed the significance of the property’s openness, noting that past cases stressing the open nature of the property were no longer good law. \textit{Id.} at 81 (citing overruling of \textit{Food Employees v. Logan Valley Plaza}, 391 U.S. 308 (1968), by \textit{Hudgens v. NLRB}, 424 U.S. 507 (1976)) (holding that private character of store and its property does not change by being in shopping center). \textit{But see} Stevens, \textit{supra} note 105, at 1360–61 (suggesting that this type of access may be a taking).

\textsuperscript{310} See \textit{Shack}, 277 A.2d at 373 (holding that property owner lacked right to exclude government and non-profit organizations trying to contact farmworkers living on property because it is an example of a “necessity . . . [that] may justify entry upon the lands of another” (citing 52 Am. Jur. \textit{Trespass} §§ 40–41, at 867–69; 6A Am. Law of Property § 28.10, at 31 (A.J. Casner ed., 1954); \textit{William M. Prosser, Torts} § 24, at 127–29 (3d ed. 1964))); \textit{cf.} \textit{Lingle v. Chevron U.S.A., Inc.}, 544 U.S. 528, 539 (2005) (holding that regulatory takings jurisprudence “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”).

\textsuperscript{311} \textit{Loretto}, 458 U.S. at 434 & n.11 (citing \textit{PruneYard}, 447 U.S. at 84; \textit{Hudgens}, 424 U.S. 507; \textit{Cent. Hardware}, 407 U.S. at 545; \textit{Babcock}, 351 U.S. 105) (holding that cable company’s “reliance on labor cases requiring companies to permit access to union organizers is . . . misplaced” because labor access is temporary and limited).

\textsuperscript{312} See \textit{Penn Cent.}, 438 U.S. at 124; \textit{accord} \textit{Palazzolo v. Rhode Island}, 533 U.S. 606, 617–18 (2001); \textit{supra} note 63 and accompanying text.
the property is preserved because employers always may impose reason-
able time, place, and manner limitations, and the NLRA will pro-
tect organizer access only if it is orderly and does not interfere with business.313 In short, access does not force an employer to shoulder a burden that the public as a whole should bear.314 Accordingly, pre-
venting employers from excluding organizers’ attempts to communi-
cate with workers where no reasonable alternatives exist does not im-
pose an unconstitutional burden on employers’ property rights.315

The primary change under the proposal would be to impose more restrictions on the means by which employers may try to exclude non-
employees. This modification, however, is less of a takings concern than
the access provided under the reasonable-alternatives exception. A rule
that permits employer attempts to oust organizers from what is argua-
ibly its property, but only if it does so in a peaceful manner, does not
begin to approach the substantial threshold of a regulatory taking.316
Rather, the rule is similar to the numerous limitations on the use of
property that do not impose unconstitutional burdens.317 If the tempo-
rary physical intrusion required under the reasonable-alternatives ex-
ception is not a taking, then the proposal’s restrictions on the manner
in which an employer can exclude organizing activity surely must be
acceptable.318 Consequently, the proposal’s limitations on private prop-
erty rights do not raise a serious takings issue.

CONCLUSION

The struggle between labor rights and property concerns has
been arduous. The ascension of property law increasingly has domi-
nated the balance between the two competing interests. The impor-
tance given to property rights, however, has resulted in a regime in

313 PruneYard, 447 U.S. at 83–84; see supra notes 194–197 and accompanying text.
314 Lingle, 544 U.S. at 538–90; PruneYard, 447 U.S. at 83; Gregory M. Stein, Regulatory
315 See PruneYard, 447 U.S. at 83–84 (noting that, unlike permanent physical taking or
requirement that expensive private marina must admit the public, requiring property
owner to permit free speech in shopping mall did not infringe right that was “so essential
to the use or economic value of their property that the state-authorized limitation of it
amounted to a ‘taking’” (citing Kaiser Aetna, 44 U.S. at 168, 178)).
316 See supra notes 312–314 and accompanying text.
317 See supra notes 9, 298–299 and accompanying text.
318 See Loretto, 458 U.S. at 436 (holding that potential physical taking is “qualitatively
more severe than a regulation of the use of property, even a regulation that imposes affir-
mative duties on the owner, since the owner may have no control over the timing, extent,
or nature of the invasion”).
which not only is the enforcement of labor rights impaired, but vindication of property rights is hindered as well.

The proposal here attempts to rectify this situation through a logical scheme that remains consistent with the U.S. Supreme Court’s right-to-access holdings. The new analysis would move the NLRB’s focus away from its skewed interpretation of organizers’ derivative rights, in favor of a much more traditional and appropriate concern—the employees’ freedom to exercise their labor rights. Through this shift, the Board would no longer have to examine state property law, thereby eliminating delayed and often ill-conceived decisions by the Board and federal courts. Instead, those issues would be decided in the forum where they belong—state court.

Similarly, the right of employees to choose freely whether to pursue collective representation is far better served by the proposal. This fundamental goal of the NLRA often has been ignored by the Board’s current analysis, under which property rights are determinative. By looking to the manner in which an employer attempts to exercise its property interests, the proposal would ensure that employees’ labor rights are protected. Employees’ ability to learn about unionization would also be enhanced, as coercive attempts to exclude union organizing would be prohibited, even on company property. Employers benefit as well, for they no longer have to face the choice between protecting an arguable property interest and risking a violation of the NLRA; instead, they would be free to test their property claim as long as they do so without infringing employee rights. The potential for conflict also would be alleviated, as unions that peacefully organize are assured that an employer would respond in kind or face an unfair labor practice finding.

Although state property law and federal labor law have become inexorably entwined, they are discrete interests that can be independently resolved. Whether organizing activity constitutes a trespass is a question best left to state courts, and the answer is generally unrelated to contemporaneous labor issues. Further, except in limited circumstances, the locus of the organizing does not affect the question whether the employees’ labor rights were infringed. That issue requires an examination of the manner in which the employer reacted to the organizing, which the Board has inexplicably disregarded more often than not. By correcting this oversight, the proposal would offer significant benefits for the enforcement of both federal labor policy and state property rights.
Abstract: Evidence scholarship has developed a permanent interdisciplinary aspect, involving a variety of different disciplinary themes. These include: the psychology of witnesses and factfinders, forensic science, theories of probability and proof, feminist perspectives on evidence law, and the law and economics perspective. After first assessing the status of traditional doctrinal scholarship, we review each of the major interdisciplinary braids, compare them, and evaluate their relative contributions. We conclude by developing a thesis about the utility of different types of evidence scholarship, arguing that interdisciplinary evidence scholarship is more promising and useful to the extent that it helps to explain or advance the truth-seeking function of trials, rather than to posit or seek extrinsic effects of rules that traditionally have been understood as protecting the accuracy of verdicts.

Introduction

In this article, we examine the changing field of evidence scholarship, which has become decidedly interdisciplinary. The importance of these endeavors is bound to the importance of evidence law: the rules by which we adjudicate facts are as important as the interpretation of substantive law, and perhaps more so.\(^1\) While each of

those interdisciplinary domains has its own literature, wherein issues of relevance to that interdisciplinary intersection are addressed and debated, the present Article is the first to consider all of the major strains, compare them, and evaluate the comparative contribution of the different approaches.²

We start with an assessment of the status and value of traditional doctrinal scholarship (Part I). We then review interdisciplinary inquiries into the psychology of witnesses and factfinders (Part II), forensic science (Part III), theories of probability and proof (Part IV), the implications of feminism for evidence law (Part V), and the contributions of the law and economics perspective (Part VI). In the process, we develop a thesis about the utility of different types of evidence scholarship; namely, interdisciplinary evidence scholarship is more promising and useful to the extent that it helps to explain or advance the truth-seeking functions of trials, rather than to posit or seek extrinsic effects from rules that traditionally have been understood as protecting the accuracy of verdicts.³

I. DOCTRINAL SCHOLARSHIP ON EVIDENCE

Evidence scholarship has a distinguished history. It attracted one of the great minds of the nineteenth century, Jeremy Bentham, whose evidence writings, after being edited by John Stuart Mill, were published in 1827 in a five-volume treatise entitled Rationale of Judicial Evidence.⁴ Bentham’s treatise urged radical utilitarian reform to the

906 (2003) (arguing that modern evidence scholarship has embraced interdisciplinary approaches within the rationalist tradition).


³ In other words, we extend to the interdisciplinary realm Bentham’s vision of trial fact finding. Bentham saw the “direct end” of legal procedure to be “rectitude of decision” and the “collateral ends” to be “the avoidance of unnecessary delay, vexation, and expense.” ¹ Jeremy Bentham, Rationale of Judicial Evidence 34 (London, Hunt & Clark 1827). We agree with this proposition, though we recognize that in exceptional circumstances goals such as protection of privacy should be considered in framing evidence law. For a summary of Bentham’s views, see William Twining, Theories of Evidence: Bentham and Wigmore 27–100 (1985).

⁴ Bentham, supra note 3.
misguided evidence rules of the time. Despite its prevailing tone of sarcasm and ridicule, Bentham’s treatise seems to have been quite effective in speeding the abolition of its principal targets, such as rules disqualifying witnesses for interest. The early twentieth century brought an evidence treatise that was hailed by eminent scholars as the best written on any subject—John Henry Wigmore’s monumental and enormously influential Evidence in Trials at Common Law collected and systematized virtually all of the common law of evidence. Both works had great influence in resolving logical contradictions, making evidence doctrine more coherent, and reforming archaic rules that compelled judges to make senseless rulings that led to unjust results.

Despite the wide-ranging interests of Bentham and Wigmore, much of their writing on evidence consisted of what would now be called doctrinal scholarship. Doctrinal scholarship focuses on analyzing and synthesizing rules and urging that they be reconceptualized or otherwise improved. That is not to say that it is formal or purely analytic. Doctrinal scholarship long has had a prescriptive element. Its practitioners have sought to improve the law and have been concerned with the social consequences of law. But their policy analysis

5 1 John Henry Wigmore, Evidence in Trials at Common Law § 8, at 611 (Tillers rev. 1983). Wigmore stated:

Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective.... But Bentham’s case must always stand out as a proof that sometimes the contrary is true—if conditions are meet. No one can say how long our law might have waited for regeneration if Bentham’s diatribes had not lashed the legal community into a sense of its shortcomings.

Id.

6 Joseph Beale wrote, “It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written.” J.H. Beale, Book Review, 18 Harv. L. Rev. 478, 478 (1905) (reviewing John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law (1905)). Of the third edition, Edmund Morgan wrote: “Not only is this the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of Anglo-American Law.” Edmund M. Morgan, Book Review, 20 B.U. L. Rev. 776, 793 (1940) (footnote omitted) (reviewing John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law (3d ed. 1940)). William Twining has noted that “one of the difficulties of debating with Wigmore was that, so great was his influence, once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap.” Twining, supra note 3, at 111.

7 Wigmore, supra note 5.

8 For examples of doctrinal scholarship and discussion of its usefulness, see Roger C. Park, Evidence Scholarship, Old and New, 75 Minn. L. Rev. 849, 859–71 (1991).
has rested mainly on history, experience, and fireside inductions—
not on knowledge of the scholarly literatures of disciplines outside the
law that address many of evidence law’s concerns.

In leading law reviews, there has been a steep decline in doctrinal
scholarship on evidence law. Examination of the top continuously-
published journals shows a dramatic reduction in the proportion of
pages devoted to such scholarship. At the turn of the twentieth cen-
tury, doctrinal articles constituted 93% of the evidence articles in
these journals. By mid-century that percentage had fallen to 79%, and
by century’s end only 20% of evidence articles were doctrinal. Doc-
trinal inquiries—that is, analyses of the rules themselves, their coher-
ence, their organization, their emergence and disappearance—have
been replaced by inquiries of other kinds.

These newer inquiries seek to cross law with some other discipline.


10 A “doctrinal” article is one that describes rules of law and synthesizes them. It may also suggest improvements or reforms. Its use of information from other disciplines is ancillary. The first author sampled evidence articles from three periods approximately fifty years apart to assess the relative frequency of doctrinal articles on evidence versus other kinds of evidence scholarship. To reduce the number of articles to be read, the inquiry was limited to often-cited American law reviews that were published under the same name in all three periods. Examination of citation studies conducted in 1930 and 1996 disclosed ten law journals that appeared among the top twenty in both studies. See Scott Finet, The Most Frequently Cited Law Reviews and Legal Periodicals, 9 Legal Reference Services Q. 227, 229 tbl.1 (1989) (presenting material from Douglas B. Maggs, Concerning the Extent to Which the Law Review Contributes to the Development of the Law, 3 S. Cal. L. Rev. 181 (1930)); James Lindgren & Daniel Seltzer, The Most Prolific Law Professors and Faculties, 71 Chi.-Kent L. Rev. 781, 789 tbl.2 (1996). Those were the Harvard Law Review, Yale Law Journal, Michigan Law Review, Columbia Law Review, University of Pennsylvania Law Review, Virginia Law Review, California Law Review, New York University Law Review, Cornell Law Quarterly/Law Review, and Minnesota Law Review. Research assistants compiled a list of evidence articles from these journals at approximately fifty-year intervals. The exact dates were chosen for index-searching convenience. A search for evidence articles was made in the Index to Legal Periodicals and the tables of contents of the listed journals. The articles were read and categorized as doctrinal treatments of evidence law or other types of evidence scholarship. (Some articles were removed from consideration after they were determined not to be evidence law articles.)

That does not mean that doctrinal scholarship is dying out. Though it is true that, with important exceptions, it is becoming less common in elite journals, it flourishes more than ever in treatises and there is still ample space for it in journals due to the sheer proliferation of law reviews. Though the change in the proportion of doctrinal and interdisciplinary evidence scholarship in often-cited journals is striking, in absolute terms there is still plenty to go around, perhaps more pages than in earlier periods.

It is clear, however, that doctrinal evidence scholarship is less often published in elite journals, less respected among top scholars, and less rewarded as a career choice than in earlier times. What accounts for this shift in emphasis? There are several reasons. Some of them are not limited to evidence scholarship, but common to all forms of legal scholarship. For example, the realist perspective has triumphed, and hence there is more emphasis on considering consequences and discovering social facts. Law schools are more inclined to hire faculty with advanced degrees in other fields. There have been well-financed attempts to spread the law and economics perspective.

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13 A count supervised by one of the authors of this article indicates that there were twenty-three doctrinal texts and treatises on evidence law in print in 1957–58 (25,416 pages), compared to 207 texts and treatises in 2001–02 (150,833 pages), a page increase of 593%. (Casebooks and commercial outlines were not counted.) The data collection was accomplished by identifying doctrinal evidence books that were listed in the 1957 and 1958 editions of *Law Books in Print* (Glanville Publishers) and the 2001–02 edition of *Books in Print* (Bowker). Books that were unfamiliar to the principal investigator were judged by their titles. For the second period, page counting was not practical for some works, so the investigators estimated page length based on the mean length of the volumes for which data were available. These estimates counted for 26,232 of the 150,833 pages counted in the second period.

14 See Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship? A Systematic Comparison of Law Review Articles One Generation Apart*, 30 Suffolk U. L. Rev. 353, 373–74 (1996). The authors found that there were nearly twice as many “practical” articles in 1985 as in 1960, a period during which the number of primary law reviews had nearly tripled. *Id.* at 373. The biggest change in content away from doctrinal scholarship occurred in the top quintile of law reviews (in terms of prestige as measured by the size of the host law school’s library). *Id.* at 374.


The decline of doctrinal scholarship on evidence also is related to particular features of evidence law. Doctrinal scholarship thrives when the law is plainly unjust, seriously confused, or rapidly changing. Evidence law is not as foolish as it was in Bentham’s time nor as disorganized as it was in Wigmore’s time. Moreover, on most topics, the climate for reform is not as good as it was in the eras of Wigmore and Bentham. The mildly radical reform attempted in Edmund Morgan’s *Model Code of Evidence* failed completely, and today’s judges and lawyers seem generally satisfied with the Federal Rules of Evidence, which were largely a codification of common-law rules extant in the mid-twentieth century. Finally, the confusion that existed in Wigmore’s time and before has been largely tamed by the Federal Rules, so there is no enthusiasm for ground-breaking reclassifications. And, compared to other fields, doctrinal change is infrequent. The Advisory Committee has proven conservative in its role of proposing amendments. Nor have the evidence rules that are primarily focused on achieving accuracy attracted much congressional activity. Congress tends to have a substantive agenda, and even the rules of privilege, which attract the attention of interest groups and which are frequently the subject of state-level legislation, have not attracted much attention from Congress at the national level—at least not since the disputes in the 1970s over the content of the newly codified Federal Rules of Evidence.

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17 *Model Code of Evidence* (1942). Edmund M. Morgan, Professor at Harvard Law School, was the Chief Reporter and wrote the foreword. Edmund M. Morgan, *Foreword to Model Code of Evidence* 1–70 (1942).


The lack of doctrinal change has two effects. First, there are fewer new developments to explain and critique; over time it becomes harder to generate new ideas about old doctrine. Second, the fact that proposals for change tend to die discourages scholars from advocating change. This discouragement is important because modern doctrinal scholarship is prescriptive. While it was possible 100 years ago to publish an article that merely described and organized doctrine, modern doctrinal scholarship invariably makes the case for reform and improvement. If reform is unlikely, there is less incentive to argue for improvements. When change does occur—as when the Supreme Court changed confrontation doctrine in its 2004 decision in *Crawford v. Washington*—an outpouring of doctrinal scholarship results.

The era of the great doctrinal analysts and treatise-writers can be seen as a continuation of Bentham’s project of eliminating artificial distinctions and obstacles to free proof. Though current evidence law may have anomalies, they are not as striking as they were in Bentham’s time. One does not see judges straining against evidence rules that they themselves consider to be unjust.


20 For an example of such an article, see generally David Torrance, *Evidence of Character in Civil and Criminal Proceedings*, 12 YALE L.J. 352 (1903).


Another possible reason that doctrinal evidence scholarship may decline is that the trial is becoming more of a rarity. Evidence doctrine is most important in jury trials, where there are two decision-makers—one a referee who screens the evidence, and the other a factfinder that weighs the merits. But if jury trials (or trials in general) become less important, rules that have application mainly to the courtroom become correspondingly less important. This may contribute to the study of evidence as a topic, not of courtroom rules, but of how to determine the truth.

That is not to say that evidence rules always will remain static. Indeed, structural changes eventually might make the current rules obsolete. If Mirjan Damaška is right in thinking that the pillars of evidence law are crumbling because of structural changes—a drift away from the jury-centered time-concentrated adversarial model—then at some point doctrinal rejuvenation might re-open the door to doctrinal analysis. But if the rejuvenation comes, as Damaška predicted, because the pillars of the exclusionary rules deteriorate, then the rules excluding evidence will themselves become less important, an effect that is sure to reduce the importance of scholarship describing them.

Doctrinal scholarship has some significant benefits. It produces material that can be easily understood by lawyers and judges on the basis of their law school training and that helps them in understanding and systematizing the law. Judge Harry Edwards’s eloquent complaint that he finds little of use in elite law reviews suggests that journals may be losing readership among judges and policymakers, the very people who are in the best position to systematize and improve the law. But this service to the profession also can be accomplished by producing interdisciplinary scholarship that is useful and accessible. And that seems to be what is happening.

On the whole, then, the increased amount and prestige of interdisciplinary scholarship is a welcome development because of the value of functional approaches to the analysis and criticism of law. Rules of law need to be assessed in light of their social impact. Light

24 See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (exhaustively reviewing the evidence on the trend toward fewer and fewer trials). See also the entire issue of the Journal of Empirical Legal Studies in which Galanter’s article appears, which is devoted to the subject of the vanishing trial.


26 Id. at 149–52.

from other fields can be an aid in assessing the impact of law, but scholars in those other departments usually do not have the knowledge of legal doctrine and legal institutions needed to deliver well-crafted analyses. On the other side of the same coin, evidence scholars have a special need to become conversant with those other disciplines as well as with doctrinal analysis. This is perhaps especially true of the scientific method because both the social and natural sciences are increasingly relevant to the law’s attempt to reach accurate verdicts. It is hard to know whether a rule helps triers reach accurate results without knowing something about human reasoning, or to know whether a forensic technique is valuable without knowing something about the scientific method.

We turn next to an examination of the principal strains of contemporary interdisciplinary scholarship on evidence.

II. Psychology and Evidence

For obvious reasons, psychology is the most important of the interdisciplinary threads that can be woven into evidence law scholarship. Evidence law is much concerned with the abilities of witnesses to perceive, to remember, and to report what they have observed. It is also concerned with the abilities of jurors to comprehend, evaluate, and draw inferences from the evidence presented to them, including their ability to assess the sincerity of lay witnesses and to understand and not be overwhelmed by expert witnesses. All of these are psychological issues. By psychology we are referring to experimental psychology, cognitive psychology, and social psychology, rather than to clinical psychology.\(^{28}\) Experimental studies that address topics such as memory, perception, judgment, inference, decisions under conditions of uncertainty, and jury behavior are plainly relevant to evidence law.

A. Early Examples

The history of experimental psychology and law has been one of bursts of enthusiasm followed by periods of disenchantment. The first scholar to look at the interconnections of law and psychology was Hugo Münsterberg, a Harvard professor who, in the course of invent-

\(^{28}\) These areas of psychology of primary interest to the scholarship of evidence law are the offspring of the marriage of philosophy and experimental biology that took place in the later decades of the nineteenth century and the early twentieth. Clinical psychology has different intellectual ancestors. See generally Edwin G. Boring, A History of Experimental Psychology (2d ed. 1929).
ing one field of applied psychology after another—applications of psychology to industry, education, medicine, psychotherapy, business—undertook the first exploration of legal issues through a psychological lens. His 1908 book, *On the Witness Stand*,29 dealt with problems of the perception and memory of witnesses, crime detection, confessions (especially false ones), influences on the examination of witnesses, hypnotism and crime, and the prevention of crime. Some of his points were sound, others flawed or quite speculative.30 Unfortunately for the fledgling field, our evidence law forebear, John Henry Wigmore, took a strong dislike to Münsterberg’s book, and published a somewhat bizarre, but unmistakably scathing, critique of it.31 Apparently Münsterberg never replied to Wigmore’s attack,32 and we do not know whether Wigmore’s assault caused him to abandon his work on law and psychology. Certainly it could have deterred others with an interest in the intersections where the two fields might profitably have met. One wonders what the body of psychology and evidence law scholarship might have developed into, and how much sooner, if the

29 HUGO MÜNSTERBERG, ON THE WITNESS STAND (1908).

30 Münsterberg’s first two chapters, on memory, perception, and the fallibility of eyewitnesses, foreshadowed much later work and basically were sound, though written in a more casual fashion than contemporary reports of experimental work. For an assessment, see Ludy T. Benjamin, Jr., Hugo Münsterberg, Portrait of an Applied Psychologist, in 4 PORTRAITS OF PIONEERS IN PSYCHOLOGY 113, 113–30 (Gregory A. Kimble & Michael Wertheimer eds., 2000). Münsterberg then argued, however, that psychologists could detect lies about bad acts through a process of word association in which they present a suspect with words that are neutral and words that are related to the crime and measure the respective response times. MÜNSTERBERG, supra note 29, at 73–110. Wigmore effectively demolished this assertion. See John H. Wigmore, Professor Miensterberg [sic] and the Psychology of Testimony, 3 U. ILL. L. REV. 399, 427–31 (1909) (presenting a mock trial in which members of the bar brought a claim of libel against Professor Münsterberg for overstating the usefulness of psychologists as experts at trial). Other assertions by Münsterberg also were highly speculative, including that post-hypnotic suggestion could cause someone to bequeath all his money and then commit suicide, or that flashing lights increase suggestiveness and could cause false confessions.

31 See generally Wigmore, supra note 30.

32 Part of the reason might be that Münsterberg was busy with other projects. The same year that Wigmore’s article appeared, Münsterberg published two more books, one on values and the other on the psychology of teaching, HUGO MÜNSTERBERG, THE ETERNAL VALUES (1909); HUGO MÜNSTERBERG, PSYCHOLOGY AND THE TEACHER (1909). The next year he was appointed an exchange professor from Harvard to the University of Berlin and sent on a quasi-diplomatic mission to establish an American Institute. BORING, supra note 28, at 427–28. By then the stage was being set for the outbreak of the First World War, and Münsterberg was trying vainly to reverse the momentum by promoting cultural ties between his two homelands. Id.; MATTHEW HALE, JR., HUMAN SCIENCE AND SOCIAL ORDER: HUGO MÜNSTERBERG AND THE ORIGINS OF APPLIED PSYCHOLOGY 103–05, 165–68 (1980); William Stern, Hugo Münsterberg: In Memoriam, 1 J. APPLIED PSYCHOL. 186, 186 (1917).
initial encounter had not been hobbled by the overreaching of its first important contributor and the overreaction of its first important critic.

Wigmore also tried to derail the second major event in the history of evidence law and psychology. When a bright young Yale law professor, Robert M. Hutchins, who in 1926 had just begun to teach evidence, delivered a paper on psychology and the law of evidence, Wigmore sent him a letter registering his disapproval and referring Hutchins to Wigmore’s earlier critique of Münsterberg.33 For good measure, Wigmore also sent a complaint to the president of Yale University.34 Hutchins was not the least deterred. He took on psychologist Donald Slesinger as a collaborator and together they wrote prolifically on psychology and evidence law.35 The articles drew from the extant body of psychological research to scrutinize evidence doctrine, identify weaknesses, and suggest improvements. Professor Schlegel’s appraisal of them is that:

The articles were of a generally high quality, although their effectiveness varied directly with respect to the quality and relevance of the underlying psychological literature: where good quantitative, behavioral studies were available, the articles were crisp and their criticisms effective; where an older, introspective psychology or new freudian psychology provided the studies, the articles tended to be less well focused and their criticisms weak.36

Like other legal realist initiatives in law and social science, Hutchins and Slesinger’s work just ran out of steam. The whole field of law and any social science was somewhat dormant for a time, suffering from lack of funding during the Great Depression and a redirection


34 See id. at 474 n.83.


36 Schlegel, supra note 33, at 482.
of the energies of realist leaders during the Depression and the Second World War.\textsuperscript{37} Hutchins left Yale in 1929 to become president of the University of Chicago, and four years later, at the ripe age of thirty-four, delivered an address in which he expressed doubts that the psychology of the era could teach the law enough to answer the necessary questions and resolve uncertainties about numerous evidence rules and their applications.\textsuperscript{38}

B. Three Contemporary Stories of Success and Its Alternatives

1. Research Relevant to Eyewitness Identification

One of the first topics of major and continuing research has been eyewitness identification accuracy—an initiative of psychologists, not law professors. One of the early modern landmarks on this subject was Elizabeth Loftus’s book, \textit{Eyewitness Testimony}, published by the Harvard University Press.\textsuperscript{39} Today there are literally hundreds of studies on the subject of eyewitness testimony; one bibliography of eyewitness research lists 2000 entries, most of them scientific studies.\textsuperscript{40} The body of research, both field studies and laboratory studies, has been growing at an increasing rate.\textsuperscript{41} On many questions, the findings show a high degree of convergence. Moreover, the research, unlike that of Münsterberg or that reviewed by Hutchins and Slesinger in their studies on psychology and evidence, shows a high degree of sensitivity to the legal context. The researchers do not stop at identifying factors, such as weapon focus, that create poor witnessing conditions. They also study witnessing within the legal system.

The weakness of eyewitness identification would not be such a concern if jurors gave it proper weight. But are jurors sensitive to witnessing conditions and problems? This topic has had the benefit of a substantial amount of sophisticated research.\textsuperscript{42} Do eyewitness experts help jurors understand? That has also been the subject of controlled experiments.\textsuperscript{43} Do judges and lawyers understand problems with wit-

\textsuperscript{37} Id. at 585–86.
\textsuperscript{39} \textit{Elizabeth F. Loftus, Eyewitness Testimony} (1979).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 173–80.
\textsuperscript{43} \textit{Id.} at 213–24.
nessing conditions? Can judicial instructions help? Is cross-examination and adversarial testing sufficient to alert jurors to the dangers? All of these context issues have been the subject of empirical research by scholars in the field\textsuperscript{44}—exactly what Wigmore and Hutchins were calling for and bewailing the absence of.

The topic had become so popular that one of us, while an editor of the journal \textit{Law and Human Behavior}, wrote an editorial urging psycholegal scholars to tackle more than just eyewitness identification.\textsuperscript{45} The dearth of scientific scholarship in the legal profession was noted even in the pages of \textit{The New Yorker}, where the author, Atul Gawande, struck a tone similar to Münsterberg’s:

[T]he legal profession has conducted no further experiments on the reliability of eyewitness evidence, or on much else, for that matter. Science finds its way to the courthouse in the form of “expert testimony”—forensic analysis, ballistics, and so forth. But the law has balked at submitting its methods to scientific inquiry. Meanwhile, researchers working outside the legal establishment have discovered that surprisingly simple changes in legal procedures could substantially reduce misidentification. They suggest how scientific experimentation, which transformed medicine in the last century, could transform the justice system in the next.\textsuperscript{46}

In contrast to a century ago, today’s research on eyewitness testimony is far more complete, more carefully related to the legal context, and more legally sophisticated. And this time around, the legal academy has itself been much more receptive to and sophisticated about the research.\textsuperscript{47}

\textsuperscript{44} Id. at 143–68, 255–64.


I have received many papers devoted to the study of eyewitness phenomena; more, in fact, than any other category. Yet the subject of eyewitnesses will occupy at the most only a few hours of a law student’s academic life; only a fraction of the thousands of annual pages in law reviews; can be only one of a large number of issues a judiciary committee will address itself to in a year’s policy making.


\textsuperscript{47} Thus, Gawande’s criticism is unfair, at least as it pertains to eyewitness identification research.
Psychologists have studied the effect of eyewitness age, eyewitness sex, sex of the target person, training of eyewitnesses (such as bank tellers) in how to identify, the dubious value of consistency of description and eyewitness confidence, the effects of disguise and weapon focus, the rate of decay of memory, the effects of post-event information (such as seeing mugshots before making a lineup identification), exposure time, distinctiveness of the target, length of retention interval, encoding instructions, biases in lineup structure and composition, the effect of context reinstatement (having the eyewitness do the identification in the same surroundings as the crime), live v. video v. still pictures at exposure and at identification, and the difficulties of cross-racial identification and whether people with friends of another race are better identifiers than others.48 Psychologists also have done studies of jurors, finding that juror subjects often overemphasize factors that have only a weak relationship to accuracy, such as witness confidence, and underestimate other factors, such as the witness’s age, the effect of disguise, or the distinctiveness of the target person.49

What have been the legal consequences of this research? One important question that evidence casebooks address is whether expert testimony is admissible to alert jurors to the dangers of eyewitness identifications by pointing out the factors that increase or decrease eyewitness accuracy.50 Most courts continue to hold that it is within the discretion of trial judges to exclude this evidence, but there are exceptions.51 Some trial judges, of course, exercise their discretion in favor of admitting it, especially when the eyewitness identification is crucial and when it fits the facts of the case.52

More recently, eyewitness identification research has had an even more important effect on the administration of justice. It has suggested policy for the conduct of eyewitness identification procedures to minimize the risk of erroneous convictions without increasing the risk of erroneous failures to identify. In 1998, the American Psychology-Law Society produced a white paper on eyewitness identification

48 For examples of these studies, see those cited in Peter Shapiro & Steven Penrod, A Meta-Analysis of the Facial Identification Literature, 100 PSYCHOL. BULL. 139, 154–56 (1986).
49 See id. at 171–209.
51 For leading cases holding exclusion of expert testimony about eyewitness identification to be an abuse of discretion under the circumstances, see State v. Chapple, 660 P.2d 1208, 1223–24 (Ariz. 1983) and People v. McDonald, 690 P.2d 709, 726–27 (Cal. 1984).
written by a number of leading eyewitness researchers.\textsuperscript{53} Their recommendations included:

- selecting lineup foils (or fillers) to resemble the witness’s description (rather than the suspect’s);
- blind administration of lineups (because police officers who interact with the witness should not know who the suspect is);
- instructing the witness that the culprit might or might not be in the lineup (in order to reduce relative judgment);\textsuperscript{54}
- sequential lineups or photospreads (whereby witnesses see one lineup member at a time and must declare whether that person is or is not the perpetrator, which is also designed to reduce relative judgment); and
- recording the confidence of the witness immediately following any identification (in view of the high persuasiveness of this relatively unimportant element, and the malleability of confidence after the witness receives confirming or disconfirming post-identification information).\textsuperscript{55}

The U.S. Department of Justice has adopted most of these recommendations (with the notable exception of blind testing)\textsuperscript{56} and has advised all police agencies throughout the United States to follow them.\textsuperscript{57} Other jurisdictions have gone further. The Illinois Governor’s Commission on Capital Punishment recommended double-blind lineups and the state’s General Assembly funded a limited program of

\begin{itemize}
\item \textsuperscript{54} “Relative judgment” is the phenomenon whereby eyewitnesses tend to select the person in the lineup who comes closest to looking like the perpetrator rather than the person they believe is the perpetrator.
\item \textsuperscript{55} Wells et al., \textit{supra} note 53, at 627–29, 632, 635, 639.
\item \textsuperscript{56} Police representatives on the Department of Justice task force felt that a requirement of blind administration reflected a lack of trust in officers conducting lineups. They agreed that officers should not give cues to witnesses as to who the officer knew the suspect to be, but argued that they could accomplish this by willing themselves to behave properly. Interestingly, blind protocols are common in scientific research, where those scientists do not feel at all demeaned to impose blind testing regimes on themselves and see good methodology as the surest path to accurate results. Gary L. Wells et al., \textit{From the Lab to the Police Station: A Successful Application of Eyewitness Research}, 55 \textit{Am. Psychologist} 581, 594 (2000).
\end{itemize}
implementation and study of the procedure. New Jersey has adopted double-blind lineups on a statewide basis.

2. Research Relevant to Character Evidence

The legal literature on character evidence has varied in its use of insights from academic literature on psychology. Professor Uviller produced an influential article on character evidence without expressly relying upon insights from the psychology literature. Other articles do cite and discuss the literature on psychology, but are relatively cautious in their use of it. Still others have been more daring, using personality theory to argue that character evidence is worthless or virtually worthless.

The theory that character evidence lacks probative value finds support in a view of personality that sees situational pressures as being more important as a cause of human behavior than are general traits of character. Thus, whether a person is in a hurry to keep an important appointment is likely to be a more powerful determinant of whether he will stop to help someone in distress than what we can find out about that person’s general disposition toward self-sacrifice. Some legal

60 For an extensive examination of the complexities of the character evidence doctrine, see generally Edward J. Imwinkelried, Uncharged Misconduct Evidence (2d ed. 1999).
61 Uviller, supra note 23.
scholars have used “situationist” personality theory to argue that character evidence ought to be broadly excluded. They have found further support in studies of “fundamental attribution error,” studies showing that people tend to attribute too much power to dispositions and too little to situations. For example, when experimental subjects are asked to predict how people will react in certain situations where behavior has been tested in prior experiments, they tend to err on the side of underestimating the power of situations.

Along with the benefits of informing legal thought with interdisciplinary materials such as those discussed above come certain risks. One is the risk of applying literature that is too scant, too selective, and too old. Another is the danger of using research that does not generalize to the legal situation. The first risk is somewhat hard to avoid. We can’t expect law professors to be on the cutting edge of research in another field. Still, one can take precautions, such as avoiding the temptation to take one’s psychology from law review articles and the empirical studies cited in them, and checking one’s conclusions against recent editions of standard college texts on the subject.

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65 See Foster, supra note 63, at 32 (“Social psychology data reflect the conclusion that prior convictions have virtually no probative value as a predictor for determining a witness' in-court veracity.”); Leonard, supra note 63, at 26 (“[A]s currently conceptualized by the law, character evidence often fails the test of logical relevance.”); Spector, supra note 63, at 351 (“Character evidence used as a basis for predicting human behavior is useless . . . the legal conclusion therefore ought to be that evidence of character has no probative value.”); cf. Robert G. Lawson, Credibility and Character: A Different Look at an Interminable Problem, 50 Notre Dame L. Rev. 758, 783 (1974–75) (describing a less radical theory that considers both a person’s trait and the situation).

66 For a description of these experiments, see Lee Ross & Richard E. Nisbett, The Person and the Situation: Perspectives of Social Psychology 119–44 (1991). Here, incidentally, guided by the work of Ross & Nisbett, is where the debate about psychology and the character rule might have been directed most usefully: not the question of whether stable traits exist but whether factfinders over-attribute behavior to traits (and under-attribute the influence of situations) or too easily infer a trait from learning about a small sample of conduct.

67 Id.

68 Sometimes old research is every bit as good as, or better than, the most recent studies. Here, we use the elderliness of research as a shorthand for research which has been supplanted by better and more complete research, leading to different overall conclusions.

69 For an example, see David Crump, How Should We Treat Character Evidence Offered to Prove Conduct?, 58 U. Colo. L. Rev. 279, 283 n.10 (1987). Professor Crump reviewed two college textbooks to check the current status of trait theory, noting that “[b]oth of these books were used as texts in courses offered at the University of California (Davis) in 1987 and were purchased at the campus bookstore by the author of this Essay.” Id. Admittedly, following Professor Crump’s example would put legal scholars in the unwonted role of paying money for books, but perhaps interlibrary loans or faculty expense accounts could soften the blow.
Another possibility is to follow Hutchins’s example and seek a psychologist as a co-author.

The second challenge is to make sure that the interdisciplinary literature “fits”—that is, that it generalizes to the relevant legal context. This requires examination of the underlying literature and use of the basic skill exercised by doctrinal scholars, that of drawing distinctions. Sensing the lack of generalizability does not require going to somebody else’s library and digging through poorly indexed psychology journals. One only needs to look at whatever psychology research was cited and think about its applicability to the trial context. For example, the two works most heavily relied upon in law review articles were Hartshorne and May’s massive 1928 work and Walter Mischel’s 1968 book, Personality and Assessment. These were seminal works, deservedly influential in psychology. In assessing their applicability to issues of evidence law, however, legal scholars need to consider the behavior examined in those works and think about its generalizability to the behavior at issue in those situations where the law admits or excludes evidence of character.

Hartshorne and May studied deceptive behavior in thousands of schoolchildren. Under observation, children were given the opportunity to steal coins, to lie, or to cheat on a test. The authors compared children’s propensity to engage in different kinds of dishonest or deceptive behavior—for example, cheating on self-graded classroom tests compared to stealing coins or cheating on tests of athletic ability. They found that correlations between different kinds of dishonest or deceptive behaviors were very modest.

Mischel evaluated the accuracy and utility of psychological assessments of character traits and of psychodynamic states (ego strength, defenses, repression, dependency, etc.). Much of his groundbreaking book focuses on the reliability and validity of personality tests and clinical assessments. Clinical assessments did not stand up well either in terms of interrater reliability or in terms of external measures,

70 See articles cited supra notes 62, 63, 65.
71 Hugh Hartshorne & Mark A. May, Studies in Deceit (1928).
72 Walter Mischel, Personality and Assessment (1968).
73 See Hartshorne & May, supra note 71, at 90–103.
74 See id. at 382–84. The authors stated that “as we progressively change the situation we progressively lower the correlations between the tests. . . . [W]e interpret these facts to mean that the consistency of the individual is a function of the situation.” Id. at 384. Hartshorne and May concluded that “[t]he results of these studies show that neither deceit nor its opposite, ‘honesty,’ are unified character traits, but rather specific functions of life situations.” Id. at 411.
such as progress of the patient.\textsuperscript{75} Pencil-and-paper personality tests and tests such as the Rorschach test, sentence completion tests, and the Thematic Apperception Test (TAT) did not correlate very highly with each other or with measures of behavior.\textsuperscript{76} His views about the lack of utility of trait-state theories are tied to his preference for “social behavior” therapy—for instance, counter-conditioning and extinction of phobias by small steps during which the patient becomes desensitized to the object of fear—as opposed to psychodynamic analysis based upon the belief that a person’s basic personality can be inferred from cues such as performance on projective tests, Freudian slips, or interpretation of dreams.\textsuperscript{77} He found that hypotheses about generalized traits often did not stand up. For example, he noted that some psychodynamic theorists believe that reactions toward authority stemming from attitudes towards parental figures would generalize to attitudes towards superiors in the workplace.\textsuperscript{78} However, experimental testing indicates that there was no substantial correlation between attitudes toward fathers and attitudes toward bosses.\textsuperscript{79} He obtained similar results in examining attitudes towards peers and comparing them to attitudes toward siblings.\textsuperscript{80} Thus, Mischel concluded that “there was little evidence for generality of attitudes either toward authority or toward peers.”\textsuperscript{81}

Mischel also expressed doubt about the generality of the psychological construct of an “authoritarian personality.”\textsuperscript{82} Psychologists had hypothesized that persons with authoritarian personalities had little tolerance for ambiguity. But tests that measure different types of intolerance of ambiguity had little correlation with each other.\textsuperscript{83} He noted similar results with the posited personality trait of “rigidity.”\textsuperscript{84} Similarly, pencil-and-paper anxiety scales correlated substantially with each other, but not with psychological measures of anxiety.\textsuperscript{85} He noted generally that when behaviors are measured by tests with similar formats and content there are substantial correlations but the cor-

\textsuperscript{75} Mischel, supra note 72, at 106–48.
\textsuperscript{76} Id. at 118–23.
\textsuperscript{77} Id. at 149–50.
\textsuperscript{78} Id. at 21.
\textsuperscript{79} Id. at 22.
\textsuperscript{80} Mischel, supra note 72, at 22.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 28.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 29.
\textsuperscript{85} Mischel, supra note 72, at 81.
relation often does not hold when the same behaviors are measured by different means.\textsuperscript{86} Though much of his book deals with correlations between psychological tests or between tests and personality ratings by subjects or their acquaintances, sometimes he also considered studies that involved observed behavior. For example, he referred to the Hartshorne and May study as one in which cheating on one test did not have a high correlation with cheating on a different type of test, and lying in classroom situations showed almost no correlation with deception in out-of-classroom situations.\textsuperscript{87} He noted that experiments in which children’s propensity to delay gratification was observed indicated that this behavior was also malleable, and could be influenced by such situational factors as observation by the children of the behavior of adult confederates who modeled patience.\textsuperscript{88}

The question for the law of evidence is whether the findings of the studies reviewed and reported by Hartshorne and May and Mischel—and cited by proponents as the basis for a strict ban on character evidence—generalize to the situation of greatest interest to the law of evidence. One can question the relevance of the studies involving children. To what extent is the moral behavior of children stable enough to make one think that what is learned from those studies tells us about the behavior of adults?\textsuperscript{89} Similarly, valid research about the predictive value of ordinary behavior does not necessarily generalize to the prediction of extreme behavior.\textsuperscript{90}

When the legal issue is whether evidence showing propensity for criminal violence should be admitted, there is an additional problem of “fit”: none of the underlying research in the studies referred to dealt with criminal or violent behavior. Although decades of research have carried the Hartshorne and May findings beyond the lying, cheating, and stealing of schoolchildren to a far wider array of behavior and situations, and though the studies reviewed by Mischel and their progeny similarly examined a wide array of behavior, it is not clear that they generalize to violent behavior. Conclusions about the

\textsuperscript{86} Id. at 101.
\textsuperscript{87} Id. at 23–25.
\textsuperscript{88} Id. at 151–52.
\textsuperscript{89} This has been itself a research problem in psychology: what factors enable the prediction of a person’s adult behavior from his or her behavior as a child? One of the best answers has been temperament (activity level, emotionality, sociability, impulsivity). See Arnold H. Buss & Robert Plomin, A Temperament Theory of Personality Development 7–8 (1975); Jerome Kagan, Temperamental Contributions to Social Behavior, 44 Am. Psychologist 668, 668 (1989).
\textsuperscript{90} See Ross & Nisbett, supra note 66, at 116–17; Park, supra note 62, at 737 & n.67.
lack of cross-situational consistency of behavior have been based on studies that generally examine nonviolent, noncriminal behavior of normal research participants. This is not a criticism of that body of research, but simply an observation that they do not include the behavior of greatest relevance to the law, and a caution about generalizing from those findings to the legal question of the predictive power of character and other-crimes evidence. Some of the studies do deal with aggression, a trait construct that seems somewhat analogous to violent criminal conduct, but the reported research on that trait gives little comfort to those who believe that behavior is highly unstable and situation-dependent. At the end of the day, external validity (generalizability) can only be determined empirically, not logically.

Even for the behavior studied, Mischel did not offer extreme claims about the absence of individual differences or the irrelevance of prior behavior. He even looked favorably upon the use of other-act evidence for prediction of behavior in certain situations, considering it superior to clinical psychodynamic assessments based on constructs such as “infantile dependency needs” or “passive-aggressive character make-up.” Indeed, one of the important implications that psychologists took from Mischel’s findings was that personality measures are weaker predictors than past behavior is, leading to the aphorism that “the best predictor of future behavior is past behavior.” By focusing on the behavior, as a matter of sheer prediction, it does not matter

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91 For a useful review of these studies, see generally Ross & Nisbett, supra note 66.
92 See Walter Mischel, Introduction to Personality 480–81 (5th ed. 1993) (“Aggression is a dimension of behavior on which stable individual differences have been identified beginning in grade school. These differences remain stable even over long periods of time.”); see also Leonard Berkowitz, Aggression: Its Causes, Consequences, and Control 131 (1993); Michael R. Gottfredson & Travis Hirschi, A Control Theory Interpretation of Psychological Research on Aggression, in Aggression and Violence: Social Interactionist Perspectives 47, 50 (Richard B. Felson & James T. Tedeschi eds., 1993) (“[W]hat is not arguable is that aggressive behavior, however engendered, once established, remains remarkably stable across time, situation, and even generations within a family” (quoting L. Rowell Huesmann et al., Stability of Aggression over Time, 20 Developmental Psychol. 1120, 1133 (1984))); Dan Olweus, Stability of Aggressive Reaction Patterns in Males: A Review, 86 Psychol. Bull. 852, 872–73 (1979). The famous Milgram experiments, in which subjects were induced to give seemingly dangerous (but fake) electric shocks to confederates when told to do so by an authority figure, could be adduced as evidence that criminal aggression is highly situational, but these experiments are better regarded as testing obedience to authority than as a test of antisocial aggressiveness. See Ross & Nisbett, supra note 66, at 52–58; Gottfredson & Hirschi, supra, at 53 (Milgram’s studies “measure compliance, obedience, or . . . acquiescence,” rather than aggression).
93 Mischel, supra note 72, at 135–48.
94 Id.
whether the causes are internal biological or personality factors that we have not yet discovered and measured or whether the causes are external situational ones (and the behavior recurs because similar situations are repeatedly encountered). In this respect, one might find in Mischel a trace of support for admission of bad-act evidence that evidence judges would see as character evidence, and for exclusion of expert clinical assessments that judges might see as falling outside the character ban.95

What about the findings of research that has focused on individual differences in and predictors of violence and aggression? Some of that research suggests more useful explanatory and predictive factors. For example, the effects of age and gender are well recognized, with a greatly disproportionate amount of violent crime committed by males between eighteen and twenty-one years of age.96 Among prisoners who had been convicted of unprovoked violent acts (as compared to prisoners convicted of nonviolent crimes) the former had higher levels of testosterone,97 and among non-prison populations, boys and men with higher testosterone levels were more likely to respond aggressively to provocation.98 When aggression has been rewarded, especially intermittently, it tends to persist.99 Some men have long records of criminal violence, which has been found to serve one of two major purposes: to command respect among associates and for more instrumental purposes.100 A review of a large body of research on people who participate in violent and other criminal activity found

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95 Evidence judges are sometimes more willing to let in bad-act evidence to impeach a witness when it supports an expert psychiatric assessment by a clinician than when it is offered for the naked inference that because the subject previously engaged in bad-act behavior, he is likely to do so again. The expert testimony can be viewed as being about an illness or medical condition, whereas naked bad-act evidence is likely to be viewed as forbidden evidence of character. See United States v. Lindstrom, 698 F.2d 1154, 1162 n.6 (11th Cir. 1983).


that such conduct clusters among genetically closely-related individu-
als.\textsuperscript{101}

The most voluminous work, which has focused squarely on the
question of the predictability of violence, has been in the area of
mental illness and violence. Consistent with the findings of Mischel
and others, clinicians using psychiatric theories and diagnoses long
have had difficulty predicting who among the mentally ill will commit
acts of violence and who will not.\textsuperscript{102} That persistent finding has been
helpful in leading researchers away from reliance on clinical assess-
ment to study specific risk factors\textsuperscript{103} and to apply those risk factors
actuarially. This has increased the power of violence prediction. Men-
tal disorder itself is “a risk factor of modest magnitude for the occur-
rence of violence.”\textsuperscript{104} The factors most useful for predicting the vio-
lence proneness of the mentally disordered are the same as those
useful for predicting in the general offender population—namely,
criminal history, antisocial personality, substance abuse, and family
dysfunction.\textsuperscript{105} Prediction tools using the risk factor approach have
greatly improved predictive power, though it remains less than a pre-

\textsuperscript{101} Wilson & Herrnstein, supra note 96, at 90–100. For researchers, the debate over
these findings focuses on whether they reflect biological differences (inherited or other-
wise) or whether they are differences in how these closely related individuals were raised in
their families of origin. Leon Kamin, Is Crime in the Genes? The Answer May Depend on Who
lack of empirical basis for their arguments and their failure to distinguish between causa-
tion and correlation); Heathcote W. Wales, Tilting at Crime: The Perils of Eclecticism, 74 Geo.
L.J. 481, 489–91 (1985). The day may be drawing near when extensions of the human ge-
nome project will allow far more precise predictions of at least some kinds and causes of
violent behavior. See 60 Minutes: Murder Gene (CBS television broadcast Feb. 10, 1999) (pro-
\linefiling Jeff Landrigan, an Arizona death row prisoner with an extensive criminal record
matching that of his biological father, Darrel Hill, who is also on death row in Arkansas,
even though the son was adopted out of his biological family in infancy). In the meantime,
the U.S. Supreme Court will soon decide whether Jeff Landrigan made a colorable claim that
he was prejudiced by ineffective assistance of counsel because his lawyer failed to submit
during sentencing evidence of his (partly genetic) predisposition to violence. See generally
Landrigan v. Schriro, 441 F.3d 638 (9th Cir. 2006) (en banc), cert. granted, 75 U.S.L.W. 3162
(U.S. Sept. 26, 2006) (No. 05-1575). For the issue of the admissibility of past acts, the cause of
the behavior matters little; the persistence of the behavior is the relevant finding.

\textsuperscript{102} 2 Modern Scientific Evidence: The Law and Science of Expert Testimony
\S\S 12:1, 12:20 (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders eds.,
2005) [hereinafter Modern Scientific Evidence] (“[T]he sober conclusion that clinicians are ‘modestly better than chance’ at predicting violence appears to be becoming the consensus view.”).

\textsuperscript{103} See generally John Monahan et al., Rethinking Risk Assessment: The MacAr-
thur Study of Mental Disorder and Violence (2001).

\textsuperscript{104} 2 Modern Scientific Evidence, supra note 102, \S 12:12.

\textsuperscript{105} Id. \S 12:19.
cise art or science. The occurrence of past violent acts is predictive; the more of the acts and the more serious they are, the higher the predictive accuracy.

Ultimately, what the law needs to know is whether reform will increase the accuracy of factfinder conclusions. The possible reforms run from exclusionary proposals (barring character and other-acts evidence) to the more inclusive proposals (making character evidence in some form, as well as other-acts evidence, more available). To reach such conclusions, the law must learn more about the actual utility of “character” and prior acts in predicting behavior (or else it must guess), as well as about how factfinders will process those kinds of information. The research referred to is clearly relevant to those tasks, but also is insufficient.

What we have seen so far is that clinical opinions about personality traits may be less useful than practitioners believe as a predictor of future behavior, but that past behavior might be more useful, especially if the violent behavior has been recurrent, if the situation settings for the behavior at issue were similar, and if factfinders can be given realistic, informative, data-based cautions about the predictive power of the evidence. It is by no means out of the question that a high comparative propensity to engage in violent behavior could have great value, when used in conjunction with incident-specific evidence, in post-dicting whether a person committed a single act of that type of behavior on a particular occasion.

The larger point we have tried to make is not about whether the body of psychological research points toward an expansion or a contraction of the prohibition on character evidence. The larger point is about generalizing and distinguishing studies, about making fair and informed use of studies, and about trying to reach a correct answer to evidence policy questions. In using social science literature, legal scholars should not lose the standards that they would apply in creating first-rate doctrinal scholarship. First-rate doctrinal scholarship is not advocacy scholarship; the authors do not snatch quotations from cases on their side and ignore cases on the other side. They are expected to squarely confront authority on the other side and to argue why it is inapposite or wrongly decided, if they conclude that it is. Secondly, doctrinal scholars are expected to read the authorities that they rely upon

106 Id. § 12:13.
107 See Monahan et al., supra note 103, at 44–47.
108 Though we say this with some trepidation, a Bayesian format for presenting the information might be most appropriate. See infra note 183 and accompanying text.
with care and determine whether they are applicable or distinguishable. They should do no less when using psychology authority.

3. Research Relevant to the Hearsay Rule

The first empirical study of the juror use of hearsay was published in 1991. Since then there have been at least twenty-six other studies, most of them original empirical work as opposed to reviews or commentary on empirical work by others. Unlike the eyewitness studies, the hearsay studies often involve collaboration between law professors and psychologists. Fourteen of these studies were co-authored by law professors, one by a lawyer, and two by William C. Thompson, a psychology professor who has a law degree and who probably spends more time in court than most law professors who teach evidence. These close collaborations are entirely understandable. For hearsay research, lawyers and psychologists need each other. The legal setting of eyewitness identification problems is easy for someone with no formal law training to understand. But the legal context in which hearsay issues arise, the rationales of the hearsay rule, and the situations in which out-of-court statements would be admissible in a real trial are things that can be understood only by someone who has carefully studied the concepts.

In essence, these studies present some mock jurors with the “live” testimony of a witness with personal knowledge and other mock jurors with the same information from a hearsay witness. The research question asked by most of these studies is whether the jurors discount the evidence they acquired through hearsay, reflecting their recognition of its weaknesses compared with the firsthand witness. A few studies have been clever enough to ask whether the jurors are able to make proper use of the hearsay evidence in order to move closer to an accurate conclusion about the underlying events. For example, if the out-of-court declarant’s statements

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111 Id. In addition to arguing appellate cases involving high-tech forensic science, Thompson was co-counsel for O.J. Simpson in People v. Simpson.

were made under the influence of suggestive questioning, does that troublesome fact come through to the jurors as well by way of a hearsay witness as it does by examination of the firsthand witness? Some studies created mock cases, the “truth” of which is not only not known but does not exist; others created a set of true underlying facts, and the jurors’ conclusions about the event could be compared to its reality. Some of the studies presented the “case” by way of brief written transcripts or even briefer summaries, others by audio or videotaped presentations of mock trials. In some stud-

113 Id.

114 See, e.g., Jonathan M. Golding, Rebecca Polley Sanchez & Sandra A. Sego, The Believability of Hearsay Testimony in a Child Sexual Assault Trial, 21 Law & Hum. Behav. 299, 304 (1997); Landsman & Rakos, supra note 109, at 73.

115 Peter Miene, Roger C. Park & Eugene Borgida, Juror Decision Making and the Evaluation of Hearsay Evidence, 76 Minn. L. Rev. 683, 688–89 (1992). This reveals a major advantage to simulation studies in this context. In actual trials, rarely can one know what the true underlying facts were. Some of the studies were ingenious enough to begin by having the “hearsay witnesses” observe a videotaped event (the underlying reality that would be at issue) and then be videotaped being interviewed about what they had seen. Those interviews became the “in court” hearsay testimony heard by the mock jurors. See Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, Jurors’ Perceptions of Eyewitness and Hearsay Evidence, 76 Minn. L. Rev. 703, 708 (1992). The results of such studies can provide insights into the ability of mock jurors to reach accurate conclusions about the underlying events that are otherwise completely unavailable.


117 See, e.g., Miene et al., supra note 115, at 689; Angela Paglia & Regina A. Schuller, Jurors’ Use of Hearsay Evidence: The Effects of Type and Timing of Instructions, 22 Law & Hum. Behav. 501, 506 (1998). Professor Michael Seigel argues that all hearsay experiments in which the trial stimuli were videotaped fail to test any difference between hearsay and non-hearsay conditions. Professor Seigel writes:

[A]lthough each of the studies purports to examine the ability of human subjects to differentiate and discount hearsay in comparison with witness testimony, they actually measure individuals’ abilities to differentiate among different types of hearsay and hearsay within hearsay. Remarkably, the articles are silent on this critical issue concerning their internal design.

Michael L. Seigel, A Pragmatic Critique of Modern Evidence Scholarship, 88 NW. U. L. Rev. 995, 1042–43 (1994). As applied to videotaped simulations, this criticism is conceptually barren. The hearsay rule is actually two rules: the important and consequential rule that a witness cannot report another person’s statement if it is used for its truth, and the relatively trivial rule that witnesses testifying to firsthand observations cannot testify by videotape. Because these two rules both share the label “hearsay” instead of being called the “secondhand information rule” and the “videotape rule,” Professor Seigel believes that a trial presented by videotape cannot tell us anything about the processing of secondhand information. He gives no reason for this other than the labels. To be sure, videotaped trials are not real trials, but this challenge to validity is no more serious in the hearsay context than in any other context using videotaped stimuli, such as studies of the effects of jury instructions.
ies the hearsay witness was a layperson,\(^{118}\) in others an expert witness.\(^{119}\) In some the firsthand witness was cross-examined\(^ {120}\) and in others not.\(^ {121}\) And so on.

Put succinctly, some of these studies appear to offer greater verisimilitude than others.\(^ {122}\) And, perhaps more important, the studies asked different research questions, thereby having more (or less) relevance to the legal policy questions about hearsay that need to be asked and answered. The results, however, cannot be put succinctly. The circumstances of some studies revealed jurors to be quite capable of heavily discounting hearsay testimony as compared to firsthand witness testimony.\(^ {123}\) In other studies, the jurors credited the hearsay as much as they did the firsthand testimony.\(^ {124}\) It is not always clear what the right or ideal response should be to the hearsay testimony, in contrast to the testimony of the firsthand witness.

Whatever their methods and findings, these studies are an important start, but certainly no more than a start, in a complex area of evidence law and policy. Reflecting on how they relate to evidence policy, and especially on where they cast light or fall short of casting light, should guide more and better studies in the future. Our reflections below are organized in terms of three important issues of hearsay policy.

a. **Whether Hearsay Should Be Received when There Is a Choice Between Hearsay and Live Testimony**

This first issue of hearsay policy arises when a live firsthand witness is available, but a party would like to offer a hearsay witness in-

\(^{118}\) See Golding et al., *supra* note 114, at 304.

\(^{119}\) Regina A. Schuller & Angela Paglia, *An Empirical Study: Juror Sensitivity to Variations in Hearsay Conveyed via Expert Evidence*, 23 LAW & PSYCHOL. REV. 131, 137–38 (1999) (finding no differences in verdicts as a function of the amount of hearsay underlying an expert opinion, though other measures suggested that the participants were able to distinguish between hearsay that was supported by other evidence presented at trial and hearsay that was not supported in that fashion).

\(^{120}\) See Rakos & Landsman, *supra* note 116, at 658–60.

\(^{121}\) See Kovera et al., *supra* note 115, at 707–10.

\(^{122}\) It is far from clear whether realistic simulations are necessary to get correct answers that are generalizable to actual trial settings. A comparison of simulations with more and with less verisimilitude found that the results did not differ. Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75, 88 (1999). But it almost certainly is the case that lawyers and judges are more persuaded by studies that share many superficial similarities with trial procedures.

\(^{123}\) See Kovera et al., *supra* note 115, at 719; Miene et al., *supra* note 115, at 691.

stead. The policymaker must ask whether harm is done by allowing adversaries to substitute hearsay for available live testimony. Most jurists would agree that the principal harm would be the loss of cross-examination.\textsuperscript{125} It is risky to allow adversaries to substitute hearsay evidence for cross-examined evidence. They will substitute hearsay for live testimony when the substitution helps their case. An advocate would choose to forgo the benefits of a vivid live presentation when the advocate does not want to have her witness questioned by the opponent, which is exactly the situation in which cross-examination might turn up information helpful in finding the truth.

The existing empirical studies of hearsay simply do not address this issue. They do not try to study whether adversaries would choose to present inferior evidence in the absence of a hearsay rule, and they do not attempt to examine the value of cross-examination in uncovering new evidence. The experiments focus on the modality of presentation of the evidence, not on whether the trial procedure of cross-examination uncovers useful new information. What the studies test is the impact of the medium, just as in an experiment comparing the effects of live testimony with the effects of closed-circuit television testimony. There is no attempt to determine whether cross-examination might bring out new facts or reveal collateral facts bearing on the credibility of the witness.

That is not so much a flaw in the studies as it is a limitation on the inferences that can be drawn from them. The hearsay studies that seek to say something about the accuracy of hearsay, as opposed to its impact, do not seek to simulate any kind of cross-examination, much less typical cross-examination.\textsuperscript{126} Thus it is obvious that they are of limited usefulness in assessing the value of hearsay testimony as a substitute for cross-examined testimony.

b. \textit{Whether Hearsay Should Be Received when There Is No Choice}

A different issue of hearsay policy is presented when the declarant is unavailable, so that hearsay testimony is the only way of learning her account of the facts. Here, there is a strong common-sense argument that hearsay is better than nothing at all, that one need not

\textsuperscript{125} The substitution has other consequences, such as precluding physical confrontation between the witness and the accused in criminal cases and allowing evidence to be received from out-of-court declarants who were not under oath or subject to observation for demeanor cues.

\textsuperscript{126} See Kovera et al., \textit{supra} note 115, at 707–10; Pathak & Thompson, \textit{supra} note 112, at 375–77, 379–80.
go in the dark because the light is not perfect. But the hearsay rule sometimes bars such testimony.\textsuperscript{127} The empirical question is whether hearsay evidence is so misleading that it ought to be excluded even when live testimony is not an alternative. Here, empirical studies can be helpful even if they do not simulate adversarial incentives to substitute hearsay for live testimony. Nonetheless, it is difficult to use the existing experiments to reach conclusions about this issue.

The legal policy issue is whether hearsay would be helpful to the jury in reaching the ground truth. In most of the experiments, the ground truth was not known to the experimenter, as we noted above.\textsuperscript{128} In two of the experiments, however, the investigators did have accurate knowledge of the ground truth.\textsuperscript{129} They controlled and recorded the events witnessed by the hearsay declarant and by the person reporting the content of the hearsay statements, and examined the question whether the juror subjects were able to use the secondhand information to reconstruct accurately what actually happened.

Neither of those experiments simulated cross-examination.\textsuperscript{130} Here it is necessary to distinguish between cross-examination of the declarant and cross-examination of the in-court hearsay witness. If the declarant is not available for cross-examination, the legal policy issue does not turn on whether it would be better to hear from a cross-examined declarant or from a hearsay witness, because cross-examining the declarant is not an option. But an experiment would cast clearer light on the legal situation if it involved cross-examination of the hearsay witness. The cross-examiner could ask questions that might undermine the believability of the hearsay witness. At a minimum, these questions make it more apparent to the jurors that the hearsay witness did not see the event, does not know from firsthand

\textsuperscript{127} See United States v. Day, 591 F.2d 861, 881–83 (D.C. Cir. 1978); Roger C. Park, \textit{Trial Objections Handbook} § 4:6 (2d ed. 2001). The increasing popularity of the concept that a defendant forfeits his hearsay/confrontation objection by silencing the victim could, however, someday lead to free admission of victim statements, at least in cases in which there is enough evidence of homicide to allow the trial judge to find that the prosecution has laid the foundation for forfeiture by showing that the defendant killed the victim. See People v. Giles, 19 Cal. Rptr. 3d 843, 850 (Ct. App.), \textit{petition for review granted}, 102 P.3d 930 (2004); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004) (holding that defendant forfeited the right to confrontation by murdering victim (citing Richard D. Friedman, \textit{Confrontation and the Definition of Chutzpa}, 31 Isr. L. Rev. 506 (1997))).

\textsuperscript{128} See \textit{supra} note 114 and accompanying text.

\textsuperscript{129} Kovera et al., \textit{supra} note 115, at 707–09; Pathak & Thompson, \textit{supra} note 112, at 375–81.

\textsuperscript{130} Kovera et al., \textit{supra} note 115, at 707–09; Pathak & Thompson, \textit{supra} note 112, at 375–81.
knowledge what happened, is relying solely on the declarant, and does not know the witnessing conditions of the declarant (such as whether something was in the way or whether the declarant was paying attention).

c. Whether Erroneous Admission of Hearsay Should Be Deemed Prejudicial Error

Appellate courts often confront the question whether erroneous admission or exclusion of hearsay is prejudicial error. When an evidence error is harmless in the sense that it was quite unlikely to have affected the result, appellate courts refuse to reverse. The hearsay studies are relevant to this policy issue even when they do not address the question whether hearsay aids in reaching accurate verdicts. If juries heavily discount hearsay, as some of the studies suggest, then the erroneous admission of hearsay (at least where it is substituted for live testimony) should be considered prejudicial error less often.

The hearsay experiments reach divergent results, and without further research we cannot be sure why. Based on the features of the extant studies, the reason might be a difference in the medium by which the trial evidence was presented (written versus audio or videotaped). Or it might have been a difference in whether or not the hearsay witnesses were especially credible individuals (for instance, expert witnesses). In some studies, the mode of presentation may have made it particularly hard for jurors to realize they were dealing with hearsay, a problem that is much less likely to occur in a trial. Another possibility has to do with who the out-of-court declarant was. Substituting hearsay adults for child declarants may be more acceptable to the mock jurors than other hearsay because they could readily sympathize with the possible need for it. Because there are many different situations in which hearsay can be offered, and different witnesses through whom it can be offered—parties, police, informants, children, experts, to name a few—it is hard to generalize. Indeed, the divergent results might have been due to something else. In any event, the divergent results, the wide range of circumstances in which hearsay issues can arise, and the differences between the simulations and the actual courtroom environment, caution against deriving broad policy recommendations from the experiments on hearsay impact.

Despite the reservations noted above concerning those three basic hearsay policy issues, the experiments are a good start in answering

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132 See Kovera et al., supra note 115, at 719; Miene et al., supra note 115, at 691.
more narrow questions. For example, the experiment by Warren and Woodhall\textsuperscript{133} suggests the danger in admitting hearsay in the child witness context—persons interrogating child witnesses do not remember accurately their mode of interrogation or whether they were suggestive. The Pathak and Thomson experiment\textsuperscript{134} indicates that when the suggestive interrogation causes a complete change of story, the trier of fact may be able to detect the truth even without realizing the full danger of suggestiveness. Other experiments may be useful to lawyers making strategic decisions, such as whether to substitute a hearsay witness for a child witness. And, as has been the case with studies of eyewitness testimony, the studies are more likely to be useful as they multiply and converge. Studies examining particular hearsay dangers—for example, the danger of suggestive questioning of child witnesses—in particular situations are likely to be more useful than studies that attempt to answer the global question of whether hearsay is good evidence.

But the studies that are available now are just a start. Hearsay issues arise in many different contexts. A study that tests whether jurors (or judges, for that matter) are successful in using hearsay evidence of eyewitness identification will not necessarily tell you anything about whether they would be successful in using hearsay accounts of medical diagnosis or hearsay accounts of declarations by child witnesses. And the purposes of cross-examination can be different in different situations, hence the use of hearsay will differ as an adequate substitute for cross-examination. Hearsay might be an adequate substitute in situations in which the purpose of cross-examination is to show defects in perception, but not where the purpose is to show deception. A hearsay experiment that shows jurors successfully using hearsay from a neutral declarant would not show that the jurors could detect a lying declarant through the medium of a hearsay witness.\textsuperscript{135}

Consequently, it makes sense to approach the vast problem of hearsay and its exceptions bit by bit, studying specific situations such


\textsuperscript{134} Pathak & Thompson, \textit{supra} note 112, at 386.

\textsuperscript{135} Suppose, for example, that a lawyer plans to cross-examine a lying police officer by getting the police officer committed to the story that the officer had not used the N word in the previous ten years, a story that the cross-examiner knows can be definitively disproved. A study that shows one does not lose anything when one uses hearsay instead of a neutral witness would not mean that one does not lose anything when one uses hearsay in lieu of cross-examining Detective Fuhrman in the O.J. Simpson trial.
as child witness interrogations and specific dangers such as insensitivity to suggestiveness. To get a good grip on it, there probably will need to be hundreds of studies, as in the eyewitness area. Until then, policymakers seeking answers to questions such as whether the hearsay rule should be abolished or modified in a particular class of situations will have to continue to rely upon their traditional tools of history, experience, and fireside induction, with occasional help from the empirical research that is available.

In the preceding examples, psychological research and theory were employed to test the assumptions underlying evidence doctrine. That is, indeed, what most legal scholars have used psychology for. But another role, one that awaits future development, is the possibility that psychology could help to identify and explain existing regularities in evidence law: why, in the hands of common-law evidence rule-makers, certain rules evolved and others did not.  

III. LAW AND FORENSIC SCIENCE

Law and forensic science has long been a topic of evidence scholarship—the history of articles about new ways of gathering evidence to prove the identity of suspected perpetrators is a long one. But the flourishing of this field has been remarkable since the Supreme Court’s 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Daubert’s command to judges to do their own screening for scientific validity rather than merely deferring to self-declared experts has encouraged scholarship about whether expertise has been scientifically tested, what the results of testing have been, and how well judges have been doing with the law and the science.  

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Daubert already has led to an astonishing amount of scholarship and has created a legal environment that will lead to even more scholarly (as well as judicial) discussion of issues concerning the scientific validity of scientific claims and forensic techniques. It quickly gave birth to new treatises seeking to look at the world of scientific evidence through the framework of Daubert. These discussions focus not only on issues of the legal admissibility of scientific evidence, or other limitations that might be placed on it, but also on the scientific basis for the evidence as required by Daubert and Kumho Tire Co. v. Carmichael. In the post-Daubert world, judges, lawyers, and legal scholars cannot do their work properly without becoming scientifically literate.

What lawyers, scholars, and the courts are discovering is that some kinds of evidence, most notably some of the forensic sciences, which had been all but unquestioned under older admissibility tests, appeared to have startling weaknesses when viewed through the lens of Daubert and Kumho Tire Co. v. Carmichael. In the post-Daubert world, judges, lawyers, and legal scholars cannot do their work properly without becoming scientifically literate.

Ironically, at the same time that judges, legal scholars, and scientists are inquiring into the scientific foundations of forensic science, often finding them to be surprisingly weak, popular culture is experiencing an upsurge of credulousness. See Janine Robben, The 'CSI' Effect: Popular Culture and the Justice System, 66 OR. St. B. Bull. 9, 9 (Oct. 2005).


Efforts to assist them have taken the form of conferences, courses, CLE programs, checklists, and works of the kind cited supra note 143. A good example of the need of judges and lawyers to learn to think conceptually about scientific research is provided by Edward J. Imwinkelried, Coming to Grips with Scientific Research in Daubert’s “Brave New World”: The Courts’ Need to Appreciate the Evidentiary Differences Between Validity and Proficiency Studies, 61 BROOK. L. REV. 1247, 1282–84 (1995).
of the new test. On the other side of the coin, and perhaps ironically, the new legal test might breathe new life into proffered polygraph examinations. Once courts must ask seriously about scientific foundations of fields, they discover that more science and more research exist concerning polygraph examination than about most or all of the traditional forensic sciences. What courts should do with the new realizations, what are the exact requirements of Daubert, and what are or should be the contours of Daubert’s exclusionary zone are the subjects of countless articles.

Another important development in the area has been the rise and success of DNA evidence. At first DNA evidence was accepted blindly, like many other forensic sciences. Then came the People v. Castro case—real scientists got involved and criticized the methodology of the DNA labs, successfully. Subsequently, the issues of methodology and fit were addressed and cleaned up. It now appears that DNA analysis may, by example, fuel improvements in the rest of forensic science, because its more careful and explicit scientific approach puts to shame so much of what previously had been accepted as forensic expertise. The advent of DNA typing has made the shaky scientific foundations of the traditional forensic individualization sciences all the more apparent. In addition, DNA-based exonerations of persons who had been erroneously convicted are exposing the flaws of the traditional forensic sciences, just as they have already reinforced, in the eyes of policymakers, the findings of scientific studies about the fallibility of eyewitness identification.

There already have been successful challenges to a form of expertise that, for most of the twentieth century, had been regarded as

146 It turns out that these traditional identification techniques often are little more than observation plus intuition (look and opine), with little and sometimes no scientific underpinnings or testing of any of these fields’ foundational questions, which they merely beg. See 4 Modern Scientific Evidence, supra note 102, §§ 31:33–:45; Michael J. Saks, Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science, 49 Hastings L.J. 1069, 1094–127 (1998); Saks & Koehler, supra note 139, at 892.

147 See 4 Modern Scientific Evidence, supra note 102, § 40.

148 Id. § 32:3 (“rapid and sometimes uncritical acceptance”).

149 See generally Saks, supra note 146.


152 See Saks & Koehler, supra note 139, at 893.

153 Edward Connors, Thomas Lundregan, Neal Miller & Tom McEwen, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 24 (1996); U.S. Dep’t of Justice, supra note 57, at 3.
being of settled admissibility—handwriting identification. Similar weaknesses can be found in microscopic hair identification, bite-marks, toolmarks, and other areas of forensic identification. Even the holy grail of forensic science, fingerprinting, has been challenged. We are not referring to rolled prints used to prove that a person once arrested in Phoenix is the same person who is now on trial in San Francisco, but rather the methods used in and assumptions relied upon in comparing latent prints, lifted from crime scenes, with rolled prints. The scientific basis for the claim that identification by latent prints is infallible if established procedures are followed just does not exist.

Most federal courts that have confronted this realization responded to it by manipulating the law to permit admission. One federal judge initially responded by limiting admission (excluding the fingerprint expert’s conclusion of identity, but allowing testimony concerning the similarities and differences between the latent and known prints), but later reversed himself and went the way of other courts. The issue has even begun to interest the general public.

Perhaps the most dramatic example of the impact of the law’s new approach to scrutinizing purported scientific evidence has been bullet lead analysis. Bullet lead analysis, in use since the 1960s, involves the comparison of the chemical composition of a crime scene bullet to the chemical composition of bullets found in the possession of a suspect. Debate over the technique throughout the 1990s questioned the theory behind it, and pointed out that experts often testified beyond what could be supported by available data. The resulting debate ultimately led the Federal Bureau of Investigation (the

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160 See Michael Specter, *Do Fingerprints Lie?*, New Yorker, May 27, 2002, at 96. That article predicts, accurately we think, that the issue is not going to go away. Id. at 105.
161 Weighing Bullet Lead Evidence, supra note 139, at 8.
only practitioner of the technique) to discontinue it in 2005, based on a review of the claims of this “science” produced by the National Research Council.\(^{163}\)

In addition, there are important questions directed at what might be regarded as the intersection of forensic science, law, and psychology. What inferences do jurors draw from admitted expert testimony on forensic science? Do they understand the evidence properly? Are they misled by the testimony? Can the testimony be cabined in ways that would correct any problems that are found?\(^{164}\)

Of course, classifications are always disputable, and some might argue that the field of “law and forensic science” is really too small if it embraces only the traditional forensic sciences, and that a better title would be “law and the scientific method,” because people who write in this field also write about other Daubert topics, such as the admissibility of epidemiological evidence, psychological syndrome evidence, and so on. Certainly the scientization of law, and of society in general, with or without Daubert, inevitably will lead to more evidence scholarship about law and science of all kinds.\(^{165}\)

IV. THE “NEW EVIDENCE SCHOLARSHIP”—PROBABILITY AND PROOF

The term “New Evidence Scholarship,” coined by Richard Lempert,\(^{166}\) is broad enough to cover all interdisciplinary scholarship or even all innovative scholarship. But the term has most often been applied to scholarship on probability and proof, including evidence

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\(^{163}\) See generally Weighing Bullet Lead Evidence, supra note 139.


\(^{165}\) In addition to the paradigm-shifting developments in traditional criminal identification, there will be new legal solutions as well as new problems brought by advances in biotechnology, nanotechnology, and digital informatics, among other fields.

\(^{166}\) Richard Lempert, The New Evidence Scholarship: Analyzing the Process of Proof, 66 B.U. L. Rev. 439, 439–40 (1986) (“Evidence is being transformed from a field concerned with the articulation of rules to a field concerned with the process of proof. Wigmore’s other great work [The Science of Judicial Proof, cited infra note 168] is being rediscovered, and disciplines outside the law, like mathematics, psychology and philosophy, are being plumbed for the guidance they can give.”).
scholarship that applies formal tools of probability theory, such as Bayes’ Theorem.\footnote{167}

Formal analysis of legal evidence is not a wholly new idea. Wigmore’s \textit{Science of Judicial Proof} used symbols and charts as part of a system of evidence analysis.\footnote{168} And there is a long, if intermittent, history of interest in legal uses of statistics and basic probability theory: in the \textit{Howland Will Case} in the 1860s, for example, an eminent scholar used the product rule in an attempt to calculate whether commonalities in two signatures could have been coincidental.\footnote{169}

But the word “new” is a fair one, at least in terms of the volume of scholarship. Among the seminal works we can count John Kaplan’s 1968 article on decision theory,\footnote{170} Richard Eggleston’s 1978 book entitled \textit{Evidence, Proof and Probability},\footnote{171} and Jonathan Cohen’s 1977 challenge to the applicability of standard probability reasoning in legal contexts.\footnote{172} The 1968 case of \textit{People v. Collins},\footnote{173} in which the prosecution misused evidence of probabilities in an ingenious fashion, stirred up interest in how probabilities might properly be used in trials. The celebrated debate in the \textit{Harvard Law Review},\footnote{174} with Michael Finkelstein and William Fairley on one side and Laurence Tribe on the other, no doubt inspired other scholars to pursue the topic,

even though Tribe’s skepticism toward the practicality of using Bayesian approaches at trial also may have had a dampening effect. William Twining’s calls to action no doubt also helped, as did conferences on New Evidence Scholarship organized by Peter Tillers. David Schum, a nonlawyer, also deserves much credit for interesting law professors in the formal analysis of evidence.

One “New Evidence” topic revolves around the question whether standard probability logic is or ought to be consistent with judicial fact finding. Sometimes naked statistical evidence seems intuitively insufficient to justify a judgment. If the only proof that the plaintiff was injured by the defendant’s bus instead of another company’s bus was mere evidence that a majority of the blue busses in town belonged to the defendant, many of us would hesitate to find that identification sufficient. Or if the defendant was chosen at random from a crowd in a rodeo, and was sued on a claim that he had not paid for his ticket, we would hesitate to issue judgment based merely on proof that only 499 tickets had been sold and there were a thousand spectators, so that defendant, chosen at random, had just over a 50% chance of being a gatecrasher. Does the fact that our intuition makes us cringe from issuing judgment on these facts alone mean that the standard logic of probability does not or should not apply to trials? Scholars who are comfortable with using standard probability logic have provided many answers to the paradox, including the argument that if that is all the plaintiff chooses to present then we cannot be sure that


176 Professor Tillers was the chair (with Eric Green), the moderator, and a panelist at the Boston University School of Law Symposium on Probability and Inference in the Law of Evidence, April 4–6, 1986, and the organizer, the chair, and a panelist at the Cardozo Conference on Decision and Inference in Litigation, Cardozo School of Law, Yeshiva University, March 24–26, 1991. E-mail I from Peter Tillers, Professor of Law, Benjamin N. Cardozo School of Law, to Roger C. Park (July 8, 2005) (on file with the authors). When contacted, Professor Tillers also noted the influence of activities such as William Twining’s 1982 conference on “Facts in Law” at Durham University and the honors seminars organized by Adrian Zuckerman at Oxford that started in 1984. E-mail II from Peter Tillers, Professor of Law, Benjamin N. Cardozo School of Law, to Roger C. Park (July 8, 2005) (on file with the authors). For a European perspective on the development of the field, see Twining, Rethinking Evidence: Exploratory Essays, supra note 1, passim and 349–50.


178 See generally Cohen, supra note 172 (describing anomalies that arise if Pascalian probability theory is applied in certain legal situations, and arguing that a “Baconian” approach would be more just).

The conjunction problem raises similar questions. Standard instructions tell jurors that if they find each element to be true by a preponderance of the evidence, they should find for the plaintiff. The problem is that proving each element to be more probable than not does not prove that the conjunction of all elements is more probable than not. If we make the assumption that the elements are independent of each other, this instruction is technically inaccurate because if there are two elements and the probability of each of them being true is 60%, then the probability of both being true is .6 x .6, or 36%. Does that mean that the standard logic of probability is inapposite, and that we therefore must think of legal reasoning as proceeding from some other basis? The conjunction problem is one reason why Professor Allen has proposed reconceptualization of civil trials in a way that tells juries to decide whose story is most believable, as opposed to telling them to decide whether the plaintiff has established each element by a preponderance of the evidence.\footnote{180}{Ronald J. Allen, A Reconceptualization of Civil Trials, 66 B.U. L. REV. 401, 425–37 (1986).}

Again, there are answers, including the answer that jury instructions are often ambiguous on the question whether it is sufficient merely to prove each element by a preponderance, and that instructions sometimes suggest that the joint occurrence of all elements must be proven.\footnote{181}{See Dale A. Nance, A Comment on the Supposed Paradoxes of a Mathematical Interpretation of the Logic of Trials, 66 B.U. L. REV. 947, 949–52 (1986).} Moreover, the approach of telling juries to judge the relative plausibility of the parties’ stories would lead to its own anomalies. Suppose, for example, the defendant tells one story, the plaintiff tells a slightly more plausible
story, and the jury believes that a third story not offered by either party (but favoring the defendant) is the true one.\textsuperscript{182}

Another topic, the use of Bayes’ Theorem to evaluate evidence and evidence law, has become one of the centerpieces of the New Evidence Scholarship.\textsuperscript{183} Bayes’ Theorem is a basic tenet of probability theory that can be used to adjust a probability assessment upon receiving new evidence. For example, imagine a case in which the issue is whether the defendant is the source of a hair found at a crime scene. After hearing testimony of lay witnesses, the factfinder forms an opinion that the odds are 2 to 1 that the defendant is the source of the hair. In addition, there is expert testimony that mitochondrial DNA (mtDNA) sequencing shows that the hair has a genetic profile that has a population frequency of 1%. The defendant’s hair matches that profile. Bayes’ Theorem would provide a way of updating the prior estimate of 2-to-1 odds with the new information of the match.

In the above example, the probability of this test result, given a defendant who is not the source of the hair, is 1 in 100, which is the random match probability in the general population. That does not mean, however, that there is a 1 in 100 probability that the defendant is the source, given the mtDNA test results. The error of confusing these two probabilities is known as “transposing the conditional.”

The following example illustrates the error of transposing the conditional. The probability that a person has committed a crime, given that he is in prison, $Pr(C \mid P)$, is obviously not the same as the probability that a person is in prison, given that he has committed a crime, $Pr(P \mid C)$. The latter probability is much lower, considering that not all criminals are caught and that not all crimes are punished with incarceration. To believe that $Pr(C \mid P)$ must be equal to $Pr(P \mid C)$ is the error of transposing the conditional.

Another way to understand the error of transposing the conditional is to suppose that there is absolutely no evidence against the defendant except the mtDNA test on the hair. Suppose there are 100,000 other people living in the vicinity and no reason except the mtDNA finding to point a finger at the defendant instead of one of the others. Suppose also that the defendant’s genetic profile matches and the probability of a random match is 1%. In other words, the


\textsuperscript{183} For a useful introduction, see generally David McCord, \textit{A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond}, 47 Wash. & Lee L. Rev. 741 (1990).
probability of a match, given that the defendant is not the source, is 1%. That does not mean that the probability the defendant is not the source, given that there is a match, is only 1%. One would expect, out of the 100,000 other possible suspects, that 1,000 of them would also match. If so, the probability that the defendant is not the source, given a match, is closer to 99.9% than to 1%. Of course, the probability that the defendant is not the source would decrease dramatically once other inculpatory evidence is offered, such as testimony that the defendant had a motive and was seen near the crime scene.

A factfinder who used Bayes’ Theorem to take account of the mtDNA test could arrive at a probability that the defendant is the source without falling into transposition error. Suppose again that the factfinder estimates the prior odds that the defendant was the source (before the DNA test) to be 2 to 1. That factfinder could multiply the prior odds by a statistic called the “likelihood ratio” to obtain the posterior odds (the revised estimate of the odds the defendant was the source, after taking the mtDNA test into account). The likelihood ratio is derived by dividing the probability of finding the evidence of a match, given that the defendant is the source, by the probability of finding it, given that the defendant is not the source. Assume that the probability of finding a match, given that the defendant is the source, is 100%. If the defendant is not the source, the probability of finding a match is 1/100 or 1% (the probability of a random match in the general population). The likelihood ratio therefore is 100% divided by 1%, or 100. To calculate the posterior odds, one would mul-

184 For purposes of the example, we are ignoring the possibility that someone not living in the vicinity is the source.

185 This assumption is not logically compelled. It would not be valid, for example, if laboratory error were taken into account, or if hairs from the same person could have different mtDNA profiles. But here we assume that we would find a match every time if the hair came from the defendant.

186 These assumptions require that we ignore the danger of laboratory error. Putting the danger of lab error aside is controversial among scholars, even in the usual case in which frequency evidence is presented without any Bayesian interpretation. The factfinder may be prejudiced when an extremely small match probability is presented without incorporating (or even estimating) the danger that a match might occur through lab error. On the other hand, it seems reasonable to consider one thing at a time (first what the evidence shows assuming no lab error, then the danger of lab error in the specific case). Compare Jonathan J. Koehler, Audrey Chia & Samuel Lindsey, The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?, 35 JURIMETRICS J. 201 (1995), and Jonathan J. Koehler, Why DNA Likelihood Ratios Should Account for Error (Even When a National Research Council Report Says They Should Not), 37 JURIMETRICS J. 425 (1997) with Margaret A. Berger, Laboratory Error Seen Through the Lens of Science and Policy, 30 U.C. DAVIS L. REV. 1081 (1997).
tiply the prior odds of 2 to 1 by the likelihood ratio of 100. Thus, the factfinder using this method would conclude that the updated odds that the defendant was the source are 200 to 1.

In an article published early in the Bayesian debate, Finkelstein and Fairly suggested using Bayes’ Theorem to aid jurors in cases in which the issue is the identity of the perpetrator and the perpetrator has left trace evidence at the scene of the crime. They constructed a hypothetical case in which the accused is charged with murdering his girlfriend, and the perpetrator of the crime left behind a hand print. They illustrated how Bayes’ Theorem could be used to get from the random match probability (the frequency of handprint features in the general population) to an estimate of how likely it was that the defendant left the print at the scene.

In a celebrated reply, Professor Laurence Tribe, then an evidence teacher, raised several objections to this use of Bayes’ Theorem in the trial process. Jurors who are not proposition bettors might have mistaken or inconsistent understandings of the meaning of prior probability. There is a danger of “[d]warºng . . . [s]oft [v]ariables,” that is, the danger that the impressiveness of statistics would obscure other issues (such as whether there might be an innocent explanation for the presence of the print). Moreover, uncertainty about facts upon which the Bayesian calculations would be based could require additional quantification decisions about so many issues that use of the Theorem would be more confusing than helpful. If there is a danger that the expert might be mistaken about the frequency of the print, for example, that would have to be taken into account somehow, but it would not be easy for a factfinder to adjust the statistics. Tribe’s analysis was in turn criticized by psychologists for making

187 See generally Finkelstein & Fairley, supra note 174.
188 Id. at 496.
189 Id. at 498–500.
190 Tribe, supra note 174, at 1358–77.
191 Tribe pointed out that to some jurors a probability of .50 might stand for what the chances were before any evidence was introduced, while to others it might mean that the search has to be narrowed to two suspects. Id. at 1358–59.
192 Id. at 1361–65.
193 For Bayes’ Theorem to be helpful in the hypothetical described by Finkelstein and Fairley, one has to assume that the person whose handprint is on the knife is guilty of being the killer, and that the handprint expert is accurate. A factfinder who believed that these two facts were not certain would have to discount the probability estimate obtained by using Bayes’ Theorem, and giving instructions about how to do this would be too complicated to be feasible. Id.
faulty psychological assumptions as well as by statisticians, philosophers, and legal scholars.

Bayesian skeptics have continued to point out problems with the use of Bayes in the trial process. Progressive updating using Bayes’ Theorem throughout the trial would be so computationally complex that it would be beyond the capacity of the factfinder. Moreover, trials are structured in such a way that the jury does not receive information in a way that facilitates Bayesian updating. For example, the jury might have difficulty formulating prior probability assessments when it does not get instructions about the law until the end, and hence does not know exactly what proposition it is supposed to decide.

To some extent, Bayesian enthusiasts and Bayesian skeptics seem to be talking past each other. The skeptics have demonstrated that it is not practical to use Bayesian analysis very often in the course of trial, but most of the enthusiasts do not argue for such a use. Bayesians often emphasize the value of Bayesian reasoning outside the heat of trial, in assessing the value of rules excluding evidence or in weighing the probative value of certain types of evidence. A basic Bayesian perspective asks about the degree to which new evidence changes our estimate of the odds of a fact being true, and tells us to compare the likelihood of finding the evidence if the fact were true with the likelihood of finding it if the fact were false. It can, for example, help us understand why prior convictions have little probative value in im-


196 Cohen, supra note 172, at 53–56.


198 See Ronald J. Allen, Rationality, Algorithms and Judicial Proof: A Preliminary Inquiry, 1 Int’l J. Evidence & Proof 254, 265–69 (1997); Mike Redmayne, Presenting Probabilities in Court: The DNA Experience, 1 Int’l J. Evidence & Proof 187, 199–208 (1997) (although Professor Redmayne suggests with “some trepidation” that Bayesian presentations will be appropriate in some cases, id. at 213, his article acknowledges and illustrates practical and conceptual difficulties); see also Alex Stein, Judicial Fact-Finding and the Bayesian Method: The Case for Deeper Skepticism About Their Combination, 1 Int’l J. Evidence & Proof 25, 34–47 (1997).

199 Friedman, supra note 195, at 290.

200 Id.

201 Id.
peaching the testimony of the accused in a criminal case.\textsuperscript{202} Learning of the evidence of the prior conviction does not change our prior estimate of the odds that the defendant would lie. If he is guilty of a serious charge, the situational pressures to lie are so strong that even a generally honest person likely would lie to escape punishment; learning the fact that he was dishonest on an earlier occasion does not change the odds much. If he is innocent of the charged crime, the situational pressures are likely to push him toward telling the truth even if he is a veteran liar, and, anyway, it does not much matter if he lies his way out of a false charge. Of course, one could arrive at the same insight without knowledge of Bayes’ Theorem, but it seems likely that exposure to the approach helps us be sensitive to the right factors in assessing probative value.\textsuperscript{203} Similarly, a Bayesian perspective can help us understand why evidence that a man accused of murdering his wife had beaten her on previous occasions is probative, despite the fact that spousal abuse is common and that very few abusers progress to murder.\textsuperscript{204} Scholars also have relied on Bayesian models to analyze such diverse evidentiary issues as the meaning of the concept of relevance,\textsuperscript{205} the value of forensic identification evidence,\textsuperscript{206} the proper interpretation of DNA evidence,\textsuperscript{207} the value of expert testimony in child abuse cases,\textsuperscript{208} the value of hearsay,\textsuperscript{209} and the appropriateness of questioning children in a suggestive manner.\textsuperscript{210}

\textsuperscript{202} See Friedman, supra note 23, at 659–66; Posner, supra note 179, at 1526–27, 1533–35. Professor Uviller arrived at a similar conclusion without reference to Bayes’ Theorem. See Uviller, supra note 23, at 867–68 (“[I]t seems quite likely that a guilty person without prior convictions will lie on the stand as readily as will a guilty veteran, while innocent people with extensive criminal histories will testify as truthfully as the innocent novice.”).


\textsuperscript{204} Richard D. Friedman & Roger C. Park, Sometimes What Everybody Thinks They Know Is True, 27 Law & Hum. Behav. 629, 637 n.15 (2003).

\textsuperscript{205} Lempert, Modeling Relevance, supra note 203, at 1021–32.


A number of Bayesian enthusiasts believe that the Theorem can be useful at trial, though few would argue for applying Bayesian analysis iteratively to discrete pieces of evidence. For example, in a DNA case one might aggregate all the non-DNA evidence, assign prior odds, and then multiply by a likelihood ratio derived from the DNA evidence. How to combine the evidence might be demonstrated to the jury either by using a chart showing prior and posterior odds under different assumptions about prior odds, or by telling them to multiply the prior odds by the likelihood ratio.\(^{211}\) This approach is still problematic, for reasons discussed by Tribe\(^{212}\) and Allen,\(^{213}\) and courts have been slow to adopt it.\(^{214}\) Proponents of decision aids have nonetheless made some progress. In paternity cases, for example, some courts have allowed charts to be provided to jurors showing how a prior probability of paternity should be revised in light of the paternity index (likelihood ratio) associated with a genetic test.\(^{215}\) Experts sometimes use Bayes’ Theorem in calculating an estimate of paternity that they then offer to the trier as the probability of paternity, though this procedure is controversial among scholars because it involves making an artificial assumption that the prior probability of paternity is 50%. This assumption is made without taking into account the actual non-test evidence, so that the 50% figure would be used even if there were convincing evidence that the defendant was sterile.\(^{216}\) The National Research

\(^{211}\) See Nance, \textit{supra} note 182, at 1610–16; Dale A. Nance & Scott B. Morris, \textit{An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Large and Quantifiable Random Match Probability}, 42 \textit{Jurimetrics} J. 403, 437–45 (2002). For advocacy of the approach of telling the trier about the likelihood ratio and explaining how to use it to combine DNA evidence with other evidence, see Geoffrey K. Chambers, Stephen J. Cordiner, John S. Buckleton, Bernard Robertson & G.A. Vignaux, \textit{Forensic DNA Profiling: The Importance of Giving Accurate Answers to the Right Questions}, 8 \textit{Crim. L.F.} 445, 456–59 (1997); see also Robertson & Vignaux, \textit{supra} note 206, at 20–21, 51–65 (supporting an approach under which a forensic expert explains to the trier of fact that “[t]his evidence is R times more probable if the accused left the mark than if someone else did,” and that “[t]his evidence therefore [very strongly] supports the proposition that the accused left the mark”).

\(^{212}\) Tribe, \textit{supra} note 174, at 1355–78.

\(^{213}\) Allen, \textit{supra} note 198, at 265–69.

\(^{214}\) On the infrequency of use of these Bayesian presentation methods except in paternity cases, see D.H. Kaye \textit{et al.}, \textit{supra} note 141, § 12.4.2(b), at 478 (“[L]ikelihood ratios are rarely introduced in criminal cases . . . .”).


\(^{216}\) See, e.g., Kammer v. Young, 535 A.2d 936, 938–40 (Md. Ct. Spec. App. 1988) (affirming judgment in case in which expert, pursuant to command of Maryland statute, gave opinion as to probability of paternity based on Bayesian calculation with assumed prior odds of .5). For criticism of this approach, see Robertson & Vignaux, \textit{supra} note 206, at 25–27; Jonathan J. Koehler, \textit{DNA Matches and Statistics: Important Questions, Surprising An-
Council has suggested that experts might compute posterior probabilities to show jurors the power of DNA evidence for establishing identity,\textsuperscript{217} although this proposal also remains controversial.\textsuperscript{218}

When Bayesian skeptics and Bayesian enthusiasts address common ground, there seems to be a degree of convergence. Professor Allen, a leading Bayesian skeptic, has allowed that “there may very well be situations involving virtually purely statistical evidential bases in which Bayes’ theorem would be a useful analytic tool,” and that “the Bayesian skeptic does not deny a use for Bayes’ Theorem as an analytical tool.”\textsuperscript{219} Professor Friedman, a leading enthusiast, has written that, at least in cases in which statistical evidence does not otherwise play a substantial role, there is “usually no substantial reason to make an explicit presentation of probability theory; factfinders can deal with the evidence much as they deal with ordinary questions in their everyday lives.”\textsuperscript{220}

Some of the Bayesian debaters are more prone to thought experiments than to empirical research, but there have been efforts to test whether jurors are intuitive Bayesians and whether Bayesian charts or instructions will aid decision making. Numerous studies have shown that most of the time human beings do not behave according to the Bayesian ideal.\textsuperscript{221} Generally, humans are too conservative, failing to adjust their prior estimates to the degree required by Bayesian models of rational decision making. In a more fundamental way, Bayesian modeling fails to capture the decision processes of human decisionmakers. Jurors appear to evaluate evidence in a trial not


\textsuperscript{219} Allen, supra note 198, at 258.

\textsuperscript{220} Friedman, supra note 195, at 290; see also John A. Michon, The Time Has Come to Put This Debate Aside and Move On to Other Matters, 1 Int’l J. Evidence & Proof 331, 334 (1997).

by sequential updating but by constructing plausible narratives that might account for the evidence.\textsuperscript{222} As some researchers have concluded, humans are story tellers, not meter readers. But in cases in which the human story is supplemented by forensic match evidence, there is some empirical evidence that human decision making might be improved, or at least might come closer to the Bayesian norm, by use of a Bayesian chart showing the trier how estimates of prior probability should be changed by the forensic evidence.\textsuperscript{223}

Another thrust of the “New Evidence Scholarship” is concerned with inference and decision making in litigation, with the problem of processing evidence and drawing inferences from it in order to prepare for trial, to try cases, and to decide them. It seeks to develop theories of inference in the litigation context.\textsuperscript{224} This area of scholarship is concerned with the problem of how lawyers can organize the mass of evidence in a case in a meaningful and effective way to be persuasive to factfinders. How are lawyers to sort through the maze of evidence to determine which propositions that need to be proved are supported by what evidence, in a complex interconnected hierarchy of raw facts, intermediate inferences, and ultimate conclusions?

Wigmore\textsuperscript{225} developed the first system for organizing and assessing evidence for litigation by employing careful logic to trace the factual support for inferences. “Wigmorian analysis is an attempt to capture the way we think when we think at our best.”\textsuperscript{226} Wigmorian charting was a major milestone in lawyerly thinking about facts, but it still was somewhat crude. Anderson and Twining\textsuperscript{227} not only resurrected Wigmorian charting, but improved upon it, such as by enabling it to take into account the applicable substantive law and by expanding it beyond requiring the chartist to have a single ultimate probandum in mind before starting. Instead, the chartist is able to explore alternative conclusions to which the evidence might lead. Wig-


\textsuperscript{223} See Nance, supra note 182, at 1610–16; Nance & Morris, supra note 211, at 437–45.


\textsuperscript{225} Wigmore, supra note 168.


morian and related kinds of charting\textsuperscript{228} clarify the elements of evidence and their inter-relationships. Moreover, the addition of an element to the chart is an implicit probability judgment of the element’s importance. It is a small step to add quantified probability statements either of the empirical kind or the chartist’s subjective probability of the element.\textsuperscript{229}

We should add a brief mention of evidence scholars who have addressed philosophical issues about the foundations of knowledge. At least three distinguished evidence scholars have assessed the significance of philosophical skepticism to the law of evidence. Despite some differences, they essentially have concluded that lawyers and evidence scholars need not worry about the implications of profound skepticism.\textsuperscript{230} The basic suppositions of a system of litigation require rejecting profound skepticism, even if one sees goals other than truth finding to be central.

There is, however, a debate about the extent to which we should enthroned truth finding as the central goal of evidence law and believe that the goal can be accomplished. Professor William Twining has noted and described the tradition of “optimistic rationalism” in evidence law and evidence scholarship.\textsuperscript{231} Professor Seigel has argued that philosophical pragmatism is a better foundation for thinking about evidence than optimistic rationalism. He posits that the rationalist tradition has caused too great an emphasis on truth finding, causing theorists to underestimate the value of other goals, such as

\textsuperscript{228} Namely, the improvements offered by Anderson & Twining, id., and by such devices as decision trees, influence diagrams, and Bayes networks. See generally Robertson & Vignaux, supra note 226.

\textsuperscript{229} Robertson & Vignaux, supra note 226, at 1456.

\textsuperscript{230} See William Twining, Some Scepticism About Some Scepticisms, in Rethinking Evidence: Exploratory Essays, supra note 1, at 92, 94, 134 (stating that few philosophers consistently maintain philosophical skepticism, and the literature "poses few threats to the centrality of the concepts of Truth, Reason and Justice in any theory of Evidence"); Ronald J. Allen, Truth and Its Rivals, 49 Hastings L.J. 309, 315–318 (1998) (“There is indeed an important philosophical puzzle, but it primarily is how to explain what is obviously true.” Id. at 315. “[T]he implications of scepticism for the legal system are marginal at best” because all the rivals to truth as a goal of litigation themselves involve rejection or cabining of the philosophical problem of scepticism. Id. at 317.); Mirjan Damaška, Truth in Adjudication, 49 Hastings L.J. 289, 290 (1998) (stating that “when we engage in . . . adjudication, we presuppose a world beside our statements,” and arguing that radical postmodern thought has no bearing on evidence law). But cf. Donald Nicolson, Truth, Reason, and Justice: Epistemology and Politics in Evidence Discourse, 57 Mod. L. Rev. 726, 743–44 (1994). Nicolson’s arguments are critiqued in Jackson, supra note 1, at 898–99.

\textsuperscript{231} See William Twining, The Rationalist Tradition of Evidence Scholarship, in Rethinking Evidence: Exploratory Essays, supra note 1, at 32, 33.
making verdicts more acceptable to the public and ending disputes in an efficient way.\textsuperscript{232} In contrast, and without relying to the same degree upon the literature on philosophy, Professor Nesson has argued that the legal system already gives primacy to making verdicts acceptable instead of to finding the truth.\textsuperscript{233}

Professors Allen and Leiter have sought to bring lawyers up to date on epistemology in an exploration of contemporary work on naturalized epistemology.\textsuperscript{234} Though their work is tough sledding for readers without a background in philosophy, it reaches conclusions that should be comforting to interdisciplinary evidence scholars. Allen and Leiter themselves note that “[f]or the great bulk of evidentiary scholars, then, this paper merely solidifies the ground beneath their feet.”\textsuperscript{235} They maintain that philosophy should not be an a priori discipline, but one that is continuous with an a posteriori inquiry in the empirical sciences.\textsuperscript{236} They approve of a functional approach to evidence law, assessing the wisdom of rules in light of their social effects, and using the tools of social science to study consequences of legal rules; hypotheses should be tested empirically and discarded in the face of disconfirming data. Their illustrations of this proposition include criticism of some of Judge Posner’s speculative conclusions about the economics of evidence law.\textsuperscript{237} Finally, because naturalized epistemology is instrumental, evidence rules should only require intellectual performances that factfinders are capable of doing—“ought implies can”—a position that they see as militating against searches for formal “algorithms,” such as Bayes’ Theorem, for use in fact finding at trial.\textsuperscript{238}

\begin{thebibliography}{99}
\bibitem{232} Seigel, \textit{supra} note 117, at 996–99. For comments on critiques of the rationalist tradition, see Jackson, \textit{supra} note 1, at 898–901.
\bibitem{234} See generally Allen & Leiter, \textit{supra} note 2.
\bibitem{235} \textit{Id.} at 1493.
\bibitem{236} \textit{Id.} at 1494–97.
\bibitem{237} \textit{Id.} at 1503, 1511, 1516–25.
\end{thebibliography}
V. Feminist Evidence Scholarship

Since 1990, an increasing number of law review articles have examined evidence law from a feminist perspective. Most of this scholarship has dealt with evidence doctrines that relate to sexual assault and spousal abuse. Topics relating to sexual assault have addressed rape shield rules, exceptions to the rule against character evidence for prior crimes of the alleged perpetrator, and admissibility of rape trauma syndrome testimony. Topics concerning spousal abuse have included whether victims should be forced to testify over a claim of spousal immunity, whether prior acts of domestic violence against other victims should be admissible, and whether social science evidence in spousal abuse cases, including testimony about battered woman’s syndrome, should be admissible. Feminist scholars also

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239 See generally Orenstein, supra note 19 (supporting rape shield legislation but opposing legislation admitting prior sex crimes of the alleged perpetrator).

240 See generally Baker, supra note 19; Orenstein, supra note 19.

241 Compare Toni M. Massaro, Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implication for Expert Psychological Testimony, 69 Minn. L. Rev. 395, 398 (1985) (“[Rape trauma syndrome] evidence can help the fact finder resolve difficult issues of guilt or innocence and . . . such evidence can educate jurors and judges, which may help correct erroneous social attitudes about the crime of rape.”), with Susan Stefan, The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law, 88 NW. U. L. Rev. 1271, 1277 (1994) (“The introduction of rape trauma syndrome evidence in criminal trials has probably assisted in convicting rapists, but at the cost of reinforcing the very myths and assumptions that early feminists fought so hard to eliminate.”).

242 For scholars who have urged that the victim not be allowed to invoke spousal immunity to refuse to testify against a battering husband, see generally Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849 (1996) (favoring mandated victim participation in domestic violence cases for a variety of reasons, including deterrence and the educative function of the law) and Malinda L. Seymore, Isn’t It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence, 90 NW. U. L. Rev. 1032 (1996) (the husband is likely to coerce the wife into not testifying, and treating the matter as “private” violates feminist norms).


244 Battered woman’s syndrome (“BWS”) testimony, as represented in the work of Lenore Walker, is sometimes offered into evidence to explain the conduct of women who kill their husbands. See generally Lenore E. Walker, The Battered Woman (1979); Lenore E. Walker, The Battered Woman Syndrome (1984) [hereinafter Walker, The Battered Woman Syndrome]. Walker posits that women who do not leave their battering husbands are experiencing “learned helplessness,” a phenomenon similar to that experienced by dogs in an experiment where dogs that could not control the electric shocks they were receiving
have examined evidence issues whose impact on women is less obvious, including the excited utterance exception,\textsuperscript{245} the party admission doctrine,\textsuperscript{246} the use of inconsistent statements to impeach,\textsuperscript{247} and the increased rigor \textit{Daubert} demands of expert testimony.\textsuperscript{248}  

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\textsuperscript{245} See generally Aviva Orenstein, \textit{“MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule}, 85 CAL. L. REV. 159 (1997) (excited utterance exception reflects male perspective; calm statements of sexual assault victims should also be admissible, subject to conditions).


\textsuperscript{247} In two articles, Kim Lane Schepple has argued that the law gives too much credence to initial stories to the derogation of revised versions of events, one example being the use of prior statements to impeach. See generally Kim Lane Schepple, \textit{The Ground-Zero Theory of Evidence}, 49 HASTINGS L.J. 321 (1998) [hereinafter Schepple, \textit{Ground-Zero}]; Kim Lane Schepple, \textit{Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth}, 37 N.Y.L. SCH. L. REV. 123 (1992) [hereinafter Schepple, \textit{Just the Facts, Ma’am}].

\textsuperscript{248} See Andrew E. Taslitz, \textit{What Feminism Has to Offer Evidence Law}, 28 SW. U. L. REV. 171, 211 (1999) [hereinafter Taslitz, \textit{What Feminism Has to Offer Evidence Law}] (favoring an approach to expert testimony that allows “all relevant voices on perspectives” to be heard, and stating that “informing the jury about weaknesses in certain social science evidence and allowing it to be admitted subject to certain reliability safeguards may often be preferable to a flat exclusionary rule if the social science helps to convey an excluded group’s voice”). See generally Andrew E. Taslitz, \textit{A Feminist Approach to Social Scientific Evidence: Foundations}, 5 MICH. J. GENDER & L. 1 (1998) [hereinafter Taslitz, \textit{A Feminist Approach to Social Scientific Evidence}].
A number of feminist evidence scholars, noting that scholars from different strands of feminism might have different views about law, have classified feminist legal theory into three categories.249 The first is liberal feminism, sometimes dubbed “sameness” feminism. Liberal feminists are said to favor formal equality with men and assume that women can compete in the same way as men; they do not emphasize differences between men and women.250 Radical feminists, sometimes called “dominance” feminists, see patriarchy and male domination of women, especially sexual domination, as the key to understanding modern society and its laws.251 A third strain of feminism, sometimes called “difference” feminism or “cultural” feminism, notes differences between men and women and argues for the legitimacy or superiority of the female perspective.252 These authors express a wide variety of views, some of them shared with strains of critical legal theory or postmodernism. These views include valuing

Some feminist scholars question the methodological rigor to which good science aspires and they advocate—to greater or lesser degrees—more intuitive, contextual, narrative, and relational paths to knowledge. One of the more extreme statements of this view is offered by Catharine MacKinnon:

If feminism is a critique of the objective standpoint as male, then we also disavow standard scientific norms as the adequacy criteria for our theory, because the objective standpoint we criticize is the posture of science. In other words, our critique of the objective standpoint as male is a critique of science as a specifically male approach to knowledge. With it, we reject male criteria for verification.


One need not look far for examples of errors resulting from poor research design that have had profoundly detrimental effects on women. A recent example is provided by developments in knowledge about hormone replacement therapy. Less rigorous research design (observational) led to the belief that estrogen replacement was beneficial. Better research design (experimental) eventually revealed that such treatment was dangerous, but not before decades of misguided estrogen replacement had caused tens of thousands of unnecessary breast cancers, heart attacks, and strokes in women. Jerry Avorn, Powerful Medicines: The Benefits, Risks, and Costs of Prescription Drugs 23–38 (2004).

249 See Seymore, supra note 242, at 1066–70 (dividing the feminist legal movement into “liberal feminism,” “relational feminism,” and “radical feminism”); Taslitz, What Feminism Has to Offer Evidence Law, supra note 248, at 175–76 (dividing into “liberal feminism,” “radical feminism,” and “cultural feminism”); cf. Orenstein, supra note 246, at 226–27 (dividing into “difference feminism,” “dominance feminism,” and “postmodern feminism”).

250 Taslitz, What Feminism Has to Offer Evidence Law, supra note 248, at 176.

251 Id. at 175.

252 Id.
intuition and emotion; believing in contextualized thinking instead of abstract, rigid rules; and emphasizing the value of relationships over market-like competition.\textsuperscript{253}

Some feminist scholars emphasize the value of narratives over, or as an equal partner with, quantitative social science.\textsuperscript{254} Others have reservations about the public-private distinction, arguing that it has been used to shield the abuse of women by treating what goes on in the home as a private matter, beyond the reach of the law.\textsuperscript{255} Many scholars are attentive to the law’s constitutive role in helping define society and perpetuate views of the world.\textsuperscript{256} Sometimes one also sees a belief in the pervasiveness and inevitability of politics, and a result-oriented approach that deprecates the wisdom or feasibility of achieving objective solutions to social problems.\textsuperscript{257} The “cultural” strand of feminism seems to present the most obvious challenge to what William Twining called the tradition of “optimistic rationalism” in evidence scholarship.\textsuperscript{258}

The influence of this strand of feminism on specific doctrinal reform is likely to be limited until the rest of the world changes, however, because of a tension between the results of a conflict resolution model based on cultural feminism and the more immediate goal of fair outcomes for women litigants. An emphasis on contextualized decision making that explores all of the relational nuances of a situa-

\textsuperscript{253} Kinports summarized some of these differences as follows: “Men tend to value autonomy, abstract reasoning, individual rights, hierarchical organization, and detachment from others, [feminists] said, whereas women are more likely to value relationships, contextual reasoning, interdependence, and connection and responsibility to others.” Kinports, supra note 248, at 417. See generally Taslitz, What Feminism Has to Offer Evidence Law, supra note 248.

\textsuperscript{254} As an example, see generally Mahoney, supra note 248.

\textsuperscript{255} “Feminists have long realized that the absence of the state, of law, from the private sphere has itself contributed to male dominance and female subordination. . . . The battered women’s movement has been, in the past twenty years, enormously successful in bringing the ‘private’ problem of wife abuse to public attention.” Seymore, supra note 242, at 1071.

\textsuperscript{256} See, e.g., Baker, supra note 19, at 591 (discussing whether Rule 413 spreads or diminishes rape myths, and concluding that it perpetuates a stereotype of the chronic rapist); Marilyn MacCrimmon, The Social Construction of Reality and the Rules of Evidence, 25 U.B.C. L. Rev. 36, 49–50 (1991); Mahoney, supra note 248, at 6–7 (noting interaction of law and culture and advocating “separation assault” as a legal concept that can “reshape cultural understanding”); Orenstein, supra note 19, at 692 (opposing Rule 413, in part because it perpetuates misconception that rape is not pervasive); Taslitz, What Feminism Has to Offer Evidence Law, supra note 248, at 180.

\textsuperscript{257} See Taslitz, What Feminism Has to Offer Evidence Law, supra note 248, at 213–17.

\textsuperscript{258} See William Twining, The Rationalist Tradition of Evidence Scholarship, in Rethinking Evidence: Exploratory Essays, supra note 1, at 32–33.
tion militates against having fixed rules, and in favor of discretionary decision making. But if decisionmakers have attitudes tainted by sexism, then fixed rules are needed to protect women, because discretion will be exercised against them. Hence it is helpful to have as rigid a rule as possible against admission of the complainant’s sexual history in rape cases.

Moreover, evidence law is adjective, and it is hard to predict what substantive effect a particular evidence proposal will have. For example, an approach toward tough screening of “junk science” supported by large manufacturers seeking to escape liability in products liability cases can have the unexpected effect of hurting the prosecution in criminal cases. Similarly, liberal admission of rape trauma syndrome testimony can backfire when defendants in rape cases want to put in evidence of absence of symptoms to support the conclusion that the complainant was not raped. Thus, it may be harder for a substantive agenda, such as that of liberal feminism or dominance feminism, to be reflected in evidence law because one can see ahead of time that it might cut both ways.

Perhaps for that reason, the areas in which reforms advocated by feminists, and by others concerned with fair treatment of women, seem to have been most effective and widely accepted are those in which the beneficial impact of the reform in helping women is predictable because women are disproportionately the victims of a particular crime. These include “rape shield” statutes protecting sexual assault victims from revelation of sexual history and exceptions to the character evidence rule for prior crimes committed by the accused in sex crime and domestic violence cases.\(^{259}\)

Much of the feminist writing on evidence is consistent with all three of the above-described strands of feminism, including liberal feminism, and hence its method is not too different from what might be obtained by a conventional legal analyst concerned with fair treatment of women. But sometimes dominance feminism or cultural feminism seems to have led in directions that a conventional legal analyst might not follow. Without attempting a comprehensive review of the literature, we refer to four leading articles in which dominance feminism or cultural feminism appears to have been particularly influential on the analysis or result.\(^{260}\)

\(^{259}\) See generally Baker, supra note 19; Orenstein, supra note 19.

\(^{260}\) Baker, supra note 19; Mahoney, supra note 248; Orenstein, supra note 19; Scheppele, \textit{Just the Facts, Ma’am}, supra note 247.
Our first examples are two articles about Federal Rule of Evidence 413, which allows evidence that the accused committed other sexual assaults to be admitted in a sexual assault prosecution.\footnote{Fed. R. Evid. 413.} Aviva Orenstein and Katharine Baker, working independently, both came to the conclusion that the legislation was unwise and unjustifiable.\footnote{Baker, supra note 19, at 623–24; Orenstein, supra note 19, at 690–97. The rape statistics are controversial. See Neil Gilbert, Miscounting Social Ills: Sexual Assault and Advocacy Research, in Welfare Justice: Restoring Social Equality 84, 99–108 (1995); Park, supra note 62, at 765–69.} Strains of cultural feminism and dominance feminism can be seen in both works. The authors see the legislation as unwise because it decontextualizes the situation by stereotyping rapists, treating them as pathological outlaws rather than normal men engaged in situational conduct.\footnote{Baker, supra note 19, at 576–83; Orenstein, supra note 19, at 690–97.} The authors also believe the legislation perpetuates rape “myths” about rape being strange and deviant, whereas the authors see rape as common and widespread, and as a way that society controls women.\footnote{Baker, supra note 19, at 576–78; Orenstein, supra note 19, at 692–93.} Finally, because rape is so common, men who have raped do not particularly stand out from other men, and hence rape has less probative force than would be the case were it a rare phenomenon.\footnote{Baker, supra note 19, at 578–83; Orenstein, supra note 19, at 693.}

Another example of scholarship that seems influenced by strands of cultural feminism is Martha Mahoney’s article about spousal abuse cases.\footnote{Mahoney, supra note 248.} She addresses the question of why women do not leave abusive relationships. Much of her article consists of narratives, including her own, of battered women.\footnote{Id. at 7–8. She states: [T]his article offers narratives and poems from the lives of survivors of domestic violence, and a few from the stories of non-survivors, as part of its analysis and argument. Seven women’s stories have come to me through their own accounts. Five of these have at some time identified themselves as battered women. . . . The other women’s voices in this paper are drawn from identified published sources. One of these stories is my own. Id. (citations omitted).} She avoids criticism of Lenore Walker’s controversial work,\footnote{Walker, The Battered Woman Syndrome, supra note 244. On Walker’s methodology, see David L. Faigman, Note, The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent, 72 Va. L. Rev. 619, 641–47 (1986).} even though she has mixed feelings about the
message sent by learned helplessness, and advocates using the concept of “separation assault” as being more central to understanding why the battered woman, who is likely to be assaulted upon separating, does not leave the abusive relationship.

Reliance on narratives is sometimes said to be a characteristic of feminist writing, and Mahoney’s article is a good example of extensive use of narratives. She uses stories from acquaintances, from the facts of reported cases, and from other published sources as social fact evidence to support her views of domestic violence. While she does not reject quantitative social science, she seems to have an attitude toward proof of social facts that differs from that of many social scientists and Daubert-era evidence experts. She is indifferent to defects in the methodology of Walker’s battered woman research, assessing the theory primarily in terms of its utility in telling a story of oppression and the countervailing danger that the story may degrade women. She uses anecdotal evidence extensively, and regards it as a source of convincing proof instead of a source of hypotheses to be tested. Stories from the author’s acquaintances and from reported cases would be viewed with suspicion by many social scientists because of the small sample size and obvious problems of selection bias. (For one

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260 Mahoney, supra note 248, at 42. She states:

I do not mean to criticize here the psychological theory underlying battered woman syndrome, or even the particular theory of learned helplessness. First, the collection of experience and perception summed up in battered woman syndrome are descriptively true of many women. Lenore Walker’s defense of expert testimony is also correct: it helps women’s stories be brought into court by bringing together fragments that women experience as part of a whole relationship. Finally, I would not choose to discard such a major tool in the effort to explain women’s experience in court, just because it has proved vulnerable to distortion in culture and law—we need more, not less, explanation. However, as long as explanation emphasizes “helplessness” in the psychology of individual women, it runs into the danger of contributing to stereotyping.

Id. (citations omitted).

270 Id. at 7. She states:

Because of the interactive relationships between law and culture in this area, law reform requires such an approach to simultaneously reshape cultural understanding. Separation assault is particularly easy to grasp because it responds to prevailing cultural and legal inquiry (“why didn’t she leave”) with a twist emphasizing the batterer’s violent quest for control.

Id.

271 Id. at 7–8.

272 See id. at 29–30.

273 Id. at 20–24.
thing, the typicality of facts stated in reported cases is highly suspect because trial of a question of fact is itself an aberration; the typical dispute never reaches the legal system, and those that do rarely survive to trial and appeal.) Narratives and counter-narratives can be produced on almost any issue. It is not clear that feminists rely on anecdotal evidence more than the conventional fireside policy analyst, which includes most lawyers, though feminist writers seem more ready to reveal their reliance on it and even revel in it. In some cases, this may be due to suspicion of the motives and funding sources of social scientists, or simply to belief in the power of general feminist theory to guide the way in deciding which narratives to believe.

The final example is an article by Kim Lane Scheppelle entitled *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth.* This article, using the Anita Hill hearings as its point of departure, posits that impeachment of witnesses hurts women disproportionately because women delay in making a complaint or give inconsistent versions of a complaint at different times. In cases of sexualized violence, such as rape, sexual harassment, or spousal abuse, victims often delay in reporting the incident and do not report a full or accurate version the first time. They then suffer when impeached with evidence of delay in reporting or of prior inconsistent statements. But victims have legitimate reasons for delay and revision. They are traumatized by the attack. Or they fear that the dominant culture might blame the victim, for example, by saying that she provoked the attack. Or they do not perceive the full implications of, say, sexual harassment until after they have thought about it or perhaps had therapy. Instead, they may present initial accounts that try to repair relationships and make things normal again.

In addition to her points that are specific to women and sexualized violence, Scheppelle has a more general point rooted in postmodern epistemology. Invoking Wittgenstein, she notes that accounts of events (“stories”) are narratives that are influenced by interpretive

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274 Mahoney, *supra* note 248, at 27–28 (noting “split between social scientists and feminist activists on domestic violence issues”; complaining about “gender-neutral approach” of some social scientists; arguing that funding sources have affected how issues were explored and what research was done, and that “conscious use of feminist methodology in research is rare”).

275 Scheppelle, *Just the Facts, Ma’am,* *supra* note 247.

276 *Id.* at 126–28.

277 *Id.* at 138–39.

278 *Id.* at 142–43.

279 *Id.* at 138–41.
frameworks. A woman who interprets her husband’s violence toward her as expressing his love does not see an event of battering the same way that a feminist lawyer sees it. But the difference in accounts that the feminist lawyer and the battered woman would give is not, Scheppele writes, a difference “between truth and falsehood,” but a difference in interpretive frameworks. Consciousness raising may cause the same person to see the same event in different ways. The second interpretation may be better, just as a revised paper is better than the original. Understanding how accounts of facts are “socially constituted” is necessary to liberate women from sexualized violence: “[F]act-finders need to understand that early narratives about sexualized violence may reveal not some deeper truth, but rather the effects of oppression on women. Not allowing women to reinterpret their own experiences as they learn to oppose the abuse is a way of furthering that oppression.”

Scheppele’s solution for this perceived unfairness is not entirely clear. In her first article on the subject she complained about judicial “exclusion” of revised accounts, which would be manifestly unfair treatment if “exclusion” meant exclusion from evidence. The revised accounts are not excluded from evidence, of course, but merely subject to impeachment by prior inconsistent statements. Although an operational solution is not offered in any detail, Scheppele’s general message is clear—that “much more sympathy and belief” should be given the revised stories, even when they contradict what was said

280 Scheppele, Just the Facts, Ma’am, supra note 247, at 167–68.
281 Id. at 168.
282 Id.
283 Id. at 168–70.
284 Id. at 172.
285 “Courts’ exclusion of revised stories works disproportionately against women because women are disproportionately the victims of a socialization that masks the immediate recognition of sexualized abuse as abuse.” Scheppele, Just the Facts, Ma’am, supra note 247, at 169–70.
286 Scheppele recognizes this point in a later article on the same subject, in which she says:

What I have argued so far is that the Federal Rules of Evidence show a strong preference for acquiring information as close in time and space to the events in issue as possible. This does not mean that all other information is excluded. Certainly not. It means, however, that whatever is said and done at the time of the trouble will always have a place in the evidence that must be considered.

Scheppele, Ground-Zero, supra note 247, at 330.
at the time of the events that led to the litigation. And even though she relies on examples from cases involving sexual violence and harassment, she seems to call for application of her perspective to all kinds of cases.

The importance of freshness of memory is a psychological insight that is not often questioned, and Scheppele is effective in making us think twice about it. Nevertheless, she could have done more to combine feminist social science with other studies of perception and memory. In her principal article, Scheppele virtually ignores the extensive body of literature on eyewitness testimony, except for one unexplained citation to Elizabeth Loftus. Some of the psychology scholarship on eyewitnesses would be helpful to her argument—studies suggesting, for example, that consistency in description of suspects is not a strong predictor of accuracy. Other parts of this body of scholarship would not strengthen Scheppele’s argument—studies of the contaminating effect of post-event information and suggestive interviewing are examples.

In summary, feminist evidence scholarship sometimes reflects an attitude that favors qualitative anecdotal data (such as narratives) over systematic quantitative analysis, that views science as irredeemably political, or that at least views general feminist theory as a better guide to social facts than the sorts of expertise and data generally favored by scientists and by Daubert. For example, Professor Taslitz opposes using a “flat exclusionary rule” for evidence that “helps to convey an excluded group’s voice,” even if the evidence fails more conventional criteria such as whether the methodology that produces the evidence is valid by the conventions of science. This attitude may explain why discussions of battered woman’s syndrome sometimes seem result-oriented, as if the portrait that the theory paints of women is more

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287 Id. at 334.
288 Scheppele, Just the Facts, Ma’am, supra note 247, at 167 n.174.
289 See Cutler & Penrod, supra note 40, at 93–95.
290 In her more recent article, Scheppele seems more receptive to the idea that reflection can contaminate memories, and is somewhat broader in her citation of social science literature. In Scheppele, Ground-Zero, supra note 247, at 325–26, she notes psychological experiments on the distortion of memory, writing that “subjects in experiments often show that their memories can in fact be predictably altered by the introduction of new information, and they unproblematically (even unconsciously) take into account the new information as if it were part of the original memory.” This, of course, is a very good reason to distrust factual accounts given after there has been some time for reflection, for time affords possibilities for distortion even if one assumes that reflection itself does not distort.
291 Taslitz, What Feminism Has to Offer Evidence Law, supra note 248, at 211.
important in judging its acceptability than the validity of the research methods that produced it.

Of course, much legal thinking and law rely on anecdotes and fireside inductions. In that, feminist scholarship is entirely mainstream. Moreover, many (and probably most) of the hypotheses developed by feminist scholars are amenable to empirical testing. Feminist scholarship generates ideas that are unlikely to have been thought of without the theoretical discipline that gave rise to them. The empirical soundness of many of those new hypotheses deserves to be studied and tested. Much the same can be said for evidence law and economics scholarship, to which we turn next.

VI. ECONOMICS AND EVIDENCE

Until quite recently, it could be said that law and economics scholars had virtually nothing to say about evidence law.292 This is not exactly surprising. Evidence scholarship focuses on understanding, explaining, evaluating, and suggesting improvements for rules that are concerned principally with the goal of maximizing the ability of trials to discover the truth of a matter in dispute.293 It is easy to see how various fields might contribute to this endeavor, such as logic,

292 See Park, supra note 8, at 849 n.2. Some might say that Jeremy Bentham was an exception. But Bentham was a long time ago; his Rationale of Judicial Evidence was published in 1827. Bentham, supra note 3. He was less an economist than a utilitarian philosopher (and cognitivist). His solution to any problem of evidence was to abolish rules and rely on the discretion of judge and jury. And his work has been all but ignored by evidence scholars of the twentieth century. See Twining, supra note 3, at ix.

293 See, e.g., William Twining, Evidence and Legal Theory, 47 MOD. L. REV. 261, 272 (1984). Twining states:

The most striking feature of [evidence scholarship] is how homogeneous it is. Nearly all of the Anglo-American writers from Gilbert to Cross have shared essentially the same basic assumptions about the nature and ends of adjudication and about what is involved in proving facts in this context. . . . It can be re-stated simply in some such terms as these: the primary end of adjudication is rectitude of decision, that is the correct application of rules of substantive law to facts that have been proved to an agreed standard of truth or probability. The pursuit of truth in adjudication must at times give way to other values and purposes, such as the preservation of state security or of family confidences; disagreements may arise as to what priority to give to rectitude of decision as a social value and to the nature and scope of certain competing values. . . . But the end of the enterprise is clear: the establishment of truth.

Id. See other citations and quotations to similar effect in Chris William Sanchirico, Character Evidence and the Object of Trial, 101 COLUM. L. REV. 1227 passim (2001).
psychology and other cognitive sciences, philosophy, statistics, feminism, and so on. But economics?

The first great law and economics movement, which arose in the late nineteenth century, involved the macroeconomics of law.294 It was concerned with political economy, the behavior of markets, and economic systems, and was reflected in areas of law such as anti-trust, taxation, and banking regulation. The second great law and economics movement—the one with which readers of this article will be more familiar—involves the microeconomics of law, the pursuit of efficiency and wealth maximization.295 It has been concerned with the effects on individual behavior of varying incentive structures and has been reflected in economic analyses of torts, contracts, property, and criminal law. What could marginalism or wealth maximization have to do with the truth-seeking goals of evidence law?

Only recently has there been a broad-gauged attempt to apply microeconomics to evidence law. To be sure, there were occasional articles on incentives and disincentives for gathering evidence,296 how those incentives affect the evidence offered to courts,297 the resulting outcomes of trials and the impact of those outcomes on behavior (especially economic activity) outside of court.298 These studies focused mainly on the problems of assembling evidence for trials and the effects of verdicts. Recently, we have seen broader attempts to apply economics to evidence law and the philosophy of evidence. We focus here on three authors whose work illustrates this new contribution to evidence scholarship.

Perhaps fittingly, the first broad major law and economics treatment of evidence law, tackling a wide range of evidence topics, is by Richard Posner.299 In his article, Judge Posner’s assumptions about rational planning often lead him to inferences about evidence rules’ strong ex ante effects. His perspective entails implicit assumptions about pervasive knowledge of the rules among the general population, and about the friction-free willingness of actors to change cus-

299 Posner, supra note 179.
tomary ways of doing things in order to obtain an advantage if they ever wind up in litigation, assumptions which sometimes seem unrealistic.\textsuperscript{300} As might be expected, Judge Posner also brings to his study of evidence law a sensitivity to costs, trade-offs, and substitutions.\textsuperscript{301}

Posner’s rational choice, ex ante perspective is not the best starting point when drawing inferences about the issues at the core of traditional American evidence law. Many rules, such as the hearsay and character evidence bans, have long been viewed as being tailored with cognitive biases in mind and aiming to control reasoning at trial rather than future primary conduct.\textsuperscript{302} They seek to protect against mistaken, unreasonable, or lawless interpretations of evidence by factfinders. But Posner is fearless in applying his perspective, even to seemingly unpromising topics such as character evidence.\textsuperscript{303} We describe and discuss some of those ideas. First, we present some of the good ones.

In his discussion of search and seizure, Posner assesses the value of sanctions other than exclusion of evidence, such as damages remedies for illegal searches.\textsuperscript{304} Posner argues that if these alternative sanctions were effective, there would be evidentiary gain because the searches would not be made in the first place.\textsuperscript{305} Therefore, he suggests, those who oppose \textit{Mapp v. Ohio}\textsuperscript{306} ought to be arguing about the definition of illegal search rather than about the sanction.\textsuperscript{307} Scholars from the law and economics perspective seem able to come up with that sort of realization much more readily than others.

Next, there is the famous blue bus conundrum.\textsuperscript{308} Suppose a plaintiff is negligently injured by a bus, but cannot determine what bus company owned the bus that hurt him. And suppose it can be learned that bus Company A runs 51 buses along the route where the accident occurred, while Company B runs 49 buses there. Should the

\begin{itemize}
  \item \textsuperscript{300} See \textit{id.} at 1529, 1531.
  \item \textsuperscript{301} \textit{Id.} at 1542–46.
  \item \textsuperscript{302} But see the discussion of Sanchirico’s work, \textit{infra} notes 320–332 and accompanying text.
  \item \textsuperscript{303} For more thorough critiques of Posner’s article, see Allen & Leiter, \textit{supra} note 2, at 1510–27; Lempert, \textit{supra} note 2, at 1639–700. \textit{See generally} Park, \textit{supra} note 2.
  \item \textsuperscript{304} Posner, \textit{supra} note 179, at 1533.
  \item \textsuperscript{305} \textit{Id.}
  \item \textsuperscript{306} 367 U.S. 643 (1961).
  \item \textsuperscript{307} Posner, \textit{supra} note 179, at 1533.
  \item \textsuperscript{308} For commentary on the blue bus problem, see generally Allen, \textit{supra} note 179; Callen, \textit{supra} note 179; Shaviro, \textit{A Response to Professor Allen}, \textit{supra} note 179; Shaviro, \textit{A Response to Professor Callen}, \textit{supra} note 179; Shaviro, \textit{Statistical–Probability Evidence and the Appearance of Justice}, \textit{supra} note 179.
\end{itemize}
“naked” statistical fact that the defendant Company A owns 51% of the buses be admissible and sufficient to establish by a preponderance of the evidence that one of the defendant’s buses caused the plaintiff’s injuries? Here is part of Posner’s analysis of this problem:

Suppose both parties do conduct a thorough investigation yet are unable to come up with any additional evidence bearing on the ownership of the bus. There is no longer a basis for suspicion that the plaintiff really believes that a bus owned by Company B hit him, or for punishing him for not having investigated more. The case may seem no different from any other one tried under the preponderance of the evidence standard in which the balance of probabilities tilts only slightly in favor of the plaintiff. But there is a difference. Suppose the legal system can identify an entire class of cases in which the balance of probabilities tilts as slightly in favor of the plaintiff as it does in the bus case. If there are 1000 such cases, then allowing them to be tried can be expected to yield 510 correct decisions (that is, 510 decisions in which the defendant was in fact the injurer) and 490 incorrect ones, while not allowing them to be tried can be expected to yield 490 correct decisions and 510 erroneous ones. The social benefits of the twenty additional correct decisions that allowing the 1000 cases to be tried would produce—benefits in more perfect deterrence of negligent accidents—would probably fall short of the social cost of 1000 trials.\footnote{Posner’s analysis makes the useful policy point that admitting the evidence, and therefore allowing the trials to go forward, has the virtue of reaching more correct results, but there is a disproportionate social cost of that marginal improvement in accuracy.\footnote{On the other hand, if the analysis is correct, it would seem that the decision whether to allow the evidence would turn on what proportion of the blue bus company’s buses run on that route. At some point, the gain in accuracy becomes worth the administrative and transaction costs. So it would seem that a rule setting a higher threshold for admission of such evidence would be the efficient solution in such cases.}}

Posner’s analysis makes the useful policy point that admitting the evidence, and therefore allowing the trials to go forward, has the virtue of reaching more correct results, but there is a disproportionate social cost of that marginal improvement in accuracy.\footnote{On the other hand, if the analysis is correct, it would seem that the decision whether to allow the evidence would turn on what proportion of the blue bus company’s buses run on that route. At some point, the gain in accuracy becomes worth the administrative and transaction costs. So it would seem that a rule setting a higher threshold for admission of such evidence would be the efficient solution in such cases.}
busses, because it would be less careful; moreover, a monopoly would eventually be created because A, burdened by higher liability costs, would withdraw from the route.\footnote{Posner, supra note 179, at 1510.}

Judge Posner seems to enjoy revving up his models and seeing where they go, and it is not clear that he is completely serious in his remark about the demise of bus Company A.\footnote{The bus-monopoly comment occurs at one of two places in which Judge Posner puts an exclamation point after a speculative comment about ex ante effects. See Posner, supra note 179, at 1510 (Posner’s present comment that allowing naked statistical evidence to sustain “blue bus” verdict might lead to bus monopoly); id. at 1532 (comment that abrogating attorney-client privilege might increase enrollment in law schools, because clients would seek to learn more about the law themselves). Professor Lempert has decoded this punctuation to mean that Judge Posner was joking. See Lempert, supra note 2, at 1671, 1690. If so, this is an unusual way to signal humor, and one is left puzzled about how to treat other passages that lacked exclamation points but also seemed far-fetched.} At any rate, the consequence predicted is speculative and fails to take account of likely changes in behavior. If the companies really reacted that strongly to the burden of having liability imposed on the basis of naked statistical evidence, then they might instead each reduce the number of busses in an attempt to have fewer than half, thus leading to a race to the bottom.\footnote{Allen & Leiter, supra note 2, at 1526.}

But it seems more likely either that naked statistical cases would be so rare as not to affect conduct at all, or that if the companies did feel pressure to reduce the number of busses, there would be countervailing incentives that lead to adjustments in conduct, such as use of safety measures, that would make it worthwhile for the dominant company to bear the litigation burden while continuing to operate. Consumers might even prefer the larger and safer company, paying a premium for its services. Only one thing is clear: the ex ante consequences of the rule, if they exist at all, are highly speculative and unpredictable.

Next, we look at questionable economic ideas about character evidence. Posner argues the following regarding prior-crime evidence:

It is only weakly probative, because repeat offenders are punished more heavily than first-time offenders in part precisely to offset any greater propensity to commit crimes that their previous convictions have revealed. If recidivists are punished severely enough, the propensity to commit a subse-
quent offense may be reduced to the same level as the propensity to commit a first offense.314

This proposition—that previously convicted defendants, if punished severely enough, will not be any more likely to commit crime than persons with clean records—would seem to merit a look at the empirical evidence. It requires justification in view of data showing that previously convicted defendants are dozens or hundreds of times more likely to commit an offense than are persons chosen at random.315 Just proposing new ideas based upon a rational choice model, under which potential offenders apparently make a reasonable assessment of the value of present gratification compared to future punishment,316 can be positively misleading to policymakers unless the scholar is willing to check his assumptions against potentially disconfirming data.317

Marital privilege is another area where Posner’s analysis sometimes gets out of control, requiring more human foresight, knowledge, and flexibility than is plausible. It is doubtful that even law professors consult the rules about marital privilege before confiding in their spouses or committing a crime, but Posner has ordinary people doing both.318

We agree with Allen and Leiter that Judge Posner’s article is prone to speculative theorizing.319 We cannot say for certain that

314 Posner, supra note 179, at 1525.

315 See Park, supra note 62, at 758–63. Prediction systems using actuarial methods commonly use prior crimes as a predictor. See Michael R. Gottfredson & Travis Hirschi, A General Theory of Crime, passim and 107 (1990) (stating that “research regularly shows that the best predictor of crime is prior criminal behavior” and that the differences between people, with respect to the likelihood they will commit criminal acts, persist over time); John Monahan, U.S. Dep’t of Health & Hum. Servs., The Clinical Prediction of Violent Behavior 71–72 (1981) (“If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act.”). See generally Peter Hoffman, Predicting Criminality, U.S. Dept of Justice Study Guide (1988); Vernon L. Quinsey, Grant T. Harris, Marnie E. Rice & Catherine A. Cormier, Violent Offenders: Appraising and Managing Risk (1998).

316 It seems likely, for example, that persons who are prone to criminal acts are also prone to an unrealistically low estimate of the danger of getting caught and the cost of future punishment. See Gottfredson & Hirschi, supra note 315, passim and 107.

317 Park, supra note 2, at 2057–58.


319 Allen & Leiter, supra note 2, at 1521–27. However, for a similar economic analysis in a case that reaches a much more plausible legal conclusion, see Judge Posner’s opinion in Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) (opining that decision rules in preliminary motions should minimize the cost of error).
these are incorrect, flawed ideas. We can say that, if the reality of human behavior is important to evidence policy, and hypotheses are to be tested, then one has to have some idea about which hypotheses are plausible enough to be worth the effort. One could regard the passages discussed above as saying: “I’m not asserting this is true; I’m just showing you where the model leads; I’m just throwing out ideas for you ordinary scholars to check out.” But in deciding whether to seek empirical verification of ideas, one has to make some choices about what to test. Guidance could come from theory, analogous studies, fireside inductions from history and experience, and intuition. With those preliminary screening tools as our guide, many of Posner’s economic ideas about evidence law appear unpromising.

In contrast to Posner’s shotgun approach to applying economic ideas to evidence law, the scholars whose work we examine next use a laser.

The first work reflects the characteristic concern of contemporary law and economics with the impact of incentives and disincentives on individual behavior by deliberately looking away from the fact-finding function of evidence rules to consider the arguable impact of the rules on (mostly) crime deterrence.320 More specifically, Professor Sanchirico argues that the rule prohibiting the use of character evidence for propensity reasons cannot be explained coherently or convincingly in terms of enhancing the accuracy of trial fact finding.321 He reviews each of the major extant truth-focused explanations for the rule—namely, the limited probative value of character evidence, the strong tendency of the jury to overweigh such evidence, the temptation of the jury to impose liability for the defendant’s character rather than for the wrongful conduct charged, judicial efficiency, an effort to impel parties to produce more and better evidence directed toward the conduct at issue, and trial bias (a biased distribution of persons selected for prosecution that further reduces the inferential value of character evidence)—and argues that they are unconvincing.322

320 See generally Sanchirico, supra note 293.
321 Id. at 1231–32.
322 Id. at 1239–59. We need not delay with a critique of his critiques, except to say that the traditional explanations do not strike us to be as weak as Sanchirico asserts. Sanchirico, like most if not all of us, holds rival theories to higher standards of validity than he holds his own. Interested readers will have to decide for themselves whether Sanchirico has reached the right verdict on each theory, including his own.
Sanchirico then offers a new explanation for the rule, one rooted in the notion that trials in general, and this rule in particular, are devices for dispensing primary incentives. To explain the rule coherently, all we need do is analyze the character evidence ban in light of its ability to deter undesirable conduct, rather than its ability to lead factfinders closer to truth:

Character evidence . . . is one area in which the truth seeking approach and the primary incentives approach to trial point in very different directions. This Article makes use of that divergence to advance our understanding of both character evidence and trial. It demonstrates that many of the rules governing character evidence—so difficult to rationalize when trial is regarded as an isolated exercise in sorting out past events—fall easily into place when trial is viewed as but one component of the larger system by which the state regulates everyday out of court behavior. The Article draws from this stark disparity in explanatory power the important lesson that, despite most of what is said about the object of trial, our desire to find the truth is subordinate to our desire, in effect, to shape it through the provision of incentives.323

The essential argument of Sanchirico’s theory about the character evidence ban is this: character evidence has predictive and therefore probative value.324 But it has no incentive value—its presence or absence creates no incentive to refrain from proscribed acts.325 “Trace evidence,”326 on the other hand, generally comes into being by the commission of proscribed acts and generally does not when such acts are not performed. Thus, trace evidence has incentive value.327 By focusing on trace evidence, the law reinforces the disincentive to committing proscribed acts. Were character evidence permitted as evidence of conduct, the disincentive for performing proscribed acts would be dampened.328 Without a character evidence ban, a person with a “bad” character is in a “damned if you do and damned if you

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323 Id. at 1231–32.
324 No one disagrees with this proposition. Even those who regard character evidence as a weak predictor of behavior do not say that it has zero predictive value.
325 Id. at 1260–63.
326 Evidence left by the commission of an act, including the memories of eyewitnesses.
327 Sanchirico, supra note 293, at 1262.
328 Id. at 1266.
don’t” situation.\textsuperscript{329} If he refrains from the proscribed behavior, he still could be convicted of a relevant crime based on the evidence that he is more likely than others to commit such crimes. But with a character evidence ban in place, refraining from proscribed acts has greater power to prevent conviction (because the trace evidence necessary for conviction will not exist) and therefore the person is more likely to refrain. Thus, deterrence is stronger with the rule against character evidence than without it.\textsuperscript{330}

The posited effect is plausible, but not intuitively compelling. It is possible, for example, that admission of character evidence would have the opposite effect. Persons tainted by provable prior offenses would realize that their chance of conviction would be high if they were arrested, and make a special effort to avoid situations that might lead to arrest. Sexual predators would not share beds with children; assaultive personalities would avoid dangerous barrooms. That effect could cause prior offenders to avoid situations and associations that might tempt them to crime, thus deterring it. To our intuitions, it seems unlikely that the rule prohibiting use of character evidence against the accused (but allowing use of bad acts for other purposes) has any substantial effect on the conduct of potential violators. In the exceptional situations where potential perpetrators do take the rule into account, the question whether it deters or promotes crime is highly uncertain and speculative.

Even though our intuitions differ from his, Sanchirico’s theory is plausible in accounting for the existing law. What is less plausible is that judges, facing an issue of whether evidence should be admitted at trial, presented with arguments from counsel about accuracy versus fairness, and despite writing opinions that consider the problem in those terms, are nevertheless solving the dilemma with entirely different goals in mind, and that the most influential (if not most) judges are collectively engaged in the unexpressed enterprise of talking about in-court accuracy versus fairness but adopting rules calculated for out-of-court deterrence. It’s not impossible, but surely improbable.

Sanchirico uses this basic incentivist notion to explain the wisdom of an array of related rules: the admissibility of character evidence for impeachment, at sentencing, and for punitive damages; exceptions to the character evidence rule that make sense from a

\textsuperscript{329} Id.
\textsuperscript{330} Id.
deterrence perspective; and exceptions to the character evidence rule that do not make sense from a deterrence perspective.\textsuperscript{331}

The article illustrates an important value of the “new” discipline’s meta-theoretical imperatives. Because it is the concern of microeconomic analysis to search for incentives and consider their effects, Sanchirico was led to look away from the trial’s apparent internal quest for true facts and look instead to the effects of the rule outside of the trial. He was led to look away from seeing the rule as part of a backward-looking search for truth to seeing it instead as a forward-looking tool of social control.

If Sanchirico were arguing that evidence rules are primarily aimed at truth seeking or fair fighting in trials, but that they inevitably have evidence-generating or evidence-suppressing effects in the world outside of trials, his argument would be both hard to disagree with and less interesting. We refer to situations where potential defendants in sexual harassment suits act to ensure that their conduct with potential accusers takes place in the presence of witnesses; document retention (and destruction) policies at corporations; and careful management of hazardous waste in anticipation of the burdens of proof in environmental lawsuits. Or, if he argued that specific rules evolved to provide incentives for certain relationships (notably, the privilege rules, which promote candid communication among clients and patients and spouses) and behavior (notably, the exclusion of evidence of repairs following accidents so that lawsuits do not become disincentives to accident prevention), he would, again, be making an argument that would be both hard to disagree with and nothing new. But Sanchirico goes much further.

Although Sanchirico focuses on one rule, he argues that his analysis is illustrative of a larger truth about trials: they are more concerned with “influencing what happens in the future . . . than discovering what happened in the past.”\textsuperscript{332} That is a bold departure from (and challenge to) the heretofore nearly unanimous evidence scholarship of the past several hundred years. Whether it can be shown to be true remains to be seen. But who cannot be excited by the debates promised by so grand a claim, however those debates might turn out?

\textsuperscript{331} The most prominent example is the relatively recent exception admitting evidence of an accused’s propensity to engage in proscribed sexual conduct. Fed. R. Evid. 412. According to Sanchirico’s economic analysis, these rules will reduce the disincentive to commit such crimes. Id. at 1301.

\textsuperscript{332} Sanchirico, supra note 293, at 1259.
While much of Posner’s analysis and the central core of San-
chirico’s work look at evidence law less as a set of rules designed to
improve truth finding and more as devices concerned with regulating
behavior outside of trial by dispensing contingent incentives and dis-
incentives, Alex Stein and his colleagues bring economic analysis back
to evidence scholarship’s traditional concern with the effect of the
rules on decision making.

In a recent article, Stein succeeds in combining traditional evi-
dence scholarship’s core concern of accurate factfinding with a “con-
sequentialist game-theoretic perspective.” Professors Seidmann and
Stein explore the question of whether the right of criminal defen-
dants to remain silent benefits only guilty defendants or whether it
creates conditions that assist factfinders in distinguishing innocent
from guilty defendants, and therefore benefits courts and society (by
reducing the incidence of erroneous convictions). Critics of the right
to silence dating back at least to Bentham have argued that inno-
cent suspects and defendants do not need the right (they desire to
offer true exculpatory evidence), and that only the guilty will avail
themselves of it, thus increasing the incidence of erroneous acquit-
tals. Defenders of the right to silence have defended it on a com-
pletely different plane, arguing that regardless of any costs in accuracy
it may entail, the right is necessary to promote moral and ethical val-
ues of fair process.

Seidmann and Stein offer an economic argument supporting the
right to silence that had been overlooked by both utilitarian critics
and libertarian defenders. The critics of the right to silence made a
series of economic miscalculations; the defenders may have turned
to moral and ethical arguments because the erroneous reasoning of
the critics appeared so persuasive. In any event, consequentialist game
theory analysis has led to a new and utilitarian explanation for and
defense of the right to silence.

To summarize: If they were compelled to submit to interroga-
tions and to testify, guilty suspects and defendants would tell lies to

333 Daniel J. Seidmann & Alex Stein, The Right to Silence Helps the Innocent: A Game-
334 In fairness to Bentham, his views were at least sometimes compatible with the best
evidence principle in regard to rules excluding evidence. See Dale A. Nance, The Best Evi-
335 Seidmann & Stein, supra note 333, at 451–52.
336 Id. at 452–55.
337 Id. at 455–58.
avoid conviction. Whenever police or prosecutors are unable to expose those lies, the guilty would be indistinguishable from the innocent. Jurors and judges, aware that guilty (as well as innocent) defendants were offering exculpatory statements, would discount those statements, giving all of them less weight. With the right to silence, guilty suspects face the choice of telling lies that could be discovered (adding to the evidence against them) or exercising their right to silence. As more guilty defendants choose the option of remaining silent, they do not “pool with” innocent suspects and defendants.\textsuperscript{338} Consequently, innocent and guilty suspects and defendants become more distinguishable.\textsuperscript{339} Thus, the right to silence helps the innocent to be found not guilty.

Further analysis suggests that these effects are most likely to occur when the prosecution’s evidence is moderately inculpatory (rather than weak or strong), and works only when the standard of proof is “beyond a reasonable doubt” (rather than some lower threshold).\textsuperscript{340} Indeed, the authors argue that a reduction in the standard of proof would lead not only to more erroneous convictions, “but also [to] serious indeterminacy in suspect identification and selection.”\textsuperscript{341} The authors argue that their analysis fits well with, and supports, or explains, not only the basic Fifth Amendment right of silence, but much of the jurisprudence that has grown up around it.\textsuperscript{342}

The game theory analysis consists largely of thinking through the strategies of innocent and guilty suspects and defendants under varying conditions of evidence, standards of proof, and several other variables.\textsuperscript{343} These are plausible, reasonable arguments about what suspects and defendants and factfinders would do. But they rarely are informed by empirical data about such behavior. They could be in-

\textsuperscript{338} Id. at 457.
\textsuperscript{339} Id.
\textsuperscript{340} Seidmann & Stein, supra note 333, at 470.
\textsuperscript{341} Id. at 449.
\textsuperscript{342} For examples, see Mitchell v. United States, 526 U.S. 314, 330 (1999) (applying the right to silence in sentencing proceedings); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (permitting adverse inferences from pre-arrest and post-arrest silence for impeachment purposes if a defendant testifies); Jenkins v. Anderson, 447 U.S. 231, 238–40 (1980) (same); Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that the right to silence protects only against compelled testimony, not against compelled production of physical evidence); Griffin v. California, 380 U.S. 609, 615 (1965) (prohibiting adverse inferences from refusal to testify).
\textsuperscript{343} Seidmann & Stein, supra note 333, at 466–74.
The absence of empirical testing is, of course, typical of economic analysis of law.\textsuperscript{345}

Seidmann and Stein do, however, offer a brief section that purports to test the implications of their theory against empirical data.\textsuperscript{346} Though the section seems to be an afterthought, and not much intellectual energy is put into it, at least it is there. But the data are tenuous\textsuperscript{347} and presented in a way that is confusing if not contradictory.

\textsuperscript{344} For example, regarding the assumption that innocent suspects tell exonerating truths: To what extent do innocent suspects lie also, in order to add a margin of safety to their factual innocence, only to get caught in the lie? (Doesn’t that vitiate anti-pooling effects?) Regarding the assumption, \textit{id.} at 450, that only in the “rare” case, with abnormal people or abnormal circumstances, do the police so confuse or intimidate suspects that they cannot make rational calculations about their own best moves: To what extent do police interrogation techniques succeed in confusing or intimidating typical suspects into making foolish choices, including making inculpatory statements (which, after all, is exactly what interrogation methods are designed to do)? Regarding the assumption that “a typical suspect confesses to a crime only when confronted with evidence that he believes to be irrefutable,” \textit{id.} at 450–51, to what extent is this true? Will guilty suspects choose to continue to remain silent even if inferences based on silence are allowed—for example, because they have no convincing story, or because prior convictions will become admissible? If the guilty did speak instead of confessing or remaining silent, would their tales be as convincing as those of the innocent? See Gordon Van Kessel, \textit{Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence}, 35 \textit{Ind. L. Rev.} 925, 956–60 (2002). Is it plausible to believe simultaneously that factfinders obey the instruction not to draw adverse inferences from silence to an extent that encourages guilty defendants to remain silent, and also that the right to silence favors the innocent by making factfinders more likely to believe their stories? \textit{See id.} at 942.

The answer the authors are likely to give is that so long as a plurality of the actual behavior is consistent with their assumptions, their theory still has predictive and explanatory value.

But it is worth reminding ourselves about the value of data. One illustration of the usefulness of combining data on actual behavior with game theory is provided by Professor Robert Axelrod. Robert Axelrod, \textit{The Evolution of Cooperation} (1984). Axelrod conducted a game theory contest in which entrants submitted computer programs designed to elicit cooperative responses from the opponent in the game. Naturally, many entries were based on theories sans data. The winning entry, it turned out, was from a psychologist who doubtless knew from empirical experiments on game theory by research psychologists (for an example, see Anatol Rapoport, \textit{Experimental Games and Their Uses in Psychology} 19, 25–28 (1973)) that the most successful strategy for eliciting cooperation from an opponent is tit for tat, and who wrote a simple program to play that strategy. Axelrod, \textit{supra}, at 31.


\textsuperscript{347} Seidmann & Stein, \textit{supra} note 333, at 498–502.

\textsuperscript{347} Seidmann and Stein themselves declare half of the data to be useless—in their words, “too contaminated with measurement error (including inconsistent classification schemes) to draw any meaningful conclusions.” \textit{Id.} at 500.
From the data mish-mash they conclude that the two predictions they derive from their model are confirmed. 348

Perhaps the most telling finding (the import of which is not noted by Seidmann and Stein) is that very few suspects refuse to answer police questions. Siedmann and Stein cite two American studies that found that only 9.5% and 20.9% of suspects invoked their right to silence. 349 British studies found about 10%, and a law allowing prosecutors to argue adverse inferences reduced that number by only a few percent. 350 If the actual figure is around 10%, and the claimed benefits are found only when the inculp atory evidence is moderate, then we are talking about a few percent of cases. If the vast majority of suspects talk even when they have a right to silence, then presumably most of them are offering the police lies that falsely tend to exonerate. Does this not create the very pooling that the article argues is prevented by the right to silence? But if so many presumably guilty suspects lie rather than avail themselves of their right to silence, then Bentham and his followers are also rather far off the mark. 351

348 Id. at 499, 502.
349 Id. at 448 n.60.
350 Id. at 501.
351 Which suggests to us that economists of the law have not escaped the need to be more concerned about data. Economic models are not the royal road to truth, and need to be tested more earnestly. In the paper’s introduction, the authors dismissed the empirical approach:

A factual examination of these assumptions may follow two principal routes. One of these routes is empirical. By gathering and analyzing relevant empirical data, one can evaluate the workings of the right to silence without relying on sheer intuition. Such an approach might determine, statistically or by any other epistemologically plausible standard, whether the right aids only the guilty. The alternative route, which this Article follows, is behavioral modeling. Such modeling is usually, but not exclusively, based on rational-choice theory. Because reliable empirical evidence is often unavailable, the empirical approach is often problematic, as is the case with the factual assumptions examined by this Article. For example, it is extremely difficult, if not altogether impossible, to estimate the effect of the right to silence on the rate of true and false confessions. A suspect may confess to a crime for a variety of reasons. He may confess to a crime truthfully on finding the incriminating evidence irresistible. Alternatively, he may make a false or a truthful confession under the pressure of police questioning. He may also make a false confession to exonerate the actual guilty party (for example, out of fear or love). A suspect deciding to remain silent during his interrogation may do so regardless of the right to silence: silence would be the best strategy for many guilty suspects even in the absence of a right.

An even greater problem inherent in the empirical approach lies in its limited ability to produce determinate predictions when applied to human actions and decisions. There is no good reason to believe that uniformly ob-
Other analyses by Stein take the view that evidence law is less a method of maximizing the chances of finding the truth in a disputed matter than a means of apportioning the risk of error when decisions are made under uncertainty. In his recent book, *Foundations of Evidence Law*, Stein proposes a theory built on economic analysis combined with probability theory, epistemology, and moral philosophy. In Stein’s analysis, evidence rules exist principally to ensure the just allocation of errors, not to prevent errors by finding truth. By taking the view that evidence law seeks the just allocation of the risk of error, Stein seeks to resolve a number of paradoxes that seem to result from a purely truth-seeking perspective.

Stein proposes a number of principles that both explain and justify the rules found in evidence law, and these principles work to serve the error allocation function. The “principle of maximal individualization” prevents factfinders from making a decision against a party when the evidence they have to work with is not subject to individualized testing. This principle is said to have broad application, although, like most principles, it can be trumped by other values. Three

served actions and decisions will continue in the future. Reliance on statistical generalizations in forecasting human actions may prove perilous: recall Bertrand Russell’s (in)famous chicken, conditioned to expect its daily feeding until the day the farmer interrupted this routine by butchering it for meat. One can make predictions about human actions only within some theoretical framework that imposes order on the empirically gathered facts. Generalizations about human actions acquire plausibility only by virtue of some explanatory theory that connects actions to reasons. Theoretical lenses may be microscopic or macroscopic, depending on the desired level of abstraction. In a search for a causal mechanism that explains numerous actions by their underlying motivations, theoretical lenses must be at a relatively high level of abstraction. This form of reductionism is necessary to tame “wild facts” and is, therefore, intrinsic to behavioral modeling. The compromised accuracy resulting from this reductionism is the price that any behavioral theory (and, perhaps, any theory) exacts in order to attain determinacy.

Seidmann & Stein, *supra* note 333, at 436–37 (citations omitted). Of course this is no different from most legal scholarship, and it would be unfair to lay any special criticism on the doorstep of Seidmann and Stein.


354 Id. at 100. Readers will recognize in this a justification for holding “naked statistical evidence” to be inadmissible or insufficient. See *supra* notes 178–179 and accompanying text.
other principles guide the construction of rules that allocate the risk of error. The “cost-efficiency principle,” which applies in all litigation, requires that factfinders minimize the total cost of errors and error-avoidance.\textsuperscript{355} The “equality principle” applies in civil litigation and posits that fact-finding procedures and decisions must not produce unequal apportionment of the risk of error between parties.\textsuperscript{356} The “equal best principle,” which applies in criminal trials, requires that to justifiably convict a defendant the state must make its best efforts to protect the defendant from the risk of erroneous conviction and must not provide better protection to other individuals.\textsuperscript{357}

Although Stein presents these ideas as a break from evidence law and the ostensible goals of evidence doctrine, it seems to us that his ideas are more a complement than an alternative to most existing theory. Rules that allocate the risk of making erroneous decisions are closer cousins of rules designed to enhance truth finding than Stein realizes. Indeed, it is hard to imagine any sophisticated system for seeking correct answers that is not at the same time concerned with allocation of the risk of error. Perhaps the best and most obvious analogy is to hypothesis testing in science: the rules for determining whether to reject a null hypothesis (in the pursuit of empirical truth) take fully into account the risk of erroneous rejection of true null hypotheses and erroneous failure to reject false null hypotheses. The risks of the two types of error are balanced in a manner that reflects the costs and harms associated with one type versus the other.\textsuperscript{358} In science, and, we believe, in trials, fact finding under conditions of uncertainty and the allocation of the risk of error work happily together hand in glove.

What we’ve seen so far in the law and economics contributions to evidence scholarship is usually a strong version of rational choice theory. But since evidence scholars are usually alert to the nonrational limitations of human reasoning, why not explore a weaker version of rational choice? Why not something like the bounded rationality of behavioral law and economics?\textsuperscript{359} Perhaps that will be the next turn.

\textsuperscript{355} Stein, supra note 352, at 136–37.
\textsuperscript{356} Id. at 217–18.
\textsuperscript{357} Id. at 172–78.
\textsuperscript{358} See David H. Kaye & David A. Freedman, Statistical Proof, in 1 Modern Scientific Evidence, supra note 102, at ch. 5. One can alternatively refer to any textbook on inferential statistics in any field that uses statistics.
CONCLUSION

In large part, the factors that influence the mix of doctrinal and interdisciplinary scholarship on evidence are similar to those that affect that mix in other fields. As in other legal fields, a variety of obstacles to interdisciplinary work exists. Consider first the category of quantitative empirical research, which in the case of evidence law often means research on law and psychology. Law professors have no training in empirical research and analysis. Even if they did, they do not have students who are in a position to assist in carrying out such research. Even if those problems can be surmounted, there are daunting funding problems, aggravated by the fact that the federal government has not seen funding of research for the improvement of law as a high priority.360 The traditions of single authorship and of grand theory scholarship also militate against empirical work.361 Empirical research does not suit the scholarly habits of many law professors who rarely venture beyond the law library, and now, with so many resources online, need not even leave their offices.362 Changes in law schools can help reduce these obstacles.363 One of the most notable developments is the seemingly steady increase in the number of scholars joining the ranks of the legal academy who are educated in disciplines in addition to law, as well as having training in empirical research. For others, law schools could do more to support training of law professors in the needed methodological skills, encouraging them to attend research institutes or take needed courses. Changes in the way manuscripts are reviewed by law journals, for ex-

360 Federal funding agencies such as the State Justice Institute and the National Institute of Justice seldom have the funding of research on evidence law on their agendas. The National Science Foundation, however, has been more supportive of such work.

361 Professor Lawrence Friedman has written:

To begin with, empirical research is hard work, and lots of it; it is also nonlibrary research, and many law teachers are afraid of it; it calls for skills that most law teachers do not have; if it is at all elaborate, it is team research, and law teachers are not used to this kind of effort; often it requires hustling grant money from foundations or government agencies, and law teachers simply do not know how to do that. . . .

Prestige is a factor, too. Law schools . . . tend to exalt “theory” over applied research. Empirical research has an applied air to it, compared to “legal theory.”


363 For suggestions along the lines described in this paragraph, see generally Lee Epstein & Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1 (2002).
ample by adding an element of blind peer review by faculty members, might encourage careful empirical research. The tradition of single authorship needs to be changed, encouraging legal scholars to collaborate with colleagues in other departments. In the field of evidence, collaboration is eased by the fact that the evidence scholar’s concern with the accuracy of witnesses and factfinders overlaps with the psychologist’s interest in memory, perception, and human reasoning.

Lempert raises a more specific methodological concern about empirical research in the field of evidence: “With the exception of some psychologists, few scholars have attempted to shed an empirical light on evidentiary issues. One reason for our lack of empirical knowledge is that it is hard to study the effects of evidence rules outside the laboratory, and laboratory studies raise substantial external validity problems.”364 Whether the issue of generalizability is greater here than in other kinds of simulation research is not clear. And the problem sometimes exists and sometimes does not exist. It seems to us that numerous research questions can be studied without running into very serious questions of generalizability. It is difficult to see why laboratory studies of sequential and simultaneous lineups would not be generalizable to legal situations. One also can do simulation studies about how, for example, people reason about evidence, such as Thompson and Schumann’s studies of the prosecutor’s fallacy and the defense attorney’s fallacy,365 or Koehler’s experiments on how people reason about probability.366 Where the question is generalizability from the research participants, when the task is one requiring intellect and it is failed by undergraduates, one would think the failure results would generalize to lay juries. Other times, experiments can and have been done using jurors. In addition, one can do field studies on how juries reason about evidence. One example is a study of jury deliberations by Diamond and Vidmar in which they found, by recording the deliberations, that jurors did not talk about using insurance coverage to find deep pockets, but rather they talked about whether the plaintiff had insurance that would provide a collateral source for compensation.367 On the other hand, as our assessment of the hearsay studies indicates, sometimes it is very difficult to mirror

364 Lempert, supra note 2, at 1709 (citation omitted).
365 See generally Thompson & Schumann, supra note 221.
the legal situation in laboratory studies. The use of qualitative information and fireside inductions always will be important in assessing evidence law. It is dangerous to generalize about generalizability; the devil is in the details, or in the particular subject being studied.

Interdisciplinary scholarship on forensic science is a particularly promising (if difficult) field. Work on forensic science topics is more challenging than much of the work on law and psychology, because of the absence of overlap of legally relevant issues with issues that are already being studied in other academic disciplines. In many areas, forensic science expertise has developed without input from the academy or attention to the scientific method.\textsuperscript{368} This creates obvious obstacles to research, but also an unmatched opportunity to contribute by doing something that is not being done elsewhere. Law professors should become involved, and try to interest experts in other fields as well. We hope that the development of institutes and centers will start to address this problem.\textsuperscript{369} If courts heed Daubert’s call to screen expertise for scientific validity, the threat of exclusion of evidence should create an incentive for this type of work.

Scholarship on probability and proof, and on formal aids to drawing accurate inferences, will continue to be an important component of evidence scholarship. Some topics seem to have run (or over-run) their course, such as the blue bus and gatecrasher problems. Topics involving the study of inference and decision making have unrealized potential and will probably continue to be growth areas. For example, one can expect to see further efforts to upgrade Wigmorean charting and further work on computer-aided pretrial fact analysis. Bayes will live on, both as an aid in thinking about evidence law and, among Bayesian enthusiasts, as a tool in fact analysis. But, because the decisions of humans (jurors and judges) are not well explained or predicted by Bayesian approaches, watch for the further incorporation of cognitive science and the arrival of artificial intelligence into these projects—to the extent that these new sciences provide more accurate predictions of how judges will rule and how jurors will infer. At the same time, we are unlikely to see Bayes’ Theorem in trials themselves, where many items of evidence are involved and an expert would have to explain to the factfinder how to apply the theory.

\textsuperscript{368} See supra notes 146–163 and accompanying text.

\textsuperscript{369} For example, one development in progress is the creation of an “Institute for Studies in Science and Law,” which would bring together ideas for needed research, researchers who could carry out the research, and funding for the research. See Inst. for Studies in Sci. and Law, Purpose Statement (Sept. 11, 2005) (on file with the authors).
Interest in evidence and feminism will continue and grow to the same extent that an intellectual tradition regarded as distinctly feminist continues and grows. It may tend to concentrate on areas of evidence that are of special concern to women (sexual assault, obviously), but moving beyond those limited areas will be useful to both the scholars and to the law of evidence. There certainly is no reason why evidence law should not be as susceptible to continued feminist analysis as it is to analysis through the lens of any other field. In some ways, feminist legal analysis has the same advantage that traditional legal analysis had, namely, that it is an armchair activity that can be carried on by taking a set of ideas and using them as a lens with which to examine the law.

Law and economics scholarship on evidence will continue to be a presence in leading law reviews. It is possible that evidence law will not attract as much funding as in other areas of law and economics legal scholarship because it is not as obvious a fit with the political agenda of funders, but theoretical law and economics scholarship does not require any more funding than doctrinal scholarship, and elite journals are fond of it. Moreover, it need not be as time-consuming as empirical research, since the theorist can take a body of ideas and apply them to one legal topic after another.

Although we welcome interdisciplinary scholarship in general, we also see some unsettling elements. First, it sometimes exalts political and substantive concerns over the goal of accuracy. Second, it sometimes seeks or postulates implausible extrinsic effects.

The first of these concerns applies to feminist scholarship that, for example, argues for admission of battered woman’s syndrome expert testimony. Some of the writing in the field seems to regard the results

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370 Expressing this view, Richard Lempert writes:

[M]ajor funders of law and economics seem to have a pro-business, anti-regulation, and/or generally conservative political agenda they wish to promote. Although the Olin Foundation’s support of . . . intellectual activities that promote no coherent social agenda are contrary to my hypothesis, I still do not believe that evidence law will be a high priority for support among law and economics research funders. Not only does evidence law not deal with issues that are at the core of what funders hope to establish through economic research, but, as Posner points out, when the lamp of economics shines on evidence law, what it reveals is not necessarily compatible with conservative or big business political agendas. Posner, for example, argues that a law and economics perspective supports the institution of jury trial, a message that business supporters of law and economics are unlikely to relish.

Lempert, supra note 2, at 1637–38 (citations omitted).
that this admission would bring—favoring women defendants in murder cases, for example—as trumping concerns about the accuracy of the expertise admitted. And, to the extent that feminist scholars are influenced by post-modern epistemology, this might cause them to be fact-skeptics or to privilege anecdotal evidence—narratives—over more thorough, complete, critical, and systematic (in a word, scientific) evidence.

There is nothing illogical about preferring a substantive agenda to a procedural agenda. In the field of evidence, however, this posture is likely to be dangerous and self-defeating. First, there is no way to ensure that a politicized approach can be confined to feminist issues.\textsuperscript{371} Taking such an approach would require either openly subordinating the goal of accuracy or secretly implementing another goal while adhering to the rhetoric of pursuing the truth. Both approaches have disadvantages. It is unlikely that establishing a practice of secretly distorting evidence law in pursuit of substantive agendas will work in the long run to protect those whom society otherwise victimizes; after all, judges come from the dominant group and share its prejudices and interests. And, of course, there is a great danger of getting caught. The open pursuit of substantive goals also invites imitation in other areas, and sacrifices one important way in which evidence law can promote equality. An avowed and honest pursuit of accuracy has the advantage of cutting both ways, helping the powerful in one case and the disadvantaged in another.\textsuperscript{372}

Our concern about pursuing substantive effects also applies to law and economics scholarship, with the added twist that some of the substantive effects that have been posited seem implausible. With its strong interest in incentives, law and economics scholarship may be particul-

\textsuperscript{371} For a reluctant endorsement of the idea of recognizing that the acceptance of BWS is frankly political, accompanied by expression of wishes that this approach can be cabin ed, see Robert P. Mosteller, \textit{Syndromes and Politics in Criminal Trials and Evidence Law}, 46 Duke L.J. 461, 509–16 (1996). Professor Mosteller’s reservations about his own proposal are a good summary of our reasons for disagreeing with him. \textit{Id.}

\textsuperscript{372} For a prominent example: \textit{Daubert} as doctrine advances the interests of rich civil defendants as well as indigent criminal defendants in avoiding having junky science used against them in court. In applying \textit{Daubert}, judges may not be so evenhanded but instead scrutinize the offerings of civil plaintiffs more studiously than they scrutinize the offerings of government prosecutors; such judges are subject to serious criticism for their willful disregard of the law. \textit{See} D. Michael Risinger, \textit{Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?}, 64 Alb. L. Rev. 99, 104–12 (2000). Also, compare the reviews of case law relating to expert evidence usually associated with civil cases to that usually associated with criminal cases, in the various chapters of \textit{Modern Scientific Evidence}, \textit{supra} note 102.
larly vulnerable to this flaw. When your tool is a hammer, everything looks like a nail. As long as law and economics scholarship looks for the ways in which evidence rules shape everyday societal behavior, and disregards the truth-finding aspects of evidence rules, it risks overlooking core concerns in favor of chasing epiphenomena. While we do not agree that evidence-related law and economics is necessarily “common sense on stilts,” we do think that evidence scholars already are quite adept at imagining the possible effects of evidence rules without any training in economics. What is needed is empirical validation, not increasingly ingenious and speculative hypotheses about what the extrinsic effects of evidence rules might be. There are plenty of good hypotheses that are in need of testing, and inventing clever new ones that no one has thought of before should, all else equal, have lower priority than trying to validate plausible old ones.

We recognize that one cannot predict with assurance the future path of law and economics evidence scholarship based on what has appeared so far, and we have no desire to “strangle the infant in its crib.” Moreover, we recognize that, in other fields, predictions that law and economics scholarship would level off or die out have proven to be wrong, or at least premature. Nonetheless, we think that the scholarship so far too often has shown a proclivity toward having fun by tracing out the implications of models, regardless of what other sources of knowledge might say about the plausibility of the models or the deduced effects.

Interdisciplinary scholarship that has the objective of improving fact finding is an obvious boon for evidence scholars. In this category we place scholarship that deals with probability and proof, with human psychology and human reasoning, with the scientific method and forensic science. Interdisciplinary scholarship that pursues other objectives is a less obvious match. To the extent that feminist scholarship pursues substantive objectives, it would do better to direct those efforts at changing the substantive law, rather than at addressing problems indirectly by changing (and perhaps distorting) evidence

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373 Lempert, supra note 2, at 1619. Also see Posner’s response, supra note 2.
374 See Posner, supra note 2, at 1721.
375 See id. at 1714 (citing Owen M. Fiss, The Law Regained, 74 Cornell L. Rev. 245, 245 (1989) (“[L]aw and economics . . . seems to have peaked.”); Morton J. Horwitz, Law and Economics: Science or Politics?, 8 Hofstra L. Rev. 905, 905 (1980) (“I have the strong feeling that the economic analysis of law has 'peaked out' as the latest fad in legal scholarship.”)).
law. To the extent that law and economics scholarship posits a strong incentive effect of rules that purport merely to seek accuracy, few will find such arguments plausible. To the extent that it seeks this effect through the reform of evidence law, we worry that its influence will be harmful, leading evidence law away from the important mission of producing accurate verdicts.

Whether accuracy should be the primary objective of evidence law is a topic that could support an article twice as long as this one. Other general goals, such as satisfaction of the parties or catharsis, are at least plausible, and in particular contexts goals such as the protection of privacy or encouraging beneficial out-of-court conduct are paramount. But, as a general matter, it is hard to understand how a society can follow the rule of law in the absence of accurate fact finding. In pursuit of these purposes, one needs to have in mind goals for evidence law and evidence scholarship. We argue that the main, though certainly not the only, goal for evidence law is to promote accuracy in fact finding. Accuracy is essential to accomplishing the goals of substantive law. For the substantive law to work, the fact-finding mechanism must be accurate enough to enforce its prohibitions and dispense its rewards. While one should not be unduly optimistic about the goal of accuracy, one should also avoid extreme cynicism. There is no good reason to believe that the goal of accuracy ultimately will be undermined by the self-serving conduct of actors in the system. After all, those powerful enough to create the substantive law are motivated to make sure that it is enforced effectively, so accuracy in fact finding should in general have a powerful constituency. Any goal of accomplishing something else (such as pretending to be accurate while not actually being so) is likely to be self-defeating because the deception inevitably will be discovered.

It is a heady task to make prescriptive statements about the direction of evidence scholarship, because there is so little general agreement about what constitutes good scholarship. The dispute about the use of fiction in scholarship in other fields is only one example of the

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376 If the goal is to provide an escape from criminal liability for women who kill their abusers, the better way to accomplish that is to change the substantive law of self defense to insulate such persons from liability in appropriately defined circumstances, not to squeeze questionable expertise in through the evidence rules. Doing that weakens the evidence rules, invites backfire (as similarly questionable expertise is used against women), and might offer only temporary protection (as the experts change their own views over time). See David L. Faigman, Legal Alchemy: The Use and Misuse of Science in the Law 74 (1999); Faigman, supra note 268, at 643–47.

377 See generally Nesson, supra note 233.
divergence of views. There is little agreement upon basic premises, such as whether scholarship should be useful. Evidence scholarship has many purposes, but surely one worthwhile purpose is to improve the accuracy of verdicts. Traditional doctrinal scholarship aimed at this goal by improving evidence law, for example by eliminating anomalies and obstacles to rational proof. The “New Evidence Scholarship” on probability and proof represented a turn from reasoning about evidence law to reasoning about evidence facts. With William Twining’s influential approval, scholars became interested in how formal methods might be used as an aid in drawing inferences and finding facts. We think that it is even more exciting to contemplate scholarship—like that done on eyewitness memory and on forensic science—that aims at improving the evidence facts themselves by influencing the way in which evidence is generated.


379 “[T]he scholar seeks knowledge for its own sake, not for some further purpose, although the knowledge he acquires may be instrumentally useful for other ends.” Anthony T. Kronman, Foreword: Legal Scholarship and Moral Education, 90 Yale L.J. 955, 967–68 (1981).


Leaving No Child Behind (Except in States That Don’t Do As We Say): Connecticut’s Challenge to the Federal Government’s Power to Control State Education Policy Through the Spending Clause

Abstract: The No Child Left Behind Act of 2001 (“NCLB”) conditions the states’ receipt of federal education funds on, among other things, the creation of testing schemes for elementary school students and the posting of test results. Although NCLB threatens the states’ constitutional power to set education policy, two provisions of the law could potentially alleviate this threat: (1) an “unfunded mandates” provision prohibiting federal officers from requiring the states to spend funds not provided by NCLB, and (2) a provision allowing the U.S. Secretary of Education (the “Secretary”) to waive provisions of NCLB at a state’s request. These provisions, however, have not circumscribed the federal government’s role to the satisfaction of some states, prompting Connecticut, a state whose own policies conflict with NCLB’s testing requirements, to file the first state NCLB lawsuit against the federal government. This Note argues that Connecticut’s claims that the Secretary’s administration of these two provisions violates the Spending Clause are valid. This Note then focuses on the Spending Clause’s prohibition of conditions that require a state to violate any other provision of the Constitution, arguing that NCLB, as it is currently administered by the Secretary, may force Connecticut and other states to violate the Equal Protection Clause.

Introduction

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act of 2001 (“NCLB” or the “Act”) into law at a high school in Hamilton, Ohio. The President sat at a teacher’s desk amongst a group of students and assured the audience that “the Federal Government will not micromanage how schools are run. We be-

lieve strongly—we believe strongly the best path to education reform is to trust the local people.”

The No Child Left Behind Act of 2001 was enacted pursuant to Congress’s Spending Clause power; it conditions the states’ receipt of federal education funds on compliance with certain mandates. Two of the most prominent mandates require states that accept the funds to develop and implement testing schemes, and to make those test results publicly available. The states and local schools are free to fashion their own curricula and to determine what academic content to include in their tests, but all such choices are made under the supervisory eye of the U.S. Department of Education (the “Department”).

When NCLB became law, the President, Congress, and the U.S. Secretary of Education (the “Secretary”) all emphasized that the Act allows states the necessary flexibility to tailor local policies to local problems. Nevertheless, some states disagree. Although the Secretary may waive many of the Act’s requirements when states request exemptions, the Secretary is not required to honor those requests and has in fact denied many.

Remarks, supra note 1, at 25.


For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary [of Education] a plan, developed by the State educational agency . . . that satisfies the requirements of this section and that is coordinated with other programs under this [Act and other education laws].

Id. § 6311(a)(1).

6 Id. § 6301 (“[The purpose of this title] can be accomplished by . . . providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance . . . .”); Remarks, supra note 1, at 25 (“[S]chools not only have the responsibility to improve; they now have the freedom to improve.”); ED, Desktop Reference, supra note 3, at 3 (“This historic reform gives states and school districts unprecedented flexibility in how they spend their education dollars, in return for setting standards for student achievement and holding students and educators accountable for results.”).

See infra notes 131–135 and accompanying text. See generally Caroline Hendrie, NCLB Faces Hurdles in the Courts, Educ. Week, May 4, 2005, at 1 (discussing states that have considered suing the federal government over NCLB); Salzman, supra note 4.

8 See 20 U.S.C. § 7861(a); infra notes 148–160 and accompanying text.
NCLB erects a federal regulatory framework over education, despite a general understanding that the power to set education policy has traditionally been reserved to the states. Indeed, when the U.S. Supreme Court rejected an equal protection challenge to state school funding systems in the 1973 case of *San Antonio Independent School District v. Rodriguez*, the Court treaded cautiously in large part because it recognized the value of local control over public schools.

Perhaps cognizant of the implications that NCLB could have on the balance of power between the federal government and the states, Congress included a so-called “unfunded mandates” provision in the Act. Section 7907(a) provides that nothing in the Act shall be construed to authorize an officer of the federal government to mandate, direct, or control a state or a state’s resources, or to mandate any state to spend funds not paid for under the Act.

Despite this provision, Congress has not appropriated sufficient funds for states to comply fully with NCLB’s requirements. Connecticut, for example, claims that it lacks the $41.6 million necessary to comply with the Act’s requirement that testing be conducted every year for elementary school students. Based largely on this lack of sufficient funding, in August 2005 Connecticut filed a lawsuit, *Con-*

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12 Id. The unfunded mandates provision was carried over from three earlier education statutes enacted during the 1990s. Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 20, Pontiac v. Spellings, No. 05-CV-71535 (E.D. Mich. Aug. 5, 2005). The sponsor of the provision in the law in which it originally appeared, the Goals 2000: Educate America Act of 1993, explained that the provision was meant to “put to rest the concern that we are going to dictate from the Federal level that somewhere, some way, the local and State Governments will find money for our dictates.” 139 Cong. Rec. H7741 (1993) (statement of Rep. Goodling).

13 See Nat’l Conference of State Legislatures, Task Force on No Child Left Behind Final Report, at ix–x (2005), available at http://www.ncsl.org/programs/educ/nclb_report.htm (noting that at least a dozen studies have been conducted to estimate how much it costs the states to comply with NCLB’s administrative requirements, and that in the best case scenario federal funding marginally covers these costs).

necticut v. Spellings, against the Secretary over the Secretary’s refusal to waive the mandates that the state cannot afford to implement.\textsuperscript{15}

It was not only lack of funding, however, that led Connecticut to challenge NCLB in court.\textsuperscript{16} The lawsuit also reveals a clash between two different approaches to education—the federal government’s and Connecticut’s—and questions the extent to which Congress can use its power under the Spending Clause to persuade the states to follow its policies by offering federal funds.\textsuperscript{17} Thus, in addition to challenging the Secretary’s authority to withdraw Connecticut’s education funding for noncompliance when the state does not receive sufficient funds to comply, Connecticut also alleges that the Secretary is unconstitutionally coercing Connecticut into following federal policy.\textsuperscript{18}

This notion of “unconstitutional coercion” comes from the U.S. Supreme Court’s Spending Clause jurisprudence, most clearly enunciated in the 1987 case of South Dakota v. Dole, under which the Court generally has upheld federal spending legislation so long as it complies with five relatively loose restrictions.\textsuperscript{19} First, Congress’s exercise of the spending power must be in pursuit of the general welfare.\textsuperscript{20} Second, Congress must condition the states’ receipt of federal funds unambiguously.\textsuperscript{21} Third, the conditions imposed must be reasonably related to a national interest.\textsuperscript{22} Fourth, the conditions imposed must not violate any other constitutional provision.\textsuperscript{23} And finally, Congress may not condition the states’ receipt of federal funds in a coercive way.\textsuperscript{24}

Although challenges under Dole have almost always failed, in the 1997 case of Virginia Department of Education v. Riley the U.S. Court of Appeals for the Fourth Circuit struck down a funding condition on the grounds of Dole’s second ambiguity restriction, and suggested that the fifth coercion restriction might apply as well.\textsuperscript{25} Significantly, Riley

\textsuperscript{17} See Second Amended Complaint, \textit{supra} note 16, at 42–43; Salzman, \textit{supra} note 4.
\textsuperscript{18} Second Amended Complaint, \textit{supra} note 16, at 42–43.
\textsuperscript{20} Dole, 483 U.S. at 207.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 207–08.
\textsuperscript{23} \textit{Id.} at 208.
\textsuperscript{24} \textit{Id.} at 211.
was an education case. Connecticut’s lawsuit presents an even more persuasive challenge to Congress’s use of the Spending Clause, both generally and to advance education policy. For decades before Congress seized the policy reins, education reformers worked toward education equity on the state level. Although these reformers have had only limited success, Rodriguez implies that their ability to experiment with different approaches—in contrast to NCLB’s one-size-fits-all approach—is imperative and, perhaps, constitutionally required.

This Note uses Connecticut v. Spellings in two respects: (1) as a vehicle for analyzing the constitutionality of NCLB under Dole, and (2) as an illustration of the extent to which the federal government—through the U.S. Department of Education—has become so entangled in state decision making on education that the local control celebrated in Rodriguez is slipping away. Part I traces early education reforms, starting with the failed attempt to constitutionalize reform in Rodriguez and ending with state court and legislative efforts. Part II details the federal government’s evolving role in education reform, culminating in the enactment of NCLB, and also recounts the major criticisms of the Act. Part III describes Connecticut’s struggle to implement NCLB’s requirements, including its lawsuit against the Secretary. To set the stage for Connecticut’s Spending Clause claims, Part IV traces the U.S. Supreme Court’s Spending Clause jurisprudence over the last seventy years. This Part also notes how the federal courts of appeals, and particularly the Riley court, have handled challenges to federal spending legislation. Part V applies Dole to Connecticut’s challenge. Finally, Part VI focuses on the fourth Dole restriction.

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26 See Riley, 106 F.3d at 560–61. Riley involved a challenge to the Secretary’s authority under the Individuals with Disabilities in Education Act. Id. at 560.
27 See generally Second Amended Complaint, supra note 16.
28 See infra notes 58–89 and accompanying text.
29 See Rodriguez, 411 U.S. at 44, 49–50; see also Lopez, 514 U.S. at 565–66 (expressing concern that if Congress’s power pursuant to the Commerce Clause were to become too broad, Congress would be able to intrude upon the states’ education power by regulating each and every aspect of local schools).
30 See infra notes 240–319 and accompanying text.
31 See infra notes 39–89 and accompanying text.
32 See infra notes 90–130 and accompanying text.
33 See infra notes 131–170 and accompanying text.
34 See infra notes 171–218, 231–239 and accompanying text.
35 See infra notes 219–230 and accompanying text.
36 See infra notes 240–279 and accompanying text.
37 See infra notes 280–287 and accompanying text.
quirements, the Secretary is putting Connecticut at risk of violating the Equal Protection Clause as applied in Rodriguez because Connecticut does not have sufficient funds to implement the NCLB requirements and those requirements also clash with the state’s policies. 38

I. EARLY ATTEMPTS AT EDUCATION REFORM: THE SUPREME COURT SENDS REFORMERS TO THE STATES

A. Reform Attempts in the Courts: School Funding Lawsuits

Almost thirty years before the No Child Left Behind Act of 2001 was signed into law, the U.S. Supreme Court turned education reformers away from the federal courts with its decision in San Antonio Independent School District v. Rodriguez, applauding local control over school districts for the diversity of approaches to education it allows. 39 Accordingly, reformers shifted to state courts with their school funding claims, where they were more favorably received. 40 Unfortunately, the courts’ institutional structure as a non-political branch of government inhibited their efforts to effect significant change in education policy. 41


In 1973, the U.S. Supreme Court held in Rodriguez that Texas’s school financing system, which had a disproportionate impact on public school students in low-property-wealth districts in the state, did not violate the Equal Protection Clause of the Fourteenth Amendment. 42 The Court specifically found that wealth, in and of itself, is not a suspect classification entitled to strict scrutiny upon judicial review. 43 The Court further found that education is not a fundamental

38 See infra notes 288–319 and accompanying text.
40 See infra notes 58–63 and accompanying text.
41 See infra notes 64–78 and accompanying text.
42 411 U.S. at 55.
43 Id. at 22–25; see infra notes 46–50 and accompanying text.
right afforded explicit protection under the U.S. Constitution. Thus, applying rational basis review to the state’s school financing system, the Court held that the system did not violate the Equal Protection Clause because it reasonably furthered Texas’s legitimate interest in retaining local control over the state’s schools.

In analyzing whether wealth is a suspect classification under the Equal Protection Clause, the Court refused to accept the district court’s reasoning for finding wealth to be a suspect classification—that because, under traditional school financing systems, some poorer students receive less expensive education than other more affluent students, these systems discriminate on the basis of wealth. This finding, the Court reasoned, ignored two threshold questions: (1) whether it made a difference for purposes of consideration under the U.S. Constitution that the class of disadvantaged “poor” could not be identified or defined in customary equal protection terms; and (2) whether the relative—rather than absolute—nature of the deprivation asserted by the respondents was of significant consequence. The Court answered both of these questions in the affirmative.

With regard to whether poor students living in low-property-wealth districts constituted a class cognizable in equal protection terms, the Court refused to extend strict scrutiny to such a large, diverse, and amorphous class with none of the traditional indicia of suspectness.

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44 See Rodriguez, 411 U.S. at 35. The Court rejected the respondents’ argument that education is a fundamental right under the U.S. Constitution because, without an education, citizens cannot fully realize other, explicitly protected rights, such as the First Amendment freedoms. Id. at 35–36; cf. id. at 62–63 (Brennan, J., dissenting) (disagreeing with the Court’s assertion that a right may only be deemed “fundamental” if it is explicitly or implicitly guaranteed by the Constitution, and arguing instead that the “fundamentality” of any given right is, “in large measure, a function of the right’s importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed”). A complete discussion of the Court’s holding that education is not a fundamental right is beyond the scope of this Note. For further discussion, see Victoria J. Dodd, A Critique of the Bush Education Proposal, 53 ADMIN. L. REV. 851, 863–67 (2001) (arguing that history, precedent, and policy prescribe that the Supreme Court should overrule Rodriguez and establish a fundamental right to education).

45 See Rodriguez, 411 U.S. at 55.
46 See id. at 19.
47 Id.
48 Id. at 25.
49 Id. at 28 (“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”). The respondents offered two other ways of defining the affected class: (1) the comparative personal wealth of the students’ families, and (2) district wealth. Id. at
The Court was particularly reluctant to apply strict scrutiny because the respondents had not provided sufficient proof that the poorest families necessarily resided in the districts with the lowest levels of property wealth. With regard to whether an absolute deprivation of education was required, the Court reasoned that the Equal Protection Clause does not require absolute equality; nor, in light of the infinite variables that affect the education process, could any financing system assure such equality except in the most relative sense. The Court also questioned whether quality of education could even be determined by the amount of money expended for it.

In holding that poor students were not a suspect class and that Texas’s interest in retaining local control over school districts survived rational basis review, the Court stressed the value in local control. Stating that pluralism allows schools to experiment more freely and citizens to participate more directly, the Court emphasized that no area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Since Rodriguez, the Supreme Court has not closed its doors to education equal protection cases completely. In the 1982 case of Plyler v. Doe, for example, the Court held that Texas could not absolutely deny a public education to undocumented immigrants without violating the Equal Protection Clause. Still, such decisions have gen-

25, 27. The Court rejected both of these alternative classifications. Id. at 27–28. With regard to comparative personal wealth, the Court held that even if the plaintiffs’ proof supported the allegation that the less wealthy received less money for education, which it did not, the Court would still be reluctant to grant suspect class status to a class so large and diverse. Id. at 26. With regard to district wealth, the Court refused to extend strict scrutiny to a class defined merely by the common factor of residence in districts that happen to have less property wealth than other districts. Id. at 28.

50 See Rodriguez, 411 U.S. at 23.
51 Id. at 23–24.
52 Id. at 23, 24 & n.56.
53 See id. at 49–53. For example, the Court noted: “[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.” Id. at 43. Acknowledging that almost every other state used a school financing system similar to Texas’s system, the Court further explained that “it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.” Id. at 44.
54 Id. at 50.
56 See id.
nerally been limited to absolute denials of education; they have not been extended to educational inequity.57

2. State Courts: Reformers Find New Hope with State Constitutions and Statutes

With the federal courts largely closed off to educational inequity claims, parents, students, and community groups turned to the state courts and other theories to challenge school funding schemes and state education legislation having a disparate impact on minority and low-income populations.58 The highest courts of most states have decided at least one school funding challenge, with many state supreme courts hearing protracted serial litigation.59 Unlike the Rodriguez Court, most state courts generally have been receptive to such cases.60 Courts have interpreted state constitutional guarantees of public education as guarantees of educational opportunity, not of equal dollar amounts per student.61 Still, many plaintiffs have successfully argued that disparities in property value among local school districts have resulted in inequitable funding levels, and thus inequitable distribution of resources, among districts.62 Plaintiffs have alleged state constitution equal protection violations, state constitution education article violations, violations of Title VI of the Civil


58 See Dayton & Dupre, supra note 39, at 2364.


60 See, e.g., McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981); Rose, 790 S.W.2d at 209; McDuffy, 615 N.E.2d at 519.


62 See McDaniel, 285 S.E.2d at 157 (“[W]e know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs’ claim of constitutional infringement an abdication of our constitutional duties.” (quoting Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 443 N.Y.S.2d 843, 854 (App. Div. 1981), modified, 439 N.E.2d 359 (N.Y. 1982))); Dayton & Dupre, supra note 39, at 2377. But see Ex parte James, 836 So. 2d 813, 819 ( Ala. 2002) (“[W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.”).
Rights Act of 1964, and “accountability” violations under recent state legislative reform efforts.\(^{63}\)

The decisions handed down by the courts have had sweeping consequences for children, parents, schools, and taxpayers.\(^{64}\) School funding litigation has prompted major funding changes, including tax increases and the redirection of resources throughout decades of serial litigation.\(^{65}\) Although courts often have granted broad deference to legislative policies on taxation and school funding, many courts have nonetheless seen it as their duty to interpret provisions of state constitutions and adjudicate the constitutionality of school finance systems.\(^{66}\)

Despite these sweeping consequences, however, plaintiffs’ victories in the state courts have not led to widespread—or even limited—changes in educational inequities.\(^{67}\) Mere declarations that school funding systems are unconstitutional have not substantially furthered education reform; instead, such declarations have been followed by little progress.\(^{68}\) After several decades of continuous court involve-

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\(^{64}\) Dayton & Dupre, supra note 39, at 2397.

\(^{65}\) Id. at 2398. For example, the Kentucky Supreme Court made this declaration in Rose v. Council for Better Education:

>This decision applies to the entire sweep of the system—all parts and parcels. This decision applies to the statutes creating, implementing, and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.

790 S.W.2d at 215.

\(^{66}\) Compare Lujan, 649 P.2d at 1018 (recognizing the need for judicial deference to the legislature), and McDaniel, 285 S.E.2d at 165 (same), with Rose, 790 S.W.2d at 209 (recognizing a judicial duty to adjudicate education funding disputes), and McDuffy, 615 N.E.2d at 519 (same).

\(^{67}\) See Dayton & Dupre, supra note 39, at 2405–06; John Dayton et al., Education Finance Litigation: A Review of Recent State High Court Decisions and Their Likely Impact on Future Litigation, 186 EDUC. L. REP. 1, 1 (2004) (noting that of the thirty-six states that have issued decisions on the merits of school funding suits, nineteen have upheld the funding system while seventeen have declared them unconstitutional).

\(^{68}\) Dayton & Dupre, supra note 39, at 2406 (observing that many states are closer to fiscal equity in education funding without litigation than those states whose courts have been involved in serial funding litigation).
ment in education “reform,” funding cases demonstrate that reform is difficult to achieve without political will.\(^{69}\)

The courts’ institutional structure prevents them from determining—much less implementing—effective solutions to school funding challenges.\(^{70}\) One critic has commented that judicial restraint limits state courts in several ways.\(^{71}\) First, it prevents the courts from “inventing” rights that do not appear explicitly in state constitutions.\(^{72}\) Although all state constitutions contain an education clause mandating some level of free public education, the level of duty imposed on the legislative and executive branches varies from state to state and is rarely clear.\(^{73}\) Moreover, when state constitutions do, either explicitly or implicitly, require the state to provide a quality education, judicial restraint causes courts to pause before defining and enforcing that standard.\(^{74}\) Whether the courts view themselves as lacking the expertise necessary to develop a standard, or view themselves as incapable of enforcing a standard, they typically have deferred to the political branches in this area.\(^{75}\) Even where courts determined some standard and found that the state school finance system violated it, they have been reluctant to order anything other than limited remedies.\(^{76}\)

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\(^{69}\) See id.; see also James S. Liebman & Charles F. Sabel, A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 185 (2003) (noting that rather than leading to equalization in funding among school districts, school funding lawsuits have often led to reduced overall spending on schools, as well as acrimony between legislatures and courts).


\(^{71}\) See id. at 482–84.

\(^{72}\) See id. at 482.

\(^{73}\) Compare Mass. Const. pt. 2, ch. 5, § 2 (mandating that a public education system be established), and N.Y. Const. art. XI, § 1 (same), with Ky. Const. § 183 (mandating a level of quality for public education), and N.J. Const. art. VIII, § 4 (same).

\(^{74}\) See Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (“What constitutes a ‘high quality’ of education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards.”).

\(^{75}\) See id.; Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (holding that the state constitution required a minimum quality of education, but defining the quality standard as the minimum standard for accreditation already used by the state board of education); see also George D. Brown, Binding Advisory Opinions: A Federal Court’s Perspective on the State School Finance Decisions, 35 B.C. L. REV. 543, 546 (1994) (arguing that state judicial decisions in the education reform arena resemble a set of guidelines for the next, legislative step in the process, unlike federal judicial decisions, which issue judgments designed to affect the rights and duties of the litigants before them).

\(^{76}\) Thro, supra note 70, at 483–84; see Brown, supra note 75, at 549.
Because courts continue to defer to the legislative and executive branches, it is unlikely that school funding litigation in state courts could ever lead to meaningful and lasting education reform; indeed, the U.S. Supreme Court in *Rodriguez* questioned whether school funding is even related to student achievement at all. Nevertheless, this type of litigation continues to wend its way through the courts, while high-property-wealth districts retain or even increase their quality of education and low-property-wealth districts fail to generate the popular and legislative support they need to overcome the political influence of high-property-wealth districts.

B. Reform Attempts in the State Legislatures: Education Reform Laws

In the meantime, some scholars have argued that the key to a lasting resolution to the school funding problem is to persuade the voting public that making the goal of adequate education for all children a reality is consistent with their own self-interest. In fact, rather than continuing to bring school funding lawsuits, they argue, plaintiffs’ resources would be better spent on lobbying the electorate and the legislatures to eliminate educational disparities among districts—not because a court finds them unconstitutional, but because such disparities are harmful to the whole community. School funding litigation can be a useful tool for bringing reform issues to the public’s attention, but

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77 See *Rodriguez*, 411 U.S. at 24 n.56, 47 n.101; *Edgar*, 672 N.E.2d at 1191 (deferring to the state legislature); *Skeen*, 505 N.W.2d at 318 (deferring to the state board of education); *Thro*, supra note 70, at 484 (arguing that judicial restraint prevents meaningful education reform). One scholar has argued, however, that courts recently have been crafting a new and potentially effective role for themselves in education reform cases, by fashioning legal standards that allow them to keep an eye on the political branches and to intervene by exercising the “veto” of judicial review when they choose to do so. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 Hastings L.J. 1077, 1230 (2004).


79 *Dayton & Dupre*, supra note 39, at 2410.

80 See id. Emerging education reforms such as vouchers and charter schools may impede efforts to persuade the public, however, if these reforms reduce the public’s stake in improving the state of public education. See id. at 2411.
litigation alone is insufficient to bring about substantive, lasting change.\textsuperscript{81} In order to achieve a long-term leveling of resources across districts and an adequate level of education for all students, these scholars argue, plaintiffs must shift from the courts to the political process, and attempt to build a coalition for school funding reform.\textsuperscript{82}

Indeed, some education reformers have done just that, and many state legislatures have responded by mounting large-scale reforms of their school finance systems.\textsuperscript{83} Some state legislatures have assumed a larger role not only in regulating and contributing to local school budgets, but also in articulating clear policy goals for public education, a task that previously had been left to the local districts.\textsuperscript{84} To leave some measure of local control intact, states have linked policy areas like teacher education, teacher evaluation, academic standards and testing, and other accountability measures to incentives and sanctions, rather than mandating such policy choices.\textsuperscript{85} Nonetheless, accountability reforms have somewhat reduced the discretionary decision-making authority of local school boards and administrators.\textsuperscript{86}

Unfortunately, these recent attempts at school reform by state legislatures have not substantially affected educational inequities.\textsuperscript{87} Some scholars have argued that state reform efforts have failed in this respect because they do not affect power relationships or fundamentally change schools’ accustomed practices and organization.\textsuperscript{88} Nevertheless, the \textit{Rodriguez} Court implied that the opportunities for experimentation and diversity of approaches that local control provides outweigh such negatives.\textsuperscript{89}

\begin{footnotes}
\item[81] See id.
\item[82] See id.
\item[84] See id. at 5.
\item[87] See Rebell & Hughes, \textit{supra} note 86, at 103.
\item[88] Id. at 104.
\item[89] See 411 U.S. at 49–53.
\end{footnotes}
II. Recent Education Reforms: The Federal Government’s Evolving Role

In the face of only somewhat successful state attempts to achieve educational equity, Congress has increasingly asserted itself in the education policy arena in recent decades.90 More than thirty-five years before the federal government extended its reach into the depths of state and local education policy with NCLB, Congress passed the Elementary and Secondary Education Act of 1965 ("ESEA").91 With Title I of the ESEA, Congress intended to support the states in educating impoverished, underachieving students.92 Over the following years, as the courts heard school funding litigation and the state legislatures fashioned education reform legislation, the federal government’s supportive role evolved into a more dominant one.93 Ultimately, NCLB was enacted in January 2002.94 The President touted the Act as a bargain of “flexibility for accountability” between the federal government and the states.95 Nonetheless, by enacting a comprehensive regulatory scheme, Congress and the President have sent a message to the states that the federal policy is the right policy, to which state policies will take a back seat.96 Education reformers, scholars, teachers, and parents disagree, however, about whether NCLB is the path to educational equity.97

A. Early Federal Reforms: Title I of the Elementary and Secondary Education Act of 1965

The federal government’s role in education policy largely began with Title I of the Elementary and Secondary Education Act of 1965.98

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92 See infra notes 98–102 and accompanying text.
93 See infra notes 102–107 and accompanying text.
94 See infra notes 108–110 and accompanying text.
97 See infra notes 119–130 and accompanying text.
Title I provided federal funds to local school districts with high concentrations of children from low-income families.\textsuperscript{99} The law operated narrowly to support the states in paying the extra costs of educating “educationally disadvantaged” students.\textsuperscript{100} Congress later revised ESEA with the Improving America’s Schools Act of 1994.\textsuperscript{101} With this revision, Congress shifted its focus, requiring the states to hold disadvantaged students benefiting from Title I programs to the same standards as all other students.\textsuperscript{102}

In recent years, federal influence over education policy has grown.\textsuperscript{103} After the National Commission on Excellence in Education examined the quality of education at the Secretary’s direction and released its report, \textit{A Nation at Risk}, in 1983, the federal government focused its attention more sharply on the discouraging state of public education across the country.\textsuperscript{104} As better research data regarding the state of education became available, there were more opportunities for national pronouncements of education policy.\textsuperscript{105} Presidential administrations and Congresses have seized upon these opportunities

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\textsuperscript{100} IRP, supra note 99, at 2; see 146 Cong. Rec. S3232–33 (2000) (statement of Sen. Gregg) (describing how Title I has operated in the past, and how NCLB improves Title I).


\textsuperscript{103} See Conley, supra note 83, at 26–30.


\textsuperscript{105} See Conley, supra note 83, at 26.
enthusiastically. This more emphatic federal role is reflected in the reauthorized Elementary and Secondary Education Act of 1965, known as the No Child Left Behind Act of 2001.

B. A More Comprehensive Role: The No Child Left Behind Act of 2001

The No Child Left Behind Act of 2001 was initiated by President George W. Bush and passed with overwhelming bipartisan support in Congress. The Act embodies four key principles: stronger accountability for results, greater flexibility for school districts and schools in the use of federal funds, more choices for parents of children from disadvantaged backgrounds, and an emphasis on teaching methods that have been demonstrated to work. Unlike prior versions of Title I of ESEA, NCLB applies to all public school students, not only the disadvantaged.

1. Overview of NCLB

NCLB conditions the receipt of certain education funds on the states’ compliance with federal mandates. These mandates particularly emphasize state, district, and school accountability for the education of their children. For example, each state must develop statewide standards for reading, mathematics, and science of challenging academic content and achievement that apply to all children. In order to measure students’ achievement of these standards, the states must design and implement annual tests. States must make the test results available to the public annually, disaggregated within every state, district, and school by gender, major racial and ethnic groups, English proficiency, migrant status, disability, and status as economically disadvantaged, so that interested parties can compare results among these groups. By the end of the 2013–2014 school year, all

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106 See id.
students in each group must meet proficiency as defined by the state’s standards and measured by performance on its tests.\textsuperscript{116}

The Act grants the Secretary the authority to waive its statutory and regulatory requirements.\textsuperscript{117} A state educational agency requesting a waiver must, among other things, describe how the waiving of a requirement will (1) improve the academic achievement of students, and (2) improve the quality of instruction for students, and (2) improve the academic achievement of students.\textsuperscript{118}

2. Criticisms of NCLB

NCLB’s stated purpose is to raise expectations for low-income students and to achieve educational equity.\textsuperscript{119} Opinions are mixed, however, as to whether NCLB achieves a substantial step toward this goal.\textsuperscript{120} Education advocates and members of Congress have attacked NCLB’s focus on testing as the method for measuring schools’ progress, claiming that testing narrows the curriculum by prompting teachers to “teach to the test,” taking time away from other valuable academic and social activities.\textsuperscript{121} NCLB also provides incentives for states to create

\textsuperscript{116} See id. § 6311(b)(2)(F).
\textsuperscript{117} Id. § 7861(a).
\textsuperscript{119} Id. § 6301 (“[The purpose of this Act can be accomplished by] ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement . . . .”); see 149 Cong. Rec. S194 (2003) (statement of Sen. Gregg) (“[T]he purpose of this bill is to make sure kids learn. These people who put these plans together are excited about the fact that they now have a law they can follow which allows them to make sure that kids do learn.”).
\textsuperscript{120} See infra notes 121–124 and accompanying text. See generally Pascal D. Forgione, Jr., \textit{One Language: With Standards Comes a Requirement to Reduce Variability in the Quality of Instruction, QUALITY COUNTS AT 10: A DECADE OF STANDARDS-BASED EDUC.}, Jan. 2006, at 62, available at http://www.edweek.org/ew/articles/2006/01/05/17forgione.h25.html (arguing that standards of the type encompassed in NCLB are a necessary first step to closing the achievement gap); Amy M. Reichbach, Note, \textit{The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education}, 45 B.C. L. Rev. 667 (2004) (arguing that although the federal government has failed to enforce NCLB adequately and the states have failed to comply fully with the Act’s requirements, educational advocates should try to enforce the Act’s policies by bringing private lawsuits under third-party beneficiary theory). For example, NCLB has divided leading national civil rights groups: many groups support the Act’s efforts to close achievement gaps and to hold schools accountable for student progress, but some groups argue that the Act’s sanctions stigmatize struggling districts without providing them with the necessary resources to improve. Karla Scoon Reid, \textit{Civil Rights Groups Split over NCLB}, Educ. Week, Aug. 31, 2005, at 1.
lower standards and easier tests so that it is easier to show progress, and for states to allow underachieving students simply to drop out of school.\textsuperscript{122} Moreover, although better student performance in core education areas is desirable, comparisons between states are difficult because NCLB allows states to develop and use their own testing instruments.\textsuperscript{123} Finally, some commentators argue that the federal government must commit more money to implementing NCLB if the law is to be successful.\textsuperscript{124}

Although NCLB advances many of the same policy goals as the states’ education reform legislation, state and local governments necc-

\textsuperscript{122} See No Child Left Behind?, NEA Today, May 2003, at 20, 22 (arguing that NCLB provides schools with little incentive to prevent at-risk students from leaving school altogether); Press Release, Comm. on Educ. & the Workforce, Boehner Backs Secretary Paige’s Strong Stand on State Education Standards (Oct. 23, 2002), available at http://edworkforce.house.gov/press/press107/paigeletter102302.htm (praising then-U.S. Secretary of Education Rod Paige for taking a hard stance against those states that had lowered their standards to hide low achievement levels in their schools); see also Thomas Toch, Margins of Error: The Education Testing Industry in the No Child Left Behind Era 20 (2006), available at http://www.educationsector.org/usr_doc/Margins_of_Error.pdf (suggesting that the federal government should, among other things, support research on testing and create an independent national testing oversight agency).


\textsuperscript{124} See, e.g., Dodd, supra note 44, at 853; No Child Left Behind?, supra note 122, at 22.
essarily give up some control over their own public education systems under the Act.\textsuperscript{125} This loss of control, combined with insufficient funding of the Act, has led some to complain that the federal government is violating NCLB’s own “unfunded mandates” provision.\textsuperscript{126} The states must, among other things, develop testing systems and academic standards, but the federal government has not provided the states with sufficient funds to do so.\textsuperscript{127} The federal government has rebuked such claims, but complaints have not abated.\textsuperscript{128}

Ultimately, scholars, educators, and legislators disagree over what policies and approaches will best lead to educational equity through-

\textsuperscript{125} See Conley, supra note 83, at 28–29.
\textsuperscript{126} See 20 U.S.C. § 7907(a) (Supp. III 2003); 149 Cong. Rec. S100 (2003) (statement of Sen. Durbin) (“When it comes down to it, you have the Bush administration on the one hand posing for pictures and shaking hands with school principals across America and with the other hand reaching into their pockets and pulling out their State funds to fund his unfunded mandate under No Child Left Behind.”). \textit{See generally} Brief for the American Ass’n of School Administrators as Amici Curiae Supporting Petitioners, Sch. Dist. of the City of Pontiac v. Spellings, No. 05–2708 (6th Cir. Mar. 31, 2006) (urging the court to interpret NCLB’s unfunded mandates provision to mean that the federal government may not require the states to spend their own funds to comply with NCLB); Brief for Joe Baca, Jr., California State Assemblyman et al. as Amici Curiae Supporting Petitioners, \textit{Pontiac}, No. 05–2708 (6th Cir. Mar. 31, 2006) (same); Brief for Connecticut et al. as Amici Curiae Supporting Petitioners, \textit{Pontiac}, No. 05–2708 (6th Cir. Mar. 31, 2006) (same); Brief for Edward G. Rendell, Governor of Pennsylvania as Amicus Curiae Supporting Petitioners, No. 05–2708 (6th Cir. Mar. 31, 2006) (same); \textit{infra} note 135. The unfunded mandates provision states:

\begin{quote}
Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate any State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.
\end{quote}

\textit{§} 7907(a).

\textsuperscript{127} See 147 Cong. Rec. E1143 (2001) (statement of Rep. Rodriguez) (“In the name of accountability, more testing will be mandated with little financial support from the federal government.”); \textit{supra} notes 13–14 and accompanying text.

\textsuperscript{128} See Colo. Ass’n of Sch. Executives et al., \textit{No Child Left Behind Position Paper} 8 (2005), \textit{available} at \url{http://www.co-case.org/associations/779/files/White20Paper%20on%20NCLB%204.5.05.pdf} (arguing that schools should not be required to comply with NCLB’s requirements until the Act is fully funded); \textit{No Child Left Behind?}, \textit{supra} note 122, at 22 (noting that NCLB funding for 2003 fell $8 billion short of authorized levels); \textit{What’s a Promise Worth?}, Am. Teacher, Dec. 2003/Jan. 2004, at 6 (arguing that by setting expectations high but keeping funding low, the federal government is practically asking the states to fail to comply with NCLB’s mandates); Press Release, U.S. Dep’t of Educ., New GAO Report Finds that \textit{No Child Left Behind} Is Not an “Unfunded Mandate” (May 25, 2004) (citing U.S. Gen. Accounting Office, \textit{Unfunded Mandates: Analysis of Reform Act Coverage} (2004)), \textit{available} at \url{http://www.ed.gov/news/pressreleases/2004/05/05252004a.html}.  

out the nation.\(^{129}\) Despite this disagreement, NCLB mandates that states comply with certain policies chosen by Congress, thereby constraining the states’ and local districts’ abilities to experiment with other options.\(^{130}\)

### III. Connectcut Challenges the No Child Left Behind Act

Amidst scholarly and other criticism of NCLB, some states have begun to resist the Act.\(^{131}\) Last year, Utah’s legislature passed a resolution giving state education law preference over federal mandates.\(^{132}\) Colorado now protects districts in the state that opt out of the Act’s requirements from sanctions threatened by the U.S. Department of Education and the state board of education.\(^{133}\) Some states, though not joining or filing lawsuits themselves, are supporting other states’ and districts’ challenges to NCLB.\(^{134}\)

On August 22, 2005, Connecticut became the first state to file suit against the federal government over NCLB.\(^{135}\) Connecticut’s lawsuit,

\(^{129}\) See supra notes 119–124 and accompanying text.


\(^{131}\) See Jeff Archer, Connecticut Files Court Challenge to NCLB, Educ. Week, Aug. 31, 2005, at 23.

\(^{132}\) H.J.R. Res. 3, 56th Leg., Gen. Sess. (Utah 2005); see Archer, supra note 131.

\(^{133}\) 2005 Colo. Sess. Laws 487; see Archer, supra note 131. Colorado has also resisted on a smaller scale: in December 2005, taxpayers in the Kit Carson school district voted by referendum to replace the federal funds the district will lose by dropping out of NCLB with a property-tax levy. David J. Hoff, Colo. Town Raises Taxes to Finance NCLB Withdrawal, Educ. Week, Jan. 4, 2006, at 3.


\(^{135}\) See Second Amended Complaint, supra note 16, at 1; Archer, supra note 131. Connecticut attempted to persuade other states to join the lawsuit, but these efforts were unsuccessful. Sam Dillon, U.S. Is Sued by Connecticut over Mandates on School Tests, N.Y. Times, Aug. 23, 2005, at B1.

The National Education Association (“NEA”), joined by a handful of individual school districts from several states, filed a similar lawsuit in April of last year, premised largely on NCLB’s “unfunded mandates” provision. 20 U.S.C. § 7907(a) (Supp. III 2003); Complaint at 1, Sch. Dist. of the City of Pontiac v. Spellings, No. 05-cv-71535-DT (E.D. Mich. Apr. 20, 2005); see Hendrie, supra note 7; infra note 162. On November 23, 2005, a federal district court judge granted the Secretary’s motion to dismiss the lawsuit. Pontiac, No. 05-cv-71535-DT, 2005 WL 3149545, at *5 (E.D. Mich. Nov. 23, 2005); see Michael Janofsky, Judge Rejects Challenge to Bush Education Law, N.Y. Times, Nov. 24, 2005, at A22. The trial judge found
Connecticut v. Spellings, focuses on a provision in the Act prohibiting Congress from requiring any state or school district to spend any funds or incur any costs not paid for under the Act—the so-called “unfunded mandates” provision. The state alleges that the federal government is not providing enough funds to carry out its obligations under the Act, effectively violating NCLB’s unfunded mandates provision. Connecticut also claims that the federal government is unconstitutionally coercing the state to comply with NCLB’s mandates.

A. Connecticut and the Secretary Clash over No Child Left Behind’s Mandates

Connecticut’s lawsuit stems from a clash between the state’s testing scheme and NCLB’s testing requirements. For over twenty years, Connecticut has implemented assessment and accountability measures for its local school districts through its Connecticut Mastery Test (“CMT”) statutory scheme. Connecticut alleges that CMT has been successful, as the state’s students rank among the highest achievers in the nation. Indeed, NCLB adopts some of the principles and elements of the CMT scheme.

that NCLB’s “unfunded mandates” provision simply meant that no federal officer or employee could require a state to spend its own funds; the provision did not prohibit Congress from doing so. Pontiac, 2005 WL 3149545, at *4; see infra note 162. He reasoned that if Congress had meant to fund all of NCLB’s requirements 100%, it would have said so clearly and unambiguously. Pontiac, 2005 WL 3149545, at *4. The NEA has appealed that ruling. See Brief for Petitioners, Pontiac, No. 05–2708 (6th Cir. Mar. 22, 2006).

136 20 U.S.C. § 7907(a); see Hendrie, supra note 7.
137 Second Amended Complaint, supra note 16, at 40–41; see Archer, supra note 131.
140 Second Amended Complaint, supra note 16, at 1.
There are three substantial differences between the CMT scheme and NCLB that have led Connecticut to struggle with implementing NCLB. First, Connecticut requires public school students in fourth, sixth, and eighth grades to take the CMT in reading, writing, and mathematics; NCLB requires that students be tested in math and reading or writing every year from third grade through eighth grade and at least once in tenth through twelfth grade.\footnote{20 U.S.C. § 6311(b)(3)(C)(v), (vii) (Supp. III 2003); Second Amended Complaint, supra note 16, at 20.} Second, Connecticut grants special education students the option of taking the CMT at the student’s instructional level rather than his or her grade level; NCLB largely requires testing at a student’s grade level.\footnote{20 U.S.C. § 6311(b)(3)(C)(ix)(I); Second Amended Complaint, supra note 16, at 21.} Finally, Connecticut’s CMT testing is only offered in English, though the state allows English language learner (“ELL”) students three years in the U.S. school system before requiring them to take the CMT; NCLB requires that ELL students be tested, in either English or their native language, after one year in a U.S. school.\footnote{20 U.S.C. § 6311(b)(3)(C)(x); Second Amended Complaint, supra note 16, at 21–22.} Connecticut’s amended CMT testing statutes conform to NCLB’s testing requirements, but only to the extent that state funds are not used for NCLB mandates.\footnote{Conn. Gen. Stat. § 10-14n(g) (2005). Subsection (g) provides:

[M]astery testing pursuant to this section shall be in conformance with the testing requirements of the No Child Left Behind Act provided (1) any costs of such conformance to the state and local or regional boards of education that are attributable to additional federal requirements of the No Child Left Behind Act shall be paid exclusively from federal funds . . . .

Id. (internal citations omitted).}

Connecticut cannot comply with both its state education statutes and NCLB’s mandates as they are currently funded.\footnote{Second Amended Complaint, supra note 16, at 4.} Accordingly, the state has requested several times that the U.S. Secretary of Education waive specific provisions of the Act.\footnote{Id. at 23–24; see supra notes 117–118 and accompanying text.}

On January 14, 2005, Connecticut’s Commissioner of Education (the “Commissioner”) requested certain waivers from the U.S. Department of Education’s interpretations of NCLB’s mandates in order to maintain the state’s own CMT scheme, including allowances for annual testing to take place in alternate grades rather than every grade, for
assessment of special education students at instructional level rather than grade level, and for testing of ELL students after three years in the U.S. school system rather than after one year.\footnote{149} Connecticut’s claimed grounds for the waiver were the success of its CMT scheme and the lack of sufficient federal education funding to comply with NCLB.\footnote{150} On February 28, 2005, the Secretary denied the waiver request for alternate year testing and the three-year phase-in for ELL students, and she took the special education waiver request under consideration.\footnote{151}

On April 7, 2005, the Secretary announced a new policy for the granting of waivers of the Act’s special education testing requirements.\footnote{152} The new policy permits up to 2\% of students to be tested using modified or alternative assessments.\footnote{153} States that do not have annual testing in every grade, however, are not eligible for the waiver.\footnote{154}

Even if Connecticut were eligible for the waiver, the cost of developing and administering these alternative assessments would prevent the state from taking advantage of the new policy.\footnote{155} Thus, on April 18, 2005, the Commissioner met with the Secretary and U.S. Deputy Secretary of Education (the “Deputy Secretary”) to discuss the
State’s waiver requests.\textsuperscript{156} In response, the Deputy Secretary suggested that Connecticut offer testing in every grade, but eliminate written response testing in the third, fifth, and seventh grades.\textsuperscript{157} The Commissioner found this “lower-quality” testing option unworkable.\textsuperscript{158}

In the following months, the Commissioner repeatedly renewed Connecticut’s waiver requests.\textsuperscript{159} Ultimately, on June 20, 2005, the Secretary formally denied those requests.\textsuperscript{160}

\textsuperscript{156} \textit{Id.} at 30. The Commissioner had written to the Secretary on March 31, 2005, renewing the State’s original waiver requests. \textit{Id.} at 28; Letter from Betty J. Sternberg to Raymond Simon, \textit{supra} note 142.


\textsuperscript{158} Complaint, \textit{supra} note 15, at 19; see Letter from Betty J. Sternberg to Margaret Spellings, \textit{supra} note 157.

\textsuperscript{159} Second Amended Complaint, \textit{supra} note 16, at 32–34. For example, on May 18, 2005, the Commissioner wrote to the Secretary, noting that extensive scientific research supported Connecticut’s testing scheme, and that no research supported the position that testing in every grade is more effective than alternate grade testing. Letter from Betty J. Sternberg, Conn. Comm’r of Educ., to Margaret Spellings, U.S. Sec’y of Educ. (May 18, 2005), available at http://www.state.ct.us/sde/nclb/correspondence/LetterSpellings05-18-attach.pdf; see Letter from Betty J. Sternberg, Conn. Comm’r of Educ., to Raymond Simon, U.S. Assistant Sec’y of Educ. (May 27, 2005), available at http://www.state.ct.us/sde/nclb/correspondence/Simon_letter527.pdf.


B. Connecticut Files the First State Lawsuit Challenging No Child Left Behind

On August 22, 2005, Connecticut filed its lawsuit against the Secretary in federal district court. In its complaint, the state alleges that the Secretary is violating § 7907(a) of NCLB, the so-called “unfunded mandates” provision, by mandating, directing, and controlling the allocation of state resources. The federal funds the state receives are insufficient to pay for compliance with the Act, and the Secretary has the authority to waive those mandates. Nonetheless, the

Despite these comments, the Secretary has adopted some of the policies for which Connecticut has requested waivers. See, e.g., Office of Elementary and Secondary Educ., U.S. Dep’t of Educ., Peer Review Guidance for the NCLB Growth Model Pilot Applications 1 (2006) [hereinafter ED, Growth Model], available at http://www.ed.gov/policy/elsc/guid/growthmodelguidance.pdf. For example, on November 18, 2005, the Secretary announced a pilot program under which up to ten states could apply to measure achievement by student growth, similar to the “cohort analysis” that Connecticut had proposed. See Press Release, U.S. Dep’t of Educ., Secretary Spellings Announces Growth Model Pilot, Addresses Chief State School Officers’ Annual Policy Forum in Richmond (Nov. 18, 2005), available at http://www.ed.gov/news/pressreleases/2005/11/11182005.html; supra note 149. On January 27, 2006, the Secretary released further guidance on the program, and twenty states have requested to participate. Lynn Olson, States Vie to Be Part of NCLB’s “Growth” Pilot, EDUC. WEEK, Feb. 1, 2006, at 24; Diana Jean Schemo, 20 States Ask for Flexibility in School Law, N.Y. TIMES, Feb. 22, 2006, at B5. See generally ED, Growth Model, supra.


162 20 U.S.C. § 7907(a) (Supp. III 2003); Second Amended Complaint, supra note 16, at 40–41. The NEA’s lawsuit, which was also brought under the unfunded mandates provision, was dismissed by a federal district court in November 2005. Pontiac, 2005 WL 3149545, at *5; see supra note 135. Connecticut’s Attorney General, who initiated the state’s lawsuit, publicly stated that he finds the Pontiac ruling wrong and in no way legally binding on Connecticut’s lawsuit. Janofsky, supra note 135.

163 20 U.S.C. § 7861 (Supp. III 2003); Second Amended Complaint, supra note 16, at 41. Connecticut claims that it needs more than $41 million in additional federal funds to comply fully with NCLB’s requirements. Salzman, supra note 4. The Secretary, however, has disputed this estimate. See Spellings, supra note 160. She contends that the testing scheme Connecticut plans to implement under the Act is “entirely optional,” because the state could satisfy its obligations by administering less rigorous—and thus less expensive—tests. Memorandum of Law in Support of Defendant’s Motion to Dismiss at 23–24, Connecticut v. Spellings, No. 3:05-cv-01330 (MRK) (D. Conn. Dec. 2, 2005); see Letter from Margaret Spellings to Betty J. Sternberg, supra note 160 (“[T]he system designed by the
Secretary has refused to grant Connecticut’s waiver requests, instead requiring the state and its school districts to comply fully with the Department of Education’s allegedly rigid interpretation of the NCLB mandates.\textsuperscript{164}

Connecticut also claims a violation of the Spending Clause and Tenth Amendment of the U.S. Constitution.\textsuperscript{165} The state argues that the Secretary is exceeding her powers under the Spending Clause and violating the Tenth Amendment of the Constitution in two ways: (1) by coercing the state to take actions that Congress could not otherwise compel it to take; and (2) by changing one of the conditions pursuant to which the state accepted federal funds under NCLB, thereby precluding the state from exercising its choice to participate in the Act knowingly.\textsuperscript{166}

Connecticut makes several requests for relief.\textsuperscript{167} First, the state asks the court to declare that Connecticut’s failure to comply with the Secretary’s interpretations of NCLB’s mandates does not provide a basis for withholding any federal funds to which the state and its

\textsuperscript{164} See Second Amended Complaint, \textit{supra} note 16, at 41-42.

\textsuperscript{165} U.S. Const. art. I, § 8, cl. 1; \textit{id.} amend. X; Second Amended Complaint, \textit{supra} note 16, at 42–43.

\textsuperscript{166} \textit{Id.} at 42–43. Connecticut also alleges that the Secretary’s decision to deny the State its requested waivers is arbitrary and capricious, contrary to constitutional right, power or privilege, and unsupported by the record, in violation of the Administrative Procedure Act. \textit{Id.} at 43–45; see 5 U.S.C. § 706(2) (2000).


\textsuperscript{167} Second Amended Complaint, \textit{supra} note 16, at 46–49.
school districts are entitled under the Act.\textsuperscript{168} Second, the state asks the court to enjoin the Secretary from withholding federal funds, from withholding approval of Connecticut’s plans, and from denying any waiver because of Connecticut’s refusal to expend its own funds to achieve compliance with the Secretary’s assessment requirements.\textsuperscript{169} Finally, the state asks the court to order the Secretary to grant Connecticut’s waiver requests.\textsuperscript{170}

IV. \textit{South Dakota v. Dole} and the Supreme Court’s Spending Clause Jurisprudence

After reformers worked for decades in the states by filing new lawsuits and developing new policies, Congress seized control of the education reform arena by enacting NCLB pursuant to its power to condition the states’ receipt of federal funds under the Spending Clause.\textsuperscript{171} Not satisfied that federal policy is the right policy, Connecticut alleges that the Secretary has, among other things, exceeded her Spending Clause authority under the Act.\textsuperscript{172} Unfortunately for the state, Connecticut faces an uphill battle: since as far back as the 1930s, the U.S. Supreme Court has generally upheld spending legislation, with few limitations.\textsuperscript{173}

\begin{itemize}
\item \textsuperscript{168} See id. at 46–47.
\item \textsuperscript{169} See id. at 47–48.
\item \textsuperscript{170} See id. at 46. As of August 2006, the Secretary has filed a motion to dismiss the lawsuit and the court continues to consider arguments for and against the motion. See Connecticut v. Spellings, No. 3:05-cv-1330 (MRK) (D. Conn. July 31, 2006) (order granting motion for leave to file second amended complaint). Many of these arguments involve disagreement over whether Connecticut’s claims are ripe for review and whether the court has jurisdiction over those claims under the Administrative Procedure Act. See Reply in Support of Defendant’s Motion to Dismiss at 2–8, Spellings, No. 3:05-cv-1330 (MRK) (Jan. 13, 2006); Plaintiff’s Opposition to Defendant’s Motion to Dismiss at 10–27, Spellings, No. 3:05-cv-1330 (MRK) (Dec. 23, 2005); Memorandum of Law in Support of Defendant’s Motion to Dismiss at 14–23, Spellings, No. 3:05-cv-1330 (MRK) (Dec. 2, 2005).
\item \textsuperscript{171} See U.S. Const. art. I, § 8, cl. 1; ED, Desktop Reference, \textit{supra} note 3, at 3. The Spending Clause provides: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .” U.S. Const. art. I, § 8, cl. 1.
\item \textsuperscript{172} Second Amended Complaint, \textit{supra} note 16, at 42–43. Although Connecticut also alleges that the Secretary has violated NCLB’s unfunded mandates provision directly, as well as the Administrative Procedure Act, this Note focuses on the state’s Spending Clause claim.
\item \textsuperscript{173} See Richard W. Garnett, \textit{The New Federalism, the Spending Power, and Federal Criminal Law}, 89 CORNELL L. REV. 1, 24 (2003) (“At first blush, it is difficult to discern any limits or bounds to a power to ‘provide for’ or ‘promote the general Welfare’ of the Nation.”); \textit{infra} notes 174–213 and accompanying text; see also Michele Landis Dauber, \textit{Judicial Review and the Power of the Purse}, 23 LAW & Hist. REV. 451, 452–53 (2005) (arguing that the Supreme
A. The Early Spending Clause Cases

The U.S. Supreme Court struck down a Spending Clause statute for the first and only time in 1935 in *United States v. Butler*.174 In *Butler*, the Court held that the Agricultural Adjustment Act, authorizing the Secretary of Agriculture to impose taxes on farmers, was unconstitutional.175 The Court stated that Congress’s power to authorize the expenditure of federal funds for public purposes is not limited by the direct grants of power in Article I, Section 8 of the U.S. Constitution.176 The Court found, however, that the tax unconstitutionally invaded the powers of the states by regulating agricultural production within the states.177 Thus, because the tax violated the Tenth Amendment, it was not a valid exercise of the taxing and spending power.178 As discussed below, the Court later abandoned *Butler*’s Tenth Amendment reasoning.179

In fact, only two years later, the Supreme Court reined in the Tenth Amendment implications of *Butler* in *Steward Machine Co. v. Davis*.180 In that case, the Court upheld provisions of the Social Security Act that imposed a tax on employers with eight or more employees.181 The petitioner had argued that the tax coercively invaded the states’ autonomy in violation of the Tenth Amendment, because the provisions allowed employers a credit for up to 90% of the tax if they made contributions to their states’ unemployment funds.182 This credit

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174 See 297 U.S. at 72–75.
175 See id. at 65–67.
176 See id. at 68.
177 See id. at 74–78.
178 See 297 U.S. at 72–75.
181 See id. at 592–93.
182 See id. at 585–86.
effectively led the states, most of which did not have unemployment programs prior to the Social Security Act, to establish such programs.\textsuperscript{183}

In responding to the petitioner’s contention, the Court noted the “national” dimensions of the unemployment problem at the time the Social Security Act was passed, as well as the states’ inability to address this problem sufficiently because of their poor economic positions.\textsuperscript{184} The provision allowing for the tax credit did not coerce the states into developing unemployment funds, the Court reasoned; rather, it gave the states a motive for doing so, which was not inconsistent with the Tenth Amendment.\textsuperscript{185} The Court did not, however, completely rule out the possibility that a state might be unconstitutionally coerced by some future exercise of the spending power.\textsuperscript{186}

B. The Court Considers Conditions on Grants to the States

In the years following \textit{Butler} and \textit{Steward Machine Co.}, the Court largely deferred to Congress when reviewing challenges to exercises of the spending power.\textsuperscript{187} This was the case even as Congress began to impose conditions on grants to state and local governments.\textsuperscript{188} In 1947 in \textit{Oklahoma v. Civil Service Commission}, for example, the Supreme Court upheld a provision of the Hatch Act, which granted federal funds to state governments on the condition that the states adopt civil service systems and limit the political activities of some government workers.\textsuperscript{189} The Court reasoned that Congress’s power to set conditions for the receipt of federal funds is broad, extending even to areas

\begin{itemize}
\item \textsuperscript{183} \textit{Id.} at 587–88.
\item \textsuperscript{184} \textit{See id.} at 586–88.
\item \textsuperscript{185} \textit{Steward Mach. Co.}, 301 U.S. at 589–90.
\item \textsuperscript{186} \textit{See id.} at 590. The Court stated:
\begin{quote}
Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.
\end{quote}
\textit{Id.}
\item \textsuperscript{187} \textit{See Helvering v. Davis}, 301 U.S. 619, 640 (1937) (“The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”); \textit{see also Steward Machine Co.}, 301 U.S. at 583 (“We find no basis for a holding that the power [of taxation] which belongs by accepted practice to the Legislatures of the states, has been denied by the Constitution to the Congress of the nation.”).
\item \textsuperscript{188} \textit{See generally Oklahoma v. Civil Serv. Comm’n}, 330 U.S. 127 (1947).
\item \textsuperscript{189} \textit{See id.} at 143–44.
\end{itemize}
that Congress might not otherwise have the power to regulate.\textsuperscript{190} The Tenth Amendment does not bar exercises of such power, the Court stated, because the states can simply refuse to comply by declining the conditioned federal funds.\textsuperscript{191}

In 1981 in \textit{Pennhurst State School \& Hospital v. Halderman}, however, the Court limited this power somewhat when it held that conditions on grants to states and local governments must be expressly stated.\textsuperscript{192} In \textit{Pennhurst}, the Court held that Pennsylvania, which operated the petitioner-hospital, could not be liable in a civil suit brought by a patient for violating a bill of patients’ rights included in the Developmentally Disabled and Bill of Rights Act because Congress had not expressly required the states to follow the bill of rights as a condition for grants under the statute.\textsuperscript{193} The Court reasoned that “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”\textsuperscript{194} Thus, the constitutionality of Congress’s exercise of the spending power depended on whether the state voluntarily and knowingly accepted the terms of the contract, and the Court found that Pennsylvania had not so accepted the bill of rights.\textsuperscript{195}

C. \textit{The Modern Rule: South Dakota v. Dole}

In 1987 in \textit{South Dakota v. Dole}, the Supreme Court tied together its earlier spending cases.\textsuperscript{196} In \textit{Dole}, the Court upheld a federal statute that conditioned the receipt of federal highway funds on the states’ implementation of a minimum drinking age of twenty-one.\textsuperscript{197} The Court reiterated that, incident to the Spending Clause, Congress may attain objectives that are otherwise not considered within its enumerated powers by conditioning federal grants.\textsuperscript{198} Still, the spending power is not unlimited.\textsuperscript{199} Accordingly, the Court listed five gen-

\textsuperscript{190} \textit{Id.} at 143 (“While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.”).

\textsuperscript{191} \textit{See id.}

\textsuperscript{192} \textit{See} 451 U.S. at 17.

\textsuperscript{193} \textit{See id.} at 18–19.

\textsuperscript{194} \textit{Id.} at 17.

\textsuperscript{195} \textit{See id.} at 17–18.

\textsuperscript{196} \textit{See} 483 U.S. at 207–12.

\textsuperscript{197} \textit{See id.} at 208–10.

\textsuperscript{198} \textit{Id.} at 207.

\textsuperscript{199} \textit{Id.}
eral restrictions on Congress’s power to impose conditions on the states in exchange for the receipt of federal funds.\(^{200}\)

First, Congress must exercise the spending power in pursuit of the general welfare.\(^{201}\) Courts, however, should substantially defer to Congress in determining whether a particular expenditure is intended to serve a public purpose.\(^{202}\) Second, when Congress conditions the states’ receipt of federal funds, it must do so unambiguously.\(^{203}\) Third, the conditions imposed must be reasonably related to a federal interest in particular national programs.\(^{204}\) Fourth, the conditions must not violate any other constitutional provision.\(^{205}\) The Tenth Amendment alone does not act as a constitutional bar; rather, the Court described this last restriction as the unexceptionable proposition that the power may not be used to induce the states to engage in activities that would themselves be unconstitutional.\(^{206}\)

\(^{200}\) Id. at 207–12.
\(^{201}\) Dole, 483 U.S. at 207; see Butler, 297 U.S. at 65.
\(^{202}\) Dole, 483 U.S. at 207; see Helvering, 301 U.S. at 640–41.
\(^{203}\) Dole, 483 U.S. at 207; see Pennhurst, 451 U.S. at 17.
\(^{204}\) Dole, 483 U.S. at 207–08. But see id. at 213–17 (O’Connor, J., dissenting) (arguing that the condition must not only be related to a federal interest, but also more narrowly to the federal spending itself); infra notes 216–218 and accompanying text.
\(^{205}\) Dole, 483 U.S. at 208.
\(^{206}\) See id. at 210; see also Oklahoma, 330 U.S. at 143. As examples of the type of condition that would violate this fourth restriction, the Court offered a grant of federal funds conditioned on invidiously discriminatory state action, or on the infliction of cruel and unusual punishment. Dole, 483 U.S. at 210–11; cf. United States v. Am. Library Ass’n, 539 U.S. 194, 214 (2003) (upholding condition on public libraries’ receipt of federal funds requiring them to use filtering software on their computers to block access to obscene material on the Internet, because libraries’ use of the software did not violate patrons’ First Amendment rights, and thus the condition did not induce the libraries to violate the Constitution).

In applying these four restrictions to the case before it, the Supreme Court held that the minimum drinking age condition was not problematic. Dole, 483 U.S. at 208. The Court easily concluded that the condition served the general welfare because the incentive for young people to drink and drive created by differing drinking ages amongst the states was an interstate problem requiring a national solution. Id. Moreover, the condition could not have been more clearly stated, and was related to a national concern: safe interstate travel. Id. at 208–09. Finally, the Twenty-first Amendment did not constitute an independent constitutional bar to Congress’s power to impose the condition upon the states under the Spending Clause. Id. at 209–10. Although it acknowledged that the Twenty-first Amendment prohibits direct regulation of drinking ages by Congress, the Court, citing Butler, reasoned that the constitutional limitations on conditions imposed by Congress on the states pursuant to the Spending Clause are less exacting than those limitations at play when Congress directly regulates the states under any of its other powers. Id. at 209. But see Am. Library Ass’n, 539 U.S. at 226–27 (Stevens, J., dissenting) (arguing that a federal statute penalizing a library for failing to install filtering software on its computers would unques-
The Court’s fifth restriction was more elusive, and was described in later cases by the lower courts as the coercion theory.\textsuperscript{207} Citing \textit{Steward Machine Co.}, the Court noted that its previous decisions had recognized that Congress’s conditioning of federal funds might be so coercive in some situations as to pass the point at which “pressure turns into compulsion.”\textsuperscript{208} In such situations, the condition would violate the Tenth Amendment.\textsuperscript{209} In the case before it, however, the Court found the coercion theory to be “more rhetoric than fact.”\textsuperscript{210} That most of the states had complied with the minimum drinking age condition in order to receive federal highway funds was not evidence of coercion, the Court reasoned.\textsuperscript{211} Rather, the minimum drinking age condition was “relatively mild encouragement.”\textsuperscript{212} The Court reached this conclusion particularly because any state refusing to establish a minimum drinking age of twenty-one would stand to lose only a relatively small percentage—five percent—of federal highway funds.\textsuperscript{213}

Justice O’Connor dissented in \textit{Dole}, finding the minimum drinking age condition an unconstitutional attempt to regulate the sale of liquor, rather than a condition on spending reasonably related to the expenditure of federal funds as the majority held.\textsuperscript{214} She agreed with the majority’s articulation of the general restrictions on Congress’s spending power, and that the minimum drinking age condition did not violate the “general welfare” and “unambiguous” restrictions.\textsuperscript{215}

\textsuperscript{207} \textit{Dole}, 483 U.S. at 211; see \textit{West Virginia v. U.S. Dep’t of Health & Human Servs.}, 289 F.3d 281, 288 (4th Cir. 2002); \textit{Kansas v. United States}, 214 F.3d 1196, 1201 (10th Cir. 2000); \textit{Nevada v. Skinner}, 884 F.2d 445, 447 (9th Cir. 1989); see also \textit{Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.}, 527 U.S. 666, 687 (1999) (noting that “in cases involving conditions attached to federal funding, [the Court has] acknowledged that the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion”’ (quoting \textit{Dole}, 483 U.S. at 211)).

\textsuperscript{208} \textit{Dole}, 483 U.S. at 211 (citing \textit{Steward Mach. Co.}, 301 U.S. at 590).

\textsuperscript{209} See \textit{id.}

\textsuperscript{210} \textit{Id.}; see \textit{Steward Mach. Co.}, 301 U.S. at 589–90.

\textsuperscript{211} See \textit{Dole}, 483 U.S. at 211.

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Id.} at 212 (O’Connor, J., dissenting). Justice Brennan also dissented, arguing that the power to regulate the purchase of liquor was clearly reserved to the states, and that the Twenty-first Amendment itself strikes the proper balance between federal and state authority. \textit{Id.} (Brennan, J., dissenting).

\textsuperscript{215} \textit{Id.} at 213 (O’Connor, J., dissenting). Justice O’Connor also stated that she was willing to assume that the Twenty-first Amendment did not constitute an independent constitutional bar to the minimum drinking age condition. \textit{Id.}
Still, Justice O’Connor found the majority’s application of the “reasonable relation” condition unconvincing.\textsuperscript{216}

Although the majority held that Congress’s interest in safe interstate travel was sufficiently related to the minimum drinking age condition, Justice O’Connor argued that the condition was too over- and under-inclusive.\textsuperscript{217} Justice O’Connor warned that if Congress is able to regulate activity within the states that has only an attenuated relationship to a federal interest, then Congress would have the power to effectively regulate almost any area of a state’s social, political, and economic life.\textsuperscript{218}

D. Virginia Department of Education v. Riley: The Fourth Circuit Strikes Down a Spending Condition and Hints at Reviving the Coercion Test

Despite Justice O’Connor’s warning, not only has the Supreme Court repeatedly upheld Congress’s spending power legislation, but the lower federal courts have also been reluctant to find such legislation unconstitutional.\textsuperscript{219} The federal courts of appeals have been particularly wary of challenges to Spending Clause legislation brought under the coercion theory.\textsuperscript{220}

\textsuperscript{216} \textit{Dole}, 483 U.S. at 213 (O’Connor, J., dissenting).

\textsuperscript{217} \textit{Id.} at 214–15. The condition was over-inclusive, she reasoned, because a minimum drinking age of twenty-one would stop persons younger than twenty-one from drinking even when they were not driving on the interstate highways; the condition was under-inclusive because persons younger than twenty-one pose only a fraction of the national drunken driving problem. \textit{Id.}

\textsuperscript{218} \textit{Id.} at 215. Justice O’Connor further warned:

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives “power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.” \textit{Id.} at 217 (quoting \textit{Butler}, 297 U.S. at 78).

\textsuperscript{219} See \textit{Kansas}, 214 F.3d at 1200 (“Although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition.” (quoting \textit{Oklahoma v. Schweiker}, 655 F.2d 401, 406 (D.C. Cir. 1981))). \textit{But see Riley}, 106 F.3d at 561 (en banc) (striking down condition because the language of the Individuals with Disabilities Education Act only implicitly, at best, required the states to provide a free appropriate public education to disabled students expelled for reasons unrelated to their disabilities). The Tenth Circuit noted in \textit{Kansas v. United States}, however, that the D.C. Circuit had overlooked \textit{United States v. Butler}. \textit{Kansas}, 214 F.3d at 1200 n.6.

\textsuperscript{220} \textit{West Virginia}, 289 F.3d at 288 (listing cases in which the circuits have expressed strong doubts about the viability of the coercion theory); \textit{see Kansas}, 214 F.3d at 1201; \textit{Skinner}, 884 F.2d at 448.
The U.S. Court of Appeals for the Fourth Circuit’s en banc decision in 1997 in *Virginia Department of Education v. Riley* represents the rare case in which a court struck down a spending condition.221 In *Riley*, the en banc court reversed the decision of a panel of the circuit, striking down a condition imposed on Virginia by the Secretary for

For example, in 2000 in *Kansas*, the U.S. Court of Appeals for the Tenth Circuit upheld provisions of the Personal Responsibility and Work Opportunity Reconciliation Act, which conditioned the receipt of federal funds on the states’ compliance with federal child enforcement policy. See 214 F.3d at 1203. There, Kansas argued that it did not wish to comply with the requirements because they were too onerous and expensive, but that the state was effectively being coerced into doing so because of the amount of money at stake. *Id.* at 1198. The court noted that the boundary between offering an incentive to the states and coercing the states to comply with federal policy had never been made clear, despite the Supreme Court’s articulation of the coercion theory in cases like *Steward Machine Co.* and *Dole*. *Id.* at 1202. Moreover, the Tenth Circuit reasoned, the lower courts have refused to strike down federal legislation in cases where similarly large amounts of money were at stake. *Id.;* see *Schweiker*, 655 F.2d at 414 (upholding Congress’s conditioning of Medicaid funds on state implementation of a provision in the Supplemental Security Income program, even though Oklahoma stood to lose all of its Medicaid funding and risked the collapse of its entire medical system if it failed to comply). Thus, the court declined to hold that unconstitutional coercion exists when Congress conditions federal funds in such a way that it creates a powerful incentive for states to comply with its conditions; rather, at least in the context of the case before it, “a difficult choice remains a choice, and a tempting offer is still but an offer.” *Kansas*, 214 F.3d at 1203.

Similarly, in 2002 in *West Virginia v. U.S. Department of Health & Human Services*, the U.S. Court of Appeals for the Fourth Circuit upheld amendments to the Medicaid Act requiring the states to adopt a program to recover certain expenditures from the estates of deceased Medicaid beneficiaries in exchange for Medicaid funds. See 289 F.3d at 297. There, West Virginia believed that the estate recovery program was bad public policy, but argued that it had no choice but to comply with the program because the state was more dependent on Medicaid funds than most other states. *Id.* at 287. The Fourth Circuit noted that the Supreme Court has provided so little guidance for determining when the line between encouragement and coercion is crossed that some courts have concluded that the coercion theory essentially raises political questions that cannot be resolved by the courts. *Id.* at 289; see *Skinner*, 884 F.2d at 448 (“The difficulty, if not the impropriety of making judicial judgments regarding a state’s financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.”). The court conceded, however, that several judges on the Fourth Circuit had endorsed the coercion theory only a few years earlier in *Virginia Department of Education v. Riley*. *West Virginia*, 289 F.3d at 290; see infra notes 227–230 and accompanying text. Still, the court declined to strike down the condition in the current case because the Medicaid Act granted the U.S. Secretary of Health and Human Services the discretion to withhold funds only from categories of the Medicaid program that were affected by a state’s failure to comply with one of the Medicaid Act’s requirements. *Id.* at 292–93. Thus, although the Fourth Circuit recognized that a particular sanction imposed by the Secretary may be constitutionally suspect in certain cases, such was not the case for West Virginia, because the state had only been warned that noncompliance could result in the loss of all or part of its Medicaid funds. See *id.* at 285–86, 292–93. The court reasoned that the “or part” qualification saved the condition. *Id.* at 292–93.

221 106 F.3d at 560–61 (per curiam).
receipt of its funding under the Individuals with Disabilities Education Act (“IDEA”). A provision of IDEA requires the states to provide disabled students with a free appropriate public education. Virginia adopted a policy under which it ceased providing such education to disabled students expelled or suspended for reasons unrelated to their disabilities. The Secretary responded by threatening to withhold Virginia’s entire $60 million IDEA grant if it did not amend its policy. The Fourth Circuit held that the plain language of IDEA did not even implicitly condition the receipt of IDEA funds on the provision of education to expelled and suspended students; thus, the Secretary violated Dole’s second restriction that conditions on federal funding be unambiguous when he threatened to withhold Virginia’s funds.

Although the court did not hold on Dole’s coercion theory, six judges adopted the dissenting panel opinion of Judge Luttig, which discussed the Tenth Amendment implications of the condition imposed by the Secretary. Judge Luttig argued that, if the coercion theory has any reach at all, “a Tenth Amendment claim of the highest order” exists where the federal government withholds the entirety of a substantial federal grant on the basis that a state refuses to fulfill its federal obligation in some insubstantial respect. That Virginia faced such a penalty because it refused to acquiesce in federal policy for school discipline was particularly troubling. Citing Justice O’Connor’s dissent in Dole, Judge Luttig suggested that the condition in this case might not only be impermissible coercion, but also unconstitutional regulation in the guise of a spending condition.

222 Id. at 561.
224 Riley, 106 F.3d at 560 (per curiam).
225 Id.
226 Id. at 561; see Dole, 483 U.S. at 207; see also Pennhurst, 451 U.S. at 17.
227 See Riley, 106 F.3d at 561, 569–72 (Luttig, J.).
228 Id. at 570; see West Virginia, 289 F.3d at 291 (stating that, after Riley, the coercion theory remains viable in the Fourth Circuit, so that federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect).
229 Riley, 106 F.3d at 569 (Luttig, J.) (noting that the Department of Education was withholding funds based on Virginia’s refusal to surrender control over “one of its most effective tools for maintaining order” and that Congress was thus sharply curtailing the state’s local autonomy over student discipline).
230 Id.; see Dole, 483 U.S. at 215–18 (O’Connor, J., dissenting). Contra Jim C. v. United States, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (en banc) (reversing the judgment of a panel of the circuit and holding that the Rehabilitation Act of 1973 does not unconstitutionally coerce the states into waiving their Eleventh Amendment sovereign immunity,
E. Arlington Central School District Board of Education v. Murphy: 
*Toward a More Rigorous Interpretation of the Spending Clause*

In June 2006, the Supreme Court issued a significant decision indicating that the Court may begin to interpret the reach of Congress's Spending Clause laws more narrowly. In *Arlington Central School District Board of Education v. Murphy*, the Court held that parents prevailing in actions brought against school districts under IDEA may not recover the costs of experts used for litigation purposes. Noting that its decision was “guided by” the fact that IDEA had been enacted pursuant to the Spending Clause, the Court focused on whether IDEA provided “clear notice” to the states that they would be required to compensate parents for the cost of experts as a condition to receiving IDEA funds. The Court decided that IDEA did not provide such notice, because the text of the statute indicated that the costs of experts were not recoverable, and because the Court had so interpreted similar provisions in prior cases. The respondents argued that a statement in a congressional conference committee report proved that Congress intended the states to compensate prevailing parents for expert costs, but the Court reasoned that this legislative history was not sufficient to provide the notice required by the Spending Clause.

The Court’s decision in *Murphy* indicates a turn, because, as Justice Ginsburg pointed out in her concurrence, the majority could have reached the same result without considering the Spending Clause question. Moreover, Justice Breyer argued in his dissent that the Court has not, under *Pennhurst*’s (and later *Dole*’s) clear statement rule, required Congress to identify specifically each and every condition in a Spending Clause statute. To Justice Breyer, the proper question was not whether IDEA provided clear notice to the states, but rather because “[t]he sacrifice of all federal education funds . . . would be politically painful, but we cannot say that it compels Arkansas’s choice”).


232 *Murphy*, 126 S. Ct. at 2461.

233 *Id.* at 2458–59. The Court’s clear notice requirement came from *Pennhurst*, where the Court had stated that because “legislation enacted pursuant to the spending power is much in the nature of a contract,” recipients of federal funds must accept federally imposed conditions “voluntarily and knowingly.” See *id.* at 2459 (quoting *Pennhurst*, 451 U.S. at 17).

234 *Id.* at 2460–63.

235 *Id.* at 2463.

236 *Id.* at 2464 (Ginsburg, J., concurring in part and concurring in the judgment).

237 See *Murphy*, 126 S. Ct. at 2470–71 (Breyer, J., dissenting).
whether the states would have accepted IDEA funds had they only known about the condition—here, to compensate prevailing parents for expert costs.\textsuperscript{238} Thus, the Justices disagreed over how rigorously the Spending Clause doctrine should be applied, and the Justices who favored a more rigorous interpretation prevailed in this case.\textsuperscript{239}

V. \textsc{Connecticut v. Spellings Under South Dakota v. Dole: The No Child Left Behind Act Should Not (but Most Likely Will) Survive Spending Clause Scrutiny}

Because Connecticut challenges the Secretary’s denial of its waiver requests under the Spending Clause, a reviewing court would apply the U.S. Supreme Court’s \textit{South Dakota v. Dole} test.\textsuperscript{240} Although the courts have generally upheld federal spending legislation (with the exception of the U.S. Court of Appeals for the Fourth Circuit in \textit{Virginia Department of Education v. Riley}), Connecticut’s claims should

\textsuperscript{238} Id. at 2471. In any event, Justice Breyer believed that the legislative history, held insufficient to provide clear notice by the majority, made Congress’s purpose, and thus the meaning of the IDEA provision at issue, sufficiently clear to hold the states responsible for compensating prevailing parents. \textit{See id.} at 2474–75.


persuade a court to apply the Dole test more aggressively. Not only has the federal government intruded upon the states’ traditional education power, but NCLB also threatens local control over public schools, which the Supreme Court in San Antonio Independent School District v. Rodriguez insisted is essential to maintaining a valuable diversity of approaches to education policy.

In Dole, the Court listed five general restrictions on Congress’s power to impose conditions on the states in exchange for the receipt of federal funds: (1) Congress’s exercise of the spending power must be in pursuit of the general welfare, (2) Congress must condition the states’ receipt of federal funds unambiguously, (3) the conditions imposed must be reasonably related to a national interest, (4) the conditions imposed must not violate any other constitutional provision, and (5) Congress may not condition the states’ receipt of federal funds in a coercive way. Connecticut specifically challenges the Secretary’s denials of its waiver requests, which a court may be more likely to sustain than a facial challenge because of courts’ general reluctance to disturb spending legislation. Nevertheless, a reviewing court might uphold NCLB, even in the face of Connecticut’s more limited claims, though this Note argues that such a holding would be wrong under a careful application of Dole.

First, NCLB would survive Dole’s first restriction requiring that the Act be passed in pursuit of the general welfare. The Supreme Court and the lower courts have all generally deferred to Congress on this issue. Moreover, although critics disagree about whether NCLB achieves its goals, the Act is plainly aimed at the very same public purpose that education reformers have been working toward for decades: equal opportunity and quality education for all students.

Whether NCLB would survive Dole’s second restriction, however, which requires that all conditions imposed on the states’ receipt of

241 See Second Amended Complaint, supra note 16, at 42–43; supra notes 219–221 and accompanying text.
242 See 411 U.S. 1, 49–53 (1973).
243 Dole, 483 U.S. at 207–11.
244 See West Virginia, 289 F.3d at 292 (noting that West Virginia was effectively mounting a facial challenge to the challenged Medicaid provisions, so that the state bore the “very heavy burden” of showing that the provisions could not operate constitutionally under any circumstances).
245 See infra notes 246–277 and accompanying text.
246 See Dole, 483 U.S. at 207.
federal funds provide states with clear notice, is less obvious. Any claim Connecticut could make that its obligation to comply generally with the Act’s requirements was unclear would be dubious at best. Unlike in the 1981 case of Pennhurst State School & Hospital v. Halderman, where the Supreme Court struck down a condition because it found Pennsylvania and the other states had not knowingly and voluntarily accepted the condition, Connecticut and the other states are clearly aware that they must comply with specific conditions to receive funds under NCLB. Still, Connecticut’s argument is more subtle and complex than this. One of the state’s basic allegations with respect to Dole’s second restriction is that Connecticut believed that, under the “unfunded mandates” provision, it would not be forced to comply with NCLB’s mandates unless Congress provided the state with sufficient funds to do so.

Excluding Arlington Central School District Board of Education v. Murphy, the only recent case striking down a condition based on Dole’s second restriction is the 1997 case of Virginia Department of Education v. Riley. In Riley, the U.S. Court of Appeals for the Fourth Circuit struck down a condition the Department had imposed on Virginia, requiring the state to provide public education under IDEA to disabled students expelled for reasons unrelated to their disabilities, where Virginia had a policy denying such students public education. The basis for the court’s opinion in Riley was that IDEA neither implied that states were required to provide public education in such circumstances, nor clearly stated this condition.

Unlike the condition at issue in Riley, NCLB’s unfunded mandates provision is expressly included in the Act. The question thus becomes whether the language of the provision is so ambiguous that Connecticut must be granted its own understanding of the provi-

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251 See 451 U.S. at 18–19.
253 Id.
254 Riley, 106 F.3d at 561 (per curiam); see Murphy, 126 S. Ct. at 2461 (holding that the terms of the IDEA statute failed to provide the state clear notice that prevailing parents may recover the costs of experts or consultants); supra notes 231–239 and accompanying text.
255 Riley, 106 F.3d at 561.
256 Id.
sion.258 Still, even if the language of the unfunded mandates provision is somewhat ambiguous, accepting Connecticut’s interpretation that the federal government must provide all funds necessary for implementing NCLB’s mandates would effectively enable the reviewing court to saddle Congress with a burden it may not have intended.259

Connecticut also argues, alternatively, that the state accepted federal funds under NCLB based on the state’s understanding that the Secretary would waive any provision of the Act that conflicted with substantiated state policy.260 This argument presents an even more difficult question than the unfunded mandates argument, because the Act does not require the Secretary to grant any state’s waiver request, and thus her discretion is very wide.261 Any ambiguity in the Secretary’s waiver authority should be resolved in favor of Connecticut under Dole, but the Secretary could easily argue that the state knew that her waiver authority was both broad and discretionary, and that there was no guarantee that she would make exceptions for any particular state policy.262 Of course, such an argument is an affront to federalism.263 The Supreme

258 See 20 U.S.C. § 7907(a). At least one scholar has argued that Connecticut’s claim is legally strong, because the unfunded mandates provision’s language is explicit and because Connecticut is one of the country’s highest-achieving states and thus would make a “sympathetic plaintiff.” Dillon, supra note 135. But see Sch. Dist. of the City of Pontiac v. Spellings, No. 05-cv-71535-DT, 2005 WL 3149545, at *4 (E.D. Mich. Nov. 23, 2005) (finding that the unfunded mandates provision prohibits federal officials from requiring the states to spend their own funds, but that Congress is not prohibited from doing so); Michael Heise, No Lawsuit Left Behind: Chief Justice Roberts, the Schoolmaster?, Educ. Next, Winter 2006, at 7, 7 (predicting that Connecticut’s lawsuit will probably fail in court, but arguing that both Connecticut’s and the NEA’s lawsuits may be politically effective in diluting NCLB’s requirements).

259 See Pontiac, 2005 WL 3149545, at *4 (finding that if Congress had meant to fund all of NCLB’s requirements fully, it would have said so clearly and unambiguously); Reply in Support of Defendant’s Motion to Dismiss at 12–13, Connecticut v. Spellings, No. 3:05-cv-01330 (MRK) (D. Conn. Jan. 13, 2006) (arguing that Connecticut’s interpretation of the unfunded mandates provision assumes that the federal government took on a primary role of fiscal responsibility for education under NCLB, which is contrary to congressional intent).


261 See 20 U.S.C. § 7861. In fact, although a full discussion of the Secretary’s argument on this point is beyond the scope of this Note, the Secretary contends that her discretion to grant waivers under NCLB is not subject to judicial review. See Memorandum of Law in Support of Defendant’s Motion to Dismiss at 51–55, Spellings, No. 3:05-cv-01330 (MRK) (Dec. 2, 2005).

262 See Dole, 483 U.S. at 207.

263 See Lopez, 514 U.S. at 564–66 (characterizing education power as within state sovereignty and expressing concern about Congress’s ability to intrude on that power by regulating local schools).
Court indicated in *Murphy* that it may be more likely to strike down federal funding conditions, but the condition at issue in that case was more discrete than NCLB’s waiver provision.\(^{264}\)

Third, NCLB would most likely survive *Dole’s* third restriction requiring that the Act be rationally related to a federal interest.\(^{265}\) The federal government believes that testing and the subsequent availability of test scores to the public is the key to boosting the quality of education for all students.\(^{266}\) Under Justice O’Connor’s over-inclusive/under-inclusive analysis, articulated in her dissent in *Dole*, the NCLB provisions challenged by Connecticut might be considered over-broad.\(^{267}\) For instance, NCLB requires that all students be tested, even though only some categories of students have historically suffered from poor education.\(^{268}\) The federal government might respond, however, that all students must be tested so that lower scores can be compared with higher scores.\(^{269}\) In any event, Connecticut does not challenge the rational relationship of the provisions it seeks to have waived.\(^{270}\)

Finally, NCLB should not survive *Dole’s* last restriction, which requires that the Act not so coerce Connecticut into complying with its mandates that pressure turns into compulsion.\(^{271}\) Should a court follow the U.S. Court of Appeals for the Fourth Circuit’s lead in *Riley* and actually apply the restriction, the court would probably find the Secretary’s refusal to grant Connecticut’s waiver requests here to be unconstitutionally coercive.\(^{272}\) Nevertheless, courts generally hesitate to delve into this uncertain area of Spending Clause law.\(^{273}\)

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265 See 483 U.S. at 207–08.

266 20 U.S.C. § 6301 (Supp. III 2003) (“[The purpose of this Act can be accomplished by] ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement . . . .”).


269 See id. § 6301.


271 See 483 U.S. at 211; *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Department of Education has stressed that states that do not wish to comply with NCLB’s requirements are free to avoid those requirements by turning down the funding. *Hendrie, supra* note 7.

272 See *Riley*, 106 F.3d at 569–72 (Luttig, J.); see also *West Virginia*, 289 F.3d at 290. *See generally Coulter M. Bump, Note, Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending That Leaves Children Behind*, 76 U. COLO. L. REV. 521 (2005) (arguing that, particularly in the context of NCLB, the Supreme Court should revive the coercion analy-
Again, the only recent case to apply the coercion restriction is Riley, although the holding did not concern the restriction. Judge Luttig, joined by five other judges in an en banc decision, stated that “a Tenth Amendment claim of the highest order” exists where the federal government withholds the entirety of a substantial federal grant on the basis that a state refuses to fulfill its federal obligation in some insubstantial respect, as the government had threatened to do in that case. The requirements Connecticut seeks to have waived here are more substantial than the requirement the Fourth Circuit took issue with in Riley: there, Virginia withheld public education from only a relatively small number of expelled students, while Connecticut has asked to be relieved of its obligations under key provisions of NCLB. Nevertheless, as with most of Dole’s restrictions, the coercion restriction is flexible enough to accommodate either result.

Ultimately, if the states’ ability to experiment with education policy is to survive, a reviewing court should find NCLB as currently administered to be unconstitutionally coercive under Dole. The federal government’s role in education has only increased since it first enacted the Elementary and Secondary Education Act in 1965, and this role shows signs of further expansion.

sis from Steward Machine Co. to create effective limits on the reach of congressional spending power).


274 See Riley, 214 F.3d at 569–72 (Luttig, J.).

275 See id. at 570.

276 See id.; Letter from Margaret Spellings to Betty J. Sternberg, supra note 141 (“The significance of the[ ] assessments [required under NCLB] cannot be understated.”). The importance of administering standardized tests in every grade has been a key point of contention between the Secretary and the Commissioner. Compare Spellings, supra note 160 (“Teachers cannot remedy weaknesses they don’t see. The whole point of assessing students regularly is to catch problems early so they can be fixed before it’s too late.”), with Letter from Betty J. Sternberg to Margaret Spellings, supra note 157 (“The U.S. Department of Education sees every-year testing as a ‘principle,’ while Connecticut sees it as a ‘practice’—one that, in our state, will actually be detrimental to the goal of leaving no child behind.”).

277 See Dole, 483 U.S. at 211–12.

278 See id.

VI. THE FOURTEENTH AMENDMENT AND SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ UNDER DOLE’S FOURTH RESTRICTION: A POSSIBLE INDEPENDENT CONSTITUTIONAL BAR TO CONGRESS’S CONDITIONING FEDERAL FUNDS ON STATE COMPLIANCE WITH THE NO CHILD LEFT BEHIND ACT

As discussed in Part V, any court reviewing Connecticut’s claims under South Dakota v. Dole would likely uphold the Secretary’s denial of Connecticut’s waiver requests. Even if Connecticut were to succeed on its claim that the Secretary is violating Dole’s second restriction, Congress could easily rectify a court ruling striking down the relevant provisions of NCLB on these grounds by amending the Act. A reviewing court should, however, apply the Dole test more aggressively in Connecticut’s case and find another ground on which to strike down the provisions of NCLB that Connecticut challenges, at least as they are currently administered by the Secretary. Dole’s fourth independent constitutional bar restriction should provide such a ground.

In Dole, the Court listed five general restrictions on Congress’s power to impose conditions on the states in exchange for the receipt of federal funds. The fourth restriction provides that conditions imposed must not violate any other constitutional provision. The Court stated that the Tenth Amendment alone does not act as a constitutional bar; rather, the Court described the restriction as the unex-

280 See supra notes 246–279 and accompanying text. See generally South Dakota v. Dole, 483 U.S. 203 (1987). This analysis assumes, however, that the Supreme Court’s recent federalism decisions with respect to the Commerce Clause do not foreshadow a similar shift in its Spending Clause jurisprudence. See Baker & Berman, supra note 240, at 510–11 (arguing that if Congress attempts to evade the Court’s federalism decisions by exploiting Dole in order to legislate in areas of traditional state concern, the Court will tighten the Dole standard or abandon it entirely); Choper, supra note 273, at 465 (arguing that if the Court chooses to become active in the Spending Clause area, there is room for it to expand its authority to review spending legislation that imposes unconstitutional conditions on the states); supra note 240.

281 See IDEA Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60 (superseding the U.S. Court of Appeals for the Fourth Circuit’s decision in Virginia Department of Education v. Riley, which struck down a condition the Department had imposed on the states in exchange for receipt of IDEA funds, almost immediately after that case was decided).


283 See id.

284 Id. at 207–11.

285 Id. at 208.
ceptionable proposition that the power may not be used to induce the states to engage in activities that would themselves be unconstitutional.\textsuperscript{286} As examples of the type of conditions that would violate this fourth restriction, the Court offered a grant of federal funds conditioned on invidiously discriminatory state action, or the infliction of cruel and unusual punishment.\textsuperscript{287}

In Connecticut’s case, the potential for liability to its public school students under the Fourteenth Amendment’s Equal Protection Clause should serve as an independent constitutional bar to NCLB as it is currently administered.\textsuperscript{288} If the Secretary prevails in Connecticut’s lawsuit, Connecticut may ultimately lose its education funds under Title I.\textsuperscript{289} A Connecticut statute effectively prohibits the state from using any of its own funds to implement NCLB’s requirements; thus, faced with insufficient federal funding, Connecticut will not be able to comply with NCLB as currently mandated.\textsuperscript{290} Not only would Connecticut lose federal funds it had been using to comply with NCLB,

\textsuperscript{286} Id. at 210.
\textsuperscript{287} Dole, 483 U.S. at 210–11; cf. United States v. Am. Library Ass’n, Inc., 539 U.S. 194, 214 (2003) (upholding condition on public libraries’ receipt of federal funds requiring them to use filtering software on their computers to block access to obscene material on the Internet, because libraries’ use of the software did not violate patrons’ First Amendment rights, and thus the condition did not induce the libraries to violate the Constitution).
\textsuperscript{288} See U.S. Const. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides, in relevant part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Id.
\textsuperscript{289} Second Amended Complaint, supra note 16, at 16. In its complaint, Connecticut states that the state of Utah formally asked the Secretary about the consequences of opting out of NCLB’s requirements. Id. The Secretary responded that Utah would lose not only its Title I funds, but also any other funds allotted according to the Title I formula. Id.; see Nat’l Conference of State Legislatures, supra note 13, at 49 (noting the same, and characterizing the Secretary’s response as “raising the stakes for nonparticipation” in NCLB as compared to previous versions of Title I).

Since NCLB was enacted, at least three states have been fined for failing to comply with some of the Act’s mandates. Rob Hotakainen, No State Left Untouched by Education Law, STAR TRIB., May 9, 2005, at 1A. In April 2005, Texas was fined $444,282—the second-largest fine ever imposed by the Department—for allowing 9% of its disabled students to use alternative tests, in violation of the then-federal limit of 1%. Id. In 2003, Minnesota was fined $113,000 when it substituted graduation rates and attendance records for test scores to show progress, and Georgia was fined $783,327 for failing to establish its state testing scheme. Id.

Moreover, the Department recently released its designations of the states for complying with NCLB’s testing provisions. Lynn Olson, Department Raps States on Testing, EDUC. WEEK, July 12, 2006, at 1. Four states were designated as “full approval”; eleven states received designations such that some federal funds will be redirected to local districts. See id. Connecticut was designated as “approval expected.” Id.

\textsuperscript{289} See CONN. GEN. STAT. § 10-14n(g) (2005).
but it could also lose funds it has relied on since the original enactment of the Title I program more than forty years ago to maintain its own education policies.\footnote{See 46 CONN. S. PROC., pt. 9, 2003 Sess. 2626, 2635 (May 21, 2003) (statement of Sen. Gaffey) ("How the heck is Connecticut going to turn around and say, oh, we don’t want to comply and you can keep the $200 million you give us in Title I monies. Everybody around this circle knows that we can’t afford to refuse $200 million in Title I monies that our school children are entitled to."); Second Amended Complaint, supra note 16, at 16.}

Consider this scenario: several years from now, if NCLB is even somewhat successful in moving toward its goal of equal educational opportunity and quality education for all students, the children in most states will have substantially similar levels of education measurable by similar standards.\footnote{Cf. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19, 24 (1973).} In contrast, children from any state that has not participated in NCLB—either because of insufficient funding or simply by the state’s choice—will probably not have that same level of education, because those states will be struggling to recover from the loss of Title I funds they had received for over forty years.\footnote{Cf. id. at 19, 24, 28.} If those children decide to file a lawsuit against their states because they have not received the same level of education as all of the other children in the nation, due in large part to the fact that their states have not received the federal funds that other states have, will those children substantiate a valid equal protection claim?\footnote{See id. at 22–25. The Court also held that education is not a fundamental right afforded explicit protection under the U.S. Constitution. Id. at 35.}

This Note argues that they would, and thus that the Fourteenth Amendment should stand as an independent constitutional bar to NCLB as it is currently administered.\footnote{U.S. CONST. amend. XIV; see Dole, 483 U.S. at 208–10.} Admittedly, the Court in \textit{San Antonio Independent School District v. Rodriguez}, based on the state of education in 1973, would probably say no.\footnote{See Rodriguez, 411 U.S. at 54–55.} In \textit{Rodriguez}, the Supreme Court held that Texas’s school financing system, which had a disproportionate impact on public school students in low-property-wealth districts in the state, did not violate the Equal Protection Clause of the Fourteenth Amendment.\footnote{Id.} The Court determined that wealth, in and of itself, is not a suspect classification entitled to strict scrutiny upon judicial review.\footnote{See Rodriguez, 411 U.S. at 55.} Thus, applying rational basis review to the state’s school financing system, the Court held that the system did not violate the Equal Protection Clause because it reasonably fur-

\footnote{See 46 CONN. S. PROC., pt. 9, 2003 Sess. 2626, 2635 (May 21, 2003) (statement of Sen. Gaffey) ("How the heck is Connecticut going to turn around and say, oh, we don’t want to comply and you can keep the $200 million you give us in Title I monies. Everybody around this circle knows that we can’t afford to refuse $200 million in Title I monies that our school children are entitled to."); Second Amended Complaint, supra note 16, at 16.}


\footnote{Cf. id. at 19, 24, 28.}

\footnote{U.S. CONST. amend. XIV; see Dole, 483 U.S. at 208–10.}

\footnote{See Rodriguez, 411 U.S. at 54–55.}

\footnote{Id.}

\footnote{See id. at 22–25. The Court also held that education is not a fundamental right afforded explicit protection under the U.S. Constitution. Id. at 35.}
thered Texas’s legitimate interest in maintaining local control over the state’s schools.\textsuperscript{299}

At the time of the \textit{Rodriguez} decision, however, the states and local districts controlled education policy.\textsuperscript{300} Moreover, the U.S. Supreme Court was largely concerned with two issues in that case: (1) the \textit{Rodriguez} plaintiffs could not articulate a discrete class in equal protection terms; and (2) the plaintiffs had not been absolutely deprived of education, and any other difference in quality of education was not measurable.\textsuperscript{301}

Although “students in Connecticut” may not be a classification “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”—the classifications the Court typically subjects to strict scrutiny—“students in Connecticut” is certainly a discrete class.\textsuperscript{302} More significantly, with NCLB’s standards and rankings, an absolute denial of education perhaps may not be necessary to find an Equal Protection Clause violation, because a certain, measurable level of quality education may begin to emerge.\textsuperscript{303}

The question becomes whether Connecticut’s rationale for failing to comply with NCLB—namely, that its state law prohibited the use of state funds for NCLB’s mandates and that it disagreed with federal policy choices—would stand up to strict scrutiny.\textsuperscript{304} Connecticut has an interest in developing its own education policies pursuant to the power reserved to the states under the Tenth Amendment, but it is not clear whether this interest is compelling enough to survive strict scrutiny.\textsuperscript{305} Furthermore, even if a reviewing court refused to

\textsuperscript{299} \textit{Id.} at 55.
\textsuperscript{300} \textit{See id.} at 49–53.
\textsuperscript{301} \textit{Rodriguez}, 411 U.S. at 19.
\textsuperscript{302} \textit{Id.} at 28; \textit{cf. id.} at 22–28.
\textsuperscript{303} \textit{See Dayton et al., supra note 67, at 10–11} (arguing that future school funding plaintiffs will assert that the states have a constitutional duty of accountability, as defined in NCLB and state accountability legislation, as part of their duty to provide an adequate education for all of the states’ students); \textit{Heise, supra note 258, at 7} (noting that school funding disputes are increasingly cast in a way to implicate NCLB); \textit{Bill Scanlon, Educators: State at Risk to School-Funding Lawsuits,} \textit{Rocky Mountain News}, July 22, 2005, at 26A (quoting a school finance expert as saying that although states have defended themselves against school funding lawsuits in the past by demonstrating that they had equalized spending among districts, courts have recently started to insist that states provide adequate funding to move closer to NCLB’s goals). \textit{See generally 20 U.S.C. § 6311 (Supp. III 2003)}.
\textsuperscript{304} \textit{Cf. Rodriguez}, 411 U.S. at 16–17 (noting that the state had conceded that its financing system would not stand up to strict scrutiny).
\textsuperscript{305} \textit{See U.S. Const. amend. X}.
apply strict scrutiny, there would still be the question of whether Connecticut’s rationale would stand up to rational basis review. The answer could be yes, because, in light of widespread criticism of NCLB’s policies, it might be reasonable for Connecticut to believe that it can do better. The Secretary might argue, however, that Connecticut’s achievement gap is quite large, and thus that such a belief would not be reasonable. In any event, this Note argues that the viability of this type of equal protection claim demonstrates that Congress and the Secretary are compelling Connecticut, albeit indirectly, to violate its public school students’ Fourteenth Amendment rights.

The argument that NCLB would lead Connecticut to violate its students’ Fourteenth Amendment rights if the Secretary does not waive the requirements the state lacks funds for and disagrees with deviates somewhat from the independent constitutional bar restriction as the Supreme Court envisioned it in Dole. One could argue that unlike the expenditures envisioned by Dole, such as funds conditioned on infliction of cruel and unusual punishment, here it is only if Connecticut does not comply with the conditions that it would violate the Constitution. But in reality, the damage has already been done. Not only have all forty-nine other states created academic standards in accordance with NCLB (all approved by the Secretary) so that Connecticut’s students could use them against the state in an equal protection lawsuit, but even Connecticut itself has already created similar standards. At the time, of course, it was operating under the belief that the unfunded mandates provision meant what it says, and that the Secretary would use his or her waiver authority thoughtfully. It is NCLB, by suddenly and forcibly conditioning the states’ receipt of Title I funds that they had received for decades on

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306 Cf. Rodriguez, 411 U.S. at 55. At least two scholars argue that NCLB’s accountability standards will enable plaintiffs to prove intentional discrimination for the purposes of Equal Protection Clause claims, simply by producing information that the states themselves have generated as required under the Act. Liebman & Sabel, supra note 69, at 297. Thus, these scholars argue, the burden will be on the schools to explain to the courts why they have not been able to meet their own targets, particularly when other schools in the state have met those targets. See id.

307 See supra notes 119–130 and accompanying text.

308 See supra notes 141, 160 and accompanying text.

309 See Dole, 483 U.S. at 210–11.

310 Cf. id. at 208–10.

311 Cf. id.


313 See Olson, supra note 289.
the creation of new academic standards, without actually providing funding adequate to meet those very standards, that causes states like Connecticut to run afoul of the Fourteenth Amendment.\footnote{1080} Moreover, this Fourteenth Amendment question is a step removed from Connecticut’s claims in the lawsuit, but it nevertheless demonstrates the extent to which federal policy, in the form of NCLB, could continue to dominate the education reform arena not only legislatively, but also in the courts.\footnote{1085} Although an Equal Protection Clause analysis under Rodriguez involves anticipating the future effects of a loss for Connecticut in its lawsuit, the repercussions of Connecticut submitting to federal coercion to follow federal policy, and thus giving up local control of its schools, are potentially great.\footnote{1086}

Ultimately, Connecticut’s challenge to NCLB illustrates the extent to which the federal government, through the Secretary, has preempted the states’ ability to make policy choices about education.\footnote{1087} The clash between Connecticut and the Secretary has landed in court, yet school funding lawsuits demonstrate that the courts are unable to contribute significantly to education reform when there is no political will to reform.\footnote{1088} A more cooperative, and less combative, relationship between the Secretary and states like Connecticut could allow NCLB to flourish as one approach to education policy, rather than as the only approach, because the states would not waste energy and resources resisting the Act.\footnote{1089}

**Conclusion**

Thirty years after the U.S. Supreme Court sent education reformers away to resolve inequity concerns at the state level, the federal court system—and potentially the Supreme Court itself—faces a doubly troubling challenge. Not only has the federal government reached into the states and local school districts in an unprecedented way, but this step also threatens Connecticut and other states with a

\footnote{1084} See id.; see also § 6311(b)(3)(C) (i)–(ii).\footnote{1085} See generally Second Amended Complaint, supra note 16.\footnote{1086} See Rodriguez, 411 U.S. at 49–53.\footnote{1087} See Second Amended Complaint, supra note 16, at 1–16.\footnote{1088} See Dayton & Dupre, supra note 39, at 2410–11; Rebell & Hughes, supra note 86, at 101–13; Thro, supra note 70, at 482–84; see also Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 208 (1982) (“We have previously cautioned that courts lack the ‘specialized knowledge and experience’ necessary to resolve ‘persistent and difficult questions of educational policy.’” (quoting Rodriguez, 411 U.S. at 42)).\footnote{1089} See Salzman, supra note 166.
hard choice: either subject themselves to coercion and accept the federal government’s funds, or risk equal protection liability should their students challenge their decisions to follow their own policies and thereby forego federal funds.

Even if Congress has taken a step in the right direction toward effective education reform with the No Child Left Behind Act, the Act cannot be the only possible right step—education reformers have been working toward the same goal for decades, and even they have not achieved much success. The Secretary should use her power to waive provisions of NCLB more respectfully so that the states can continue to experiment with a diversity of approaches to education reform. Likewise, Congress should fund NCLB more fully so that the states can comply with the Act’s requirements, but reserve their own funds for expenditure on their own policy choices.

Nicole Liguori
DISPOSING OF CHILDREN: THE EIGHTH AMENDMENT AND JUVENILE LIFE WITHOUT PAROLE AFTER ROPER

Abstract: In most states, juveniles may receive the sentence of life without the possibility of parole when convicted in adult court. Scientific research has shown, however, that the brains of juveniles are different from those of adults. Citing this research, the U.S. Supreme Court held in the 2005 case of Roper v. Simmons that sentencing juveniles to the death penalty violates the Eighth Amendment due to their reduced culpability. Applying the reasoning of Roper, this Note argues that sentencing juveniles to life without parole violates the Eighth Amendment on its face. In the alternative, it argues that the sentence violates the Eighth Amendment as applied in certain cases. In addition, this Note presents policy arguments for the abolition of the sentence by state and federal legislatures.

Introduction

In the last decade, the general public has devoted significant attention to the issue of youth violence because of tragedies such as the in-school murders committed by two teenagers in Littleton, Colorado. Public outcry has resulted in changes that have dismantled the juvenile justice system, a system founded on the idea that childhood is a distinct phase of life, and that juveniles are less culpable for crimes than adults and more amenable to rehabilitation. The changes implemented by states have made it easier for these states to prosecute juveniles as adults, and thereby reflect the growing notion that children are indistinguishable from adults. States implemented these changes to emphasize punishment and deterrence, rather than focusing on rehabilitation. Today, children are not only transferred to and

1 Kim Taylor-Thompson, States of Mind/States of Development, 14 Stan. L. & Pol'y Rev. 143, 143, 144 & n.10 (2003). Throughout this Note, all references to youths, children, adolescents, and juveniles refer to persons under the age of eighteen. The phrase “life without parole” refers to sentences of life without the possibility of parole. The phrase “juvenile life without parole” refers to sentences of life without parole imposed on persons younger than eighteen.

2 Id. at 146–49.

3 Id.

4 Id. at 148–49.
prosecuted in the adult system more readily than before the 1990s, but also are sentenced to its penultimate penalty—life without the possibility of parole. At least 2225 people in the United States currently are serving sentences of life without parole for crimes they committed before their eighteenth birthdays.

Recent research on adolescents, however, shows that there are significant psychological and neurological differences between the brains of adolescents and adults. Psychologists and juvenile rights advocates use these studies to support their position that the culpability of juveniles is reduced. In 2005, the U.S. Supreme Court recognized this reduced culpability when it held in *Roper v. Simmons* that imposing the death penalty on juveniles violates the U.S. Constitution. The Court examined the evolving standards of decency in the United States and held that the juvenile death penalty violates the Eighth Amendment on its face.

The Court also considered the opinions of independent associations and the practices of other countries. Although sentencing juveniles to life without parole has become more common in the United States since the 1990s, the international community overwhelmingly has rejected the practice. Only about fourteen other countries permit life sentences for children, and even in those countries, it is rarely imposed. Also, a number of international human rights treaties re-

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6 Id.
8 See Cauffman & Steinberg, supra note 7, at 742–43; Sowell et al., Mapping Continued, supra note 7, at 8819; Steinberg & Scott, supra note 7, at 1013.
10 Id.
11 Id. at 575–78.
12 Human Rights Watch, supra note 5, at 104–07.
13 Id. at 106. It is not clear whether any of these countries permits the possibility of parole. Id. Of the fourteen other countries that permit the sentence, only three currently have people serving life without parole for crimes committed as children—South Africa, Tanzania, and Israel. Id.
fect the worldwide rejection of this sentence. The United States, however, either has refused to ratify these treaties, or has ratified them only with a reservation that preserves its right to incarcerate juveniles for life without parole. The United States stands nearly alone in a world that identifies the sentence of juvenile life without parole as a human rights violation.

This Note explores the impact of Roper on sentencing juveniles to life without the possibility of parole. Given the ambiguity of the Supreme Court’s Eighth Amendment analysis, it is difficult to predict how the Court would rule on the constitutionality of juvenile life without parole. By applying current psychological research and the reasoning in Roper, however, this Note concludes that the Court should find that juvenile life without parole violates the Constitution on its face or at least in certain cases where the harshness of the penalty outweighs the gravity of the offense.

Part I of this Note provides a history of the juvenile justice system and discusses the process by which adult court jurisdiction subjects children to life without the possibility of parole. Part II surveys the state laws regarding life without the possibility of parole. Part III examines the psychological and neurological differences between children and adults. Part IV discusses the application of the Eighth Amendment to capital and non-capital sentences, particularly the Supreme Court’s recent decision in Roper. Part V suggests that juvenile life without parole violates the Eighth Amendment on its face. Even if the Court finds that the sentence does not violate the Constitution on its face, Part VI argues that juvenile life without parole violates the Eighth Amendment as applied in certain cases. Part VII explores other reasons for the U.S. Congress and state legislatures to abolish

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15 Id. at 94.
16 See infra notes 222–299 and accompanying text.
17 See infra notes 222–299 and accompanying text.
18 See infra notes 222–299 and accompanying text.
19 See infra notes 222–299 and accompanying text.
20 See infra notes 27–61 and accompanying text.
21 See infra notes 62–80 and accompanying text.
22 See infra notes 81–108 and accompanying text.
23 See infra notes 109–221 and accompanying text.
24 See infra notes 222–255 and accompanying text.
25 See infra notes 256–299 and accompanying text.
the sentence of juvenile life without parole, including the United States’s stature in international human rights law, the costs of lifetime imprisonment, and the racial disparities in sentencing.\textsuperscript{26}

I. Children in Adult Court

Throughout U.S. history, the juvenile justice system has changed with societal attitudes about adolescent capabilities.\textsuperscript{27} At the formation and in the early days of the American justice system, children were tried as adults and could be put to death.\textsuperscript{28} The advent of juvenile courts in the early twentieth century ushered in an era during which rehabilitation was the primary goal for juvenile sentencing.\textsuperscript{29} In the past fifteen years, however, states have changed their laws to allow again adult sentencing of juveniles in certain cases, focusing on the goals of retribution and deterrence rather than rehabilitation.\textsuperscript{30} Today, children are more vulnerable to life without parole sentences than at any time since the nineteenth century.\textsuperscript{31}

Children always have been subject to prosecution in the U.S. justice system.\textsuperscript{32} In the late eighteenth and early nineteenth centuries, children as young as seven were tried in adult courts and could be convicted if the government showed the child possessed the capacity to form a mens rea.\textsuperscript{33} If convicted, children faced the full range of penalties, including the death penalty.\textsuperscript{34}

In the early twentieth century, however, child welfare advocates convinced states that children’s immaturity and potential for rehabilitation should influence the response to their criminal behavior.\textsuperscript{35} This social reform movement argued that children were less criminally re-

\textsuperscript{26} See infra notes 300–335 and accompanying text.
\textsuperscript{28} See Taylor-Thompson, supra note 1, at 145.
\textsuperscript{29} Id. at 147.
\textsuperscript{30} See id. at 148.
\textsuperscript{31} See id.
\textsuperscript{32} Id. at 145.
\textsuperscript{33} See Taylor-Thompson, supra note 1, at 145. The government had this burden when a child criminal defendant advanced an infancy defense, in which the child asked the court to dismiss the charges because she lacked the capacity to distinguish between right and wrong. Id.
\textsuperscript{34} See id. Although the practice was rare, some children between the ages of ten and twelve were executed. See id. at 145–46.
sponsible than adults and more amenable to treatment and intervention.36 Advocates believed that criminal behavior by children resulted from external forces, such as impoverished living conditions or parental neglect.37 In response, states created juvenile courts that relied on a “best interest of the child” approach to tailor treatment plans to the offenders’ needs.38 The goal of creating these courts was to treat the delinquent children and enable their return to society as productive citizens.39 Illinois created the first juvenile court in 1899 and other states replicated the idea across the country.40 After the creation of juvenile courts, judges in most states retained the discretion to waive jurisdiction and allow prosecution of children in adult criminal court.41 For the first half of the twentieth century, however, states almost exclusively tried children in juvenile courts.42

Early juvenile court proceedings were more informal than adult court proceedings and provided few adult-like due process protections.43 This procedural informality raised questions about protections for juveniles and consistency in sentencing.44 Because juvenile courts in the early twentieth century did not recognize constitutional due process protections for children, their decisions often were arbitrary.45 To impose more order in juvenile delinquency hearings, in 1967 the U.S. Supreme Court in In re Gault extended to juveniles many of the procedural due process rights enjoyed by criminal defen-

36 See Scott & Grisso, supra note 35, at 141–43; Taylor-Thompson, supra note 1, at 146.
38 Taylor-Thompson, supra note 1, at 147.
39 Id. at 146.
40 Id. at 147.
41 See Patrick Griffin et al., U.S. Dep’t of Justice, Trying Juveniles As Adults in Criminal Court: An Analysis of State Transfer Provisions 3 (1998), available at http://www.ncjrs.gov/pdffiles/172836.pdf. All states that authorize discretionary waivers require a waiver hearing. Id. Most waiver statutes specify transfer criteria that must be met before a court may consider waiver. Id.
42 See Human Rights Watch, supra note 5, at 14.
43 See Taylor-Thompson, supra note 1, at 147. For example, juveniles did not have the right to an attorney in juvenile court. Id.
44 Scott & Grisso, supra note 35, at 145; Taylor-Thompson, supra note 1, at 147.
45 In re Gault, 387 U.S. 1, 18–20 (1967). Under the rationale of the state as parens patriae, children had a right to custody rather than to liberty. Id. at 16–17. Therefore, when the state intervened for the parents of a delinquent child, it merely substituted the custody to which the child was entitled. Id. Because juvenile proceedings were civil rather than criminal, they were not subject to the due process requirements for deprivations of liberty. See id. at 17. Such individualized treatment often led to arbitrary results. See id. at 18–19.
dants in adult courts. These included the right to notice of charges, the right to counsel, the privilege against self-incrimination, and the right to cross-examination of witnesses.

An increase in juvenile crime during the 1980s and 1990s incited public outcry demanding tougher penalties for juveniles. The rate of juvenile arrests for violent crime grew substantially beginning in the mid-1980s and peaking in the mid-1990s, including the juvenile arrest rates for murder, aggravated assault, and forcible rape. The juvenile arrest rate for robbery declined through the 1980s, but then grew rapidly to its peak in 1995.

These increases in juvenile arrests fueled a trend to “get tough” on youth crime. Supporters of this trend urged policymakers that children who committed violent offenses were inherently dangerous and destined for a life of crime. In response, all states changed their laws to make it easier to try and sentence child offenders in adult courts. States restricted the jurisdiction of juvenile courts by lowering the age for adult court jurisdiction, expanding criteria for transfer, enacting automatic transfer statutes, and granting prosecutors the discretion to file charges against children directly in adult court. Today, all states allow adult criminal prosecution of children under

46 Id. at 33, 36–37, 55–56. The Court based its decision partly on concerns that juveniles were getting neither the promised rehabilitation nor the procedural rights guaranteed to adults. Id. at 18 n.23. The Court noted that “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” Id. at 18.

47 Id. at 33, 36–37, 55–56. The Court did not extend to juveniles the right to trial by jury, nor did it adopt a punitive approach. See Taylor-Thompson, supra note 1, at 147.


49 See Snyder, supra note 48, at 6.

50 See id.

51 See Scott & Grisso, supra note 35, at 148; Taylor-Thompson, supra note 1, at 148. The emphasis in this modern system is on protecting society from the harms caused by youthful offenders. Scott & Grisso, supra note 35, at 148.

52 See Scott & Grisso, supra note 35, at 149; Taylor-Thompson, supra note 1, at 148–49.

53 See Scott & Grisso, supra note 35, at 149–50; Taylor-Thompson, supra note 1, at 149.

54 See Griffin et al., supra note 41, at 3–11. Twenty-eight states have statutes that remove certain offenses from the juvenile court’s jurisdiction. Id. at 8. Fourteen states require mandatory waiver of juvenile court jurisdiction in cases that meet certain criteria. Id. at 4. Fifteen states have direct file statutes that define a category of cases in which the prosecutor determines whether to proceed initially in juvenile or criminal court. Id. at 7.
certain circumstances.\textsuperscript{55} Many states do not have a minimum age for transfer to adult court.\textsuperscript{56} Unless statutorily exempt, once children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole.\textsuperscript{57}

It is now apparent that the dramatic increases in violent crime in the 1980s and 1990s were short-lived and not indicative of a generation of “super-predators” as analysts had warned in the mid-1990s.\textsuperscript{58} In 2003, the juvenile arrest rates for murder, forcible rape, and robbery reached their lowest levels since 1980, and the rate for aggravated assault also declined.\textsuperscript{59} Nevertheless, the 1990s’ “get tough” trends encouraged the average person to view juvenile offenders as dangerous threats rather than wayward children in need of rehabilitation.\textsuperscript{60} Critics contend that the legacy of those fear-filled years is a justice system that, rather than holding juveniles accountable, holds the nation’s youngest offenders disposable.\textsuperscript{61}

\section*{II. State Laws Regarding Life Without Parole}

Though state sentencing laws vary, most states permit juvenile life without the possibility of parole.\textsuperscript{62} Only eight states and the District of Columbia prohibit the sentence.\textsuperscript{63} Four of those states—Alaska, Maine, New Mexico, and West Virginia—proscribe life without parole


\textsuperscript{56} See Human Rights Watch, \textit{supra} note 5, at 18.

\textsuperscript{57} See id. at 25.

\textsuperscript{58} See Zimring, \textit{supra} note 55, at 105–06 (quoting analysts including John Dilulio of Princeton University, who coined the term “super-predators,” James Fox of Northeastern University, and the Council on Crime in America, all of whom warned of an impending crime wave in the first ten years of the twenty-first century due to population growth of teenagers).

\textsuperscript{59} See Snyder, \textit{supra} note 48, at 6.

\textsuperscript{60} See Taylor-Thompson, \textit{supra} note 1, at 148–49.

\textsuperscript{61} See Human Rights Watch, \textit{supra} note 5, at 116.


for all offenders, regardless of age. The other jurisdictions—Kansas, Kentucky, New York, Oregon, and the District of Columbia—prohibit the sentence for juveniles. In twenty-seven of the forty-two states that permit sentencing of juveniles to life without parole, the sentence is mandatory for anyone, child or adult, found guilty of certain enumerated crimes.

The crimes for which offenders receive sentences of life without parole vary by state. Children can be sentenced to life without parole for homicide offenses, robbery, aggravated assault, and rape. In most states, juvenile offenders may receive this sentence for felony murder or aiding and abetting a murder.

Recently, some states have considered or passed changes to their sentencing laws. In 2004–2005, Colorado and Florida considered, but did not pass, bills that would ban juvenile life without the possibility of parole. Texas did pass a new law in 2005. Although Texas previously proscribed the sentence of life without parole for all offenders, the state changed its laws effective September 1, 2005 to

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68 See id. Although ninety-three percent of youths are sentenced to life without parole for homicide offenses, the punishment is not reserved only for the most brutal murderers. See Human Rights Watch, supra note 5, at 27. Rather, the Amnesty International self-report study of 172 youth offenders found that twenty-six percent were sentenced to life without parole for felony murder. Id. In a survey of 146 juvenile lifers in Michigan, nearly half reported that they were convicted of aiding and abetting or that they did not personally commit the murder. See LaBelle et al., supra note 67, at 4.
71 See Hughes, supra note 70, at B2; Reinhard, supra note 70, at 1A.
permit this sentence for all offenders found guilty of a capital felony without regard to age.\textsuperscript{73}

In the forty-two states that permit juvenile life without parole, there is wide variation in the number of offenders serving the sentence.\textsuperscript{74} For instance, three states—New Jersey, Utah, and Vermont—permit the sentence for all offenders, but had no child offenders serving life without parole as of 2005.\textsuperscript{75} In each of several other states, including Florida, Louisiana, Michigan, and Pennsylvania, there are currently more than 300 youths serving life without parole.\textsuperscript{76} In total, there are currently at least 2225 child offenders serving life without parole in the United States.\textsuperscript{77}

Criminal justice policy choices influence each state’s sentencing rate for life without parole.\textsuperscript{78} The sentencing rates are higher in states that (1) make life without parole mandatory for certain crimes and (2) do not set a minimum age for adult court jurisdiction.\textsuperscript{79} Advocates for children contend that legislators adopting such laws should consider evidence—discussed in Part III of this Note—that demonstrates significant psychological and neurological differences between children and adults.\textsuperscript{80}

\section*{III. Differences Between Children and Adults}

Scientists have identified psychological and neurological differences between children and adults.\textsuperscript{81} These differences undermine the legitimacy of imposing equal measures of retribution on the two groups.\textsuperscript{82} In 2005, the U.S. Supreme Court found these differences

\begin{itemize}
  \item \textsuperscript{73} See Human Rights Watch, supra note 5, at 35.
  \item \textsuperscript{75} See Human Rights Watch, supra note 5, at 35; LaBelle et al., supra note 67, at 4.
  \item \textsuperscript{76} See Human Rights Watch, supra note 5, at 1.
  \item \textsuperscript{77} See id. at 37.
  \item \textsuperscript{78} See id. at 18 (presenting a table of minimum age for adult prosecution by state); id. at 35 (presenting a table of total number of youths serving life without parole by state); id. at 37 (discussing differences between states with mandatory sentences and those with discretionary sentences).
  \item \textsuperscript{79} See id. at 45.
  \item \textsuperscript{80} See id. at 45.
  \item \textsuperscript{81} See, e.g., Cauffman & Steinberg, supra note 7, at 742–43; Sowell et al., Mapping Continued, supra note 7, at 8819; Steinberg & Scott, supra note 7, at 1013.
  \item \textsuperscript{82} See Steinberg & Scott, supra note 7, at 1011 (stating “adolescents are less culpable than are adults because adolescent criminal conduct is driven by transitory influences”). But see Alfred S. Regnery, Getting Away with Murder: Why the Juvenile Justice System Needs an
significant when it held in *Roper v. Simmons* that the juvenile death penalty violates the Eighth Amendment; the Court stated: “These differences render suspect any conclusion that a juvenile falls among the worst offenders.”83 The Court noted that almost every state prohibits children younger than eighteen from voting, serving on juries, or marrying without parental consent, in recognition of the immaturity and irresponsibility of juveniles.84 American law, acknowledging that children are unable to make rational decisions, adopts a paternalistic approach that finds legal rights of children meaningful only as exercised by adult agents acting with the children’s best interests in mind.85 The law assumes that children as a class are inherently different from adults.86 Scientific research supports this assumption.87

The literature on psychological development attributes adolescent immaturity to two types of deficiencies: cognitive and psychosocial.88 Cognitive development refers to the way adolescents think and make decisions.89 Psychosocial development refers to the values and preferences that inform adolescents’ decision making.90 Although researchers disagree on the extent to which adolescents and adults differ in cognitive reasoning, studies have identified strong psychosocial differences that may affect determinations of culpability.91

The psychosocial research shows strong differences between adolescents and adults that implicate assessments of culpability.92 Researchers have identified four psychosocial factors that affect the way adolescents make decisions, including whether to commit a crime or

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Overhaul, 34 Pol’y Rev. 65, 65 (1985) (“These are criminals who happen to be young, not children who happen to commit crimes.”).

84 See id. at 569.
87 See infra notes 88–108 and accompanying text.
88 See Cauffman & Steinberg, supra note 7, at 742–43; Scott & Grisso, supra note 35, at 161; Steinberg & Scott, supra note 7, at 1011–12.
89 See Scott & Grisso, supra note 35, at 157.
90 See Steinberg & Scott, supra note 7, at 1012.
91 See Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. Adolescence 265, 275 (1989). One study found that adolescents are aware of the risks they take and that little growth in logical abilities related to decision making occurs past age sixteen. See Cauffman & Steinberg, supra note 7, at 743–44 (stating that research shows few significant differences). In contrast, one study indicated there may be significant differences in the extent to which those logical abilities are employed. See Scott & Grisso, supra note 35, at 160.
92 See Cauffman & Steinberg, supra note 7, at 744.
an antisocial act: peer influence, attitude toward risk, future orientation, and capacity for self-management. In one study, adolescents on average scored significantly lower than adults on these factors and displayed less sophistication in decision making. Although individual levels of these factors are more predictive of antisocial decision making than chronological age alone, researchers found that the period between ages sixteen and nineteen is an important transition point in psychosocial development.

Furthermore, psychosocial research confirms what every parent knows—that adolescents are more vulnerable to peer influence and more likely to take risks than adults. Adolescents are more focused on short-term consequences and less sensitive to future outcomes, a combination that can lead to risky behavior. When faced with a stressful situation, adolescents fail to see more than one option due to their lack of experiences and ineffective information-processing abilities. These attributes lead many adolescents to experiment with criminal conduct. For most children, antisocial conduct is “adolescence-limited”; in other words, they grow out of it.

In addition to psychological research showing differences in the way adolescents think and react, neurological studies reveal physio-
logical differences between their brains and the brains of adults.\textsuperscript{101} Research using magnetic resonance imaging ("MRI") shows that the human brain continues to develop beyond adolescence.\textsuperscript{102} The brain grows in volume and becomes more organized into a person's early twenties.\textsuperscript{103} In particular, the frontal lobe undergoes substantial growth during adolescence.\textsuperscript{104} It is the area responsible for impulse control, judgment, problem solving, and behavior.\textsuperscript{105} Instead of using the frontal lobe to make decisions, adolescents rely more heavily on the amygdala, the emotional center of the brain.\textsuperscript{106} As a result, adolescents are more prone to erratic behavior than adults.\textsuperscript{107} As the Supreme Court recognized in \textit{Roper}, this evidence of neurological differences between adolescents and adults, combined with the evidence of psychosocial differences, supports a presumption of diminished culpability for adolescent offenders.\textsuperscript{108}

\textbf{IV. Interpretation of the Eighth Amendment}

The reduced culpability of juveniles is important when courts determine whether a punishment is appropriate for a juvenile who has been found guilty of a crime.\textsuperscript{109} Courts apply the Eighth Amendment to determine whether a punishment is so cruel and unusual that

\begin{thebibliography}{99}
\bibitem{102}See Jay N. Giedd et al., \textit{Brain Development During Childhood and Adolescence: A Longitudinal MRI Study}, 2 \textit{Nature Neuroscience} 861, 861 (1999) (concluding that the volume of brain matter continues to increase and reorganize through age twenty); Sowell et al., \textit{In Vivo}, supra note 101, at 861. These studies refute the conclusions of previous generations of psychologists who believed that human brain development finishes before age twelve. See Giedd et al., \textit{supra} note 102, at 861; Sowell et al., \textit{In Vivo}, \textit{supra} note 101, at 861.
\bibitem{103}See Mary Beckman, \textit{Neuroscience: Crime, Culpability, and the Adolescent Brain}, 305 \textit{Science} 596, 596 (2004); Giedd et al., \textit{supra} note 102, at 861; Sowell et al., \textit{In Vivo}, \textit{supra} note 101, at 861.
\bibitem{104}See Sowell et al., \textit{Mapping Continued}, \textit{supra} note 7, at 8821; Wallis, \textit{supra} note 96, at 59–60 (attributing behavioral problems in adolescents to hormonal changes as well as the immaturity of the frontal lobe).
\bibitem{105}See Wallis, \textit{supra} note 96, at 59–60.
\bibitem{106}See Beckman, \textit{supra} note 103, at 599; Wallis, \textit{supra} note 96, at 62 (noting that using the amygdala may explain why adolescents have difficulty reading emotional signals).
\bibitem{107}See Beckman, \textit{supra} note 103, at 599; Wallis, \textit{supra} note 96, at 62.
\bibitem{108}See 543 U.S. at 570; Steinberg & Scott, \textit{supra} note 7, at 1011. Similarly, the Supreme Court held in \textit{Atkins v. Virginia} in 2002 that differences between mentally retarded and average adults diminish the personal culpability of mentally retarded criminal defendants. 536 U.S. 304, 318 (2002).
\end{thebibliography}
it violates the U.S. Constitution.\footnote{See U.S. Const. amend. VIII; \textit{Roper}, 543 U.S. at 560.} The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\footnote{U.S. Const. amend. VIII.} It is applicable to the states through the Fourteenth Amendment.\footnote{\textit{See} U.S. Const. amend. XIV, § 2; \textit{Roper}, 543 U.S. at 560.}

\section*{A. Proportionality Principle}

The Eighth Amendment’s guarantee of a right not to be subjected to excessive sanctions flows from the basic principle that a punishment should fit a crime.\footnote{\textit{Atkins} v. \textit{Virginia}, 536 U.S. 304, 311 (2002); \textit{Weems} v. \textit{United States}, 217 U.S. 349, 367 (1910).} It reaffirms the government’s duty to respect the dignity of all persons, even those convicted of the most heinous crimes.\footnote{\textit{Roper}, 543 U.S. at 560.} The Eighth Amendment prohibits both disproportionate types of punishments and sentences that are disproportionate to the crime committed.\footnote{\textit{Harmelin} v. \textit{Michigan}, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring); \textit{Solem} v. \textit{Helm}, 463 U.S. 277, 284 (1983).}

Although the U.S. Supreme Court’s Eighth Amendment decision making is not a model of clarity, there seem to be two tests the Court uses to determine whether a sentence violates the cruel and unusual clause of the Eighth Amendment.\footnote{\textit{See} \textit{Roper}, 543 U.S. at 561 (applying the “evolving standards” test to find that the juvenile death penalty is unconstitutional on its face); \textit{Harmelin}, 501 U.S. at 1001 (applying the “gross disproportionality” test to find that life without parole as applied to the offender did not violate the Constitution).} First, the Court evaluates the sentence on its face by determining whether, when applied to a specific class of offenders, it is so disproportionate according to “evolving standards of decency” that it violates the Constitution and, therefore, the class of offenders deserves a categorical exemption from the punishment.\footnote{\textit{Roper}, 543 U.S. at 561.} Alternatively, the Court applies a gross disproportionality test to determine whether the sentence as applied to the particular offender for the particular offense violates the Constitution.\footnote{\textit{Harmelin}, 501 U.S. at 965 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).}

Not all members of the Supreme Court agree, however, that the Eighth Amendment provides a proportionality guarantee.\footnote{\textit{See} \textit{Ewing} v. \textit{California}, 538 U.S. 11, 32 (2003) (Thomas, J., concurring); \textit{Harmelin}, 501 U.S. at 965 (Scalia, J., concurring).} Rather, Justices Scalia and Thomas have consistently written that the Eighth
Amendment prohibits only those cruel methods of punishment not typically employed in the Anglo-American tradition, to be determined without reference to an individual offense.\(^\text{120}\) In 1991 in *Harmelin v. Michigan*, Justice Scalia, in a Part joined only by Chief Justice Rehnquist, wrote that the lack of a proportionality guarantee is demonstrated by the text of the Eighth Amendment, its history, the framers’ intent, the early commentary, the early judicial constructions, and the subjective nature of such analysis.\(^\text{121}\) Due to respect for stare decisis, however, Justice Scalia recognized a right to proportionality limited to cases involving the death sentence.\(^\text{122}\) Justice Thomas, however, recognizes no such right.\(^\text{123}\)

**B. Testing a Sentence on Its Face: “Evolving Standards of Decency”**

To determine whether the application of a punishment to a specific class of offenders is so disproportionate as to be cruel and unusual under the Eighth Amendment, the Court refers to “evolving standards of decency that mark the progress of a maturing society.”\(^\text{124}\) To determine “evolving standards of decency,” the Court reviews objective indicia, including legislative enactments and jury behavior with respect to the mode of punishment, to identify a national consensus against a particular mode of punishment.\(^\text{125}\) The Court also applies its own judgment to determine whether the punishment violates the Eighth Amendment.\(^\text{126}\) In making that judgment, the Court examines the culpability of the specific class of offenders and considers whether the application of the particular punishment to the class of offenders measurably contributes to the social purposes intended by the punishment, taking into consideration the opinions of independent associations and the practices of other countries.\(^\text{127}\)

\(^{120}\) See *Ewing*, 538 U.S. at 32; *Harmelin*, 501 U.S. at 965.

\(^{121}\) 501 U.S. at 966–93 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).

\(^{122}\) See id. at 996 (Scalia, J., plurality opinion).

\(^{123}\) See *Ewing*, 538 U.S. at 32 (Thomas, J., concurring) (stating that “the Eighth Amendment contains no proportionality principle”).


\(^{125}\) See id.

\(^{126}\) See id. at 563; *Atkins*, 536 U.S. at 312.

\(^{127}\) Thompson v. Oklahoma, 487 U.S. 815, 833 (1988). In *Ewing v. California*, decided in 2003, the Supreme Court identified four standard justifications that inform a state’s sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution. 538 U.S. at 25. Although the Constitution does not mandate adoption of any one penological theory, a legitimate punishment must further at least one of these goals. See id.; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).
The only punishment for which the Supreme Court has recognized categorical exemptions for certain classes of offenders is the death penalty. The Court has held that it violates the Constitution on its face to impose the death penalty for the crimes of rape of an adult woman and felony murder based on robbery where the defendant did not kill, attempt to kill, or intend to kill. The Court also has held that lower courts may not impose the death penalty on juveniles or the mentally retarded for any crime.

The Supreme Court first recognized a categorical exemption from the death penalty in 1988 in Thompson v. Oklahoma. There, the plurality set aside the death sentence imposed on a fifteen-year-old offender and determined that the nation’s standards of decency did not permit the execution of any offender who was under the age of sixteen at the time of the crime. It noted that the last execution for a crime committed by an offender under the age of sixteen was carried out in 1948, forty years prior.

In the 2002 case of Atkins v. Virginia, the Supreme Court applied this reasoning to create a categorical exemption from the death penalty for the mentally retarded. The Court identified a national consensus against the death penalty for the mentally retarded because at least thirty-three states prohibited the punishment and there was a consistent direction of change away from imposing the punishment. The Court decided that mental retardation diminishes personal culpability such that the death penalty is an excessive sanction for that category of offenders.

The Supreme Court’s most recent decision creating a categorical exemption from the death penalty is Roper v. Simmons. On March 1,

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128 See Roper, 543 U.S. at 561.
130 See Roper, 543 U.S. at 574 (holding that the juvenile death penalty is unconstitutional); Atkins, 536 U.S. at 321 (holding that the death penalty is unconstitutional when applied to mentally retarded offenders).
131 487 U.S. at 838.
132 Id. at 822–23.
133 Id. at 832.
134 536 U.S. at 321.
135 Id. at 314–16.
136 Id. at 321.
137 543 U.S. at 568.
2005, the Court held that execution of individuals who were under eighteen years of age at the time of their crimes is prohibited by the Eighth Amendment. This decision overruled the 1989 case of Stanford v. Kentucky, in which the Court held that the death penalty may be imposed on sixteen- and seventeen-year-olds. The Court identified a national consensus against the penalty and applied its independent judgment to confirm the consensus.

1. Roper v. Simmons: National Consensus Against Juvenile Death Penalty

To identify a national consensus against the juvenile death penalty, the Court looked to the rejection of the practice in the majority of states, the infrequency of its use where it remained on the books, and the consistency in the trend toward abolition of the practice. The Court noted that, at the time, thirty states proscribed the juvenile death penalty. The Court recognized the infrequency of the practice in the twenty states that did not formally prohibit it. And in the previous ten years, the Court noted, only three states executed prisoners for crimes committed as juveniles.

In addition, the Court examined the rate of abolition of the juvenile death penalty in the states. The Court compared the number of states that allowed the juvenile death penalty at the time it decided Stanford to the number of states that allowed the practice at the time it considered Roper. The Roper Court recognized a significant, consistent direction of change demonstrated by the abandonment of the juvenile death penalty in five states during the fifteen years between Stanford and Roper. The Court concluded that these objective indicia demonstrated a national consensus against sentencing juveniles to death.

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138 Id.
140 Roper, 543 U.S. at 568–71.
141 Id. at 564–65.
142 Id. at 564.
143 Id.
144 Id. at 565.
145 Roper, 543 U.S. at 565–66.
146 Id. at 566; see Stanford, 492 U.S. at 380.
147 Roper, 543 U.S. at 565–66.
148 Id. at 567–68.

The Court in *Roper* also exercised its independent judgment to determine that the death penalty is disproportionate punishment when applied to juveniles.\(^{149}\) It noted three general differences between juveniles and adults that diminish the culpability of juveniles, citing psychology publications.\(^ {150}\) First, juveniles’ lack of maturity and responsibility often preclude them from making rational decisions and cause them to take risks and seek thrills.\(^ {151}\) Second, juveniles are more susceptible to negative influences and outside pressures, including peer pressure.\(^ {152}\) Third, the character of juveniles is not as well-formed as that of adults.\(^ {153}\) Because juveniles are less culpable than adults, the Court concluded that the penological justifications for the death penalty—retribution and deterrence—apply to juveniles with lesser force than adults.\(^ {154}\) The Court concluded that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juveniles.\(^ {155}\) Therefore, the Court applied its independent judgment to confirm a national consensus against the practice.\(^ {156}\)

The Court also cited the overwhelming weight of international opinion against the juvenile death penalty.\(^ {157}\) The Court wrote, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”\(^ {158}\) When the Court decided *Roper*, the United States was the only country in the world that gave official sanction to the juvenile death penalty.\(^ {159}\) The Court noted that the United Kingdom, whose experience bears particular relevance in light of the historic ties between it and the United States, eliminated the practice fifty-six years ago.\(^ {160}\)

\(^{149}\) *Id.* at 568–72.

\(^{150}\) *Id.* at 569.

\(^{151}\) *Id.* (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).

\(^{152}\) *Roper*, 543 U.S. at 569.

\(^{153}\) *Id.* at 570.

\(^{154}\) *Id.* at 571–72.

\(^{155}\) *Id.* The Court concluded that retribution fails as a justification because imposing the law’s most severe penalty on one whose culpability is diminished is inherently disproportional. *Id.* The Court rejected deterrence as a justification because it is unclear whether the death penalty has a significant deterrent effect on juveniles. *Id.*

\(^{156}\) *Id.* at 574.

\(^{157}\) *Roper*, 543 U.S. at 575.

\(^{158}\) *Id.* at 578.

\(^{159}\) *Id.* at 575.

\(^{160}\) *Id.* at 577–78.
The Court also pointed to international resolutions to confirm its holding. In particular, the Court mentioned Article 37 of the United Nations Convention on the Rights of the Child (the “CRC”), which proscribes juvenile life without parole. The Court noted that every country in the world ratified this resolution except the United States and Somalia. The Court cited parallel provisions in other significant international covenants such as the International Covenant on Civil and Political Rights (the “ICCPR”), adopted by the United Nations (the “U.N.”) General Assembly in 1966 and signed and ratified by the United States subject to a reservation in 1992. In reservation number two, the United States reserved the right to impose capital punishment on any person other than a pregnant woman, including those persons below eighteen years of age. The Roper Court wrote that it does not reflect disloyalty to the U.S. Constitution to acknowledge and consider other nations’ recognition of fundamental rights. The Court thereby created a categorical exemption from the death penalty for juveniles.

This “evolving standards of decency” test, which examines a certain punishment on its face to exempt a class of offenders, is the first test for violations of the Eighth Amendment. The Supreme Court never has determined whether juveniles as a class are exempt from the punishment of life without the possibility of parole due to their reduced culpability. Even if a class does not qualify for a categorical exemption, however, courts still must examine the sentence as applied to a particular offender to determine if it violates the Constitution.

C. Testing a Non-Capital Sentence as Applied

The Supreme Court has stated that the Eighth Amendment’s proportionality principle applies to non-capital sentences such that those

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161 Id. at 576.
162 Roper, 543 U.S. at 576 (citing CRC, supra note 14, at art. 37).
163 Id.
164 Id. (citing ICCPR, supra note 14, at art. 6(5)).
166 543 U.S. at 578.
167 Id.
168 See id. at 561.
169 See id. at 568.
170 See Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring).
sentences may be tested as applied.\textsuperscript{171} The Court also has stated, however, that successful challenges are rare outside of the capital punishment context because the Eighth Amendment prohibits only grossly disproportionate sentences.\textsuperscript{172} Strict proportionality between crime and sentence is not required.\textsuperscript{173}

In 1983 in \textit{Solem v. Helm}, the Supreme Court held that a sentence of life without the possibility of parole violates the Eighth Amendment as applied when imposed for a seventh nonviolent felony.\textsuperscript{174} In \textit{Solem}, the defendant was sentenced to life in prison without the possibility of parole for writing a “no account” check for $100.\textsuperscript{175} The Court identified three factors relevant to disproportionality: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences that could be imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions.\textsuperscript{176} \textit{Solem} was the first, and remains the only, case in which the Supreme Court invalidated a prison sentence due to its length.\textsuperscript{177}


Eight years after \textit{Solem} in 1991, the Supreme Court again addressed proportionality for a non-capital offense in \textit{Harmelin v. Michigan}.\textsuperscript{178} There, a majority of the Court concluded that life without the possibility of parole for a first-time offender convicted of possession of 672 grams of cocaine did not violate the Eighth Amendment.\textsuperscript{179} Members of the Court disagreed, however, on the proportionality standard for non-capital offenses.\textsuperscript{180} Justice Scalia wrote that the individualized proportionality principle applies only to death penalty jurisprudence.\textsuperscript{181} He stated that the Court’s decision in \textit{Solem} was wrong because the Eighth Amendment contains no proportionality guarantee.\textsuperscript{182}

\textsuperscript{171} See \textit{id.} at 997.
\textsuperscript{172} See \textit{id.} at 1001; \textit{Solem}, 463 U.S. at 288.
\textsuperscript{173} \textit{Harmelin}, 501 U.S. at 1001; \textit{Solem}, 463 U.S. at 288.
\textsuperscript{174} 463 U.S. at 303.
\textsuperscript{175} \textit{Id.} at 281.
\textsuperscript{176} \textit{Id.} at 292. The gravity of the offense is determined in light of the harm inflicted by the offender on the victim and society, as well as the culpability of the offender. See \textit{id}.
\textsuperscript{177} See \textit{id.} at 303.
\textsuperscript{178} See \textit{Harmelin}, 501 U.S. at 961–62 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).
\textsuperscript{179} \textit{Id.} at 1009 (Kennedy, J., concurring).
\textsuperscript{180} See \textit{id.} at 996–97.
\textsuperscript{181} \textit{Id.} at 996. (Scalia, J., plurality opinion).
\textsuperscript{182} \textit{Id.} at 965 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).
In contrast, Justice Kennedy, joined by Justices O'Connor and Souter, concurring in part and in the judgment, recognized that a non-capital sentence could violate the Eighth Amendment as applied if it was grossly disproportionate to the crime, but maintained that the facts of *Harmelin* did not meet this standard.\(^{183}\) At least three circuit courts regard Justice Kennedy’s test as the rule of *Harmelin* because it is the position taken by those members who concurred in the judgment on the narrowest grounds.\(^{184}\) The other members of the *Harmelin* Court agreed with Justice Kennedy that the Eighth Amendment includes a proportionality guarantee for non-capital offenses, but they dissented from the judgment because they found the sentence grossly disproportionate to the crime and therefore unconstitutional.\(^{185}\)

In the test for gross disproportionality established by Kennedy, the reviewing court first determines whether a threshold comparison of the crime and the sentence leads to an inference of gross disproportionality.\(^{186}\) If so, the court undertakes the intrajurisdictional and interjurisdictional analyses set forth in *Solem*—by comparing the sentences imposed on other criminals in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions—to validate the court’s initial inference that a sentence is grossly disproportional to a crime.\(^{187}\) Justice Kennedy rejected the idea that *Solem* announced a rigid three-part test, and instead concluded that consideration of the second and third *Solem* factors is appropriate only when the threshold comparison leads to an inference of gross disproportionality.\(^{188}\)

To conduct the threshold comparison, a court considers the gravity of the offense and the harshness of the penalty.\(^{189}\) When determining the gravity of the offense, the court considers the culpability of the offender, the harm inflicted on society by the offender, and the criminal record of the offender.\(^{190}\) In *Harmelin*, Justice Kennedy maintained that a sentence of life without the possibility of parole did not raise an inference of gross disproportionality because the offense—

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\(^{183}\) 501 U.S. at 997 (Kennedy, J., concurring).

\(^{184}\) See Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 754 (9th Cir. 2001); Henderson v. Norris, 258 F.3d 706, 709 (8th Cir. 2001); United States v. Jones, 213 F.3d 1253, 1261 (10th Cir. 2000); United States v. Bland, 961 F.2d 123, 128–29 (9th Cir. 1992).

\(^{185}\) *Harmelin*, 501 U.S. at 1027 (White, J., dissenting).

\(^{186}\) *Id.* at 1005 (Kennedy, J., concurring).

\(^{187}\) *Id.*

\(^{188}\) *Id.*

\(^{189}\) *Id.* at 1004.

\(^{190}\) *Solem*, 463 U.S. at 292.
possession of more than 650 grams of cocaine—threatened to cause “grave harm” to society.\textsuperscript{191} Due to the seriousness of the offense, and because the offender’s culpability was not reduced, the Court upheld the sentence.\textsuperscript{192}

2. Recent Applications of the Gross Disproportionality Test

The Supreme Court decided two cases regarding the proportionality principle for non-capital punishment on March 5, 2003.\textsuperscript{193} In \textit{Lockyer v. Andrade}, Justice O’Connor, writing for a majority of the Court, admitted that the Court’s precedents in this area have not established “a clear or consistent path for courts to follow.”\textsuperscript{194} The Court held that a decision by the California Court of Appeal to affirm the petitioner’s two consecutive terms of twenty-five years to life in prison for a “third strike” conviction was not contrary to, and did not involve an unreasonable application of, any clearly established gross disproportionality principle and thus did not warrant habeas relief.\textsuperscript{195}

In \textit{Ewing v. California}, also decided on March 5, 2003, the plurality held that a prison term of twenty-five years to life does not violate the Eighth Amendment when imposed for felony grand theft on a repeat felon under California’s three strikes law.\textsuperscript{196} Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, held that the sentence was not grossly disproportionate.\textsuperscript{197} The plurality applied the test from Justice Kennedy’s concurrence in \textit{Harmelin} and held that the threshold comparison of the crime and sentence does not lead to an inference of gross disproportionality.\textsuperscript{198} The plurality concluded that the sentence of twenty-five years to life was justified by the state’s public safety interest in incapacitating and deterring recidivist felons and by the offender’s long and serious criminal record.\textsuperscript{199}

\textsuperscript{191} 501 U.S. at 1002 (Kennedy, J., concurring). In \textit{Harmelin}, the Court also held that mandatory sentences are not unconstitutional because the Constitution does not mandate any particular penological theory and because the Court is deferential to legislative policy. Id. at 995 (Scalia, J., plurality opinion). For another opinion upholding mandatory sentences, see Chapman \textit{v. United States}, 500 U.S. 453, 467 (1991) (holding that a mandatory sentencing scheme for drug distribution offenses does not violate the Eighth Amendment).

\textsuperscript{192} See \textit{Harmelin}, 501 U.S. at 1002–04 (Kennedy, J., concurring).


\textsuperscript{194} 538 U.S. at 72.

\textsuperscript{195} Id. at 77.

\textsuperscript{196} 538 U.S. at 30–31 (plurality opinion).

\textsuperscript{197} Id.

\textsuperscript{198} Id. at 30.

\textsuperscript{199} Id. at 29–30.
3. Juvenile Life Without Parole Under the Gross Disproportionality Test Prior to \textit{Roper}

The Supreme Court never has considered the effect of juvenile status on proportionality within the context of non-capital sentencing, such as on life without parole.\textsuperscript{200} Given the recent confirmations of Chief Justice Roberts and Justice Alito, it is unclear whether the Court will continue to apply the gross disproportionality test articulated in \textit{Harmelin}.\textsuperscript{201} Although a few federal courts of appeals and state courts considered sentences of juvenile life without parole prior to \textit{Roper}, none of these courts has considered the constitutionality of the sentence since \textit{Roper}.\textsuperscript{202}

\textbf{a. Holdings of the Federal Courts of Appeals}

Prior to \textit{Roper}, two circuit courts held that juvenile life without parole does not violate the Eighth Amendment.\textsuperscript{203} In 1998 in \textit{Rice v. Cooper}, the U.S. Court of Appeals for the Seventh Circuit held that a sentence of life without the possibility of parole imposed on a sixteen-year-old for the first degree murder of four people did not lead to an inference of gross disproportionality, even though the court recognized that the sentence is exceptionally severe for a minor.\textsuperscript{204} In 1996, the Ninth Circuit held in \textit{Harris v. Wright} that it was not cruel and unusual within the meaning of the Eighth Amendment to sentence a fifteen-year-old first-time offender convicted of felony murder to life without the possibility of parole, even though his co-defendant fired the gun.\textsuperscript{205} The Ninth Circuit held that the juvenile failed to show that evolving standards of decency reject the sentence of life without the possibility of parole on its face, or that the sentence

\begin{itemize}
  \item \textsuperscript{200} See \textsc{Human Rights Watch}, supra note 5, at 86.
  \item \textsuperscript{201} See 501 U.S. at 1005 (Kennedy, J., concurring). In \textit{Harmelin}, Chief Justice Rehnquist joined Justice Scalia in an opinion refusing to extend the proportionality principle to non-capital sentences. See \textit{id.} at 994 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist). Justice O’Connor, on the other hand, joined the Justice Kennedy concurrence that established the gross disproportionality test. See \textit{id.} at 996–97 (Kennedy, J., concurring). Therefore, the loss of these two Justices results in one fewer vote in favor and one fewer vote against a proportionality principle for non-capital cases. See \textit{id.} at 994 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist); \textit{id.} at 996–97 (Kennedy, J., concurring).
  \item \textsuperscript{202} See \textit{Roper}, 543 U.S. at 551.
  \item \textsuperscript{203} See \textit{Rice v. Cooper}, 148 F.3d 747, 752 (7th Cir. 1998); \textit{Harris v. Wright}, 93 F.3d 581, 585 (9th Cir. 1996).
  \item \textsuperscript{204} 148 F.3d at 752.
  \item \textsuperscript{205} 93 F.3d at 585.
\end{itemize}
was grossly disproportionate as applied to the crime.\(^{206}\) The court stated that age has no obvious bearing on a proportionality analysis in a non-capital case.\(^{207}\) The court also wrote that the sentence of life without the possibility of parole raises no inference of disproportionality when imposed on a murderer, regardless of age.\(^{208}\)

b. State Court Holdings

Some state courts have held that juvenile life without the possibility of parole violates the federal and/or state constitutions.\(^ {209}\) In *Naovarath v. State* in 1989, the Nevada Supreme Court held that life without the possibility of parole was cruel and unusual punishment under the state and federal constitutions for a thirteen-year-old convicted of murdering a man who molested him.\(^ {210}\) The judge stated, “To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder.”\(^ {211}\) The judge questioned whether sentencing children to life imprisonment without parole measurably contributes to the intended objectives of retribution, deterrence, and segregation from society.\(^ {212}\) As to retribution, the judge found that children do not deserve the degree of retribution represented by life without the possibility of parole given their lesser culpability and greater capacity for growth, and given society’s special obligation to children.\(^ {213}\) The judge also concluded that the objective of deterrence fails given the inability of children to consider ramifications for their actions, and that segregation is not justified.\(^ {214}\)

Other state supreme courts have overturned life without parole punishments or excessively long prison sentences under their state constitutions.\(^ {215}\) In 1968, the Supreme Court of Kentucky held in *Workman v. Kentucky* that a sentence of life without the possibility of parole im-

\(^{206}\) Id. at 584–85.

\(^{207}\) Id. at 585.

\(^{208}\) Id.


\(^{210}\) 779 P.2d at 948–49, 949 n.6.

\(^{211}\) Id. at 947.

\(^{212}\) Id.

\(^{213}\) Id. at 948.

\(^{214}\) Id.

\(^{215}\) See *People v. Miller*, 781 N.E.2d 300, 310 (Ill. 2002); *Trowbridge v. State*, 717 N.E.2d 138, 150 (Ind. 1999); *Workman*, 429 S.W.2d at 378.
posed on a fourteen-year-old convicted of rape violates the Kentucky Constitution. In 1999, in *Trowbridge v. State*, the Indiana Supreme Court reduced a sentence imposed on a fifteen-year-old convicted of murder, rape, robbery, and auto theft, among other crimes, from 199 years to ninety-seven years. It held that age is an element to consider in constitutional proportionality analysis. The Supreme Court of Illinois reduced a mandatory sentence of life without parole imposed on a child offender. In 2002, in *People v. Miller*, the court affirmed a decision to reduce a mandatory sentence of life without the possibility of parole imposed on a fifteen-year-old who acted as a lookout in the murder of two rival gang members. The court held that imposing life without the possibility of parole on a child who had one minute to contemplate his involvement violates the state constitution.

V. Juvenile Life Without Parole as a Facial Constitutional Violation

If the U.S. Supreme Court hears a case in which a juvenile sentenced to life without parole claims a violation of the Eighth Amendment, there are two ways the Court could overturn the sentence. It could decide that the sentence is so disproportionate on its face that it always violates the Constitution, or the Court could conclude that the sentence is grossly disproportionate as applied to the particular juvenile for the particular offense. This Part applies the first test to the sentence of life without parole and concludes that the Court should create a categorical exemption for juveniles, even though there may not be a strong national consensus against the practice. Although the Court has recognized categorical exemptions only for the death penalty, the same reasoning it used there should apply to other sentences, such as life without the possibility of parole.

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216 429 S.W.2d at 378.
217 717 N.E.2d at 150–51.
218 Id.
219 *Miller*, 781 N.E.2d at 310.
220 Id.
221 Id. at 308–10 (citing ILL. CONST. art. I, § 11).
223 See *Roper*, 543 U.S. at 561; *Harmelin*, 501 U.S. at 1001.
224 See *infra* notes 226–255 and accompanying text.
A. National Consensus

The Supreme Court is unlikely to recognize a strong national consensus against juvenile life without parole.\(^{226}\) Unlike the arguable consensus in \textit{Roper v. Simmons}, where thirty states prohibited the juvenile death penalty and the twenty others rarely imposed it, many states continue to sentence juveniles to life without parole.\(^{227}\) The sentence is permitted in forty-two states and required for certain crimes in twenty-seven states.\(^{228}\)

It is possible, however, for the Court to recognize a national consensus if it emphasizes the direction of change in sentencing rates in the past decade.\(^{229}\) Although there is no strong trend toward state statutory abolition of the sentence, there is a trend toward reduced imposition of the sentence: the total number of youths sentenced to life without parole per year decreased from 152 in 1996 to fifty-four in 2004.\(^{230}\) If the Supreme Court hears a juvenile life without parole case in the next few years, however, before there is time for many states to change their laws, it likely will not find a strong national consensus against the practice.\(^{231}\)

B. Independent Judgment of the Court

Although the Court is not likely to find a strong national consensus against juvenile life without parole, it still must apply its own judgment to determine whether the sentence is unconstitutional on its face.\(^{232}\) In the past, the Court has not employed this step of the analysis to find unconstitutional a punishment that is still embraced by the states, but there is no precedent precluding it from doing so.\(^{233}\) In making its independent judgment, the Court considers the culpability of the class of offenders, the social purposes intended by the punishment, the opinions of independent associations, and the practices of other countries.\(^{234}\)

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\(^{226}\) See \textit{Roper}, 543 U.S. at 564.

\(^{227}\) See \textit{Human Rights Watch}, supra note 5, at 36.

\(^{228}\) See \textit{id}. at 25.

\(^{229}\) See \textit{Roper}, 543 U.S. at 565–66.

\(^{230}\) See \textit{Human Rights Watch}, supra note 5, at 31. This decrease in rate of sentencing might be explained partly, however, by the decrease in juvenile arrests since the 1990s. See \textit{Snyder}, supra note 48, at 6.

\(^{231}\) See \textit{Roper}, 543 U.S. at 564–67.


\(^{233}\) See \textit{id}.

The Court already has decided that the psychosocial and neurological differences between adolescents and adults support a presumption of diminished culpability for adolescent offenders.\(^{235}\) This presumption should influence the Court’s independent judgment against the punishment of juvenile life without parole because it undermines the legitimacy of imposing equal measures on adults and children.\(^{236}\)

The presumption of reduced culpability also affects the Court’s analysis of the social purposes of the punishment.\(^{237}\) In *Ewing v. California* in 2003, the Supreme Court identified four standard justifications that inform a state’s sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution.\(^{238}\) Although the Constitution does not mandate adoption of any one penological theory, a legitimate punishment must further at least one of these goals.\(^{239}\) In *Roper*, the Court held that the juvenile death penalty is unconstitutional because neither retribution nor deterrence—the two purposes served by the death penalty—provide adequate justification for the punishment.\(^{240}\) Regarding the sentence of juvenile life without parole, the Court should find that each of these justifications also fails due to the unique nature of adolescence.\(^{241}\)

The justifications for sentencing a juvenile to life without parole fail due to the differences between adolescents and adults.\(^{242}\) First, rehabilitation by definition is not an intended purpose of life without parole.\(^{243}\) Second, deterrence fails as a justification given the inability of children to consider ramifications for their actions.\(^{244}\) Third, incapacitation by definition obtains its goal, but the decreased culpability of juveniles does not justify life in prison.\(^{245}\) Fourth, retribution fails as

\(^{235}\) See *Roper*, 543 U.S. at 570; Steinberg & Scott, *supra* note 7, at 1011; *supra* notes 81–108 and accompanying text.

\(^{236}\) See *Roper*, 543 U.S. at 570.

\(^{237}\) See id. at 571–72.


\(^{239}\) Id.; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

\(^{240}\) 543 U.S. at 571.


\(^{242}\) See *Roper*, 543 U.S. at 571; *Naovarath*, 779 P.2d at 948.

\(^{243}\) See *Ewing*, 538 U.S. at 25–27 (noting that life sentences further the goals of retribution, deterrence, and incapacitation).

\(^{244}\) See *Naovarath*, 779 P.2d at 948; Scott & Grisso, *supra* note 35, at 164 (noting that adolescents place more value on short-term consequences and are less sensitive to future outcomes). Similarly, the *Roper* Court noted the absence of evidence that the death penalty has a deterrent effect on juveniles. 543 U.S. at 571.

\(^{245}\) See *Naovarath*, 779 P.2d at 948.
a justification because children do not deserve the degree of retribution represented by life without the possibility of parole given their lesser culpability, their capacity for growth, and society’s special obligation to children.\textsuperscript{246} Therefore, sentencing juveniles to life without parole does not measurably contribute to the social purposes intended by the punishment.\textsuperscript{247}

The Court also should consider international standards to confirm its judgment that juvenile life without parole is disproportionate punishment on its face.\textsuperscript{248} In \textit{Roper}, the Court confirmed its determination that the death penalty is always disproportionate punishment for juveniles by citing the overwhelming weight of international opinion against the practice.\textsuperscript{249} The international community also has rejected juvenile life without parole.\textsuperscript{250} Only fourteen countries besides the United States permit juvenile life without parole sentences and in many countries they are rarely, if ever, imposed.\textsuperscript{251} Out of 145 countries examined by Human Rights Watch for its 2005 report, only four countries currently have child offenders serving life sentences—Israel, South Africa, Tanzania, and the United States.\textsuperscript{252} The United Kingdom, with whom the United States shares historic ties, abolished juvenile life without parole in 1996.\textsuperscript{253} The numbers speak for themselves: there are currently at least 2225 child offenders serving life without parole in the United States, but in the rest of the world there are only about twelve.\textsuperscript{254} In light of this support, the Court should find that juvenile life without parole violates the Constitution on its face.\textsuperscript{255}

\textbf{VI. Juvenile Life Without Parole as a Constitutional Violation in Certain Cases}

Even if the U.S. Supreme Court does not create a categorical exemption for juveniles from life without parole, it should hold that the punishment violates the Eighth Amendment as applied in certain

\begin{itemize}
  \item \textsuperscript{246} See id.
  \item \textsuperscript{247} See \textit{Thompson}, 487 U.S. at 833.
  \item \textsuperscript{248} See \textit{Roper}, 543 U.S. at 578.
  \item \textsuperscript{249} \textit{Id.} at 575.
  \item \textsuperscript{250} \textit{Human Rights Watch, supra} note 5, at 106.
  \item \textsuperscript{251} \textit{Id.}
  \item \textsuperscript{252} \textit{Id.} at 105–06.
  \item \textsuperscript{253} See \textit{Roper}, 543 U.S. at 577 (noting the particular relevance of the United Kingdom to the United States); Hussain v. United Kingdom, 22 Eur. Ct. H.R. 1, 27 (1996) (abolishing life without parole for juveniles in the United Kingdom).
  \item \textsuperscript{254} See \textit{Human Rights Watch, supra} note 5, at 1, 106.
  \item \textsuperscript{255} See \textit{Roper}, 543 U.S. at 561; \textit{Thompson}, 487 U.S. at 833.
\end{itemize}
cases under the *Harmelin v. Michigan* gross disproportionality test.\(^{256}\) Although the Supreme Court’s “precedents in this area have not been a model of clarity,”\(^{257}\) it seems as though the Court first determines whether a “threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”\(^{258}\) The Court makes the threshold comparison by considering the gravity of the offense and the harshness of the penalty.\(^{259}\) If the comparison creates an inference of gross disproportionality, the Court undertakes the jurisdictional analyses set forth in *Solem v. Helm* to validate its initial judgment that a sentence is grossly disproportionate to a crime.\(^{260}\) Although successful challenges under this test are exceedingly rare, the Court should find an inference of disproportionality in certain cases.\(^{261}\)

### A. Gravity of the Offense

The first factor in the threshold comparison is the gravity of the offense.\(^{262}\) The Supreme Court held in *Solem* in 1983 that courts must weigh the gravity of an offense in light of the culpability of the offender and the harm caused to the victim or society.\(^{263}\) In *Roper v. Simmons*, the Supreme Court decided that juveniles are less culpable than adults.\(^{264}\) Therefore, when reviewing a sentence, the Court should assign less weight to crimes committed by juveniles.\(^{265}\)

Before *Roper*, the Ninth Circuit reached a different conclusion in *Harris v. Wright* in 1996.\(^{266}\) There, the court held that it does not violate the Eighth Amendment to sentence a fifteen-year-old first-time offender convicted of felony murder to life without the possibility of parole, even though his co-defendant fired the gun.\(^{267}\) The Ninth Circuit held that age has no obvious bearing on the proportionality analysis in non-capital cases.\(^{268}\) Given the strong evidence of psychosocial and neurological differences between adolescents and adults

\(^{258}\) *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).
\(^{259}\) *Id.* at 1004.
\(^{260}\) *Id.* at 1005; *Solem v. Helm*, 463 U.S. 277, 292 (1983).
\(^{261}\) See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).
\(^{262}\) See *id.* at 1004.
\(^{263}\) 463 U.S. at 292, 296–97.
\(^{264}\) 543 U.S. 551, 570 (2005).
\(^{265}\) See *id*.
\(^{266}\) *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996).
\(^{267}\) See *id*.
\(^{268}\) See *id*.
published since the Ninth Circuit decided *Harris* in 1996, and given the holding in *Roper*, however, the Supreme Court should find that age does have a bearing on proportionality analysis in non-capital cases. Therefore, the Court should consider the age of the offender in its threshold comparison when it weighs the gravity of the offense.

The Court should be particularly influenced by this reduced gravity when it considers sentences imposed on juveniles for felony murder. The precise definition of felony murder varies from state to state, but generally all persons engaged in a felony are liable for murder if one of them kills a person during the felony, even if the others did not participate in the murder or intend for the murder to occur. Given the reduced culpability of juveniles in general and the lack of intent or participation on the part of felony-murderers, the Court should find that these crimes are less grave when committed by juveniles. Certainly, offenses less serious than felony murder are also reduced in gravity when committed by juveniles.

**B. Harshness of the Penalty**

When the Court evaluates the second factor, the harshness of the penalty, it should recognize that a sentence of life without parole has particularly severe consequences for juveniles. Life sentences imposed on juveniles necessarily are longer than life sentences for adults. The years child offenders spend in prison are the most formative ones, in which typical adolescents finish their education, form relationships, start families, and gain employment.

In addition, research shows that juveniles in adult facilities are

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269 See *Roper*, 543 U.S. at 569–70; Steinberg & Scott, *supra* note 7, at 1014; *supra* notes 81–108 and accompanying text.
270 See *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring).
276 *See LaBelle et al.*, *supra* note 67, at 18.
277 *See id.* (quoting one child offender serving life without parole who said, “I don’t even know what I’m missing, only that I’m missing everything . . . . I recognize that I’m not mentally capable to endure this for another 50+ years”).
more likely to be victimized than those in juvenile facilities.\textsuperscript{278} One study found they are five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than are children in juvenile facilities.\textsuperscript{279} The fact that brains of juveniles are still developing suggests a lack of coping mechanisms necessary to deal with these types of problems.\textsuperscript{280}

In addition to physical abuse, juvenile offenders suffer from lack of intellectual development due to sparse educational opportunities in prison.\textsuperscript{281} Prisons are not required to provide educational programming for inmates older than eighteen, and federal funding for post-secondary education is available only for incarcerated youths under the age of twenty-five and within five years of release.\textsuperscript{282} Juveniles serving life without parole are disqualified because they are never within five years of release.\textsuperscript{283} Therefore, post-secondary education is available for youth offenders serving life without parole only if they or their families can afford to pay for it.\textsuperscript{284} Although many prisons offer educational and vocational programs, they often determine eligibility by weighing a number of factors including length of time remaining on an inmate’s sentence.\textsuperscript{285} Because offenders sentenced to life without parole have the greatest amount of time remaining on their sentences, prisons often exclude them from programs to reserve resources for inmates returning to society.\textsuperscript{286}

As stated by the Supreme Court of Nevada in \textit{Naovarath v. State}, “Denial of [opportunity for parole] means denial of hope; it means that good behavior and character improvement are immaterial.”\textsuperscript{287} To adjudicate a child as forever irredeemable is to impose a hopelessness that is particularly severe for a juvenile.\textsuperscript{288} When the Court weighs the harshness of the penalty as part of the threshold comparison, it should consider the special status of juveniles and find that the harshness factor weighs in favor of disproportionality.\textsuperscript{289}

\textsuperscript{278} See id.; see also Martin Forst et al., \textit{Youth in Prisons and State Training Schools}, 40 JUV. \\& FAM. CT. J. 1, 9 (1989).
\textsuperscript{279} See Forst, supra note 278, at 9.
\textsuperscript{280} See Roper, 543 U.S. at 569–70.
\textsuperscript{281} See Human Rights Watch, supra note 5, at 67–72.
\textsuperscript{283} See id.
\textsuperscript{284} See Human Rights Watch, supra note 5, at 69.
\textsuperscript{285} See id. at 70–71.
\textsuperscript{286} See id.
\textsuperscript{287} 779 P.2d 944, 944 (Nev. 1989).
\textsuperscript{288} See id. at 947.
\textsuperscript{289} See Roper, 543 U.S. at 570.
Another factor in the analysis of harshness of the penalty is the criminal record of the offender.\textsuperscript{290} For a first-time offender, this factor always weighs in favor of disproportionality.\textsuperscript{291} Even for a juvenile with a prior record of juvenile adjudications, the Court should give less weight to these adjudications than it would assign to an adult with a prior criminal record.\textsuperscript{292} Ultimately, the Court should find that the threshold comparison of the offense and the punishment of life without parole creates an inference of gross disproportionality when the offender is a juvenile and a first-time offender, especially when the juvenile did not participate in a murder or intend for a murder to occur.\textsuperscript{293}

C. Jurisdictional Analyses

When a Court finds an inference of gross disproportionality, it conducts the jurisdictional analyses described in \textit{Solem} to validate its initial judgment that a sentence is grossly disproportionate to a crime.\textsuperscript{294} Specifically, the Court compares the challenged sentence to those imposed on other criminals in the same jurisdiction and those imposed for commission of the same crime in other jurisdictions.\textsuperscript{295} The Court has not conducted these analyses since \textit{Solem} in 1983 because the Court has not found any inferences of disproportionality.\textsuperscript{296} The outcome of these analyses largely will depend on the current rate of sentencing in the state where the juvenile is convicted.\textsuperscript{297}

In certain cases, the Court should identify an inference of disproportionality and should confirm that inference through inter-jurisdictional and intrajurisdictional comparisons to find that juvenile life without parole fails the gross disproportionality test and violates the Constitution as applied to the specific offender.\textsuperscript{298} The Court should do so when it reviews a sentence of life without parole imposed on a first-time juvenile offender who did not participate in a

\textsuperscript{290} See \textit{Harmelin}, 501 U.S. at 1005 (Kennedy, J., concurring).

\textsuperscript{291} See \textit{id}. The Amnesty International report surveyed 281 youth offenders and found that fifty-nine percent received a life without parole sentence for their first offense. See \textit{Human Rights Watch}, supra note 5, at 28.

\textsuperscript{292} See \textit{Roper}, 543 U.S. at 570.

\textsuperscript{293} See \textit{Harmelin}, 501 U.S. at 1005 (Kennedy, J., concurring).

\textsuperscript{294} See \textit{id}.

\textsuperscript{295} \textit{Solem}, 463 U.S. at 292.


\textsuperscript{297} See \textit{Solem}, 463 U.S. at 292.

\textsuperscript{298} See \textit{Harmelin}, 501 U.S. at 1005 (Kennedy, J., concurring).
murder or intend for a murder to occur in a jurisdiction that does not frequently impose the penalty.\textsuperscript{299}

VII. POLICY ARGUMENTS FOR ABOLITION OF JUVENILE LIFE WITHOUT PAROLE BY CONGRESS AND STATE LEGISLATURES

Even if the U.S. Supreme Court does not find juvenile life without parole to violate the Eighth Amendment, the U.S. Congress and state legislatures should pass laws to proscribe this punishment for federal and state crimes and to allow current child offenders serving this sentence to obtain review by courts for re-sentencing to include the possibility of parole.\textsuperscript{300} Both Congress and state legislatures should abolish this sentence due to the psychological research demonstrating the reduced culpability of juveniles, the absence of a deterrent effect, and the increased harshness of the penalty.\textsuperscript{301} Congress should abolish juvenile life without parole for federal crimes also to improve the standing of the United States in the international human rights community.\textsuperscript{302} State legislatures should proscribe the punishment also due to the high costs of aging prison populations.\textsuperscript{303} Additionally, both Congress and state legislatures should abolish the sentence due to the racial disparities in sentencing of juvenile life without parole.\textsuperscript{304}

A. International Law

The interpretive use of international law promotes a broad range of normative values, including enhancing the international stature of the United States, promoting its ability to influence the development of these norms, enhancing its ability to protect its interests abroad, and advancing the development of a well-functioning international judicial system.\textsuperscript{305} International human rights law explicitly prohibits sentences of life without parole for those who commit their crimes before the

\textsuperscript{299} See id.

\textsuperscript{300} See infra notes 301–335 and accompanying text.

\textsuperscript{301} See supra notes 81–108, 244, 275–293 and accompanying text.

\textsuperscript{302} See infra notes 308–319 and accompanying text.


\textsuperscript{304} See infra notes 326–335 and accompanying text.

\textsuperscript{305} Ingrid Brunk Wuerth, Authorizations for the Use of Force, International Law, and the Charming Betsy Canon, 46 B.C. L. Rev. 293, 303 (2005). Critics of the use of international law argue that it is counter-majoritarian and antidemocratic. Id. at 304.
age of eighteen.\textsuperscript{306} Almost every country besides the United States adheres to this prohibition.\textsuperscript{307}

In 1959, the U.N. General Assembly adopted the Declaration of the Rights of the Child, which recognized that children need special legal protections due to their immaturity.\textsuperscript{308} Seventy-eight members of the U.N. General Assembly, including the United States, voted to adopt the Declaration.\textsuperscript{309} Since then, the international community has protected further the rights of children and the United States has been left behind.\textsuperscript{310}

For example, the United States has failed to ratify the United Nations Convention on the Rights of the Child (the “CRC”), which went into force in 1990 and explicitly proscribes sentencing juveniles to life without parole.\textsuperscript{311} Every country in the world ratified this resolution except the United States and Somalia.\textsuperscript{312} If Congress expects and intends the United States to be a world leader on the issue of human rights, the Senate should consent to ratification of the CRC without reservation.\textsuperscript{313}

In 1992, the United States became a party to the International Covenant on Civil and Political Rights (the “ICCPR”), which was adopted by the U.N. General Assembly in 1966.\textsuperscript{314} The ICCPR acknowledges the special needs of children in the criminal justice system by requiring the separation of child offenders from adults and the provision of treatment appropriate to the child’s age.\textsuperscript{315} It also emphasizes the importance of rehabilitation by requiring parties to focus on education rather than punishment when sentencing children for offenses.\textsuperscript{316} When the United States ratified the ICCPR, however, it attached this limiting reservation:

\begin{quote}
That the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provi-
\end{quote}

\begin{footnotes}
\item[306] Human Rights Watch, supra note 5, at 94.
\item[307] Id.
\item[309] See Human Rights Watch, supra note 5, at 94.
\item[310] Id.
\item[311] CRC, supra note 14, at art. 37; see Roper v. Simmons, 543 U.S. 551, 576 (2005).
\item[312] Roper, 543 U.S. at 576; LaBELLE ET AL., supra note 67, at 21.
\item[313] See CRC, supra note 14, at art. 37(a); Human Rights Watch, supra note 5, at 7.
\item[314] See generally ICCPR, supra note 14; Rights Report, supra note 165.
\item[315] ICCPR, supra note 14, at art. 10(3).
\item[316] ICCPR, supra note 14, at art. 14(4).
\end{footnotes}
sions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14.317

Given the frequency with which the United States prosecutes juveniles as adults and incarcerates them in adult prisons, it is failing to adhere to the terms of its reservation.318 If the United States wants to continue to influence the development of international human rights norms, it should remove its reservation to the ICCPR and proscribe the sentence of juvenile life without parole for federal crimes.319

B. Costs of Lifetime Imprisonment

Even if juvenile life without parole is not found to violate the Eighth Amendment, state legislatures should proscribe the punishment for one practical reason—it is expensive.320 Because offenders serving life without parole necessarily age and die in prison, this sentence increases the size of the elderly inmate population.321 Prisoners over age sixty are now the fastest-growing age segment; this population grew nearly fifty percent between 1999 and 2004.322 The needs of elderly inmates are much greater than those of younger inmates: they have more chronic health problems, need expensive medication, and often require handicap-accessible housing.323 Because elderly inmates require more medical care, it costs nearly three times as much to incarcerate them.324 State legislatures should consider this cost when contemplating long sentences.325

318 See Human Rights Watch, supra note 5, at 97–98.
319 See id.
320 See Labelle et al., supra note 67, at 22 (estimating that it costs the state of Michigan more than one million dollars to incarcerate a juvenile lifer for fifty years); Wilson & Vito, supra note 303, at 25.
321 See Wilson & Vito, supra note 303, at 25.
323 See Wilson & Vito, supra note 303, at 25.
324 See Blum, supra note 322, at 1; Tammerlin Drummond, Cellblock Seniors: They Have Grown Old and Frail in Prison. Must They Still Be Locked Up?, Time, June 21, 1999, at 60.
325 See Human Rights Watch, supra note 5, at 7–9.
C. Racial Disparities in Sentencing

Finally, Congress and the states should consider research studies showing that minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system. Minorities are more likely than white youths to be detained, formally charged, waived to adult court, and incarcerated. In 1997, the most recent year for which data are available, minority youths made up about one-third of the juvenile population nationwide but two-thirds of the detained and committed population in secure juvenile facilities. African-American youths are overrepresented more than any other minority group.

The overrepresentation of minority youths also exists in sentencing. In 2005, Amnesty International found that black youth offenders constituted sixty percent of all youth offenders serving life without parole in the United States, whereas whites constituted only twenty-nine percent. Data from individual states also show disparities in sentencing. In Michigan, the American Civil Liberties Union (the “ACLU”) reported that of 307 people serving life without parole in 2004, the majority (221) consists of minority youths and 211 of those are African Americans. A Florida study found that, among like offenders, minority youths had a higher probability than white youths of receiving the harshest disposition available at each stage of processing. This racial disparity in sentencing, combined with the other arguments against juvenile life without parole, should convince Congress and state legislatures to prohibit the sentence for juveniles.

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327 Id. at 2–3.
330 See LaBelle et al., supra note 67, at 6.
331 Human Rights Watch, supra note 5, at 39. A shortcoming of this study is that it fails to control for type of conviction and extent of criminal history. Id. Therefore, it cannot be used to determine whether minority children are sentenced to higher rates than white children from similar backgrounds. Id.
332 Id.
333 LaBelle et al., supra note 67, at 6.
334 Human Rights Watch, supra note 5, at 40.
335 See id. at 39–40.
Conclusion

Sentencing juveniles to life without the possibility of parole is cruel and unusual punishment and violates the Eighth Amendment of the U.S. Constitution because adolescents are less culpable than adults due to their psychological and neurological deficiencies. The U.S. Supreme Court should create a categorical exemption for juveniles from life without parole by applying its independent judgment in the “evolving standards of decency” test. Juvenile life without parole violates the Eighth Amendment on its face because of the reduced culpability of children and because the sentence does not contribute to the purposes of lifelong imprisonment for adults. Even if application of this test does not result in abolition of the sentence, the Court should find that juvenile life without parole is grossly disproportionate as applied in certain cases, such as for a first-time offender for a crime of felony murder. Furthermore, even if the Court finds that sentencing juveniles to life without parole does not violate the Constitution, the U.S. Congress and state legislatures should pass laws to exempt juveniles from this type of punishment. Although children should be held accountable for their crimes, the U.S. criminal justice system should never make them disposable.

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