

Essays on the Unintended Consequences of Interjurisdictional Law

by

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ABSTRACT

This dissertation studies unintended legal consequences in three fields: private U.S. interstate law, public U.S. interstate law, and international law. The first essay examines a feature in federal civil litigation that is really fit only for one jurisdiction or a small state, but has been overextended to apply to interstate disputes. Using a Third Circuit case, the first essay examines how corporations can exploit a loophole in federal civil procedure and choice of law practice to evade liability for torts. Amendments to civil procedure are presented as a solution.

The second essay examines a phenomenon in public interstate law, in which permutations of laws governing individual jurisdictions have produced undesirable results. U.S. states redraw electoral districts for state legislatures and the federal Congress following each decennial census. That process must generally comport with what the Supreme Court of the United States calls “traditional” districting criteria. However, the lack of a clear definition of that term is leading to abuse by conflicted interests. The second essay submits an empirical and objectively discernible definition of traditional districting criteria that would end such abuse: a criterion is traditional only if it is legislatively codified in the laws of 26 or more states and prohibited by 12 or fewer.

The final essay examines a problem in international law that obstructs the creation of treaties against transboundary pollution. States must generally and consistently renounce transboundary pollution for it to become illegal under CIL. However, because states culpable for transboundary pollution are not likely to suddenly practice self-restraint, transboundary pollution must already be illegal for states to renounce it generally and consistently. To circumvent this catch-22, I propose forcing states to engage in conservation by using a legal device that states have already voluntarily bound themselves to for a different purpose, but can be interpreted plausibly as creating environmental obligations. Specifically, BITs can be interpreted to arbitrate disputes not only about investment expropriation, but also environmental disputes arising from any investment. The essay elaborates on the legal mechanism that would enable environmental arbitration, as well as contributing to a discourse on how the global community may legitimately outlaw an offense over the objection of the offenders, but also under the consent of the governed.

CHAPTER I

Problem Statement

Laws tend to fall behind the times because legislatures often react to change instead of anticipating it.¹ Some outdated laws are harmless because there no longer exists a need to amend them, resulting in those laws simply being forgotten over time. For example, New Jersey law requires all counties to build “two substantial pillars on the same meridian line and not less than one hundred feet apart”² by their courthouses, so that surveyors can orient compasses. However, the GPS has long since made the compass obsolete,³ resulting in the law being unenforced (and no one being punished for violating it), even though it has been on the books since 1877.⁴ Other outdated laws have more grave consequences. For example, Article 2, Section 2, Clause 1 of the U.S. Constitution⁵ is arguably outdated because it does not explicitly prohibit a president from pardoning oneself for federal crimes.⁶ Unlike laws requiring accommodations for compass users, this part of the Constitution would need to be amended urgently to prevent such self-dealing.

These examples concern unintended legal consequences (or the lack thereof) that are mainly a product of time—laws defeated by circumstances not anticipated at the time they were drafted. Outdated law is an oft-cited source of unintended legal consequences, by both scholars

¹ See, e.g., Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 308 (2010) (“For just as Congress cannot anticipate and foreclose presidential authority of every stripe . . . it also cannot anticipate all the circumstances under which it would like to consent to presidential power.”).

² N.J. Stat. Ann. § 51:3-1 (West).

³ See New Jersey Law Revision Commission, *Final Report Relating to Repeal of Anachronistic and Invalid Statutes* 5 (2012), available at <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/5cf80298b8ddf20001fcca2f/1559757464913/generalrepealerFR030512.pdf>.

⁴ N.J. Stat. Ann. § 51:3-1 (West).

⁵ U.S. CONST. art. II, § 2, cl. 1.

⁶ See Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 97 (2019) (“The actual language of the Constitution does not impose limitations on the President’s right to self-pardon except in ‘[c]ases of [i]mpeachment.’”).

and the public.⁷ However, commentators are notably quieter when it comes to unintended legal consequences that are primarily a consequence of space, not time. For example, a law that was designed to govern only one jurisdiction may operate in unanticipated ways after being used to govern multiple jurisdictions. In a different example, each legal system may govern only one jurisdiction, but increasing interjurisdictional interactions may reveal loopholes to be exploited in *permutations* of those legal systems. The United States is a particularly appropriate environment for this spatial category of unintended legal consequences, because interstate and international interactions abound in the U.S.⁸ but its legal system remains stubbornly territorially tethered.⁹

This dissertation studies the spatial class of unintended legal consequences in three fields: private U.S. interstate law, public U.S. interstate law, and international law. The first essay examines a feature in federal civil litigation that is really fit only for one jurisdiction or a small state, but has been overextended to apply to interstate disputes. Civil suits begin with the plaintiff alleging the harm inflicted by the defendant. Generally, to survive the preliminary pleading stage and move on to full trial, the plaintiff must know two things. First, the plaintiff must be aware of facts about the case that are specific enough to convince courts that she has a plausible likelihood

⁷ See, e.g., *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 199 (2d Cir. 2009) (Calabresi, J., concurring) (“Interpreting the Constitution, with respect to out-of-date constitutional provisions, presents a more complex set of challenges. Because the U.S. Constitution is so difficult to amend, a provision that has become anachronistic is even less likely to be repaired by the political branches than is an out-of-date statute.”); Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (but Not Quite) Version 2.0*, 65 ME. L. REV. 77, 79 (2012) (“[T]he United State is struggling along with an anachronistic Constitution 1.0, while much of the rest of the world has advanced to constitutionalism 2.0.”); *A Constitutional Anachronism*, N.Y. TIMES, Sept. 6, 2003 (“[I]mmigrants remain ineligible for the nation’s highest office because of a provision in the Constitution The provision has long since outlived its usefulness, if it had any in the first place.”).

⁸ Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1310 (1999) (“In the United States, unlike in unitary legal systems, the conflict of laws serves a dual purpose: It is applicable to the resolution of problems arising from interstate transactions on the one hand and international transactions on the other.”).

⁹ See, e.g., Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 6-7 (1993) (“*Pennoyer* not only committed the United States to anachronistic jurisdictional rules, but also precluded future progress by constitutionalizing the anachronism.”); James D. Rosener & Shawn P. McAveney, *Controlling Chaos: Frameworks for Governing Virtual Relationships: Part 1*, 18 INTELL. PROP. & TECH. L.J. 13, 18 (2006) (“Transactions involving parties within the United States often involve a complex mixture of regulations from one or more of the more than 50 independent state and territorial legal systems, as well as the federal legal system.”).

of winning at trial.¹⁰ Second, the plaintiff must allege which state’s law would apply to her case, which often requires knowledge of which state the harm inflicted against her originated from.¹¹

In classic cases like car accidents, plaintiffs usually know where the tort occurred because they witness it. However, when the harm is inflicted over the internet across state lines, plaintiffs may not know which jurisdiction the tort originated from. If the tortfeasor’s identity is unknown, the procedural defect requiring plaintiffs to know the physical origin of their harm in the internet age would be moot because the plaintiff could not sue anyway. However, if the plaintiff is aware of the facts about her case and the tortfeasor’s identity but not of their location, she may face a situation even worse than being unable to sue. That is, the plaintiff may sue, survive the pleading stage (because of her knowledge of the case), and lose at trial for having alleged a wrong state’s law, which can cost years of time and resources for nothing. Using a Third Circuit case in which this phenomenon apparently occurred,¹² the first essay examines how corporations can exploit this loophole to evade liability for torts and presents amendments to civil procedure as a solution.

The second essay examines a phenomenon in public interstate law, in which permutations of laws governing individual jurisdictions have produced undesirable results. U.S. states redraw electoral districts for state legislatures and the federal Congress following each decennial census. When states redistrict, they are effectively forced to do so according to what the Supreme Court calls traditional districting criteria, because following those criteria constitutes a *prima facie* defense against accusations of racial gerrymandering.¹³ Apart from a handful of criteria whose “traditional” status is considered to be uncontroversial—such as drawing equally populated, compact districts consisting of contiguous territory—the Supreme Court leaves the rest of this list open-ended and indeterminate, apparently to allow adaption to changing circumstances.¹⁴

¹⁰ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (“[A] claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

¹¹ See, e.g., *Holborn Corp. v. Sawgrass Mut. Ins. Co.*, 304 F. Supp. 3d 392, 398-400 (S.D.N.Y. 2018) (conducting a choice of law analysis on the basis of the plaintiffs’ allegations of fact at the motion to dismiss stage).

¹² See *Maniscalco v. Brother Int’l (USA) Corp.*, 793 F. Supp. 2d 696, 704 (D.N.J. 2011), *aff’d sub nom*; *Maniscalco v. Brother Int’l (USA) Corp.*, 709 F.3d 202 (3d Cir. 2013).

¹³ See *Bush v. Vera*, 517 U.S. 952, 962 (1996) (“[T]he neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be subordinated to race.”).

¹⁴ See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“Where these or other [traditional criteria] are the basis for redistricting . . . a State can ‘defeat a claim that a district has been gerrymandered on racial lines.’”).

Although flexible guidelines do lend themselves to adaptation more effectively than rigid rules do, conflicted interests are exploiting this flexible definition in service of their own gain through litigation, at the public’s expense. Specifically, when a districting proposal is challenged in court, conflicted interests—often legislators drawing their own electoral districts—claim that “traditional” must be defined to include any criterion a state has ever used even once, regardless of whether that criterion is currently used and by how many states. Thereafter, districting authorities cherry-pick criteria most expedient for themselves, such as protecting incumbents, preserving existing district cores, and advantaging their own political party.¹⁵ The second essay in this dissertation submits an empirical and objectively discernible definition of traditional districting criteria that would end such abuse: a criterion is traditional only if it is legislatively codified in the laws of 26 or more states and prohibited by 12 or fewer. The essay elaborates on the constitutional justifications for this definition as well as its gains in terms of public policy.

The final essay examines a beneficial example of unintended legal consequences, found in bilateral investment treaties (BITs). Although the argument to address environmental pollution through globally binding treaties has persisted in legal academia for decades,¹⁶ such treaties have been hard to come by in practice; those that managed to achieve global *participation* have often had to sacrifice meaningfully binding provisions in order to survive negotiations. For example, agreements such as Copenhagen, Doha, and Kyoto, failed because the negotiating parties could not agree, signatory states did not ratify the agreements they managed to reach, or the ratifying states failed to meet their obligations.¹⁷ Even accords without any pretense of enforceability, like

¹⁵ *League of Women Voters v. Commonwealth*, 178 A.3d 737, 779 (Pa. 2018) (stating that Dr. Wendy K. Tam Cho was retained by the Commonwealth of Pennsylvania); *Decl. of Wendy K. Tam Cho*, at 10, *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Dec. 4, 2017) (“Incumbent protection has been mentioned by the Court as one of the traditional districting principles . . . see, e.g., *Shaw v. Hunt*. . .”), https://www.brennancenter.org/sites/default/files/audio/LWV_v_PA_Expert_Report_WendyTamCho.pdf.

¹⁶ See, e.g., Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85 (1991) (“The Article will urge ratification of the proposed Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution . . . drawn up . . . in 1979.”); Joseph C. Sweeney, *International Protection of Earth’s Oceans*, 43 FORDHAM INT’L L.J. 669, 735 (2020) (“[I]t would be entirely appropriate for [the International Maritime Organization] to be assigned a leading role in the UN efforts to control waste and plastics on the oceans by treaty.”).

¹⁷ See Caplan, *supra* note 13, at 791-92 (stating that Copenhagen “produced little more than vague commitments to reduce world greenhouse gas concentrations by unspecified means”); Nilufer Oral, *Ocean Acidification: Falling Between the Legal Cracks of UNCLOS and the UNFCCC?*, 45 ECOLOGY L.Q. 9, 20 (2018) (stating that the Doha Amendments to the Kyoto Protocol have not entered into force because of insufficient ratification by the states that ratified Kyoto); Christopher E. Angell, *Assessing Climate Agreement Principles: The Tension Between Early Equivalent Actions and Variable Costs*, 35 COLUM. J. ENVTL. L. 213, 220 (2010) (“Many [ratifying state] parties [to the Kyoto Protocol] are projected to miss their assigned emissions targets.”).

the Paris Agreement, are on the brink of collapse because of increasing hostility to globalization and transnational governance.¹⁸ A more incremental alternative to treaties is to create binding obligations of environmental protection in customary international law, which derives from “a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁹

However, legislating a customary international law of state environmental protection faces a catch-22. States must generally and consistently renounce transboundary pollution for it to become illegal under CIL. However, given that the states culpable for transboundary pollution are not likely to suddenly practice self-restraint, transboundary pollution must already be illegal for states to renounce it generally and consistently. To circumvent this catch-22, I propose forcing states to engage in environmental protection through the use of a legal device that states have already voluntarily bound themselves to for a different purpose, but can be interpreted plausibly as creating environmental obligations. Specifically, BITs can be interpreted to arbitrate disputes not only about investment expropriation, but also environmental disputes arising from any investment. The essay elaborates on the legal mechanism that would enable environmental arbitration, as well as contributing to a discourse on how the global community may legitimately outlaw an offense over the objection of the offenders, but also under the consent of the governed.

¹⁸ See Elizabeth F. Quinby, *Regulating Geoengineering: Applications of GMO Trade and Ocean Dumping Regulation*, 51 VAND. J. TRANSNAT'L L. 211, 223 (2018) (“[T]he [emission reduction targets] set by individual countries [pursuant to the Paris Agreement] are not binding, and the Paris Agreement does not include mechanisms to enforce the contributions”); Marcello Di Paola & Dale Jamieson, *Climate Change and the Challenges to Democracy*, 72 U. MIAMI L. REV. 369, 406 (2018) (describing the United States government’s claim that it withdrew from the Paris Agreement because it “disadvantages the United States to the exclusive benefit of other countries”).

¹⁹ *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307-08 (2d Cir. 2000).

CHAPTER II

Conflict of Laws for the Age of Cybertorts: A Game-Theoretic Study of Corporate Profiteering from Choice of Law Loopholes and Interstate Torts

INTRODUCTION

“[C]onflict of laws is a dismal swamp . . . inhabited by . . . eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”²⁰ – 1953

“[T]he scholarly consensus [is] that choice of law doctrine is an unsalvageable mess.”²¹ – 2015

Depending on whom one asks, conflict of laws dates to the rise of the Roman Republic²² or to the fall of the Holy Roman Empire.²³ Compared to classical Mediterranean merchants and medieval fiefdoms, people and states of the Internet Age interact over borders much more often.²⁴ As more interstate dealings cause more interstate disputes, one might expect conflict of laws—the discipline that decides which state’s law governs an interstate dispute—to become more important. However, more scholars and practitioners are discrediting American conflict of laws scholarship with each passing decade.²⁵ Why has conflict of laws scholarship fallen into disuse in both theory and practice when it should be more useful than ever before?

²⁰ William L. Prosser, *Interstate Publications*, 51 MICH. L. REV. 959, 971 (1953).

²¹ Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. ST. L.J. 683, 685 (2015).

²² See Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 816 (2006) (“The beginnings of . . . choice of law are to be found in Roman times . . . in the 3rd century B.C.”); 1 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 277 (1911) (explaining that Ancient Rome allowed foreigners to settle disputes according to the laws of their origin).

²³ See *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 82 (1971) (“[T]he disintegration of the Holy Roman Empire and the appearance of the nation-states gave rise to a countervailing notion of international law, upon which, in a sense, modern conflicts is based.”).

²⁴ See ANNA MANCINI, *ANCIENT EGYPTIAN WISDOM FOR THE INTERNET: ANCIENT EGYPTIAN JUSTICE AND ANCIENT ROMAN LAW APPLIED TO THE INTERNET* 5-10, 11 (2002) (explaining that legal systems in Ancient Egypt and Rome were organized territorially but the internet “cuts down the costs of international communication . . .”); Søren Michael Sindbæk, *The Small World of the Vikings: Networks in Early Medieval Communication and Exchange*, 40.1 NORWEGIAN ARCHAEOLOGICAL REV. 59, 60, 71 (2007) (“[T]he growth of electronic communication, especially the Internet, has triggered a rapid development in the understanding of communication. . . . The critical difference between the early medieval and the modern worlds was not the scale of connections but their pervasiveness. . . .”).

²⁵ See *supra* notes 1-2 and accompanying text.

It may seem futile to ask why conflict of laws is declining, because so many have already complained for so long that conflicts scholarship is unhelpful, irrelevant, or unintelligible. In 1967, Professor Maurice Rosenberg quipped that choice of law doctrine is about as useful to practice as a Ouija board.²⁶ In the half-century since, conflicts scholars have acknowledged that their own discipline can seem to be “an ossified body of doctrine that fails to supply coherent answers” to real-world problems,²⁷ or “as abstruse as determining the number of angels who can dance on the head of a pin.”²⁸ Professor William Reynolds even writes that “[c]hoice of law today, both the theory and practice of it, is universally said to be a disaster.”²⁹

This Article’s first objective is to show that conflicts scholarship can address practical problems confronting the Internet Age. To that end, I examine a loophole in conflict of laws and civil procedure practice that corporate tortfeasors can exploit to evade paying damages to their victims. In *Maniscalco v. Brother Int’l Corp.*, the defendant corporation’s affiliate in Japan (BIL) allegedly committed a tort that remotely harmed U.S. residents.³⁰ Apparently unaware that the alleged tort occurred in Japan,³¹ the plaintiffs sued under the law of New Jersey, where BIC is headquartered.³² Although the complaint was plausible enough to survive a motion to dismiss,³³ BIC apparently knew that the alleged wrongful conduct occurred in Japan, not in New Jersey.³⁴ Hence, regardless of the case’s merits, BIC could have moved to dismiss by revealing that the

²⁶ Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 460 (1967).

²⁷ David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 47 (2014).

²⁸ John B. Martin, *A General Framework for Analyzing Choice of Law Problems in Air Crash Litigation*, 58 J. AIR L. & COM. 909, 980 (1993).

²⁹ William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 (1997).

³⁰ 793 F. Supp. 2d 696, 704 (D.N.J. 2011) [hereinafter *Maniscalco III*], *aff’d sub nom.* *Maniscalco v. Brother Int’l (USA) Corp.*, 709 F.3d 202 (3d Cir. 2013) [hereinafter *Maniscalco IV*].

³¹ The plaintiff’s complaint does not allege tortious conduct originating in Japan. Complaint, *Maniscalco v. Brother Int’l Corp. (USA)*, 2008 WL 2559365 (D.N.J. June 26, 2008) (No. 3:06-cv-04907). When the district court partially denied Brother’s motion to dismiss and thus ruled that New Jersey law applies to some of the plaintiff’s claims, the court did not cite any allegations of tortious conduct originating from Japan. *See Maniscalco v. Brother Int’l Corp. (USA)*, 627 F. Supp. 2d 494 (D.N.J. 2009) [hereinafter *Maniscalco II*]. The court refers to the fact that the defendant’s tort originated in Japan only after “the Court ha[d] at its disposal the discovery provided by the parties[.]” *Maniscalco III*, 793 F. Supp. 2d 707 n.4.

³² *Maniscalco IV*, 709 F.3d at 204.

³³ *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (“a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”); *Maniscalco II*, 627 F. Supp. 2d at 499 (“Because the Court finds that Plaintiffs have sufficiently alleged the three [New Jersey Consumer Fraud Act] elements, BIC’s motion to dismiss Plaintiffs’ [New Jersey] CFA claims is denied.”).

³⁴ *Maniscalco III*, 793 F. Supp. 2d at 699.

plaintiffs sued under the law of a wrong state.³⁵ However, even though BIC did successfully move to dismiss on the choice of law issue, it did so only after the case went to discovery.³⁶ Why did BIC protract for years³⁷ a case that it could have gotten dismissed almost immediately?

I argue that BIC deliberately protracted the case to prevent the plaintiffs from suing again under the correct state's law. To move to dismiss for incorrect choice of law, BIC must argue that the case is better connected to a state other than New Jersey.³⁸ To do so, BIC must effectively reveal where the alleged tort really took place. If BIC moved to dismiss too early, the plaintiffs could use that information to sue again under an appropriate state's law. However, if BIC protracted the plaintiffs' suit under New Jersey law long enough, the plaintiffs would not have any resources left with which to sue again, even after they learn that the alleged tort occurred in Japan. Indeed, when BIC's motion to dismiss was pending, BIC argued that the choice of law is "best left for resolution later,"³⁹ indicating an intent to delay revealing the case's contacts to Japan. The court denied BIC's motion to dismiss and spent two more years on the case, only to dismiss it for incorrect choice of law after conducting full discovery.⁴⁰ I call this tactic the Maniscalco exploit ("ME" or "the exploit") after the cases that indicate its existence.

The Maniscalco exploit arises from a defect in choice of law and civil procedure practice. When courts address a choice of law question at the pleading stage, they often rely on plaintiffs' allegations of fact.⁴¹ A factual allegation critical to the choice of law is the state where the act

³⁵ See Fed. R. Civ. P. 12(d); for a more detailed discussion on when and how a court can consider extrinsic evidence introduced by the defendant in ruling on a motion to dismiss for failure to state a claim, see *infra* Part I.A.

³⁶ See *supra* note 12 and accompanying text; *Maniscalco III*, 793 F. Supp. 2d at 710 (dismissing the suit because "New Jersey law does not apply" and the "relevant decisions [regarding the alleged wrongful conduct] were not made in New Jersey, but in Japan.").

³⁷ *Maniscalco v. Brother Int'l Corp. (USA)*, 2008 WL 2559365, at *4 (D.N.J. June 26, 2008) (stating that the plaintiffs "filed suit in October 2006") [hereinafter *Maniscalco I*]; *Maniscalco III*, 793 F. Supp. 2d at 710 (dismissing the suit in 2011 because "New Jersey law does not apply").

³⁸ See *Maniscalco III*, 793 F. Supp. 2d at 707 ("Under 148(2) [of the Restatement (Second) of the Conflict of Laws], a Court must weigh various 'contacts' between Plaintiffs' fraud claims and the relevant states to determine which state has the greatest ties to the claims.").

³⁹ See *Maniscalco II*, 627 F. Supp. 2d at 499 n.2 ("BIC contends that New Jersey law should not apply to this case but BIC suggests that this issue is best left for resolution later. . . . Accordingly, the Court will not address it here.").

⁴⁰ The trial court denied in part BIC's motion to dismiss on June 19, 2009. See *Maniscalco II*, 627 F. Supp. 2d at 494. The court dismissed for incorrect choice of law on June 24, 2011. See *Maniscalco III*, 793 F. Supp. 2d at 696. One of the plaintiffs appealed, which was dismissed on March 8, 2013. See *Maniscalco IV*, 709 F.3d at 204.

⁴¹ See, e.g., *Reginella Const. Co. v. Travelers Cas. & Sur. Co. of Am.*, 949 F. Supp. 2d 599 (W.D. Pa. 2013) (relying on the plaintiffs' allegations of fact to conduct choice of law analysis in order to consider a motion to dismiss).

causing the injury took place.⁴² In cases like car accidents, the plaintiffs usually know where the tortious act took place because they witness it.⁴³ However, in cases like *Maniscalco* in which the alleged tort occurs in another state, the plaintiffs may not know where it happened.⁴⁴ Yet, current practice addresses the choice of law issue at pleading relying on plaintiffs' potentially inaccurate knowledge of where a tort originated,⁴⁵ or after pleading and discovery,⁴⁶ which would protract cases that should have been disposed of at pleading for incorrect choice of law. For example, *Maniscalco* denied a motion to dismiss relying on the claim that the act occurred in New Jersey⁴⁷ but dismissed after discovery pointed to Japan.⁴⁸ Hence, the plaintiffs wasted years on a futile case because they could not correctly allege the origin of the tort, even though they alleged who harmed them and how the harm occurred plausibly enough to survive a motion to dismiss.

The *Maniscalco* exploit is important because it helps corporations evade liability for, and thereby reliably profit from, committing interstate torts against individuals. Consider a company that harms its customers in the course of selling its products. Without the *Maniscalco* exploit, this hypothetical company should not expect to evade liability so easily because its victims are likely to sue and because their claims are likely to survive a motion to dismiss. The victims are likely to sue because they would know who harmed them: unlike the typical tortfeasor who

⁴² The place of the wrong is either the decisive factor or a significant factor in the choice of law decision under the First and Second Restatements. *See* Restatement (First) of Conflict of Laws § 377 (1934) (“The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”); Restatement (Second) of Conflict of Laws § 145 (1971) (“Contacts to be taken into account . . . include . . . the place where the conduct causing the injury occurred”). States using the First Restatement have defined the place of the wrong as the state where wrongful conduct occurred, not the state in which harm resulting from wrongful conduct was suffered. *See, e.g.,* *Cremit v. Brown*, 955 F. Supp. 499 (D. Md.), *aff’d sub nom. Banca Cremit, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017 (4th Cir. 1997) (applying the law of the state in which “the alleged misrepresentations occurred” instead of the law of the state in which the loss resulting from the misrepresentations was felt). States using the Second Restatement have also distinguished between the state in which wrongful conduct occurred and the state in which injury resulted from that wrongful conduct in the choice of law inquiry. *See Maniscalco IV*, 709 F.3d at 208.

⁴³ *See, e.g.,* *Budget Rent-A-Car Sys., Inc. v. Chappell*, 304 F. Supp. 2d 639 (E.D. Pa. 2004) (applying Pennsylvania law to a case arising from a car accident that occurred in Pennsylvania, under the most significant relationship test).

⁴⁴ *See* Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1113 (2011) (“A cyber-attacker can also be physically removed from the victim. He may be . . . even across the globe.”).

⁴⁵ *See, e.g.,* *Holborn Corp. v. Sawgrass Mut. Ins. Co.*, 304 F. Supp. 3d 392 (S.D.N.Y. 2018) (conducting a choice of law analysis on the basis of the plaintiffs' allegations of fact at the motion to dismiss stage).

⁴⁶ *See, e.g.,* *Snyder v. Farnam Companies, Inc.*, 792 F. Supp. 2d 712 (D.N.J. 2011) (ruling that choice of law analysis for breach of warranty claims was premature at the motion to dismiss stage).

⁴⁷ *See Maniscalco II*, 627 F. Supp. 2d at 499 (“Because the Court finds that Plaintiffs have sufficiently alleged the three [New Jersey Consumer Fraud Act] elements, BIC’s motion to dismiss Plaintiffs’ CFA claims is denied.”).

⁴⁸ *See Maniscalco III*, 793 F. Supp. 2d at 710.

remotely harms residents of other states,⁴⁹ this company cannot hide behind anonymity to evade liability because it has an interest in selling its goods under its own brand.⁵⁰ The plaintiffs' claims are likely to survive pleading because they are likely to know how they were harmed: the *Maniscalco* plaintiffs, for example, were able to allege how they were harmed specifically enough to survive motions to dismiss under plausibility pleading.⁵¹

However, if the victims can be induced to sue in a state that has no genuine contacts with the alleged tort, their case would be dismissed for incorrect choice of law regardless of its merits. Specifically, a corporate tortfeasor would use its multistate presence to obfuscate the true origin of the tort to its victims and to induce them to sue under the law of a state where they would lose on the choice of law—a state in which neither the tortious act nor the victims' injury occurred. Once the victims sue in a dummy state, the tortfeasor would protract the futile suit to drain their funds. In *Maniscalco*, the defendant's U.S. affiliate was headquartered in New Jersey, home to "one of the strongest consumer protection laws in the nation."⁵² Apparently unaware that their injury originated in Japan,⁵³ the plaintiffs sued unsuccessfully in New Jersey instead of a state in which they suffered the injury (California or South Carolina), where they could have won on the choice of law.⁵⁴ The *Maniscalco* exploit promises to be all the more profitable now, when the internet makes it easier both to commit interstate torts⁵⁵ and to conceal one's actual physical location.⁵⁶

⁴⁹ See Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 821 (2004) ("[A]nonymity can also be a substantial aid to tortious conduct.").

⁵⁰ Cf. LOUIS E. BOONE & DAVID L. KURTZ, *ESSENTIALS OF CONTEMPORARY BUSINESS* 8 (2013) ("Companies also discovered the need to distinguish their goods and services from those of competitors.").

⁵¹ See *supra* note 14 and accompanying text.

⁵² *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 460 (N.J. 1994); see also Baher Azmy & David Reiss, *Modeling A Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002*, 35 RUTGERS L.J. 645, 665 (2004); William J. Diggs, *Consumer Protection in an Ebay Marketplace: An Analysis of the Supreme Court of New Jersey's Radir Wheels Decision to Extend Liability Under the New Jersey Consumer Fraud Act to Individual Ebay Sellers*, 40 SETON HALL L. REV. 811 (2010).

⁵³ See *supra* note 12 and accompanying text.

⁵⁴ See *infra* notes 77-79 and accompanying text.

⁵⁵ See, e.g., Christopher P. Beall, Comment, *The Scientological Defenestration of Choice of Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 361, 365 (1997) ("Choice of law issues arise with respect to torts committed via the Internet because interstate communication is so much more prevalent and effortless in that network of networks.").

⁵⁶ Granted, the means to conceal one's location over the internet may not be foolproof. See Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815, 822 (2013) ("[t]he . . . switch to IPv6 makes it even harder to go untraced online in the absence of deliberately deploying anonymizing software like Tor."). However, the *Maniscalco* exploit is expected to work more often than not because "[i]t is difficult for unsophisticated, private victims of Internet

Despite the *Maniscalco* exploit's significance, neither conflict of laws nor civil procedure scholarship studies it. Existing works in conflict of laws neglect the exploit because, for at least fifty years, scholars have debated what an ideal choice of law rule should look like⁵⁷ rather than how flaws in existing choice of law rules immediately affect litigation outcomes. Existing works in civil procedure do not study the exploit because they focus on a different kind of information asymmetry. Much of the work on the so-called paradox of pleading argues that many plaintiffs cannot file complaints that survive pleading because the facts they need to make plausible claims are held by the defendants.⁵⁸ Although the paradox of pleading is indeed grave harm to plaintiffs with valid claims, many of its victims at least avoid costly litigation because the lack of the facts they need to survive a motion to dismiss deters them from suing.⁵⁹ In contrast, victims of the exploit would sue, survive pleading, and see their case dismissed for incorrect choice of law after spending years on the case, because they know enough about how they were harmed to make plausible claims, but not enough about where the tort occurred to sue under a correct state's law.

This Article fills that gap in choice of law and civil procedure literature by using a game-theoretic model to study the workings and consequences of the *Maniscalco* exploit. I build a formal model using *Maniscalco*'s fact pattern, as opposed to gathering empirical data on how the exploit is used, because the exploit is likely to be unobservable in the long run. If the exploit is used often enough, plaintiffs might not sue in the long run because they expect to waste money on a case they will lose. If a mere threat to use the exploit is enough to deter litigation, observed instances of the exploit would understate its actual prevalence and impact. After modeling the exploit, I present as a solution to it flashlight discovery limited to the choice of law question conducted while a motion to dismiss is pending, so that plaintiffs would find out early whether

harassment to use tort law . . . as a remedy to Internet harassment. . . Internet-specific issues—including the . . . need to unmask possible defendants . . . exacerbate the expense and difficulty of litigation.” Winhkong Hua, *Cybermobs, Civil Conspiracy, and Tort Liability*, 44 *FORDHAM URB. L.J.* 1217, 1229 (2017).

⁵⁷ See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 189 (1963) (arguing that courts should apply the law of the state with the strongest policy interest in a case); Kermit Roosevelt III & Bethan R. Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 *AJIL UNBOUND* 139, 143 n.19 (2016) (debating the normative merits of the Third Restatement's proposed two-step process to choice of law).

⁵⁸ See, e.g., Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 *STAN. L. REV.* 905, 927 (2010) (“[c]ivil rights plaintiffs alleging motive-based torts . . . cannot state a claim because they do not have access to documents . . . and they cannot get access . . . without stating a claim.”).

⁵⁹ Cf. Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and A Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 *ROGER WILLIAMS U. L. REV.* 750, 758 (2012) (“plaintiffs’ attorneys who work on a contingent fee basis screen their potential cases and accept only those with a high likelihood of success.”).

they would lose on the choice of law issue if they proceeded to trial. In contrast, the prevailing practice would deny a motion to dismiss a plausible case, conduct full discovery, then dismiss for incorrect choice of law.⁶⁰ I then model the consequences of implementing this solution.

As briefly introduced so far and as will be shown in more detail, *Maniscalco* establishes that conflicts scholarship can address a salient practical problem: namely, a procedural defect that would allow corporations to profit from interstate torts. However, conflicts scholarship is still considered to be anything but practically useful. Courts have shown that “methodology rarely drives judicial decisions[.]”⁶¹ Twenty-four states have dropped the discipline from their bar exams.⁶² Even conflicts scholars admit that this “venerable discipline” is in decline⁶³ and have for decades discussed how to “rethink”⁶⁴ and “reform”⁶⁵ conflict of laws, seemingly to no avail. Thus, I return to the question posed at the beginning of this Article: why is conflict of laws considered to be impractical, when people deal across borders more frequently than ever before?

This Article’s second objective is to investigate why conflicts scholarship is considered to be unhelpful at a time of unprecedented need. Existing works make the discipline’s decline seem simple to reverse, by exaggerating the role of a single cause and the efficacy of a single solution. Some attribute the “turmoil that . . . besets choice of law” to a neglect of foreign law.⁶⁶ Others blame “abstract arguments . . . couched in pseudo-sophisticated jargon[.]”⁶⁷ I attribute the field’s decline to more fundamental problems in what conflicts scholars consider to be important issues and how they conduct scholarly inquiry. I submit that scholars’ obsession with comprehensive,

⁶⁰ See, e.g., *Arroyo v. Milton Academy*, 2011 WL 65938 at *3 (D.Vt. Jan. 10, 2011) (Declining to conduct “choice-of-law analysis” because “it would be premature . . . before the completion of discovery.”).

⁶¹ EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 2.19, at 83 (4th ed. 2004); see also Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View “From the Trenches,”* 43 AM. J. COMP. L. 1, 2 (1995) (“[O]f all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice of law methodology followed by the court.”) (emphasis omitted).

⁶² Laura E. Little, *Conflict of Laws Structure and Vision: Updating a Venerable Discipline*, 31 GA. ST. U. L. REV. 231, 234-35 (2015).

⁶³ *Id.*

⁶⁴ Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 286 (1990).

⁶⁵ Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: “One, Two, Three, Baby, You and Me”*, 72 MO. L. REV. 793, 814 (2007).

⁶⁶ See, e.g., Friedrich K. Juenger, *The Need for A Comparative Approach to Choice of law Problems*, 73 TUL. L. REV. 1309, 1314 (1999); see also Ralf Michaels & Christopher A. Whytock, *Internationalizing the New Conflict of Laws Restatement*, 27 DUKE J. COMP. & INT’L L. 349, 358 (2017) (“The new Conflict of Laws Restatement provides an exciting opportunity to offer courts much-needed guidance in conflict of laws in the international context and to benefit from comparative analysis.”).

⁶⁷ Earl M. Maltz, *Do Modern Theories of Conflict of Laws Work? The New Jersey Experience*, 36 RUTGERS L.J. 527, 547 (2005).

ideal choice of law rules at the expense of studying how existing rules immediately affect individual litigation outcomes, unfalsifiable argumentation, and failure to define terms vital to productive dialogue have created debates ad nauseam over the exact same ideas,⁶⁸ jargon that splits hairs,⁶⁹ and abstruse claims that elude seemingly everyone but their fiercest disciples.⁷⁰

This Article proceeds as follows. Part I elaborates on the legal basis and usage of the exploit, shows how this Article fits into choice of law and civil procedure literature, and presents a one-sided incomplete information game to model the exploit. This model is akin to the chain-store paradox entry-deterrence game, which depicts a chain store taking losses in the short run to drive out local stores in the long run.⁷¹ Part II advances flashlight discovery on the choice of law question pending motions to dismiss as a solution to the exploit, and models the consequences of implementing it. Part III argues that a misunderstanding of practitioners' needs and undisciplined inquiry have relegated the discipline to an academic backwater, and proposes a shift from macro-theoretical conflict of laws (designing comprehensive, ideal choice of law rules) to micro-applied conflicts (studying how existing rules immediately affect individual litigation outcomes). I then conclude by discussing the debate over the alleged irrelevance of legal scholarship as a whole.

Although this Article's immediate subject matter is conflict of laws, civil procedure, and torts, I intend its practical benefits to reach beyond those fields. The practical need for conflict of laws scholarship has arguably never been greater than now, when the internet's omnipresence is making our territorial legal system as it exists increasingly unsustainable.⁷² By helping to cure

⁶⁸ See, e.g., Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 47 (2001) (“[I]n choice of law theory, we observe a debate that cycles endlessly, regarding whether choice of law by courts should be governed by detailed, predictable rules, or, instead, by broad standards, such as balancing tests.”); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 997 (1991) (“Every argument advanced either for or against [renvoi] has turned out to be inconclusive or question-begging. Each step in the debate has led us back to the starting point—a veritable *circulus inextrabilis*.”)

⁶⁹ Cf. Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 926–28 (2004).

⁷⁰ Cf. LEA BRILMAYER, *CONFLICT OF LAWS*, at xiii (2d ed. 1995) (acknowledging a “wild-eyed community of intellectual zealots” in conflict of laws and that the field’s “reputation as arcane and abstract . . . is well deserved.”).

⁷¹ DAVID DRANOVE, DAVID BESANKO & MARK SHANLEY, *ECONOMICS OF STRATEGY* 200 (2017).

⁷² See, e.g., Estelle Shirbon, *Press Ban in Tatters as UK Celebrity Threesome Story Spreads Online*, REUTERS, Apr. 20, 2016, available at <https://uk.reuters.com/article/uk-britain-legal/press-ban-in-tatters-as-uk-celebrity-threesome-story-spreads-online-idUKKCN0XH1WO> (describing how English residents circumvented a gag order on English tabloids by accessing the banned information on Scottish press through the internet); OLGA KIESELMANN, *DATA REVOCATION ON THE INTERNET*, at v (2017) (“Sometimes users . . . want to delete their . . . data from the Internet . . . [T]o delete previously published data, the user would need to delete it on a foreign server, i.e., where she has absolutely no control.”); Zhongjie Wang et al., *Your State Is Not Mine: A Closer Look at Evading Stateful Internet*

the discipline’s generations-old malaise,⁷³ this Article aims to prod conflicts scholarship to leave its echo chamber and to contribute to designing a legal system fit to survive the age of cybertorts.

I. THE MECHANISM AND MATERIAL CONSEQUENCES OF THE MANISCALCO EXPLOIT

A. *The Legal Basis and Tactical Usage of the Maniscalco Exploit*

The series of cases named *Maniscalco v. Brother Int’l Corp.* arose from an alleged defect in certain printer models sold by the defendant (hereafter BIC), which is headquartered in New Jersey.⁷⁴ The plaintiffs, who purchased the printers at issue in California and South Carolina, sued under the New Jersey Consumer Fraud Act (CFA) alleging, inter alia, that BIC knowingly sold “machines that they know are likely to fail” due to the defect.⁷⁵ In 2009, the U.S. District Court for the District of New Jersey denied BIC’s motion to dismiss the CFA claims, ruling that they were sufficiently specific.⁷⁶ For the purpose of considering the motion to dismiss, the trial court applied New Jersey law without considering another state’s law because BIC argued that the choice of law question is “best left for resolution later[,]” and the plaintiffs did not object.⁷⁷

However, the plaintiffs’ case fell apart once discovery revealed that Brother Industries Limited (BIL), BIC’s parent entity located in Japan, had manufactured the printers at issue and printed the manuals that should have disclosed the alleged defect.⁷⁸ Once this evidence was revealed, BIC moved successfully to dismiss, arguing that New Jersey law does not apply under the most significant relationship rule because the failure to disclose any alleged defect occurred in Japan.⁷⁹ The court agreed that New Jersey had fewer contacts with the case than did Japan,⁸⁰ and ruled that the laws of the plaintiffs’ home states (South Carolina and California) have the most significant relationship to the case because the plaintiffs purchased the allegedly defective

Censorship, PROCEEDINGS OF THE 2017 INTERNET MEASUREMENT CONFERENCE 114 (arguing that the INTANG measurement-driven censorship evasion tool can circumvent Chinese state censors at “near perfect evasion rates”).

⁷³ See *supra* notes 1-2 and accompanying text.

⁷⁴ *Maniscalco II*, 627 F. Supp. 2d at 497.

⁷⁵ *Id.* at 500.

⁷⁶ *Id.* at 506.

⁷⁷ *Id.* at 499 n.2.

⁷⁸ *Maniscalco III*, 793 F. Supp. 2d at 707 n.4.

⁷⁹ *Id.* at 707.

⁸⁰ *Id.* at 710.

printers and relied on any misrepresentation in those states.⁸¹ The Third Circuit affirmed, ruling that New Jersey law does not apply because at least some of the allegedly tortious conduct “emanated from Japan.”⁸² The court also ruled that the law of the appellant’s home state (South Carolina) would apply to the case, despite the lack of a presumption for applying its law.⁸³

I argue that Brother could have disposed of *Maniscalco* during pleading, but deliberately protracted the case to discovery in order to drain the plaintiffs’ funds on a futile case. BIC knew in November 2002 that BIL had investigated in Japan the alleged defect at issue in *Maniscalco*.⁸⁴ Hence, when the plaintiffs sued under New Jersey law in 2006⁸⁵ alleging that BIC investigated the defect and concealed it,⁸⁶ BIC could have disposed of the case at the motion to dismiss stage by revealing the fact that the alleged tortious conduct occurred in Japan. (The court could have considered extrinsic evidence at pleading by converting the motion to dismiss into a motion for summary judgment⁸⁷ or by using incorporation by reference.⁸⁸) However, had BIC disposed of the case early, the plaintiffs may have sued again under a correct state’s law because they would now know where the alleged tortious act occurred. Instead, BIC asked the court not to consider the choice of law issue at pleading⁸⁹ and moved to dismiss only after discovery revealed what it knew already,⁹⁰ thereby protracting the case for two more years until the inevitable dismissal.⁹¹

⁸¹ *Id.* at 708.

⁸² *Maniscalco IV*, 709 F.3d at 211.

⁸³ Following the trial court’s dismissal, only the South Carolina-based plaintiff appealed. *Id.* at 208.

⁸⁴ *Maniscalco III*, 793 F. Supp. 2d at 699.

⁸⁵ *Maniscalco I*, 2008 WL 2559365 at *4.

⁸⁶ *Maniscalco IV*, 709 F.3d at 206.

⁸⁷ *See* Fed. R. Civ. P. 12(d); *Messer v. Virgin Islands Urban Renewal Bd.*, 623 F.2d 303, 307 (3d Cir. 1980) (“where matters outside the pleadings are considered by the district court, a motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted will be treated as a Rule 56 motion for summary judgment.”).

⁸⁸ Usually, courts invoking incorporation by reference consider extrinsic evidence pending a motion to dismiss only when certain conditions are met: for example, if the authenticity of the extrinsic evidence is not disputed and the complaint relies on the extrinsic evidence. *See Pryor v. Nat’l Collegiate Athletic Ass’n.*, 288 F.3d 548, 560 (3d Cir. 2002). However, federal courts have frequently considered extrinsic evidence pending a motion to dismiss even when these conditions do not apply. *See, e.g., Calkins v. Dollarland, Inc.*, 117 F. Supp. 2d 421, 429 n.4 (D.N.J. 2000) (considering extrinsic evidence introduced by the defendant without converting the motion to dismiss to a motion for summary judgment, despite the plaintiff’s opposition); *Kniewel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (considering extrinsic evidence that is neither attached to nor cited by the plaintiff’s complaint).

⁸⁹ *Maniscalco II*, 627 F. Supp. 2d at 499 n.2.

⁹⁰ *See supra* note 12 and accompanying text; *Maniscalco III*, 793 F. Supp. 2d at 710 (dismissing the suit because “New Jersey law does not apply” and the “relevant decisions [regarding the alleged wrongful conduct] were not made in New Jersey, but in Japan.”).

⁹¹ *See supra* note 21 and accompanying text.

One may argue that BIC's failure to disclose the case's Japanese contacts at pleading was not the result of a deliberate attempt to protract litigation. Instead, BIC might have involuntarily waited until after discovery to move to dismiss for incorrect choice of law, because the District Court has ruled in past cases that "it can be inappropriate or impossible for a court to conduct [choice of law] analysis at the motion to dismiss stage when . . . no discovery has taken place."⁹² However, this argument fails to answer two questions. First, if the court would have waited until discovery to decide the choice of law anyway, why did BIC preemptively ask the court to delay addressing the issue?⁹³ Second, if BIC did not intend to protract the case, why didn't BIC supply the facts that the court needed to decide the choice of law early? In fact, the District Court has used extrinsic evidence in the past to dismiss claims, over plaintiffs' objections.⁹⁴ Moreover, the plaintiffs would likely not have objected to BIC introducing extrinsic evidence, because knowing that the case is connected to Japan would have saved the plaintiffs from years of futile litigation.

However, preventing the victims from suing under the law of the state where the tortious act occurred, on its own, does not guarantee success with the exploit. To maximize the likelihood that the plaintiffs' case will be dismissed on the choice of law issue, they must also be prevented from suing under the law of the states in which they suffered the alleged injury. In *Maniscalco*, the courts ruled that the laws of California and South Carolina—where the plaintiffs purchased the allegedly defective printers—apply to the case, according to the most significant relationship rule.⁹⁵ Applying the law of the state where the injury was suffered is unlikely to be an anomaly, as courts facing similar circumstances in other states that use the Second Restatement have done the same.⁹⁶ Courts in states that follow the First Restatement have also ruled that the place of the wrong is the state where the injury was suffered, not the state where the act causing the injury occurred.⁹⁷ Hence, a tortfeasor using the exploit must induce victims to sue under the law of a

⁹² In re Samsung DLP Television Class Action Litig., 2009 WL 3584352, at *3 (D.N.J. Oct. 27, 2009); *see also* Arlandson v. Hartz Mountain Corp., 792 F. Supp. 2d 691, 699-700 (D.N.J. 2011).

⁹³ *See Maniscalco II*, 627 F. Supp. 2d at 499 n.2.

⁹⁴ *See Calkins*, 117 F. Supp. at 429 n.4.

⁹⁵ *See Maniscalco III*, 793 F. Supp. 2d at 708; *Maniscalco IV*, 709 F.3d at 208.

⁹⁶ *See Pennsylvania Employee, Benefit Tr. Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 475 (D. Del. 2010) (applying New York law because New York is "the forum where he relied on Defendants' alleged misrepresentations").

⁹⁷ *See, e.g., Bullard v. MRA Holding, LLC et al.*, 740 S.E.2d 622 (Ga. 2013) (ruling that the place of the wrong under *lex loci* is the state in which injury is felt, not the state in which the conduct causing the injury occurred).

state where neither the tortious act nor the injury occurred. Notably, the *Maniscalco* plaintiffs sued in New Jersey, which has “one of the strongest consumer protection laws in the nation.”⁹⁸

Of course, not all tortfeasors may find the exploit to be useful. Unlike many corporations, which cannot act completely anonymously because they need to market their goods and services under their own brands, individual tortfeasors who act alone over the internet can be difficult to catch.⁹⁹ Because they may not be brought to trial to begin with, such lone wolves may not need to use the exploit. Even if the tortfeasor is a corporation who cannot act anonymously, the exploit would also be unhelpful if its cost exceeds its revenue. For example, if a tort returns \$30,000 in gains but it would cost \$50,000 to protract a futile trial to discovery, the exploit would appear to be not worth its cost. However, this cost-benefit calculation does not account for the exploit’s long-term gains. Assume that the tortfeasor commits ten torts that each returns \$30,000, and that the tortfeasor goes to trial and uses the exploit for a total of four times, each at a cost of \$50,000. If the plaintiff stops suing with the fifth tort because the previous losses have built an expectation that she will lose at trial, the tortfeasor would make an overall profit despite initial losses. Part I.C.3 describes in detail how a tortfeasor may take short-term losses for greater long-term gains.

Moreover, although corporate tortfeasors can still use the *Maniscalco* exploit even if none of the material acts occur over the internet, the rising volume of cross-border transactions made over the internet¹⁰⁰ promises to make the exploit both easier to use and more effective.¹⁰¹ Since long before the internet existed, corporations, unlike individuals, have maintained a presence in many states simultaneously.¹⁰² Even in *Maniscalco*, none of BIL’s allegedly tortious conduct took place over the internet; the plaintiffs sued under New Jersey law because they apparently

⁹⁸ See *Cox*, 647 A.2d at 460.

⁹⁹ See, e.g., Marcus Chung, *A New Wave of Ransomware Is Coming This Fall (and You're Probably Not Prepared)*, 20 J. HEALTH CARE COMPLIANCE 37, 37 (2018) (“one of the easiest assaults on a computer system is ransomware—a debilitating attack through which an anonymous criminal encrypts your files and then forces you to pay them whatever amount they request in order to regain access to your system”).

¹⁰⁰ See Sindbæk, *supra* note 5.

¹⁰¹ Although this Article focuses on the use of the *Maniscalco* exploit in litigation arising from torts, it could also be used in cases arising from contracts because corporations could deceive plaintiffs as to which state has the most significant relationship to a contract. Of course, I am not claiming that the exploit can be used in *all* cases arising from torts and contracts. In product liability suits, for example, it would be difficult to misrepresent the state with genuine contacts to a case because plaintiffs would sue in the state where the product at issue was manufactured.

¹⁰² See *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945) (establishing personal jurisdiction in Washington against a Delaware corporation whose principal place of business was in Missouri).

did not know that the tortious act occurred in Japan.¹⁰³ However, the fact remains that the internet makes it easier to commit torts over state borders¹⁰⁴ and to disguise one’s actual location.¹⁰⁵ Although the widely available means to conceal one’s location while acting via the internet are not foolproof,¹⁰⁶ I submit that they need not be foolproof for the exploit to work, given that attorneys¹⁰⁷ and the public¹⁰⁸ that they represent in court tend to be unfamiliar or inept with cybersecurity practices.

One may argue that BIC could have evaded liability in *Maniscalco* without using the exploit because an act material to the plaintiffs’ alleged injury—the “failure to disclose latent defects” in the printers at issue¹⁰⁹—was committed by BIC’s parent entity, not by BIC. However, neither the District Court nor the Third Circuit ever states that Brother could have gotten the case thrown out by invoking the corporate veil. Moreover, the rule that “a subsidiary is not liable for acts of its parent” does not hold if the veil is pierced.¹¹⁰ Because the corporate veil is not always available and can be pierced when one legal entity is the alter ego of another in the commission of a tort,¹¹¹ my proposition that the *Maniscalco* exploit can be a generally useful tool for corporate tortfeasors stands. Furthermore, the fact that one cannot invoke the tortious acts of a subsidiary to obtain personal jurisdiction against a parent entity without sufficient contacts to the

¹⁰³ See *supra* note 12 and accompanying text.

¹⁰⁴ See Beall, *supra* note 36.

¹⁰⁵ Charles A. Weiss, Note, *Available to All, Produced by Few: The Economic and Cultural Impact of Europe’s Digital Single Market Strategy Within the Audiovisual Industry*, 2016 COLUM. BUS. L. REV. 877, 897–98 (2016) (describing how users of virtual private networks can “can disguise their location with [a proxy] in a different territory.”).

¹⁰⁶ See Kaminski, *supra* note 37.

¹⁰⁷ See, e.g., Cheryl B. Preston, *Lawyers’ Abuse of Technology*, 103 CORNELL L. REV. 879, 922 (2018) (stating that law firms are woefully unprepared for cyberattacks); Gerald O’Hara, *Cyber-Espionage: A Growing Threat to the American Economy*, 19 COMM. LAW CONSPPECTUS 241, 243 (2010) (“Private firms are often unaware of data breaches, sometimes discovering cyberattacks only after they have been ongoing for months or even years.”).

¹⁰⁸ See, e.g., Kenneth Olmstead & Aaron Smith, *What the Public Knows about Cybersecurity*, PEW RES. CENTER (Mar. 22, 2017), <http://www.pewinternet.org/2017/03/22/what-the-public-knows-about-cybersecurity/> (“Of the 13 questions [about cybersecurity] in the survey, a substantial majority of online adults were able to correctly answer just two of them.”); Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 U. ILL. J.L. TECH. & POL’Y 341, 349-50 (“technical issues surrounding cybersecurity are not widely understood by the general public.”).

¹⁰⁹ *Maniscalco IV*, 709 F.3d at 211.

¹¹⁰ See, e.g., *Phonometrics, Inc. v. Resinter N. Am. Corp.*, 124 F.3d 229, 229 (Fed. Cir. 1997) (“a subsidiary is not liable for acts of its parent, and vice versa (absent some piercing of the corporate veil)”).

¹¹¹ See, e.g., *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

alleged tort¹¹² does not apply to *Maniscalco* because, in that case, the parent did have genuine contacts.

Finally, a qualification is in order about the significance of the *Maniscalco* exploit in the tactical considerations made by corporate tortfeasors and their victims. The fact that this Article focuses on the exploit should not be taken to mean that it is the *only* factor that affects corporate tortfeasors' decision to misrepresent the origin of a tort as a particular state, or their victims' decision to sue under the laws of a certain state. Whether a borrowing statute affects the statute of limitations¹¹³ or even whether plaintiffs' counsel has an office in a state may affect the parties' decisions. This Article simply argues that the *Maniscalco* exploit is a significant factor that would affect the parties' tactical calculus and that existing works fail to address it.

Part I.A having established the legal basis of the *Maniscalco* exploit, Part I.B. discusses how this work fits into conflicts and civil procedure literature. Part I.C models the consequences of the *Maniscalco* exploit using entry deterrence games under one-sided incomplete information.

B. The Scholarly Significance of the Maniscalco Exploit in Conflict of Laws and Civil Procedure

To my knowledge, no work in conflict of laws or civil procedure studies the *Maniscalco* exploit. I submit that conflicts literature overlooks the *Maniscalco* exploit because conflict of laws scholars tend to focus on designing theoretically ideal choice of law rules, but the exploit is about how a defect in an existing choice of law rule immediately affects litigation outcomes. The history of American conflict of laws is scholars vying to replace the prevailing choice of law rule with their idea of a theoretically superior alternative. The First Restatement's *lex loci* rule, once dominant, was overthrown by scholars and judges in the so-called choice of law revolution of the 1960s.¹¹⁴ Since then, the discipline has seen repeated proposals and takedowns of the same few choice of law rules such as interest analysis, comparative impairment, and the better rule of

¹¹² See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); see also Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1 (1986).

¹¹³ See, e.g., *Miller v. Stauffer Chem. Co.*, 581 P.2d 345, 348 (Idaho 1978) (“Borrowing statutes change the common law rule governing choice of the applicable statute of limitation.”).

¹¹⁴ See Symeon C. Symeonides, *The Choice of Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1849.

law.¹¹⁵ The debate over interest analysis remains especially memorable, both for its longevity¹¹⁶ and the acrimonious tone taken by some of the interlocutors, unusual even for legal academia.¹¹⁷

Amid such heightened passions for ideal choice of law rules, scholars have neglected the value of studying how litigants and judges interact with extant choice of law rules. For example, conventional conflicts scholarship does not study how uncertainty over the facts of a case affects courts' choice of law. A "classic choice of law problem[]" asks if "two friends from Maine get into a car accident . . . in Chad, which law governs whether the passenger can sue the driver for negligence?"¹¹⁸ Those who study classic choice of law problems tend to assume that two Mainers really did get into a car accident in Chad, and argue over which state's law should apply to that case.¹¹⁹ In contrast, this Article is uninterested in whether it would be just to apply New Jersey law to *Maniscalco*. Instead, it points out that in actual litigation—unlike in classic choice of law problems—there can be uncertainty over whether the wrongful act occurred in New Jersey at all, and that defendants may abuse that uncertainty to evade liability. Put differently, if classic choice of law debates the philosophical reasons for whether one should drive on the left or right side of the road, this Article simply shows that driving on the right is correlated to more accidents.¹²⁰

¹¹⁵ See, e.g., Gene R. Shreve, *Currie's Governmental Interest Analysis—Has It Become A Paper Tiger?*, 46 OHIO ST. L.J. 541, 542 (1985) ("Today, Currie's governmental interest analysis is scarcely more than a paper tiger."); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) ("Interest analysis is the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents."); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989) (arguing that the Second Restatement "mystifies rather than clarifies"); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 19 (1963) (advancing the comparative impairment approach); William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1035 (1999) (criticizing the comparative impairment approach); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586-88 (1966) (advancing the "better rule of law" approach); Note, *Bundled Systems and Better Law: Against the Leflar Method of Resolving Conflicts of Law*, 129 HARV. L. REV. 544 (2015).

¹¹⁶ See, e.g., Lea Brilmayer, *What I Like Most about the Restatement (Second) of Conflicts, and Why It Should Not Be Thrown Out with the Bathwater*, 110 AJIL UNBOUND 144, 144 (2016) ("This symposium's essay by . . . Kermit Roosevelt III, seems to retain what may be the least defensible aspects of governmental interest analysis[.]").

¹¹⁷ See, e.g., Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1131 (1994) ("Professor Brilmayer . . . refuse[s] to "get it" and abuse[s] Currie's ideas, [and] she has spawned a whole school of misinformed fry-critics [who have] . . . infected both courts and practicing lawyers . . .").

¹¹⁸ Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 978 (1991).

¹¹⁹ See, e.g., H. Thomas Byron III, *A Conflict of Laws Model for Foreign Branch Deposit Cases*, 58 U. CHI. L. REV. 671, 671-72 (1991) (describing foreign bank deposit cases as a "classic conflict of laws problem" and arguing that "courts should resolve this problem . . . by explicitly . . . balancing the interests of the affected jurisdictions.").

¹²⁰ See JOHN J. LEEMING, ROAD ACCIDENTS – PREVENT OR PUNISH? 26 (1969).

To my knowledge, the work to come closest to discussing the exploit is an endnote in a casebook by Brilmayer, Goldsmith, and O’Hara O’Connor. The difference is that the endnote presents uncertainty over the facts of a case during pleading as an unfair advantage for plaintiffs, whereas this Article argues that the uncertainty benefits tortfeasors. The endnote discusses a case in which LCD panel manufacturers had allegedly fixed prices in violation of California law. The district court dismissed, ruling that only “plaintiffs who purchased products in California” may invoke California law,¹²¹ but the plaintiffs did not plausibly allege that the purchases at issue had occurred in California.¹²² The Ninth Circuit reversed, ruling that the plaintiffs’ allegations that the defendants had committed wrongful acts in California were enough to apply California law at pleading: “Wherever the outer limit of due process constraints may lie . . . the Defendant’s alleged illegal activity within California created more significant contacts with California than contacts described in *Allstate* created with Minnesota.”¹²³ The endnote in the casebook then asks:

Doesn’t the Ninth Circuit’s ruling allow plaintiffs to unfairly control the choice of law, simply by making allegations of contact with the forum? The proper standard of proof for such allegations, made at the outset of the case and before the trier of the fact has evaluated the evidence, has been the subject of some dispute. Under the Supreme Court’s current standard, a plaintiff must have “enough facts to state a claim to relief that is plausible on its face” to survive a 12(b)(6) motion for dismissal. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Does *Allstate v. Hague* meet this standard?¹²⁴

AU Optronics shows that plaintiffs can obtain favorable choice of law rulings by falsely asserting contacts.¹²⁵ However, the endnote’s implied concern that the ruling unfairly benefits plaintiffs, or that plaintiffs might sue under the laws of unrelated states en masse, is unjustified. Plaintiffs are

¹²¹ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2010 WL 4705518, at *2 (N.D. Cal. Nov. 12, 2010), *rev’d sub nom.* *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106 (9th Cir. 2013).

¹²² *In re TFT-LCD Antitrust Litig.*, 2010 WL 4705518, at *1.

¹²³ *AU Optronics*, 707 F.3d at 1111.

¹²⁴ LEA BRILMAYER, JACK GOLDSMITH & ERIN O’HARA O’CONNOR, *CONFLICT OF LAWS: CASES AND MATERIALS* (7th ed. 2015).

¹²⁵ No public proceeding in the Ninth Circuit or in the district court ever revealed whether the original plaintiffs in the *AU Optronics* case, AT&T and its subsidiaries, had falsely alleged contacts with California at the pleading stage; the original plaintiffs apparently settled shortly after the Ninth Circuit’s ruling. *See* Pan Chih-yi & Ann Chen, *AUO Says Price-Fixing Lawsuit Fully Settled with AT&T*, FOCUS TAIWAN (Feb. 18, 2013), <http://focustaiwan.tw/news/aeco/201302180021.aspx>. All known proceedings following the Ninth Circuit’s ruling involved state governments and indirect purchaser plaintiffs of LCD panels such as Best Buy, who settled their claims in 2016. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2017 WL 66836, at *2 (N.D. Cal. Jan. 6, 2017).

unlikely to falsely assert contacts because, even if they can trick a court into applying a favorable state's law and denying a motion to dismiss, their scheme would be exposed at discovery. The exception that proves this rule is *Hatfill v. Foster*, in which the plaintiff falsely asserted contacts with Virginia for a favorable choice of law ruling but was exposed during further proceedings.¹²⁶ Even if the court does not expose the plaintiffs sua sponte, defendants are likely to do so because they often know more about how the plaintiffs were harmed than the plaintiffs do.¹²⁷ Indeed, plaintiffs' ability to control the choice of law by alleging contact with a state is more likely to harm the plaintiffs themselves: as this Article shows, the Maniscalco exploit enables tortfeasors to evade liability by inducing plaintiffs to sue under the law of a state where they cannot win.

Unlike most conflicts scholars, many civil procedure scholars have studied a problem that, like the Maniscalco exploit, arises from an information asymmetry between plaintiffs and tortfeasors.¹²⁸ However, the paradox of pleading in civil procedure and the Maniscalco exploit are caused by different kinds of information asymmetry, and the exploit is likely to be more damaging to its victims. The paradox of pleading refers to the tendency of tort victims to know less about how they were harmed than do the people who harmed them.¹²⁹ For instance, someone who suspects wrongful termination might not sue if the reason for the dismissal "is revealed only in documents that the plaintiff has not seen" and are held by the employer, because the complaint would not survive a motion to dismiss.¹³⁰ Like victims of the paradox of pleading, victims of the exploit lack information held by tortfeasors that they need to win. The difference is that victims of the paradox know so little about who harmed them and how that they cannot survive pleading, but victims of the exploit know enough to survive a motion to dismiss but not enough to win.

This difference is not a mere technicality, because the difference makes the Maniscalco exploit potentially more harmful than the paradox of pleading is. The paradox harms plaintiffs by deterring them from suing or, if they sue despite the deterrence, by getting their claims dismissed at pleading for insufficient plausibility. The harm to the plaintiffs who do not sue would be not

¹²⁶ *Hatfill v. Foster*, 372 F. Supp. 2d 725 (S.D.N.Y. 2005) [hereinafter *Hatfill I*], *rev'd on reconsideration*, 415 F. Supp. 2d 353 (S.D.N.Y. 2006) [hereinafter *Hatfill III*] (applying Virginia law at pleading); *Hatfill III*, 415 F. Supp. 2d at 359-60 (reversing because "[the] plaintiff and his lawyers pulled a fast one on the Court").

¹²⁷ See, e.g., Kilaru, *supra* note 39.

¹²⁸ See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20 (2010) (arguing that plausibility pleading is "fact pleading by another name.").

¹²⁹ See, e.g., Kilaru, *supra* note 39.

¹³⁰ A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 28 (2009).

being paid damages, whereas the additional harm to those who sue and lose would be the cost of litigating until dismissal at pleading.¹³¹ In contrast to the paradox, the Maniscalco exploit harms plaintiffs by inducing them to bring cases that will survive pleading, but under the law of a state where those cases will be dismissed after discovery for incorrect choice of law. The harm to the victims of the exploit would include not being paid damages and the cost of litigating a case into discovery. Because litigating a case into discovery usually costs much more than litigating into dismissal during pleading,¹³² the exploit is likely to be much more harmful than the paradox is.

Moreover, like the scholarship on the paradox of pleading, studies on the various ways to introduce evidence at the motion to dismiss stage neglect the Maniscalco exploit. The exploit can induce plaintiffs to sue under the law of a state where they are guaranteed to lose and litigate that futile case into discovery because, at the time they sue, the plaintiffs have bad information about where the tort that harmed them took place. Hence, a solution to the Maniscalco exploit would be to introduce evidence about where an alleged tortious act occurred at the motion to dismiss stage, so that plaintiffs tricked by tortfeasors can cut their losses early and sue under the law of a state that has genuine contacts to the case. However, to my knowledge, existing works bill access to evidence at the motion to dismiss stage as solutions to the paradox of pleading, not the Maniscalco exploit.¹³³ In Part II, I propose flashlight discovery limited to the choice of law issue as a solution to the exploit and model how various conditions would affect its implementation.

Finally, this Article identifies a tactical consideration that tortfeasors would make in the course of deceiving courts, which existing works neglect. Recall that, at pleading, tortfeasors like BIC must make two claims: that they did not commit the tort they are accused of, and that any tortious act, if it did occur, would have taken place in a state that lacks genuine contacts with the

¹³¹ See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 879 (2010) (“[S]trict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.”).

¹³² See Table C-5, U.S. District Courts: Median Time Intervals from Filing to Disposition of Cases Terminated, by District and Method of Disposition – During the 12-Month Period Ending June 30, 2018, *available at* <https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2018/06/30> (showing that the median time from filing to disposition of a federal civil case during or after pretrial proceedings is 13.1 months); Raúl Rojas, *Offer of Judgment Rules in Puerto Rico and Florida*, 49 REV. DER P.R. 1, 11 (2009) (“From filing to discovery [it] is common to have a couple of years pass by.”).

¹³³ See, e.g., Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 836 (2013) (“plaintiffs cannot state a claim because they do not have access to discovery, but they will not have access to discovery until they state a claim.”); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010).

alleged tort. These claims could raise suspicions that the tortfeasor did commit the tort and is trying to hide the state with the most significant relationship to the tort, akin to how someone accused of murder might be viewed with suspicion if they claimed that they did not kill anyone but, if they did, they must have been drunk. The fact that tortfeasors must deny wrongful conduct while pointing plaintiffs to a dummy state suggests that tortfeasors' legal arguments must strike a fine balance so as to deceive plaintiffs while avoiding punishment for openly deceiving the court.

Part I.B having established the position of the Maniscalco exploit within conflict of laws and civil procedure literature and having justified its study, Part I.C models the effects of the exploit on litigation, using entry deterrence games under one-sided incomplete information.

C. An Entry-Deterrence Model of Interstate Torts with the Maniscalco Exploit, Under One-Sided Incomplete Information

This subpart adapts the chain-store paradox, which models a chain store selling goods at a loss in the short run to muscle out local stores in the long run,¹³⁴ to model a corporate tortfeasor financing futile litigation in the short run to prevent plaintiffs from suing in the long run. The model used in this Article is different from the chain-store paradox, in that the uncertainty at play is whether the plaintiff is suing under the law of a dummy state; in the chain-store paradox, the uncertainty at play is the strength of the chain store's resolve to put competitors out of business. The two models are similar in that they both simulate a process of entry deterrence, and that the stronger player may take losses in the short run for greater gains in the long run.

I use a formal model to study the Maniscalco exploit for two reasons. First, the exploit is likely to be unobservable in the long run. Part I.A explained that, if tortfeasors use the exploit sufficiently often in the short run to evade paying damages to plaintiffs, tortfeasors may profit from the exploit in the long run without actually using it, because the expectation that tortfeasors will win by draining the plaintiffs' funds would deter plaintiffs from suing. If a credible threat to use the exploit is enough to make the exploit profitable, an empirical study of only observed instances of the exploit would understate the true magnitude of its effect on the litigation process.

¹³⁴ See DRANOVE, BESANKO & SHANLEY, *supra* note 52.

Second, formal models grounded in defensible assumptions about reality can concisely simulate complex strategic behavior and reveal valuable insights into its consequences.¹³⁵ I find clarity and conciseness especially important to a discussion on the consequences of choice of law rules, because unfalsifiable argumentation and disagreements over vital terminology have caused decades of futile debate over which choice of law rule is theoretically superior to another;¹³⁶ Part III discusses this persistent malady in detail and advances formal modeling as an aid for logical argumentation in conflicts scholarship. To show how formal models can serve in that capacity, Part I.C models civil litigation as a sequential game in which a tortfeasor and a plaintiff act in turn—commit a tort, respond by filing a complaint, and so on—seeking to maximize payoffs.¹³⁷

I model the Maniscalco exploit using a finite repeated game in which one tortfeasor faces multiple plaintiffs, one plaintiff in each round. Part I.C.1 uses Bayesian updating to explain how the plaintiff in the first round of the repeated game falls victim to the exploit and how plaintiffs in subsequent rounds gradually come to expect the tortfeasor to use the exploit. Part I.C.2 uses an extended game tree to model the behavior of the tortfeasor and the n th plaintiff ($n > 1$, $n \in \mathbb{N}$), to derive the conditions under which the tortfeasor would use the exploit and those under which the plaintiff would go to trial, settle, or give up on suing the tortfeasor. Part I.C.3 depicts the r th round ($r > n$, $r \in \mathbb{N}$) and briefly returns to the n th to show that the tortfeasor has an incentive to use the exploit at a loss in the short run, because the long-term gains may offset them. That is, if the tortfeasor has used the exploit often enough by the n th round that the r th plaintiff expects to lose at trial, the tortfeasor could profit thereafter without having to pay the cost of the exploit (protracting trials) because plaintiffs beginning with the r th would not sue the tortfeasor.

1. The ME Model: Bayesian Updating in the Early Rounds of the Game

¹³⁵ See Lea Brilmayer & Yunsieq P. Kim, *Model or Muddle? Quantitative Modeling and the Façade of “Modernization” in Law*, 56 WASHBURN L.J. 1, 19 (2017) (criticizing formal models grounded in indefensible assumptions about reality); JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 2 (1994) (“Game theory . . . can tell us what behavior we should expect as a consequence of [formal models].”).

¹³⁶ See *infra* Part III.

¹³⁷ Cf. Jeffrey S. Banks & Joel Sobel, *Equilibrium Selection in Signaling Games*, 55.3 *ECONOMETRICA* 647 (May 1987); Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 214–15 (2007) (modeling civil litigation as a sequential game).

Players. The ME model features two categories of players: a corporate tortfeasor present in multiple states and individual plaintiffs located in a state different from that of the tortfeasor. The repeated game assumes that one tortfeasor faces one plaintiff in each round for a finite number of rounds, for simplicity. In reality, tortfeasors may be simultaneously engaged in multiple trials in which the Maniscalco exploit is used. However, regardless of the number of tortfeasors and plaintiffs who face each other simultaneously, the fact remains that there exists a point in time t in which no plaintiff has ever seen the exploit, and a point $t + 1$ in which a plaintiff observes the exploit for the first time. As long as points t and $t + 1$ exist, the number of litigants in a single round does not affect the model's conclusions, as will be shown shortly.

Incomplete information in the first round. Part I.A explained that, in order to use the Maniscalco exploit, the tortfeasor would first misrepresent the origin of a tort as a state that has no genuine contact with that tort. At the beginning of the first round, when the exploit has never yet been observed at any trial, the plaintiff does not suspect either this misrepresentation or that she has no chance to win at trial because of that misrepresentation. To understand why the first-round plaintiff does not suspect the tortfeasor's misrepresentation, consider the following process through which she assesses the tortfeasor's and her own likelihood of winning at trial. This Bayesian updating process is crucial not only to understanding how the first-round plaintiff forms her mistaken beliefs, but also to understanding how plaintiffs (or plaintiffs' counsel) in subsequent rounds of the repeated game change their beliefs about their own chances of winning.

Assume that the tortfeasor harms the first-round plaintiff and misrepresents the state with genuine contacts to the tort. As explained previously, the plaintiff believes that she has a good chance to win on the merits because she knows exactly how she was harmed; the only mistaken bit of information she has is about the state where the tort originated.¹³⁸ Because the first-round plaintiff believes that she has a strong case on the merits, the only remaining factor in her assessment of her chances of winning at trial is how much the legal system inherently advantages tortfeasors. **Table 1** shows the three possible states of the world from the plaintiff's perspective, ordered from low to high advantage for tortfeasors: optimal, suboptimal, and broken.

¹³⁸ See *supra* notes 26-29, 76-79 and accompanying text.

The first-round plaintiff inevitably falls for the Maniscalco exploit because she seriously contemplates the optimal and suboptimal worlds, but not the broken. In the optimal world, the legal system operates as it would ideally: no one commits torts because tortfeasors would always lose at trial and pay more in costs and damages than they would gain from a tort. The first-round plaintiff deduces that she is not in the optimal world because she has already been harmed. As for the broken world, in which the legal system favors tortfeasors so much that they always win, the plaintiff does not consider it because she has never seen the exploit before. A plaintiff may contemplate the broken world as a theoretical exercise, but never seriously: one could exit the top floor of a skyscraper through the elevator or the window, but no non-suicidal person would entertain the second option.¹³⁹ However, the first plaintiff is actually in the broken world because the Maniscalco exploit and the tortfeasor’s misrepresentation guarantee that she will lose at trial.

| Table 1: Three Possible States of the World, First-Round Plaintiff’s Perspective | |
|---|--|
| Type | Characteristics |
| <i>Optimal</i> | No one ever commits torts because tortfeasors always lose |
| <i>Suboptimal</i> | Tortfeasors sometimes win, due to the corporate-individual asymmetry in funds and legal representation |
| <i>Broken</i> | Tortfeasors practically always win, by using the Maniscalco exploit |

In the only remaining state of the world (suboptimal), injured plaintiffs win sometimes, but not always. Although injured plaintiffs would always win in an ideal world, plaintiffs in the suboptimal world do not because their funds and attorneys are outmatched by those of corporate tortfeasors. However, plaintiffs are not entirely without hope, because the substance of the law still favors them over those who injured them. Because the tortfeasor has injured the plaintiff and she does not think that the broken world is possible, the first-round plaintiff believes that the world is suboptimal, and that she has a chance to win. Her mistaken belief is strengthened by the fact that the suboptimal and broken worlds are outwardly indistinguishable from one another: in both worlds, corporations would often be better funded than individual plaintiffs would be.¹⁴⁰

¹³⁹ See John Mueller, *The Obsolescence of Major War*, in THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS 427, 436 (Robert J. Art & Kenneth N. Waltz eds. 1999) (“Consider a man who is on the fifth floor of a building and is musing over two methods for reaching the ground floor: walking down the stairs (slow) or jumping out the window (fast). . . . the decision is not a terribly difficult one to be ‘rational’ about.”).

¹⁴⁰ Cf. Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. ST. L. REV. 303, 316 (1995) (“Cases are filed every[.]day in which the plaintiff is an individual of average means, while the defendant corporation, for example, comes laden with deep pockets, easily able to pay far more for legal representation than the plaintiff.”).

Because of her mistaken belief that the world is suboptimal, the first-round plaintiff sues, observes the Maniscalco exploit at trial, and spends years' worth of resources only to lose.

Bayesian updating after the first round. I have shown so far that the first-round plaintiff in the ME model loses at trial because she has never seen the Maniscalco exploit before and hence does not expect it. However, although keeping the exploit secret from plaintiffs virtually ensures that tortfeasors will win at trial, tortfeasors actually have an incentive to make the exploit known to as many plaintiffs as possible. If plaintiffs expect to face the exploit at trial, they may not sue at all because they expect to lose, allowing tortfeasors to reap the benefits from harming plaintiffs without expending the cost of using the exploit (the cost of protracting a futile case for years). Plaintiffs also have an incentive to anticipate whether the tortfeasor will use the exploit at trial, even if they cannot defeat it: if a tortfeasor will use the exploit, the plaintiff would be better off by anticipating it and giving up on suing, than by remaining ignorant and going to trial.

By the n th round ($n > 1$, $n \in \mathbb{N}$), the plaintiff expects the tortfeasor to use the Maniscalco exploit because the tortfeasor forces a critical mass of plaintiffs to waste money on futile cases in rounds 1 to $n - 1$, such that the n th plaintiff knows that the previous plaintiffs lost because of the exploit. I do not assume that the plaintiffs acquire this information directly from one another. Instead, I assume that the plaintiffs are represented by the same group of local attorneys, and that they advise their clients against suing after seeing enough cases in which the exploit is used.¹⁴¹ The common practice of plaintiffs' attorneys paying clients' litigation costs up front¹⁴² would make the exploit's deterrent effect even stronger than if plaintiffs financed their own litigation: the chances of an attorney financing cases that she deems to be futile are likely even lower than the chances of a plaintiff taking a futile case to trial against counsel's advice.¹⁴³

¹⁴¹ See, e.g., Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 868 (2012) (“a plaintiff may have trouble finding an attorney to take her case if . . . there is a small likelihood of prevailing.”).

¹⁴² See Cara Van Dorn, *When Joining Means Enforcing: Giving Consumer Protection Agencies Authority to Ban the Use of Class Action Waivers*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 245, 258–59 (2017) (“Plaintiffs’ attorneys typically work on a contingency fee basis, which means that the attorney pays for the costs of litigation upfront and only receives payment from the client if the case succeeds, as a percentage of the damages.”).

¹⁴³ Cf. *Moua v. Pittullo, Howington, Barker, Abernathy, LLP*, 174 Cal. Rptr. 3d 662 (Cal. App. 2014) (a case in which a plaintiff rejected a settlement offer against counsel’s advice only to receive nothing from a jury); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016) (“Plaintiffs’ attorneys will screen cases for plausible merit . . .”).

Now consider the Bayesian updating process through which the n th-round plaintiff comes to expect tortfeasors to use the exploit. Denote a plaintiff's perceived likelihood that a tortfeasor will use the Maniscalco exploit as x ; the first plaintiff's perceived likelihood that the exploit will be used is zero ($x_1 = 0$) because she has never seen it before. However, as more plaintiffs suffer through futile lawsuits, successive plaintiffs suspect more strongly that the world is "broken"—that the litigation process may be rigged against them. Assume that the second plaintiff believes that there is a ten-percent chance that the world is broken ($x_2 = 0.1$), after seeing the first-round plaintiff lose because of the exploit. Further assume that a plaintiff's perceived likelihood of winning at trial solely on the merits (the likelihood of winning at trial if the exploit were not used) is eighty percent ($q = 0.8$). After seeing the second plaintiff lose at trial, the third plaintiff updates her perception of the likelihood that the world is broken according to Bayes' Rule¹⁴⁴:

$$x_2 = P(\text{Broken}) = 0.1; \quad P(\text{Loss} | \text{Broken}) = 1; \quad P(A | B) = \frac{P(B | A)P(A)}{P(B)}$$

$$x_3 = P(\text{Broken} | \text{Loss}) = \frac{P(\text{Loss} | \text{Broken}) * P(\text{Broken})}{P(\text{Loss})}$$

$$x_3 = P(\text{Broken} | \text{Loss}) = \frac{1 * \frac{1}{10}}{\left(\frac{9}{10} * \frac{1}{5}\right) + \left(\frac{1}{10} * 1\right)} = \frac{5}{14} \approx \mathbf{0.3572}$$

The third plaintiff's perception of the likelihood that the world is broken has increased by more than twenty-five percent, compared to the second plaintiff's perception of the same likelihood.

2. The ME Model: The Repeated Game, n th Round

Part I.C.1 showed that the first-round plaintiff in the ME model falls for the Maniscalco exploit because she does not expect it, but that each successive plaintiff expects it more strongly because tortfeasors have an incentive to make the exploit seen by as many plaintiffs as possible: if plaintiffs give up on suing because they expect tortfeasors to win at trial by using the exploit, tortfeasors would reap the benefits of using the Maniscalco exploit without paying for its costs. However, even though the exploit is a winning strategy, tortfeasors may not be able to use the

¹⁴⁴ See WILLIAM M. BOLSTAD & JAMES M. CURRAN, INTRODUCTION TO BAYESIAN STATISTICS 67-69 (3d ed. 2016).

exploit in every case. For example, if the gains from harming a plaintiff are smaller than the time and money needed to protract a trial to full discovery, the exploit would not be cost-justified.

To put the previous paragraph in game theory terms, neither party in the n th round of the ME model has a pure dominant strategy. Whether a plaintiff sues depends most significantly on how much she expects the tortfeasor to use the Maniscalco exploit; whether the tortfeasor uses it depends on, among others, whether the plaintiff sues and whether it is cost-justified. However, although both parties lack pure dominant strategies, each can adopt a mixed strategy that makes the other party indifferent among their strategies.¹⁴⁵ For example, plaintiffs must switch between suing and giving up often enough to make the tortfeasor indifferent between using the exploit and not using it. The logic underlying a mixed strategy is that of a penalty kicker, who must kick in different directions often enough to prevent the goalie from predicting where the ball will go.¹⁴⁶ Thinking of the model in terms of mixed strategies also enables comparative statics, which allow closer examinations of the conditions that make litigants choose one strategy over another.

Game tree and sequence of play. **Figure 1** shows the game tree depicting the n th round of the ME model, which consists of two stages. In the first, the tortfeasor (τ) decides whether to harm the plaintiff (π) and, if so, whether to misrepresent the state with genuine contacts with the tort. If the tortfeasor does not harm the plaintiff (*abstain*), the game ends. If the tortfeasor harms the plaintiff, the tortfeasor decides whether to commit the tort in a dummy state (*misrepresent*) or not (*~misrepresent*). Depicting the commission of a tort as a conscious decision is a stylization of reality because some tortfeasors cause harm unintentionally: for example, through negligence.¹⁴⁷ However, I argue that this is a defensible stylization because, even in unintentional tort cases, the act that ultimately results in a plaintiff's injury is often caused intentionally and tortfeasors who

¹⁴⁵ Cf. Rui Zhao et al., *A Software Based Simulation for Cleaner Production: A Game Between Manufacturers and Government*, 26 J. OF LOSS PREVENTION IN THE PROCESS INDUSTRIES 59, 60 (2013) (“Game scenario two suggests that . . . there is no dominant strategy in the game. Thus, a ‘mixed-strategy’ game scenario needs to be generated to establish the corresponding Nash Equilibrium”).

¹⁴⁶ See, e.g., Pierre-André Chiappori, Steven D. Levitt & Timothy Groseclose, *Testing Mixed-Strategy Equilibria When Players Are Heterogeneous: The Case of Penalty Kicks in Soccer*, 92 AM. ECON. REV. 1138, 1142 (2002) (“[Under] the logic of mixed-strategy equilibria . . . the kicker’s probability of kicking to the center must make the goalie indifferent between jumping or staying. . .”).

¹⁴⁷ See, e.g., *Borg-Warner Corp. v. Avco Corp. (Lycoming Div.)*, 850 P.2d 628, 633 (Alaska 1993) (“all unintentional tortfeasors, whether negligent, grossly negligent or wil[l]ful and wanton . . .”).

are found liable are assumed to have been aware of the risk of causing the injury. For example, a principal who asks an unlicensed agent to drive is held liable for any resulting accident.¹⁴⁸

If the tortfeasor harms the plaintiff in the first stage, the plaintiff decides in the second stage whether to sue the tortfeasor, settle, or give up on a remedy. The dashed rounded rectangle connecting the plaintiff's two decision nodes reflects the fact that this model, without the policy solution to the Maniscalco exploit presented in Part II, is a *one-sided incomplete information game*. That is, the plaintiff does not know whether the tort occurred in a dummy state, such that the plaintiff cannot know for certain whether the tortfeasor will use the exploit at trial until it is actually used; in terms of **Table 1**, the plaintiff does not know whether the world is suboptimal or broken. The plaintiff does, however, know the *likelihood* that the tortfeasor will misrepresent, indicated by x and y , because of the Bayesian updating process shown in Part I.C.1. As for the tortfeasor, it knows the plaintiff's likelihood of suing, settling, or giving up, indicated by w and z .

Before describing the payoff terms of the game, a qualification is in order about how settlements work in the ME model. The model simplifies the settlement negotiation process by assuming that a plaintiff who wants to settle always offers the minimum payment acceptable to the tortfeasor, which the plaintiff knows in advance. In reality, parties to a civil case often settle only after a lengthy back-and-forth that informs them as to what each party is willing to accept, and abort negotiations if they fail to agree on that amount.¹⁴⁹ One may argue that a more realistic model would let the tortfeasor make an offer, let the plaintiff accept or reject, and resume trial if she rejects. However, the game abstracts away the process by which each party informs itself of the other's preferences because the model's goal is to study the workings and consequences of the Maniscalco exploit, not to faithfully represent settlement negotiations in all of their glory.

Payoffs. The n th round begins with the tortfeasor deciding whether to harm the plaintiff. If the tortfeasor abstains, neither party is affected, resulting in a *payoff* of $(\mathbf{0}, \mathbf{0})$. If the tortfeasor harms the plaintiff and the plaintiff gives up, the tortfeasor gains in the value of the harm caused by the tort and the plaintiff takes a loss in that same amount $(H, -H)$, regardless of whether the tortfeasor misrepresented the origin of the tort or not. H is always positive ($H > \mathbf{0}$), because no

¹⁴⁸ See *Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587, 590 (Tex. 1947).

¹⁴⁹ See Beverly J. Hodgson & Robert A. Fuller, *Summary Jury Trials in Connecticut Courts*, 67 CONN. B.J. 181, 193 (1993) ("settlement negotiations break down because the plaintiff will not accept less than one amount, and the defendant will not make an offer above a lesser amount.").

tortfeasor would intentionally commit a tort that creates no gain or somehow harms itself. In Part I, I assume that damages are compensatory (damages are equal to the harm inflicted by the tort, $D = H$).¹⁵⁰ Part II introduces punitive damages as part of the solution to the Maniscalco exploit.

If the tortfeasor commits a tort from a dummy state and the plaintiff sues (*misrepresent-trial*), the tortfeasor uses the Maniscalco exploit at trial. Hence, the tortfeasor's payoff is the gain from the tort offset by litigation costs and the expected value of damages ($H - C_{T\tau} - p * D$), whereas the plaintiff's payoff is the expected damages offset by the harm suffered and costs ($-H - C_{T\pi} + p * D$). Without the solution given in Part II, the plaintiff cannot win at trial if the tortfeasor uses the exploit ($p = 0$); the payoff from (*misrepresent-trial*) is ($H - C_{T\tau}, -H - C_{T\pi}$). If the tortfeasor does not misrepresent and the plaintiff sues (*~misrepresent-trial*), the payoffs are identical to those in (*misrepresent-trial*), save for the fact that p is replaced by q : ($H - C_{T\tau} - q * D, -H - C_{T\pi} + q * D$). Because the tortfeasor does not use the exploit and the plaintiff would survive a motion to dismiss,¹⁵¹ the plaintiff has a chance to win ($0 < q \leq 1$) at trial in (*~misrepresent-trial*). The model assigns different costs to the parties ($C_{T\tau}, C_{T\pi}$) because legal representation is often cheaper for corporate tortfeasors than for individual plaintiffs.¹⁵²

If the tortfeasor misrepresents and the parties settle (*misrepresent-settle*), the tortfeasor's payoff is the gain from the tort offset by transaction costs and the settlement ($H - C_{S\tau} - [p + v] * D$), whereas the plaintiff's payoff is the settlement payment offset by the harm from the tort and costs ($-H - C_{S\pi} + [p + v] * D$). I depict the settlement as some fraction of the damages that would be paid if the plaintiff won at trial ($[p + v] * D$), for three reasons. First, "the strength of a litigator's bargaining position is at least partially a function of his or her willingness to try the case if settlement negotiations break down";¹⁵³ in *misrepresent*, that resolve is denoted by p , the plaintiff's likelihood of winning at trial. Second, acceptable settlements are often calculated

¹⁵⁰ Compensatory damages are "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011).

¹⁵¹ See *supra* note 14 and accompanying text.

¹⁵² See Gilmore, *supra* note 121. Corporations can also reduce its legal costs through outsourcing, which is unavailable to individual plaintiffs. See H. Ward Classen, *Recession's Impact on in-House Counsel*, 43 MD. B.J. 42, 44 (2010) ("Many legal services . . . are conducive to outsourcing. Off-shore outsourcing of these functions allows corporations to significantly lower their legal costs.").

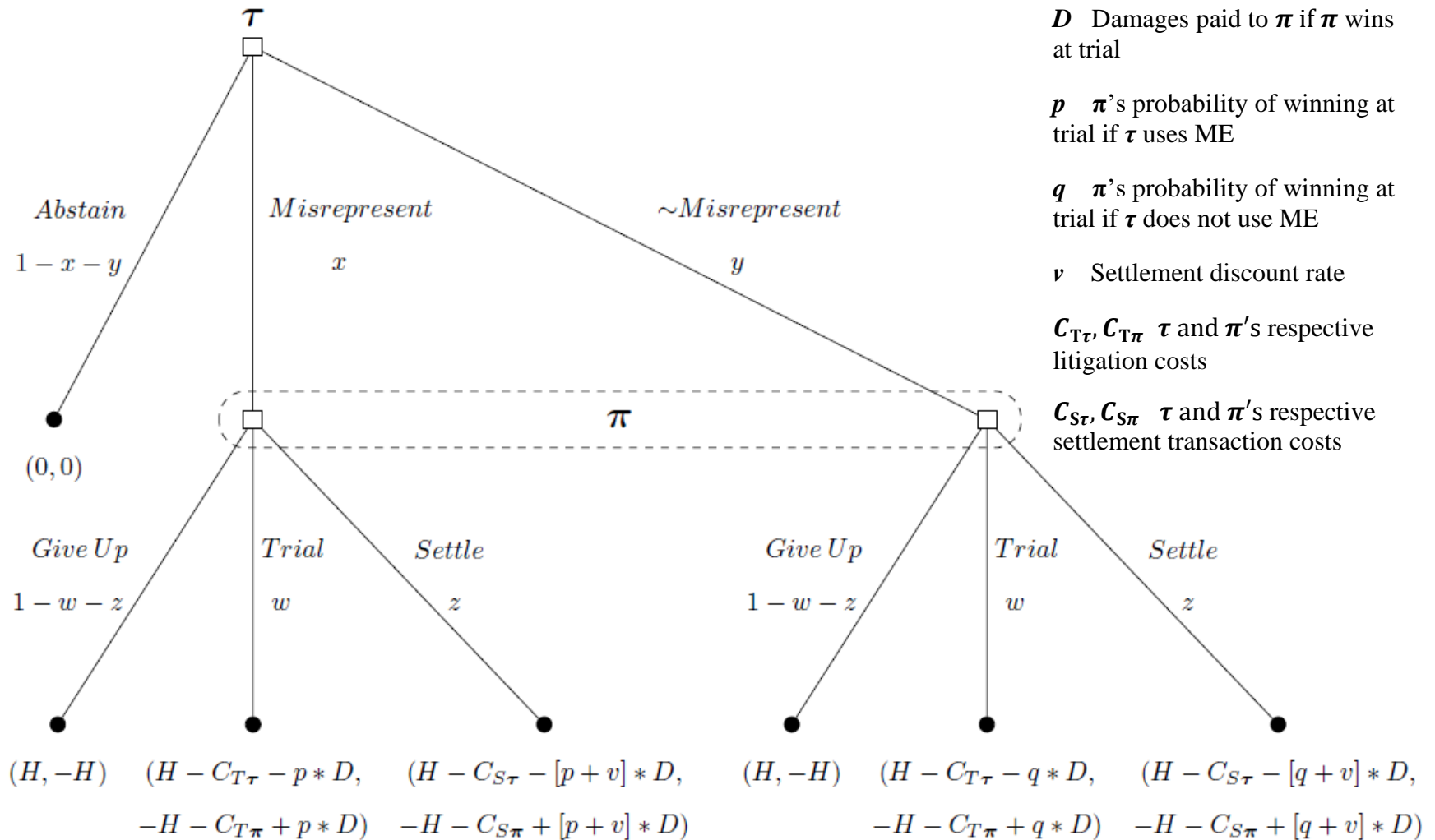
¹⁵³ See, e.g., Tracy Walters McCormack & Christopher Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 78 TEX. B.J. 210, 213 (2015).

as a fraction of damages.¹⁵⁴ Third, settlements can reflect the cost savings from avoiding a trial, even if it is based on frivolous claims.¹⁵⁵ Hence, even if the plaintiff cannot win at trial because of the exploit ($p = 0$), the parties may still settle (for example, $v = 0.05$). If the tortfeasor does not misrepresent and the parties settle (\sim misrepresent-settle), the payoffs are identical to those in *misrepresent*, save for replacing p with q ($H - C_{S\tau} - [q + v] * D, -H - C_{S\pi} + [q + v] * D$).

¹⁵⁴ See Gregory Todd Jones & Douglas H. Yarn, *Evaluative Dispute Resolution Under Uncertainty: An Empirical Look at Bayes' Theorem and the Expected Value of Perfect Information*, 2003 J. DISP. RESOL. 427, 447.

¹⁵⁵ See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 598 n.10 (1991) (citing studies positing that “settlements of frivolous suits occur” because settlement is cheaper than going to trial); see also Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 58 (2002) (“[T]he cost advantage of settlement relative to adjudication will decrease the longer negotiations proceed.”).

Figure 1: Repeated Game, n th Round, One-Sided Incomplete Information
 (τ = tortfeasor, π = plaintiff; $n > 1$, $n \in \mathbb{N}$)



| | | π | | |
|--------|------------------------|------------------------|---|---|
| | | Give up (1 - w - z) | Trial (w) | Settle (z) |
| τ | Abstain (1 - x - y) | (0, 0) | (0, 0) | (0, 0) |
| | Misrepresent (x) | (H, -H) | $(H - C_{T\tau} - p * D,$ $-H - C_{T\pi} + p * D)$ | $(H - C_{S\tau} - [p + v] * D,$ $-H - C_{S\pi} + [p + v] * D)$ |
| | ~Misrepresent (y) | (H, -H) | $(H - C_{T\tau} - q * D,$ $-H - C_{T\pi} + q * D)$ | $(H - C_{S\tau} - [q + v] * D,$ $-H - C_{S\pi} + [q + v] * D)$ |

Tortfeasor's equilibrium strategy and plaintiff's comparative statics. Having presented the game and its payoff terms, I now derive the equilibrium mixed strategies for both players, beginning with the tortfeasor. Recall that each player's mixed strategy must make the other player indifferent among their pure strategies.¹⁵⁶ Therefore, the tortfeasor's mixed strategy must make the plaintiff's expected payoffs from each of her pure strategies equal. **Table 2** shows the two parties' payoffs under every possible outcome, with the likelihood of each action being taken by each party listed alongside the action: for example, the likelihood of the plaintiff giving up on a remedy is (1 - w - z). The tortfeasor's equilibrium mixed strategy is to use each of its pure strategies according to the values of x and y that satisfy the following:

$$\begin{aligned} \pi's \text{ expected payoff from } Give \text{ up} &= \pi's \text{ expected payoff from } Trial \\ &= \pi's \text{ expected payoff from } Settle \\ -xH - yH &= x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D) \\ &= x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \end{aligned}$$

π 's preference for trial over giving up. Because the tortfeasor's mixed strategy shows the conditions in which the plaintiff is indifferent between all of her pure strategies, it can be used to examine the conditions in which the plaintiff is guaranteed to choose one strategy over another. Knowing those conditions can help predict how the parties will use and react to the Maniscalco exploit and design a policy solution to it. The n th plaintiff prefers going to trial to giving up if:

$$\begin{aligned} \pi's \text{ expected payoff from } Give \text{ up} &< \pi's \text{ expected payoff from } Trial \\ -xH - yH &< x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D) \end{aligned}$$

¹⁵⁶ See Chiappori, Levitt & Groseclose, *supra* note 127.

$$(x + y)C_{T\pi} < D(xp + yq)$$

In words, the plaintiff goes to trial instead of giving up on a remedy if her expected damages to be won under (*misrepresent*) and (*~misrepresent*) exceed her expected litigation costs.

π 's preference for trial over settling. The plaintiff prefers going to trial to settling if:

$$\begin{aligned} x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D) \\ > x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \\ -vD > C_{T\pi} - C_{S\pi} \end{aligned}$$

In words, the plaintiff goes to trial instead of settling if the difference between the expected damages to be won at trial and the settlement payment ($-vD$) is larger than the plaintiff's cost savings from avoiding a trial ($C_{T\pi} - C_{S\pi}$). For example, assume that $D = 20$, $C_{T\pi} = 8$, and $C_{S\pi} = 5$. Further assume that the plaintiff is offered a settlement payment that is 20 percent smaller than the damages that she would get if she won at trial ($v = -0.2$). Then, the plaintiff would go to trial because the discount she must accept to her expected revenue is larger than the cost savings from accepting that discount ($4 > 3$).

π 's preference for settling over giving up. The plaintiff prefers settling to giving up if:

$$\begin{aligned} -xH - yH < x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \\ (x + y)C_{S\pi} < (x * [p + v] + y * [q + v]) * D \end{aligned}$$

In words, the plaintiff prefers settling to giving up if the transaction cost for settling is lower than the combined expected gain from settling under both *misrepresent* and *~misrepresent*.

Plaintiff's equilibrium strategy and tortfeasor's comparative statics. The n th-round plaintiff's equilibrium mixed strategy requires her to use each of her pure strategies according to the values of w and z that satisfy the following equation:

$$\begin{aligned} \tau's \text{ expected payoff from } \textit{Abstain} &= \tau's \text{ expected payoff from } \textit{Misrepresent} \\ &= \tau's \text{ expected payoff from } \sim\textit{Misrepresent} \\ 0 &= (1 - w - z) * H + w(H - C_{T\tau} - p * D) + z(H - C_{S\tau} - [p + v] * D) \\ &= (1 - w - z) * H + w(H - C_{T\tau} - q * D) + z(H - C_{S\tau} - [q + v] * D) \end{aligned}$$

τ 's preference for ~misrepresent over misrepresent. The n th-round plaintiff's equilibrium mixed strategy enables comparative statics that reveal the conditions under which the tortfeasor is guaranteed to choose one pure strategy over another in the n th round. The tortfeasor prefers not misrepresenting to misrepresenting if:

τ 's expected payoff from *Misrepresent* < τ 's expected payoff from ~*Misrepresent*

$$(1 - w - z) * H + w(H - C_{T\tau} - p * D) + z(H - C_{S\tau} - [p + v] * D) \\ < (1 - w - z) * H + w(H - C_{T\tau} - q * D) + z(H - C_{S\tau} - [q + v] * D)$$

$$p > q$$

In words, the tortfeasor will avoid misrepresenting in the n th round if the plaintiff's likelihood of winning at trial when the tortfeasor misrepresents is higher than the plaintiff's likelihood of winning at trial if the tortfeasor does not misrepresent.

τ 's preference for abstain over misrepresent. The tortfeasor prefers abstaining to misrepresenting in the n th round if:

$$0 > (1 - w - z) * H + w(H - C_{T\tau} - p * D) + z(H - C_{S\tau} - [p + v] * D)$$

$$H < w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$$

In words, the tortfeasor will abstain instead of misrepresenting if the expected gain from a tort is smaller than the combined costs of going to trial and settling when the tortfeasor misrepresents.

τ 's preference for abstain over ~misrepresent. The tortfeasor prefers abstaining to not misrepresenting in the n th round if:

$$0 > (1 - w - z) * H + w(H - C_{T\tau} - q * D) + z(H - C_{S\tau} - [q + v] * D)$$

$$H < w(C_{T\tau} + q * D) + z(C_{S\tau} + [q + v] * D)$$

In words, the tortfeasor will abstain instead of not misrepresenting in the n th round if the expected gain from a tort is smaller than the combined expected cost of going to trial and settling when the tortfeasor does not misrepresent.

Discussion. The foregoing exercise highlights two significant predictions. First, consider the prediction that the n th plaintiff would sue instead of giving up if her expected damages to be

won under *misrepresent* and *~misrepresent* exceed her combined expected litigation costs ($(x + y)C_{T\pi} < D(xp + yq)$). Assume, for example, that $C_{T\pi} = 10$ and $D = 20$. Then, the plaintiff would sue if, for example, $p > 0.5$ and $q > 0.5$. Assuming that litigation costs stay constant but the amount of damages to be paid increases because the state awards punitive damages (for example, $D = 3H$),¹⁵⁷ the plaintiff would sue as long as $p > \frac{1}{6}$ and $q > \frac{1}{6}$. This prediction comports with claims that, other things being equal, plaintiffs will be more likely to sue under the laws of states that award punitive damages.¹⁵⁸ Plaintiffs would also be more likely to sue if they arrange representation under a contingency-fee agreement, such that they do not directly bear the cost of litigating cases in which the exploit is used ($C_{T\pi} \approx 0$).¹⁵⁹

Second, consider the prediction that, for the tortfeasor to commit a tort and misrepresent instead of abstaining in the n th round, the gain from a tort must exceed the combined expected cost of going to trial and settling when the tortfeasor misrepresents ($H > w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$). This may make the Maniscalco exploit seem unprofitable for many kinds of torts, because a profitable use requires the gain from a tort to be fairly large. Given the rather high cost required to justify using the exploit, the reader may wonder whether the n th round of the ME model accurately depicts what happened in *Maniscalco*. That is, the n th round of the ME model may seem to be arguing that the defendant in *Maniscalco* ate the cost of protracting a futile trial for years just to get away with selling defective printers to a handful of plaintiffs.

However, that perception would be inaccurate because it is based only on what happens in the ME model in the short run. As stated in Part I.C, the ME model is an application of the chain-store paradox, which depicts a chain store selling goods at a loss in the short run in order to muscle out local stores in the long run.¹⁶⁰ The early stages and the n th round of the ME model ($n > 1$, $n \in \mathbb{N}$) are equivalent to the short run in the conventional chain-store paradox. The tortfeasor's long-run gains in the ME model can make up for its short-run losses because the plaintiffs who expect to lose at trial because of the Maniscalco exploit stop suing the tortfeasor in

¹⁵⁷ See, e.g., Mass. Gen. Laws Ann. ch. 149, § 150 (West) (“an employee so aggrieved who prevails in such an action shall be awarded treble damages . . .”).

¹⁵⁸ See, e.g., Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992).

¹⁵⁹ See Van Dorn, *supra* note 123.

¹⁶⁰ See DRANOVE, BESANKO & SHANLEY, *supra* note 52.

the long run—just as the chain store in the chain-store paradox recoups its short-run losses by selling at monopoly prices after its competitors have gone out of business. Part I.C.3 elaborates on this process, through the r th ($r > n > 1$, $r, n \in \mathbb{N}$) and n th rounds of the model.

3. The ME Model: The Repeated Game, r th and n th Rounds

As explained in Part I.C.2, the tortfeasor in the ME model can recoup the losses incurred from using the Maniscalco exploit in the short run because plaintiffs may not sue the tortfeasor in the long run, which would allow the tortfeasor to reap the gains from the exploit without paying for the cost of using it. As for why plaintiffs with meritorious claims may decide not to sue, they may come to expect in the long run that the tortfeasor’s likelihood of using the exploit is too high to justify suing. Without the solution to the exploit given in Part II, plaintiffs may think that going to trial will consume years’ worth of resources only to end in defeat. The process through which plaintiffs acquire this expectation can be shown by using the Bayesian updating process presented in Part I.C.1 and the plaintiff’s comparative statics presented in Part I.C.2.

Plaintiffs’ rational decision to give up. Recall that the plaintiff in **Figure 1** prefers to give up on a remedy to suing the tortfeasor if the following inequality is satisfied:

$$-xH - yH > x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D)$$

In this inequality, x denotes the likelihood that the tortfeasor will misrepresent the origin of a tort in order to use the Maniscalco exploit, and y denotes the likelihood that the tortfeasor will not misrepresent. In other words, this inequality indicates that there may exist some x that forces a rational plaintiff to give up, because the likelihood that the tortfeasor will use the exploit at trial is too high to justify litigating. Assume, for illustration, that $D = H = 20$, $p = 0$, $q = 0.8$, and $C_{T\pi} = 10$. As explained in Part I.C.2, $p = 0$ because the plaintiff loses if the tortfeasor misrepresents, and $q = 0.8$ because the plaintiff has a good chance to win on the merits, if not for the misrepresentation and the exploit. Plugging these values into the inequality returns:

$$-20x - 20y > x(-20 - 10) + y(-20 - 10 + 16)$$

$$x > 0.6y$$

Under the previously stated values for D , H , p , q , and $C_{T\pi}$, $x = 0.4$ and $y = 0.5$, to pick one example, guarantee that plaintiffs will give up on suing the tortfeasor in the ME model.

This exercise returns two important predictions about the long-term behavior of litigants in the ME model. First, plaintiffs need not believe that tortfeasors will *always* use the Maniscalco exploit ($x = 1$) in order to give up on suing the tortfeasor. The previous paragraph showed that, assuming $D = H = 20$, $p = 0$, $q = 0.8$, and $C_{T\pi} = 10$, $x = 0.4$ and $y = 0.5$ are sufficient to force plaintiffs to resign. Part I.C.1 already showed how Bayesian updating can increase the value of x from 0.1 to 0.3572 in one round, assuming that $p = 0$ and $q = 0.8$. Once x becomes high enough to force plaintiffs to resign, tortfeasors would reap the gains from the Maniscalco exploit's deterrent effect without paying for its costs. These gains, in turn, could make up for any losses incurred from the cost of the exploit in the short run.

Second, a tortfeasor may be able to predict when plaintiffs will give up on suing. Assume that x^* is the minimum value of x that makes a plaintiff's payoff from giving up larger than that from suing, and that b^* is the number of trials it takes for x to reach x^* . Assuming knowledge of the other traits relevant to the plaintiff's resolve to pursue a remedy, the tortfeasor could derive the values of b^* and x^* in advance of harming the plaintiff. The growth rate of x would differ for each plaintiff, depending on things such as her level of trust in the legal system: the greater a plaintiff's trust in the law to protect victims with meritorious claims, the slower she would be to catch onto the fact that the tortfeasor has already circumvented that system.

Tortfeasors' long-run gains from plaintiffs' decision to give up. Having explained that tortfeasors may use the Maniscalco exploit at a loss in the short run to reap greater gains in the long run, I now proceed to explain how that calculation precisely works in the ME model. Recall that, in the n th round, the tortfeasor would abstain from harming the plaintiff instead of harming the plaintiff and misrepresenting the origin of that tort if:

$$H < w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$$

Put differently, the right side of this inequality is the cost of setting up the necessary conditions for using the Maniscalco exploit, and the left side is the gain from doing so. Because the right side of the inequality includes the expected cost of litigating a trial in which the exploit is used and the expected cost of a settlement, the Maniscalco exploit may appear to be too expensive to

be profitable for many kinds of torts. However, this inequality states only the costs and gains that occur from the Maniscalco exploit in the n th round. If a plaintiff decides not to sue the tortfeasor in future rounds, the gain from each future round would be H and the cost would be 0 . Taking those gains into consideration, the tortfeasor may use the exploit at a loss in the n th round.

To see how the tortfeasor incorporates expected future gains into its cost-benefit analysis, let us return to **Figure 1**. Assume that the parties are in the third round, the tortfeasor expects to gain from the Maniscalco exploit without using it beginning in the fourth round for ten rounds, and the discount rate is g . The future payoffs can be discounted to their present value using the formula for calculating the present value of an annuity;¹⁶¹ denote the present value of the gains in the ten upcoming rounds as H_F . Because the gain from each of the ten future rounds is H , the present value of this “annuity” is:

$$\begin{aligned} H_F &= \frac{H}{1+g} + \frac{H}{(1+g)^2} + \dots + \frac{H}{(1+g)^{10}} \\ &= H \left[\frac{1 - (1+g)^{-10}}{g} \right] \end{aligned}$$

Assuming $g = 0.03$, $H_F \approx 8.53H$. Now, compare the conditions required for the tortfeasor to misrepresent instead of abstaining in the third round with and without expected future gains:

With future gains: $9.53H > w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$

Without future gains: $H > w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$

When future gains are expected, the tortfeasor would be able to tolerate a higher cost of setting up the necessary conditions to use the Maniscalco exploit and still make a profit, to a limit of $8.53H$. Moreover, how tortfeasors use the exploit at high costs in the short run in view of greater gains in the long run could be generalized to rounds n and r , where $r > n$, $r, n \in \mathbb{N}$.

Part I having identified the legal basis of the Maniscalco exploit, presented the value of studying it, and modeled its consequences upon litigants’ strategic behavior, Part II advances a

¹⁶¹ See WAI-SUM CHAN & YIU-KUEN TSE, FINANCIAL MATHEMATICS FOR ACTUARIES 41 (2017) (calculating the present value of an annuity that is paid immediately).

solution—the so-called flashlight discovery ordered at the motion to dismiss stage,¹⁶² but limited to the choice of law issue—and models the potential consequences of implementing this solution.

II. FLASHLIGHT DISCOVERY ON THE CHOICE OF LAW AS A SOLUTION TO THE MANISCALCO EXPLOIT

Part I established that a prerequisite for using the Maniscalco exploit profitably is to induce plaintiffs to sue under the law of a dummy state, under which their claims would survive plausibility pleading but be dismissed for incorrect choice of law. Then, a solution to the exploit would be to conduct discovery on the choice of law issue—for example, on whether Brother’s allegedly tortious conduct emanated from New Jersey or Japan—at the motion to dismiss stage, so that plaintiffs would learn early on whether their case is futile. To minimize the likelihood of discovery abuse, the court would order discovery on the choice of law only for cases plausible enough to survive 12(b)(6) motions to dismiss.¹⁶³ If early discovery reveals that the plaintiff has sued under the law of a dummy state, she could seek a court order for voluntary dismissal under Rule 41(a)(2)¹⁶⁴ and sue under the law of a state that has genuine contacts with the alleged tort. Compared to dismissing a case after discovery, dismissing a case at the motion to dismiss stage is less likely to have drained a plaintiff’s funds so severely that the plaintiff cannot sue again.

Compared to the problem to which it is addressed, the solution of flashlight discovery is straightforward—so much so that some federal courts have already used it. In *Aon PLC v. Heffernan*, for example, “due to the significance of the choice-of-law determination as a threshold issue, the parties proceeded with discovery and briefing on the choice-of-law question before any preliminary injunction hearing or other proceedings on the merits.”¹⁶⁵ It should not be surprising that federal courts grant discovery on the choice of law issue during pleading; courts

¹⁶² See Miller, *supra* note 109, at 130 n.414 (describing the “considerable support” for conducting discovery pending a motion to dismiss at a limited scope).

¹⁶³ Cf. Singh v. Google, Inc., 2016 WL 10807598, at *1 (N.D. Cal. Nov. 4, 2016) (“[a district court’s] discretion extends to staying discovery upon a showing of ‘good cause,’ [under Rule 26(c)(1)(A)] . . . Good cause for staying discovery may exist when the district court is ‘convinced that the plaintiff will be unable to state a claim for relief.’”), quoting Wenger v. Monroe, 282 F.3d 1068, 1077 (9th Cir. 2002).

¹⁶⁴ See Fed. R. Civ. P. 41(a)(2) (describing the process for voluntary dismissal after a defendant takes court action).

¹⁶⁵ 2017 WL 478270, at *2 (N.D. Ill. Feb. 6, 2017), *reconsideration denied, motion to certify appeal granted*, 2017 WL 1430616 (N.D. Ill. Apr. 20, 2017).

wield “wide discretion in controlling discovery”¹⁶⁶ under Rule 26, which states that “methods of discovery may be used in any sequence” absent stipulations or court orders to the contrary.¹⁶⁷

If flashlight discovery on the choice of law question should seem quaint, it is likely to be because courts and scholars have largely failed to notice the problem to which it is addressed, not because the solution is legally impracticable. Federal courts predominantly address motions to dismiss and then conduct discovery before resolving choice of law issues,¹⁶⁸ or resolve choice of law issues using factual allegations in the complaint,¹⁶⁹ both of which leave plaintiffs vulnerable to the Maniscalco exploit by letting futile litigation drag on long enough to drain their funds. As for the academy, legal scholars discuss discovery at the pleading stage as an aid for plaintiffs who lack the facts they need to make claims that would survive plausibility pleading.¹⁷⁰ These plaintiffs are distinct from victims of the exploit, who have the facts they need to make plausible claims that would survive motions to dismiss, but do not know that their cases will be thrown out after full discovery for relying on the law of a state with no genuine contacts to the tort at issue.

However, flashlight discovery may not necessarily work upon implementation. If judges are too cautious to grant flashlight discovery for fear of adding to the already massive backlog of civil cases,¹⁷¹ the exploit would operate as if no solution had been implemented. The solution may fail also because plaintiffs who do not know that they are suing under the law of a dummy state do not move for discovery at the pleading stage. Conversely, if a judge is overly lenient as to grant discovery for cases that would not survive pleading or for cases in which the tortfeasor is not misrepresenting the origin of a tort, discovery at pleading would add to the case backlog and

¹⁶⁶ *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988).

¹⁶⁷ Fed. R. Civ. P. 26(d)(3)(A).

¹⁶⁸ *See, e.g., Harper v. LG Elecs. USA, Inc.*, 595 F. Supp. 2d 486, 491 (D.N.J. 2009) (“the Court will defer its choice-of-law decision until the parties present a factual record full enough to permit this Court to undertake the second step of the ‘governmental interest’ analysis.”).

¹⁶⁹ *See, e.g., Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 454–55 (8th Cir.2010); *Cooper v. Samsung Electronics America, Inc.*, 374 Fed. Appx. 250, 257 n. 5 (3d Cir.2010).

¹⁷⁰ *See, e.g., Miller, supra* note 109, at 107 (“Contained discovery before the motion’s resolution could provide a fruitful middle ground for evaluating challenges to cases that lie between the traditional Rule 12(b)(6) motion based on the complaint’s legal or notice-giving insufficiency and a motion based on the complaint’s failure to meet the factual plausibility precepts of *Twombly* and *Iqbal*.”); Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When A Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 73–74 (2012) (“I do not believe that judges are required to interpret *Iqbal* so broadly that it require automatic stays upon the filing of motions to dismiss.”).

¹⁷¹ *See, e.g., Jessica K. Phillips, Not All Pro Se Litigants Are Created Equally: Examining the Need for New Pro Se Litigant Classifications Through the Lens of the Sovereign Citizen Movement*, 29 GEO. J. LEGAL ETHICS 1221, 1228 (2016) (“With more than 330,000 civil cases in the federal court backlog in 2015. . .”).

deter plaintiffs from suing by increasing litigation costs, thereby achieving materially identical results that the Maniscalco exploit would in the long run. For want of a controlled experiment in which randomly selected judges grant early discovery, Part II.A instead models the potential outcomes, successful and not, of using flashlight discovery to address the Maniscalco exploit.

Before proceeding to Part II.A, however, a qualification is in order about the flashlight discovery advanced by this Article. I am not proposing pre-*suit* discovery that some scholars do, which would allow plaintiffs to conduct discovery before they file a complaint.¹⁷² The discovery I advocate would be limited to confirming the plaintiff's existing choice of law allegations, and judges would grant such discovery only to plaintiffs whose claims have a nontrivial likelihood of surviving a 12(b)(6) motion to dismiss. Compared to pre-suit discovery meant to let plaintiffs gather whichever facts necessary to form a complaint, flashlight discovery limited to the choice of law issue is more feasible legally¹⁷³ and is less likely to cause discovery abuse by plaintiffs.¹⁷⁴

A. The Effects of Flashlight Discovery on the Choice of Law Issue upon the Maniscalco Exploit

The success of flashlight discovery as a solution to the Maniscalco exploit depends most heavily on two factors: whether flashlight discovery successfully changes plaintiffs' incorrect perception of the world (that the world is suboptimal), and whether the additional litigation costs created by flashlight discovery deter plaintiffs from suing. If flashlight discovery fails to inform plaintiffs as to whether the tortfeasor is misrepresenting the origin of the tortious act, tortfeasors would continue to win. If flashlight discovery works as intended but creates additional litigation costs that are so large as to dwarf the damages that would be paid, plaintiffs would be deterred from suing, even if they know that flashlight discovery will identify the true origin of the tort. Part II.A describes how these variables operate and how their adverse effects could be contained.

¹⁷² See, e.g., Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 46 (2010) ("This Article explores the role that state presuit discovery could play in rectifying the information imbalance caused by Twombly and Iqbal . . . the presuit discovery mechanisms can be implemented before any substantive claims are filed in a complaint.").

¹⁷³ See, e.g., Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 226 (2007) (explaining that courts have "found nearly unanimously" that presuit discovery under Rule 27 does not allow plaintiffs to obtain facts needed to survive a motion to dismiss).

¹⁷⁴ Cf. *In re PrairieSmarts LLC*, 421 S.W.3d 296, 305 (Tex. App. 2014) ("courts must strictly limit and carefully supervise presuit discovery to prevent abuse of the rule.").

Consequences of a successful use of flashlight discovery. As demonstrated in Part I.C, plaintiffs in the ME model may believe that they are in the suboptimal world (the first-round plaintiff), or suspect that they may be in a broken world (any plaintiff after the first). Both types of plaintiffs are vulnerable to the Maniscalco exploit: the first plaintiff will sue and lose, and any plaintiff after the first would either sue as the n th plaintiff does in **Figure 1**, or give up because they fear the exploit as the n th plaintiff does, both of which would prevent plaintiffs from being compensated. A successful use of flashlight discovery would prevent plaintiffs from wasting money on futile litigation and from giving up on suing, by creating two expectations: that tortfeasors may misrepresent the origin of the tort and that, if they did misrepresent, they will be exposed early on by discovery. In short, flashlight discovery aims to change the repeated-game plaintiffs’ perception of the world from “suboptimal” or “broken” to “patched” (see **Table 3**).

Now consider the effect of flashlight discovery on litigation results. Assume that judges correctly identify claims brought under the law of a dummy state and would survive a motion to dismiss, and grant flashlight discovery only for those claims. In this situation, the fact that judges order more discovery at the pleading stage than they used to would not increase the total amount of resources spent on litigation, and therefore would not add to the case backlog. If anything, flashlight discovery would be more likely to reduce the backlog, by preventing plaintiffs from spending the years’ worth of time and money that they would have otherwise spent on futile litigation. Because discovery has informed the plaintiff about where the tortious conduct really happened, the plaintiff now sues under the law of a state where her claims will not be thrown out because of the choice of law issue. Because the plaintiff’s claims were already plausible enough to survive a motion to dismiss, both parties now know that she has a good chance to win at trial.

| Table 3: Four Possible States of the World, After a Solution to ME Is Implemented | |
|--|--|
| Type | Characteristics |
| <i>Optimal</i> | No one ever commits torts because tortfeasors always lose |
| <i>Suboptimal</i> | Tortfeasors sometimes win, due to the corporate-individual asymmetry in funds and legal representation |
| <i>Broken</i> | Tortfeasors practically always win, by using the Maniscalco exploit |
| <i>Patched</i> | Tortfeasors try to misrepresent, but are exposed by flashlight discovery |

Causes and effects of underusing flashlight discovery. Although flashlight discovery would address the exploit when used appropriately, it may be underused for two reasons. First, judges may hesitate to use discovery. Judges may not be able to distinguish claims filed under

the law of a dummy state from those filed under the law of a state with genuine contacts to the case, without actually using discovery. However, judges may not grant discovery at the pleading stage because they are wary of adding to the case backlog. In this scenario, the judge is akin to a medical test that never returns false positives (no Type I error) but returns many false negatives (Type II errors).¹⁷⁵ If judges are so cautious as to never use flashlight discovery during pleading, tortfeasors would continue to use the exploit to prevent plaintiffs from being compensated.

Second, flashlight discovery may be underutilized because plaintiffs never ask for it. Recall that the first-round plaintiff never suspects that the tortfeasor will use the Maniscalco exploit because she has never seen it before. Therefore, she may never ask the court to order the discovery that would prevent the tortfeasor from using the exploit—one cannot ask for solutions to problems that she is not aware of. Although some federal courts have ordered discovery *sua sponte*,¹⁷⁶ I find it unlikely that judges would order discovery on the choice of law issue of their own accord during pleading, when the prevailing doctrine appears to be so averse to doing so.¹⁷⁷

Causes and effects of overusing flashlight discovery. Judges may also overuse flashlight discovery for the same reason that they might underuse it: judges cannot distinguish cases in which the tortfeasor is misrepresenting the origin of a tort from the cases in which the tortfeasor is not misrepresenting. However, instead of not using flashlight discovery for fear of adding to the case backlog, judges might order flashlight discovery in nearly every case they preside over in order to catch misrepresenting tortfeasors. In this scenario, judges never return false negatives (no Type II error) but return many false positives (many Type I errors). This would drive up the per-case cost to litigate ($C_{T\pi} \uparrow$) by increasing the amount of time needed to resolve each case, which would ultimately add to the case backlog and deter plaintiffs from suing, even if they are certain that flashlight discovery would expose tortfeasors who misrepresent the origin of a tort.

The deterrent effect of increased litigation costs on the plaintiff's willingness to sue can be demonstrated formally. Let us return to the n th round depicted in **Figure 1**, but assume that the overuse of flashlight discovery has driven litigation costs up; each party's cost term now has a multiplier ($\delta > 1$). Even if the tortfeasor misrepresents the origin of a tort, it cannot use the

¹⁷⁵ See JESSICA UTTS & ROBERT HECKARD, *STATISTICAL IDEAS AND METHODS* 380 (2005).

¹⁷⁶ See, e.g., *Hatfill III*, 415 F. Supp. 2d at 356 (“I *sua sponte* ordered a fifteen[-]day period of jurisdictional discovery and directed additional briefing on the choice of law issue.”).

¹⁷⁷ See, e.g., *Snyder*, 792 F. Supp. 2d at 712; *Carton*, 611 F.3d at 454-55; *Cooper*, 374 Fed. Appx. at 257 n.5.

exploit because discovery would expose any misrepresentation; this means that $p = q$ and $0 < q \leq 1$, such that the term representing expected damages ($p * D$) in *misrepresent* survives. However, because flashlight discovery must be ordered in every case to expose tortfeasors, each case takes more time to resolve. Assume that $\delta = 2, H = D = 20, p = q = 0.8, C_{T\pi} = 10, x = 0.4$, and $y = 0.5$. Then, the plaintiff is better off giving up than going to trial:

π 's expected payoff from *Give up* > π 's expected payoff from *Trial*

$$-xH - yH > x(-H - \delta * C_{T\pi} + p * D) + y(-H - \delta * C_{T\pi} + q * D)$$

$$(x + y)\delta C_{T\pi} > D(xp + yq)$$

$$18 > 14.4$$

Recall that, in the ME model, the settlement paid to a plaintiff is proportional to her likelihood of winning at trial.¹⁷⁸ If flashlight discovery has increased litigation costs to the point that it would be rational for a plaintiff to give up on suing the tortfeasor (for example, $\delta = 2$), the tortfeasor would know that the plaintiff is unwilling to sue. As such, the tortfeasor would not pay a large settlement, and the plaintiff would therefore be better off giving up than settling as well. Assume, for illustration, that $p = q = 0.8, v = -0.6, C_{S\pi} = 5, x = 0.4$, and $y = 0.5$. Then,

π 's expected payoff from *Give up* > π 's expected payoff from *Settle*

$$-xH - yH > x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D)$$

$$(x + y)C_{S\pi} > (x * [p + v] + y * [q + v]) * D$$

$$4.5 > 3.6$$

Solutions to the unintended consequences of flashlight discovery. The foregoing exercise shows that the greatest obstacle to a successful implementation of flashlight discovery would be the difficulty of getting judges to order discovery at the appropriate rate. If the problem is that judges underuse discovery during pleading, the solution may seem simple: force judges to order discovery more often. This could be accomplished either by amending the Federal Rules of Civil Procedure, or by changing the doctrine governing the practice of choice of law at the

¹⁷⁸ See *supra* Part I.C.2.

pleading stage; recall that the Third Circuit’s practice of resolving motions to dismiss and conducting full discovery before addressing choice of law questions stems from case law.¹⁷⁹

However, forcing judges to use flashlight discovery is more likely to lead to its overuse than an appropriate level of use, because of the Catch-22 underlying this solution: judges must be able to identify the cases in which tortfeasors are misrepresenting the origin of a tort to grant flashlight discovery, but judges must grant flashlight discovery in order to catch misrepresenting tortfeasors. As demonstrated under the subheading *causes and effects of overusing flashlight discovery*, indiscriminate use of discovery at the pleading stage would increase the per-case cost to litigate by increasing the amount of time needed to dispose of each case. Hence, the solution of flashlight discovery may seem to present two options that both fail to address the exploit: either underuse flashlight discovery and let the exploit be used as is, or overuse discovery so that the worsening federal civil backlog would deter plaintiffs from bringing meritorious claims.

Fortunately, the deterrent effect of flashlight discovery on plaintiffs’ willingness to sue can be addressed by increasing the expected amount of damages to be won—by stipulating punitive damages. As shown above, flashlight discovery could deter plaintiffs from suing because the litigation costs would dwarf the expected gains from winning at trial. However, assume that the value of D increases twofold to $D = 2H = 40$, because the relevant state law is amended to allow punitive damages. Then, even if the values of all other variables stay constant ($\delta = 2, H = 20, p = q = 0.8, C_{T\pi} = 10, x = 0.4$, and $y = 0.5$), the plaintiff’s payoff from going to trial would exceed her payoff from giving up.

π 's expected payoff from *Give up* < π 's expected payoff from *Trial*

$$-xH - yH < x(-H - \delta * C_{T\pi} + p * D) + y(-H - \delta * C_{T\pi} + q * D)$$

$$(x + y)\delta C_{T\pi} < D(xp + yq)$$

$$18 < 28.8$$

Because the plaintiff’s willingness to go to trial would strengthen her bargaining position, her payoff from settling would also exceed her payoff from giving up. Assume that $v = -0.6$. Then,

¹⁷⁹ See, e.g., *Snyder*, 792 F. Supp. 2d at 712; *Carton*, 611 F.3d at 454-55; *Cooper*, 374 Fed. Appx. at 257 n.5.

$D = 2H$ guarantees that the plaintiff will sue, despite higher costs created by flashlight discovery. Assuming again that $p = q = 0.8$, $C_{S\pi} = 5$, $x = 0.4$, and $y = 0.5$ returns:

π 's expected payoff from *Give up* < π 's expected payoff from *Settle*

$$(x + y)C_{S\pi} < (x * [p + v] + y * [q + v]) * D$$

$$4.5 < 7.2$$

Arguments against the solution of flashlight discovery and punitive damages. Some may argue against the solution advanced above. First, one may argue that punitive damages would exacerbate the docket overload,¹⁸⁰ which would have already been exacerbated by the overuse of flashlight discovery. However, flashlight discovery and punitive damages combined may in fact reduce the civil docket overload: if tortfeasors expect plaintiffs to sue despite high litigation costs and expect to pay substantial damages, tortfeasors may avoid using the exploit or even abstain from harming the plaintiff altogether. Recall that, in the r th round of the ME model without flashlight discovery, the plaintiff's expectation that she will lose deters her from suing; the same mechanism could force a tortfeasor who expects to lose and pay through the nose to avoid harming the plaintiff. In other words, the equilibrium effect of flashlight discovery and punitive damages on the docket is an empirical question that is beyond the scope of this Article.

Second, one may argue that flashlight discovery and punitive damages are unnecessary because plaintiffs might develop on their own the ability to identify misrepresenting tortfeasors before filing a complaint; after all, the means to disguise one's physical location while acting through the internet are not foolproof.¹⁸¹ If plaintiffs or their counsel do develop the ability to catch misrepresenting tortfeasors on their own, that would indeed be a welcome development that makes it unnecessary to further complicate our already excessively complicated civil litigation system. However, I have argued in Part I.A that, as of now, plaintiffs and plaintiffs' counsel appear to lack the technological sophistication needed to engage in digital forensics and an awareness of the importance of cybersecurity practices.¹⁸²

¹⁸⁰ Cf. Borchers, *supra* note 139 (arguing that punitive damages increase the likelihood that plaintiffs will sue).

¹⁸¹ See Kaminski, *supra* note 37.

¹⁸² See *supra* notes 88-89 and accompanying text.

At any rate, even if it is assumed that flashlight discovery becomes redundant because plaintiffs develop the ability to identify misrepresenting tortfeasors on their own, punitive damages may still be necessary because misrepresentation by tortfeasors could increase plaintiffs' pretrial investigation costs, which would increase litigation costs, which in turn could deter plaintiffs from suing—if not for the expectation of higher damages. Scholars already argue that there exists a “cost asymmetry” among litigants because “[w]hile the plaintiff must expend resources to establish each of the elements of her cause of action, the defendant can concentrate on a single defense.”¹⁸³ Adding the need to identify where a tortfeasor committed a tortious act would add to this cost asymmetry. The precise impact of this cost increase would, again, be an empirical question. However, the point remains that, *ceteris paribus*, added costs would deter plaintiffs with meritorious claims from suing and that punitive damages would offset those costs.

III. WHY IS CONFLICT OF LAWS SCHOLARSHIP PERCEIVED TO BE IRRELEVANT TO REALITY?

Parts I and II have established that conflict of laws scholarship can be practically useful, by showing how tortfeasors can exploit a choice of law loophole to profit from interstate torts. Why, then, is conflicts scholarship considered to be unhelpful to practice and irrelevant to reality? The fact that interjurisdictional transactions have never been more frequent¹⁸⁴ indicates the timeliness of fixing conflict of laws, a discipline born to resolve interstate disputes. However, the fact that conflicts scholars have lamented the discipline's decline for at least sixty years¹⁸⁵ suggests that a cause may be difficult to identify and a fix may be difficult to implement.

Yet, existing works oversimplify the causes of, and solutions to, the decline of conflict of laws scholarship, even as they emphasize the value of reversing that decline.¹⁸⁶ Some exaggerate the role of a single cause of the problem and the efficacy of a single solution: Professor Friedrich Juenger, for example, attributes “[t]he turmoil that currently besets choice of law” to insufficient

¹⁸³ Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1327–28 (2017).

¹⁸⁴ See *supra* note 5 and accompanying text.

¹⁸⁵ See *supra* notes 1-2 and accompanying text.

¹⁸⁶ See, e.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 981–82 (1994) (“At a time when conflict of laws issues . . . arise more frequently in tort cases . . . and rational allocation of government authority over multistate or transnational business has taken on greater importance, conflict of laws theory could hardly be in greater disarray. That disarray leaves many interstate and international problems unresolved”) (citation omitted).

attention to foreign law.¹⁸⁷ Others misidentify the causes of the discipline’s decline by focusing too much on its symptoms. Professor Earl Maltz, for example, criticizes scholars who have “too great an intellectual investment in modern approaches to be persuaded by any arguments about the superiority of the prior law” and the discipline’s increasing reliance on “abstract arguments, often couched in pseudo-sophisticated jargon[.]”¹⁸⁸ Although academic complacency and obfuscation should always be criticized, to do so without thoroughly examining why they occur so often in conflict of laws is unlikely to create meaningful change. As such, perhaps it is only natural for Maltz himself to be skeptical that his criticism will change conflicts theory.¹⁸⁹

Part III identifies two reasons for, and two solutions to, the discipline’s decline. Part III.A argues that scholars’ obsession with comprehensive, ideal choice of law rules at the expense of studying how existing choice of law rules immediately affect individual litigation outcomes has made scholarship unhelpful to practice. I then explain why conflicts scholarship has failed to act on an intuitive solution, to shift focus from macro-theoretical to micro-applied conflict of laws: scholars appear to misunderstand what practitioners want out of conflicts scholarship. Scholars’ underappreciation of lawyers’ demand for advice that will immediately help in the courtroom would explain why, even as the field’s reputation for impracticality solidifies, scholars claim that the academy has failed to convince the bar of the true value of theoretical conflicts scholarship¹⁹⁰ or that creating a better choice of law theory will displace that reputation of impracticality.¹⁹¹

Following Part III.A’s explanation for why practitioners have abandoned conflict of laws, Part III.B explains why scholars have lost faith in the discipline. Prevailing accounts claim that abstruse analysis and hairsplitting jargon have repelled scholars from the field¹⁹² or that scholars who push certain theories have given the field a bad name.¹⁹³ I submit that the first explanation

¹⁸⁷ See Juenger, *supra* note 47.

¹⁸⁸ See Maltz, *supra* note 48.

¹⁸⁹ See *id.* (“I am not sufficiently naive to believe that anything said in this Article will lead to a large-scale retreat from modern conflicts theory and a concomitant resurgence in the popularity of the First Restatement.”).

¹⁹⁰ See, e.g., Little, *supra* note 43, at 233-34 (“For teaching, most existing casebooks squander the promise of Conflicts as a tool for broad understanding. . . . If future lawyers and academics do not experience the promise of Conflict of Laws analysis during their formative stages, they are less likely to push the discipline in new directions that accommodate changes in the legal, social, and technological landscapes.”).

¹⁹¹ See, e.g., Symeonides, *supra* note 95, at 1904, 1909 (attributing the discipline’s reputation for impracticality to “the complexity of the modern choice-of-law approaches” and calling for choice of law rules that accommodate “the conflicting needs of certainty and flexibility”).

¹⁹² See, e.g., Maltz, *supra* note 48; Little, *supra* note 50.

¹⁹³ See, e.g., Posnak, *supra* note 98.

confuses a symptom of the discipline’s decline for its cause, and that the second blames a subset of conflicts scholars for a fault shared by the broader field. Part III.B argues that overcomplexity is a symptom of unfalsifiable argumentation. Unfalsifiable argumentation prevents anyone from being proven wrong, which enables scholars to use the kind of “pseudo-sophisticated jargon”¹⁹⁴ that conflicts scholars are accused of using, without being contradicted. The fact that no one can be proven wrong enables the same debates to repeat themselves ad nauseam, by allowing anyone to claim that their opponents misunderstand—or, in some cases, deliberately misrepresent¹⁹⁵—them. I then propose formal modeling as a tool to aid logical argumentation in conflict of laws.

A. An Obsession with Macro-Level Theory at the Expense of Micro-Level Application

“[I]n Currie’s defense . . . Currie put forth the selfish-state analysis . . . to demonstrate how the theory worked. It was not supposed to be a guide to conducting interest analysis in actual cases—though unfortunately it seems to have been taken that way, especially by critics.”¹⁹⁶

Since Joseph Beale, American conflict of laws has largely been dominated by two groups of scholars vying to replace the prevailing choice of law rule with a superior alternative. The first has called for a new a priori theory that would predict which state’s law would apply to any case and would logically justify why. The First Restatement’s vested rights approach was overthrown for using what many saw as arbitrarily chosen factors to reach unforgivingly rigid results.¹⁹⁷ The Second Restatement’s most significant relationship rule was attacked for being so pliable that it could justify any result and, hence, lacking uniformity and predictability.¹⁹⁸ Schools of thought such as interest analysis, comparative impairment, and the better rule of law have debated which rule is the superior regime since the 1950s to the present.¹⁹⁹ Meanwhile, the second group argued

¹⁹⁴ See Maltz, *supra* note 48.

¹⁹⁵ See, e.g., Posnak, *supra* note 98.

¹⁹⁶ Kermit Roosevelt III, *Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 511 (2014)

¹⁹⁷ See, e.g., Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1129 (2010) (arguing that judges came to reject the First Restatement because they “became increasingly unwilling to apply the law of a state with only a single contact with the dispute.”).

¹⁹⁸ See, e.g., Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CAL. L. REV. 1499, 1564 (2013) (“the hallmark of the Second Restatement is its flexibility, allowing judges to apply it differently according to personal preference or their sense of the justice of the case.”).

¹⁹⁹ See *supra* notes 96-97; see also BRILMAYER, *supra* note 51, at 20-125 (outlining the historical development of schools of thought in American conflict of laws since Joseph Beale).

against any a priori choice of law rule designed to achieve theoretically “correct” results, with recommendations ranging from rules that prioritize predictability over logical consistency²⁰⁰ to having the judge choose whichever state law that would achieve substantively “just” results.²⁰¹

Although these groups make opposite arguments, they unite the vast majority of conflicts scholars in one respect: they both advance theories about how choice of law rules should work at the systemic level, akin to how macroeconomists study the economy as a whole. The discipline’s disproportionate focus on macro-level theory has relegated micro-level application of conflict of laws—studying how existing choice of law rules actually operate at the level of individual trials—into neglect, a fact that practitioners have made clear by complaining for generations that conflicts scholarship consists of abstruse theory²⁰² that is unhelpful to actual practice.²⁰³ The fact that scholars claim to have been aware of this dissatisfaction and that it has apparently not been resolved²⁰⁴ prompts two questions. First, does the bar have a legitimate need for scholarship in micro-level application that works on macro-level theory cannot fulfill? Second, if it does, why has the academy failed to pay more attention to micro-level application of conflict of laws?

Practitioners and their clients can have a genuine need for scholarly work that applies abstract theory, even if they do not appreciate the metaphysical beauty of that theory in the same way that theorists do. Take, for example, the Navier-Stokes equations, which describe the motion of viscous fluids and are used to predict the weather.²⁰⁵ Theorists (mathematicians) might care about the equations because they present an unsolved mathematical problem,²⁰⁶ not because they are a useful tool. Practitioners (meteorologists) may care about the equations because they can be

²⁰⁰ See, e.g., Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 750-51 (1924) (“It matters less what the [choice of law] rule is than that it shall be certain and so far as possible uniform. . . . There is no reason . . . our courts should give up [traditional rules] in favor of any *a priori* theory which has no support other than that of the person advocating the same.”).

²⁰¹ See, e.g., Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 952 (1994) (“no comprehensive choice of law theory, whether consequentialist or rights-based, will or should supersede the judicial inclination to focus on substantive results in the cases before them.”).

²⁰² See, e.g., Martin, *supra* note 9.

²⁰³ See, e.g., Rosenberg, *supra* note 7.

²⁰⁴ See *supra* notes 1-2, 10 and accompanying text.

²⁰⁵ See WILLI FREEDEN & MARTIN GUTTING, *SPECIAL FUNCTIONS OF MATHEMATICAL (GEO-)PHYSICS* 15 (2013).

²⁰⁶ See, e.g., Charles L. Fefferman, *Existence and Smoothness of the Navier-Stokes Equation* (“[the existence of solutions in two dimensions] gives no hint about the three-dimensional case, since the main difficulties are absent in two dimensions.”), available at <http://www.claymath.org/sites/default/files/navierstokes.pdf>. The Clay Mathematical Institute has offered \$1 million for a proof. See Clay Mathematical Institute (Apr. 18, 2019), <http://www.claymath.org/millennium-problems/navier%E2%80%93stokes-equation>.

used to predict when the next natural disaster will come,²⁰⁷ not because they want to find global solutions to the three-dimensional Navier-Stokes equations. I, a client of the practitioners, want to avoid dying in a flash flood but may not care whether the weather forecasts come out of a supercomputer or a crystal ball, as long as they are accurate. Just as non-mathematicians can have a genuine need for accurate weather forecasts, lawyers who do not care about theory can have a genuine need for conflicts scholarship that will immediately help them in the courtroom.

None of this is to disparage the value of macro-level legal theory. It would undoubtedly be valuable to create an a priori choice of law theory that would predict which state's law would apply to any given case and would logically justify why, because a law becomes more legitimate when people understand and accept why it limits their behavior. For example, people are more likely to justify "severe punishment such as the loss of liberty" for crimes such as murder²⁰⁸ than for crimes such as "sing[ing] or reder[ing] the 'Star Spangled Banner' . . . as dance music[.]"²⁰⁹ I am merely arguing that, for example, a public defender can have a genuine need for law review articles on how courts handle habeas petitions without caring about constitutional theory, and her client can want to leave prison without caring about how it happens as long as it happens legally.

However, conflict of laws has failed to pay due attention to application because scholars misunderstand what practitioners want from scholarship. That is, the academy seems to believe that the bar criticizes scholars for neglecting application because practitioners fail to appreciate the value of theory in the same way that scholars do. For example, many conflicts scholars have assigned a substantial share of the blame for the discipline's reputation among practitioners as "desolate" and "sad" to the practitioners' own failure to understand abstract scholarly theory:

How does one restate gibberish? Anyone who looks at American judicial opinions dealing with choice-of-law issues must conclude that the field is in a desolate state. . . . [J]udicial prose has an Alice-in-Wonderland kind of quality: one reads about "contacts" and "interests" as if these concepts were pretty much the same thing, or perhaps closely related . . . Even more depressing, however, at least to those who teach the subject, is the

²⁰⁷ See, e.g., John Schwartz, *25 States Are at Risk of Serious Flooding This Spring, U.S. Forecast Says*, N.Y. TIMES, Mar. 21, 2019, available at <https://www.nytimes.com/2019/03/21/climate/climate-change-flooding.html>.

²⁰⁸ See *United States v. Alton Box Bd. Co.*, 1977 WL 1374, at *6 (N.D. Ill. Mar. 4, 1977) (distinguishing mala in se crimes from mala prohibita crimes).

²⁰⁹ Mass. Gen. Laws Ann. ch. 264, § 9 (West) (imposing a fine of "not more than one hundred dollars" for the act).

disarming candor with which some judges deplore the “post-revolutionary” conflicts law. . . . [O]ne cannot help but shudder when thinking about the Supreme Court’s taking an active role in this field considering what it has done to the far simpler subject of jurisdiction. And yet, some conflicts scholars have urged the Justices to take a more active role. . . . [C]onflicts law . . . is in a sad and unrepeatable shape. . . . [O]ne cannot even trust judicial opinions to adhere faithfully to the doctrines they claim to follow.²¹⁰

Juenger and those who agree with him may well be correct that most judges confuse their own errors in application for unintelligible theory. However, even if this claim is correct, blaming the bar for not understanding the law will not help keep conflict of laws on the bar exam. Faulting judges for not understanding high conflicts theory is like faulting mechanical engineers for not understanding string theory well enough to write a thesis on it. To avoid cementing the field’s reputation as an echo chamber of self-righteous zealots, scholars must focus less on proselytizing their idea of ideal a priori choice of law rules and more on studying how existing rules affect individual litigation outcomes. The need to clarify macro-level theory by showing how it works at the micro-level is especially acute in conflict of laws, because many scholars have contributed to muddling the theoretical landscape by apparently misrepresenting the theory themselves.²¹¹

If Juenger and his camp seem to be an extremely vocal minority, they are not. Granted, not all scholars go so far as to fault judges for deliberately misapplying theory.²¹² However, like Juenger and company, many other conflicts scholars also assign a large share of the blame for the discipline’s reputation for impracticality on the bar’s failure to grasp conflict of laws theory—even though practitioners should not be expected to appreciate high theory in the same way that scholars do. Take, for example, Professor Laura Little’s claim that conflict of laws is taken to be “irrelevant” because law students and the bar do not appreciate the value of abstract conflicts theory, which in turn is because of the academy’s failure to teach the discipline properly:

²¹⁰ Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 403-04, 410 (2000); see also KERMIT ROOSEVELT, CONFLICT OF LAWS 68 (2009) (“judges tend to ignore or misunderstand even quite basic features of most choice-of-law approaches, and the difference between comparative impairment and balancing is likely to escape them entirely”).

²¹¹ See, e.g., Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 950–51 (1981) (explaining that “Currie’s followers deny the validity of invoking a set of external theorems that point a priori to a ‘correct’ choice of law” but that many of them have “defect[ed] from Currie’s no-rules methodology”).

²¹² See, e.g., ROOSEVELT, *supra* note 191.

Conflict of Laws presents opportunities for meaningful reflection on legal regulation and governmental structure. . . . In the course of resolving conflicts issues, legal thinkers can develop a deep understanding of the nature of law itself. . . . [M]any perceive the field as arcane, dry, and possibly even irrelevant. Conflict of Laws is none of these things. . . . The essay provides raw material for scholars and practicing lawyers, who . . . have the ability to raise the consciousness of others about their contemporary importance. . . . Plain words about the emotional, contemporary, and practical implications of Conflicts doctrine can help hook the listener. Yet the profound, abstract questions that comprise Conflicts of Laws are what the discipline make so important. The challenge then is to . . . capture both the practical and theoretical richness in the subject matter. . . . [M]ost . . . casebooks squander the promise of Conflicts as a tool for broad understanding.²¹³

It is only natural for a committed academic to criticize bad teaching, and Little's essay may well be the manual that the field needs to effectively teach abstract conflict of laws theory. However, improved instruction in high theory is unlikely to change the field's reputation of impracticality in the way that Little envisions, because practitioners are unlikely to develop a sudden interest in profound debates on the nature of law if scholars will not provide immediately helpful advice on how to win at trial. If, after decades of complaints that the discipline is unhelpful to practice, the academy still thinks that the practical implications of conflict of laws are there merely to "hook the listener[,]"²¹⁴ the bar will continue to believe that scholars care only about proselytizing "*a priori* theor[ies] which ha[ve] no support other than that of the person advocating the same."²¹⁵ Although we are free to teach students whatever theory we want, we must swallow that burning desire when dealing with lawyers and instead write more scholarship on micro-level application; the alternative appears to be to feel self-superior while the discipline withers away in oblivion.

B. Unfalsifiable Argumentation: The Cause of Years of Fruitless Debates

"The new critics of interest analysis . . . do not fully understand what they criticize[.]"²¹⁶ – 1988

²¹³ See Little, *supra* note 43, at 233-34.

²¹⁴ *Id.*

²¹⁵ See Lorenzen, *supra* note 181.

²¹⁶ Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics"*, 36 AM. J. COMP. L. 681, 727 (1988).

“[T]he best way to get beyond Currie is to debate him one last time in order to put [interest analysis] in perspective.”²¹⁷ – 1991

“State courts . . . misunderstand completely what Brainerd Currie meant by a ‘state interest[.]’”²¹⁸ – 2015

The argument advanced in Part III.A, that conflict of laws scholarship is considered to be impractical because it is concerned excessively with macro-level theory at the expense of micro-level application, explains why the practitioners have lost faith the field but not why the theorists also claim unanimously to be sick of it. To a layperson, the fact that conflict of laws scholars are enamored with high theory may suggest that they should have no problem continuing to obsess with “Delphic” wording and “disagree as to what it means but agree that they adore it.”²¹⁹ Year after year, however, conflicts scholars in fact lament the demise of conflict of laws theory, even as they continue to produce more of it.²²⁰ As far as I am aware, no other discipline can claim to match the strange phenomenon that we have seen in this one for generations: the academy speaks loudly and unanimously of the value of resurrecting sound conflicts theory²²¹ but apparently agrees that the task is infeasible,²²² while being roundly criticized by the bar for wasting time.²²³

Those familiar with the tortured history of this discipline may explain that the theorists are leaving because they have argued over the very same claims for decades, such as those on the merits of interest analysis cited at the beginning of Part III.B. Many of these interlocutors blame others’ misunderstanding of their arguments—willful²²⁴ and otherwise²²⁵—for the nauseatingly long duration of this debate. However, attributing decades of stasis in conflict of laws to its most eminent names all simultaneously becoming sinister or witless is plainly implausible. I argue that what many conflicts scholars have called a misunderstanding of choice of law theories is merely

²¹⁷ Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT’L L.J. 245, 246 (1991).

²¹⁸ Florey, *supra* note 2, at 686 (footnotes omitted).

²¹⁹ Rosenberg, *supra* note 7.

²²⁰ *See supra* notes 8-10.

²²¹ *See supra* notes 44-46.

²²² *See, e.g.*, Juenger, *supra* note 191.

²²³ *See, e.g.*, Trachtman, *supra* note 167, at 978 (“Conflict of laws is a source of constant embarrassment to lawyers, judges, and scholars.”).

²²⁴ *See, e.g.*, Posnak, *supra* note 98, at 1131.

²²⁵ *See, e.g.*, Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J. FORUM 293, 301 (2018) (arguing that Brilmayer and Listwa’s critique of the Draft Restatement is based on a “misunderstand[ing]”).

a symptom: scholars have left the discipline because of their own reliance on unfalsifiable argumentation, which has enabled endless squabbling over the exact same topics by preventing anyone from being proven wrong, and thereby allowing anyone to claim to be misunderstood.

1. Anyone Can Claim to Be Misunderstood When No One Can Be Proven Wrong

Unfalsifiable arguments prevent meaningful debate by allowing the debaters to repeat the same claims without being contradicted. When I say that a claim is unfalsifiable, I mean that it lacks objective and testable parameters.²²⁶ For example, the claim that cats are cuter than dogs is unfalsifiable because there is no objective agreement on what makes a species cuter than another. The claim that “God exists because the Bible says so, and the Bible is true because God says so” is unfalsifiable because it relies on circular logic: the claim that God exists and the claim that the Bible is true rely on each other as evidence, and there is no standalone way to test either claim. Because unfalsifiable arguments cannot be contradicted, they can protract debates ad infinitum just by being repeated. At the same time, purveyors of unfalsifiable arguments can deflect blame for endless debates by claiming that their opponents misunderstand them; for example, one may dismiss dog lovers as “plainly lacking in intelligence”²²⁷ or non-Christians as not “understanding that they need a savior” because they subscribe to “lies straight from the pit of hell[.]”²²⁸

Conflict of laws scholars have too often used unfalsifiable argumentation and accused their opponents of misunderstanding it. Take, for example, the claims made by some followers of governmental interest analysis, the choice of law rule that would apply the law of the state with the greater policy interest in a case, and perhaps the most debated school of thought in the field’s modern history.²²⁹ In 1985, Professor Lea Brilmayer famously argued that interest analysis is not the objective method that its proponents present it as, because it lacks a value-neutral means for

²²⁶ See Brilmayer & Kim, *supra* note 116, at 23-29 (discussing how international law scholars have used unfalsifiable argumentation to present value judgments as scientific claims and to avoid being proven wrong).

²²⁷ Chris Matyszczyk, *Cat People Are Smarter than Dog People, Study Says*, CNET, June 1, 2014, available at <https://www.cnet.com/news/cat-people-are-smarter-than-dog-people-study-says/>.

²²⁸ Matt Pearce, *U.S. Rep. Paul Broun: Evolution a Lie ‘From the Pit of Hell’*, L.A. TIMES, Oct. 7, 2012, available at <https://www.latimes.com/nation/la-xpm-2012-oct-07-la-na-nn-paul-broun-evolution-hell-20121007-story.html>.

²²⁹ See, e.g., Harold P. Southerland, *Conflict of Laws in Florida: The Desirability of Extending the Second Restatement Approach to Cases in Contract*, 21 NOVA L. REV. 777, 805 (1997) (“Though [Currie’s] forum-law solution has not been widely adopted, there is still nothing approaching general agreement about how true conflicts should be resolved. It is the most hotly debated issue in choice-of-law today.”).

determining “policy interests” underlying a state law. Because there is no agreement on what a state’s interests are, Professor Brilmayer argued, defenders of interest analysis can dress up their own preferences as state interests and present choice of law decisions based on them as unbiased:

Policy has been drained of meaning, perhaps in order to accommodate so many different viewpoints about what ought to be considered. . . . [Currie’s] methods supposedly . . . attempted to decide as the legislature would have decided had it addressed the issue . . . While apparently clear in principle, this method is somewhat difficult to apply. Most legal rules have no direct instructions on their intended range of application. . . . All of this talk about willingness to defer to state policy decisions is pure bunk. . . . Interest analysis is not a value neutral methodology that simply seeks implementation of the policy preferences of the legislature or common law court. Interest analysts have a very strong set of normative premises which enable them to contradict or belittle the preferences of legislatures and courts if those preferences resemble that “dogma,” that “sterile formalism,” that “mindless and ruthless machine,” the First Restatement of Conflicts. . . . The illustrative examples [used by proponents of interest analysis including Currie] simply indicate what interest analysts think that legislatures *ought* to want.²³⁰

In response, Professor Robert Sedler argued that Professor Brilmayer fails to understand how interest analysis decides whether a state has an interest and which law to apply to a given case:

Professor Brilmayer . . . is not particularly concerned about how interest analysis works in practice or about the results that are produced by the application of that approach. . . . According to Currie, it is rational to make choice of law decisions with reference to the policies reflected in the laws of the involved states, and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. . . . It is only where the application of a state’s law cannot be sustained either on the basis of the state’s interest in advancing the policy reflected in that law, or on the basis of factual connections between the underlying transaction and the state, that such application is unreasonable Choice of law decisions . . . should be made with reference to the policies reflected in the laws of the involved states and the interest of each state, in light

²³⁰ Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 459, 464, 469-70 (1985).

of those policies, in having its law applied . . . [to a] particular case. The justification for interest analysis is that it is rational to make choice of law decisions on this basis²³¹

Professor Sedler's argument, that interest analysis works because it is rational, is unfalsifiable for the same reason that "cats are cuter than dogs" is unfalsifiable: like the term "cuter," the material word "rational" has no objective definition. Sedler's definition of "unreasonable" as "where the application of a state's law cannot be sustained . . . on the basis of the state's interest" is a tautology because it merely repeats the claim that applying the law of the state with the greater interest in a case is reasonable, without defining what "interest" is. Throughout his entire article, Sedler repeats his claim that "interest analysis . . . works" because it provides "a rational basis for making choice of law decisions" without otherwise defining "rational," while repeating in only cosmetically different ways the claim that Brilmayer misunderstands interest analysis.

Nine years after Professor Brilmayer's attack and Professor Sedler's defense, followers of interest analysis continued to advance unfalsifiable arguments on its behalf. In 1994, Professor Bruce Posnak repeated the claim that Professor Brilmayer misunderstands interest analysis:

Not only does [Professor Brilmayer] continue to refuse to "get it" and abuse Currie's ideas, she has spawned a whole school of misinformed fry-critics [who] have . . . infected both courts and practicing lawyers and adversely affected the law. . . . Whether a state has an "interest" depends solely upon whether it is reasonable to conclude that a policy behind that state's competing law would be advanced if that law were applied. . . . [I]t is irrational for a state court to apply the law of some state when it is clear that no policy behind that law would be furthered but the policy behind the competing law would be. . . . An "interest" arises if it is reasonable to conclude that one of these policies would be advanced if that law were applied to . . . the case before the court.²³²

Professor Posnak's argument is unfalsifiable because its reasoning is circular, like the claim that God exists because the Bible says so, and that the Bible is true because God says so. Consider the last two sentences in the excerpt cited above: according to Posnak, it is irrational for a court to apply a state's law if that state has no interest in having its law apply, and an interest arises if

²³¹ Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"*, 46 OHIO ST. L.J. 483, 483, 485, 488, 490 (1985).

²³² See Posnak, *supra* note 98, at 1131, 1137, 1149, 1181.

it would be rational to apply that state's law. Because the definitions of "interest" and "rational" rely on each other and Posnak's article does not provide a standalone way to define them, his claim cannot logically be contradicted and can protract futile debate simply by being repeated.

I will not belabor this point by listing more examples of conflict of laws scholars making unfalsifiable arguments, protracting futile debates, and accusing critics of misunderstanding and misrepresenting them, well into the present.²³³ The point of this exercise is that conflicts scholars who blame the discipline's reputation for impracticality on other scholars and practitioners who allegedly misunderstand their claims may have no one to blame but themselves: it seems only reasonable to abandon a field whose noticeable advancements are in the number of ad hominem attacks exchanged between scholars, not in the quality of the arguments presented in their works. The alternative to my explanation, that unfalsifiable arguments have caused years of futile debate in conflict of laws, is to accept that its prevailing theories are so genuinely complicated that our most eminent colleagues are all flummoxed by them. If that is the case, it hardly seems proper to fault practitioners for not understanding high theory that conflicts scholars themselves do not.

2. Modeling as an Aid for Logical Debate in Conflict of Laws

As shown in Part III.B.1, unfalsifiable argumentation is a fairly simple fallacy to spot. However, the scholars who have argued against unfalsifiable claims in conflict of laws for years have failed to identify them as fallacies, even as they criticized those claims from a substantive perspective. For example, Professor Brilmayer, in over a decade of works criticizing interest analysis, focuses on its failure to clarify the roles of statutory construction and legislative intent in determining whether a state law should apply, as well as its failure to provide constitutional justification.²³⁴ Substantive criticism such as this has failed to close futile debate, because users

²³³ See, e.g., Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 297 (1966) (advancing the "better rule of law," which argues for "applying what by the forum's standard is the better of the competing rules of law" without objectively defining "better"); *supra* notes 197-98; Roosevelt & Jones, *supra* notes 38 (responding to a critique of the Draft Third Restatement that it "retains the least defensible aspects of governmental interest analysis" by arguing that "[t]he Restatement draft does not follow Currie's assumptions about state interests or his conclusions as to the scope of state laws, much less his views on how to resolve conflicts between them.").

²³⁴ See Brilmayer, *supra* note 211; Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 44-47 (1991).

of unfalsifiable argumentation capitalize on its immunity to contradiction to simply repeat their claims. Had the fallacy of unfalsifiable argumentation been pointed out explicitly, perhaps unproductive theoretical debate in conflict of laws may not have lasted for such a long time.

I submit that formal models would make logically sound debates in conflict of laws more likely by forcing arguments to explicitly state and quantify their underlying assumptions, so that they become resistant to misrepresentation by rhetorical massaging. This Article and the works in defense of interest analysis cited in Part III.B.1 have similar purposes, because they all argue that a choice of law rule will result in certain consequences: I argue that resolving the choice of law issue using plaintiffs' allegations would incentivize tortfeasors to misrepresent the origin of a tort, whereas defenders of interest analysis argue that it would apply to a case the law of a state that has the greater policy interest in having its law apply. A difference between this Article and those in defense of interest analysis is that this Article quantifies and explicitly states the assumptions underlying the argument that tortfeasors would use the *Maniscalco* exploit, in the form of parameters in **Figure 1** such as *H*. I could not rely on fallacies to present a claim that is not supported by my assumptions because anyone could check my work by solving my model.

Although formal models have been used in other fields of legal scholarship²³⁵ and could easily be imported to conflict of laws, as shown by this Article, I wish to qualify my argument in favor of using formal models in conflict of laws in order to preempt any misunderstanding of my intent. First, I am not arguing for the use of formal models in all, or even most, conflict of laws research, because formal models cannot be used to present arguments whose assumptions cannot be quantified. For example, the claim that the Second Restatement returns more just results than interest analysis does, on its own, cannot be presented using a game-theoretic model because the value preferences that lead one to conclude that one choice of law rule is normatively superior to another cannot be quantified. Legal scholars have already been criticized for attempting to lend their value judgments a specious impression of quantitative authority by presenting them using misapplied game theory,²³⁶ a trend that would only further undermine this field's reputation.

²³⁵ See, e.g., Erik Hovenkamp, *Competition, Inalienability, and the Economic Analysis of Patent Law*, 21 STAN. TECH. L. REV. 33, 71–72 (2018).

²³⁶ See Brilmayer & Kim, *supra* note 116, at 30-34.

Second, I am not arguing that game-theoretic models are inherently superior to any other research methodology. I support any research method that would make logically sound debate in conflict of laws scholarship more likely, and I am arguing that formal modeling is one of them. The social sciences have long been plagued by scholars' dogmatic attachments to particular tools for research, which limit the range of research that scholars will consider, induce scholars to use methods that are inappropriate for a given purpose, and cause rarely used but nevertheless sound methods to be "denied the name of science."²³⁷ I do not intend to contribute to introducing yet another Inquisition to a discipline already populated by "wild-eyed . . . intellectual zealots."²³⁸

Finally, I am arguing for more use of formal modeling in conflict of laws because models make it easier to determine whether an argument is logically consistent with its assumptions, not because models necessarily indicate whether the argument and its assumptions accurately portray reality.²³⁹ No model describes reality completely accurately, because to do so would defeat the purpose using a model: a model abstracts away some of reality's complexities in order to study a particular phenomenon in isolation. However, a model with brazenly false assumptions serves no use because it would model things that do not occur in reality. Yet, too many scholars in other legal disciplines openly argue that a model need not be grounded in accurate assumptions about reality, as long as the model's conclusions tell a plausible story.²⁴⁰ Presenting formal models in conflict of laws based on false assumptions would not only add to this mess, but also repeat the behavior that has plagued this field for decades: obsessing over theory with no bearing on reality.

CONCLUSION

²³⁷ Donald R. Kinder & Thomas R. Palfrey, *On Behalf of an Experimental Political Science*, in EXPERIMENTAL FOUNDATIONS OF POLITICAL SCIENCE 4 (Donald R. Kinder & Thomas R. Palfrey eds., 1993).

²³⁸ See BRILMAYER, *supra* note 51.

²³⁹ See MORROW, *supra* note 116, at 1 ("Game theory cannot tell us whether certain theories are accurate descriptions of the world, but it can tell us what behavior we should expect as a consequence of those theories.").

²⁴⁰ See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 18 (2007) ("Newton's law of falling bodies is unrealistic in its assumption that bodies fall in a vacuum, but it is still a useful theory because it predicts with reasonable accuracy the behavior of a wide variety of falling bodies in the world."); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1706 (1986) ("What's wrong with models that contain 'unrealistic' assumptions? The purpose of any model is to strip away complications, to make intractable problems manageable, to make things simple enough that we can see how particular variations matter.").

Conflict of laws, despite its notorious past, has a starring role to play in legal practice and academia in the years to come. This Article has shown firsthand how conflicts scholarship could seize such a role, by identifying and advancing a solution to a problem that will become only more prevalent and malignant in the age of cybertorts: corporations acting over the internet can exploit a loophole in territorially tethered choice of law rules to profit from interstate torts, at the expense of plaintiffs with meritorious claims against them. This Article has also shown that conflict of laws scholarship has become notorious for impracticality not because the discipline is inherently unhelpful to practice, but because scholars misunderstand what the bar wants from the academy and because they have debated one another in a way that obstructs scholarly progress.

Although scholars contributing to their own reputation for unhelpfulness is particularly egregious in conflict of laws, legal scholarship more broadly is also guilty of the same. Scholars engage in a periodical, collective hand-wringing about the declining relevance of their works to reality,²⁴¹ as if that ritualized admission of guilt licenses them to keep on sinning until the next confession. While recognition is the first step to solving any problem, claiming to have found a problem without making any progress serves only to cement suspicions that scholars are failing to address its central cause. Indeed, many point to the law review format as a main cause of legal scholarship's declining relevance,²⁴² as if to suggest that the unappealing content may become attractive in new clothes. Although law reviews may have a hand in the fall of legal scholarship, I maintain that the central cause of irrelevant content is irrelevant content. Attributing the falling relevance of legal scholarship to its publication format is like refusing to swim in shark-infested waters because of the risk of drowning, while ignoring the much higher risk of being eaten alive.

²⁴¹ See, e.g., Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981) (“legal scholarship lies at the edges of serious intellectual activity”); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 933 (1990) (“[A]midst the morass of law reviews are occasional stabs at candid self-criticism. For example, various observers have noted that supposedly analytical commentaries are predominantly descriptive and mildly plagiaristic[.]”).

²⁴² See, e.g., Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (“[I]t is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly.”) Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 95 (2001) (“Legal education would be vastly improved if American law review articles of the typical sort were abolished.”).

Fortunately, some legal scholars are defying entrenched perceptions that “[w]hat the academy is doing . . . is largely of no use or interest to people who actually practice law[,]”²⁴³ by producing timely research on some of the most pertinent issues of the day: for example, how the Supreme Court’s restrictive interpretations of the extraterritorial effects of financial regulations can allow transnational corporations to harm any country while staying beyond the reach of all of them.²⁴⁴ Conflict of laws, the discipline that governs the application of state laws to interstate activity, must immediately join and eventually lead this effort to redesign our territorially tethered legal system to survive these transjurisdictional times. With everyday life becoming increasingly dependent on the internet every day, it seems that the deck is stacked in favor of conflict of laws. To win that game, we would only have to play it.

²⁴³ Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES (May 20, 2011) (quoting Chief Justice John Roberts).

²⁴⁴ See William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1 (2019).

CHAPTER III

Gerrymandered by Definition: The Distortion of “Traditional” Districting Criteria and a Proposal for Their Empirical Redefinition

Chapter III is co-authored with Professor Jowei Chen, University of Michigan.

INTRODUCTION

What are “traditional” redistricting criteria? Although the question may seem mostly to be in service of scholarly curiosity, its answer actually has immediate practical consequences because adherence to traditional criteria grants districting plans a prima facie impression of constitutionality and serves as a strong defense to racial gerrymandering claims.²⁴⁵ Put differently, in the context of redistricting criteria, the word “traditional” is synonymous with “legal.” Because of the redistricting to follow the 2020 census and the decennial reapportionment, the meaning of “traditional redistricting criteria” has rarely been more pertinent than it is now.

However, this critically important term remains surprisingly ill-defined. The Supreme Court has never explicitly stated the qualities that make a districting criterion “traditional” or the full list of the traditional criteria themselves, stating only that “traditional” redistricting criteria “includ[e] but [are] not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests[.]”²⁴⁶ This definition was apparently left open-ended deliberately to incorporate what states consider to be traditional redistricting principles, because “[w]here these or other [traditional criteria] are the basis for redistricting . . . a State can ‘defeat a claim that a district has been gerrymandered on racial lines.’”²⁴⁷ At the same time, the Court has been reluctant to expand that list: the Court has often mentioned that a state has used a

²⁴⁵ See *Bush v. Vera*, 517 U.S. 952, 962 (1996) (“[T]he neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be subordinated to race.”).

²⁴⁶ *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

²⁴⁷ *Miller*, 515 U.S. at 916, citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*).

particular redistricting criterion, without explicitly stating whether that criterion is “traditional.”²⁴⁸

Although flexible guidelines are more easily adapted to changing circumstances than are rigid bright-line rules, that same flexibility also makes guidelines easier to abuse.²⁴⁹ Unfortunately, in redistricting, flexibility is contributing more to abuse than to good-faith adaptation. Exploiting the lack of an intelligible definition of “traditional criteria,” legislators and electoral candidates are distorting this term in service of their interests, at the expense of the public’s. Specifically, if the Supreme Court has ever said that a state used a particular districting rule even once and that rule happens to be expedient, interested parties claim that the Court endorses it as a “traditional” criterion. For example, expert witnesses retained by state legislatures have claimed that *Shaw v. Hunt* (*Shaw II*) recognizes incumbency protection as “traditional,”²⁵⁰ even though that case does nothing of the sort—the ruling says only that North Carolina has used it as a criterion.²⁵¹ Such reasoning is about as persuasive as a pharmaceutical company claiming that heroin should be legalized as a flu treatment, because it used to sell the drug legally for that purpose in the past.²⁵²

To curb such abuses of law and logic, this Article advances a definition of “traditional districting criteria” that adheres to a commonly understood meaning of tradition: widely accepted as standard practice. We propose that a districting criterion be considered traditional only if a

²⁴⁸ See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*) (noting that the North Carolina legislature had used incumbency protection as a districting criterion, without determining whether that criterion was “traditional”); *Easley v. Cromartie*, 532 U.S. 234, 240 (2001) (commenting that the North Carolina state legislature had used incumbency protection as the stated justification for its redistricting plan, without stating whether incumbency protection is traditional, defining the term traditional principles, or giving any examples of traditional principles).

²⁴⁹ Cf. David Olson & Stefania Fusco, *Rules Versus Standards: Competing Notions of Inconsistency Robustness in Patent Law*, 64 ALA. L. REV. 647, 664 (2012) (“The Supreme Court has consistently replaced the Federal Circuit’s bright-line rules with standards that . . . promot[e] flexible decision-making, but, simultaneously, allow more inconsistency to persist in the system.”); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 407-09 (1959) (arguing that 18 U.S.C. § 371 (1952), which criminalizes any conspiracies to “defraud the United States . . . in any manner or for any purpose” approximates a standard); Gideon Parchomovsky & Alex Stein, *Essays*, *Catalogs*, 115 COLUM. L. REV. 165, 194 n.185 (arguing that 18 U.S.C. § 371 may be excessively vague).

²⁵⁰ *League of Women Voters v. Commonwealth*, 178 A.3d 737, 779 (Pa. 2018) (stating that Dr. Wendy K. Tam Cho was retained by the Commonwealth of Pennsylvania); Decl. of Wendy K. Tam Cho, at 10, *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Dec. 4, 2017) (“Incumbent protection has been mentioned by the Court as one of the traditional districting principles . . . see, e.g., *Shaw v. Hunt*. . .”),

https://www.brennancenter.org/sites/default/files/audio/LWV_v_PA_Expert_Report_WendyTamCho.pdf.

²⁵¹ See *Shaw II*, 517 U.S. at 907.

²⁵² See AMIR ZADA ASAD & ROBERT HARRIS, *THE POLITICS AND ECONOMICS OF DRUG PRODUCTION ON THE PAKISTAN-AFGHANISTAN BORDER* 52 (1st ed. 2019).

majority of states require or allow it in constitutions, statutes, or legislative guidelines, and fewer than a quarter prohibit it. We also submit that a criterion considered to be traditional in either state or congressional districting should be treated as such in both. According to our database of state redistricting laws and our definition of “traditional”—permitted by 26 or more states and prohibited by 12 or fewer—equal population, compactness, contiguity, and preserving city and county boundaries are traditional criteria. Partisan advantage, incumbent protection, preserving past district cores, and preserving communities of interest, among others, are not traditional.

We propose our definition of traditional districting criteria—which we call the empirical definition—because it would distinguish traditional criteria from non-traditional criteria in an objective fashion. An objective definition is necessary because its absence in the status quo is inviting conflicted parties to claim that any expedient rule that a state has ever used is traditional. Even if it is assumed that judges—many of whom are elected²⁵³—tend to be unaffected by partisan bias, our definition is still needed to enhance the legitimacy of court-ordered redistricting plans. Even when courts decide whether a criterion is traditional in good faith, the fact that judges drawing up redistricting plans in the status quo must effectively create their own definitions of “traditional criteria” risks inviting claims that judicial activism is hijacking the democratic process.²⁵⁴ The empirical definition would enhance the substantive legitimacy of redistricting by reducing the ability of conflicted parties to manipulate it, as well as its political legitimacy by forcing court rulings to reflect precisely what most states consider to be “traditional” criteria.

Of course, the majority’s collective decisions might not always be correct or normatively just; theoretically, the legislatures of twenty-six states could conspire to recognize as traditional those criteria that advance political expedience at the expense of the public interest. We maintain that voters care enough about gerrymandering that a conspiracy among states to circumvent the

²⁵³ See Scott W. Gaylord, *Section 2 Challenges to Appellate Court Elections: Federalism, Linkage, and Judicial Independence*, 69 CASE W. RES. L. REV. 117, 147-48 (2018) (“In adopting popular elections as their method of judicial selection, twenty-two states [require] appellate judges [to] . . . be accountable to all the voters in the state.”).

²⁵⁴ See, e.g., *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 n.72 (N.D. Fla. 1996) (“we cannot deny the Florida Legislature the first opportunity to adopt a new redistricting plan. . . [because] to do otherwise would encourage the very type of judicial activism in the political process that this Court has a duty to avoid.”); Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1328 (1987) (stating that “a traditional objection to judicial activism” in partisan gerrymandering cases is that “the remedy for the evil should be sought in the legislature, not in the courts”).

empirical definition, if it materialized, is unlikely to succeed. For example, the recent successful ballot initiatives that transferred districting authority from legislators to independent redistricting commissions were caused by voters' perception that politicians "choose their own districts" and their frustration "with dysfunctional governance and unresponsive legislators[.]"²⁵⁵ Nevertheless, recognizing the possibility of the worst-case scenario, the empirical definition requires traditional districting criteria to be endorsed by a majority of states *and* prohibited by fewer than a quarter. A quarter, the same amount needed to defeat proposed amendments to the U.S. Constitution,²⁵⁶ was chosen to meaningfully check a majority's excesses while minimizing frivolous obstruction.

This Article proceeds as follows. Part I elaborates on how conflicted parties and even the Supreme Court abuse the term "traditional redistricting criteria," while scholars fail to provide satisfactory alternatives to the status quo. Part II presents the legal and political justifications for our empirical definition of traditional districting criteria, as well as ways for courts to employ the empirical definition. In the status quo, if state law is silent on whether a redistricting criterion is traditional, the decision falls to the discretion of the court that happens to hear a districting case. For example, a court might mandate equal population in congressional districting because state law requires it in state legislative districting,²⁵⁷ while another court might let the state legislature advantage a particular party in districting because state law does not prohibit it.²⁵⁸ However, if courts uniformly applied the empirical definition to determine whether a criterion is "traditional" whenever their own state's laws failed to provide guidance, voters would become less beholden to the whims of their judges or the states of their residence for protection from gerrymandering.

Whereas Part II justifies the empirical definition with the practical gains it would present, Part III uses constitutional theory to validate it. This theoretical persuasion is necessary because judicial acceptance is vital to the empirical definition's success, but judges "are more likely to be interested in the logic and symmetry of the law than in the objects and policies to be attained

²⁵⁵ David Gartner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 551 (2019).

²⁵⁶ U.S. Const. art. V.

²⁵⁷ See *League of Women Voters v. Commonwealth*, 178 A.3d at 815 ("[T]he focus on these neutral factors [equal population, compactness, contiguity, and preserving boundaries of political subdivisions] must be viewed . . . as part of a broader effort . . . to establish 'the best methods of representation to secure a just expression of the popular will.' . . . Consequently, these factors have broader applicability beyond setting standards for the drawing of electoral districts for state legislative office.").

²⁵⁸ See *Wilson v. Kasich*, 981 N.E.2d 814, 820 (Ohio 2012) ("[T]he Ohio Constitution does not mandate political neutrality in . . . reapportionment. . . . [The legislature was] not precluded from considering political factors . . .").

through the law.”²⁵⁹ Some scholars are also wary of what they see as the excessive quantification of districting law. The argument goes that some quantitative metrics would determine the legality of a districting plan according to whether it has certain properties they deem relevant, instead of merely helping courts identify whether a clearly defined illegal element exists.²⁶⁰ For a simplified comparison, imagine that an automated system identifies “speeding” according to a car’s color, not its speed.²⁶¹ Relying on such metrics would turn judges into legislators,²⁶² because they would be imposing a new definition of “speeding” on society. Overreliance on quantitative metrics may also incentivize litigants to produce increasingly abstruse ones,²⁶³ which could mislead judges.²⁶⁴

Part III.A argues that the empirical definition does not turn judges into legislators. Instead of imposing newfangled policy on a reluctant society, the empirical definition defines a central element of districting law according to both the public will and the Supreme Court’s requirement of traditionality. To invoke the speeding analogy, the empirical definition is akin to asking courts to define speeding as going over, say, 65 mph because that is how states generally define it²⁶⁵ and because the Supreme Court has so far failed to define speeding in an objectively discernible way, even as it claims to want a traditional definition. Indeed, judicial legislation is better represented by the status quo, where each court applies to districting disputes its own definition

²⁵⁹ Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816, 841-42 (1936).

²⁶⁰ See Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 983 (2019) (“Government conduct might be lawful or unlawful depending upon (non)conformity to metrical tests. This would distort the role and nature of constitutional law. Rights are best understood as creating zones of protection that provide non-conditional weight to certain characteristics or activities. . . . The invocation of such right . . . only requires that the government action intersects a protected characteristic.”).

²⁶¹ See Todd L. Cherry & Pablo Andrade, *Bright Cars and Outsiders: Evidence of Asymmetric Estimates in Vehicular Speeds*, 31 J. APPLIED SOCIAL PSYCHOLOGY 2538, 2538 (2001) (“An analysis of speeding records indicates that brightly colored vehicles systematically receive citations for relatively lower speeds.”).

²⁶² See Eisler, *supra* note 16 (“[W]ithout a principled framework that contextualizes why the metrical qualities of a gerrymander comprise a constitutional wrong, such judgments would comprise a . . . form of judicial legislation.”).

²⁶³ *Id.* at 985 (“If courts define illegal partisan gerrymandering by metrics, it would . . . allow those executing partisan gerrymanders to continue to deploy increasingly sophisticated methods without effective judicial oversight.”).

²⁶⁴ See, e.g., Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015).

²⁶⁵ See JOHN MCCORMICK, *ACID EARTH: THE GLOBAL THREAT OF ACID POLLUTION* 63 (2013) (stating that, following a change in the federal speed limit in 1987, the limit was “raised to 105 kph/65 mph on most interstate highways”). In reality, unlike redistricting criteria, it is difficult to say which limit most states use because it depends on many factors, including the type of road. See Allen M. Brabender, *The Misapplication of Minnesota’s Speeding Statute and the Need to Raise the Posted Limit or Expand Use of the Dimler Amendment*, 27 HAMLINE L. REV. 1 (2004).

of traditional criteria on a case-by-case basis, often influenced by conflicted, partisan interests.²⁶⁶ Moreover, the empirical definition’s simple numerical formula merely represents a belief that a majority of the states are more likely to define traditional criteria in the public interest, than are litigants hidden from societal scrutiny pushing redistricting plans meant to get themselves reelected in perpetuity.

Part III.B then shows that the empirical definition advances a constitutional principle that courts purport, but often fail, to follow: that redistricting rules cannot unduly discriminate against any candidate. Although the Supreme Court ostensibly requires districting proposals to be based on “consistent and nondiscriminatory application of a legitimate state policy,”²⁶⁷ courts would in fact condone certain discriminatory criteria if applied consistently to all eligible districts in a state. For example, *Larios v. Cox* held that a districting map advantaging Democratic incumbents could have been upheld if it had similarly protected Republican incumbents,²⁶⁸ and the Supreme Court recently held that incumbent protection is traditional,²⁶⁹ albeit without good reason.²⁷⁰ We submit that incumbent protection, by definition, discriminates by advantaging certain candidates for this election on the basis of the votes they won in the last one—whether that cartel includes one or both sides of the aisle is irrelevant. Moreover, the courts’ consistent application approach would incorrectly deem certain widely accepted criteria to be nontraditional, such as contiguity.

Part III relies on two types of corroboration. We first show that abusive districting criteria such as incumbent and partisan advantage do in fact lack majority state support, using our dataset indicating if a state requires, allows, prohibits, or is silent (as far as is known) on eleven criteria. Although the full dataset is posted online instead of as an appendix due to its size (28 columns by 103 rows), we present summary statistics as to how many states took what position as of April 2020 on each districting criterion.²⁷¹ Our dataset improves on existing datasets, which tend to be

²⁶⁶ See, e.g., *Smith v. Hosemann*, 852 F. Supp. 2d 757, 766-67 (S.D. Miss. 2011) (final order implementing judicially created redistricting plan, which would not force any incumbent to move despite there being no requirement to “consider incumbent residences”); *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. 2012) [*hereinafter Hippert II*] (adopting a districting plan that reflected “certain elements” from districting plans proposed by each of the litigants).

²⁶⁷ *Brown v. Thomson*, 462 U.S. 835, 844 (1983).

²⁶⁸ *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga.) [*hereinafter Larios I*], *aff’d*, 542 U.S. 947 (2004).

²⁶⁹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

²⁷⁰ See *infra* Part I.A.

²⁷¹ See COMPLETE STATE REDISTRICTING CRITERIA DATABASE [*hereinafter COMPLETE DATABASE*], available at <https://sites.lsa.umich.edu/yunsieg/research/>; see also SUMMARY STATE REDISTRICTING CRITERIA DATABASE [*hereinafter SUMMARY DATABASE*], available at <https://sites.lsa.umich.edu/yunsieg/research/>.

inaccurate,²⁷² outdated,²⁷³ or not specific as to which districting criteria a state requires.²⁷⁴ We then present our interpretation of various districting criteria and how they are used in reality, to show that the districting criteria we deem abusive not only lack the support of a majority of the states, but would also make elections inherently inequitable. For example, we argue that preserving communities of interest is likely to be abused to justify partisan or incumbent advantage after the fact, because the term *communities of interest* is so open-ended as to be effectively meaningless.

Before proceeding, we emphasize that this Article uses “abusive districting practices” as a term of art that refers specifically to two things. First, abusive districting criteria refer to those that have falsely or baselessly been presented to courts as traditional. Second, abusive districting criteria are practices privately expedient to certain groups of voters or candidates, at the expense of the public interest. Hence, not all nontraditional criteria are abusive. For example, preserving precinct lines is not traditional under the empirical definition because it lacks support among the states, but it is not abusive because, as far as we know, it has not been challenged in scholarship or courts as meaningfully distorting elections or districting. In contrast, incumbent protection and partisan advantage are nontraditional *and* abusive because they lack requisite support and would unduly favor certain interests, as discussed below. Plainly, this definition of “abusive” excludes constitutional districting practices that protect disadvantaged voting blocs. Such measures do benefit certain groups such as racial minorities, but that benefit is not against the public interest.

I. THE CURRENT DEFINITION OF “TRADITIONAL DISTRICTING CRITERIA” AND ITS ABUSE

A. A Definition Built on Logical Fallacies and Conflicts of Interest

²⁷² A database maintained by the National Conference of State Legislatures omits that Kentucky requires preserving district cores in congressional districting, Maine requires communities of interest to be preserved in state districting, and that Ohio requires the same in congressional districting, among other examples. This database lists the correct criteria for Missouri and Utah but cites the wrong provisions. See NAT’L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING CRITERIA (2019), available at <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> [<https://perma.cc/GT2M-WJJ9>]; see *supra* note 27 and accompanying text.

²⁷³ For example, a dataset provided by the Minnesota state senate is current only up to 2010. See MINNESOTA STATE SENATE, DISTRICTING PRINCIPLES FOR 2000S PLANS (IN ADDITION TO POPULATION EQUALITY), available at https://www.senate.mn/departments/scr/REDIST/Red2010/appx_principles.htm [<https://perma.cc/8JX4-58AB>].

²⁷⁴ Databases provided by Professor Justin Levitt appear to be current for at least some districting criteria, but provide information with respect to only five districting principles. See JUSTIN LEVITT, ALL ABOUT REDISTRICTING (2019), available at <http://redistricting.ils.edu/where-tablestate.php> [<https://perma.cc/XME5-MKC9>].

As briefly discussed in the introduction, the Supreme Court does not intelligibly define the qualities of “traditional districting criteria” or give the full list of them, instead identifying only a few criteria that it considers to be traditional and leaving the list open-ended. For example, *Bethune-Hill v. Virginia State Board of Elections* lists “compactness, contiguity of territory, and respect for communities of interest” as examples of traditional criteria.²⁷⁵ *Miller v. Johnson* rules that traditional criteria “includ[e] but [are] not limited to compactness, contiguity, and respect for political subdivisions”²⁷⁶ The Court’s longstanding refusal to define traditional redistricting criteria is perhaps best epitomized by *Vieth v. Jubelirer*, whose plurality opinion acknowledges that one incumbent justice recognized incumbency protection as traditional in a dissent to a past Supreme Court ruling, but never clarifies whether incumbency protection is in fact traditional.²⁷⁷

When a rule is vaguely defined, there are no clear restrictions as to who defines it or how, and a profit can be made from defining it in a certain way, interested parties will define that rule to their liking. As such, legislators and major party operatives have been frank about wanting to manipulate election rules for their own gain. For example, Mike Turzai, then-Majority Leader of the Pennsylvania House of Representatives, stated in 2012 that a law requiring voters to present ID would “allow Governor Romney to win the state of Pennsylvania, done.”²⁷⁸ Thomas Hofeller, then-Redistricting Director for the Republican National Committee, told the National Conference of State Legislatures in 2001—without any hint of irony—that redistricting is a “great event” that “is like an election in reverse” because “the politicians get to pick the voters.”²⁷⁹ Interested parties manipulate the central rule governing districting, the definition of “traditional,” by marketing the logical fallacy that any expedient rule that a state has used even once is traditional, which plainly contravenes a dictionary definition of that word: widely considered to be standard practice.²⁸⁰

²⁷⁵ 137 S. Ct. 788, 795 (2017).

²⁷⁶ 515 U.S. at 916.

²⁷⁷ 541 U.S. 267, 298 (2004) (stating that Justice Souter has previously recognized incumbency protection as a traditional districting criterion in a dissent to *Vera*, 517 U.S. at 952, but not stating whether it is a traditional districting criterion).

²⁷⁸ Mackenzie Weinger, *Pa. Pol: Voter ID Helps GOP Win State*, POLITICO, June 25, 2012, available at <https://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811>.

²⁷⁹ Nat’l Conference of State Legislatures, *2000 Redistricting Review*, C-SPAN (Aug. 13, 2001), <https://www.c-span.org/video/?165594-3/2000-redistricting-review> (at 34:01).

²⁸⁰ See THE OXFORD DICTIONARY OF DIFFICULT WORDS 441 (Archie Hobson ed. 1st ed. 2004) (defining “traditional” as “habitually done, used, or found”).

For a recent example of this fallacy at work, take the testimony of Dr. Wendy K. Tam Cho on behalf of the legislative defendants in *League of Women Voters v. Pennsylvania*:

Incumbent protection has been mentioned by the Court as one of the traditional districting principles (See, e.g., [.] *Shaw v. Hunt*, *Easley v. Cromartie*, or *Karcher v. Daggett*) and discussed in the political science literature as a common consideration in the redistricting process (Mann and Cain, 2005; Bullock, 2010). . . . [Dr. Jowei Chen, an expert testifying on behalf of the plaintiffs] unambiguously states . . . that incumbent protection is not a traditional districting principle. In my opinion, this statement is in error. . . . [I]t is unclear how [Dr. Chen] would reconcile this position with . . . *Karcher v. Daggett* . . . *Shaw v. Reno* . . . [or] *Burns v. Richardson*, 384 U.S. 73, 89 n.16²⁸¹

However, none of the sources cited by Dr. Cho corroborate her claim that incumbency protection is a “traditional” districting criterion endorsed by the Supreme Court. Most show only that the Court is aware that some states have attempted to protect incumbents in redistricting plans, and one source appears to contradict her claim. For example, the following excerpt is the only part of *Shaw II* that mentions incumbency protection in the vicinity of traditional districting principles:

. . . strict scrutiny applies when race is the “predominant” consideration in drawing the district lines such that “the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations.” . . . We do not quarrel with the dissent’s claims that . . . partisan politicking was actively at work in the districting process. That the legislature addressed these interests does not in any way refute the fact that race was the legislature’s predominant consideration. Race was the criterion that, in the State’s view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.²⁸²

As the excerpt shows, *Shaw II* is saying only that the Supreme Court is aware of North Carolina having used incumbency protection as a districting rule. Taking *Shaw II* as an endorsement of incumbency protection as a “traditional” districting principle is like reading a New York Times

²⁸¹ 178 A.3d at 737; see Cho, *supra* note 6 at 10-11, 21-22. Dr. Cho was retained by the state of Pennsylvania in the same case. See *League of Women Voters v. Commonwealth*, 178 A.3d at 779.

²⁸² 517 U.S. at 907.

article saying that it is theoretically possible to swim in the East River, and taking that as an endorsement of swimming in possibly toxic waste that presents a nontrivial risk of drowning.²⁸³

Like *Shaw II*, the other cases cited by Dr. Cho fail to support her claim that incumbency protection is a traditional districting criterion, or are irrelevant to it. *Easley v. Cromartie* states only that the *trial* court recognized protecting incumbents as a “legitimate political goal” without ever indicating whether the Supreme Court regards it as a “traditional districting principle.”²⁸⁴ Justice Thomas’ opinion further undermines Dr. Cho’s claim regarding incumbency protection, because he states explicitly that *Cromartie* does not address the issue as to whether incumbency protection is actually a legitimate political goal.²⁸⁵ *Shaw v. Reno (Shaw I)*, like *Shaw II*, discusses incumbency protection only as a consideration made by the North Carolina state legislature.²⁸⁶ *Burns v. Richardson* says only that incumbency protection does not, in itself, establish intent of invidious racial discrimination;²⁸⁷ *Karcher v. Daggett* does not refer to “traditional districting criteria,” while mentioning incumbency protection only in the same context as *Burns*.²⁸⁸

As for the scholarly sources cited by Dr. Cho, the first one makes the same error that she does: it says that the “[Supreme] Court has sanctioned the protection of incumbency as a legitimate redistricting objective” by relying on *Burns* and *White v. Weiser*,²⁸⁹ both of which state only that incumbency protection, in itself, is not evidence of invidious racial discrimination,²⁹⁰ not that it is a “traditional” criterion. The second source apparently contradicts Dr. Cho’s claim that the Supreme Court endorses incumbency protection as a “traditional districting principle”:

²⁸³ Jonathan Wolfe, *New York Today: A Beach in Manhattan*, N.Y. TIMES, Aug. 23, 2018, available at <https://www.nytimes.com/2018/08/23/nyregion/new-york-today-beach-manhattan.html> (stating that New York City police officers advise against swimming in the East River due to strong currents); Adrienne Jeffries, *Into the Murky Waters: Hundreds Brave New York City’s East River for Annual Swim*, THE VERGE, Jul. 8, 2013, available at <https://www.theverge.com/2013/7/8/4503362/brooklyn-bridge-swim-nyc-swim> (describing a swim event in the East River despite its reputation as a “stinky, polluted canal where the city pumps sewage and the mob dumps bodies.”).

²⁸⁴ 532 U.S. at 248.

²⁸⁵ *Id.* at 263 n.3 (“I assume, because the District Court did, that the goal of protecting incumbents is legitimate No doubt this assumption is a questionable proposition. Because the issue was not presented in this action, however, I do not read the Court’s opinion as addressing it.”).

²⁸⁶ 509 U.S. at 655-56.

²⁸⁷ 384 U.S. 73, 89 n.16 (1966).

²⁸⁸ 462 U.S. 725, 740-41 (1983).

²⁸⁹ 412 U.S. 783 (1973).

²⁹⁰ Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 92, 98 (Thomas E. Mann & Bruce E. Cain eds. 2005).

Especially when it comes to drawing the lines for state legislative districts and local legislative bodies, protecting incumbents often gets high priority because it is incumbents who create the new districts. . . . While there is no obligation to protect incumbents, neither must a jurisdiction go out of its way to imperil them or to make their districts more competitive. Protecting incumbents cannot justify deviations from the equal population standards, nor would it withstand a challenge under the Voting Rights Act. One scholar estimates that the congressional plans drawn following the 2000 Census sought to protect 231 of the House incumbents. . . .²⁹¹

Although Dr. Cho’s assertions regarding traditional criteria are particularly fallacious, she is only one of many witnesses to have muddled the definition of traditional criteria in prominent redistricting litigation in the guise of expertise. In *Common Cause v. Lewis*, Dr. Thomas Brunell claims that “preserving the cores of districts . . . incumbency protection, and permissible levels of partisanship” are traditional districting criteria because the North Carolina General Assembly treated them as such.²⁹² Dr. M.V. Hood also claims that incumbency protection is traditional for the same reason,²⁹³ while Dr. Douglas Johnson makes the same assumption with no basis.²⁹⁴ In *Rucho v. Common Cause*, Drs. Hood and James Gimpel claim traditional status for incumbency protection and preserving district cores without evidence.²⁹⁵ Regardless of the intent behind them, these fallacious claims would enable legislators to write the rules of the game to their advantage if courts accept them. In contrast, the empirical definition would make such schemes by states and legislators less likely, by requiring traditional criteria to be endorsed by a majority of states.

²⁹¹ CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 100 (2010).

²⁹² Decl. of Thomas Brunell, at 3, *Common Cause v. Lewis*, Case No. 18 CVS 014001 (N.C. Super. Ct. 2019) (No. LDTX291), available at <https://www.nccourts.gov/assets/inline-files/LDTX291.pdf> [<https://perma.cc/L6ME-RTZS>].

²⁹³ Decl. of Douglas Johnson, at 24, *Common Cause v. Lewis*, Case No. 18 CVS 014001 (N.C. Super. Ct. 2019) (No. LDTX287), available at <https://www.nccourts.gov/assets/inline-files/LDTX287.pdf> [<https://perma.cc/LVF8-YHQ9>].

²⁹⁴ Decl. of M.V. Hood, at 8-10, *Common Cause v. Lewis*, Case No. 18 CVS 014001 (N.C. Super. Ct. 2019) (No. LDTX284), available at <https://www.nccourts.gov/assets/inline-files/LDTX284.pdf> [<https://perma.cc/6H2Q-SUJJ>].

²⁹⁵ Decl. of M.V. Hood, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, at 3 (No. 1:16-CV-1026-WO-JEP), available at <http://s10294.pcdn.co/wp-content/uploads/2016/05/Expert-First-Rebuttal-Declaration-of-M-V-Hood-III.pdf> [<https://perma.cc/C8EF-TQXX>]; Decl. of James Gimpel, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, at 14 (No. 1:16-CV-1026-WO-JEP), available at <http://s10294.pcdn.co/wp-content/uploads/2016/05/Expert-Report-of-James-G-Gimpel.pdf> [<https://perma.cc/4B8N-E49P>].

Not only expert witnesses but also state legislatures and redistricting bodies engage in the fallacy of presenting a statement of fact—that a state has used a particular districting rule—as an endorsement of that same practice by the Supreme Court. For example, the National Conference of State Legislatures claims that Michigan is required to preserve, as far as is possible, the shapes of existing districts in any state legislative redistricting plan.²⁹⁶ However, nothing in the relevant provision requires the preservation of past districts.²⁹⁷ The only discernible reason for the NCSL interpreting this law as requiring the preservation of past districts is that it requires the state to follow *Miller*. Yet, the majority in that case says only that the Georgia state legislature’s own rules allow preserving the cores of existing districts,²⁹⁸ which is neither an endorsement nor an imposition as a requirement. Meanwhile, the Arkansas Board of Apportionment fails to cite any state or federal court case whatsoever to corroborate its claim that maintaining “continuity of representation” and “existing districts” are “redistricting criteria approved by the courts[.]”²⁹⁹

When conflicting interpretations of case law muddle up the doctrinal landscape, it has historically been the Supreme Court’s function to clear up the confusion by issuing a definitive statement of the law. The Court typically intervenes by way of a circuit split,³⁰⁰ but a split is not always required. For example, in *League of Women Voters v. Pennsylvania*, the parties disputed whether Pennsylvania’s proposed redistricting plan violated traditional districting criteria.³⁰¹ When the state supreme court’s order invalidating that plan came to the Supreme Court,³⁰² the Court could have taken the case and stated definitively the law on traditional districting criteria. Even when no doctrinal confusion exists, the Court has intervened when existing law is clearly

²⁹⁶ See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 28.

²⁹⁷ Mich. Comp. Laws Ann. § 4.261(1).

²⁹⁸ 515 U.S. at 906 (“Both the House and the Senate adopted redistricting guidelines which, among other things, required single-member districts of equal population, contiguous geography. . . . Only after these requirements were met did the guidelines permit drafters to consider other ends, such as maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents.”).

²⁹⁹ Redistricting Criteria Approved by the Courts, ARKANSAS BOARD OF APPORTIONMENT, <https://arkansasredistricting.org/redistricting-criteria/> [https://perma.cc/7VFA-YKD5?type=image].

³⁰⁰ See *Braxton v. United States*, 500 U.S. 344, 347 (1991) (“A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among . . . courts . . . concerning the meaning of provisions of federal law.”).

³⁰¹ 178 A.3d at 797.

³⁰² *League of Women Voters of Pennsylvania v. Commonwealth*, 175 A.3d 282, 284, *cert. denied sub nom. Turzai v. Brandt*, 139 S. Ct. 445, 202 L. Ed. 2d 313 (Pa. 2018).

undesirable: for example, *Erie Railroad Co. v. Tompkins* famously overturned longstanding doctrine that created a federal common law because it had enabled rampant forum shopping.³⁰³

In redistricting law, however, the Supreme Court has served only to somehow further obfuscate the effectively nonexistent definition of traditional criteria. We have already discussed how the Court has so far failed to rule intelligibly on what constitutes traditional criteria, even as individual justices commented on, for example, whether protecting incumbents is a traditional criterion.³⁰⁴ In *Rucho v. Common Cause*, the Court added to this morass of confusion in the course of justifying its refusal to intervene in cases that present nonjusticiable political questions:

[P]erhaps fairness should be measured by adherence to “*traditional*” *districting criteria*, such as maintaining political subdivisions, keeping communities of interest together, and *protecting incumbents*. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as Amici Curiae; Brief for Professor Wesley Pegden et al. as Amici Curiae in No. 18-422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts [italics added for emphasis].³⁰⁵

The Court’s designation of incumbency protection as “traditional” may seem to bring a much-needed end to a frustrating squabble. However, this statement only obfuscates further exactly what distinguishes a traditional rule from the rest, because nothing in the briefs cited by Chief Justice Roberts supports the claim that incumbency protection is a traditional districting rule. The brief filed by Members of Congress cites only “compactness, regularity, and maintenance of communities of interest” as traditional,³⁰⁶ whereas Dr. Pegden and colleagues list “population equality . . . preservation of [political] boundaries, any Voting Rights Act requirements, and . . .

³⁰³ 304 U.S. 64, 74-75 (1938) (“Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects . . . and the benefits expected to flow from the rule did not accrue. . . . *Swift v. Tyson* . . . made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.”).

³⁰⁴ See *supra* notes 33, 41 and accompanying text (describing Justice Souter’s position that incumbency protection is a traditional criterion and Justice Thomas’ position that it is a “questionable proposition.”).

³⁰⁵ 139 S. Ct. 2484, 2500 (2019).

³⁰⁶ Brief for Bipartisan Group of Current and Former Members of the House of Representatives as Amici Curiae in Support of Appellees, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), 2019 WL 1125764, at *7.

compactness[.]”³⁰⁷ and rely on literature that explicitly disregards incumbency protection.³⁰⁸ If history is any indication, the Court’s labeling of a districting practice as “traditional” in *Rucho* with no apparent basis will likely be interpreted as an imprimatur for the abuse that we criticize: if a court ever mentions an expedient districting rule and “traditional” in the same breath—even if it cites to a cookbook—interested parties would claim that the expedient practice is traditional.

At this point, a reader may still wonder why it is so important to have a firm definition of “traditional” districting criteria, or why it is so disastrous that *Rucho* named certain practices as “traditional” for no apparent reason. For example, before *Rucho*, the Supreme Court had neither endorsed incumbency protection nor outlawed it, so one may think that it is permissible for states to claim that it is “traditional” in the absence of a concrete definition of that term. As for *Rucho*, one may care only about the fact that the Court finally stated whether incumbency protection is traditional or not, and not about why—just as a typical motorist is unlikely to care whether she is required to drive on the left or right side of the road, as long as everyone drives on the same side.

Who defines traditional districting criteria and how must be normatively justified because both influence the outcomes. For the driving orientation or traffic light colors, who decides them and how are unimportant because what matters in those cases is that a rule exists, not its content. Whether motorists drive on the left or right, whether “go” is indicated by green or blue,³⁰⁹ or who selects the final rule³¹⁰ does not disrupt traffic, as long as everyone in each country drives on the same side and recognizes the same color to mean “go.” In contrast, certain districting criteria and who chooses them, such as incumbent protection urged by legislators, can lead to meaningfully different outcomes from other districting rules chosen by less conflicted entities, such as voters. As such, a proper iteration of traditional districting criteria requires not only an uncontroversial definition of that term, but also an objectively discernible and normatively defensible process for creating that definition. Unfortunately, the status quo satisfies neither

³⁰⁷ Brief of Amici Curiae Professors Wesley Pegden, Jonathan Rodden and Samuel S.-H. Wang in Support of Appellees, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 1125802, at *12.

³⁰⁸ *Id.* at *24 n.3 (2019) (citing Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L.J. 331, 332 (2015) (“... applying only the traditional redistricting criteria that have been emphasized in virtually all recent court decisions including *LULAC [et al. v. Perry]*, 548 U.S. 399 (2006): compactness, contiguity, and population equality.”)).

³⁰⁹ FRANK SCHIPPER, *DRIVING EUROPE: BUILDING EUROPE ON ROADS IN THE TWENTIETH CENTURY* 135 (2008); HARU YAMADA ET AL., *THE 7 KEYS TO COMMUNICATING IN JAPAN: AN INTERCULTURAL APPROACH* 177 (2017).

³¹⁰ *Cf.* 1001 IDEAS THAT CHANGED THE WAY WE THINK 530 (Robert Arp ed. 2013) (attributing the origin of the red-yellow-green traffic light color scheme to a British railway engineer and an American police officer).

condition, as indicated by the Supreme Court’s nebulous position on what traditional criteria are and how they are defined.

Although justifying the need for reform is straightforward, doing so prompts the question of which alternative to choose. Despite our opposition to the free-for-all represented by the status quo, we are not claiming that our empirical definition of traditional districting criteria, at least 26 states in favor and no more than 12 against, is the *only* conceivable solution. Those who support reducing conflicted interests’ influence on districting may nevertheless oppose a simple majority count of the states, as opposed to a count of the states that comprise a majority of the population, as the means of gauging the national consensus. Others may argue that traditional criteria should include not only districting practices that prevail now, but also some rules that states have legally used in the past; federal courts have indeed interpreted the word “traditional” to encompass both connotations absent qualifications, in many other contexts.³¹¹ Still others may oppose traditional criteria altogether, because neither popularity nor longevity guarantees sound law or policy.³¹²

We nevertheless advance the empirical definition due to the compelling need to curb self-dealing in redistricting and for the sake of feasibility. If traditional criteria included practices that states have used legally in the past, that definition would legitimize the behavior that this Article criticizes: conflicted interests cherrypicking and presenting as “traditional” any expedient criteria that a state has ever used. By limiting the definition of traditional criteria to practices prevailing in the present, the empirical definition would reduce self-dealing in redistricting. For illustration, consider another term that is defined by tradition but only includes behavior seen as current and widespread. Federal courts have defined customary international law as “a general and consistent practice of states”³¹³ or “rules that States universally abide by”³¹⁴ out of a sense of legal obligation. These definitions unmistakably refer only to conduct widely observed in the present, not the past.

³¹¹ See, e.g., *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (defining traditional public fora as property “devoted to assembly and debate” whether “by long tradition or by government fiat”); *Peabody Twentymile Mining, LLC v. Sec’y of Labor*, 931 F.3d 992, 998 (10th Cir. 2019) (“[A] method could be accepted by MSHA inspections over a considerable period of time . . . or by regulations that limit or define such methods. . . . The broad language of the regulation would permit all of these methods to qualify as ‘traditionally accepted.’”).

³¹² See, e.g., John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991).

³¹³ *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307-08 (2d Cir. 2000).

³¹⁴ *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1019 (9th Cir. 2014).

As for determining “traditional” status by a head count of the states, we use this measure because it is an objectively discernible metric of support that, like many judicial tests favored by the Supreme Court, would be “simplicity itself to apply.”³¹⁵ While a count of the states may be a shorthand, a more complex metric may entail “high litigation costs and unpredictable results.”³¹⁶ Moreover, this shorthand is largely in keeping with how the rest of our constitutional and legal systems are designed: the Constitution can be amended with the support of 38 or more states³¹⁷ and many federal statutes allow state law to define their scope or their operative words, such as “property.”³¹⁸ We consider our definition of traditional criteria to be preferable to alternatives that may seem superior in theory but are infeasible in reality, such as scrapping traditional districting criteria altogether. Even though many aspects of existing election law and even our constitutional system are antiquated,³¹⁹ we believe that an incremental reform of that law and system are a more constructive attempt at change than unrealistic demands for an immediate and total overhaul.³²⁰

Indeed, the empirical definition of traditional districting criteria is a particularly fitting reform for the status quo, given the objectively discernible nature of our proposed definition, the unintelligibility of the existing definition, and *Rucho*’s justification for refusing to adjudicate partisan gerrymandering cases. In *Rucho*, the Supreme Court justified abstention on the grounds that there exist no discoverable and manageable judicial standard with which to determine how much partisan gerrymandering is unconstitutionally excessive and, even if that standard existed, federal courts lack the authority to impose certain districting criteria on the states or the people.

³¹⁵ *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 459-60 (2015) (“*Brulotte* . . . is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. . . . *Brulotte*’s ease of use appears in still sharper relief when compared to *Kimble*’s proposed alternative. . . . [W]hatever its merits may be . . . that ‘elaborate inquiry’ produces notoriously high litigation costs and unpredictable results.”).

³¹⁶ *Id.*

³¹⁷ U.S. Const. art. V.

³¹⁸ See Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 142 (2020).

³¹⁹ See, e.g., Anthony J. Gaughan, *Ramshackle Federalism: America’s Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1022 (2016) (“The outdated nature of the Electoral College only scratches the surface of the election system’s problems.”).

³²⁰ See Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (but Not Quite) Version 2.0*, 65 ME. L. REV. 77, 92 (2012) (“Even under the best of circumstances, the requirement that three-fourths of the states must ratify constitutional amendments makes it nearly impossible to achieve significant change in our written Constitution through the Article V process.”); *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 103rd Cong. 132 (1993) (“Generally, change in our society is incremental . . . Real change, enduring change, happens one step at a time.”), available at <https://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf>.

Chief Justice Roberts explains how potentially reasonable visions of “fair” electoral rules may be mutually exclusive, and that choosing one of them will inevitably be a political, not legal, task:

The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in [redistricting]. . . . Fairness may mean a greater number of competitive districts. . . . But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. . . . On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by . . . cracking and packing, to ensure each party its “appropriate” share of “safe” seats. . . . Such an approach, however, comes at the expense of competitive districts. . . . Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as . . . keeping communities of interest together, and protecting incumbents. . . . But protecting incumbents, for example, enshrines a particular partisan distribution. . . . Deciding among just these different visions of fairness . . . poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments³²¹

Although Chief Justice Roberts is understandably reluctant to wade into the deepest of modern political quagmires, the empirical definition would not require him or any other judge to impose as law their personal opinions on traditional criteria. Instead, the empirical definition would ask courts only to enforce what most states already consider to be traditional criteria, which would broadly make redistricting challenges legal, not political, disputes. The empirical definition is all the more necessary given that the Court’s refusal to police the development of redistricting law is resulting not in the political process giving gerrymandering disputes a fair hearing, but conflicted parties manipulating the definition of “traditional” criteria in litigation to make said manipulation easier with every lawsuit. Accordingly, we propose that districting criteria gain traditional status only if 26 or more states require or allow them in constitutions, statutes, or legislative guidelines *and* 12 or fewer states explicitly prohibit the use of those same criteria in redistricting.

³²¹ *Rucho*, 139 S. Ct. at 2500.

Part I.A having established the necessity of a new, empirical definition of traditional districting criteria, Part I.B proceeds to examine existing scholarship on the status quo definition of traditional redistricting criteria, its proposals of alternative solutions, and their ramifications.

B. Existing Scholarship on the Status Quo Definition of Traditional Districting Criteria

Existing legal scholarship fails to offer satisfactory alternatives to the current definition of traditional districting criteria or neglects the need for such an alternative. Broadly categorized, existing scholarship takes two positions on the definition of traditional districting criteria. The first group says that there is nothing to be done because the existing definition is not sufficiently problematic or because it cannot be changed. The second group appears to acknowledge that the status-quo definition is problematic, but focuses excessively on creating a quantifiable measure of partisan gerrymandering or an easily implementable solution to it—to the point of appearing to neglect whether that quantitative measure is accurate or that intuitive solution is useful.

1. Resignation or Denial

This camp of scholars apparently assumes that the status-quo definition is either a fait accompli or sufficiently tolerable, both of which lead to questionable implications. For example, consider Professor J. Gerald Hebert's description of traditional redistricting principles:

Traditional, race-neutral districting principles often vary from one state to the next. Consequently, it is not possible to provide a detailed and complete list of such principles, especially because the Supreme Court itself has been reluctant to designate any such list as comprehensive. . . . Decisions from the Supreme Court over the course of the last decade in the *Shaw* line of cases, however, do yield some guidance as to the districting principles that can be used to defeat a racial gerrymandering claim. . . . there are at least five such traditional redistricting principles in particular that have been acknowledged by

the Court: compactness; contiguity; respect for political subdivisions; respect for communities of interest; and protection of incumbents and other political factors.³²²

Professor Hebert’s claim that “[t]raditional . . . districting principles often vary from one state to the next” and that “it is not possible” to precisely define that term is yet another example of the fallacy identified in Part I.A. That is, Professor Hebert is assuming that whatever redistricting practice a state has ever legally employed is a “traditional districting principle,” even though this kind of loose definition enables conflicted interests to cherry-pick expedient districting criteria.

A corollary of this fallacious understanding is that the same districting plan may survive a gerrymandering challenge in one state but not in another, meaning that voters may get materially different levels of protection from abusive districting depending on which state they happen to live in. For illustration, assume that Connecticut and Kansas pass a hypothetical districting plan that would prevent incumbent state legislators from competing against one another for reelection. Connecticut law is silent on whether incumbent protection is traditional,³²³ while Kansas requires that “[c]ontests between incumbent members of the [state] Legislature . . . be avoided whenever possible.”³²⁴ Pursuant to Professor Hebert’s understanding of traditional criteria, courts may rule that the plan is constitutional in Kansas but not in Connecticut because Kansas explicitly allows incumbent protection but Connecticut does not. Because compliance with traditional districting criteria grants a redistricting plan *prima facie* constitutional status,³²⁵ conflicting definitions of traditional criteria may give voters in various states different levels of constitutional protection.

Another strain of this type of research apparently believes in the existence of a consensus on the meaning of the term “traditional districting requirements,” despite decades of litigation disputing whether a single districting criterion—such as incumbency protection—qualifies as

³²² J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 450 (2000).

³²³ As far as we are aware, the only specific redistricting requirement stipulated in Connecticut law is contiguity in state legislative districts. *See* Conn. Const. art. III, §§ 3, 4. Otherwise, Connecticut law requires redistricting to “be consistent with federal constitutional standards.” *See id.* at § 5.

³²⁴ Kansas Legislative Research Department, *Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting* 4(e) (2012), available at http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf [<https://perma.cc/MVB3-RZWF>].

³²⁵ *See Shaw I*, 509 U.S. at 647 (“[Traditional] criteria are important . . . because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.”).

“traditional.”³²⁶ For example, take Professor Katharine Inglis Butler’s recommended strategy for minimizing judicial challenges to redistricting plans in the wake of the *Shaw* line of cases:

Avoid fragmenting concentrations of minority population, but do not subjugate traditional districting criteria to race. . . . [T]he federal courts should adhere strictly to traditional districting criteria The best protection against future challenges to a districting plan is to follow traditional districting standards interpreted in a manner likely to produce sensible, fair election districts that are consistent with identified representational goals. Only rarely, and perhaps never, does federal law require that jurisdictions violate these standards. Even constitutionally permissible accommodations for minorities generally can be made within the confines of these standards.³²⁷

Although her categorical statements about the apparent consequences of traditional redistricting criteria may indicate otherwise, Professor Butler’s article never defines that term or confronts its opacity over 134 pages. Not knowing what Professor Butler considers to be traditional criteria, it is impossible to evaluate her claim that “following traditional districting criteria increases the likelihood that legislators will be able to effectively represent their constituents.”³²⁸ Butler’s apparent assumption that a consensus exists on the definition of “traditional” is fallacious for the same reason that Justice Potter Stewart’s definition of pornography is: “I know it when I see it”³²⁹ works only when a consensus definition exists but that definition is hard to describe intelligibly, not when such a consensus does not exist to begin with.³³⁰ In the latter case, “I know

³²⁶ See, e.g., *Cromartie*, 532 U.S. at 263 n.3 (Thomas, J., dissenting) (stating that the goal of protecting incumbents is a “questionable proposition”); *Vera*, 517 U.S. at 1047-48 (Souter, J., dissenting) (listing incumbency protection as a “traditional districting principle widely accepted among States”).

³²⁷ Katharine Inglis Butler, *Redistricting in A Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 221, 270 (2002).

³²⁸ *Id.* at 253.

³²⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the . . . material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”)

³³⁰ See Paul Gewirtz, Essay, *On “I Know It When I See It”*, 105 YALE L.J. 1023, 1025 (1996) (“[F]rom the perspective of the traditional model of judging, ‘I know it when I see it’ is disturbing. . . . The decision seems to be based on a nonrational, intuitive gut reaction, instead of reasoned analysis; it seems to be utterly subjective and personal. . . . Instead of explaining himself with reasons, [Stewart] seems just to assert his conclusion with self-referential confidence.”) See also *Karcher*, 462 U.S. at 755 (Stevens, J., concurring) (“One need not use . . . ‘I know it when I see it’ . . . as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation . . .”).

it when I see it” amounts to no more than resignation to, or denial of, an unsatisfactory status quo.

2. Quantifiable Measures and Intuitive Ideas at the Expense of Useful Solutions

Unlike the first group of scholars, this second group recognizes the defects of the status-quo definition of traditional redistricting criteria and attempts to remedy them. However, these scholars appear to be concerned more about whether their proposals are “judicially discoverable and manageable”³³¹ than about whether they improve upon the existing definition of traditional redistricting criteria. Specifically, these scholars advance quantitative and seemingly intuitive measures of how well a state has complied with a districting criterion, but fail to show that those quantitative measures actually measure the things they are intended to measure, or whether those measures are useful in curbing racial gerrymandering or other undesirable redistricting practices.

For an example of such a proposal, take Professor Melissa Saunders’ proposed method of determining whether a district is acceptably compact. Professor Saunders states that, even as the Supreme Court prohibited states from subordinating “traditional . . . districting principles . . . to racial considerations[,]”³³² the Court failed to elaborate on what those principles are, or how states would know if said principles were subordinated to racial considerations.³³³ Professor Saunders then argues that the Court must adopt precise, quantitative measures that would show “exactly what state actors must do in order to avoid triggering” its rule against racial gerrymandering:

The Court needs to explain exactly what state actors must do in order to avoid triggering [*Shaw I*’s prohibition against race-conscious districting]. The best, and perhaps only, way for the Court to do this is to replace *Miller*’s vague “predominant factor” test with a rigid

³³¹ See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating that an indication of a case presenting a nonjusticiable political question is “a lack of judicially discoverable and manageable standards for resolving” said question).

³³² *Miller*, 515 U.S. at 916.

³³³ See Melissa L. Saunders, Essay, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 *YALE L.J.* 1603, 1633 (2000) (“What are the traditional districting principles to which the Court refers? How is compliance with those districting principles to be measured? And how much compliance with them is necessary to establish that they have not been “subordinated” to race? Absent these specifics, the rule that the Court has promulgated is much like one that says the police should give suspects warnings before interrogating them, but fails to specify the precise content of those warnings.”).

rule that the strict scrutiny of *Shaw* applies . . . to districts that not only are the product of a districting process in which race was intentionally considered, but that also fail to comply with certain clearly identified districting principles. This would mean replacing the amorphous and potentially open-ended term “traditional districting principles” with a finite list of districting criteria that have specific and objective content. *For example, the Court might say that the districts must . . . have a dispersion-compactness score of at least 0.24 and a perimeter-compactness score of at least 0.12.* Compliance . . . would not be constitutionally required Rather, it would be a safe harbor of sorts for states . . . a way to deny those who would mount equal protection challenges³³⁴ [emphasis added]

Part II discusses the legal and political problems inherent in the Supreme Court imposing a set of redistricting criteria by fiat, and why the empirical definition would instead have courts utilize criteria that are already used by most states. The point here is that, even if such problems did not exist, Professor Saunders’ measure of compactness with “specific and objective content” would not accurately measure whether a district is *constitutionally permissible*. To see why a numerical measure is not necessarily an accurate measure, consider the intuitively comparable example of the intelligence quotient (IQ). Many consider the IQ to be an objective, quantitative measure of human intelligence, with groups such as Mensa accepting members on the basis of IQ tests and the media calling them “high intelligence” societies.³³⁵ However, experts have shown that IQ tests may not accurately measure intelligence as a whole—the most widely used IQ tests returned similar results when they were used to measure mathematical skill, but were wildly inconsistent in domains of intelligence less amenable to quantification such as artistic and linguistic ability.³³⁶

Just as measures of quantitative skill do not necessarily measure intelligence accurately, Professor Saunders’ measure of compactness would not accurately measure whether a district is constitutionally permissible. Assuming arguendo that dispersion- and perimeter-compactness

³³⁴ *Id.* at 1634-35.

³³⁵ See Mola Lenghi, *Are You Smart Enough—Mensa Smart?*, NBC DALLAS-FORT WORTH, Oct. 6, 2011, available at <https://www.nbcdfw.com/news/local/are-you-smart-enough-mensa-smart/1904713/>.

³³⁶ See, e.g., Howard Gardner & Thomas Hatch, *Multiple Intelligences Go to School: Educational Implications of the Theory of Multiple Intelligences*, 18 EDUCATIONAL RESEARCHER 4, 8 (1989).

scores accurately measure compactness,³³⁷ using a threshold value to measure the constitutional permissibility of a district is problematic for two reasons. First, cutoff values are often arbitrary. To see why, recall that *Lewis* struck down districting plans proposed by the North Carolina house and senate,³³⁸ even though both plans had dispersion- and perimeter-compactness scores that were twice to thrice as high as the suggested values of 0.24 and 0.12.³³⁹ Second, even if that threshold were higher, saying that states would be in a safe harbor if they met the test for only one or some of many contributing factors to gerrymandering is inviting abuse. State districting plans with less than ten percent population deviation are presumptively constitutional, but that rule is far from a safe harbor because population deviation is only one possible indication of abusive districting.³⁴⁰

A recent variation of this type of research seems to recognize the arbitrary nature of using a single cutoff value to determine compliance with a districting criterion. However, in attempting to avoid an arbitrarily strict threshold, this scholarship appears to have dragged that bar down so low that the judicial test becomes toothless. Take Professor Michael McDonald’s “predominance test,” a proposed measure of whether a district’s compactness is constitutionally permissible:

[T]he proposed Predominance Test works in the following manner: first, create a maximally compact comparison plan by (1) drawing any mandatory districts and freezing them into place; and (2) drawing the most compact plan possible for the remaining districts, while respecting equal population and contiguity. Then, compare districts in the

³³⁷ *Contra* Aaron Kaufman, Gary King & Mayya Komisarichik, *How to Measure Legislative District Compactness If You Only Know It When You See It*, __ AM. J. OF POL. SCI 20-21 (forthcoming) (“[D]ifferent measures generate different conclusions in practice? . . . For any two measures, it is easy to draw a districting plan where the measures change the rankings of compactness in *any* arbitrary way. . . . [O]ur measure correlates quite low with most measures but at about 0.9 for convex hull and Polsby-Popper, and similarly high correlations for the naïve average of all measures.”), available at <https://gking.harvard.edu/files/gking/files/compact.pdf> [<https://perma.cc/HD32-KN2T>].

³³⁸ *Common Cause v. Lewis*, Case No. 18 CVS 014001 (N.C. Super. Ct. 2019), available at https://www.nccourts.gov/assets/inline-files/18-CVS-14001_Final-Judgment.pdf [<https://perma.cc/WB9V-2M74>].

³³⁹ Decl. of Jowei Chen, at 27, 58, *Common Cause v. Lewis*, Case No. 18 CVS 014001 (N.C. Super. Ct. 2019) (No. PX123) (showing that the invalidated plans have dispersion-compactness scores of 0.412 and 0.427, and perimeter-compactness scores of 0.321 and 0.348), available at <https://www.nccourts.gov/assets/inline-files/EX0001.pdf> [<https://perma.cc/4UGU-LEUA>].

³⁴⁰ *See Brown*, 462 U.S. at 842-45 (“Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. . . . [However,] [t]his does not mean that population deviations of any magnitude necessarily are acceptable. Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate . . . fair and effective representation if the population disparities are excessively high.”).

target plan (the plan being analyzed) to their maximally compact district equivalents. *If the compactness of a target district is less than fifty percent of the maximally compact district, then discretionary factors have predominated over compactness and a violation has occurred.* . . . [The] Predominance Test . . . provides a judicially manageable standard to identify when a compactness violation occurs [T]he test does not establish a [standard] that must be applied uniformly to all districts; rather, compactness is evaluated with respect to what is possible in the district’s geographic region [emphasis added].³⁴¹

In short, Professor McDonald would require states to draw the most compact districts as feasible, while accounting for other districting criteria such as equal population and contiguity. Then, he would accept as constitutional any plan that achieves half of the compactness achieved by the original plan. Setting aside the arbitrariness of the fifty-percent minimum, we fail to see the point in drawing up a plan that would minimize gerrymandering and then permitting states to perform only half as well. This plan is akin to devising the most feasibly stringent limit for pollutants in tap water, carefully balancing the effects to public health and the utility services’ ability to stay in business while complying with costly regulations, and then informing the utilities that they are allowed to pollute twice as much as that limit. The fifty-percent slack was presumably intended to account for “what is possible” in a particular region, but Professor McDonald’s plan already took that into account when it first asked the states to “draw[] the most compact plan possible[.]” In such a case, the fifty-percent slack would amount only to inviting abusive districting practices.

Part I having established the inadequacy of the status quo definition of traditional districting criteria and of the improvements proposed by existing scholarship, Part II proceeds to elaborate on our proposed empirical definition of traditional districting criteria, its legal and political justifications, and two alternative avenues for the empirical definition’s application.

II. THE EMPIRICAL DEFINITION’S PRACTICAL JUSTIFICATIONS

Part I demonstrated that there exists a dire, and so far unmet, need to replace the existing definition of traditional redistricting criteria; Part II will show that this Article advances a worthy

³⁴¹ Michael McDonald, *The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting*, 129 YALE L.J. FORUM 18, 20 (2019).

replacement. Our empirical definition would have the Supreme Court brand as “traditional” only those districting criteria that are required or permitted by 26 or more states and are prohibited by 12 or fewer, in state constitutions, statutes, or legislative guidelines.³⁴² By relying only on sources and qualifications that are objectively determinable, the empirical definition of traditional redistricting criteria would end the abuse in the status quo that has resulted from a subjectively stated standard, which conflicted parties can easily manipulate in service of their private interests because the Supreme Court has never intelligibly defined or meaningfully enforced it.

In addition to mending a defect in constitutional doctrine, the empirical definition would present other practical gains that would make redistricting more equitable legally and legitimate politically. Part II.A gives two advantages of the empirical definition for the legal system. First, unlike other judicial tools such as balancing tests, the empirical definition would not rely on judges’ personal normative preferences for enforcement,³⁴³ thereby reducing risks of undesirable judicial activism. Second, compared to the status quo, the empirical definition would make court cases on redistricting more predictable, which would make protection from gerrymandering less reliant on happenstance. Part II.B gives the empirical definition’s political benefits: for example, it would reflect public sentiment and check potential excesses of the majority. Finally, Part II.C presents two alternative ways for judges to use the empirical definition, and their consequences. Enhancing the equity and legitimacy of elections is inherently valuable, but it is ever more so at a time when undermining confidence in elections is an increasingly popular election strategy.³⁴⁴

³⁴² In this umbrella term we include guidelines created by legislative committees and by arms of the state government conducting redistricting in the legislature’s place. For example, a legislative committee publishes districting guidelines in Alabama, whereas a Board of Apportionment including the Governor conducts redistricting in Arkansas pursuant to its own guidelines. *See supra* note 55 and accompanying text; Reapportionment Committee Guidelines, PERMANENT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT (2019), *available at* <http://www.legislature.state.al.us/aliswww/reapportionment/Reapportionment%20Guidelines%20for%20Redistricting.pdf> [<https://perma.cc/Z76Z-LQEH>].

³⁴³ *See, e.g.*, James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095, 1103 (2000) (“Reliance on balancing tests assures that judicial determinations of constitutionality are ad hoc. Courts . . . undertake fact intensive inquiries [to] determin[e] the weight of the relevant variables which tip the . . . balance. Such inquiries are not the traditional judicial activity of applying the law to the facts of the case. Rather they are more like the traditional legislative function of determining which among competing values will carry the day.”).

³⁴⁴ *See, e.g.*, Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1587-88 (2019).

A. The Legal Justifications

1. Exorcising the Specter of Judicial Activism from Districting Law

The status quo in redistricting law is the result of the Supreme Court attempting to choose what it sees as the better of two undesirable options: trudge into the deeply politicized swamp of partisan districting and be branded as activist judges bent on subverting democracy, or refuse to intervene for fear of judicial activism and be accused of incompetence instead. The Court chose the latter by declaring in *Rucho* that partisan gerrymandering, for all of its known defects, was off-limits from judicial intervention.³⁴⁵ The reaction was swift and as expected by the Court, with the dissenting opinion arguing that the majority refused to act because it falsely sees the task of “remedy[ing] a constitutional violation . . . [to be] beyond judicial capabilities[.]”³⁴⁶ scholars claiming that the Court showed a “conservative-over-constitutionalist tendency,”³⁴⁷ and the press saying that “the Supreme Court just said federal courts can’t stop partisan gerrymandering[.]”³⁴⁸

Yet, even though some scholars accuse the Court of “subvert[ing] core judicial functions required by Article III . . . to extraconstitutional considerations[.]”³⁴⁹ there exists a facially valid reason for wanting to stop judges from singlehandedly controlling the fate of redistricting plans. Assume that the Supreme Court authorizes judges to conjure up and impose their own ideas of traditional—and therefore constitutionally permitted—redistricting criteria, as many scholars apparently want the Court to do.³⁵⁰ Further assume that a districting plan drafted by a legislature controlled by one party is presented to an elected judge who identifies with that same party,

³⁴⁵ *Rucho*, 139 S. Ct. at 2507 (“What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited . . .”).

³⁴⁶ *Id.* at 2509 (Kagan, J., dissenting).

³⁴⁷ Gary Lawson, “*I’m Leavin’ It (All) Up to You*”: *Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2019 CATO SUP. CT. REV. 31, 64.

³⁴⁸ Andrew Prokop, *The Supreme Court Just Said Federal Courts Can’t Stop Partisan Gerrymandering*, VOX, June 27, 2019, available at <https://www.vox.com/policy-and-politics/2019/6/27/18681923/supreme-court-gerrymandering-partisan-rucho-common-cause>.

³⁴⁹ G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1345 (2020).

³⁵⁰ See, e.g., Saunders, *supra* note 89 (proposing that the Supreme Court impose a “finite list of districting criteria that have specific and objective content” without stating what would authorize the Court to do so).

which has happened³⁵¹ and could happen again, since “most state judges are elected.”³⁵² Under these assumptions, a hypothetical judge could reject a politically inconvenient districting rule by stating that it contradicts the judge’s sincerely-held beliefs on traditional redistricting criteria.

Lest the reader believe this hypothetical to be cynical or ludicrous, some elected judges have done far worse for more bald-faced reasons of self-interest. For example, elected judges in Texas³⁵³ and Alabama³⁵⁴ can solicit campaign donations from attorneys with cases before them. This system apparently enabled a reelected judge to ask a local lawyer for “an amount reflective of the \$2,000 contribution you made towards my defeat” while threatening to impose an “up-charge” for “tardiness.”³⁵⁵ Such behavior is hardly anecdotal, because a long line of empirical research shows that elected judges tend to rule differently for paying customers.³⁵⁶ The fact that political interests and the witnesses they retain subordinate the law to their interests and a desire to stop them from doing so are not reasons to think that judges will be above the same behavior. Due mainly to these concerns, the empirical definition uses constitutions and legislative sources but not court-ordered districting plans to determine the “traditional” status of various criteria.³⁵⁷

³⁵¹ See *Common Cause v. Lewis*, Case No. 18 CVS 014001, at 357 (N.C. Super. Ct. 2019) (showing Judge Joseph N. Crosswhite as a presiding judge), available at https://www.nccourts.gov/assets/inline-files/18-CVS-14001_Final-Judgment.pdf [<https://perma.cc/WB9V-2M74>]; Christina Zhao, *After North Carolina Judges Toss Out Maps in Gerrymandering Lawsuit, Top GOP Lawmaker Says He Won’t Appeal Decision*, NEWSWEEK, Sep. 3, 2019 (identifying Judge Crosswhite as a Republican), available at <https://www.newsweek.com/after-north-carolina-judges-toss-out-maps-gerrymandering-lawsuit-top-gop-lawmaker-says-he-wont-1457549>; Judicial Performance Evaluation Survey – Phase I at 1, N.C. BAR ASSOCIATION (identifying Judge Crosswhite as a candidate for election), available at <https://www.ncbar.org/wp-content/uploads/2016/03/ncba-jpe-report-phase-i-pdf.pdf> [<https://perma.cc/7BSH-CJ5R>].

³⁵² M. Ryan Harmanis, *States’ Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 740 (2015).

³⁵³ See Tex. Gov’t Code Ann. § 33.051 (West) (a)(1); Tex. St. C.J.C. Canon 4(D)(1); Gilbert Garcia, *Appeals Court Judge Accepts \$11,000 from Lawyers in Pending Cases*, SAN ANTONIO EXPRESS-NEWS, Oct. 11, 2016, available at https://www.expressnews.com/news/news_columnists/gilbert_garcia/article/Appeals-court-judge-accepts-11-000-from-lawyers-9964880.php.

³⁵⁴ See Brief of Amici Curiae Thomas R. Phillips Wallace B. Jefferson Perry O. Hooper, Sr. and Sue Bell Cobb in Support of Respondent, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (No. 13-1499), 2014 WL 7405738 at *15.

³⁵⁵ *Id.*

³⁵⁶ See, e.g., Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 J. L. & POL. 645 (1999) (finding a correlation between arbitral rulings from the Supreme Court of Alabama and the sitting justices’ sources of campaign funding); Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241 (2000) (finding a significant relationship between campaign contributions and judicial rulings in the courts of last resort in Alabama, Kentucky, and Ohio).

³⁵⁷ There are still other reasons to not rely on court-ordered redistricting plans to determine the traditional status of a criterion, one being unpredictability: when a court orders that a districting plan be drawn pursuant to particular criteria, those criteria often apply only to that specific redistricting plan and the court is not claiming to be primarily responsible for conducting redistricting for that state in the future. See, e.g., *Hosemann*, 852 F. Supp. 2d at 765.

Nevertheless, compared to the prospect of relying on unfettered judicial discretion, the idea of abstaining completely from enforcing proper conceptions of traditional districting criteria is no more appealing because, as shown in Part I.A, the partisan forces with the loudest voices would simply present their own interests as law—complete judicial abstinence would be akin to letting the largest vigilante mob impose its own idea of criminal law. Our empirical definition of traditional districting criteria would eliminate this dilemma by presenting a third option: have the courts enforce proper notions of traditional districting criteria, but derive those notions from objectively identifiable evidence of what most states deem them to be. For example, seven states require or allow advantaging incumbents in congressional districting, while 14 prohibit it.³⁵⁸ In those states whose law is silent on incumbency protection, judges could rely on the empirical definition to rule that it is not traditional. Because courts would be relying on what most states have already determined, they would become more resistant to accusations of judicial activism.

Because the empirical definition would rely on what a majority of states consider to be traditional districting criteria, a reader may think that 26 states could conspire to circumvent it by codifying politically expedient districting criteria such as incumbency protection. Part II.B.1 will discuss how the combination of a safety device—that a districting criterion must be prohibited by 12 states or fewer in order to be considered traditional—and the increasing public scrutiny over abusive districting practices would foil such a conspiracy, if it were ever to materialize. For now, Part II.A.2 proceeds to discuss the second legal justification for the empirical definition: that it would, compared to the status quo, make voters less beholden to the happenstance of who their judges are and the states of their residence for constitutional protection from abusive districting.

2. A (More) Uniform Level of Constitutional Protection

In the status quo, the accident of where a voter lives and which judge happens to adjudicate plans to redraw her electoral district can determine her level of protection from abusive districting. For example, districting intended to advantage a particular party is decidedly

³⁵⁸ See COMPLETE DATABASE and SUMMARY DATABASE, *supra* note 27. Specifically, for congressional redistricting, eight states are silent (as far as is known) on whether incumbency protection is a permitted districting criterion, eleven states do not stipulate any required, allowed, or prohibited districting criterion in their laws, and seven states elect only one member each to the House of Representatives.

not a traditional criterion pursuant to the empirical definition because 17 and 14 states prohibit it respectively in state legislative and congressional redistricting.³⁵⁹ In North Carolina, however, “[p]olitical considerations and election results data may be used” to draw state legislative districts,³⁶⁰ whereas congressional redistricting must make “reasonable efforts . . . to maintain the current partisan makeup of North Carolina’s congressional delegation,” which consisted of ten Republicans and three Democrats at the time the state’s districting guidelines were published.³⁶¹

As for the rest of the states, whether a voter is protected from partisan districting is up to the vagaries of the court that adjudicates a districting plan. For example, consider the judgments of the courts of last resort in three states, whose constitutions or statutes are silent on the legality of partisan districting, on proposed redistricting plans that would allegedly advantage a particular political party. The Supreme Court of West Virginia refused to “intrude upon the province of the legislative policy determinations to overturn the Legislature’s redistricting plan[.]” citing the lack of “discern[i]ble standards for assessing partisan gerrymandering[.]”³⁶² In contrast, the Supreme Court of Ohio did not consider partisan gerrymandering claims to be nonjusticiable but upheld an allegedly partisan redistricting plan because “the Ohio Constitution does not mandate political neutrality in the reapportionment of house and senate districts[.]”³⁶³ Finally, the Supreme Court of Pennsylvania invalidated an allegedly partisan congressional districting plan, by interpreting a state constitutional guarantee of “free and equal” elections as banning partisan redistricting.³⁶⁴

At this point, a reader may accept that the status quo gives voters living in different states different degrees of protection from certain districting practices, such as advantaging particular parties or protecting incumbents, but still question why the status quo must be changed. That is, why must there be less variation in what courts consider to be traditional districting criteria, as opposed to letting each judge choose whichever districting criteria that would not result in racial gerrymandering? The first argument for having a uniform set of traditional districting criteria, as

³⁵⁹ See *supra* note 27 and accompanying text.

³⁶⁰ N.C. House and Senate Plans Criteria, HOUSE AND SENATE REDISTRICTING COMMITTEES 1 (2017), available at https://www.dropbox.com/s/79092edav03alh3/NC_2017-08-10_2017HouseSenatePlanCriteria.pdf?dl=0 [<https://perma.cc/QM5X-J4XG>].

³⁶¹ N.C. Congressional Plan Criteria, JOINT SELECT COMMITTEE ON REDISTRICTING 1 (2016), available at https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf [<https://perma.cc/E5WD-QAWF>].

³⁶² *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 389-90 (W. Va. 2012).

³⁶³ See *Kasich*, 981 N.E.2d at 820.

³⁶⁴ *League of Women Voters v. Commonwealth*, 178 A.3d at 821.

discussed in Part I.A, is that state-by-state variation has enabled conflicted interests to claim that any expedient rule is traditional. However, an even more important reason is that excessive state-by-state variation would undermine the constitutional guarantee of one-person, one-vote. To see why partisan advantage in redistricting, for example, undermines that guarantee, consider the fallacies in the Supreme Court’s refusal to intervene in partisan gerrymandering in *Rucho*:

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But . . . [i]t hardly follows from [one-person, one-vote] that . . . a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support. . . . [O]ne-person, one-vote . . . refers to the idea that each vote must carry equal weight. . . . [E]ach representative must be accountable to (approximately) the same number of constituents. That requirement does not . . . mean that each party must be influential in proportion to its number of supporters. . . . Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. . . . Unlike partisan gerrymandering claims, a racial gerrymandering claim . . . asks . . . for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.³⁶⁵

Contrary to the Supreme Court’s claim, however, partisan gerrymandering plainly contravenes one-person, one-vote. Assume, for example, that a state has 50 voters, 30 of whom vote for Party A and 20 for Party B.³⁶⁶ Further assume that each district elects one representative and consists of ten voters. Under proportional representation, this state would elect three representatives from Party A and two from Party B. However, assume that each district is drawn to include six voters who support Party A and four who support Party B. Then, because Party A’s candidates would win in every district by two votes, this state would elect five, not three, candidates from Party A. According to *Rucho*, the Supreme Court would uphold this districting plan because there is no constitutional guarantee of proportional representation and partisanship cannot be eliminated.

The Supreme Court’s presentation of partisan gerrymandering claims as being simply about proportional representation is a red herring. The aforementioned partisan gerrymandering

³⁶⁵ *Rucho*, 139 S. Ct. at 2501-02.

³⁶⁶ See Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST, Mar. 1, 2015, available at <https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/>.

example violates one-person, one-vote because the districting eliminates 20 voters' influence on government by guaranteeing that their votes will be wasted, not because the plan fails to create partisan quotas. The Court's claim that, under partisan gerrymandering, each representative would still be accountable to the same number of voters is farcical: if the electoral map is drawn to change in each district the six votes for Party A into ten votes and the four votes for Party B into zero, rational representatives would ignore voters who support Party B. For an even simpler comparison, imagine that the NBA announces that any team based in Philadelphia will hereafter qualify for the playoffs only if it wins every single game during the regular season. The Court's argument is tantamount to claiming that the Sixers have no ground to complain because they are still theoretically eligible for the playoffs, and because no city has a right to be represented there.

Because redistricting intended to advantage certain parties contravenes one-person, one-vote, there exists a constitutional imperative to reduce the ability of states or judges to legitimize partisan gerrymandering in the guise of traditional districting criteria. The same applies to other abusive districting practices such as protecting incumbents from competition, because such a practice would dilute or waste the votes of those who support a nonincumbent. In the status quo, states and judges are given excessive leeway to justify abusive districting practices because the Supreme Court effectively refuses to define or enforce the term "traditional districting criteria."

Establishing the necessity of the empirical definition prompts the following question of how broadly to apply it. Should judges consult the empirical definition only when their own state's law is silent on what traditional districting criteria are, or should the empirical definition bind a judge in, say, North Carolina to ban partisan gerrymandering, despite the state legislature requiring partisan advantage in redistricting plans? Before discussing those options and their consequences, Part II.B. advances two political justifications for the empirical definition.

B. The Political Justifications

1. A Check Upon the Excesses of a Rogue Majority

Part II.A cited practical gains expected from the empirical definition that fall in the realm of law: it would reduce the courts' vulnerability to accusations of judicial activism and remedy a doctrinal defect. These gains may be enough of a reason to propose the empirical definition, if all we were interested in was making sound law. However, the empirical definition's goal is not just

to fix a technical flaw, but also to rectify a very substantive harm that falls in the realm of public policy—the existing definition of traditional districting criteria distorts elections. Therefore, the empirical definition must not only be legally sound but also politically viable, in the sense that it must be able to survive the legislative process and public scrutiny to be implemented as policy. In that respect, an obstacle to the empirical definition’s success as policy may appear to be that the legislatures of 26 states could rig that definition to their advantage by legislatively labeling as “traditional” any expedient districting rule, such as partisan advantage or incumbent protection.

Such a conspiracy may seem to be dangerously plausible because the empirical definition examines a state’s own laws to determine which criteria that state considers to be traditional, but American voters have been either inattentive to who their legislators are or too forgiving of what they do in office. To those with at least a passing familiarity with state politics, the reelection of legislators convicted of crimes such as bribery,³⁶⁷ sex with a minor,³⁶⁸ or eight felonies,³⁶⁹ with some candidates running unopposed³⁷⁰ are something of a running joke. Perhaps not surprisingly, political science research shows that representatives have taken “unpopular roll-call positions . . . [with] few implications for most legislators’ re-election prospects.”³⁷¹ Given this state of affairs, readers may believe that, once the empirical definition is implemented, the legislatures of 26 states might simply circumvent it by writing expedient redistricting criteria into state law.

However, we believe that such a conspiracy, if it occurred, is unlikely to succeed. Despite many voters’ admittedly low level of interest in state legislators, the public attention paid to state legislative acts on districting is much more intense and persistent compared to, say, the attention

³⁶⁷ Michael D’Onofrio, *Convicted State Rep. Brown Mum on Resignation as Sentencing Nears*, PHILADELPHIA TRIBUNE, Nov. 8, 2018, available at https://www.phillytrib.com/news/elections/convicted-state-rep-brown-mum-on-resignation-as-sentencing-nears/article_d1fcb8b6-57fc-5c7b-b068-1d15938389e9.html.

³⁶⁸ Jeremy Diamond, *Virginia Lawmaker Wins Re-election Despite Jail Term for Relationship with 17-Year-Old*, CNN, Jan. 14, 2015, available at <https://www.cnn.com/2015/01/14/politics/lawmaker-jailed-wins-reelection/index.html>.

³⁶⁹ Niraj Warikoo, *Lawmaker Re-elected Despite 8 Felonies*, DETROIT FREE PRESS, Nov. 4, 2014, available at <https://www.freep.com/story/news/local/michigan/2014/11/04/michigan-legislature-voting/18505617/>.

³⁷⁰ See, e.g., Debra Cassens Weiss, *State Lawmaker Imprisoned for Barratry Is Re-elected in Jail, Released in Time for Legislative Session*, A.B.A. J., Jan. 10, 2019, available at <http://www.abajournal.com/news/article/lawmaker-imprisoned-for-barratry-is-re-elected-in-jail-and-released-in-time-for-legislative-session>; see also Steve Brown, *Two-Thirds of State Legislators Are Unopposed in the General Election*, WBUR, Nov. 1, 2018, available at <https://www.wbur.org/news/2018/11/01/massachusetts-state-house-election-preview>.

³⁷¹ Steven Rogers, *Electoral Accountability for State Legislative Roll Calls and Ideological Representation*, 111 AM. POL. SCI. REV. 555, 567 (2017).

paid to a legislator’s position on a bill defining what a bank is³⁷²—such a bill, to our knowledge, has not yet provoked the kinds of protests inspired by gerrymandering.³⁷³ As such, we argue that legislators would find it harder to act in brazenly self-serving ways in redistricting: the political science research cited in the previous paragraph states that “[i]nstead of evaluating how their representatives act on a broad ideological spectrum, voters may care about their representatives’ votes on key issues.”³⁷⁴ In cases where widespread calls for reform were met by “unresponsive legislators”³⁷⁵ in many states, voters passed redistricting reforms by constitutional amendment.³⁷⁶ The fact that constitutional amendments cannot be undone by statute would make attempts to circumvent the empirical definition by legislating expedient districting criteria even less feasible.

Despite the low likelihood of a successful conspiracy among state legislatures to legislate expedient districting criteria, the empirical definition accounts for the unlikely event by requiring that a districting criterion must be prohibited by 12 or fewer states to be considered “traditional.” For example, as of this Article’s publication, ten states require or allow advantaging incumbents in state legislative redistricting and seven do the same in congressional redistricting.³⁷⁷ Even if 16 and 19 of the states whose law is silent on the issue passed overnight incumbency protection requirements in the two respective areas of districting, incumbency protection would still not be considered traditional pursuant to the empirical definition because more than 12 states prohibit such a practice. The bar of a quarter of the states, which is the same number of states needed to defeat proposed amendments to the U.S. Constitution, was chosen to meaningfully check the excesses of a rogue majority, while minimizing frivolous obstruction to legislatures’ and judges’ ability to reflect legitimate changes in what states consider to be “traditional” districting criteria.

³⁷² H.B. 1147, 83rd Gen. Assemb., Reg. Sess. § 4-9-102(a)(8) (Ark. 2001), *available at* <https://www.sos.arkansas.gov/uploads/bcs/Act1439%20of%202001.pdf> [<https://perma.cc/5WTK-E5YA>].

³⁷³ Amy Gardner, Ted Mellnik & Adrian Blanco, *Redistricting Activists Brace for Wall of Inaction as Battle Moves to States*, WASH. POST, Nov. 13, 2019, *available at* <https://www.washingtonpost.com/politics/2019/11/12/redistricting-activists-brace-wall-inaction-battle-moves-states/>.

³⁷⁴ See Rogers, *supra* note 127 at 563-64. Rogers cites specific examples of salient issues in which representatives “face electoral punishment for unpopular roll calls[,]” such as gay marriage. *Id.* at 568.

³⁷⁵ See Gartner, *supra* note 11.

³⁷⁶ In 2018, fifteen states voted on 20 ballot initiatives regarding electoral reforms including, Colorado, Michigan, Missouri, and Utah, which specifically passed initiatives implementing new redistricting systems for state or federal legislative elections. See Erin McCarthy Holliday, *15 States Vote on Election, Voting and Redistricting Questions in Midterms*, JURIST, Nov. 7, 2018, *available at* <https://www.jurist.org/news/2018/11/15-states-vote-on-election-voting-and-redistricting-questions-in-midterms/>.

³⁷⁷ See *supra* note 27 and accompanying text.

2. The Inevitability of Judicial Challenges to Redistricting Plans in Modern Politics

The second political obstacle to the empirical definition we consider in this Article has to do with its very necessity as a proposed doctrinal change. That is, why do we need to equip the courts with the empirical definition in order to better evaluate the constitutionality of proposed redistricting plans, if many elected judges apparently cannot be trusted to rule in favor of the public interest and voters will simply bypass state legislators by constitutional referenda to create independent redistricting bodies? The idea that redistricting should be conducted partly or wholly by nonpartisan, independent commissions, which is gaining in popularity among both scholars and the public,³⁷⁸ frequently ends up arguing that courts should be removed from redistricting:

In partisan gerrymandering cases, “*a lack of judicially discoverable and manageable standards*” is the primary reason[] the Supreme Court has never declared a district plan to be an unconstitutional partisan gerrymander. . . . *Independent redistricting commissions*—enacted through state voter initiatives—*should replace the federal court[’s] authority to develop redistricting plans . . . legislators can partake in choosing commissioners and can provide them with political authority that the judiciary lacks. . . . [C]ommission[s] prohibit[] legislators and candidates from drawing district lines. Independent-commission membership also prohibits commissioners from running for office in districts they drew for one year after redistricting . . .*³⁷⁹ [emphasis added]

We argue that, even if independent redistricting commissions became the norm among the states, the empirical definition would still be critically important to curbing abusive districting. First, in the current political climate, judicial challenges of redistricting plans are effectively inevitable.³⁸⁰ When such judicial challenges occur, the presiding court will need discoverable and manageable

³⁷⁸ See, e.g., Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477, 477 (“The Supreme Court is on the cusp of rejecting one of the best ideas for reforming American elections: independent commissions for congressional redistricting.”); Alan S. Lowenthal, *The Ills of Gerrymandering and Independent Redistricting Commissions as the Solution*, 56 HARV. J. ON LEGIS. 1, 1 (2019) (“The best alternative [to the status quo] . . . has proven to be independent redistricting commissions”); Lee Drutman, *One Big Winner Last Night: Political Reform*, VOX, Nov. 7, 2018 (stating that voters approved independent redistricting commissions by a 42-percent margin in Colorado and in Michigan by 22), available at <https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner>.

³⁷⁹ Sara N. Nordstrand, Note, *The “Unwelcome Obligation”: Why Neither State Nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2007, 2026 (2018).

³⁸⁰ Cf. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390 (Fla. 2015) (stating that litigation over a proposed districting plan in Florida was “inevitable”).

standards with which to adjudicate the claim—standards that have been lacking in the status quo but would be provided by the empirical definition. Second, as shown in Part II.A.1, the empirical definition would improve the courts’ democratic legitimacy compared to the present by directing judges to apply exactly what most state legislatures consider to be traditional districting criteria.

C. Two Judicial Uses of the Empirical Definition

1. Supplemental Application: Apply Only If State Law Is Silent

The first proposed avenue for applying the empirical definition is for judges to use it to determine whether a criterion is “traditional” when their own states’ laws are silent on the issue. Assume, for instance, that a state legislative redistricting plan in Massachusetts is challenged for failing to draw compact districts.³⁸¹ Although the state’s law does not require compactness, the presiding judge could order compact districts to be drawn by citing the fact that 38 states require compactness and none prohibits it in state legislative redistricting.³⁸² The upside of this proposal, which we call supplemental application, is its feasibility: there exists no constitutional obstacle to it and it is only a slight variation on what courts already do, as will be shown momentarily. The downside of supplemental application is that it would not eliminate state-by-state variation in districting practices because it would operate only when a state’s own laws are silent. However, complete elimination of that variation appears to be infeasible, as discussed further in Part II.C.2.

Supplemental application of the empirical definition is only a slight variation on what courts already do. When a state’s laws are silent on whether a districting criterion is mandatory in, say, congressional redistricting, some courts have justified applying that criterion by relying on the fact that the same criterion is mandatory in state legislative districting. For example, in *League of Women Voters v. Pennsylvania*, the plaintiffs argued that a proposed congressional redistricting plan must draw districts of equal population by relying on a constitutional provision requiring it in state legislative districting.³⁸³ In response, the legislative defendants argued that

³⁸¹ *Cf. McClure v. Sec’y of Com.*, 766 N.E.2d 847, 853 n.8 (Mass. 2002) (discussing “the task of building districts that are both compact and equal in population” in the course of adjudicating challenges based on alleged partisan gerrymandering and a constitutional requirement to preserve municipal boundaries).

³⁸² *See supra* note 27 and accompanying text.

³⁸³ *League of Women Voters v. Commonwealth*, 178 A.3d at 794 (“Common Cause stresses that, because these criteria are specifically written into the Pennsylvania Constitution . . . and have provided the basis for invalidating

the Pennsylvania Supreme Court “should not adopt legal criteria for redistricting beyond those in Pennsylvania’s Constitution” because to do so “would infringe on . . . legislative function[s].”³⁸⁴ The court held for the plaintiffs, by ruling that a constitutional provision guaranteeing “free and equal elections” permits applying requirements for state districting to congressional districting:

The utility of these requirements [e.g., equal population] to prevent . . . gerrymandering retains continuing vitality, as evidenced by our present Constitution In that charter, these basic requirements for the creation of senatorial districts were not only retained, but, indeed, were expanded by the voters to govern the establishment of election districts for the selection of their [state] representatives. . . . [W]e find these neutral benchmarks to be particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual’s ability to select the congressional representative of his or her choice, and thereby violates the Free and Equal Elections Clause.³⁸⁵

Granted, the Pennsylvania Supreme Court relied on that state’s constitutional guarantee of free and equal elections to apply a state legislative districting requirement to congressional districting. This may indicate to some that, in states without a similar guarantee, courts may find it difficult to justify such an application, or to rely on what other states consider to be traditional districting criteria by consulting the empirical definition. However, lacking such a device, some courts simply interpreted the federal one-person, one-vote guarantee to achieve the same result. In *Raleigh Wake Citizens Association v. Wake County Board of Elections*, a redistricting plan for school board and county elections was challenged for subordinating traditional districting criteria to “illegitimate redistricting factors”: for example, the plan allowed population deviations among districts of seven percent.³⁸⁶ Although the trial court upheld the plan by ruling that neither state law nor the U.S. Constitution requires equal population or partisan neutrality in districting for school board or county elections,³⁸⁷ the Fourth Circuit reversed by citing one-person, one-vote:

state legislative district maps in the past . . . they are sufficiently precise as to present a feasible standard for evaluating the constitutionality of a congressional district map under the Free and Equal Elections Clause.”).

³⁸⁴ *Id.* at 800.

³⁸⁵ *Id.* at 815-16.

³⁸⁶ *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 338 (4th Cir. 2016) [hereinafter *Raleigh II*].

³⁸⁷ *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 166 F. Supp. 3d 553, 602–03 (E.D.N.C.) [hereinafter *Raleigh I*], *aff’d in part, rev’d in part and remanded*, 827 F.3d 333 (4th Cir. 2016).

This requirement that all citizens' votes be weighted equally, known as the one person, one vote principle, applies not just to the federal government but also to state and local governments—including school boards and county governing bodies. . . . Dr. [Jowei] Chen testified that he could conclude . . . from his simulations that the deviations at issue here are the result of using partisanship in apportioning the districts. In critiquing Dr. Chen's analysis, the district court seized on the fact that certain criteria accounted for in the computer simulations—such as setting maximum population deviation at 2% or less or “completely . . . ignor[ing] partisanship,” . . . are required by neither state nor federal law. This critique misses the point: The point is not that the simulated plans are legally required, but rather that they help demonstrate what might explain the population deviations in the enacted plan. . . . The district court clearly and reversibly erred³⁸⁸

In short, the court interpreted one-person, one-vote to justify not only applying a state legislative districting requirement of equal population to school board and county elections, but also to rule that excessive partisan advantage contravenes traditional districting requirements—despite its recognition that “the Supreme Court ha[d] not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful”³⁸⁹ at the time of the ruling. Given these precedents and the lack of constitutional obstacles, courts could easily rely on the empirical definition to determine whether a criterion is traditional, absent specific instructions in their own states' law.

Supplemental application of the empirical definition would also elucidate the Supreme Court's muddled justification for using traditional districting criteria in the first place. Case law justifies the use of traditional criteria by equating them with rational state policy and claiming to apply a test similar to rational basis review. Specifically, although population deviations among state legislative districts generally must not exceed ten percent,³⁹⁰ the Court allowed in *Reynolds v. Sims* “deviations from the equal-population principle . . . based on legitimate considerations incident to the effectuation of a rational state policy[.]”³⁹¹ As such, courts have, since the 1970s at the latest, upheld deviations in excess of ten percent when in service of permissible districting

³⁸⁸ *Raleigh II*, 827 F.3d at 340, 344.

³⁸⁹ *Id.* at 348.

³⁹⁰ *Brown*, 462 U.S. at 842; *see also* *Avery v. Midland Cty., Tex.*, 390 U.S. 474, 484-85 (1968) (“the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.”).

³⁹¹ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

goals such as preserving county boundaries, but not partisan or racial motivations.³⁹² In effect, then, courts have been purporting to apply a kind of rational basis test to distinguish legitimate districting criteria from the illegitimate ones, albeit not always invoking that particular label.³⁹³

Indeed, if it were actually carried out as *Reynolds* purports to, equating traditional criteria with rational state policy through rational basis review would be an intuitive and simple way to resolve districting cases compared to the status quo. With the exception of public policy entailing “prejudice against discrete and insular minorities,” rational basis review tends to uphold the state act at issue if it is rationally related to a legitimate government interest—even if the state act has only a “debatable” likelihood of furthering that interest.³⁹⁴ Just as rational basis review tends to be indifferent to the wisdom of challenged state acts unless they involve a suspect class, courts do not generally question the intent underlying a districting plan unless it subordinates traditional criteria to impermissible considerations such as race.³⁹⁵ If courts actually employed rational basis review and the empirical definition, it would clarify and streamline districting litigation: much of the dispute over what “traditional districting criteria” precisely are would be preempted because “rational state policy” in this context would simply mean “how a majority of the states define it.”

Despite reference to “rational state policy,” however, the practice of traditional criteria is nothing like that of rational basis review. Whereas the definitions of state policy and interests in the context of rational basis review are fairly clear, the meaning of “rational state policy” in any districting case is often unpredictable because traditional criteria seem to be defined by a mass of ad hoc exceptions presented as a rule. For example, *Mahan v. Howell* held that preserving county borders can justify deviations from population equality,³⁹⁶ while *Shaw I* ruled that compactness may excuse heavily racially packed districts.³⁹⁷ However, the Court has never upheld deviations

³⁹² See *Mahan v. Howell*, 410 U.S. 315, *modified*, 411 U.S. 922 (1973) (upholding a Virginia apportionment plan causing a maximum population deviation of 16.4 percent because of other objectives such as preserving the boundaries of political subdivisions); *Cox v. Larios*, 542 U.S. 947 (2004) [hereinafter *Larios II*] (invalidating a reapportionment plan presenting deviations of less than five percent because of, inter alia, partisan advantage); *Perez v. Abbott*, 250 F. Supp. 3d 123 (W.D. Tex. 2017) (ruling that a Texas apportionment plan presenting overall deviations of less than ten percent engages in racial gerrymandering by intentionally diluting the Latino vote).

³⁹³ See *Bush*, 517 U.S. at 1010 (Stevens, J., dissenting) (stating that “all equal protection jurisprudence might be described as a form of rational basis scrutiny” despite the majority opinion not invoking the term rational basis review in the course of ruling on equal protection challenges against a proposed redistricting plan in Texas).

³⁹⁴ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-54 n.4 (1938).

³⁹⁵ *Miller*, 515 U.S. at 919 (stating that compliance with traditional districting criteria cannot be a defense to a racial gerrymandering claim because “those factors were subordinated to racial objectives.”).

³⁹⁶ 410 U.S. at 315.

³⁹⁷ 509 U.S. at 655-56.

exceeding ten percent specifically for compactness, or clarified whether preserving county lines can excuse racial packing. *Rucho* upheld a districting map intended to elect “ten Republicans and three Democrats” (because “a map with 11 Republicans and 2 Democrats” was infeasible) on the grounds that judicial intervention *against it* would create partisan quotas fit only for proportional representation.³⁹⁸ The current state of redistricting law is ironic to a degree that it satirizes itself.

As these mixed messages are not much of a guidance as to what “rational state policy” or traditional districting criteria mean, complying with them is rarely enough to dispose of the many challenges faced by districting plans. As such, districting cases often get to the intent underlying a proposal. For example, if a districting plan advantages a certain party, is that advantage a mere byproduct of a good-faith attempt to honor legitimate districting criteria such as compactness?³⁹⁹ Defendants, usually the state legislature pushing the challenged plan, argue in the affirmative⁴⁰⁰ or that partisan advantage is a legitimate districting goal.⁴⁰¹ Plaintiffs deny that it is a legitimate goal and allege intentional bias by showing, via computer simulations, that the legislature could have created a less biased plan that advances legitimate districting goals just as effectively as the plan being defended by the legislature.⁴⁰² Not surprisingly, adjudicating districting proposals by trying to divine an illicit motive that partisans have no incentive to admit to would at best return inconsistent rulings and at worst enable those partisans to define traditional criteria by lawsuit.⁴⁰³

The empirical definition, in contrast, would resolve this chaos by defining “rational state policy” and “traditional districting criteria” in an objectively discernible way: districting criteria that at least 26 states require or permit and no more than 12 states prohibit. Because the empirical definition would simply clarify the meaning of two operative terms, it would fit seamlessly into existing doctrine, thereby minimizing any disruption that may result from adopting this reform.

³⁹⁸ 139 S. Ct. at 2491, 2499-2500.

³⁹⁹ See, e.g., *League of Women Voters v. Commonwealth*, 178 A.3d at 739; see also *Lewis*, Case No. 18 CVS 014001, available at https://www.nccourts.gov/assets/inline-files/18-CVS-14001_Final-Judgment.pdf [<https://perma.cc/WB9V-2M74>].

⁴⁰⁰ *Lewis*, Case No. 18 CVS 014001 at 239 (“Defendants presented unpersuasive evidence to rebut evidence that the Hofeller files show that Dr. Hofeller primarily focused on maximizing partisan advantage.”).

⁴⁰¹ *League of Women Voters v. Commonwealth*, 178 A.3d at 798.

⁴⁰² *Id.* at 770-75.

⁴⁰³ See, e.g., Frederick McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 327, 330-31 (2005) (“Blurry distinctions and inconsistent application of redistricting criteria mark the latest round of redistricting in ways that call into question the sanctity of ‘traditional redistricting principles.’”); Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 572 (2013) (“A redistricting plaintiff . . . may be associated with any number of groups, including political parties . . . or other interest groups.”).

Moreover, supplemental application of the empirical definition has an intuitive justification for judicial adoption. If a state’s laws explicitly say whether a districting criterion is traditional, that state’s judges may justifiably think that the empirical definition is not necessary because they are bound by those laws—unless there are grounds to overturn those laws. However, if state law is silent, it would be wholly reasonable for courts to consult the empirical definition regarding what qualifies as “rational state policy,” and the fact that a majority of the states consider something to be rational state policy is a compelling reason to treat it as a “traditional” districting criterion.

Although supplemental application is easily applicable and would address the defects in the status quo if it is applied, it may appear incomplete. Because supplemental application would kick in only when a state’s law is silent on the criteria at issue, the empirical definition would not stop states from, say, incumbent protection if their law requires it; to some readers, supplemental application may seem analogous to promising a national, single-payer health insurance scheme with the caveat that individual states may legally refuse to accept it. Such a dissatisfaction would prompt a second avenue to implement the empirical definition: applying “traditional districting criteria” in *all* states as most states define them, regardless of what a state’s own laws say. Under this option, which we call universal application, a judge in North Carolina would have to reject districting plans that advantage incumbents, even though the legislature requires that “reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent[.]”⁴⁰⁴ We now proceed to discuss that option and its potential adverse consequences.

2. Universal Application: Apply Regardless of What State Law Says

Universal application would require courts to define traditional districting criteria as the majority of states define them, regardless of what a state’s own relevant law says on the subject. The advantage to universal application is that it would grant all voters precisely the same level of protection from abusive districting, assuming successful implementation. As for disadvantages, the first would be the difficulty of successful implementation. Under the prevailing interpretation of constitutional law, the Supreme Court imposing districting criteria by fiat, notwithstanding the fact that those criteria would be based on the laws of a majority of states, may infringe upon the

⁴⁰⁴ See N.C. Congressional Plan Criteria, *supra* note 117, at 1.

right granted to the states by Article I, Section 4 of the Constitution to choose their own rules for electing Members of Congress,⁴⁰⁵ as well as the power to elect their own governments. Second, even assuming success, universally applying the empirical definition may end the development of the law on traditional districting criteria, because individual states may think that improving their laws on traditional districting criteria would be futile if most states will not amend theirs.

Universal application of the empirical definition would require creating a constitutional right to the traditional districting criteria themselves, distinct from the already existing right to elections uncontaminated by racial considerations, so that the Supreme Court has a justification to enforce that right notwithstanding state laws to the contrary. Although legal scholarship has hinted at the possibility of creating a right to traditional districting criteria,⁴⁰⁶ it seems infeasible under current law—the Court has held that traditional criteria “are important not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.”⁴⁰⁷ Even if the Court were to reverse decades of case law to create a right to traditional criteria, states may not be so easily persuaded to enforce it: even when it comes to duly passed federal laws that do not have such constitutional obstacles, states have attempted many times to nullify them⁴⁰⁸ or to repeal them by litigation.⁴⁰⁹

Even after assuming on faith that states will let the Supreme Court impose upon them a uniform definition of traditional districting criteria and states will enforce that definition exactly as imposed, there is still another problem: individual states may lose any meaningful incentive to develop districting law to adapt to changing times, because updating their own laws may seem futile if a majority of the states do not amend theirs. Recall that universal application would force courts to enforce “traditional districting criteria” as defined by at least 26 states, even if the law of the state at issue contradicts that definition. Therefore, even if the circumstances warrant an amendment, a state that wishes to, for example, preserve precinct boundaries in redistricting may

⁴⁰⁵ U.S. Const. art. I, § 4.

⁴⁰⁶ See, e.g., Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 YALE L.J. 127 (1946).

⁴⁰⁷ *Shaw I*, 509 U.S. at 647.

⁴⁰⁸ James H. Read, *Changing the Rules? Leaving the Game? Nullification, Secession, and the American Future*, 67 ARK. L. REV. 103, 104 (2014) (listing three examples of nullification bills advanced in three states).

⁴⁰⁹ See Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 451 (“Since President Obama took office in 2009, state attorneys general (AGs) have been among the administration’s most persistent foes. Most famously, several AGs initiated legal challenges to the Patient Protection and Affordable Care Act (ACA) only minutes after the president signed it into law. . .”).

not bother to legislate that requirement.⁴¹⁰ This means that, if universal application survives for a sufficiently long time, the empirical definition may no longer reflect what most states actually think about traditional districting criteria, which would defeat its claim to democratic legitimacy.

However, the numerous constitutional difficulties to universal application do not mean that the empirical definition would be wholly useless to a court considering invalidating a state’s legislated districting criterion that is plainly absurd. Imagine that a court in North Carolina has independent constitutional grounds to invalidate the state’s requirement that its districting plan put ten Republicans and three Democrats in the House of Representatives because, for example, the Supreme Court reverses *Rucho* to rule that partisan gerrymandering is justiciable. Although it would still be infeasible in this hypothetical world for the Supreme Court to order the courts of all states to invalidate any state law that contradicts the empirical definition, plaintiffs could still use the empirical definition to demonstrate why partisan advantage is not a traditional districting criterion (because only North Carolina explicitly requires or allows it), and the presiding court could endorse that argument to bolster its ruling invalidating the state’s partisan districting plan.

III. THE EMPIRICAL DEFINITION’S THEORETICAL JUSTIFICATIONS

Part II has justified the empirical definition using its anticipated practical gains. However, although substantive benefits may interest citizens, legislators, and scholars, it may not persuade the one constituency most important to the empirical definition’s success—judges. By the nature of their mandate, judges must often disregard the substantive gains to be made from a doctrinal change, if the proposed change is procedurally flawed.⁴¹¹ One such procedural defect discussed increasingly often, as law becomes ever more intertwined with politics in the United States,⁴¹² is

⁴¹⁰ As of April 2020, only nine states require or allow the preservation of precinct boundaries in either state legislative or congressional redistricting. *See supra* note 27 and accompanying text.

⁴¹¹ *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (“[W]hen the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights . . . there is reason for concern lest the only limits to such judicial intervention become the predilections of . . . this Court.”); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand . . . substantive due process because guideposts for responsible decisionmaking . . . are scarce . . .”).

⁴¹² *See, e.g.*, Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 568-69 (2007) (“[T]he debate over the proper role of our judicial branch . . . is a war being fought on overlapping political and academic fronts.”); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 2 (2011) (discussing allegations that Justice Sotomayor is an “activist judge that threatens the traditional foundation of the U.S. legal system.”)

judicial legislation: that judges must not play legislators imposing policy on behalf of those who “do not want to engage in the democratic process[] or . . . have already lost out in the legislative arena.”⁴¹³ Perhaps no field better deserves this concern than districting law, given the antics that motivated this Article—conflicted interests attempting to legislate privately expedient districting criteria such as partisan or incumbent advantage, by baselessly calling them traditional in court.

However, those wary of judicial legislation might also direct that same suspicion toward the empirical definition because, technically, it too is a proposed doctrinal change intended to reap policy benefits. For example, Professor Jacob Eisler argues that many quantitative metrics deployed in redistricting litigation to detect gerrymandering determine the legality of a districting plan according to whether it has certain properties they deem relevant—as opposed to identifying clearly defined illegal elements. This, in turn, allows the creators or users of those quantitative metrics to impose upon society the kind of districting proposals they prefer. Other quantitative metrics, according to Professor Eisler, simply lack the requisite link to constitutional doctrine:

[A]nti-gerrymandering reformers . . . argu[e] that quantitative tools can provide courts with dispositive indications of when illicit gerrymandering occurs. . . . However . . . even where reformers have used statistical indicia to convince courts that a gerrymander is illegal, neither the courts nor the reformers have clearly linked the metrics to constitutional doctrine. . . . Judicial adoption of a radically new definition of rights as quantitative outcomes would be . . . problematic. It would transform the role of statistical analysis from providing evidence of rights violations to defining the content of rights. Government conduct might be lawful or unlawful depending upon (non)conformity to metrical tests. This would distort the role and nature of constitutional law. . . . [R]ights defined by quantitative outcomes would turn courts into enforcers of policy outcomes. If courts identify constitutional wrongs whenever certain metrical thresholds are breached, they act as regulators who have concluded that certain outcomes are desirable. That the current litigation has invoked more complex quantitative indicia does not make the use of metrics to define constitutional rights any less a form of judicial policy enforcement.⁴¹⁴

⁴¹³ Hon. Diarmuid F. O’Scannlain, Lecture, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 32 (2015).

⁴¹⁴ See Eisler, *supra* note 16 at 981-85.

Part III reinforces the doctrinal basis of the empirical definition. Part III.A argues that the empirical definition does not constitute judicial legislation, by establishing that it merely defines in an objectively discernible fashion a central element of redistricting law, according to both the preferences of a majority of the states and the Supreme Court’s requirement of “traditionality.” If anything, the status quo is symptomatic of judicial legislation because judges now often define “traditional criteria” influenced by partisan interests, not by any intelligible standards, and apply those definitions to redistricting disputes.⁴¹⁵ Part III.B argues that the empirical definition would advance constitutionally required equitable redistricting more effectively than would the existing doctrine. Current case law would condone certain abusive redistricting criteria such as incumbent protection, as long as they are applied consistently throughout the whole of a redistricting plan. Moreover, this “consistent application” approach would contradict existing federal precedent by incorrectly deeming some widely accepted districting criteria, such as contiguity, nontraditional.

Part III.C provides further corroboration with qualitative analyses of various redistricting criteria, both traditional and not. These analyses establish that the criteria we deem nontraditional and abusive not only lack majority state support, but also systematically distort elections. For example, although scholars routinely lump in preserving communities of interest with traditional districting criteria,⁴¹⁶ we do not. Even states imposing that criterion rarely define “communities of interest” themselves, instead requiring districting authorities to solicit feedback from locals as to what they might be. This is unlike traditional criteria that impose substantively unambiguous requirements: for example, the equal population criterion plainly requires minimizing population deviations among electoral districts. The effectively meaningless nature of “communities of interest,” with the lack of discernible limitations on how that term can be defined, would enable conflicted interests to abuse it to justify districting intended to aid certain parties or incumbents.

⁴¹⁵ See *supra* note 6 and accompanying text.

⁴¹⁶ See, e.g., Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1580 (2005); Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 806 (2013); Abigail Aguilera, *Drawing the Line: Whitford v. Gill and the Search for Manageable Partisan Gerrymandering Standards*, 86 U. CIN. L. REV. 775, 778 (2018).

Table 4. Traditional Status of Districting Criteria, State Legislative Redistricting

| STATE LEGISLATIVE | NUMBER OF STATES WITH REDISTRICTING REQUIREMENT | | | | | | | | | | | | STATE LEGISLATIVE |
|------------------------------------|---|-------------|------------|-------------------|----------------------|---------------------------|---------------------------------|-----------------------|-----------------|------------------------------|---|--|---------------------------------------|
| | SUBSTANTIVE REQUIREMENTS | | | | | | | | | | PROCEDURAL REQUIREMENTS | | |
| | EQUAL POPULATION | COMPACTNESS | CONTIGUITY | COUNTY BOUNDARIES | MUNICIPAL BOUNDARIES | PRECINCT / VTD BOUNDARIES | PARTISAN ADVANTAGE / DATA USAGE | INCUMBENCY PROTECTION | COMPETITIVENESS | PRESERVE PAST DISTRICT CORES | COMMUNITIES OF INTEREST (neighborhoods, etc...) | ENTITY PRIMARILY RESPONSIBLE FOR DISTRICTING | |
| Required | 49 | 38 | 49 | 39 | 33 | 9 | 0 | 3 | 5 | 6 | 23 | 30 | Legislature |
| Allowed | 0 | 0 | 0 | 1 | 2 | 0 | 1 | 7 | 0 | 2 | 0 | 6 | Advisory Commission |
| Prohibited | 0 | 0 | 0 | 0 | 0 | 0 | 17 | 15 | 0 | 0 | 0 | 4 | Independent Commission |
| Silent/Unknown | 1 | 12 | 1 | 10 | 15 | 41 | 32 | 25 | 45 | 42 | 27 | 9 | Political Appointee Commission |
| Required + Allowed | 49 | 38 | 49 | 40 | 35 | 9 | 1 | 10 | 5 | 8 | 23 | 1 | Politician Commission |
| Silent/Unknown + Prohibited | 1 | 12 | 1 | 10 | 15 | 41 | 49 | 40 | 45 | 42 | 27 | | |
| TRADITIONAL? | <u>Yes</u> | <u>Yes</u> | <u>Yes</u> | <u>Yes</u> | <u>Yes</u> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | | |

⁴¹⁷ An advisory commission prepares a districting plan to be approved by elected officeholders. A politician commission consists of the elected officeholders themselves (e.g., the governor and the attorney general).

Table 5. Traditional Status of Districting Criteria, Congressional Redistricting

| CONGRESSIONAL | NUMBER OF STATES WITH REDISTRICTING REQUIREMENT | | | | | | | | | | | | CONGRESSIONAL |
|--|---|-------------|------------|-------------------|----------------------------------|---------------------------|---------------------------------|-----------------------|-----------------|------------------------------|-------------------------|--|---------------------------------|
| | SUBSTANTIVE REQUIREMENTS | | | | | | | | | | | PROCEDURAL REQUIREMENTS | |
| REQUIREMENT / CATEGORY | EQUAL POPULATION | COMPACTNESS | CONTIGUITY | COUNTY BOUNDARIES | MUNICIPAL BOUNDARIES | PRECINCT / VTD BOUNDARIES | PARTISAN ADVANTAGE / DATA USAGE | INCUMBENCY PROTECTION | COMPETITIVENESS | PRESERVE PAST DISTRICT CORES | COMMUNITIES OF INTEREST | ENTITY PRIMARILY RESPONSIBLE FOR DISTRICTING | ENTITY TYPE / AT-LARGE DISTRICT |
| Required | 29 | 26 | 29 | 26 | 21 | 9 | 1 | 2 | 4 | 6 | 18 | 31 | Legislature |
| Allowed | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 | 0 | 2 | 1 | 4 | Advisory Commission |
| Prohibited | 0 | 0 | 0 | 0 | 0 | 0 | 14 | 14 | 0 | 0 | 0 | 4 | Independent Commission |
| Silent/Unknown | 1 | 4 | 1 | 4 | 9 | 21 | 15 | 9 | 26 | 22 | 11 | 4 | Political Appointee Commission |
| Required + Allowed | 29 | 26 | 29 | 26 | 21 | 9 | 1 | 7 | 4 | 8 | 19 | 0 | Politician Commission |
| Silent/Unknown + Prohibited | 1 | 4 | 1 | 4 | 9 | 21 | 29 | 23 | 26 | 22 | 11 | 7 | At-large district |
| No known state constitutional or statutory requirement | 13 | 13 | 13 | 13 | 13 | 13 | 13 | 13 | 13 | 13 | 13 | | |
| At-large district | 7 | 7 | 7 | 7 | 7 | 7 | 7 | 7 | 7 | 7 | 7 | | |
| TRADITIONAL? | <u>Yes</u> | <u>Yes</u> | <u>Yes</u> | <u>Yes</u> | <u>Yes</u> <small>418</small> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | <u>No</u> | |

⁴¹⁸ Even though fewer than 26 states require the preservation of municipal boundaries in congressional redistricting, we still deem this criterion to be traditional because we assume that, if a criterion is “traditional” in either state legislative or congressional redistricting, that criterion is traditional in both. *See supra* pg. 4.

A. *The Empirical Definition Is Not Judicial Legislation*

1. Against Illusory Quantitative Authority

Scholars are correct to be concerned about judicial legislation. For one thing, this Article was motivated by a particularly malignant strain of that exact phenomenon: conflicted interests attempting to legislate expedient redistricting criteria by court rulings.⁴¹⁹ Moreover, scholars like Professor Eisler are correct to be concerned about quantitative metrics making judicial legislation even harder to detect,⁴²⁰ because judges are not usually trained to know when expert witnesses are trying to sneak legislation past them hidden underneath a heap of numbers, Greek letters, and coding jargon.⁴²¹ Scholars have already documented how academics, politicians, and even entire nations have suffered from blindly accepting ideas presented with illusory quantitative authority:

There is no need [to] put[] a thumb on the scales simply because a model is expressed quantitatively. That is the legal equivalent of putting a white lab coat on an attorney. . . . All too often . . . quantification has no attraction other than . . . to lure in unsuspecting onlookers with equations and formulae. . . . A disastrous example of this phenomenon occurred in China in the late 1950s, where the person responsible for misleading quantification had *seemingly* impeccable qualifications. . . . Dr. Xuesen Qian, an aerospace engineer who received his doctorate from Caltech . . . published “scientific calculations” showing that planting crops more densely and applying more fertilizer would increase the grain yield . . . *twenty-fold* . . . [I]n 1958, the [Communist] Party implemented a widespread campaign of close planting: farmers would plant anywhere between twenty and seventy-eight percent more seeds per plot of land than they had in the past. However . . . “few clear-thinking people dared to point out that deep-plowing and close-planting schemes were at best a waste of energy and at worst a destruction of

⁴¹⁹ See O’Scannlain, *supra* note 169.

⁴²⁰ See Eisler, *supra* note 16 at 981-85.

⁴²¹ See *In re Perry Cty. Foods, Inc.*, 313 B.R. 875, 879 n.2 (Bankr. N.D. Ala. 2004) (“Given the lack of training . . . in the ever expanding areas requiring technical, scientific, and quantitative capabilities, it is no longer unexpected that lawyers and judges are unable to bring to bear that which such technical, scientific, and quantitative training and background would accord them.”); see also WILLIAM A. STAHL, *GOD AND THE CHIP: RELIGION AND THE CULTURE OF TECHNOLOGY* 97 (1999) (“[S]ufficiently advanced technology is indistinguishable from magic.”).

fertile land.” A blind acceptance of Qian’s pseudoscientific claims . . . resulted in a “severe nationwide famine . . . claiming an estimated twenty-seven million lives.”⁴²²

Our opposition to specious numerical metrics of redistricting is precisely why this Article already criticized some of them. For example, Professor Melissa Saunders proposes determining whether a district is constitutionally compact using two specific metrics of compactness,⁴²³ even though those two metrics can return wildly different evaluations of the same district.⁴²⁴ Professor Michael McDonald submits an entirely new numerical measure of compactness which, stripped of its intricate presentation, merely permits districts to be half as compact as they can feasibly be.⁴²⁵ The fact that these specious metrics were published in some of the most highly cited law journals⁴²⁶ is undeniable indication of their allure, apparently to even the top of our discipline.

The empirical definition, in contrast, lacks any resemblance to such specious quantitative metrics. The empirical definition’s determination of traditional districting criteria through a basic numerical formula—at least 26 states in favor and no more than 12 against—merely represents a belief that a majority of states are more likely to define traditional criteria in the public interest than are conflicted parties attempting to implement by lawsuit redistricting plans intended to get themselves reelected in perpetuity. The empirical definition counts the number of states that have legislative instructions on various districting criteria, because we believe that this method would be both objectively discernible and easily replicated by courts—as opposed to, say, adding up the states that collectively comprise a majority of the U.S. population. Population counts are always estimates,⁴²⁷ whereas counts of states and citations to state law are not. Moreover, the formula we propose is akin to that used to pass or defeat proposed constitutional amendments.⁴²⁸ In sum, the empirical definition is a misleading quantitative metric only to those who cannot count to 26.

⁴²² Lea Brilmayer & Yunsieg P. Kim, *Model or Muddle? Quantitative Modeling and the Façade of “Modernization” in Law*, 56 WASHBURN L.J. 1, 9-10, 32-33 (2017) (internal citations omitted).

⁴²³ See Saunders, *supra* note 89.

⁴²⁴ See Kaufman, King & Komisarchik, *supra* note 93.

⁴²⁵ See McDonald, *supra* note 97 and accompanying text; see also Part I.B.2.

⁴²⁶ See WASHINGTON & LEE LAW JOURNAL RANKINGS, available at <https://managementtools4.wlu.edu/LawJournals/> (listing the Yale Law Journal as the second most frequently cited among print journals and the Yale Law Journal Forum as the most frequently cited among online journals, as of January 2021).

⁴²⁷ See *United States v. Johnson*, 122 F. Supp. 3d 272, 315 (M.D.N.C. 2015) (“Census adjustments are changes to the U.S. Census’ population estimates meant to improve the U.S. Census’ estimates’ accuracy.”).

⁴²⁸ A proposed amendment opposed by more than 12 state legislatures would not be ratified. See U.S. Const. art. V.

The empirical definition also does not perpetrate judicial legislation with nonquantitative methods. Recall that judicial legislation refers to judges doing more than merely interpreting or applying law—that phenomenon requires writing law by imposing new public policy on society through court rulings. First, the empirical definition does not invent newfangled law. It merely defines a central element of redistricting law that the Supreme Court has failed to, according to the Court’s requirement of traditionality. We define “traditional” to mean criteria endorsed by a majority of states because, as explained already, counting the number of states is an objectively discernible way to identify the prevailing practice.⁴²⁹ Clearly defining traditional criteria so as to reduce their abuse would not suddenly change what each criterion means or its legal function, unlike some metrics that are designed to impose their particular definition of gerrymandering.⁴³⁰ Under the empirical definition, equal population still means reducing population variation among districts, and contravening traditional redistricting criteria will still only trigger strict scrutiny.⁴³¹

Second, the empirical definition does not impose policy against the public will. Using the empirical definition does not require courts to make policy, because they would only be applying the policy judgments already made by the states as to which redistricting criteria are allowed and which are not. Assuming *arguendo* that the empirical definition does impose policy, it would not be against the public will because the empirical definition reflects the practices of the majority of states. The empirical definition may be an unwanted imposition only under universal application, because that method would apply all traditional criteria as defined by the empirical definition notwithstanding individual state laws to the contrary.⁴³² For example, North Carolina requires partisan and incumbent advantage in congressional districting, whereas the empirical definition considers both to be nontraditional.⁴³³ However, as explained in Part II.C, we consider universal application to be infeasible. Under its alternative, supplemental application, judges would use the empirical definition only if state law is silent as to whether a districting criterion is permitted.⁴³⁴

⁴²⁹ See *supra* Part I.A.

⁴³⁰ See Eisler, *supra* note 16 at 981-85.

⁴³¹ See *Vera*, 517 U.S. at 958.

⁴³² See *supra* Part II.C.2.

⁴³³ See COMPLETE DATABASE, *supra* note 27.

⁴³⁴ See *supra* Part II.C.1.

2. The Status Quo Represents Judicial Legislation

Although this Article mostly advances the empirical definition on its independent merits, an equally useful means of evaluating a proposed change is to compare it to the status quo—just as some elections pick an outstanding candidate while others merely dispose of the worst one. A comparative merit of the empirical definition is that the status quo in districting doctrine already represents the kind of judicial legislation that both judges and scholars claim to fear. This subpart shows how rulings on districting cases impose subjective notions of traditional criteria, on behalf of judges or the conflicted interests that “do not want to engage in the democratic process[.]”⁴³⁵ Applying the empirical definition would curb the judicial legislation that defines the status quo.

As a preliminary matter, Part II.A.2 has already shown how the lack of intelligible limits on judicial discretion gives voters wildly inconsistent protection from abusive redistricting. For example, in three states whose law is silent on the legality of districting intended to advantage a certain party, the courts of last resort ruled respectively that partisan gerrymandering is legal,⁴³⁶ illegal,⁴³⁷ or not for courts to say whether it is legal or not.⁴³⁸ However, those cases at least have something of a legal basis. The Pennsylvania case interpreted a state constitutional guarantee of fair elections to prohibit partisan advantage;⁴³⁹ the Ohio case allowed partisan advantage because the state constitution does not mandate politically neutral redistricting;⁴⁴⁰ the West Virginia case declined to take a position on the legality of partisan gerrymandering at all, citing the lack of clear doctrinal guidelines and the Supreme Court’s reluctance to take an active regulatory role.⁴⁴¹

To find examples of judicial legislation lacking *any* legal justification, one must examine court-ordered districting cases in which judges—or the litigants who influence them—apparently define and apply “traditional” criteria as they see fit, or worse, expedient. We know that litigants effectively write parts of districting plans in the U.S., beyond merely expressing their opinions as to how districting should proceed, because courts admit to it. For example, a judicially convened Minnesota districting panel adopted a plan that reflects “certain elements” of the plans proposed

⁴³⁵ O’Scannlain, *supra* note 169.

⁴³⁶ See *Kasich*, 981 N.E.2d at 820.

⁴³⁷ *League of Women Voters v. Commonwealth*, 178 A.3d at 821.

⁴³⁸ See *Tennant*, 730 S.E.2d at 389-90.

⁴³⁹ *League of Women Voters v. Commonwealth*, 178 A.3d at 821.

⁴⁴⁰ See *Kasich*, 981 N.E.2d at 820.

⁴⁴¹ See *Tennant*, 730 S.E.2d at 389-90.

by each of the litigants.⁴⁴² Where judges do not admit to such things, court-proposed redistricting plans often rely on districting criteria with no justification. A North Carolina court order requires preserving communities of interest without explanation;⁴⁴³ the aforementioned Minnesota panel allowed redistricting to consider “the impact of redistricting . . . to determine whether proposed plans result in . . . excessive incumbent conflict” for unstated reasons;⁴⁴⁴ a Nevada order cites no source whatsoever to justify eight out of its nine criteria for state legislative redistricting.⁴⁴⁵

The fact that litigants write parts of districting plans may be harmless error if the litigants have no conflicts of interest, or the districting process appropriately restrains the conflicted ones. However, any examination of the status quo reveals that it hands conflicted parties undue control over districting, instead of restraining them. Take, for example, the court-ordered redistricting in Nevada following the 2010 U.S. Census. The previously cited ruling that imposed nine criteria for state legislative districting required two public hearings to solicit opinions on how the state’s electoral districts should be drawn.⁴⁴⁶ Despite this Article’s criticism of the *content* of inaccurate testimony given by conflicted interests in districting disputes,⁴⁴⁷ we do not oppose in principle soliciting the opinion of interested parties—as long as the presiding officers entrusted to rule in favor of the public interest are willing and able to filter out the bias from the testimony. The fact that representatives of the two major parties promoted their preferred redistricting plans in the Nevada hearings⁴⁴⁸ is not the indication of judicial legislation in the status quo that we object to.

⁴⁴² See *Hippert II*, 813 N.W.2d 379.

⁴⁴³ See *Stephenson v. Bartlett*, 562 S.E.2d 377, 397 (N.C. 2002) (“communities of interest should be considered in the formation of compact and contiguous electoral districts.”).

⁴⁴⁴ *Hippert v. Ritchie*, No. A11-152, at 9 (Minn. Nov. 4, 2011) [*hereinafter Hippert I*], available at <http://macsnc.courts.state.mn.us/ctrack/document.do?document=82986a18c99dea79974780b3088b5a47948c95098f9e9ea94c43ca86c8540f5e>.

⁴⁴⁵ *Guy v. Miller*, No. 11OC421B, at 5-9 (Nev. Dist. Ct. Sept. 21, 2011) (requiring equally populated districts, contiguous districts, preservations of political subdivisions and communities of interest, compactness, incumbent protection, nesting, compliance with Voting Rights Act requirements, and representative fairness), available at <https://www.leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct10/E101011C.pdf> [<https://perma.cc/4AE5-DG2G>].

⁴⁴⁶ *Guy*, No. 11OC421B at 8.

⁴⁴⁷ See *supra* Part I.A.

⁴⁴⁸ Nevada Legislature, Summary Minutes of the Public Hearing by Special Masters to Receive Testimony Concerning Redistricting of Legislative and Congressional Districts, at 12 (Oct. 10, 2011) [*hereinafter Nevada Hearing I*] (“Fernando Romero, State Director for Democrats USA . . . noted strong opposition to the Republican map . . . Mr. Romero supports the map . . . the Nevada Latino Redistricting Coalition[.]”), available at <https://www.leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct10/M01RedistrictingPublicHearing-10-10-11-LV.pdf> [<https://perma.cc/E6BS-ERAW>]; Nevada Legislature, Summary Minutes of the Public Hearing by Special Masters to Receive Testimony Concerning Redistricting of Legislative and Congressional Districts, at 11 (Oct. 11, 2011) [*hereinafter Nevada Hearing II*] (“Mr. Hutchison [counsel retained by the Nevada

The objectionable phenomenon was that the court-appointed⁴⁴⁹ special masters presiding over the hearings apparently failed to separate biased opinions from statements of fact. Granted, the special masters may not be at fault entirely, because some partisan representatives seemingly had technical training that the special masters did not⁴⁵⁰ and others failed to disclose their various conflicts of interest. However, regardless of the exact distribution of blame, the fact remains that such a system defines judicial legislation: exploiting courts' relative lack of expertise in the more technical side of districting,⁴⁵¹ conflicted interests are misleading judges into looking favorably on, or outright incorporate, their preferred districting plans by presenting their interests as fact.⁴⁵²

Consider the example of Ron Steslow, a witness in the Nevada hearings identified as the “Redistricting Director [for] Fund for Nevada’s Future” at the time.⁴⁵³ Even as other participants declare their partisan affiliations or their relationships to the litigants in the redistricting case that caused the hearings to be held,⁴⁵⁴ Steslow discloses no conflicts of interest in his self-description:

Ron Steslow . . . stated he attended the National Conference of State Legislatures’ seminar in Washington, D.C., redistricting principles and law, and received training from the Caliper Corporation on the Maptitude Mapping Software. He explained the process he used in preparing and collecting data and the application of the data into *maps utilizing traditional districting principles*. Mr. Steslow . . . explained that when preparing the maps he focused on preserving communities of interest, population numbers and total population, voting age population (VAP) and CVAP [citizen voting age population], voter registration, and *representational fairness*. . . . Discussion ensued between Special Master Erickson and Mr. Steslow regarding whether the information provided in maps G-1, G-2, and G-3, is representative of the total population or VAP. Mr. Steslow . . .

Republican Party] stated that the Democrats fracture that community of interest He noted that the Republican maps attempt to preserve communities of interest.”), *available at* <https://www.leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct11/M02RedistrictingPublicHearing-10-11-11-CC.pdf> [<https://perma.cc/7VNY-LDEN>].

⁴⁴⁹ *Guy*, No. 11OC421B at 2.

⁴⁵⁰ *See Nevada Hearing I*, *supra* note 204 at 4 (“Thomas L. Brunell, Ph.D., Professor of Political Science, Senior Associate Dean, School of Economic Political and Policy Sciences, University of Texas at Dallas, an expert witness for the Republican Party”). The minutes do not indicate that the special masters have similar training or credentials. *See id.*; *see also Nevada Hearing II*, *supra* note 204.

⁴⁵¹ *See Eisler*, *supra* note 16 at 985 (“[The increased quantification of redistricting litigation] would also allow those executing partisan gerrymanders to . . . deploy . . . sophisticated methods without effective judicial oversight.”).

⁴⁵² *See O’Scannlain*, *supra* note 169.

⁴⁵³ *See Nevada Hearing II*, *supra* note 204 at 9.

⁴⁵⁴ *See id.* at 2.

explained that VAP and the use of communities of interest for all districts would be the best population criteria to determine the final maps [*italics added for emphasis*].⁴⁵⁵

Steslow's alleged training, reference to "representational fairness," and outward lack of partisan affiliation may make his group appear to be a grassroots organization advocating for equitable redistricting. However, Fund for Nevada's Future was a political action committee that had, in 2011, received money from newly elected Republican governor Brian Sandoval's campaign,⁴⁵⁶ the Senate Republican Leadership Conference,⁴⁵⁷ and the Republican Governors Public Policy Committee for "efforts to secure fair representation[.]"⁴⁵⁸ Although the other witnesses accused one another of pushing districting maps drawn to help their political party,⁴⁵⁹ neither the special masters nor the other witnesses ever state that they object to, or know of, Steslow representing an organization paid to "secure fair representation" on behalf of the Republican Party. Perhaps this apparent ignorance was inevitable, given that Fund for Nevada's Future publicly disclosed its receipts and expenses only in 2012, the year after the Nevada redistricting hearings were held.⁴⁶⁰

Granted, agents doing the bidding of the principals who paid them should shock no one. For example, counsel retained by the Republican Party⁴⁶¹ and a litigant backing the Republican Party's positions in the hearings⁴⁶² make fallacious claims about traditional redistricting criteria that are expedient to the Republican Party as if they were experts giving unbiased testimony on

⁴⁵⁵ See *Nevada Hearing I*, *supra* note 204 at 7.

⁴⁵⁶ Annual Campaign Contributions and Expenses Report 2 (2012), *available at* <https://www.nvsos.gov/SOSCandidateServices/AnonymousAccess/ViewCCEReport.aspx?syn=SnPdYKQxC9x%252bCMSvrdEZFg%253d%253d>.

⁴⁵⁷ *Id.*

⁴⁵⁸ OpenSecrets, Grants to Politically Active Nonprofits and Donor Organizations (2011), *available at* <https://www.opensecrets.org/outside-spending/political-nonprofits/grants?cycle=2011&id=200309803> (https://pdf.guidestar.org/PDF_Images/2011/200/309/2011-200309803-087df34e-9O.pdf [<https://perma.cc/6V97-VMZF>], page 17).

⁴⁵⁹ See *Nevada Hearing I*, *supra* note 204 at 7 (A witness retained by the Republican Party arguing that two redistricting plans "systematically favored the Democratic Party"); *id.* at 12 (a State Director for Democrats USA noting "strong opposition to the Republican map, which . . . groups the Latino Community into one district.").

⁴⁶⁰ See Nevada Secretary of State AURORA Campaign Finance Disclosure, Fund for Nevada's Future PAC (indicating the date of the annual contributions and expenses filing as January 17, 2012), *available at* <https://www.nvsos.gov/SOSCandidateServices/AnonymousAccess/CEFDSearchUU/GroupDetails.aspx?o=V5rJpUH327WNAObv7SEVjw%253d%253d>; *supra* note 214, at 1 (indicating the date of receipt as August 16, 2012).

⁴⁶¹ See *Nevada Hearing I*, *supra* note 204 at 3 ("Mark A. Hutchison . . . representing the Nevada Republican Party").

⁴⁶² See *id.* ("Daniel H. Stewart . . . representing Alex Garza"); *id.* at 12 (a witness noting "strong opposition to the Republican map presented by Mr. Garza"); Nevada Legislature, Summary Minutes of the Public Hearing by Special Masters to Receive Testimony Concerning Redistricting of Legislative and Congressional Districts Exhibit Q, at 1-2 (Oct. 12, 2011) [hereinafter *Second Redistricting Hearing Exhibit Q*] (Stewart backing Hutchison), *available at* leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct11/E101111Q.pdf [<https://perma.cc/GAN9-VNKS>].

incontrovertible issues of fact, like a physicist informing skeptical members of the U.S. House Committee on Science, Space, and Technology that melting ice caps cause sea levels to rise⁴⁶³:

Daniel H. Stewart [counsel for Alex Garza, plaintiff-intervenor] . . . stated that his client supports the use of traditional districting criteria: preservation of municipal boundaries, compact lines, contiguous lines, and protecting incumbents. . . . Mr. Stewart stated that the Special Masters should consider where there is agreement on the communities of interest in the maps that have been presented. He opined that . . . influence districts help[] elect more Democrats, and noted that influence districts are not supported as a means to maximize minority voting strength. . . . Mark A. Hutchison [counsel for the Republican Party] . . . commented that nesting is not a traditional redistricting criterion. . . . Mr. Hutchison stated that the Democrats fracture that community of interest unnecessarily . . . He noted that the Republican maps attempt to preserve communities of interest.⁴⁶⁴

Again, it should shock no one that many of these claims are unsubstantiated, misleading, or false. For example, as of 2011, no controlling Supreme Court opinion ever called incumbent protection a “traditional” districting criterion;⁴⁶⁵ not even the state court that required Nevada’s redistricting plan to “to the extent practicable . . . avoid contests between incumbents”⁴⁶⁶ stated that protecting incumbents is “traditional” or, in fact, use that word in the entire order. The claim that any plan proposed in the hearings preserves “communities of interest” is specious at best because there is nothing nearing agreement on what that term means. As Part III.C.1 shows in more detail, states disagree, academics disagree, and courts are reluctant to define that term themselves but, more pertinently, the witnesses in the proceedings disagreed.⁴⁶⁷ Finally, as a semantic matter, let alone

⁴⁶³ See *The Administration’s Climate Plan: Failure by Design, Hearing Before the H. Comm. on Science, Space, and Technology*, 113th Cong. (2014) (then-Representative Steve Stockman asking Dr. John P. Holdren “how long will it take for the sea level to rise 2 feet? . . . [I]f your ice cube melts in your glass, it doesn’t overflow. It is displacement. . . . [S]ome of the things that they are talking about that mathematically and scientifically don’t make sense.”), available at <https://www.govinfo.gov/content/pkg/CHRG-113hhr92327/html/CHRG-113hhr92327.htm>.

⁴⁶⁴ See *Nevada Hearing II*, *supra* note 204, at 11.

⁴⁶⁵ See *supra* note 33 and accompanying text (describing the plurality opinion’s failure to definitively state whether incumbent protection is a traditional redistricting criterion, while noting that a dissenting opinion to a past case did).

⁴⁶⁶ *Guy*, No. 11OC421B at 6.

⁴⁶⁷ See *Nevada Hearing I*, *supra* note 204 at 11 (“Richard F. Boulware . . . Vice President, National Association for the Advancement of Colored People . . . expressed concern regarding combining the Latino community and the African American community in the same district.”); *id.* (“Marco Rauda . . . testified . . . that many community groups of interest exist within the Latino community from northeast Las Vegas to Henderson and should not be combined as one group or defined by race. He is opposed to creating a redistricting plan that will divide the Latino community among racial lines.”); *id.* at 12 (“Fernando Romero . . . testified regarding the disparity between the

empirical, the categorical statement that influence districts get more Democrats elected is false: scholarship available at the time of the Nevada redistricting hearings in 2011 were divided on whether influence districts increase the aggregate number of minorities or Democrats elected.⁴⁶⁸

What should raise some of the more jaded eyebrows, however, is that the special masters may have perceived some of the partisan agents as disinterested experts, thereby giving privately expedient claims a false impression of impartial credibility. For example, following the hearings, counsel for a litigant backing the Republican Party’s proposals informed the special masters that Steslow was a “redistricting technician” that both he and the counsel for the Republican Party⁴⁶⁹ “used to draw maps and interpret data during this litigation[.]”⁴⁷⁰ In the hearings, Steslow failed to disclose donations from the Republican Party to “secure fair representation[.]”⁴⁷¹ claimed to have gotten training from outwardly nonpartisan entities, and claimed to have designed plans for “representational fairness”⁴⁷²—plans that happened to coincide with the ones pushed by counsel representing the Republican Party.⁴⁷³ If Steslow was perceived as a nonpartisan expert, he would likely have perverted the special masters’ mandate to “hear all the positions and . . . do what is fair in terms of the whole, applying [the witnesses’] professional backgrounds and rationale.”⁴⁷⁴

Although we use Nevada’s districting process following the 2010 census to illustrate our point that the status quo already represents egregious judicial legislation, that example is hardly

Hispanic communities and his disagreement with the idea of nesting all minority communities together. He noted strong opposition to the Republican map . . . which he noted groups the Latino community into one district.”)
⁴⁶⁸ See, e.g., Alvaro Bedoya, Note, *The Unforeseen Effects of Georgia v. Ashcroft on the Latino Community*, 115 YALE L.J. 2112, 2123 (“By definition, an influence district is highly unlikely to elect a minority community’s chosen candidate”); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2613 (2004) (“[M]inority influence is highly correlated with the Democratic Party today.”); David J. Becker, *Saving Section 5: Reflections on Georgia v. Ashcroft, and Its Impact on the Reauthorization of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 223, 224 (Ana Henderson ed., 2007) (“However, the *Ashcroft* decision . . . suggested that a covered jurisdiction could comply with Section 5, even if it reduced the ability of minority voters to elect candidates of their choice, if the jurisdiction otherwise increased the number of “influence districts,” or districts which might elect candidates “sympathetic to the interests of minority voters.” . . . Understandably, this decision resulted in a lot of serious concern . . . It was (and is) unclear what this decision would mean for the advances minority voters had made in the last forty years. Had minority voters really come so far that such a radical departure from established [VRA] jurisprudence (particularly the consideration of influence districts) was warranted?”).

⁴⁶⁹ See *supra* note 218 (describing Alex Garza and Daniel Stewart’s support of the Republican position); *Nevada Hearing I*, *supra* note 204 at 3 (“Mark A. Hutchison . . . representing the Nevada Republican Party”).

⁴⁷⁰ *Second Redistricting Hearing Exhibit Q*, *supra* note 218 (dated October 12, 2011).

⁴⁷¹ See OpenSecrets, *supra* note 214.

⁴⁷² See *Nevada Hearing I*, *supra* note 204 at 7.

⁴⁷³ *Id.* at 6 (“Ron Steslow . . . has translated the Republican Party plan into traditional districting principles . . .”).

⁴⁷⁴ See *Nevada Hearing II*, *supra* note 204 at 5.

anecdotal. Even if partisans only rarely pass themselves off as concerned citizens—Part III.C.1 presents evidence to the contrary—the fact remains that conflicted interests in the status quo also *openly* make partisan claims⁴⁷⁵ and court-ordered districting plans incorporate them.⁴⁷⁶ If nothing else, the empirical definition would at least make it harder for litigants like those in the Nevada case to falsely present as traditional whatever rule that is expedient. For example, if the empirical definition were law, a partisan counsel’s claim that incumbent protection is traditional⁴⁷⁷ would be easily contradicted because only 7 states require or allow it but 14 prohibit it in congressional districting.⁴⁷⁸ In contrast, without the empirical definition, rebutting that same false claim in the Nevada hearings in 2011 would require scouring the entire modern history of districting doctrine, to show that the Supreme Court had never yet actually called incumbent protection traditional.⁴⁷⁹

Separate from our arguments on the merits of the empirical definition, some readers may dismiss our opposition to partisanship in redistricting as naiveté, because the adversary system clearly rewards counsel who live by the saying “[I]et justice be done—that is, for my client let justice be done—though the heavens fall.”⁴⁸⁰ We know that hired guns often cannot help but fire where pointed, and that many genuinely believe that the adversary system’s “open and relatively unrestrained competition among individuals produces the maximum collective good.”⁴⁸¹ Yet, the adversary system’s assumption of “two biased and interested parties each arguing in front of an impartial referee”⁴⁸² plainly does not fit redistricting litigation, because its result affects not only the two biased parties but also the entire electorate—the latter of whom are rarely, if ever, in the courtroom.⁴⁸³ Hence, unless the public interest can be represented in every single districting case,

⁴⁷⁵ See *supra* notes 6, 48-51 and accompanying text.

⁴⁷⁶ See *Hippert II*, 813 N.W.2d 379.

⁴⁷⁷ See *Nevada Hearing II*, *supra* note 204 at 11.

⁴⁷⁸ See SUMMARY DATABASE, *supra* note 27.

⁴⁷⁹ See *supra* note 33 and accompanying text.

⁴⁸⁰ MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 9 (1975).

⁴⁸¹ Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 172, 173 (David Luban ed., 1983)

⁴⁸² Jens H. Hillen, Note, *The Court of Appeals for the Federal Circuit: Independent Review of Patent Decisions and the Constitutional Facts Doctrine*, 67 S. CAL. L. REV. 187, 187 (1993).

⁴⁸³ See Manheim, *supra* note 159, at 600 (“[R]edistricting litigants . . . not the electorate at large . . . are able to set the courts’ agendas . . . Voters across an entire jurisdiction are affected . . . when a court requires . . . an altered electoral map. . . . Yet redistricting litigation fails to trigger protections analogous to those provided in the class-action context.”).

it is only natural that we ask to rein in the partisan ones. Although winning is important, some things are even more important: the sky collapsing is bad for everyone, including the winners.⁴⁸⁴

B. The Empirical Definition Advances Constitutionally Required Equitable Redistricting

Part III.A has shown that the empirical definition would outperform the status quo in an issue area without meaningful doctrinal guidance—judges’ choice of criteria governing court-ordered districting—because the status quo frequently results in judicial legislation, whereas the empirical definition would tie judicial discretion to an objectively discernible standard. Part III.B establishes that the empirical definition would also outperform the status quo in a domain where the Supreme Court has had longstanding guidelines: determining whether a criterion was applied constitutionally to a districting plan, apart from the issue of whether that criterion is traditional. Specifically, some courts would condone abusive districting rules such as incumbent protection, as long as they are applied consistently throughout a districting plan. The empirical definition, in contrast, does not allow practices such as incumbent protection regardless of how symmetrically they are applied,⁴⁸⁵ thereby advancing a constitutional principle that courts purport, but often fail, to follow in the status quo: redistricting must not unduly discriminate against any candidate.

Since the 1960s at the latest, the Supreme Court has held that districting plans constitute “invidious discrimination” if they violate certain “individual and personal” rights.⁴⁸⁶ The Court specified how this principle would apply to districting criteria by ruling that such criteria must be “consistent and nondiscriminatory application of a legitimate state policy,”⁴⁸⁷ indicating that constitutionally acceptable uses of districting criteria require both consistency of application *and* normatively justifiable content. As for what that normatively justifiable content in a redistricting criterion might look like, the Court has held that redistricting plans must eschew not only racial discrimination but also political.⁴⁸⁸ Even *Rucho*, the 2019 case in which the Court drastically

⁴⁸⁴ Cf. DAVID HUME, *Of Passive Obedience*, in HUME: POLITICAL ESSAYS 202, 202 (Knud Haakonssen ed., 1994) (1777) (“[L]et justice be performed, though the universe be destroyed, is apparently false, and by sacrificing the end to the means, shews a preposterous idea of the subordination of duties. . . . [T]he duty of allegiance . . . must always, in extraordinary cases, when public ruin would evidently attend obedience, yield to the . . . safety of the people[.]”).

⁴⁸⁵ See SUMMARY DATABASE, *supra* note 27.

⁴⁸⁶ *Reynolds*, 377 U.S. at 561.

⁴⁸⁷ *Thomson*, 462 U.S. at 844.

⁴⁸⁸ *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (“A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’”) (citations omitted).

reduced its own authority to regulate abusive districting, explicitly named one-person, one-vote in addition to racial gerrymandering as areas where “there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.”⁴⁸⁹

However, some federal rulings have prioritized consistency of application over normative content, thereby condoning districting criteria that would violate one person, one vote. Moreover, condoning abusive redistricting criteria if they are applied consistently allows for the possibility that, if applied inconsistently, beneficial redistricting criteria may not be permitted. Hence, this “consistency of application” rule can be abused to allow discriminatory districting criteria on condition that everyone suffer from it, or reject legitimate districting criteria on condition that no one benefit from it. For example, the trial court judgment in *Larios v. Cox*, later affirmed by the Supreme Court,⁴⁹⁰ held that a redistricting proposal disproportionately advantaging Democratic incumbents could have been upheld had it protected Republican incumbents to a similar degree:

While Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another . . . to unseat as many of them as possible. . . . The population deviations in the Georgia House and Senate Plans [do not] further any legitimate, consistently applied state policy. . . . [T]he deviations were . . . intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents. Neither of these explanations withstands Equal Protection scrutiny. . . . [T]he creation of deviations [to] allow[] . . . certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional. Moreover, the protection of incumbents is . . . permissible . . . only when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner. The incumbency protection in the Georgia state legislative plans meets neither criterion.⁴⁹¹

To establish that this ruling would condone abusive districting practices that are applied consistently, it must first be shown that protection of incumbents is such a practice. Incumbent

⁴⁸⁹ *Rucho*, 139 S. Ct. at 2495-96.

⁴⁹⁰ See *Larios I*, 300 F. Supp. 2d at 1320, *aff’d*, 542 U.S. 947 (2004) [hereinafter *Larios II*] (invalidating a reapportionment plan presenting deviations of less than five percent because of, inter alia, partisan advantage).

⁴⁹¹ *Larios I*, 300 F. Supp. 2d at 1329, 1338.

protection, whether merely preventing incumbents from running against one another or giving them further advantages,⁴⁹² makes elections discriminatory by favoring a particular group of candidates for this election on the basis of the votes they won in the last one. Whether that cartel includes only one or both sides of the aisle does not change the fact that it discriminates against challengers and the voters who support them. By giving some candidates a better chance to win, whether by devaluing some citizens' votes or by removing their preferred candidate, incumbent protection violates one-person, one-vote, which the Supreme Court is obligated to protect.⁴⁹³

To see why incumbent protection is discriminatory regardless of partisanship, consider a species of incumbent protection occurring in an environment that effectively eliminates partisan manipulation: primary elections. In 2000, future Democratic Representative Hakeem Jeffries challenged Roger Green, an incumbent New York assemblyman of 19 years, for Green's seat in district 57.⁴⁹⁴ Although Jeffries lost, he won 41 percent of the vote in an "unusually impressive showing for a political novice,"⁴⁹⁵ causing him to run again.⁴⁹⁶ However, the redistricting that occurred before the 2002 election, among other changes, removed Jeffries' home from district 57 which, according to Jeffries, left him "in disbelief" and his supporters "surprised to find that they no longer lived in the assembly district that they had been living in for years, if not decades."⁴⁹⁷

We argue that incumbent protection, regardless of the degree of partisanship or protection given to incumbents, violates one-person, one-vote by discriminating against certain candidates and voters. However, some may not believe that incumbent protection violates one-person, one-vote, even if they agree that it is discriminatory. Assume that a strong challenger announces her intent to run against an incumbent. The incumbent causes his district to be redrawn so that the strong challenger is removed from his district. If another challenger runs, one might argue that one-person, one-vote would not be violated despite the incumbent rigging the districting process,

⁴⁹² With some exceptions, state redistricting authorities and courts do not specifically list all the advantages afforded to incumbents. As far as we are aware, one such exception is incumbents being exempted from running against one another in the same districts. *See infra* Part III.C.1. However, in practice, incumbents also seem to benefit by evading competitive challengers. *See infra* notes 250-53 and accompanying text.

⁴⁹³ *Rucho*, 139 S. Ct. at 2495-96.

⁴⁹⁴ Jonathan P. Hicks, *New York Today: Rematch Produces Spirited Primary Race for Assembly Seat in Brooklyn*, N.Y. TIMES, Jul. 22, 2002.

⁴⁹⁵ *Id.*

⁴⁹⁶ Jonathan P. Hicks, *In District Lines, Critics See Albany Protecting Its Own*, N.Y. TIMES, Nov. 2, 2004 (stating that districting barred Jeffries from running in district 57 in 2004, resulting in Green running unopposed in the primary).

⁴⁹⁷ GERRYMANDERING (Green Film Company 2010), at 13:20.

because anyone can still cast a ballot against the incumbent that weighs just as much as one cast by another voter. Some might go further and say that incumbent protection, regardless of variety, does not violate one-person, one-vote as long as it does not directly devalue a citizen’s ballot—even if redistricting allows incumbents to run unopposed.⁴⁹⁸ The Supreme Court used the same reasoning in *Rucho* to rule that partisan gerrymandering does not violate one-person, one-vote.⁴⁹⁹

However, such an argument is a red herring, just as the Court’s claim in *Rucho* regarding partisan gerrymandering is.⁵⁰⁰ Superficially satisfying individual quantitative tests of redistricting proposals, such as one-person, one-vote or equally populated districts, does not guarantee that a plan is constitutionally legitimate, because those measures test for only a few of many signs that some ballots may be worth less than others; coughing is a common symptom of COVID-19, but not coughing is far from a guarantee that one is virus-free.⁵⁰¹ This lesson, which seems to be lost on the *Rucho* majority, was one that the Supreme Court used to recognize—*Gaffney* held in 1973 that “[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’”⁵⁰² In the same way, superficially giving each ballot the same value does not ensure one-person, one-vote if incumbent protection robs voters of the candidates they would have cast their ballots for.

Perhaps the strangest part of this farcical logic is that, outside the context of redistricting law, circumventing one rule by breaking another one is usually called cheating. Imagine that an unscrupulous Formula One racer attempts to illegally equip his car with a jet engine instead of a piston engine, so as to easily outstrip his competitors.⁵⁰³ Upon being exposed and forced to revert to a piston engine, said racer finishes first by destroying his competitors’ cars.⁵⁰⁴ In this example,

⁴⁹⁸ See Hicks, *supra* note 252.

⁴⁹⁹ *Rucho*, 139 S. Ct. at 2501-02.

⁵⁰⁰ See *supra* Part II.A.2.

⁵⁰¹ Melissa M. Arons et al., *Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility*, 382 NEW ENG. J. MED. 2081, 2082 (2020) (“Nursing staff assessed residents twice daily for possible . . . symptoms of Covid-19, including . . . cough A total of 6 residents tested positive . . . of these . . . 2 had been asymptomatic during the preceding 14 days.”).

⁵⁰² 412 U.S. at 751 (internal citations omitted).

⁵⁰³ See FEDERAL AVIATION ADMINISTRATION, AIRPLANE FLYING HANDBOOK 15-2 (2016) (“One of the advantages of the jet engine over the piston engine is the jet engine’s capability of . . . greater . . . horsepower[.]”), available at https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/airplane_handbook/media/airplane_flying_handbook.pdf. Of course, attaching a turbofan jet engine to a car is an exaggerated example for illustrative purposes.

⁵⁰⁴ Cf. Brad Spurgeon, *A Lingering Controversy Since 1994*, N.Y. TIMES, Mar. 13, 2015 (describing allegations of Michael Schumacher attempting to defeat competitors by deliberately crashing into their cars during races).

ensuring a fair competition requires that all cars be built according to the same regulations *and* that no racers sabotage their competitors; only one is insufficient. If the unscrupulous racer is not punished, Formula One could not seriously claim to be a racing competition because the winners would no longer be the best racers, but instead the best saboteurs.⁵⁰⁵ In the real-world analogue of this hypothetical, seven-time world champion Michael Schumacher’s former teams have been accused of using illegal parts in their cars,⁵⁰⁶ and Schumacher himself was disqualified from an entire season for willfully crashing into the car of a close competitor for the championship.⁵⁰⁷

As shown, *Larios* places excessive value on whether a districting criterion was applied consistently, at the expense of properly evaluating whether that criterion is normatively valid—thereby condoning discriminatory criteria such as incumbent protection, as long as both major parties profit equally. However, the existing doctrine still has room to get worse. This so-called “consistency of application” approach, taken to its logical end, would allow courts not only to condone abusive districting criteria that are applied consistently, but also to obstruct the use of valid criteria if applied inconsistently. Moreover, *Larios*’ choice of the word “consistent” made coherent enforcement of this standard impractical because the ruling failed to specify just what degree of consistency is consistent enough. Just as almost anything can conceivably be attacked as being imperfect, nearly any rule can conceivably be attacked as not being consistent enough.

The consistency of application approach logically requires judicial intervention against the usage of districting criteria that states consider to be traditional by an overwhelming margin, because many states apply them in an inconsistent, but not necessarily invalid, fashion. Consider the requirement that districts must consist of contiguous territory, which is required by 49 states and prohibited by none in state legislative districting.⁵⁰⁸ According to our database of districting law, states apply this criterion in at least three ways. Most states require only contiguity without

⁵⁰⁵ Cf. Tom Phillips, *Felipe Massa Believes Renault Cheats Cost Him Title*, THE GUARDIAN, Oct. 1, 2009, available at <https://www.theguardian.com/sport/2009/oct/01/formula-one-felipe-massa-nelson-piquet-junior> (a Formula One racer arguing that a deliberately caused crash that was not punished at the time cost him the 2008 championship).

⁵⁰⁶ Maurice Hamilton, *Motor Racing: United Dolours of Benetton Maurice Hamilton on the Cheating Storm Still Hovering over Michael Schumacher’s Team*, THE GUARDIAN, July 31, 1994 (describing allegations of Benetton Formula using illegal traction control); Alan Baldwin, *Motor Racing: Seven F1 Teams Challenge Secret Ferrari Settlement*, REUTERS, Mar. 4, 2020, available at <https://www.reuters.com/article/us-motor-f1-ferrari/motor-racing-seven-f1-teams-challenge-secret-ferrari-settlement-idUSKBN20R1NE> (describing a settlement reached by Scuderia Ferrari not disclosed to any other team, following investigations into Ferrari’s allegedly illegal engine used in 2019).

⁵⁰⁷ *Schumacher Loses Championship Runner-up Crown*, BBC, Nov. 11, 1997, available at <http://news.bbc.co.uk/2/hi/europe/29895.stm>.

⁵⁰⁸ See SUMMARY DATABASE, *supra* note 27.

more;⁵⁰⁹ some accept contiguity by water;⁵¹⁰ others say that “contiguity by water is acceptable to link territory within a district provided that there is a reasonable opportunity to access all parts of the district.”⁵¹¹ Contiguity by water allows inconsistent application to districts depending on their adjacency to bodies of water,⁵¹² whereas contiguity by water depending on ease of access invites even more inconsistency at the districting authority’s discretion. If the existing doctrine is not a double standard, it must reject both incumbent protection and contiguity if applied inconsistently.

Some readers may not be concerned about the *Larios* ruling being used against legitimate redistricting criteria because, unlike incumbent protection, courts have not yet invalidated widely accepted criteria such as contiguity due to inconsistent application. However, this is not cause for absolution because it indicates two possibilities. First, this consistent application approach itself is not consistently applied. Second, the consistent application approach tolerates a certain amount of inconsistency, so that contiguity is allowed but partisan incumbent protection is not, but courts have never articulated how much inconsistency is tolerable. The first possibility would indicate that courts can enforce *Larios* selectively, depending on how palatable a particular redistricting criterion appears to a judge. The second possibility would indicate that litigants would not know if *Larios* was selectively enforced, if it ever were. Either way, *Larios*’ consistency of application approach would undermine the “logic and symmetry of the law” that judges claim to value.⁵¹³

In fact, *Larios* would not only be harmful if enforced as intended but also hard to enforce as intended, given the partisan nature of redistricting in the status quo. Recall that *Larios* would allow incumbent protection if it does not overly favor a party.⁵¹⁴ However, bipartisan incumbent protection is effectively an oxymoron because most states redistrict through their legislatures⁵¹⁵

⁵⁰⁹ See, e.g., Cal. Const. art. XXI, § 2(d)(3); N.Y. Const. art. III, § 4(c)(3); Tex. Const. art. III, § 25.

⁵¹⁰ See, e.g., 3rd Congressional District Criteria, Joint Reapportionment Committee, at III (Aug. 17, 2015), available at http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_congress_criteria_8-17-15.pdf [<https://perma.cc/9MZR-EK3Q>].

⁵¹¹ 2011 Redistricting Guidelines, Senate Judiciary Committee, at II, Apr. 13, 2011, available at <http://redistricting.scsenate.gov/Documents/RedistrictingGuidelinesAdopted041311.pdf> [<https://perma.cc/J4WG-XJH8>].

⁵¹² See *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002) (“[M]asses separated by water may nevertheless satisfy the contiguity requirement in certain circumstances. . . . [I]n today’s world of mass media and technology, [contiguous land access] is not necessary for communication . . . between such residents and their elected representative.”).

⁵¹³ Haines, *supra* note 15.

⁵¹⁴ *Larios I*, 300 F. Supp. 2d at 1338.

⁵¹⁵ See SUMMARY DATABASE, *supra* note 27.

and legislatures are designed to serve the majority party’s interests.⁵¹⁶ Although some scholars speak of cartels ostensibly meant to protect incumbents of both major parties,⁵¹⁷ the reality is that legislative districting is more likely to prefer copartisan to opposition incumbents⁵¹⁸—especially because the Supreme Court recently refused in *Rucho* to police partisan gerrymandering.⁵¹⁹ For example, North Carolina requires “reasonable efforts” to ensure that its congressional delegation consists of ten Republicans and three Democrats.⁵²⁰ In addition to locking in a discriminatory partisan ratio of incumbents, if any election returned, say, nine Republicans and four Democrats, this rule would ensure that one Democratic incumbent gets less protection than Republicans do.

In sum, existing doctrinal guidance on the application of districting criteria represented by *Larios* and *Rucho* lacks a coherent logical basis, condones abusive criteria such as incumbent protection, and is also difficult to enforce as intended, given the partisan nature of redistricting. The empirical definition, in contrast, neither condones discriminatory practices on condition that everyone suffer from it, nor depends on unpersuasive caveats to establish its constitutional basis. Part III.C presents this Article’s last category of corroboration, by describing how we interpreted various redistricting criteria and how they are used in practice by the states. The main purpose of these analyses is to show that the districting practices that the empirical definition deems abusive and nontraditional—such as partisan advantage, incumbent protection, preserving communities of interest, and preserving past district cores—would render elections systematically inequitable.

C. Interpretations of Various Districting Criteria

1. Nontraditional Districting Criteria

Preservation of communities of interest. We do not consider preserving communities of interest to be a traditional districting criterion pursuant to the empirical definition. The first and

⁵¹⁶ See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 2* (1st ed. 1993) (“[T]he legislative process in general . . . is stacked in favor of majority-party interests.”).

⁵¹⁷ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002) (“[I]f a legislative plan were to provide the two major political parties with reasonable prospects of achieving what they believed to be their appropriate shares of representation, what could be objectionable in such a coalition effort?”).

⁵¹⁸ Cf. FRANCES E. LEE, *INSECURE MAJORITIES* 143, 158 (2016) (examining the causes of “more party-line voting” and “the growth in partisan conflict” in both chambers of Congress).

⁵¹⁹ 139 S. Ct. at 2500.

⁵²⁰ N See N.C. Congressional Plan Criteria, *supra* note 117, at 1.

obvious reason for disqualification is that, in state legislative and congressional districting, fewer than 26 states require or allow it via constitutions, statutes, or legislative guidelines.⁵²¹ However, we advance additional reasons that preserving communities of interest is not traditional, which many commentators neglect. First, the requirement to preserve communities of interest often imposes a procedure instead of a substantively unambiguous districting principle. Second, the term is so open-ended that it can be used to justify abusive practices such as partisan advantage or incumbent protection under a different label. For these reasons, we classify the communities of interest criterion as a procedural requirement, in the same category as rules deciding which part of a state government conducts redistricting.⁵²² In contrast, what we call traditional criteria impose legitimate, substantive requirements on districting, such as equally populated districts.

First, preserving communities of interest is not a traditional districting criterion because it frequently adds a procedural requirement to the redistricting process, instead of a substantively unambiguous redistricting principle. Specifically, because of the indefinite nature of the term “communities of interest” and courts’ reluctance to define that term themselves,⁵²³ many states require redistricting authorities to obtain input from local residents as to what they consider their communities of interest to be. In contrast, every other districting criterion in our dataset imposes substantively unambiguous requirements on redistricting: for instance, that “no representative district shall have a population which exceeds that of any other representative district by more than five percent.”⁵²⁴ Yet, scholars and judges routinely lump in preserving communities of interest with other more substantive criteria in the same “traditional” category.⁵²⁵ For illustration, consider the relevant legislative guidelines in the states of Alabama, Kansas, and Virginia:

The integrity of communities of interest shall be respected. . . . [A] community of interest is defined as an area with recognized similarity of interests, including but not limited to racial, ethnic, geographic, governmental, regional, social, cultural, partisan, or historic

⁵²¹ See SUMMARY DATABASE, *supra* note 27.

⁵²² See *id.*

⁵²³ See, e.g., *In re Legislative Districting of State*, 805 A.2d 292, 298 (Md. 2002) (“[I]t is not for the Court to define what a community of interest is and where its boundaries are, and it is not for the Court to determine which regions deserve special consideration and which do not.”).

⁵²⁴ Iowa Code Ann. § 42.4(1)(a) (West).

⁵²⁵ See, e.g., *Rucho*, 139 S. Ct. at 2500; *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002); Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1580 (2005); Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 806 (2013).

interest . . . Public comment will be received by the Reapportionment Committee regarding the existence and importance of various communities of interest. The Reapportionment Committee will attempt to accommodate communities of interest identified by people in a specific location. . . . The discernment, weighing, and balancing of the various factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.⁵²⁶

Subject to the requirement of [equal population among districts] . . . [t]here should be recognition of similarities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered. While some communities of interest lend themselves more readily than others to being embodied in legislative districts, the Committee will attempt to accommodate interests articulated by residents. . . . If possible, preserving the core of the existing districts should be undertaken when considering the “community of interests” in establishing districts.⁵²⁷

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. . . . The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.⁵²⁸

All three states require redistricting authorities to consult residents on what their communities of interest are, but no state requires specific, substantive consequences on redistricting as a result of such consultation. This is in contrast to any substantive criterion, both traditional and not, which

⁵²⁶ Reapportionment Comm. Guidelines, *supra* note 98, at IV.7.B.

⁵²⁷ Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting, Legislative Redistricting, 4(d), *available at* http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf [<https://perma.cc/MVB3-RZWF>].

⁵²⁸ Va. House Criteria, House Committee on Privileges & Elections, Committee Resolution 1, at V (Mar. 25, 2011), *available at* http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_House_criteria_3-25-11.pdf [<https://perma.cc/8SET-6XPT>].

do require particular results out of districting. Consider incumbency protection. One may debate the level of protection (for example, putting incumbents in safe districts or prohibiting them from competing against one another), but no one can dispute what an incumbent is. As for preserving communities of interest, the only objectively discernible mandate in that criterion as given above is to solicit input. Hence, we consider this procedural criterion to be neither traditional nor the same as substantive criteria. If the empirical definition considered the communities of interest criterion to be traditional, it would have to put the same label on other procedural elements, such as the entity mainly responsible for districting. Most states redistrict through their legislatures,⁵²⁹ but it would be plainly unreasonable to make all other states to follow suit because of that reason.

Second, preserving communities of interest is neither substantive nor traditional because the term is so open-ended that it can justify abusive districting practices after the fact. Although scholars have long recognized the “vague,”⁵³⁰ “diversely defined,”⁵³¹ and even “meaningless”⁵³² nature of that term, they have been notably quiet on its potential for abuse. Virginia, for example, allows communities of interest to be defined by “political beliefs” or “voting trends,”⁵³³ which could allow legislators to justify partisan redistricting under a different name. The fact that some states claim to exclude partisanship in determining communities of interest⁵³⁴ may not reduce the likelihood of abuse, because what is in fact a community of interest held together by partisanship could easily be presented as based on any of the many other possible justifying factors. Although we are not aware of litigation alleging such abuse as of the publication of this Article, the risk of such abuse is more than speculative. Consider testimony given in a public proceeding in Arizona convened to solicit the residents’ input on what the local communities of interest look like⁵³⁵:

⁵²⁹ See SUMMARY DATABASE, *supra* note 27 and accompanying text.

⁵³⁰ Andrew J. Clarkowski, *Shaw v. Reno and Formal Districting Criteria: A Short History of a Jurisprudence That Failed in Wisconsin*, 1995 WIS. L. REV. 271, 301.

⁵³¹ Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 32 (1985).

⁵³² Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 663 (1993).

⁵³³ See *supra* note 284 and accompanying text; see also SARAH J. ECKMAN, CONG. RESEARCH SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 14 (2019) (“People within a community of interest generally have . . . common interests These recognized similarities may be due to shared social, cultural . . . partisan, or economic factors”), available at <https://fas.org/sgp/crs/misc/R45951.pdf>.

⁵³⁴ See, e.g., Cal. Const. art. XXI, § 2(d)(4); Mi. Const. Art. 4, § 6(13)(c) (West).

⁵³⁵ Arizona Independent Redistricting Commission, Proceedings, at 99 (2011), available at <https://azredistricting.org/docs/Meeting-Info/Transcript-080511.pdf> [<https://perma.cc/L2YP-HPRA>].

It is a false dichotomy to say that competition and communities of interest undermine each other. The origins of the concept of community of interest come from 20 or 30 years ago when commissions and legislatures all over the country and the Department of Justice were trying to say people of like interests should be able to vote together. Farmers with farmers, students with students. Unfortunately[,] it's misused, communities of interest, now as a front. People will create astroturf groups to come forward and tell you this is our community of interest. And I've already seen it tonight. You'll see more of it when the maps come out. *They'll say this is our community of interest when what is really happening behind the scenes is some legislator or congressman is trying to protect their own power base, protect their own seat* [italics added for emphasis].

Clearly, this testimony alone is insufficient evidence as to whether party operatives or legislative aides masqueraded as unbiased locals to unduly influence states' determination of "communities of interest." However, it is sufficient evidence to show that partisans or incumbents *could* easily engage in such abuse. For the foregoing reasons, we consider preserving communities of interest to be neither substantive nor traditional regardless of the number of states endorsing the criterion, even though fewer than 26 states legislatively require or allow it in the redistricting process.

Preservation of past district cores. Preserving past district cores refers to keeping each of the previously enacted plan's districts intact as much as possible in a new districting plan. Each new district would be as similar as possible to its geographically corresponding district under the previously enacted plan, thus minimizing any boundary changes from the previous plan.⁵³⁶ Of course, preserving past district cores effectively perpetuates any biases that were present in the drawing of the previously enacted plan. If the previous plan was drawn to favor a political party, then preserving these districts' cores would perpetuate the same partisan bias under the new plan.

Only six states have a requirement of preserving past district cores, and two additional states allow the practice. For example, Nebraska's legislature passed a legislative resolution in 2011 requiring "the preservation of the cores of prior districts" in the drawing of congressional districts.⁵³⁷ Oklahoma's state house adopted a similar set of redistricting guidelines, stating that

⁵³⁶ See *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 457 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004).

⁵³⁷ Legislative Resolution 102, at 2, Apr. 9, 2011, *available at* <https://nebraskalegislature.gov/FloorDocs/102/PDF/Intro/LR102.pdf> [<https://perma.cc/2GEH-N7WC>].

the state’s restricting authority may “preserve the core of existing districts” in the drawing of state legislative and congressional districts.⁵³⁸ However, the other 42 states are silent on the permissibility of preserving past district cores. Because fewer than 26 states allow or require this criterion, preserving past district cores is not traditional pursuant to the empirical definition.

Although the fact that fewer than ten states require or allow the preserving of past district cores alone is enough to not treat that criterion as traditional, there is yet another, qualitative reason: preserving past district cores is defined so as to not be a rational state policy. Recall that the Supreme Court presents traditional districting criteria as rational policy goals that may justify minor deviations from equal population,⁵³⁹ and that we use the same framework to reinforce the theoretical basis of the empirical definition.⁵⁴⁰ However, the plain text of that requirement alone may seem insufficient to determine whether it may be a legitimate state policy, because seven of the eight states that allow or require the preserving of past district cores say nothing about what that should look like in practice;⁵⁴¹ as for the eighth, Arkansas states that “the map makers can take into account the existing districts, their geographic location, and the current population.”⁵⁴² Indeed, even when preserving district cores is an explicit consideration, actual redistricting plans have preserved anywhere from less than 18 percent to more than 90 percent of past districts.⁵⁴³

However, determining whether the preservation of past district cores can be a legitimate state policy objective becomes an easier task when one interprets that requirement as simply to “minimize changes” to the current districting plan.⁵⁴⁴ According to this interpretation, preserving past district cores can mean at least two things, depending on how highly it is prioritized in the redistricting process. First, a redistricting authority might prioritize district preservation enough to unduly subordinate to it traditional criteria such as equal population. Second, the redistricting

⁵³⁸ 2011 Redistricting Committee Guidelines for Redistricting, House Redistricting Committee § 5 (Feb. 14, 2011), available at

<https://www.okhouse.gov/research/2011RedistrictingGuidelines-FINAL.pdf> [<https://perma.cc/AV3Z-7EKH>].

⁵³⁹ *Reynolds*, 377 U.S. at 579.

⁵⁴⁰ See *supra* Parts II.C.1 and III.A.

⁵⁴¹ See, e.g., Ohio Const. Article XI, Section 7(D), N.Y. Const. art. III, § 4(c)(5); see also *supra* note 27 and accompanying text.

⁵⁴² See *supra* note 55 and accompanying text.

⁵⁴³ *Larios I*, 300 F. Supp. 2d at 1334; *Favors v. Cuomo*, No. 11-CV-5632 DLI RR, 2012 WL 928216, at *15 (E.D.N.Y. Mar. 12, 2012), report and recommendation adopted as modified, No. 11-CV-5632 RR GEL, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012).

⁵⁴⁴ *Luna v. Cty. of Kern*, 291 F. Supp. 3d 1088, 1112 (E.D. Cal. 2018) (“Defendants . . . argue that Kern County has for decades adhered to a broader principle that new district maps should maintain the core of existing districts and minimize changes.”).

authority might preserve past district cores only if doing so would not sacrifice traditional criteria to any degree. If the first interpretation is correct, preservation of past district cores should not be deemed traditional, because creating population deviations to preserve past districts would defeat the very purpose of redistricting—to redraw electoral districts in response to population changes. If the second interpretation is correct, preserving districts would be a tautological or toothless requirement that means “make any necessary changes, but don’t make any unnecessary ones.”

Reality seems to reflect parts of both possible interpretations. Districting authorities do not seem to baldly admit to prioritizing past district preservation over all other objectives,⁵⁴⁵ but they also do not plausibly defend the practice of preserving past district cores while ostensibly engaged in the process of redrawing those districts to accurately reflect population changes. For example, some state and local authorities claim that preserving past district cores is in service of maintaining “continuity of representation”,⁵⁴⁶ that is, “preserv[ing] relationships between elected officials and their constituents over time.”⁵⁴⁷ We submit that the only legitimate indicator of how long a relationship between elected officials and voters should last is the length of their term, not districts drawn to extend the careers of politicians who would otherwise have been thrown out.

As for the second interpretation, preserving past district cores seems neither completely toothless nor meaningful, because that criterion does seem to affect redistricting outcomes⁵⁴⁸ but it also appears to be used as a front to justify a different objective. Many scholars have noted that preserving past district cores often effectively advances incumbent protection, by preserving an incumbent’s power base.⁵⁴⁹ At any rate, we consider neither the preservation of past district cores for its own sake nor doing so for the ulterior motive of protecting incumbents to be a rational state policy⁵⁵⁰ and, as such, do not consider that criterion to be a traditional districting principle.

⁵⁴⁵ See, e.g., Brief of Appellees Miller, Howard, and Massey, *Abrams v. Johnson*, 521 U.S. 74 (1997), 1996 WL 528369, at 68-69 (defending the challenged districting plan as presenting only “slight” deviations from “absolute population equality” and stating that it presented the lowest deviation among any of the constitutionally viable alternative districting plans).

⁵⁴⁶ See *supra* note 55 and accompanying text.

⁵⁴⁷ *Luna*, 291 F. Supp. 3d at 1112 (“These principles, defendants contend, help preserve relationships between elected officials and their constituents over time.”).

⁵⁴⁸ See, e.g., *Stone v. Hechler*, 782 F. Supp. 1116, 1126–27 (N.D. W.Va. 1992) (ruling that the eventually adopted districting plan “better preserves the cores of prior districts than any of the sixteen viable [p]lans”).

⁵⁴⁹ See, e.g., Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1161 (2005) (“[P]reserving district cores or configurations inadvertently is often a decision in favor of preserving safe seats for incumbents.”).

⁵⁵⁰ See *supra* Part III.B.

Partisan advantage. In legislative and congressional districting, partisan advantage refers to drawing district lines with the intent to achieve a certain political or partisan outcome, either within a single district or across multiple districts in a districting plan. Colloquially, this practice is called partisan gerrymandering. Although allegations of partisan gerrymandering abound throughout the history of legislative and congressional districting in the United States, we find that state constitutions and redistricting statutes rarely, if ever, openly endorse the practice.

In fact, the most common mentions of partisan considerations in districting laws are explicit prohibitions against the practice of partisan gerrymandering. For example, Article III, Section 21 of Florida’s constitution, as approved by ballot initiative in November 2010, states that “[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent[.]”⁵⁵¹ California’s Voters First Act, approved by ballot initiative in November 2008, amended California’s constitution to include a similar prohibition on partisan gerrymandering: “[d]istricts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”⁵⁵² 17 states prohibit the pursuit of partisan advantage in state legislative districting and 15 prohibit it in congressional districting.

In contrast, only a single state has adopted an endorsement of partisan gerrymandering in its districting practices. North Carolina’s General Assembly conducted a mid-decade redrawing of both its congressional districts in 2016 and its state legislative districts in 2017, after the previous plans were struck down in *Harris v. McCrory* and *Covington v. North Carolina*.⁵⁵³ Prior to redrawing the congressional plan in 2016, the General Assembly’s Joint Select Committee on Congressional Redistricting passed the “2016 Contingent Congressional Plan Committee Adopted Criteria” to outline the set of criteria the General Assembly would use, which requires maintaining the “current partisan makeup of North Carolina’s congressional delegation[.]”⁵⁵⁴ In state legislative districting, “[p]olitical considerations and election results data may be used.”⁵⁵⁵

⁵⁵¹ Fla. Const. art. III, § 21(a).

⁵⁵² Cal. Const. art. XXI, § 2(e).

⁵⁵³ *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff’d*, 137 S. Ct. 2211 (2017).

⁵⁵⁴ See N.C. Congressional Plan Criteria, *supra* note 117, at 1.

⁵⁵⁵ N.C. House and Senate Plans Criteria, Senate Committee on Redistricting & House Select Committee on Redistricting 1 (Aug. 10, 2017), *available at* https://www.dropbox.com/s/79092edav03alh3/NC_2017-08-10_2017HouseSenatePlanCriteria.pdf?dl=0 [<https://perma.cc/QM5X-J4XG>].

The unusual nature of North Carolina’s explicit approval of partisanship in its districting criteria underscores the non-traditional nature of partisan criteria in redistricting laws. The fact that the North Carolina state legislature attempted to mandate a partisan Republican advantage in its districting does not make partisanship a traditional principle. Instead, North Carolina’s use of partisan criteria is far outweighed by the 15 other states that explicitly prohibit partisan goals in districting, leading us to conclude that partisan advantage is not a traditional districting criterion.

Incumbent protection. Incumbent protection refers to the drawing of district boundaries so as to advantage incumbent legislators electorally. In general, the very few states that mandate incumbent protection as a districting criterion simply require the redistricting authority to avoid placing multiple incumbent legislators into the same electoral district when drawing new district boundaries. For example, Georgia’s “Guidelines for the House Legislative and Congressional Reapportionment Committee” stipulate that “[e]fforts should be made to avoid the unnecessary pairing of incumbents.”⁵⁵⁶ Similarly, in 2002, the Alabama Legislature’s Reapportionment Committee adopted its “Reapportionment Committee Guidelines” for drawing state legislative and congressional districts. Alabama’s reapportionment guidelines similarly require the protection of incumbents by avoiding incumbent pairings: “[c]ontests between incumbent members of the Legislature . . . or of the Congress will be avoided whenever possible.”⁵⁵⁷

Notably, states that require incumbent protection in state legislative or congressional districting—Alabama, Kansas, North Carolina, and Vermont—do not specify any requirements beyond avoiding pairing incumbents.⁵⁵⁸ These states do not, for example, require incumbents’ districts to be drawn with a partisanship composition that heavily favors the incumbent’s party. Instead, the only specific requirement articulated by these states relate to incumbent pairings.⁵⁵⁹ In a related context, seven states allow, without requiring, the protection of incumbents in state

⁵⁵⁶ 2011-2012 Guidelines for the House Legislative and Congressional Reapportionment Committee, III.A.8, available at <https://www.dropbox.com/s/2egd5vpo0djzqt5/GeorgiaHouseCommitteeGuidelines2011-12.pdf> [<https://perma.cc/J8XB-QGYB>].

⁵⁵⁷ Reapportionment Comm. Guidelines, *supra* note 98, at IV.7.A.

⁵⁵⁸ The fact that a state specifies how incumbent protection is to be granted—for example, by avoiding incumbent pairings—does not mean that only that type of incumbent protection will occur in practice: a hypothetical incumbent who intentionally redrew a district to remove a challenger might ostensibly cite a different purpose. *Cf.* Hicks, *supra* note 250 (state representative Roger L. Green, in response to accusations of redistricting a challenger out of his district, claiming that the redistricting was intended to make room for more public housing).

⁵⁵⁹ See Reapportionment Comm. Guidelines, *supra* note 98, at IV.7.A.; Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting, *supra* note 283, at 4(e); see also *supra* note 311 and accompanying text; Vt. Stat. Ann. tit. 17, §§ 1906b(c)(4), 1906c(c)(4).

legislative redistricting. Five states allow the consideration in congressional redistricting. Overall, a total of ten states either require or allow incumbency protection in state legislative redistricting, and seven states either require or allow it in congressional redistricting. Because the number of states that require or allow incumbent protection constitutes only a fifth of the states at most, we do not consider the protection of incumbents to be a traditional districting principle.

Moreover, these few states that allow or require incumbent protection are outweighed by the larger number of states that explicitly prohibit the protection of incumbents in districting. For example, Arizona’s constitution states that “[t]he places of residence of incumbents or candidates shall not be identified or considered.”⁵⁶⁰ Montana also prohibits the consideration of incumbency in redistricting: “A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress.”⁵⁶¹ 15 states in total prohibit incumbent protection as a criterion in state legislative redistricting while 14 prohibit it in congressional redistricting. Over a third of the states explicitly prohibit incumbency protection, thus supporting our conclusion that incumbent protection is not a traditional districting principle.

Competitiveness. A small number of states require districting plans to promote electoral competitiveness, without always consistently and clearly defining competitiveness. For example, Arizona requires that “[t]o the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals[,]”⁵⁶² but does not define how competitiveness is to be measured. In contrast, Missouri not only requires competitiveness but also defines a competitive district as one in which “parties’ legislative representation shall be substantially and similarly responsive to shifts in the electorate’s preferences.”⁵⁶³ Furthermore, the Missouri constitution even outlines a specific formula and a set of past elections to be used for measuring competitiveness, and the state constitution defines a competitive districting plan as one in which both of the two major political parties have a similar ratio of wasted votes.⁵⁶⁴

However, these constitutional mandates in Arizona and Missouri are the exception to the norm. Only five states mandate competitiveness in state legislative redistricting, and four states

⁵⁶⁰ Ariz. Const. art. IV, Pt. 2 § 1 (15).

⁵⁶¹ Mont. Code Ann. § 5-1-115(3) (West).

⁵⁶² Ariz. Const. art. IV, Pt. 2 § 1 (14) (f).

⁵⁶³ Mo. Const. art. III, § 3(c)(1)(b).

⁵⁶⁴ *Id.*

mandate it in congressional redistricting. All others are simply silent regarding this criterion. Because only a tenth of the states require or permit consideration of district competitiveness, we conclude that it is not a traditional districting principle.

Preservation of precinct boundaries. Precincts, sometimes also referred to as voting districts or election districts,⁵⁶⁵ are generally the “smallest geographic unit” at which elections are administered and election results are reported.⁵⁶⁶ The fundamental difference between precincts and other political subdivisions, such as counties and municipalities, is that precincts are generally drawn by election commissions purely for purposes of election administration.⁵⁶⁷ In contrast to counties and municipalities, precincts usually do not perform any other governmental function beside their use in election administration, nor do precincts generally have their own governing bodies.⁵⁶⁸ Moreover, because precincts are used primarily for election administration, precinct lines tend to change more frequently and significantly than county or city borders do.⁵⁶⁹

As a result, it is not surprising that state laws and constitutions do not treat precincts in the same way that they treat county, city, or other administrative boundaries. Specifically, in both congressional and state legislative districting, only nine of the 50 states require the preservation of precinct boundaries. No states prohibit the practice, but the vast majority of states are simply silent regarding the importance of following precinct boundaries. For this reason, we do not find strong evidence that the consideration of precinct boundaries is a traditional districting criterion.

2. Traditional Districting Criteria

⁵⁶⁵ *Covington v. North Carolina*, 316 F.R.D. 117, 135 n.18 (M.D.N.C. 2016) (ruling that voter tabulation districts and precincts are “essentially synonymous” for the purposes of adjudicating challenges to redistricting plans).

⁵⁶⁶ *See Benisek v. Lamone*, 266 F. Supp. 3d 799, 824 (D. Md. 2017), *aff’d*, 138 S. Ct. 1942 (2018) (Niemeyer, J., dissenting).

⁵⁶⁷ *See* Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 133, 140 (2007) (“[p]recincts were . . . created to make voting easier for voters. . .”).

⁵⁶⁸ *See, e.g.*, Lauren Watts, Comment, *Reexamining Crawford: Poll Worker Error as a Burden on Voters*, 89 WASH. L. REV. 175, 216 (2014) (stating that, in Indiana, a “precinct election official is a type of poll worker . . . [who] is appointed for the sole purpose of serving voters on Election Day”).

⁵⁶⁹ *See* Samuel S.-H. Wang et. al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 222 (2019) (“[v]oting precinct boundaries . . . are frequently changed by state legislatures, by local election administrators, or by both.”).

Equal population. The principle of equal population in redistricting was first mandated in 1872 by Congress, which called for Members of the U.S. House of Representatives to be elected from single-member districts “containing as nearly as practicable an equal number of inhabitants[.]”⁵⁷⁰ Currently, state requirements for equal population require either that single-member districting plans consist of equally populated districts, or that multi-member districting plans consist of districts with equal ratios of population to legislators.

In addition to states’ own equal population requirements, federal courts have enforced this redistricting criterion since *Baker v. Carr*, in which the Supreme Court ruled that Equal Protection Clause challenges against malapportioned legislative districting are justiciable.⁵⁷¹ The Court subsequently held that congressional districts⁵⁷² and state legislative districts⁵⁷³ must comply with equal population requirements. As to the precise level of population equality required in districting plans, the Court has articulated that congressional districts must be drawn “as nearly as practicable to population equality,”⁵⁷⁴ while state legislative districting plans may have maximum population deviations of up to 10% without creating a “*prima facie* case of invidious discrimination under the Fourteenth Amendment[.]”⁵⁷⁵

States’ own requirements regarding population equality are in some instances more stringent than the ten percent standard articulated in *Brown v. Thomson*. For example, Iowa requires by statute that “no representative district shall have a population which exceeds that of any other representative district by more than five percent.”⁵⁷⁶ Montana imposes an even more stringent standard, requiring that state legislative districts be “within a plus or minus 1% relative deviation from the ideal population of a district[.]”⁵⁷⁷ Likewise, the vast majority of states have articulated a population equality requirement of some sort in their constitutions, statutes, or legislative guidelines. Specifically, 49 of 50 states have mandated population equality in the drawing of state legislative districts, and 29 states have similarly required population equality in

⁵⁷⁰ Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28 (current version at 2 U.S.C. § 2c (1994)), available at <https://www.loc.gov/law/help/statutes-at-large/42nd-congress/session-2/c42s2ch11.pdf>.

⁵⁷¹ 369 U.S. 186 (1962).

⁵⁷² *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁵⁷³ *Reynolds*, 377 U.S. at 579.

⁵⁷⁴ *Karcher*, 462 U.S. at 740.

⁵⁷⁵ *Thomson*, 462 U.S. at 842.

⁵⁷⁶ Iowa Code Ann. § 42.4(1)(a) (West).

⁵⁷⁷ Mont. Code Ann. § 5-1-115(2)(a).

congressional districting.⁵⁷⁸ Because most states require population equality and none prohibits the criterion, we characterize population equality as a traditional redistricting criterion.

Contiguity. The criterion of geographic contiguity in redistricting was first mandated by Congress in the Apportionment Act of June 25, 1842, which directed that Members of the U.S. House of Representatives to be elected from single-member congressional districts “composed of contiguous territory[.]”⁵⁷⁹ Today, almost all states require contiguity in redistricting. Specifically, 49 states mandate contiguity in the drawing of state legislative districts, and 29 states similarly require contiguity in congressional redistricting. Because most states require contiguity and none prohibits the criterion, we characterize contiguity as a traditional redistricting criterion.

Though there is little variation in how different states define contiguity, a small minority of states specify the conditions under which contiguity across water is sufficient to satisfy the contiguity requirement. Tennessee and Virginia, for example, specify that “contiguity by water is sufficient,”⁵⁸⁰ and South Carolina states that “[c]ontiguity by water is acceptable to link territory within a district provided that there is a reasonable opportunity to access all parts of the district and the linkage is designed to meet the other criteria stated herein.”⁵⁸¹ This last variety, like the preservation of communities of requirement, may be abused to achieve other districting goals. It is difficult to see why contiguity by water should be granted to some districts but not to others, if not for an ulterior motive: water is unlikely to obstruct election officials’ access to any part of South Carolina absent a natural disaster, given that the state’s largest body of water is Lake Marion and that even its “most seaward” island is connected to the rest of the state by bridge.⁵⁸²

Compactness. The principle of geographic compactness in redistricting was articulated in the Apportionment Act of 1901, which required Members of the U.S. House of Representatives

⁵⁷⁸ See *supra* note 27 and accompanying text.

⁵⁷⁹ Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491 (current version at 2 U.S.C. § 2c (1994)), available at <https://www.loc.gov/law/help/statutes-at-large/27th-congress/session-2/c27s2ch47.pdf>.

⁵⁸⁰ Tenn. Code Ann. §§ 3-1-102(e), 3-1-103(b)(4) (West); 3rd Congressional District Criteria, Joint Reapportionment Committee, at I (Aug. 17, 2015), available at http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_congress_criteria_8-17-15.pdf [<https://perma.cc/9MZR-EK3Q>].

⁵⁸¹ See 2011 Redistricting Guidelines, Senate Judiciary Committee, *supra* note 267, at III.F.

⁵⁸² See ROBERT C. CLARK & TOM POLAND, 2 REFLECTIONS OF SOUTH CAROLINA 224 (2014); PAGE PUTNAM MILLER, FRIPP ISLAND: A HISTORY 33 (2006); MELISSA WATSON, CAMPING SOUTH CAROLINA: A COMPREHENSIVE GUIDE TO PUBLIC TENT AND RV CAMPGROUNDS 72 (2014); see also *Wilkins*, 571 S.E.2d at 109 (ruling that bodies of water do not make communication or elections meaningfully difficult in the contemporary world).

to be elected from single-member districts consisting of “compact territory.”⁵⁸³ More recently, the Supreme Court has employed compactness as a test to determine whether a districting plan violates the Fourteenth Amendment or the Voting Rights Act. *Thornburg v. Gingles* held that plaintiffs alleging that a multimember districting plan dilutes the votes of racial minorities must first prove that the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district.”⁵⁸⁴ *Shaw I* applied strict scrutiny to North Carolina’s 12th congressional district because the district was so “unusually shaped” and “bizarre” that it was “unexplainable on grounds other than race.”⁵⁸⁵ Although the Court did not suggest that a non-compact district is inherently unlawful, it still used geographic compactness as a tool to identify unlawful districts because compactness is a “traditional districting principle[,]” as *Shaw* noted.⁵⁸⁶

The precise quantitative metric to be used in measuring district compactness is generally not specified by state constitutions and redistricting statutes. The vast majority of states have articulated geographic compactness as a districting criterion, but most of these states simply have a broad pronouncement about the importance of prioritizing compactness in the drawing of districts. Articles VII and VIII of Rhode Island’s constitution, for example, mandate that state house and senate districts be drawn “as compact in territory as possible.”⁵⁸⁷ Most other states also have similar broadly-worded pronouncements regarding compactness. Only a handful of states have prescribed a specific quantitative measurement of district compactness. For example, the laws of Iowa and Montana stipulate that “the compactness of a district is greatest when the length of the district and the width of a district are equal.”⁵⁸⁸

Overall, 38 of 50 states require compactness in the drawing of state legislative districts, and 26 of the 30 states with enacted congressional districting criteria require compactness in the drawing of congressional districts. No state prohibits the consideration of compactness. Contrary to the specific nature of population equality requirements, these state mandates generally do not identify a minimum threshold level that satisfies the compactness requirement. Instead, states

⁵⁸³ Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734 (current version at 2 U.S.C. § 2c (1994)), available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/31/STATUTE-31-Pg733a.pdf> [<https://perma.cc/N5NJ-GYF9>].

⁵⁸⁴ 478 U.S. 30, 38 (1986).

⁵⁸⁵ 509 U.S. 630, 635, 643, 655 (1993).

⁵⁸⁶ *Id.* at 647.

⁵⁸⁷ R.I. Const. art. VII, § 1; R.I. Const. art. VIII, § 1.

⁵⁸⁸ Iowa Code Ann. § 42.4(4)(a) (West); Mont. Code Ann. § 5-1-115(2)(d) (West).

generally require compactness to be prioritized as much as possible. While most states do not specify the precise metric or method to be used to measure geographic compactness, a few states do require specific quantitative measurements of compactness to be used in evaluating districts. Because the vast majority of states require geographic compactness in redistricting, and no states prohibit the criterion, we characterize compactness as a traditional redistricting criterion.

Preservation of county and municipal boundaries. The Supreme Court has long recognized that traditional districting criteria include “respect for political subdivisions.”⁵⁸⁹ Specifically, the Court noted in *Davis v. Mann* that there is “a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines[.]”⁵⁹⁰ In *Mahan v. Howell*, the Court held that the Virginia General Assembly’s goal of avoiding the fragmentation of political subdivisions, including counties, cities, and towns was a “rational” objective justifying the minor population deviations in the state’s legislative districts.⁵⁹¹ Similarly, *Gaffney v. Cummings* held that the Connecticut constitution’s requirement of preserving town boundaries was a rational state policy that justified minor population deviations in the state’s house and senate districts.⁵⁹²

Moreover, prior to the Court’s reapportionment revolution in the 1960s, many states had historically apportioned state legislative districts primarily on the basis of counties. Under the reapportionment scheme challenged in *Baker*, for example, the Tennessee constitution allocated a variable number of state representative and senate seats to each county, and no county could be split up into multiple legislative districts.⁵⁹³ Similarly, under the system struck down in *Reynolds v. Sims*, Alabama’s constitution arranged for each county to elect one senator each; thus, counties were the sole basis for legislative districts, regardless of the population of each county.⁵⁹⁴ Hence, not only have states historically used political subdivisions in drawing legislative districts, but the Court has also explicitly acknowledged that traditional districting criteria include avoiding the splitting of these political subdivisions.

Currently, many states require following county and city boundaries without specifying when exceptions are permitted. For example, West Virginia simply requires state senate districts

⁵⁸⁹ *Shaw I*, 509 U.S. at 647.

⁵⁹⁰ 377 U.S. 678, 686 (1964).

⁵⁹¹ 410 U.S. at 328.

⁵⁹² 412 U.S. at 742.

⁵⁹³ 369 U.S. at 189.

⁵⁹⁴ 377 U.S. at 539.

to be “bounded by county lines[.]”⁵⁹⁵ However, some states that require preserving county and city boundaries allow exceptions only if necessary to complying with other traditional districting criteria. For example, New Jersey law states that “[u]nless necessary to meet the foregoing requirements [population equality, compactness, and contiguity], no county or municipality shall be divided among Assembly districts”⁵⁹⁶ Pennsylvania’s constitution, after discussing the equal population, compactness, and contiguity requirements in legislative districting, specifies that “[u]nless absolutely necessary, no county, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district[.]”⁵⁹⁷ These examples illustrate the pattern that states sometimes allow district boundaries to deviate from county and city boundaries only when necessary for complying with another traditional districting criterion.

Overall, our analysis of redistricting laws across the 50 states confirms that traditional districting criteria include adherence both to county and city boundaries. First, we find that 39 of the 50 states have an explicit requirement to follow county boundaries when drawing state legislative districts. Meanwhile, 26 states require following county boundaries when drawing congressional districts. No state prohibits the consideration of county boundaries. Because a majority of states explicitly require the preservation of county boundaries in districting, we characterize the consideration of county boundaries as a traditional redistricting criterion.

With respect to municipal boundaries, we find a similar pattern among the states. For state legislative districts, 33 of the 50 states explicitly require the preservation of municipal boundaries, two additional states allow for the consideration of municipal boundaries, and no states prohibit the practice. As a majority of the states require the criterion in state legislative districting, and no states prohibit it, we characterize the consideration of municipalities as a traditional districting criterion. In congressional districting, 21 states require the preservation of municipal boundaries. Even though these 21 states constitute less than a majority of the 50 states, we nevertheless consider municipal boundaries to be a traditional districting criterion because a majority of states require it in state legislative districting, as stated at the start of this Article.⁵⁹⁸

⁵⁹⁵ W. Va. Const. art. VI, § 4.

⁵⁹⁶ N.J. Const. art. IV, § 2, ¶ 3.

⁵⁹⁷ Pa. Const. art. II, § 16.

⁵⁹⁸ *See supra* Introduction.

CONCLUSION

Devising judicial solutions to abusive redistricting practices has long been considered to be an intractable problem. As discussed in Part I, commentators apparently resigned themselves to the notion that the term “traditional redistricting criteria” was too amorphous and subjective to be intelligibly defined. As for judges tasked with solving that problem, there existed a plausible justification to pawn that burden off to, ironically, those who bear much of the responsibility for causing that problem in the first place: ending gerrymandering was a job for partisans (or their disgruntled constituents) because redistricting is a political problem, not a legal one. This excuse became law with the help of those with a vested interest in eliminating judicial supervision from districting, leaving only them to write the list of traditional districting criteria to their own liking.

However, the empirical definition would make “traditional redistricting criteria” tangible and objective, by defining that term as those criteria that a majority of the states practice. By making the courts merely a vessel and enforcer of what states already endorse, the empirical definition would make gerrymandering a legal problem, not a political one: enforcing traditional redistricting criteria would no longer constitute judges subverting democracy by imposing their private notions of proper districting practices. We also showed that the risk of state legislatures circumventing the empirical definition is minimal, and that the empirical definition would curb undesirable districting practices if implemented. For example, advantaging a certain party and protecting incumbents are not “traditional” criteria because fourteen to seventeen states prohibit those practices, but only one to ten states require or allow them.⁵⁹⁹ In contrast, the status quo legitimizes too brazen a conflict of interest for any sober mind to condone. Surely, someone is drunk at the wheel when the people writing the laws are simultaneously profiting off of them.

Although we believe that the empirical definition would cure the defects in the status quo definition of traditional districting criteria, every reform risks creating unintended consequences of its own. This prompts a question: if redistricting is done according to traditional criteria as we define them through the empirical definition, would that reduce partisan districting? We show evidence in the affirmative in the next Article in this research agenda, by simulating election results in districts drawn pursuant to the empirical definition. In doing so, we aim to contribute to dispelling the illusion that, just because elections will likely be partisan, election laws must also.

⁵⁹⁹ See SUMMARY DATABASE, *supra* note 27 and accompanying text.

CHAPTER IV

Legislating Customary International Law (Against Transboundary Pollution): Generating “State Practice” from Reconstrued Bilateral Investment Treaties

INTRODUCTION

“Th[is] Article will urge ratification of the proposed Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution . . . drawn up . . . in 1979.”⁶⁰⁰ – 1991

“The lack of an accessible, global, and holistic text for the environment . . . justifies the adoption of a Global Pact for the Environment.”⁶⁰¹ – 2020

How can the law curb transboundary pollution—environmental degradation in one state caused by pollutants created in another? For at least a generation,⁶⁰² the prevailing answer among legal scholars has been regulation using multilateral treaties. Citing sparse examples of success,⁶⁰³ scholars have proposed global treaties to address marine pollution,⁶⁰⁴ radiation pollution,⁶⁰⁵ topsoil loss,⁶⁰⁶ and “international environmental emergencies.”⁶⁰⁷ Some even propose treaties to expand the jurisdiction of the International Criminal Court to include

⁶⁰⁰ Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85 (1991).

⁶⁰¹ Yann Aguila, *Toward a Global Pact for the Environment*, 114 AM. SOC’Y INT’L L. PROC. 217, 218 (2020).

⁶⁰² See *supra* notes 1-2; *infra* notes 5-10.

⁶⁰³ See FELIX R. FITZROY & ELISSAIOS POPYRAKIS, AN INTRODUCTION TO CLIMATE CHANGE ECONOMICS AND POLICY 140 (2d ed. 2016) (calling “the success of the Montreal Protocol” a “rare glimpse of hope”).

⁶⁰⁴ See David VanderZwaag, *A Global Treaty to Address Land-Based Sources of Marine Pollution*, 12 OCEAN & COASTAL L.J. 355, 357 (2007) (reviewing DAUD HASSAN, PROTECTING THE MARINE ENVIRONMENT FROM LAND-BASED SOURCES OF POLLUTION: TOWARDS EFFECTIVE INTERNATIONAL COOPERATION (2006)).

⁶⁰⁵ Helmut J. Heiss, *Legal Protection Against Transboundary Radiation Pollution: A Treaty Proposal*, 4 FORDHAM ENVTL. L. REP. 167 (1993).

⁶⁰⁶ Nicholas A. Fromherz, *The Case for A Global Treaty on Soil Conservation, Sustainable Farming, and the Preservation of Agrarian Culture*, 39 ECOLOGY L.Q. 57 (2012).

⁶⁰⁷ Claire Wright, *Blueprint for Survival: A New Paradigm for International Environmental Emergencies*, 29 FORDHAM ENVTL. L. REV. 221, 222 (2017) (“This article proposes the adoption of a new treaty that would provide . . . a workable system [to address] disaster[s] that other States and the international community in general should be permitted to assist remediate . . .”).

“environmental crimes[,]”⁶⁰⁸ or to create an International Environmental Court of Justice that grants state parties “universal standing” to sue for pollution in general.⁶⁰⁹ Although some cautious voices do acknowledge the complications inherent in multilateral treaty-making,⁶¹⁰ many such scholars nevertheless insist on global treaties, arguing that “global problems require global solutions.”⁶¹¹ Others propose a network of bilateral treaties instead of a single global treaty, on the grounds that bilateral instruments may be easier to negotiate and more likely to elicit binding abatement commitments than global treaties are.⁶¹²

Unfortunately, reality has been unkind to environmental treaty-making, global or bilateral. Attempts to curb pollution globally, such as Copenhagen, Doha, and Kyoto, failed because many negotiating states opposed meaningfully binding provisions, signatory states refused to ratify the watered-down terms that survived negotiations, or ratifying states reneged on their obligations.⁶¹³

⁶⁰⁸ See Rajendra Ramlogan, *Creating International Crimes to Ensure Effective Protection of the Environment*, 22 TEMP. INT’L & COMP. L.J. 345, 400-02 (2008) (“It is desirous . . . to start the debate on . . . [placing] environmental crimes . . . contain[ing] an international element . . . within the jurisdictional reach of the [International Criminal Court] . . . [T]he road to the creation of environmental crimes in MEAs is destined to be a rocky one.”).

⁶⁰⁹ See, e.g., Suriya E.P. Jayanti, *Recognizing Global Environmental Interests: A Draft Universal Standing Treaty for Environmental Degradation*, 22 GEO. INT’L ENVTL. L. REV. 1, 20 (2009); see also Amedeo Postiglione, *Essay, A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 ENVTL. L. 321 (1990).

⁶¹⁰ See, e.g., LAWRENCE SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 6-7 (1994) (“the procedures we currently use to formulate global environmental agreements were not designed to handle the unique demands of environmental problem solving. . . . A new consensus-building process is required, and the institutional arrangements on which we have relied must be changed.”).

⁶¹¹ See, e.g., Brigitte Stern, *How to Regulate Globalization*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 247, 255 (Michael Byers ed., 2000) (“the only way to regulate the global economy and the global world is . . . the creation of a truly world-wide international law system of regulation.”).

⁶¹² See, e.g., Bradley C. Karkkainen, *The Great Lakes and International Environmental Law: Time for Something Completely Different?*, 54 WAYNE L. REV. 1571, 1582 (2008) (arguing that U.S.-Canada bilateral treaties “have served as . . . prototypes . . . for . . . widely adopted . . . approaches” and “represent . . . the best that . . . international environmental law . . . has achieved.”); Andrew Caplan, Note, *Multilateralism and the Failure of the Status Quo: The Case for Bilateral Climate Negotiations Between the United States and India*, 43 GEO. WASH. INT’L L. REV. 781, 783 (2011) (“[B]ilateral treaties may be more effective than multilateral treaties at laying down binding . . . climate change commitments.”); Scott J. Shackelford, *The Future of Frontiers*, 23 LEWIS & CLARK L. REV. 1331, 1331 (2020) (“Governance is transitioning away from . . . multilateral treaties to regional and bilateral accords.”).

⁶¹³ See, e.g., Caplan, *supra* note 13, at 791-92 (stating that Copenhagen “produced little more than vague commitments to reduce world greenhouse gas concentrations by unspecified means”); Nilufer Oral, *Ocean Acidification: Falling Between the Legal Cracks of UNCLOS and the UNFCCC?*, 45 ECOLOGY L.Q. 9, 20 (2018) (stating that the Doha Amendments to the Kyoto Protocol have not entered into force because of insufficient ratification by the states that ratified Kyoto); Christopher E. Angell, *Assessing Climate Agreement Principles: The Tension Between Early Equivalent Actions and Variable Costs*, 35 COLUM. J. ENVTL. L. 213, 220 (2010) (“Many [ratifying state] parties [to the Kyoto Protocol] are projected to miss their assigned emissions targets.”).

Even the Paris Agreement, which lacks enforceability,⁶¹⁴ nearly succumbed to a political climate increasingly hostile to globalization.⁶¹⁵ Bilateralism has also underperformed expectations, even when it “involves only two partners that have a long history of peaceful relations regarding most matters of common concern.”⁶¹⁶ The cause of this enduring frustration is clear: most states lack incentives to curb pollution unilaterally because abatement costs are immediate, but much of the gains would accrue only after the current generation dies.⁶¹⁷ Yet, much legal scholarship on environmental treaties has failed to address their infeasibility, dismissing it as “a political issue not examined in this Article”⁶¹⁸ or simply admitting that a treaty seems “impossible politically.”⁶¹⁹

Of course, not all scholars rely on treaties to reduce transboundary pollution. Some argue that a restriction on transboundary pollution is “firmly entrenched” in CIL⁶²⁰ and that CIL is just as binding as a treaty is.⁶²¹ Indeed, if CIL has already created a state obligation to abate, diplomats would no longer have to move heaven and earth to negotiate treaties that merely trumpet dubious promises to abate. However, scholars cannot say that CIL limits transboundary pollution because there is no consensus on what CIL requires states to do, except for a few

⁶¹⁴ See Antonia Eliason, *Using the WTO to Facilitate the Paris Agreement: A Tripartite Approach*, 52 VAND. J. TRANSNAT'L L. 545, 547 (2019).

⁶¹⁵ See Marcello Di Paola & Dale Jamieson, *Climate Change and the Challenges to Democracy*, 72 U. MIAMI L. REV. 369, 406 (2018) (describing the Trump administration's claim that the Paris Agreement disadvantages the U.S. “to the exclusive benefit” of other states); Daniel Bodansky, Essay, *Climate Change: Reversing the Past and Advancing the Future*, 115 AJIL UNBOUND 80, 80 (2021) (stating that the Biden administration rejoined the Paris Agreement).

⁶¹⁶ Oran R. Young, *North American Resource Regimes: Institutionalized Cooperation in Canadian-American Relations*, 15 ARIZ. J. INT'L & COMP. L. 47, 68 (1998); see also Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT'L L. 1, 27-28 (2007) (“Despite early cheers of success, progress under the [U.S.-Canada] Air Quality Agreement . . . has stalled since 2000.”).

⁶¹⁷ See, e.g., Thomas Bernauer et al., *A Comparison of International and Domestic Sources of Global Governance Dynamics*, 40 BRITISH J. POL. SCI. 509, 522 (2010) (“Since the social costs of current economic behavior and political choices often materialize only over the long term and burden future generations . . . democratic leaders may refrain from ratifying international environmental treaties that impose high short-term costs.”).

⁶¹⁸ Joseph C. Sweeney, *International Protection of Earth's Oceans*, 43 FORDHAM INT'L L.J. 669, 735 (2020) (addressing “opposition . . . from those who feel that . . . natural forces will solve the problem”).

⁶¹⁹ John H. Knox, *Assessing the Candidates for A Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVTL. L.J. 153, 165-66 (2003) (discussing obstacles to state ratification of the Espoo Convention and acknowledging that it “could take an extremely long time” for Espoo to become a global treaty).

⁶²⁰ Maria L. Banda, *Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm*, 103 MINN. L. REV. 1879, 1936-37 (2019).

⁶²¹ See Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 763 (2004) (“[L]aw of nations’ . . . encompasses both treaty-based and customary international law. . . . Courts dealing with ATCA cases, however, have narrowed the original meaning of [CIL].”).

peremptory norms such as the ban on conquest.⁶²² To make such a claim, scholars would have to demonstrate objectively that transboundary pollution control is a “consistent practice of states followed by them from a sense of legal obligation[.]”⁶²³ Nevertheless, some scholars argue that something is law⁶²⁴ because “international law is made, not by states, but by ‘silly’ professors writing books[.]”⁶²⁵ If scholars continue to allege the existence of CIL without evidence of state practice,⁶²⁶ people outside their echo chamber will continue to treat the claims reverberating within as “certainly without merit.”⁶²⁷

As shown, both schools of thought are stagnant. One promotes globally enforced treaties against pollution without explaining how the polluting states would be made to agree to their own punishment.⁶²⁸ The other insists that CIL bans transboundary pollution without demonstrating a “consensus among nations that a high level of pollution . . . is universally unacceptable.”⁶²⁹ Both cases of stagnation are caused by the same catch-22. Creating CIL against transboundary pollution requires state practice against transboundary pollution, such as ratifying treaties to that effect.⁶³⁰ Yet, given the scarcity of coercive means in international law, getting a critical mass of states to join such a treaty would require a level of normative pressure that offsets the large profits from

⁶²² See, e.g., Justin K. Holcombe, *Protecting Ecosystems and Natural Resources by Revising Conceptions of Ownership, Rights, and Valuation*, 26 J. LAND RESOURCES & ENVTL. L. 83, 96 (2005) (referring to a “clear jus cogens international prohibition against conquest”); Mike Graves, Comment, *Customary Ivory Law: Inefficient Problem Solving with Customary International Law*, 26 WASH. INT’L L.J. 325 (2017) (“Scholars disagree not only on whether a particular norm has become a customary law, but also on what constitutes persuasive evidence of that fact.”); see also Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1819 (2011) (“[B]ecause the [Supreme] Court [of the United States] examines alleged breaches of customary international law on a case-by-case basis, it is difficult to generalize a rule specifying when an international obligation will be recognized as customary international law.”).

⁶²³ *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307-08 (2d Cir. 2000).

⁶²⁴ Nilüfer Oral, *The International Law Commission and the Progressive Development and Codification of Principles of International Environmental Law*, 13 FIU L. REV. 1075, 1085 (2019) (stating that the “International Watercourses Convention . . . is recognized as having codified customary international law” without further explanation).

⁶²⁵ Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT’L & COMP. L. 399, 401 (1996) (“[I]nternational law is made, not by states, but by ‘silly’ professors writing books[.]”).

⁶²⁶ *United States v. Yousef*, 327 F.3d 56, 101-02 (2d Cir. 2003) (citing Sohn, *id.*, in the course of rejecting scholars’ claims that “they themselves are an authentic source of customary international law”); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[Scholarly] works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”).

⁶²⁷ *Yousef*, 327 F.3d at 102 (referring to Sohn, *supra* note 26).

⁶²⁸ See *supra* notes 14-20 and accompanying text.

⁶²⁹ *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 519 (S.D.N.Y. 2002), *aff’d*, 414 F.3d 233 (2d Cir. 2003).

⁶³⁰ Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in *CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 117 (Curtis A. Bradley ed., 2016) (“[T]reaties are the most important type of evidence in CIL determinations[.]”).

polluting.⁶³¹ So far, only CIL (jus cogens) has provided such pressure: conquest, for example, has become “subrationally unthinkable” to most states despite the profit potential.⁶³² In short, creating CIL against transboundary pollution would require well-enforced treaties against transboundary pollution, but creating such treaties would effectively require CIL against transboundary pollution.

This Article presents a solution to this problem, which I call the CIL catch-22. The catch is that creating CIL against transboundary pollution requires state practice in the form of accordant treaties, but getting states to join such treaties in the status quo requires CIL to compel states to do so. In order to make global environmental treaties more feasible, I propose to create state practice against transboundary pollution using treaties that already exist. Specifically, a set of treaties that present large benefits to states would be reconstrued consistently with the text to impose a duty against transboundary pollution, under the assumption that compliance with that duty would constitute state practice. This duty would be restricted in scope, to keep the total cost of complying with the reconstrued treaty lower than the preexisting benefits from the treaty. The goal is to coax states to comply, if begrudgingly, to generate state practice against transboundary pollution. Should that practice reach a critical mass, the resulting CIL and the pressure it exerts would make transboundary pollution, like conquest, “subrationally unthinkable”⁶³³ to most states.

The device to be used to legislate a CIL against transboundary pollution is a subset of the bilateral investment treaties (BITs) that form the investor-state dispute settlement (ISDS) system. This may seem counterintuitive because conservation is of only peripheral concern to BITs in the status quo: the prevailing perception of BITs is that they exist mainly to protect foreign investors from the states that host their investments.⁶³⁴ For example, when BITs (or arbitrations conducted

⁶³¹ See *supra* note 18 and accompanying text (discussing incentives underlying the failure of environmental treaties).

⁶³² See John Mueller, *The Obsolescence of Major War*, in *THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS* 427, 436 (Robert J. Art & Kenneth N. Waltz eds., 1999) (“At first war becomes rationally unthinkable Then it becomes subrationally unthinkable—rejected not because it’s a bad idea but because it . . . never comes up as a coherent possibility.”); see also Holcombe, *supra* note 23 (referring to a “clear jus cogens international prohibition against conquest”); MARTIN GRIFFITHS, *RETHINKING INTERNATIONAL RELATIONS THEORY* 78 (2011) (“Since 1945, conquest has become so illegitimate that it is rarely attempted and even less often successful. . . . [R]espect for state sovereignty has solidified the . . . consensus against international aggression.”).

⁶³³ See Mueller, *supra* note 33.

⁶³⁴ See, e.g., Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements*, 38 U. PA. J. INT’L L. 425, 455 (2017) (“the treaties [BITs] have dual purposes—to protect foreign investment and, by protecting these investments, to attract foreign investment.”).

pursuant to them) invoke environmental concerns, they mostly do so in the context of prohibiting expropriations executed in bad faith under the pretense of conservation.⁶³⁵ Although some BITs acknowledge conservation needs more explicitly by, for example, having state parties recognize that it is inappropriate to promote investments by undoing domestic environmental regulations, such provisions tend to be worded as to not be mandatory.⁶³⁶ As far as is known, no BIT has ever been used to punish states or investors for transboundary pollution via adversarial proceedings.⁶³⁷

Nevertheless, at least 153 BITs can reasonably be reconstrued to arbitrate transboundary disputes caused by pollution from identifiable sources, better known as point source pollution.⁶³⁸ Such BITs, which this Article calls environmental BITs (EBITs), share two traits. First, EBITs do not meaningfully limit the subject matter of arbitrable disputes, hence enabling the arbitration of pollution claims. For example, the U.K.-China EBIT governs disputes “concerning an amount of compensation” that have not been settled for six months, with no other conditions on the content of such disputes.⁶³⁹ The Romania-Armenia EBIT applies to “investment disputes” between a state and investors of the other state.⁶⁴⁰ Such broad subject matter, combined with a deliberately liberal definition of *investment* in most BITs, can reasonably be interpreted to include disputes

⁶³⁵ See, e.g., Agreement for the Promotion and Protection of Investment, Austria-Nigeria, art. 7(4), Apr. 8, 2013 (stating that policies to “protect legitimate public welfare objectives” such as “the environment” constitute indirect expropriation only if adopted in bad faith); United Nations Conference on Trade and Development, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II*, 6, UNCTAD/DIAE/IA/2011/7 (2012) (listing BITs with identical language), available at https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf [hereafter *UNCTAD Expropriation*]; *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005) (a case of alleged expropriation by environmental regulation).

⁶³⁶ Agreement Between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Reciprocal Protection of Investment, Colom.-Fr., art. 10(2), Oct. 7, 2014 [hereafter *Colombia-France BIT*]; cf. Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 VA. ENVTL. L.J. 102, 109-15 (2015) (citing FTAs that “note the importance of” or “reaffirm . . . commitment to” certain environmental treaties).

⁶³⁷ Cf. Tina Lam, *The Legal Hurdles Preventing a U.S.-China Bilateral Investment Treaty: Problems with National Security, Environmental and Labor Standards, and Investor-State Dispute Settlement Mechanisms*, 16 FLA. COASTAL L. REV. 303, 314 (2015) (calling environmental consultation provisions in the U.S. Model BIT “relatively weak”); *Colombia-France BIT*, art. 15(2) (excluding environmental pollution from the subject matter of arbitration).

⁶³⁸ See 33 U.S.C.A. § 1362(14) (West) (defining “point source” with respect to pollution).

⁶³⁹ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China Concerning the Promotion and Reciprocal Protection of Investments with Exchanges of Notes, U.K.-China, art. 7(1), May 15, 1986 [hereafter *U.K.-China EBIT*].

⁶⁴⁰ Agreement Between the Government of Romania and the Government of the Republic of Armenia on the Promotion and Protection of Investments, Rom.-Arm., art. 9(1), Sep. 20, 1994 [hereafter *Romania-Armenia EBIT*].

involving nearly “everything of economic value”⁶⁴¹ that creates point source pollution or were harmed by it. Obviously, not all BITs can be interpreted to arbitrate environmental cases; the Italy-Bangladesh BIT, for instance, applies only to disputes regarding “expropriation . . . or similar measures[.]”⁶⁴²

Second, EBITs do not restrict the location of investments eligible for arbitration, enabling the arbitration of *transboundary* pollution disputes. The Albania-Croatia EBIT, for example, can arbitrate “[a]ny dispute between either Contracting Party and an investor of the other Contracting Party concerning investments[.]”⁶⁴³ with no conditions on where those assets must be located; the sole condition is that a dispute must involve Albania or Croatia and nationals of the other state who own those investments. This silence regarding the location of arbitration-eligible investments allows EBITs to arbitrate claims arising from pollution that harms assets outside a state’s borders. For example, if waste dumped into the Adriatic by the Albanian state⁶⁴⁴ washes up on Croatian shores and harms beachfront property owned by Croatian nationals,⁶⁴⁵ the Albania-Croatia EBIT could arbitrate that dispute. Unlike the Albania-Croatia EBIT, the Peru-Cuba BIT, for example, protects only Peruvians holding investments in Cuba or Cubans holding investments in Peru.⁶⁴⁶ Hence, this BIT could not arbitrate *transboundary* pollution cases: if Cuban investors wanted to arbitrate against the Peruvian government, it could only be about an investment located in Peru.

⁶⁴¹ Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT’L L. 953, 959 (2007) (“The wide-ranging definition of ‘investment’ [typical in over 2,000 BITs] has resulted in the protection of basically everything of economic value.”); see also *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008) (stating that the ICSID Convention left the term “investment . . . intentionally undefined”).

⁶⁴² Agreement Between the Government of the Republic of Italy and the Government of the People’s Republic of Bangladesh on the Promotion and Protection of Investments, It.-Bangl., art. 9(1), Mar. 20, 1990.

⁶⁴³ Agreement Between the Government of the Republic of Albania and the Government of the Republic of Croatia for the Encouragement and Reciprocal Protection of Investments, Alb.-Croat., art. 10(1), Mar. 5, 1993 [hereafter *Albania-Croatia EBIT*].

⁶⁴⁴ See Edmond Hoxhaj, *Oil Pollution Threatens Europe’s Last Wild River*, BALKANINSIGHT, Dec. 5, 2018, available at <https://balkaninsight.com/2018/12/05/oil-pollution-threatens-europe-s-last-wild-river-11-30-2018/> (“Oil spills from the deposits of [Albanian] state-owned company Albpetrol . . . have created a stream oil sludge which flows in the Vjosa River . . . [which] flows from the Pindus Mountains in Greece to the Adriatic Sea in Albania.”).

⁶⁴⁵ See Benet Koleka, *Croatia Helps Albania to Tackle Waste Thrown into Adriatic*, REUTERS, July 19, 2018, available at <https://www.reuters.com/article/us-albania-croatia-pollution-idUSKBN1K924M> (stating that “garbage thrown into rivers [in Albania] generally washes eventually into the Adriatic” and onto Croatian shores).

⁶⁴⁶ Agreement Between the Government of the Republic of Peru and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of Investments, Cuba-Peru, art. 1(1), Oct. 10, 2000 [hereafter *Cuba-Peru BIT*].

This environmental construction of BITs presents both practical and scholarly benefits. In the practical sense, creating CIL against transboundary pollution is a prerequisite for the globally enforced treaties that we would need to deliver comprehensive solutions to environmental crises such as climate change.⁶⁴⁷ Too often, existing works promoting global environmental treaties must disclaim themselves as merely “a starting point rather than a comprehensive study” because they fail to resolve their own “innumerable practical and theoretical complications[.]”⁶⁴⁸ This Article, in contrast, presents a solution to one such complication: if CIL made transboundary pollution anywhere near as illegitimate a state act as conquest, the perverse incentives that derail or declaw environmental treaties now⁶⁴⁹ would no longer be as powerful an obstructive force. This Article’s treaty construction also confronts the most enduring, fundamental challenge to international law. In a system predicated upon state consent,⁶⁵⁰ how can the global community outlaw a harmful act over the objection of the offenders, but simultaneously under the agreement of the governed?

From a scholarly perspective, this Article would help to break an impasse. Decades of academic debate on how CIL forms has concluded that “no one knows[.]”⁶⁵¹ leading practitioners to suspect CIL of having “a make-it-up-as-you-go-along feel to it.”⁶⁵² Because no one knows how CIL forms, the only definite way in the status quo to explain why one norm has become CIL but another norm has not would be to go back in time, change history, and observe whether those same norms become CIL. In fact, even if we could travel back in time, we still might not learn how CIL forms because this time machine test assumes that we can distinguish

⁶⁴⁷ See, e.g., Cary Coglianese & Jocelyn D’Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1414-15 (2008) (“Perhaps not all global problems require a comprehensive, global solution—but reversing the trajectory and effects of GHG emissions most assuredly does.”).

⁶⁴⁸ Jayanti, *supra* note 10, at 4.

⁶⁴⁹ Statement by President Trump on the Paris Climate Accord, THE WHITE HOUSE (June 1, 2017) (claiming that compliance with the Paris Agreement will lead to a “decimation” of American industries), available at <https://it.usembassy.gov/statement-president-trump-paris-climate-accord/> [<https://perma.cc/TS53-WZCS>].

⁶⁵⁰ See, e.g., Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT’L L. 137, 142 (2005) (“Notwithstanding . . . criticism of Article 38 [of the Statute of the International Court of Justice] and state consent, most international lawyers still rely on them as international law’s operating framework.”); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT’L L. 507, 531 (2011) (“[A] norm of CIL can exist if states consent to it[.]”).

⁶⁵¹ See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 243 (2010) (“No one knows precisely how much state practice is required to create a CIL rule . . .”).

⁶⁵² *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 86 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013).

CIL from mere norms that are not legally binding. As we ourselves have admitted,⁶⁵³ however, legal scholars have not reliably discerned whether a given legalistic norm is CIL or not.⁶⁵⁴

I submit that this impasse is due to an overly passive view of CIL formation. The claims that “no one knows”⁶⁵⁵ how CIL forms and that “questions about CIL are substantially empirical”⁶⁵⁶ implicitly view the rules governing CIL formation as a preexisting, immutable fact waiting to be discovered, instead of rules that we can deliberately write and amend to serve our own needs. This passive view is not applied to anything else we call *law*. Under this view, the only way to get the CIL we need would be to wait for custom to form spontaneously by sedimentation, with no idea as to when (or if) that custom will ever cement into law—especially if states have little incentive to create it, such as custom against pollution. This Article challenges the prevailing paradigm on CIL with a strategy to *legislate* CIL. If successful, creating CIL against transboundary pollution would no longer be beholden to states someday being inspired to sabotage their own economic interests.

This Article proceeds as follows. Part I establishes that existing theories on transboundary pollution control and CIL formation tend to be inadequate. Many scholars would use naming and shaming to normatively pressure polluters into abatement. However, such works overlook the fact that shaming would be ineffective without a preexisting CIL against transboundary pollution. As for oft-cited theories on how CIL forms, their contributions have limited effects in resolving the CIL catch-22. Part II.A shows how eligible BITs would be reinterpreted to become EBITs so that they can arbitrate transboundary pollution cases and legislate accordant CIL. Because there exist at least 153 EBITs among 94 states as of August 2021, the complete list of EBITs is provided online.⁶⁵⁷ In this Article, I analyze the material provisions of representative EBITs in detail, in order to provide as clear an image as possible of how transboundary pollution claims would be arbitrated pursuant to EBITs.

Part II.B presents a strategy to induce states to accept EBITs. Reconstructing BITs as EBITs would present additional costs to states in both the short run and long run. In the short run, states

⁶⁵³ See Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47, 57 (1996) (“no one knows whether [jus cogens] even exists[.]”).

⁶⁵⁴ ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 21 (2007).

⁶⁵⁵ Bradley & Gulati, *supra* note 52.

⁶⁵⁶ Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1896 (2016).

⁶⁵⁷ See EBIT DATABASE, available at <https://sites.lsa.umich.edu/yunsieg/research/>.

would face costs from transboundary pollution claims. I propose to limit this new short-run cost so that the *total* short-run cost of complying with an EBIT stays below its benefits to states, hence inducing states to keep the EBIT.⁶⁵⁸ Specifically, a minimum amount in controversy rule would keep the number of pollution claims low enough to be tolerable to states, but also high enough for EBITS to generate the critical mass of state practice needed to establish CIL. The long-run cost of EBITS to states would be the resulting CIL that would make it harder to thwart comprehensive environmental treaties. Unlike the short-run cost of EBITS, this long-run cost cannot be bargained away, because the point of EBITS is precisely to impose that cost on states. However, I show how EBITS' long-run cost can be sold to governments by presenting low electoral costs to incumbent politicians, notwithstanding high electoral costs to their successors and high costs to the state.

Part III presents a legal basis for reconstruing BITs as EBITS and using EBITS to legislate accordant CIL. A likely objection to reconstruing BITs as EBITS is that they lack genuine consent, because states are unlikely to have contemplated facing pollution cases when they joined BITs.⁶⁵⁹ Part III.A argues that, although international law relies nontrivially on consent, states must not be allowed to use initial intent as a cudgel to exclude treaty constructions that are consistent with the plain text; letting them would defeat the point of having any text.⁶⁶⁰ Both national and international law have been used beyond the original intent when the need was legitimate and the new reading was tenable. For instance, the Commerce Clause was interpreted to prohibit racial discrimination in public accommodations⁶⁶¹ and the European Convention on Human Rights has been applied far beyond the parties' original intent.⁶⁶² Parts III.B and C justify this Article's innovations to the rules governing CIL formation by showing that such rules, for the most part, do

⁶⁵⁸ George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95, 108 (2002) ("If [an] agreement produces only modest benefits, it will take less of an increase in compliance costs before costs begin to outweigh benefits, making it desirable for the state to defect.").

⁶⁵⁹ Cf. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 219 (Feb. 8, 2005) ("[A] host state which has not specifically agreed [to a particular dispute settlement mechanism] can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation . . . cannot be the presumed intent of [the] Contracting Parties.")

⁶⁶⁰ See, e.g., Bernard Hanotiau, *Are Bilateral Investment Treaties and Free Trade Agreements Drafted with Sufficient Clarity to Give Guidance to Tribunals?*, 5 AM. U. BUS. L. REV. 313, 316-18 (2016) (criticizing states' attempts to exclude unfavorable readings of vaguely worded BITs by issuing "[I]nterpretative [N]ote[s]" and arguing that states should instead "hypothesiz[e] ways to avoid [unpalatable outcomes] when constructing the document itself.").

⁶⁶¹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

⁶⁶² See Anna R. Jay, Note, *The European Convention on Human Rights and the Black Hole of State Responsibility*, 47 N.Y.U. J. INT'L L. & POL. 207, 237-38 (2014).

not exist: scholars have, at best, posited the existence of those rules in theory without identifying their content in practice.

To some, legislating CIL may seem too incremental of a solution given the urgency of the pollution problem. For example, the oceans hold ten times more plastic than previously thought and the ice caps are melting a hundred times faster than previously thought.⁶⁶³ However, the point of legislating CIL is precisely to resolve transboundary pollution as quickly as possible, by making globally reaching treaties against transboundary pollution more feasible. Granted, legislating CIL will take time, and fast, comprehensive solutions may seem more appealing. However, repeated calls for action without results feed the pessimistic perception that *any* scholarly effort may be futile. Incrementalism, with its faults, is still preferable to nihilism.⁶⁶⁴

I. EXISTING SCHOLARSHIP ON TRANSBOUNDARY POLLUTION CONTROL AND CIL

Part I discusses the limitations of existing theories on transboundary pollution control and CIL formation. Many works support exerting normative pressure on transboundary polluters using public shaming. Part I.A argues that shaming, despite some success against other types of undesirable behavior, is ineffective and even counterproductive against transboundary pollution—unless a CIL against transboundary pollution already exists. As for the theories on CIL formation, existing works study how decentralized and uncoordinated state acts might develop into CIL, not how CIL may be legislated centrally and deliberately. Parts I.B and I.C identify some shortcomings of existing theories that prevent the full resolution of the CIL catch-22.

A. *Shaming Transboundary Polluters (Without a CIL Against Transboundary Pollution): Demanding Rational Actors to Abandon Legal and Expedient Behavior*

⁶⁶³ Fiona Harvey, *Atlantic Ocean Plastic More Than 10 Times Previous Estimates*, THE GUARDIAN (Aug. 18, 2020), available at <https://www.theguardian.com/environment/2020/aug/18/atlantic-ocean-plastic-more-than-10-times-previous-estimates>; Justin Worland, *Glaciers Are Melting Underwater. It's Worse Than Previously Thought*, TIME, July 25, 2019, available at <https://time.com/5635131/climate-change-glacier-melt-underwater/>.

⁶⁶⁴ Cf. *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 103rd Cong. 132 (1993) (“Generally, change in our society is incremental . . . Real change, enduring change, happens one step at a time.”), available at <https://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf> [<https://perma.cc/7VT9-M8Y6>].

Unethical activities are not always illegal. For example, purchasing gold from the Congo is legal under U.S. law,⁶⁶⁵ even though doing so risks funding armed groups perpetrating rape and torture.⁶⁶⁶ Both governments and scholars have relied on name-and-shame tactics against a wide range of legal but unseemly behavior, in hopes that ostracization would act as a deterrent force.⁶⁶⁷ However, naming-and-shaming often fails because it requires a target to have a sense of shame.⁶⁶⁸ That tactic also fails when the target is capable of shame but sincerely believes that it has nothing to be ashamed of,⁶⁶⁹ which could backfire on activists if the belief of innocence is shared broadly by the public.⁶⁷⁰ In either case, the target of the name-and-shame tactic will likely contend that it has done nothing wrong—as in, nothing illegal—a response known colloquially as “sue me.”

Unfortunately, the “I did nothing wrong” defense, whether sincerely believed or merely exploited as a convenient excuse, works especially well against transboundary pollution charges. Many of the most heavily polluting states are developing economies because pollution is often a byproduct of rapid industrialization.⁶⁷¹ Meanwhile, many prominent advocates of transboundary pollution control are developed countries that industrialized long ago.⁶⁷² Hence, developing states may refuse to abate because they believe that the developed ones polluted their way to

⁶⁶⁵ See 15 U.S.C.A. § 78m(p) (West) (requiring disclosures of uses of conflict minerals sourced from the DRC).

⁶⁶⁶ See *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 545-46 (D.C. Cir. 2015).\

⁶⁶⁷ See, e.g., David Bloom, *Tax Avoidance—A View from the Dark Side*, 39 MELB. U. L. REV. 950, 957 (2016); Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 DEL. J. CORP. L. 757 (2007).

⁶⁶⁸ See Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, 94 (2015) (“If corporations cannot feel shame, however, then ‘name and shame’ tactics will be ineffective[.]”).

⁶⁶⁹ See Sharon Yadin, *Regulatory Shaming*, 49 ENVTL. L. 407, 431 (2019) (“[I]f the [target] facility’s employees believe that there is nothing wrong with their employer’s actions . . . the shaming process . . . will fail.”).

⁶⁷⁰ Cf. David Luban, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589, 604 (1993) (reviewing THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991)) (“The trouble with a ‘morally activist’ lawyer . . . [is] the appearance of self-righteousness . . . holding up her own conscience as the yardstick by which other people[’s] morals are to be measured.”).

⁶⁷¹ See, e.g., Sonja Schiller, Note, *Avoiding the Problem of the Commons in A Communist Society: The Role of Water Rights in the Enforcement of Environmental Law in China*, 29 WASH. U. J.L. & POL’Y 349, 351 (2009) (“Aggressive economic development and related water pollution have diminished China’s already scarce water resources.”).

⁶⁷² See, e.g., Carolyn Abbot & David Booton, *Using Patent Law’s Teaching Function to Introduce an Environmental Ethic into the Process of Technical Innovation*, 21 GEO. INT’L ENVTL. L. REV. 219, 252 (2009) (“Since its inception . . . the European Union has been extremely proactive in the area of environmental protection.”).

prosperity and are now kicking away the ladder,⁶⁷³ even though developing states really must abate to avert further global disaster.⁶⁷⁴ Even if the “I did nothing wrong” defense is not sincerely believed or simply unavailable, developing and developed states alike may want to deny that global pollution is a problem, because the alternative is to admit complicity in the increasingly faster death of the planet. As such, it is perhaps obvious that appeals to morality—such as those famously made by Greta Thunberg—have apparently failed to move governments, despite some public approval.⁶⁷⁵

Of course, moral appeals can sometimes be useful. When a socially undesirable behavior stems from genuine ignorance, moral arguments could induce people to change that behavior by raising awareness.⁶⁷⁶ However, in the case of transboundary pollution, a majority of the electorate has already heard and rejected the moral argument. 69 percent of Americans claim to want their government to take “aggressive action to slow global warming”⁶⁷⁷ and 50 percent recognize that climate change is a “moral” issue,⁶⁷⁸ but only 34 percent would support an annual tax increase of \$100 for that effort.⁶⁷⁹ This suggests that the moral imperative for carbon abatement is worth less than \$100 to most voters, which may disappoint but should not shock. A strong moral case exists against purchasing gold from the Congo, but Apple still used it to make iPhones and people still bought them.⁶⁸⁰ However well-intended, insisting on moralizing at the

⁶⁷³ See, e.g., HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 9-11 (2002); Daniel Barstow Magraw, *The International Law Commission’s Study of International Liability for Nonprohibited Acts as It Relates to Developing States*, 61 WASH. L. REV. 1041, 1055 (1986).

⁶⁷⁴ See DONALD A. BROWN, CLIMATE CHANGE ETHICS: NAVIGATING THE PERFECT MORAL STORM 215 (2013).

⁶⁷⁵ Graeme Wearden, *Thunberg: Davos Leaders Ignored Climate Activists’ Demands*, THE GUARDIAN, Jan. 24, 2020.

⁶⁷⁶ Cf. Jennifer M. Egan & Joshua M. Duke, *Water Quality Conflict Resolution and Agricultural Discharges: Lessons from Waterkeeper v. Hudson*, 39 WM. & MARY ENVTL. L. & POL’Y REV. 533, 567 (2015) (“The Waterkeepers group [the plaintiffs in the litigation discussed by the authors] likely saw moral suasion a way to raise awareness . . .”).

⁶⁷⁷ Valerie Volcovici, *Americans Demand Climate Action (As Long As It Doesn’t Cost Much): Reuters Poll*, REUTERS, June 26, 2019, available at <https://www.reuters.com/article/us-usa-election-climatechange/americans-demand-climate-action-reuters-poll-idUSKCN1TR15W>.

⁶⁷⁸ Yale Program on Climate Change Communication & George Mason University Center for Climate Change Communication, *Climate Change in the American Mind* 26 (2020), available at <http://climatecommunication.yale.edu/wp-content/uploads/2020/05/climate-change-american-mind-april-2020b.pdf>.

⁶⁷⁹ See Volcovici, *supra* note 78. Contingent valuations have known limitations in identifying respondents’ actual willingness to pay. See JOHN O’NEILL, MARKETS, DELIBERATION AND ENVIRONMENT 21 (2007). The point here is the stark disparity between voters’ perceived morality of abatement and their *self-declared* willingness to pay for it.

⁶⁸⁰ See Brian Merchant, *Op-Ed: Were the Raw Materials in Your iPhone Mined by Children in Inhumane Conditions?* L.A. TIMES, July 23, 2017.

expense of other solutions in the face of this reality may be counterproductive: a long line of research shows that shaming can *reinforce* the undesirable behavior being targeted.⁶⁸¹

On top of historical and psychological complications underlying transboundary pollution, academic and activist attempts to shame transboundary polluters fail also because they ignore the formidable international legal obstacles in their way. For example, demanding that every country, bank, and firm “immediately and completely divest from fossil fuels” to fight climate change⁶⁸² is asking rational, self-interested actors to abandon behavior that is expedient, not immediately fatal to most people in the current generation,⁶⁸³ and most importantly, not definitely illegal—which is just as good as “legal” to many. For a wrong to constitute a violation of CIL, states must “have demonstrated that the wrong is of mutual, and not merely several, concern,” which is why theft does not violate CIL even though practically every state’s domestic law prohibits it.⁶⁸⁴ According to this standard, egregious pollution—even the fatal kind—apparently does not contravene CIL:

[This court] conclude[s] that plaintiffs have not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation’s borders, violate any well-established rules of customary international law. While nations may generally agree that human life, health, and sustainable development are valuable and should be respected, and while there may be growing international concern over the impact of environmental pollution on humanity, plaintiffs have not demonstrated any general consensus among nations that a high level of pollution, causing harm to humans, is universally unacceptable.⁶⁸⁵

Given that life-threatening pollution within a state’s borders apparently does not violate the law of nations, it should not surprise that *transboundary* pollution also does not. International

⁶⁸¹ See, e.g., Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, 55 UCLA L. REV. 1805, 1813 (2008) “[T]he line between moral duty and moralizing is slender, and crossing that line may be easy yet counterproductive. Moral suasion in environmental law has often . . . accomplish[ed] little at high cost.”)

⁶⁸² Greta Thunberg et al., *At Davos We Will Tell World Leaders to Abandon the Fossil Fuel Economy*, THE GUARDIAN, Jan. 10, 2020, available at <https://www.theguardian.com/commentisfree/2020/jan/10/greta-thunberg-davos-tycoons-fossil-fuels-dismantle-climate-crisis>; see also Adam Law et al., *Medical Organisations Must Divest from Fossil Fuels*, BMJ, Dec. 12, 2018, available at <https://www.bmj.com/content/363/bmj.k5163>.

⁶⁸³ See Philip Cafaro, *Beyond Business as Usual: Alternative Wedges to Avoid Catastrophic Climate Change and Create Sustainable Societies*, in THE ETHICS OF GLOBAL CLIMATE CHANGE 193 (Denis G. Arnold ed., 2011).

⁶⁸⁴ *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

⁶⁸⁵ *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 519 (S.D.N.Y. 2002), *aff’d*, 414 F.3d 233 (2d Cir. 2003).

legal instruments such as U.N. General Assembly resolutions and the Convention on the Law of the Sea do proclaim state obligations to protect the environment.⁶⁸⁶ However, federal courts hold that “abstract rights and liberties devoid of articulable or discernable standards and regulations” do not establish customary international law,⁶⁸⁷ because “they are merely aspirational and were never intended to be binding” on states.⁶⁸⁸ As for instruments that are intended to be binding, such as UNCLOS, whether they create obligations under CIL against transboundary pollution is often unclear.⁶⁸⁹ Assuming *arguendo* that UNCLOS does create such obligations, its relevant provisions can be “vague and difficult to apply[,]” as demonstrated by international tribunals and courts.⁶⁹⁰

I am in no way praising the status quo for legalizing environmental destruction. I believe that CIL should unequivocally limit transboundary pollution, which is why this Article proposes to deliberately legislate CIL to that effect. The point here is that, in the current normative climate in which polluters can plausibly claim that their behavior is legal and thus not immoral, lecturing states hoping that they will sabotage their own interests has so far been ineffective and will likely be counterproductive. Yet, many scholars argue that states “might be persuaded to act [because] they have a moral obligation to do so.”⁶⁹¹ While it is correct that states have “a moral obligation to be accountable for . . . climate change[,]”⁶⁹² the true challenge lies in holding states accountable. As detailed in Part II, the environmental construction of BITs aims to render transboundary pollution initially unprofitable and ultimately unthinkable. This solution would

⁶⁸⁶ See World Charter for Nature, G.A. Res. 37/7, ¶ 11, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) (“Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature”); United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 art. 192 (“States have the obligation to protect and preserve the marine environment.”) [hereafter UNCLOS].

⁶⁸⁷ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999); see also *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1095 (N.D. Cal. 2008), *aff’d*, 621 F.3d 1116 (9th Cir. 2010) (citing to *Beanal*).

⁶⁸⁸ *Flores*, 414 F.3d at 259; see also *id.* at n.36 (stating that the plaintiffs rely on the World Charter for Nature).

⁶⁸⁹ See, e.g., Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties As Customary International Law to Sue Under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085, 1088 (“[M]ost international environmental law principles, including those in UNCLOS, are generally too vague to be the basis of an ATS suit”).

⁶⁹⁰ *Id.* at 1165-66.

⁶⁹¹ Cass R. Sunstein, *The World vs. the United States and China? The Complex Climate Change Incentives of the Leading Greenhouse Gas Emitters*, 55 UCLA L. REV. 1675, 1697 (2008).

⁶⁹² Daniel A. Farber, *The Case for Climate Compensation: Justice for Climate Change Victims in A Complex World*, 2008 UTAH L. REV. 377, 379.

exploit self-interest to create state practice against transboundary pollution, in contrast to existing means of “[m]oral suasion in environmental law . . . that neglect pragmatic incentives[.]”⁶⁹³

Before proceeding to Part I.B, a disclaimer is in order about this Article’s argumentative stance. This Article’s observation that environmental treaties in the status quo are not sufficiently effective to meaningfully control transboundary pollution is not an endorsement of the neorealist claim that international law mostly reflects “pure coincidence of interest,”⁶⁹⁴ not law. This Article takes no position on the stale and mostly ideological squabble⁶⁹⁵ over whether international law is really “law.” Nor am I using the example of environmental treaties to claim that all treaties are inherently useless. As Professor Barbara Koremenos argues, the fact that enforcement measures in some treaties are never invoked or that other treaties lack them entirely may indicate that those treaties need not be enforced to be effective.⁶⁹⁶ This Article is merely observing that a nontrivial share of environmental treaties is unenforced *and* ineffective, and is advancing an instrumental argument on how to fix that problem using BITs, international investment arbitration, and CIL.

B. The Catch-22 in the Decentralized Formation Rule of Customary International Law

Part I.A has shown that exerting normative pressure against polluters using shame would be ineffective without preexisting CIL against transboundary pollution. Deliberate legislation of CIL also aims to pressure polluters into abating, but differs from typical moral argumentation in that deliberate legislation would exploit state interest instead of suppressing it. Indeed, neglect of material incentives is arguably a reason that the CIL catch-22 remains unresolved. Creating CIL against transboundary pollution under prevailing rules effectively requires global environmental treaties, but scholars have not yet shown how states might be coaxed to join such a treaty against their own interests—absent pressure tantamount to that from CIL. Of course, deliberate legislation

⁶⁹³ See Wiener, *supra* note 82.

⁶⁹⁴ Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999).

⁶⁹⁵ See Lea Brilmayer & Yunsieg P. Kim, *Model or Muddle? Quantitative Modeling and the Façade of “Modernization” in Law*, 56 WASHBURN L.J. 1, 14-29 (2017).

⁶⁹⁶ See BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* 231 (2016); see also Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 210 (2007) (“[I]nternational law may actually be quite efficient with states not creating and/or delegating dispute resolution authority when it is not likely to be needed.”).

cannot be the *only* way to create CIL in the face of perverse incentives, because some CIL norms already exist. CIL has been thought to form under current rules which, for the sake of distinction from the centralized, deliberate legislation of CIL, I call decentralized formation: spontaneous and uncoordinated state acts establishing “state practice,” which in turn develops into accordant CIL.

Although this work is the first to my knowledge to articulate the catch-22 involving CIL and treaties, some have argued that the decentralized formation rule of CIL is circular. For example, Professors Curtis Bradley and Mitu Gulati comment that “[t]here is also a circularity problem in requiring that nations act out of a sense of legal obligation before they become bound, since it is not clear how this sense of legal obligation would arise.”⁶⁹⁷ This comment does not identify the causal link between that circularity and the difficulty that states face in negotiating well-enforced conservation treaties, nor does it propose using existing treaties to legislate CIL. Nonetheless, the comment is evidence of scholars’ awareness that the current decentralized formation rule of CIL is inadequate, at least in part because it is circular.

As such, resolving the CIL catch-22 requires a causal theory of the decentralized formation rule, or a new formation rule with discernible rules for a norm to become CIL. However, some recent CIL scholarship is apparently moving in the opposite direction, by proposing to redefine CIL so broadly that it can refer simultaneously to conflicting ideas; as such, identifying a causal mechanism of CIL under that definition becomes impossible.⁶⁹⁸ Professor Monica Hakimi argues that the current definition of CIL, which she calls the “rulebook conception[,]” is “not only incorrect but insidious”⁶⁹⁹ due to its “precise and rigid” rules that apply “the same way in all cases of a given type[.]”⁷⁰⁰ Professor Hakimi proposes that the rulebook conception be replaced by a definition of CIL that “emerges more enigmatically . . . through an unstructured process in which the participants apply variable criteria to justify their normative positions[,]” each generally without “sufficient authority to stamp out the others”⁷⁰¹:

⁶⁹⁷ Bradley & Gulati, *supra* note 52, at 210. Other sources, such as the Restatement (Third) of the Foreign Relations Law, acknowledge this circularity as the subject of “philosophical debate” but simultaneously dismiss it as a “conceptual difficulty . . . [that has] not prevented the acceptance” of CIL. *See id.* at § 102, reporters’ note 2.

⁶⁹⁸ *See* Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1536-37 (2020) (“We should retire the rulebook conception and acknowledge that CIL is a more variable, enigmatic kind of law.”).

⁶⁹⁹ *Id.* at 1536.

⁷⁰⁰ *Id.* at 1490-91.

⁷⁰¹ *Id.* at 1516, 1519.

[I]magine that a state decides to build a hydroelectric power plant along a shared river without . . . accounting for the environmental risks to its neighbors. . . . [N]eighboring states . . . might . . . argue that the acting state overstepped its authority Such claims are . . . made all the time . . . without any overarching organizing principle for prioritizing among them. . . . The disparate claims . . . are all part of the CIL mix. They are the raw data that help to define CIL. . . . Tendentious or controversial CIL claims are common and often presented as if they simply describe the positive law. . . . However, even when a claim is contested, it becomes part of the CIL mix The fact that a claim is opportunistic does not necessarily diminish its legal relevance. This does not mean that all CIL claims have equal weight. . . . But unless an actor is specifically charged with resolving a . . . dispute under CIL, its authority to define CIL will be incomplete[.]⁷⁰²

For a concise explanation of Hakimi’s thesis, consider an analogy of a suspect on trial for first-degree murder. Under the “rulebook conception” of CIL as rigid and more or less uniformly applied rules, neither the prosecutor nor the defendant disputes what first-degree murder is or its illegality. Instead, the parties dispute, among other things, the facts: the defendant may argue that he did not commit first-degree murder because he was intoxicated at the time of the offense and therefore lacked specific intent.⁷⁰³ Under Hakimi’s view of CIL (excepting “sticky” rules such as the ban against genocide),⁷⁰⁴ the parties debate the very definition of first-degree murder and its illegality. In short, if a norm is to be defined as CIL under the “rulebook conception,” practically everyone involved must define it identically. In contrast, Hakimi would include any number of claims, including conflicting claims promoted by conflicted interests, in what she calls the “CIL mix[.]”⁷⁰⁵ Any such claim, according to Hakimi, “has the potential to affect the law’s content.”⁷⁰⁶

Hakimi’s definition would exacerbate the CIL catch-22 by eliminating CIL as a source of normative pressure. As stated in the introduction, the catch-22 arises from states’ failure to join abatement treaties against their interests. CIL is a rare source of pressure that can compel states in a consent-based system into unprofitable but necessary behavior. As such, creating CIL as we know it is a viable solution to the catch-22. However, CIL as Hakimi defines it would not wield

⁷⁰² *Id.* at 1494-95.

⁷⁰³ *See* *United States v. Boyles*, 57 F.3d 535, 541 (7th Cir. 1995) (stating that intoxication may serve as an excuse).

⁷⁰⁴ Hakimi, *supra* note 112, at 1518.

⁷⁰⁵ *Id.* at 1494.

⁷⁰⁶ *Id.*

any pressure against immoral activity because CIL could not objectively define immoral activity. For a law to exert pressure, there has to be an agreement about what it deems to be “evil in itself” or, at least, simply prohibited.⁷⁰⁷ Hakimi’s “CIL mix” invites expedient claims from conflicted interests to fight for dominance without setting any rules for which will become CIL.⁷⁰⁸ Because “the fact that a claim is opportunistic does not necessarily diminish its legal relevance[,]”⁷⁰⁹ CIL as Hakimi defines it would only extend the current impasse in international environmental law: activists trying in vain to shame polluters who claim to have done nothing illegal or immoral.⁷¹⁰

Hakimi may argue that, while domestic laws tend to be defined clearly, the same standard should not apply to CIL because it is an inherently different, “contingent and variable” species of law.⁷¹¹ In addition to claiming that CIL does not now fit the rulebook conception, Hakimi seems to think that CIL will not ever fit it: she argues that “[w]e should retire the rulebook conception” and rhetorically asks “[w]hat exactly do [proponents of the rulebook conception] think they gain by pretending that CIL is something that it is not?”⁷¹² It is understandable that the rulebook view creates frustration in the status quo. For example, uncertainty over the exact share of consenting states needed to form CIL⁷¹³ may induce risk-averse judges to require unanimity,⁷¹⁴ which can make CIL hard to create. However, our choices need not be limited to an unsatisfactory rule or no rule at all. As detailed in Part III, if deliberate legislation can be established as a formation rule of CIL, so can the share of agreeing states needed to successfully legislate CIL. All that Hakimi’s “variable” view of CIL would achieve is an agreement to continue disagreeing about what CIL is.

Despite flaws, Hakimi does attempt to theorize how CIL forms. However, many international environmental law scholars do not offer such a theory and operate as if CIL already bans transboundary pollution,⁷¹⁵ despite the large body of authoritative analyses and judicial

⁷⁰⁷ See Judith J. Johnson, *Why Mississippi Should Reform Its Penal Code*, 37 MISS. C. L. REV. 107, 139 n.39 (2019) (distinguishing mala in se crimes from mala prohibita crimes).

⁷⁰⁸ Hakimi, *supra* note 112, at 1494.

⁷⁰⁹ *Id.* at 1495.

⁷¹⁰ See *supra* Part I.A.

⁷¹¹ Hakimi, *supra* note 112, at 1491.

⁷¹² *Id.* at 1536-37.

⁷¹³ See Curtis A. Bradley & Mitu Gulati, *Mandatory Versus Default Rules: How Can Customary International Law Be Improved?*, 120 YALE L.J. ONLINE 421, 446-47 (2011).

⁷¹⁴ Cf. Lauren B. Kallins, Note, *The Juvenile Death Penalty: Is the United States in Contravention of International Law?*, 17 MD. J. INT’L L. & TRADE 77, 95 (1993) (“[T]here are some judges who require unanimity in state practice before concluding that a rule of customary international law has been created.”).

⁷¹⁵ See, e.g., Banda, *supra* note 21, at 1935-37; Abadie, *supra* note 22, at 763; Oral, *supra* note 25, at 1085.

rulings to the contrary cited in Part I.A.⁷¹⁶ Dr. Maria Banda argues that a state duty to mitigate transboundary pollution “undergirds the entire international environmental regime . . . and has become firmly entrenched in the corpus of customary international law”⁷¹⁷:

States are responsible for activities, occurring in their territory, which have injurious extraterritorial effects. This principle was extended to the environmental realm in the seminal *Trail Smelter* arbitration between the United States and Canada—the first inter-State dispute over air pollution. . . . [T]he Tribunal famously ruled that . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. . . . The *Trail Smelter* principle has been reaffirmed in numerous international decisions, General Assembly resolutions . . . international standards and guidelines, and has become firmly entrenched in the corpus of customary international law.⁷¹⁸

While I support the normative claim that transboundary pollution *should* be illegal under CIL, its actual illegality is disputed, contrary to Banda’s claims. Federal courts have cited some of the same authorities cited by Banda to rule that CIL *does not* ban transboundary pollution. For example, the Second, Fifth, and Ninth Circuits hold the position that “abstract rights and liberties devoid of . . . discernible standards”⁷¹⁹ invoked in General Assembly resolutions do not establish CIL because “they are merely aspirational and were never intended to be binding[.]”⁷²⁰ While I am in no way arguing that judicial interpretations of international law are inherently superior to scholarly interpretations, the judicial view is the constitutionally enforceable one. As such, when authoritative sources clash over whether some norm is CIL, judges must be persuaded if scholarly views are to tip the scale in any direction.⁷²¹ Doing so requires more than presenting a normative

⁷¹⁶ See *supra* notes 86-91 and accompanying text.

⁷¹⁷ See Banda, *supra* note 21, at 1934, 1937.

⁷¹⁸ *Id.* at 1934-37.

⁷¹⁹ *Beanal*, 197 F.3d at 167; see also *Bowoto*, 557 F. Supp. 2d at 1095, *aff’d*, 621 F.3d at 1116 (citing to *Beanal*).

⁷²⁰ *Flores*, 414 F.3d at 259.

⁷²¹ See, e.g., *The Paquete Habana*, 175 U.S. at 700 (“[Scholarly] works are resorted to . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”).

judgment as black-letter law,⁷²² or proposing to retire a definition of CIL that “informs . . . how most international lawyers analyze CIL[.]”⁷²³ without offering a viable and compelling alternative.

C. Existing Theories on the Formation of Customary International Law

Part I.B has introduced the catch-22 of CIL and shown how some existing scholarship attempts to redefine the concept of CIL in a way that investigating its causal mechanism becomes effectively impossible. However, there is an extensive literature that does claim to explain why states obey international law, and why some customary norms attain legally binding status while others do not.

Specifically in the international legal context, Professor Harold Koh argues that states internalize norms through what he calls the “transnational legal process.” This process begins with norm entrepreneurs prodding states to confront hitherto obscure norms, often following current events that bring attention to those norms. States are thus forced to interpret and apply those norms to the relevant events. With sufficient repetition, these interactions generate “a legal rule which will guide future transnational interactions between the parties[.]” which in turn gradually causes states to internalize and abide by those norms as law.⁷²⁴ The theory explains certain examples of the formation of international law, such as the ABM Treaty and the Oslo Accords.⁷²⁵ However, the theory would not explain how the catch-22 in the realm of CIL against transboundary pollution may be resolved, because it does not study the link between globally reaching environmental treaties and the presence of a CIL against transboundary pollution.

Of course, recent work does attempt to refine the claim that norm entrepreneurs convince states to adopt particular norms as law. Professor Katerina Linos attaches to this mechanism an empirical basis and a more definite form, by giving the domestic electorate an active role in influencing states’ policy and compliance with international law. Linos shows that voters, regardless of partisanship, are more likely to back a proposed health care, employment, or family

⁷²² See, e.g., Banda, *supra* note 21, at 1934-37.

⁷²³ Hakimi, *supra* note 112, at 1490-91.

⁷²⁴ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-48 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)).

⁷²⁵ See Koh, *supra* note 143, at 2646-58.

policy if they are given information indicating that it has already succeeded abroad. For example, upon being told that another country successfully adopted universal health care or that the U.N. endorsed it, support for it in the U.S. increased by 19 percent among Democrats and by 31 percent among Republicans.⁷²⁶ Once voters become aware of these foreign benchmarks, they would support politicians who pledge to legislate them.⁷²⁷ Although Linos extends this diffusion mechanism only to international agreements,⁷²⁸ Professor Karen Knop submits that it could also create customary international law by propagating proto-legal customary norms among states:

[W]hen Linos connects her analysis of policy diffusion to prescriptions for international law, she takes up only the merits of formal [and] informal agreements. . . . [H]owever, an “international model” can mean the convergence of the policies adopted by governments with or without the involvement of a treaty, declaration, or other multilateral instrument. Although Linos does not make this connection, the diffusion of a policy not (specifically) prescribed by a multilateral instrument can be understood as a story about . . . “general principles of law recognized by civilized nations.” The spread of one OECD state’s health, family, or employment laws to other OECD states then appears as a process of crystallizing custom or general principles of law, or . . . their informal versions.⁷²⁹

Although Linos improves upon norm dynamics theory, it would not illustrate how a CIL outlawing transboundary pollution would develop, because most voters do not perceive pollution abatement in the same way that they see, say, health care reform. Part I.A cited data showing that the vast majority of Americans refuse to pay for conservation even as they claim to recognize its moral imperative and actual necessity,⁷³⁰ because gains from conservation will likely accrue only in the distant future—likely well after their own lifetimes.⁷³¹ In contrast, policies that command majority support, such as universal health care and anti-discrimination,⁷³² offer voters immediate

⁷²⁶ KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* 44-50 (2013).

⁷²⁷ *Id.* at 2-3.

⁷²⁸ *Id.* at 179-85.

⁷²⁹ Karen Knop, *Hard Facts: Implications of Policy Diffusion for International Law*, 108 AM. J. INT’L L. 843, 848 (2014) (reviewing LINOS, *supra* note 166).

⁷³⁰ See *supra* notes 78-79 and accompanying text.

⁷³¹ See Bernauer et al., *supra* note 18, at 522.

⁷³² See, e.g., Gabriela Schulte, *Poll: 69 Percent of Voters Support Medicare for All*, THE HILL, Apr. 24, 2020, available at <https://thehill.com/hilltv/what-americas-thinking/494602-poll-69-percent-of-voters-support-medicare-for-all>; Justin McCarthy, *Slim Majority in U.S. Favors New LGBT Civil Rights Laws*, GALLUP, June 13, 2019, available at <https://news.gallup.com/poll/258176/slim-majority-favors-new-lgbt-civil-rights-laws.aspx>.

gains. As such, single-payer health care and conventions prohibiting employment discrimination may spread internationally according to Linos' theory, but the same is unlikely to hold for a CIL against pollution. Again, a key contention of this Article is that international environmental law faces a catch-22: states are unlikely to ratify treaties absent a CIL duty to protect the environment but that CIL is unlikely to materialize unless states first voluntarily join treaties for conservation.

Part I has shown that prevailing theories of CIL formation would not resolve the CIL catch-22. Some propose to define CIL in a way that makes it impossible to identify any causal mechanism, while other theories do not touch on the link between CIL and globally reaching environmental treaties. While this Article does not claim to be able to predict the fate of every single proto-legal norm, it does offer a theory that is free of the shortcomings listed above. Deliberate legislation would address the CIL catch-22 observed in transboundary pollution control, offer a clear hypothesis of how CIL may develop in that domain, and can be tested by its success or failure in actually forming CIL. Part II presents the specifics of deliberate legislation.

II. GENERATING STATE PRACTICE AGAINST TRANSBOUNDARY POLLUTION FROM ENVIRONMENTAL BITs AND INVESTMENT ARBITRATION

Part I discussed the inadequacy of prevailing theories on CIL formation and the need for a strategy to legislate CIL; Part II presents that strategy. As shown, a catch-22 inhibits the formation of CIL from voluntarily established state custom. Creating CIL against transboundary pollution in the status quo effectively requires states to ratify environmental treaties, but getting states to ratify such a treaty requires CIL to pressure states to do so. Instead of relying on states to defy their own incentives by joining costly treaties, I propose to legislate CIL by exploiting existing treaties and self-interest. A subset of BITs which I call EBITs would be reconstrued to impose environmental duties, whose burden is light enough that states would accept the reconstruction in order to keep benefitting from the BITs. However, as shown in Part III.B, compliance with those environmental duties would constitute state practice against transboundary pollution. The goal is to legislate CIL from this state practice, so that the resulting normative pressure pushes transboundary pollution, like conquest, out of the realm of rational thought and into "subrationally unthinkable" territory.⁷³³

⁷³³ See Mueller, *supra* note 33.

Part II.A defines EBITs and explains how BITs would be reconstrued to become EBITs. EBITs are BITs that define *investments* so as to enable the arbitration of transboundary pollution claims arising from investments. In the context of transboundary pollution cases arbitrable under EBITs, *investments* are assets that created point source pollution or were harmed by it. I examine material provisions in various EBITs to justify this treaty construction, and show how differences among EBITs can change the process of transboundary pollution arbitration. Part II.B presents a strategy to get states to comply with EBITs. I propose a minimum amount in controversy (MAC) requirement to limit the number of environmental disputes that are arbitrated. The MAC would need to be high enough that states would not abrogate EBITs for fear of the excessive costs of arbitrating every frivolous claim, and low enough that the number of pollution claims arbitrated would be sufficient to establish clear evidence of state practice against transboundary pollution.

A. The Environmental Construction: Transforming BITs into EBITs

EBITs are BITs whose plain-text reading allows the arbitration of transboundary pollution disputes arising from investments. I define such disputes as those arising from assets discharging point source pollution, which causes directly attributable material harm outside the state of origin, or disputes arising from assets that were materially harmed in a directly attributable way by point source pollution originating in a foreign state. The exclusion of non-point source pollution (such as carbon emissions causing climate change), a strict⁷³⁴ standing rule, and the MAC requirement presented in Part II.B are collectively intended to maximize the number of states that comply with EBITs. Although there were 153 EBITs among 94 states as of August 2021, I post the full list online⁷³⁵ due to space limits. This Article gives a close reading of several EBITs, to illustrate in detail how BITs would be reconstrued into EBITs to arbitrate transboundary pollution disputes.

Two features distinguish EBITs from BITs that could not arbitrate pollution claims. First, EBITs do not meaningfully limit the subject matter of arbitration, which enables the arbitration of

⁷³⁴ I call the standing rule that I propose “strict” because it would only recognize directly attributable material harm. In contrast, the current U.S. federal standing doctrine, which claims to adhere to “a strict regime of injury-in-fact, causation, and redressability,” has shown internal inconsistencies that permit the litigation of indirect and intangible harm. See Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 172-80, 235 (2012) (discussing examples of alleged harm such as that involving FOIA requests and pollution).

⁷³⁵ See EBIT DATABASE, available at <https://sites.lsa.umich.edu/yunsieg/research>. When I say “among 94 states,” I mean that 94 states have at least one EBIT in force with at least one other state.

environmental disputes arising from investments. The Greece-Albania EBIT defines *investment* as “every kind of asset” and makes eligible for arbitration “[a]ny dispute between either Contracting Party and an investor of the other Contracting Party concerning investments or the expropriation or nationalization of an investment[.]”⁷³⁶ The plain meaning of “concerning investments” includes disputes arising from anything of monetary value harmed by pollution, between one state and the other’s nationals holding such assets. Lest a reader consider this reading to be an ambush against Greece and Albania, many BITs that preceded the Greece-Albania EBIT apparently anticipated the risks from overly generous dispute resolution clauses. For example, the Greece-Hungary BIT applies only to claims about expropriation and nationalization.⁷³⁷ The Turkey-Denmark BIT only governs cases arising from obligations stipulated in the BIT,⁷³⁸ which do not include conservation.

The second requisite feature of EBITs is that they do not limit the location of investments eligible for arbitration, which enables the arbitration of *transboundary* pollution claims. Imagine a dispute between, for example, France and Algerians with investments *in Algeria*, not in France: a French state-owned nuclear plant, say, pollutes the Mediterranean⁷³⁹ and harms fisheries along the Algerian coast owned by Algerians.⁷⁴⁰ According to this Article’s construction of EBITs, the France-Algeria EBIT can arbitrate this case because it applies to disputes between one state and

⁷³⁶ Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and the Reciprocal Protection of Investments, art. 10(1), Greece-Alb., Jan. 8, 1991 [hereafter *Greece-Albania EBIT*].

⁷³⁷ Agreement Between the Government of the Hellenic Republic and the Government of the Hungarian People’s Republic for the Encouragement and the Reciprocal Protection of Investments, art. 10(1), Greece-Hung., May 26, 1989; *see also* *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Oct. 9, 2009, Final Award, ¶ 107 (holding that a clause in the Austria-Slovakia BIT requiring arbitrable disputes to be about “the amount or modality of compensation per Article 4 [expropriation]” indicates an intent to “deliberately narrow[] down the initially broad scope of arbitral disputes.”). Whereas the Austria-Slovakia BIT is not an EBIT because it explicitly limits the subject of arbitrations to compensation for expropriation and transfer obligations, the U.K.-China EBIT is an EBIT because it merely requires arbitrable disputes to be about “an amount of compensation which has not been amicably settled after a period of six months” without any further conditions on the subject of arbitration. *See U.K.-China EBIT*, *supra* note 40, at art. 8(2).

limits the scope of arbitration to “disputes about the amount of compensation”).

⁷³⁸ Agreement Between the Republic of Turkey and the Kingdom of Denmark Concerning the Reciprocal Promotion and Protection of Investments, art. 8(1)(b), Turk.-Den., Feb. 7, 1990.

⁷³⁹ *Cf. France’s Oldest Nuclear Reactor to Finally Shut Down*, THE GUARDIAN, June 28, 2020 (describing a nuclear reactor run by “state-owned energy company EDF” that caused “water pollution [and] a fuel leak”), available at <https://www.theguardian.com/environment/2020/jun/28/frances-oldest-nuclear-reactor-to-finally-shut-down>.

⁷⁴⁰ *Cf. Peter M. Haas, Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT’L ORG. 378-79 (1989) (“Pollution of the Mediterranean Sea was widely regarded as a collective goods problem . . . [among] Spain, France, Italy, and Monaco. . . . Algeria blamed France for much of the Algerian coastal pollution[.]”); Inal Ahmed et al., *Levels and Ecological Risk Assessment of Heavy Metals in Surface Sediments of Fishing Grounds along Algerian Coast*, 136 MARINE POLLUTION BULLETIN 322, 323 (identifying “discharge from . . . power plants” as a source of the pollution of fisheries along the Algerian coast).

investors of the other state, without any conditions on the location of the investments at issue.⁷⁴¹ In contrast to the France-Algeria EBIT, a BIT such as the Ethiopia-Sudan BIT could not arbitrate a similar transboundary point source pollution dispute between relevant parties, because that BIT defines *investments* as “every kind of asset invested by Investors of one Contracting Party in the territory of the other Contracting Party[.]”⁷⁴² This means that, if an Ethiopian investor wanted to arbitrate against Sudan, the resulting arbitration could only be about investments located in Sudan.

Under the textualist, plain-meaning construction that I propose,⁷⁴³ whether a BIT qualifies as an EBIT depends on the meaning of both substantive words like *investment* and of grammatical words like *the* and *also*—just as Supreme Court rulings can hinge on the meaning of words like *so*.⁷⁴⁴ For example, the Jordan-Bahrain BIT is not an EBIT because Article 7 is titled “Settlement of dispute between the Investor and *the* Host State.”⁷⁴⁵ *The* indicates that Article 7 is referring to an investor and the state hosting her investment, such as Bahraini investors with assets in Jordan and the Jordanian government, thereby excluding the arbitration of transboundary pollution cases. If it referred to “investors and a contracting state” or “investors and a host state,”⁷⁴⁶ the Jordan-Bahrain BIT would be an EBIT because those terms can refer to an investor bringing arbitrations and Jordan *or* Bahrain, not necessarily the state hosting that particular investor’s investments. In contrast, Article 6 of the Romania-Armenia EBIT does not affect its status as an EBIT because it says that the BIT “shall *also* apply” to investments made in one state by citizens of the other.⁷⁴⁷

⁷⁴¹ Agreement Between the Government of the French Republic and the Government of the People’s Democratic Republic of Algeria for the Encouragement and the Reciprocal Protection of Investments, art. 8(1), Fr.-Alg., Feb. 13, 1993 [hereafter *France-Algeria EBIT*].

⁷⁴² Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Sudan on the Reciprocal Promotion and Protection of Investment, art. 1(a), Eth.-Sudan, Mar. 7, 2000.

⁷⁴³ Cf. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (internal quotation marks omitted).

⁷⁴⁴ See *Van Buren v. United States*, 141 S. Ct. 1648, 1655 (2021) (“Van Buren’s account of ‘so’—namely, that ‘so’ references the previously stated ‘manner or circumstance’ in the text of § 1030(e)(6) itself—is more plausible than the Government’s. ‘[S]o’ . . . typically ‘[r]epresent[s]’ a ‘word or phrase already employed,’ thereby avoiding the need for repetition.”) (quoting the Oxford English Dictionary).

⁷⁴⁵ Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the State of Bahrain on the Mutual Promotion and Protection of Investment, art. 7, Jordan-Bahr, Feb. 8, 2000.

⁷⁴⁶ See, e.g., *Greece-Albania EBIT*, *supra* note 176, at art. 10; *Romania-Armenia EBIT*, *supra* note 41, at art.9.

⁷⁴⁷ *Romania-Armenia EBIT*, *supra* note 41, at art. 6.

As may be apparent from the variety of EBITs cited, EBITs are not uniform. For example, the Lebanon-Egypt EBIT would only let investors initiate arbitrations,⁷⁴⁸ whereas the U.K.-China EBIT would allow investors or states to do so.⁷⁴⁹ Such bidirectional EBITs pose a risk of abuse by authoritarian regimes: if states can expropriate under the pretense of environmental protection,⁷⁵⁰ they may also abuse environmental arbitration to intimidate uncooperative foreign investors. How successful such abuse may be is uncertain because party-appointed arbitrators, not states, tend to adjudicate investment arbitrations.⁷⁵¹ However, to abuse EBITs, authoritarians would first need to accept this Article's proposed treaty construction that would transform their BITs into EBITs. Authoritarian regimes generally reject unfavorable international law due to the seeming or actual diminution it would cause to their power.⁷⁵² Should authoritarian governments accept EBITs, it would likely cost them in the form of a precedent of having accepted unfavorable⁷⁵³ international law; should authoritarian governments reject EBITs, they could not abuse them for political ends.

If EBITs can arbitrate transboundary pollution cases, which kinds (and levels) of pollution could be the subject of arbitration? As explained, my proposed treaty construction exploits BITs' silence on the subject of arbitrable cases. Hence, EBITs could arbitrate any kind of transboundary pollution claim as long as it involves investments, the states involved have an EBIT, and a direct line of causality exists between the pollution and the investment (this third condition would limit the scope of EBITs to point source pollution). Arbitrability would not depend on the amount of

⁷⁴⁸ Agreement Between the Government of the Lebanese Republic and the Government of the Arab Republic of Egypt on the Mutual Revitalization and Protection of Investments, art. 9(1), Leb.-Egypt, Mar. 16, 1996.

⁷⁴⁹ *U.K.-China EBIT*, *supra* note 40, at art. 8(2).

⁷⁵⁰ *See, e.g.*, *Phelps Dodge Corp. v. Islamic Republic of Iran*, 10 Iran-U.S. Cl. Trib. Rep. 121, 130 (1986) (holding that the stated intent of expropriation does not relieve Iran from its duty of compensation); *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/01, Award, ¶ 71 (Feb. 17, 2000) (“[T]he purpose of protecting the environment . . . does not alter the [fact that] adequate compensation must be paid.”).

⁷⁵¹ *See* Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 436 (2013) (“Most international investment arbitrations are decided by . . . two party-appointed arbitrators (one per side) and a presiding arbitrator, chosen either by the parties themselves or by a neutral third-party.”).

⁷⁵² *Cf.* Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 227, 231 (2020) (“[A]s a general matter[,] authoritarian states do not seem to participate in the international legal order to the same degree as democracies. . . . Such regimes have a common interest in reasserting norms of noninterference[.]”).

⁷⁵³ Authoritarian regimes would likely find international law mandating environmental protection to be unfavorable. *See, e.g.*, Gareth Porter, *Pollution Standards and Trade: The “Environmental Assimilative Capacity” Argument*, 4 GEO. PUB. POL'Y REV. 49, 61 (1998) (referring to “authoritarian regimes that stressed high rates of economic growth and viewed popular demands for environmental protection as signs of disloyalty”); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 286 (2014) (“Authoritarian regimes typically pin their legitimacy to the achievement of substantive outcomes, such as . . . economic growth[.]”); Irene Villanueva Nemesio, Note, *Strengthening Environmental Rule of Law: Enforcement, Combatting Corruption, and Encouraging Citizen Suits*, 27 GEO. INT'L ENVTL. L. REV. 321, 326 (2015) (“Countries hoping for economic growth might find environmental protection counter-productive to this goal.”).

harm from pollution because BITs tend to define *investment* as “basically everything of economic value”;⁷⁵⁴ arbitrability would not depend on the type of pollution, such as air or water pollution, because state pairs with EBITs include bordering states, non-bordering states sharing access to bodies of water, and states on opposite sides of the globe.⁷⁵⁵ Therefore, EBITs could conceivably adjudicate any kind of transboundary point source pollution dispute, regardless of the magnitude of the damage incurred, the distance between the states involved, or the kind of pollution at issue.

Although such broad applicability may be useful for many other environmental protection measures, versatility to that degree would be undesirable and unnecessary for EBITs. Unlike, say, domestic regulations that can be enforced relatively easily, EBITs must first be accepted by states and arbitrators to have any positive result. However, states may reject EBITs for fear of excessive liability and costs: even littering, if done by an appropriate foreign national or state actor, may be arbitrable “transboundary pollution” under EBITs. An overbroad reach would also be unnecessary for EBITs because their purpose is not to directly regulate every conceivable kind of point source pollution on a case-by-case basis through expensive adversarial proceedings—or, as Professor Jan Paulsson put it, “to turn investment arbitration into a Court of Common Pleas having the mission of correcting the conduct of every bureaucrat in the world.”⁷⁵⁶ Instead, the purpose of EBITs is to generate enough state practice against transboundary pollution to establish accordant CIL, so that future environmental treaties can curb both point *and* nonpoint source pollution comprehensively.

As such, EBITs need an additional mechanism to ensure that they strike a balance. EBITs must create enough arbitrations to generate the critical mass of state practice needed to legislate CIL against transboundary pollution, but not so many arbitrations that governments reject EBITs for fear of excessive cost or liability. Part II.B presents such a mechanism: a minimum amount in controversy (MAC) requirement for transboundary pollution claims arbitrated using EBITs. The MAC requirement aims to sell EBITs despite their high financial cost to states in the long run, by presenting a low electoral cost to politicians in the short run—that is, to incumbent politicians.

⁷⁵⁴ Chung, *supra* note 42, at 959.

⁷⁵⁵ See, e.g., *Greece-Albania EBIT*, *supra* note 176; *France-Algeria EBIT*, *supra* note 181; *Albania-Croatia EBIT*, *supra* note 44; *U.K.-China EBIT*, *supra* note 40.

⁷⁵⁶ Jan Paulsson, *Avoiding Unintended Consequences*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 254 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008).

B. *Controversial But Not Courageous: A Strategy to Make EBITs Cost Votes, Not Elections*

Sir Humphrey Appleby: There are four words you have to work into a proposal if you want a [Cabinet] Minister to accept it.

Sir Frederick Stewart: Quick, simple, popular, cheap. And equally, there are four words to be included in a proposal if you want it thrown out.

Sir Humphrey: Complicated, lengthy, expensive, controversial. And if you want to be *really* sure that the Minister doesn't accept it, you must say the decision is *courageous*.

Bernard Woolley: And that's worse than controversial?

Sir Humphrey: *Controversial* only means "this will lose you votes"; *courageous* means "this will lose you the election."

— *Yes Minister*, "The Right to Know"⁷⁵⁷

As presented in Part II.A, EBITs can arbitrate effectively any point source transboundary pollution dispute, regardless of the type of pollutant involved or the resulting magnitude of harm. Such overbroad applicability can deter states from reconstruing their BITs into EBITs for fear of exorbitant arbitration costs. However, although EBITs are new, the problem of states rejecting treaty reconstructions that would raise compliance costs is an old one⁷⁵⁸ to which existing works already offer a solution. The idea is as simple as a hostage strategy. Treaty compliance usually presents costs and benefits to state parties, and reconstruing a treaty can add to those costs. Yet, if the increase in cost is small enough, such that the *total* cost of complying with the reconstrued treaty remains smaller than the preexisting benefits from compliance, states would likely swallow the reconstrued treaty and the accompanying increase in compliance costs (albeit begrudgingly):

In multilateral agreements that regulate public goods, defection from a given agreement affects every treaty partner the same, so the relative importance of states is largely

⁷⁵⁷ *Yes Minister: The Right to Know* (BBC television broadcast Mar. 31, 1980) (18:23).

⁷⁵⁸ See, e.g., Laurence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367, 370-71 (2006) ("[A]n international tribunal . . . may adopt an expansive interpretation . . . [that] raise[s] the cost of compliance for one or more treaty parties . . . [which may] denounce[] the treaty and then re-accede[] to it with a reservation . . .").

immaterial. What matters in this case is how important the agreement is to the defecting state. If the agreement produces a high level of benefits, states will endure an appreciable rise in compliance costs before they defect—just as they will in connection with a valued relationship in the case of agreements that regulate private goods. If the agreement produces only modest benefits, it will take less of an increase in compliance costs before costs begin to outweigh benefits, making it desirable for the state to defect.⁷⁵⁹

Applied to EBITs, this hostage strategy would take the form of a MAC requirement for investment arbitrations arising from transboundary pollution. The MAC requirement's objective is to reduce the number of pollution arbitrations that states face, so that the total cost to comply with an EBIT remains lower than the preexisting benefits from the treaty. Yet, at the same time, the MAC requirement would need to generate enough arbitrations to establish evidence of a state practice against transboundary pollution. Although the hostage strategy has obviously never been attempted with respect to EBITs, there already are indications of its prospects for success. Despite much theoretical work positing a correlation between an increase in the cost to comply with BITs (such as increases in the cost of awards or the number of arbitration claims filed) and the number of states abrogating or renegotiating BITs,⁷⁶⁰ empirical research finds that “many states have not taken action”⁷⁶¹—indicating that many states would pay more to continue benefitting from BITs.

However, the MAC rule may seem insufficient to get states to accept EBITs. The cost that the MAC requirement aims to mitigate, the cost of arbitrating transboundary pollution claims in the immediate future, is only the short-term cost of EBITs. EBITs also impose a long-term cost on states, by legislating CIL that makes it hard (ideally impossible) for states to thwart globally reaching environmental treaties. The MAC requirement would mitigate only the short-term cost

⁷⁵⁹ Downs & Jones, *supra* note 59, at 108.

⁷⁶⁰ See, e.g., George Kahale III, *Rethinking ISDS*, 44 BROOK. J. INT'L L. 11, 12-14 (2018) (“The question of whether investor-state arbitration is broken . . . is being increasingly answered with a resounding “yes[.]” In recent years, [six Asian, African, and Latin American states] have all taken steps to terminate investment treaties . . . all the result of . . . the risk of catastrophic awards. . . . The rise of anti-ISDS sentiment in Europe is hardly surprising[.]”).

⁷⁶¹ See Tuuli-Anna Huikuri, *Keep, Terminate, or Renegotiate? Bargaining Power and Bilateral Investment Treaties* 7-8 (13th Annual Conference on the Political Economy of International Organization) (“[U]p to 2018, the association between how many ISDS cases a state has faced and how many BITs they have . . . unilaterally terminate[d] is not particularly strong [S]tates at various levels of ISDS-exposure have not terminated any BITs While states that have unilaterally terminated the most BITs have also faced large numbers of ISDS disputes . . . many states have not taken action despite expansive experience with dispute settlement with investors. . . . [W]ith Ecuador, Indonesia, Italy, Bolivia, and South Africa, [India] accounts for over 90% of known unilaterally terminated investment treaties[.]”), available at https://www.peio.me/wp-content/uploads/2020/02/PEIO13_paper_158_1.pdf.

of EBITs, because the whole point of EBITs is to impose their long-run cost on states so that they are forced to address transboundary pollution in a comprehensive manner. If that long-term cost were bargained away to get states to accept EBITs, it would defeat the purpose of getting states to accept EBITs. Therefore, the MAC requirement may seem insufficient to sell EBITs to a self-interested state capable of taking long-term costs into account. Theoretically, such a state should prefer to pass the cost of curbing transboundary pollution to more irrational states or posterity.⁷⁶²

Yet, despite EBITs' high financial cost to states in the long run, I submit that the MAC requirement can sell EBITs by presenting low electoral costs to politicians in the short run. Unlike the "rationalist ideal" of states,⁷⁶³ politicians who run governments in practice often pursue short-run interests that conflict with long-term state interests, a phenomenon well represented by the so-called third rail of politics: policy whose creation is in the interests of everyone but the politician who creates it⁷⁶⁴ because of immediate electoral costs. An example of such a policy is tax reform; in 2013, senators made reform proposals to the Senate Finance Committee only after a guarantee that they would be kept secret for 50 years.⁷⁶⁵ Another example is conservation treaties with high short-run compliance costs, which are often rejected despite greater long-run gains.⁷⁶⁶ This means that, conversely, if a policy can present low electoral costs to incumbents, it could be sold despite high costs to their successors. In short, selling EBITs requires convincing politicians that they may cost votes, but not elections—that EBITs may be controversial but not courageous, if only for now.

Of course, accepting EBITs would likely cost some politicians some votes. A longstanding cause of opposition to treaties is that they undermine state sovereignty;⁷⁶⁷ some zealous objectors

⁷⁶² See, e.g., Michèle B. Bättig & Thomas Bernauer, *National Institutions and Global Public Goods: Are Democracies More Cooperative in Climate Change Policy?*, 63 INT'L ORG. 281, 283 (2009) ("The conventional logic of public goods theory holds that [GHG] problems are very difficult to solve, particularly at the global level.").

⁷⁶³ Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUD. 307, 308 (2002).

⁷⁶⁴ See *Yes Minister: The Bed of Nails* (BBC television broadcast Dec. 9, 1982) (08:12) ("The reason there has never been an integrated transport policy is that such a policy is in everybody's interest, except the Minister who creates it. . . . Why do you think the Transport Secretary isn't doing it? Why do you think he suggested the Lord Privy Seal? Why do you think the Lord Privy Seal suggested the Chancellor of the Duchy of Lancaster? . . . Minister, this hideous appointment has been hurtling around Whitehall for the last three weeks, like a grenade with the pin taken out.").

⁷⁶⁵ See Jeanne Sahadi, *Tax Reform Proposals to Be Secret for 50 Years*, CNN MONEY, July 25, 2013, available at <https://money.cnn.com/2013/07/25/pf/taxes/tax-reform/>.

⁷⁶⁶ See Bernauer et al., *supra* note 18.

⁷⁶⁷ See, e.g., U.S. Senate, *Senate Debate on United Nations Disabilities Treaty*, C-SPAN (Dec. 4, 2012), <https://www.c-span.org/video/?309777-5/senate-debate-united-nations-disabilities-treaty> (at 11:43) (Senator James Inhofe claiming that ratifying the Convention on the Rights of Persons with Disabilities "could result in transferring a disabled child from the home to government-run schools if . . . unaccountable bureaucrats deem it necessary"); Kaj

even oppose treaties that they concede are unenforceable.⁷⁶⁸ Because some implacable opposition to treaties will likely persist, EBITs cannot be marketed to some politicians. Instead, selling EBITs requires showing the other politicians that the electoral cost of EBITs is likely low enough (and the benefits high enough) that EBITs are worth supporting. The MAC requirement would reduce the electoral cost of EBITs by suppressing EBITs' short-run costs in terms of money or sovereignty. As for the benefits, EBITs give politicians a chance to greenwash themselves. Just as many firms make gestures toward environmentalism without making a genuine effort,⁷⁶⁹ politicians may want to signal their commitment to conservation, especially due to the increasing amount of harm attributed to climate change.⁷⁷⁰ Accepting EBITs would help politicians send such a signal, while pawning off the electoral consequences (CIL against transboundary pollution) to their successors.

Existing works show positive indications about the prospects of the “controversial but not courageous” strategy. Bounded rationality models theorize that governments tend to ignore “low probability, high-impact risks” until they become “vivid[.]”⁷⁷¹ As such, despite the “considerable sovereignty costs” of BITs, states join them without “carefully considering the costs and benefits of different provisions[.]”⁷⁷² If this theory holds, many governments would accept EBITs because they present low short-run electoral costs, offer electoral gains (greenwashing), and the long-term cost—CIL against transboundary pollution—would not become “vivid” until after the incumbents have left office. Indeed, empirical works show that many developing states⁷⁷³ have an “irrational

Hobér, *Investment Treaty Arbitration and Its Future—If Any*, 7 Y.B. ON ARB. & MEDIATION 58, 62 (2015) (“The argument is that BITs impose restrictions on, and indeed undermine, the sovereignty of the host State[.]”).

⁷⁶⁸ *Senate Debate on United Nations Disabilities Treaty*, *supra* note 207 (at 24:16) (Senator Mike Lee claiming that he “simply cannot support a treaty that threatens the right of parents to raise their children with a constant looming threat of state interference” while acknowledging that “[t]his treaty simply has no enforcement mechanism[.]”).

⁷⁶⁹ Jacob Vos, Note, *Actions Speak Louder Than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 676 (2009) (discussing GM's allegedly “worthless gesture toward environmentalism”).

⁷⁷⁰ See, e.g., Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429, 430, 469 (2021) (“[Corporate social responsibility] laws may be political greenwashing through which politicians give symbolic importance to CSR. . . . The legal importance of CSR will likely continue to rise with the increasing threats of climate change[.]”).

⁷⁷¹ Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. QUARTERLY 1, 4 (2014).

⁷⁷² *Id.* at 1, 12.

⁷⁷³ See Prabhash Ranjan & Pushkar Anand, *Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does It Go Too Far?*, in *INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA* 579, 581 (Luke Nottage ed. 2018) (“[A]n example of India being a “rule taker” in international investment law: it adopted rules developed and largely used elsewhere.”); Jonathan Bonnitcha, *International Investment Arbitration in Myanmar: Bounded Rationality, but Not as We Know It*, in *INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA* 335, 356 (Luke Nottage ed. 2018) (“Myanmar[] appears to be a “rule-taker” even in its BITs with other developing ASEAN countries.”).

preference” for copying BITs already written by other states, to the point of raising doubts about whether some states “actually knew what they signed.”⁷⁷⁴ Other works indicate that “governments with shorter time horizons” are more likely to join BITs whose benefits “[occur] in the short term while the costs loom larger in the long term[.]”⁷⁷⁵ Collectively, these findings show promise for similarly manipulating the political costs of EBITs to make them more palatable to governments.

Of course, after EBITs are accepted, states may theoretically renegotiate or abrogate them once their risks become “vivid”: that is, once EBITs begin to be used for transboundary pollution arbitrations.⁷⁷⁶ However, renegotiation is made less likely by the fact that, in many transboundary pollution claims, a state is disproportionately the offender and the other state the victim. Typical water pollution disputes, for example, feature an upstream state polluting a river to the detriment of a downstream state.⁷⁷⁷ As such, while the upstream state may want to renegotiate an EBIT, the downstream state is unlikely to be receptive. States can abrogate EBITs, but not without forgoing the benefits they offer in attracting investments—which may be the same reason that many states in the status quo keep BITs despite mounting compliance costs.⁷⁷⁸ If a state does abrogate EBITs, many of them can still be used to arbitrate environmental claims (thereby generating state practice against transboundary pollution) thanks to survival clauses, which preserve the protections from abrogated BITs to investments that existed before the abrogation for “an ample period of time.”⁷⁷⁹

Part II has advanced a strategy to legislate CIL against transboundary pollution by using EBITs, and the practical benefits of doing so. A MAC requirement would put a ceiling on the cost of complying with EBITs, so that states would accept EBITs to continue reaping their preexisting benefits. States’ compliance with EBITs in the form of arbitrating transboundary pollution claims would constitute “state practice” required to legislate accordant CIL, as will be explained in Part

⁷⁷⁴ Poulsen, *supra* note 211, at 9, 12.

⁷⁷⁵ Jia Chen & Fangjin Ye, *Cost of Compliance, Autocratic Time Horizon, and Investment Treaty Formation*, 73 POL. RES. QUARTERLY 325, 330 (2020).

⁷⁷⁶ See Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273, 276 (2013) (“[M]any developing country officials have been bounded rational when learning about BITs by ignoring the risks of BITs until they were hit by their first claim.”).

⁷⁷⁷ See, e.g., Scott C. Armstrong, *Water Is for Fighting: Transnational Legal Disputes in the Mekong River Basin*, 17 VT. J. ENVTL. L. 1, 8 (2015) (stating that “Chinese dams have serious adverse effects downstream” in states such as Laos, Thailand, and Vietnam).

⁷⁷⁸ See Huikuri, *supra* note 201.

⁷⁷⁹ See Katia Fach Gómez, *Latin America and ICSID: David Versus Goliath?*, 17 L. & BUS. REV. AM. 195, 217-18 (2011) (“[B]ilateral investment treaties usually contain a survival clause. This clause allows investments made before the BIT termination date to remain protected by the same text during an ample period of time[.]”).

III.B. If this CIL is established, it would remove transboundary pollution, like conquest, from the realm of rational decisions into “subrationally unthinkable” territory for most states. Part III gives the legal basis of EBITs and of using EBITs to legislate CIL against transboundary pollution. For example, I justify circumventing genuine state consent in order to impose EBITs, and creating the various rules of operation that are needed to legislate CIL. These rules would, for example, define “state practice” for the purpose of establishing CIL, how much state practice is needed to create CIL, and how one would know whether a critical mass of requisite state practice has accumulated.

III. THE LEGAL BASIS OF EBITs AND THE DELIBERATE LEGISLATION OF CIL

Part II presented the mechanics and benefits of reconstruing BITs as EBITs, so that EBITs may be used to arbitrate transboundary pollution claims and those arbitral rulings can accumulate a critical mass of accordant state practice, which in turn would be legislated as CIL. Despite the benefits they would present, however, actually implementing these steps may seem to contradict existing rules or theories on how international investment law and CIL operate. As such, Part III establishes the legal basis for EBITs, using EBITs to generate state practice, and legislating CIL.

Part III.A rebuts the popular claim that BITs and ISDS should not be used for any purpose other than their original goal of fostering foreign investments. Indeed, arbitrators have famously found for states in disregard of a BIT’s plain language, on the grounds that following the plain language would contradict the parties’ expectations at the time they joined the treaty.⁷⁸⁰ As Part II explained, EBITs are written so unusually vaguely that their plain-text reading exposes parties to transboundary pollution arbitration. To exclude a plain-meaning reading simply because states realize too late that it would inconvenience them would defeat the purpose of having any text in a treaty. By that logic, states could use original intent as a cudgel to exclude any reading they find unpalatable, regardless of what the text says. Part III.B justifies this Article’s innovations to the formation rules of CIL (such as deliberately legislating CIL) by pointing to the fact that scholars have, at best, only postulated the existence of those rules without actually identifying the content.

⁷⁸⁰ *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 219 (Feb. 8, 2005) (justifying its denial of the claimant’s reliance on the most favored nations clause in the Bulgaria-Cyprus BIT).

A. *The Necessity of Circumventing Genuine State Consent with Respect to EBITs*

The Vienna Convention on the Law of Treaties requires treaties to “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . . in light of its object and purpose.”⁷⁸¹ No one could credibly claim that states intended to expose themselves to transboundary pollution arbitrations when they first signed the BITs that this Article proposes to reconstrue as EBITs.⁷⁸² As such, those who argue that “[investment] arbitrators must apply . . . the VCLT in interpreting [BITs]”⁷⁸³ may object to construing BITs as EBITs and to using EBITs to arbitrate transboundary pollution claims, regardless of what a BIT’s plain-text reading permits.

Many arbitrators would find this claim persuasive because tribunals have already gone out of their way to defer to states’ alleged original intent, even if doing so would contradict the plain text of the treaty at issue. Like many other BITs,⁷⁸⁴ the Bulgaria-Cyprus BIT has a most favored nations clause requiring states to give investors “a treatment which is not less favorable than that accorded to . . . investors of third states.”⁷⁸⁵ The only limitation on this treatment is that it excludes privileges arising from Bulgaria’s or Cyprus’ membership in “economic communities and unions, a customs union[,] or a free trade area.”⁷⁸⁶ Although the Bulgaria-Cyprus BIT is silent on ICSID arbitrations, other BITs entered into by Bulgaria, such as the Bulgaria-Finland BIT, permit ICSID arbitrations.⁷⁸⁷ In *Plama Consortium Limited v. Bulgaria*, a Cypriot claimant demanded ICSID arbitration by invoking the Bulgaria-Cyprus BIT’s MFN clause and the Bulgaria-Finland BIT’s arbitration provision.⁷⁸⁸ The tribunal denied, ruling that a literal construction of the MFN clause would contradict Bulgaria’s expectation of its own liability arising from the Bulgaria-Cyprus BIT:

⁷⁸¹ Vienna Convention on the Law of Treaties art. 31(1), May 23 1969, 1155 U.N.T.S. 331 [hereafter *VCLT*].

⁷⁸² See, e.g., *France-Algeria EBIT*, preamble (declaring the EBIT’s purpose to strengthen economic cooperation and to create favorable conditions for foreign investments between France and Algeria).

⁷⁸³ Andrew D. Mitchell & James Munro, *Someone Else’s Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements*, 28 EUR. J. INT’L L. 669, 677 (2017).

⁷⁸⁴ See Joost Pauwelyn, *Multilateralizing Regionalism: What About an MFN Clause in Preferential Trade Agreements?*, 103 AM. SOC’Y INT’L L. PROC. 122, 122 (2009) (“MFN clauses are a common aspect of almost all bilateral investment treaties (BITs).”).

⁷⁸⁵ Agreement Between the Government of the People’s Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments, Bulg.-Cyprus, art. 3(1), Nov. 12, 1987.

⁷⁸⁶ *Id.* at art. 3(2).

⁷⁸⁷ See Agreement Between the Government of the Republic of Finland and the Government of the People’s Republic of Bulgaria on the Promotion and Protection of Investments, Fin.-Bulg., art. 8(2), Oct. 3, 1997.

⁷⁸⁸ See *Plama Consortium Decision on Jurisdiction*, *supra* note 220, at ¶ 79.

The present Tribunal fails to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the “basket of treatment” and “self-adaptation of an MFN provision” in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation . . . cannot be the presumed intent of Contracting Parties.⁷⁸⁹

Obviously, there is some merit to the tribunal’s claim. If states were perpetually exposed to all sorts of arbitrations that they never directly agreed to participate in, the ISDS system might collapse from states abandoning it. This same policy concern and deference to alleged state intent were echoed by the tribunal for *Maffezini v. Spain*, which also featured a claimant citing the MFN clause in one BIT to invoke arbitration provisions in another BIT. Despite ruling for the claimant, the tribunal stated that “the beneficiary of the [MFN] clause should not be able to override public policy considerations that the [state] parties might have envisaged as fundamental conditions . . . of the [BIT,]”⁷⁹⁰ even though the text of the BIT does not permit exceptions to MFN treatment for public policy reasons.⁷⁹¹ In the context of EBITs, this reasoning would oppose reconstruing BITs as EBITs even if the text would permit doing so, on the grounds that such a construction would undermine the BITs’ alleged intended purpose as well as public policy considerations—even if those public policy considerations did not exist at the time the BITs were originally agreed to.⁷⁹²

I argue that alleged intent should not release states from having to comply with treaty text because it was the text that states agreed to, not any concern that states “might have envisaged” at the time of the agreement.⁷⁹³ For example, *Plama Consortium* should not have released Bulgaria from having to comply with the Bulgaria-Cyprus BIT’s MFN clause. If investors using that MFN

⁷⁸⁹ *Id.* at ¶ 219.

⁷⁹⁰ Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 62 (Jan. 25, 2000).

⁷⁹¹ See Agreement Between the Kingdom of Spain and the Argentine Republic on the Promotion and Reciprocal Protection of Investments, Spain-Arg., Oct. 3, 1991.

⁷⁹² *Plama Consortium*, *supra* note 220, at ¶ 36 (Bulgaria claiming that it should not be bound by the Bulgaria-Cyprus BIT’s MFN clause because “BITs concluded by Bulgaria following the collapse of communism reflect fundamental changes in Bulgaria’s public policy . . . which do not inform . . . its earlier BITs, such as that with Cyprus.”).

⁷⁹³ *Maffezini*, *supra* note 230, at ¶ 62.

clause to invoke remedies in other BITs undermines Bulgaria’s public policy,⁷⁹⁴ Bulgaria should not have agreed to give investors “a treatment which is not less favorable than that accorded to . . . investors of third states”⁷⁹⁵ because the plain meaning of that clause is exactly to expose Bulgaria to “a large number of permutations of dispute settlement provisions from the various BITs which it has concluded.”⁷⁹⁶ In fact, nothing stopped Bulgaria from pursuing that policy concern in many of its BITs negotiated before *Plama Consortium*, which permit Bulgaria to revoke MFN treatment prospectively or retroactively.⁷⁹⁷ Just as the effect of MFN clauses should be dictated by the text, not intent, BITs should be reconstrued as EBITs if the plain meaning of the text would permit it.

I am not arguing that intent is meaningless to treaty construction. Evidence of intent can help resolve disputes that turn on the meaning of genuinely unclear terms.⁷⁹⁸ My point is simply that intent should not be given so much deference that it trumps the plain meaning of treaty text, because that would defeat the purpose of having any text. If arbitrators release states from treaty commitments because of concerns that states “might have envisaged”⁷⁹⁹ regardless of when they did,⁸⁰⁰ states could rewrite treaties unilaterally however and whenever they find it expedient. For example, some states might issue “Interpretative Note[s]” of investment agreements to discourage tribunals from making unpalatable treaty constructions, instead of “hypothesizing ways to avoid [undesirable outcomes] when constructing the document itself”;⁸⁰¹ other states may abuse policy concerns to escape from commitments to investors.⁸⁰² The claim that the plain meaning of treaty

⁷⁹⁴ *Plama Consortium*, *supra* note 220, at ¶ 36.

⁷⁹⁵ *Bulgaria-Cyprus BIT*, *supra* note 225, at art. 3(1).

⁷⁹⁶ *Plama Consortium*, *supra* note 220, at ¶ 219.

⁷⁹⁷ See Agreement Between the Government of the Republic of Latvia and the Government of the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investments, Lat.-Bulg., art. 3(4), Dec. 4, 2003 (“Each Contracting Party reserves the right to make . . . exceptions from [most favored nations] treatment. . . . However, any new exception shall only apply to investments made after the entry into force of such exception”); Agreement Between the Government of the Republic of Bulgaria and the Government of the Hellenic Republic for the Promotion and Reciprocal Protection of Investments, Greece.-Bulg., art. 3(4), Mar. 12, 1993 (identical language); Agreement Between the Government of the Republic of Lebanon and the Government of the Republic of Bulgaria on Mutual Promotion and Protection of Investments, Leb.-Bulg., art. 3(4), June 1, 1999 (allowing state parties to make exceptions to MFN treatment without a guarantee against the retroactive application of exceptions).

⁷⁹⁸ *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Oct. 9, 2009, Final Award, ¶ 106 (citing travaux préparatoires as supporting evidence of the tribunal’s interpretation of Article 8 of the Austria-Czechoslovakia BIT).

⁷⁹⁹ *Maffezini*, *supra* note 230, at ¶ 62.

⁸⁰⁰ *Plama Consortium*, *supra* note 220, at ¶ 36 (Bulgaria arguing against the application of the Bulgaria-Cyprus BIT’s MFN clause because Bulgaria’s present public policy goals differ from those at the time the BIT was created).

⁸⁰¹ Hanotiau, *supra* note 60, at 316-18.

⁸⁰² *Plama Consortium*, *supra* note 220, at ¶ 221 (“The present Tribunal was puzzled as to what the origin of [states’] ‘public policy considerations’ [which the *Maffezini* tribunal held should override plain-text applications of MFN clauses] is. When asked by the Tribunal at the hearing, counsel for the claimant responded: ‘they just made it up.’”).

text cannot override public policy is especially unpersuasive coming from some developed states regarding MFN clauses,⁸⁰³ given that colonial powers used MFN clauses to secure “equality in exploitation” among themselves against Asian states unfamiliar with modern international law.⁸⁰⁴

Some may nevertheless argue against reconstruing BITs as EBITs on the grounds that the plain meaning doctrine does not permit literal constructions if they lead to absurd results⁸⁰⁵: states may genuinely not have anticipated BITs being construed as EBITs, unlike the possibility of MFN clauses being invoked against their interests.⁸⁰⁶ However, such a claim neglects the bitter with the sweet doctrine.⁸⁰⁷ Whatever their motivations are for joining vaguely worded BITs,⁸⁰⁸ many states profited from that vague language. For example, arbitration clauses with unlimited subject matter would do more to attract investments than arbitration provisions limited to expropriation, because the former would give investors more leverage against host states.⁸⁰⁹ Unrestricted arbitral clauses being used to bring unanticipated claims is an inevitable risk of overpromising to investors. As

⁸⁰³ *Maffezini, supra* note 230, at ¶ 41 (“Spain . . . argues that under the principle *eiusdem generis* the most favored nation clause . . . cannot be extended to matters different from those envisaged by the basic treaty.”).

⁸⁰⁴ Shinya Murase, *The Most-Favored-Nation Treatment in Japan’s Treaty Practice During the Period 1854-1905*, 70 AM. J. INT’L L. 273, 274, 278, 284 (“[I]t was in the latter half of the nineteenth century that unilateral MFN clauses were most extensively concluded between the European Powers and Asian countries. These unilateral clauses served as an instrument for securing ‘equality in exploitation’ in the economically backward regions of Asia where several of the capital exporting countries were in competition and conflict with each other. . . . [A]t the time of concluding their first international treaty, the Japanese leaders were not fully aware of the precise significance and function of the MFN clause. . . . Japan soon became a ‘victimizer’ in relation to neighboring Asian countries, imposing upon them the same unilateral clause that the West had foisted upon Japan.”).

⁸⁰⁵ See *Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.*, 976 F.2d 90, 95 (2d Cir. 1992) (citing *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989)) (“[T]he plain language of a treaty must be followed, but only if the language is unambiguous or if the plain meaning does not produce ‘necessarily absurd’ results.”).

⁸⁰⁶ Cf. Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10683, 10693 (2015) (“Tribunals have . . . interpreted MFN provisions to allow foreign investors to import more favorable provisions from the host country’s other IIAs. . . . The [Trans-Pacific Partnership] anticipates this issue by clarifying that the MFN provision does not encompass [Investor-State Dispute Settlement] procedures[.]”).

⁸⁰⁷ Although the bitter with the sweet doctrine’s original context is rulings on entitlements by the Supreme Court of the United States, scholars frequently apply the rationale that anyone seeking to rely on a law must accept both the costs and benefits of doing so to international legal contexts. See Karen H. Flax, *Liberty, Property, and the Burger Court: The Entitlement Doctrine in Transition*, 60 TUL. L. REV. 889, 894-99 (1986) (discussing the bitter with the sweet doctrine in U.S. Supreme Court rulings); J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT’L L. 129, 152 (1989) (“This ‘bitter with the sweet’ notion is articulated as a corollary to the universal character of customary law . . . that helps create uniformity in the international system.”).

⁸⁰⁸ Scholars have presented anecdotal evidence that some states lacked the “capacity to negotiate” BITs, which indicates that those states may not have “actually kn[own] what they signed.” See Poulsen, *supra* note 213, at 7, 9.

⁸⁰⁹ See Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT’L L. 496, 555 (2009) (“[A]n investor who has easier or broader recourse to arbitration has a competitive advantage over other investors who cannot initiate investor-State arbitration on comparable terms.”).

such, states refusing to accept the downsides of vaguely worded BITs after having profited from the upsides of vaguely worded BITs is a refusal to take the bitter with the sweet.

Preventing abuse by states is not the only justification for applying treaties on the basis of the text instead of alleged intent. Another reason to allow a wide range of constructions consistent with the plain meaning of the text is that, when legislation is difficult, reinterpreting existing law unconventionally may be the only feasible way to create the new laws we need. Obviously, reconstruing treaties for initially unintended purposes would circumvent genuine state consent; for example, some BITs that I designate as EBITs state in their preamble that their goal is to “create favo[r]able conditions for investments by investors of either Party in the territory of the other.”⁸¹⁰ My point is that neither the original intent of a BIT nor the preamble expressing it should override the plain meaning of the body of a treaty⁸¹¹ or the necessity of using it to create the laws we need.

Indeed, my proposal to repurpose existing law when legislating new law is infeasible is far from radical; in other fields of law, it has been longstanding practice. Many states have so-called rigid constitutions that are very difficult to amend, which may provide some measure of political stability⁸¹² but also risk becoming “impervious to change” and thus “outdated and ill-suited for a modern world.”⁸¹³ However, when the need for reform is urgent enough, states have circumvented the normal amendment rules to bring about needed reform. One alternative to formally amending rigid constitutions, especially in the common law tradition, is to reinterpret them through judicial rulings so that de facto changes to how the constitution operates are implemented “off the books”:

[S]tudies suggest how hard it is to formally amend the United States Constitution. But the lived experience of the Constitution proves just as much. Political actors have ratified only twenty-seven formal amendments since the Constitution was adopted in 1789, an extraordinarily low number given that there have been well over eleven thousand

⁸¹⁰ See *Greece-Albania EBIT*, *supra* note 176, at Preamble.

⁸¹¹ Max H. Hulme, Comment, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1305 (2016) (“[E]xperts generally disapprove of . . . using treaty preambles to make substantive declarations of rights or obligations. . . . [S]everal tribunals deciding disputes arising under bilateral investment treaties (BITs) have relied on language in BIT preambles to read broad, investor-friendly principles into the standard of ‘fair and equitable treatment’ (FET) commonly included in these treaties. . . . Far from being universally accepted, these rulings have provoked staunch criticism of what is perceived as overreliance on preamble terms during object-and-purpose analysis.”).

⁸¹² See Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 467 (2018) (“The need for stability may . . . suggest the desirability of some rigidity in the [constitutional] amendment rule[.]”).

⁸¹³ Alina Veneziano, Essay, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age*, 46 FORDHAM URB. L.J. 602, 636-37 (2019).

amendment proposals in the same period. The ratio of proposals to ratifications has only increased over the years. . . . This decelerating pace of formal amendment is paired with a modern fact of constitutional law in the United States: constitutional change today occurs “off the books.” What results is an informal amendment, where the authoritative meaning of the Constitution is transformed without a corresponding alteration to its text.⁸¹⁴

Such off-the-books amendment has reconstrued constitutional provisions for purposes that are far removed from original intent, perhaps just as far removed as EBITs are from BITs. For example, the Commerce Clause of the U.S. Constitution empowers Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸¹⁵ Many works find that the Commerce Clause was originally intended to apply narrowly, to govern only the interstate transport and exchange of goods.⁸¹⁶ However, the Supreme Court in *Heart of Atlanta Motel, Inc. v. U.S.* famously held that the Commerce Clause allows Congress to prohibit racial discrimination in public accommodations. Notwithstanding the appellant’s argument that the Constitution should be applied according to original intent,⁸¹⁷ the Court held that enjoining the Heart of Atlanta Motel from discrimination is within the scope of regulating interstate commerce because “approximately 75% of its registered guests are from out of State.”⁸¹⁸ Scholars have used a similar logic to argue that multilateral treaties should be used for purposes not originally intended by the state parties.⁸¹⁹

⁸¹⁴ Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 224 (2016).

⁸¹⁵ U.S. Const., art. I, § 8, cl. 3.

⁸¹⁶ See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104 (2001) (“[T]he term ‘commerce’ was consistently used in the narrow sense and that there is no surviving example of it being used in either source in any broader sense.”); Peter A. Lauricella, *The Real “Contract with America”: The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1403-04 (1997) (“Very little correspondence or debate transcripts exist from the Constitutional Convention relating to the Commerce Clause, which suggests that it was not intended to have the immense scope it has been interpreted to have today.”).

⁸¹⁷ Oral Argument at 31:44, *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (“In [*Bell v. Maryland*, 378 U.S. 226 (1964)], to quote Mr. Justice Goldberg, ‘Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purpose of the Framers.’ . . . If that theory is not so, then the Constitution is just like any other law, it could be changed from day-to-day by the Congress and by the courts. . . . [W]e have a Constitution that stays as the Constitution in the words that its there [sic], unless it is amended—in a way the constitution provides.”), available at <https://www.oyez.org/cases/1964/515>.

⁸¹⁸ *Heart of Atlanta Motel*, 379 U.S. at 243.

⁸¹⁹ See Jay, *supra* note 63, at 237-38 (“Some scholars argue that extending Convention obligations to military operations overseas . . . transgresses the intended domain of the Convention and burdens Contracting States with obligations they never intended to assume. However, as Lech Garlicki notes . . . the ECHR is exceptional in the robust body of jurisprudence it has generated. The strength of this jurisprudence is built on the acceptance of a certain dynamism that allows the Convention . . . to retain its relevance as a . . . living instrument”), quoting Lech Garlicki, *Judicial Law-Making: The Strasbourg Court on Applicability of the European Convention*, in *NEW MILLENNIUM CONSTITUTIONALISM: PARADIGMS OF REALITY AND CHALLENGES* 338 (G. G. Harutyunyan ed. 2013).

Despite its practical need, some may argue that the off-the-books amendment tactic should not be used to reconstrue treaties beyond their original purpose, given the significance of consent to international law. Volumes have been written about what consent exactly is and how it affects treaty construction,⁸²⁰ undoubtedly with more to follow. Notwithstanding some theoretical value, scholarly debates about state consent too often occur in general, abstract terms. Instead of rehashing the history of that debate, I ask readers to consider whether state parties to EBITs specifically should be permitted to exploit consent to reject that construction. I argue that they should not because, as I have shown, they do not come with clean hands.⁸²¹ States citing lack of consent to quash unfavorable readings of BITs because they were careless in negotiating the treaty text is merely the international law equivalent of insisting that a contract is void because one signed it without reading it. Such a defense would let states escape obligations for reasons “they could have remedied prior to signing” a treaty.⁸²²

Part III.A has established the legal basis of reconstruing BITs into EBITs, so as to enable the arbitration of transboundary pollution claims; Part III.B establishes the legal basis for getting those arbitral rulings recognized as state practice, and using that state practice to create accordant CIL. Before proceeding, I intend to distinguish the plain meaning construction proposed in this Article from what some scholars call the “ordinary meaning” method of treaty construction. The plain meaning rule would interpret treaties from the “literal meaning of their words, without resort to extrinsic evidence of purpose.”⁸²³ In contrast, the so-called “ordinary meaning” method would interpret a treaty by using other treaties in the same category as extrinsic evidence. For example, the ordinary meaning rule would decide what the word *investment* means in one BIT by looking at

⁸²⁰ See, e.g., VASSILIS PERGANTIS, *THE PARADIGM OF STATE CONSENT IN THE LAW OF TREATIES: CHALLENGES AND PERSPECTIVES* (2017); Thomas Christiano, Climate Change and State Consent, in *CLIMATE CHANGE AND JUSTICE* 17, 18 (Jeremy Moss ed. 2015) (“In this chapter I will discuss how state consent can be a genuine basis of legitimacy in the context of decisions about climate change. And I will explore how considerations of legitimacy can help us think about some of the different methods of treaty construction in international environmental law. . .”).

⁸²¹ Cf. Aleksandr Shapovalov, *Should A Requirement of “Clean Hands” Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission’s Debate*, 20 AM. U. INT’L L. REV. 829, 834-35 (2005) (“The clean hands doctrine is not a novelty of international law. . . . [T]he clean hands doctrine is understood as requiring that a party claiming equitable relief or asserting an equitable defense has itself acted in accordance with equitable principles.”).

⁸²² See *McCaddin v. Southeastern Marine Inc.*, 567 F. Supp. 2d 373, 383 (E.D.N.Y. 2008) (“The failure to have eyeglasses to read a contract does not constitute ‘excusable ignorance’ that can void a signed contract and relieve a party of its obligation from the terms of the contract. To hold otherwise would allow parties in an arms-length contract to escape their contractual obligations because of all types of circumstances—including bad lighting when they were reading the contract, small print size . . . that they could have remedied prior to signing the contract.”).

⁸²³ James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1061 (1988).

how that same word is defined in other BITs.⁸²⁴ This ordinary meaning rule has been criticized for “allow[ing] interpreters to gloss over difference between the source rules and their progeny[.]”⁸²⁵ I rely on the plain meaning rule, not the “ordinary meaning” rule, to reconstrue BITs into EBITs.

B. The Elephant (and Blind Men) in the Room:

CIL Formation Rules that Exist in Theory, but Nobody Can Explain in Practice

“On tackling such a big-scale issue like climate change, it’s got to be fun, it’s got to be cool.
It’s got to be sexy too[.]”

“The mere act of me explaining [what ‘sexy’ climate policy is] would not be sexy to begin with.”

— Shinjirō Koizumi, Japanese Minister of the Environment⁸²⁶

“[A treaty] generat[ing] a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law . . . so as to have become binding even for countries which . . . [are not] parties . . . is . . . perfectly possible[.] [I]t constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.”

“At the same time, this result is not lightly to be regarded as having been attained.”

— Judgment, *North Sea Continental Shelf Cases*⁸²⁷

Part III.A has established a legal basis for reconstruing BITs as EBITs, so that they could generate arbitral rulings against transboundary pollution. Part III.B presents the legal justification

⁸²⁴ Anne-Marie Carstens, Interpreting Transplanted Treaty Rules, *in* INTERPRETATION IN INTERNATIONAL LAW (Daniel Peat, Matthew Windsor & Andrea Bianchi eds., 2015) (“[A] transplanted treaty rule might become so ubiquitous within a particular series of treaties that an ‘ordinary meaning’ can be ascribed to the common terms within it by reference to the wider body of earlier treaties. Other authorities have similarly suggested that reference to an external treaty is analogous to . . . reference to a dictionary to determine the meaning of a treaty term.”).

⁸²⁵ *See id.* at 331.

⁸²⁶ Tomohiro Osaki, *Shinjiro Koizumi’s ‘Sexy’ Fight Against Climate Change Is Untranslatable, Japan’s Government Says*, JAPAN TIMES, Oct. 16, 2019, available at <https://www.japantimes.co.jp/news/2019/10/16/national/politics-diplomacy/shinjiro-koizumis-sexy-fight-climate-change-untranslatable-japans-government-says/>.

⁸²⁷ *North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.)*, Judgment, 1969 I.C.J. 3, 41-42, ¶ 71 (Feb. 20).

for the rest of this Article’s proposal: to get those arbitral rulings recognized as state practice and to convert that state practice into accordant CIL. In theory, the process of CIL formation would be governed by rules that scholars have “addressed extensively[.]”⁸²⁸ In practice, many scholars agree that CIL formation rules exist in an objectively discernible form somewhere, but cannot agree on what they are. Part III.B argues that this impasse is caused by the belief that CIL formation rules are a preexisting fact waiting to be discovered, instead of rules that do not exist yet. I argue that such rules, like anything else we call *law*, can be deliberately written.

Although disagreement over CIL formation rules has been common knowledge for years, the same cannot be said of a faulty assumption implicit in the debate: many commentators assume that CIL formation rules exist as an objectively discernible set that has already been discovered or are waiting to be discovered, instead of simply acknowledging that CIL formation rules do not yet exist and hence can be written by agreement. For example, those who argue that a norm against transboundary pollution is CIL because it is “reaffirmed in numerous international decisions [and] General Assembly resolutions”⁸²⁹ are assuming the existence of rules that consider those things to be state practice and that amount of practice sufficient to form CIL. Others, such as the ICJ, go a step further by “simply assert[ing] the [CIL formation] rules that it applies” without giving a legal justification.⁸³⁰ Still others argue that “no one knows”⁸³¹ what CIL formation rules are, as if to suggest that we are merely ignorant of an objectively discernible set of facts that already exists.

Strangely, this apparently popular perception of CIL formation rules resembles a view of a similar body of law that both the academy and the bar long ago dismissed as nonsensical. *Erie v. Tompkins* famously declared that “[t]here is no federal general common law” after “[e]xperience

⁸²⁸ Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1720 (2017). Some works refer to the formation rules of CIL as “secondary rules[.]” whereas others use the term “secondary rules” to refer to substantive rules of CIL that are derived from other substantive rules. See, e.g., Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT’L L. 973, 1068 n. 219 (1995) (using the term “secondary rules” to refer to formation rules); Samuel Shepson, Note, *Jurisdiction in Complicity Cases: Rendition and Refoulement in Domestic and International Courts*, 53 COLUM. J. TRANSNAT’L L. 701, 712 (2015) (using the term “secondary rules” to refer to “derivative” rules). To avoid confusion, I simply use the term “formation rules” to refer to rules governing the formation of CIL.

⁸²⁹ See Banda, *supra* note 21, at 1935-37.

⁸³⁰ Stefan Talmon, *Determining Customary International Law: The ICJ’s Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT’L L. 417, 441 (2015) (“[I]n a majority of cases[.] the [ICJ] has not examined the practice and *opinio juris* of states but, instead, has simply asserted the rules that it applies.”).

⁸³¹ Bradley & Gulati, *supra* note 52.

in applying [it] had revealed its defects[.]”⁸³² such as the enabling of rampant forum shopping.⁸³³ 21 years before *Erie*, Justice Holmes argued in dissent that “[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . that can be identified.”⁸³⁴ Even in the 19th century, Justice Field observed that federal general common law is often what a judge “thinks at the time should be the general law.”⁸³⁵ *Erie* has since been considered to vanquish for good “a particular way of looking at law . . . long after its inadequacies had been laid bare.”⁸³⁶ In particular, “brooding omnipresence in the sky” has become so popular as a shorthand that some call that term a caricature of some of the intricacies in the theoretical study of the common law.⁸³⁷

This critique of federal common law should also apply seamlessly to CIL formation rules. The popular view of CIL formation rules sees them precisely as a brooding omnipresence because many theorists believe that those rules exist in an objectively discernible form, but cannot agree as to what they actually are in practice. As a result, what is often presented as objectively discernible formation rules merely reflect each scholar’s subjective preference, and debates about those rules are unlikely to persuade anyone⁸³⁸—no more than opposing religions are likely to persuade each other on God’s true identity. Yet, the parallels between federal common law and CIL formation rules have largely gone unnoticed. Even some scholars who do not promote a particular view of CIL formation rules subscribe to the assumption that they must exist in an objectively discernible form, instead of thinking that they can be written by agreement. For example, Professor J. Patrick Kelly’s argument that the determination of CIL must be empirical assumes the existence of rules that define objectively what state practice is and which thresholds it must pass to become CIL:

Customary law is empirical; it cannot be a normative exercise. The positive acts of states provide evidence of the underlying social fact of what the members of a society believe they are required to do. Normative scholars, advocates, and self-interested states are

⁸³² *Erie R. Co. v. Tompkins*, 304 U.S. 64, 76, 78 (1938).

⁸³³ *Id.* at 74-75 (“*Swift v. Tyson* [41 U.S. 1 (1842)] made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.”).

⁸³⁴ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221-22 (1917) (Holmes, J., dissenting).

⁸³⁵ *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (Field, J., dissenting).

⁸³⁶ *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945).

⁸³⁷ See Patrick McKinley Brennan, *The Place of “Higher Law” in the Quotidian Practice of Law Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL’Y 437, 448-49 (2009) (criticizing “[t]he near-ubiquity of [Justice] Holmes’s ‘brooding omnipresence’ caricature”).

⁸³⁸ See *supra* notes 26-27 and accompanying text (discussing a scholarly claim that the content of CIL is determined primarily by academic works and a judicial ruling rejecting that contention).

misusing an empirical source of law to articulate their preferred norms as if they were propounding a constitution rooted in a common culture. . . . [CIL] survives only because nations and theorists mean radically different things when they use the term. . . . CIL serves and can be manipulated by many masters because its elements, state practice and *opinio juris*, have no ascertainable meaning and are routinely ignored.⁸³⁹

While Professor Kelly is correct that many scholars misuse the label of CIL to advance their own subjective, normative values, the flaw in his claim is that he apparently also views CIL formation rules as a brooding omnipresence in the sky. This illusion must be abandoned in favor of the idea that we can deliberately write and amend the rules governing CIL formation to suit our needs.

In fact, a consequence of that illusion is the inability to create the CIL formation rules (or the substantive CIL) we need—due to the belief that such rules already exist. Of course, I am not saying that *everyone* views CIL formation rules as an immutable, preexisting fact. For example, Professor Michael Reisman has asked why an investment tribunal’s judgment cannot be taken as “indicative of the state practice of those two states[,]” if those two states themselves “authorize a tribunal to resolve a matter in accordance with international law.”⁸⁴⁰ As implied by this question’s rhetorical nature, Reisman is merely proposing a formation rule that he considers to be reasonable, not presenting a belief as fact. However, many critics of that proposal do advance ill-substantiated beliefs about CIL as if they were fact, which prevents consideration of a proposed rule regardless of its merits. For example, *Glamis Gold* held that arbitral awards “do not constitute State Practice” by citing an interested party’s claim to that effect and one scholarly work,⁸⁴¹ the latter of which does not actually endorse the claim that arbitral tribunal rulings do not constitute state practice.⁸⁴²

The preconception that CIL formation rules already exist also deters domestic courts from making necessary rules for determining whether CIL exists, even when those courts have explicit permission to determine CIL. For example, *Sosa v. Alvarez-Machain* opened the door to “judicial

⁸³⁹ J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 458-59 (2000).

⁸⁴⁰ W. Michael Reisman, ‘Case Specific Mandates’ Versus ‘Systemic Implications’: How Should Investment Tribunals Decide? *The Freshfields Arbitration Lecture*, 29 ARBITRATION INT’L 131, 135 (2013).

⁸⁴¹ *Glamis Gold, Ltd. v U.S.*, ICSID, Award ¶ 605 n.1250 (June 8, 2009).

⁸⁴² See Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 252-53 (2006) (describing the claim that international court rulings do not constitute state practice without taking a position, and arguing that the persuasive strength of such a ruling in determining state practice should depend on the quality of that ruling).

recognition of actionable international norms . . . subject to vigilant doorkeeping,”⁸⁴³ while at the same time recognizing that “a judge . . . rel[ying] on an international norm will find a substantial element of discretionary judgment in the decision.”⁸⁴⁴ Plainly, these instructions do not offer much guidance as to when and how judges can determine that a norm is CIL—no more helpful than the ICJ’s cryptic warning that rule-making treaty status “is not lightly to be regarded as having been attained.”⁸⁴⁵ Nevertheless, some scholars take *Sosa*’s instructions to mean that they “offer[] broad leeway to lower federal courts to adopt and interpret norms of customary international law.”⁸⁴⁶

However, few lower courts seem to share this understanding. As established, the dominant perception that CIL formation rules already exist prevents the creation of new formation rules. Yet, many of the basic rules necessary to determine whether some state practice constitutes CIL, such as the minimum required proportion of states endorsing that practice, do not exist. Because the rules needed to find CIL do not exist, courts cannot actually find CIL in a way that others will accept, despite the allegedly “broad leeway”⁸⁴⁷ granted by the Supreme Court to determine CIL. At the same time, courts must ostensibly exercise the authority to consider whether a practice is CIL if the issue is material to a case before it. This conundrum forces courts to refuse to recognize a state practice as CIL. For instance, “some judges . . . require unanimity in state practice before concluding that [CIL] has been created[,]”⁸⁴⁸ which allows courts to superficially fulfill their duty to investigate whether a practice is CIL while ensuring that no norm will ever be found as CIL: few norms—if any—can be said to command *universal* agreement, no matter how self-evident.⁸⁴⁹

Some might dispute the claim that the lack of CIL formation rules effectively stops courts from finding CIL. For instance, Bradley and Gulati, cited in Part I.B, observed that the standard definition of CIL—custom that states obey out of a sense of legal obligation—is circular because

⁸⁴³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

⁸⁴⁴ *Id.* at 726.

⁸⁴⁵ *North Sea Continental Shelf Cases*, *supra* note 270.

⁸⁴⁶ Penny M. Venetis, *The Broad Jurisprudential Significance of Sosa v. Álvarez-Machain: An Honest Assessment of the Role of Federal Judges and Why Customary International Law Can Be More Effective Than Constitutional Law for Redressing Serious Abuses*, 21 TEMP. POL. & CIV. RTS. L. REV. 41, 52 (2011).

⁸⁴⁷ *Id.*

⁸⁴⁸ *See* Kallins, *supra* note 128; *see also* *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1024 (7th Cir. 2011) (“[W]e have not been given an adequate basis for inferring a violation of customary international law, bearing in mind the Supreme Court’s insistence on caution in recognizing new norms of customary international law in litigation under the Alien Tort Statute.”).

⁸⁴⁹ *Cf.* Patrick J. Schultz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 712 (1998) (“[T]here is almost universal agreement that no lawyer should ‘lie, cheat, or humiliate’ in the course of representing a client.”).

“it is not clear how this sense of legal obligation would arise” before states are bound by CIL.⁸⁵⁰ In a later work, Bradley argues that this circularity is resolved by what he calls the “common law account” of CIL. Just as *Sosa* stated that judges considering whether a norm qualifies as CIL “will find a substantial element of discretionary judgment in the decision,”⁸⁵¹ the common law account posits that adjudicators wield “a significant element of judgment and creativity in determining the content of CIL.”⁸⁵² Bradley argues that this discretion, which covers “how to describe [CIL and] which baselines to apply in evaluating it,”⁸⁵³ resolves the circularity in the standard definition of CIL. That is, we would no longer need to explain why a state feels legally bound to a norm before it becomes CIL, because “a CIL rule can be recognized [by adjudicators] when it is evident[.]”⁸⁵⁴:

The application of CIL by an international adjudicator . . . is best understood in terms similar to the judicial development of the common law . . . adjudicators . . . make choices about how to describe [CIL and] which baselines to apply in evaluating it, and whether and when to extend or analogize it to new situations. . . . If state practices do not become binding as CIL until the states involved act out of a sense of legal obligation, how do the states develop that sense of legal obligation in the first place? . . . Conceiving of customary international law adjudication as akin to common law adjudication . . . helps resolve the chronological paradox. Under the common law account, the recognition of a CIL rule does not require proof that states are already following a practice out of a sense of legal obligation before a CIL rule can be recognized. Rather, a CIL rule can be recognized when it is evident—from state practices, statements, and other evidence—that the rule is something that the relevant community of states wishes to have as a binding norm⁸⁵⁵

However, the common law account does not accurately explain how CIL forms; as such, it would not resolve the circularity of the standard definition of CIL. Although Bradley argues that judges recognize a norm to be CIL “when it is evident,” my point is that the rules for determining “when it is evident”—CIL’s formation rules—do not exist. This is why judges are often so risk-

⁸⁵⁰ Bradley & Gulati, *supra* note 52.

⁸⁵¹ *Sosa*, 542 U.S. at 726.

⁸⁵² Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in *CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 34, 34 (Curtis A. Bradley ed., 2016).

⁸⁵³ *Id.* at 49.

⁸⁵⁴ *Id.* at 56.

⁸⁵⁵ *Id.* at 34, 40, 56.

averse as to refuse to find CIL. When judges do claim to find CIL, their reasons for thinking that CIL is “evident” are too often clear only to them—just as the meaning of “sexy” climate policy is apparently intelligible only to Koizumi. Hence, judges can call a norm CIL, but others are unlikely to agree. For example, while Bradley may describe the ICJ’s *Trail Smelter* ruling as “discerning rules of CIL” citing “general principles” instead of specific instances of state practice,⁸⁵⁶ others argue that this tactic may “not convince its clients,” thereby driving states away from the ICJ.⁸⁵⁷ In essence, the “common law account” is committing the same error that *Sosa* and many legal scholars did, by assuming the existence of an objectively discernible set of CIL formation rules.

In sum, I argue that states can create CIL formation rules by agreement, because the most conspicuous reason for their absence in the status quo appears to be the belief that they cannot be created by agreement. Why couldn’t states make, for example, a treaty codifying the rules of CIL formation? Recall that the ICJ recognizes norm-creating clauses—treaty provisions that generate what eventually becomes CIL, which in turn can bind even the states that were not parties to those treaties.⁸⁵⁸ Put differently, norm-creating clauses are artificial devices that generate CIL, albeit not necessarily intentionally. If norm creating clauses can be tolerated, why not a device that codifies the rules for making CIL intentionally? Writing a CIL equivalent of the Vienna Convention on the Law of Treaties, which would limit their scope and bind only the states that agree, seems far less radical an idea than leaving the process of CIL formation to rules that are apparently intelligible only to the handful of judges who declared them.⁸⁵⁹ Part III.C discusses the specifics and practical implications of two ways to codify CIL formation rules: treaties and Security Council resolutions.

C. Two Avenues for Codifying CIL Formation Rules

This final section of Part III proposes two avenues for codifying CIL’s formation rules and details the practical implications of each. The first avenue is to create a CIL equivalent of the Vienna Convention on the Law of Treaties, whereas the second is to codify CIL formation rules using United Nations Security Council resolutions. If successful, every specific formation rule

⁸⁵⁶ *Id.* at 54-55.

⁸⁵⁷ Talmon, *supra* note 274.

⁸⁵⁸ *North Sea Continental Shelf Cases*, *supra* note 270.

⁸⁵⁹ See, e.g., John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007) (criticizing the process of the generation and interpretation of CIL as undemocratic and elitist).

needed to legislate CIL—getting arbitral rulings recognized as state practice and setting the minimum number of endorsing states at which state practice becomes CIL—could be codified. I argue that the first avenue would be more feasible than the second avenue.

1. By Treaties: A Vienna Convention on the Law of CIL Formation

Treaties are one possible avenue for codifying CIL formation rules. An advantage of the treaty avenue is that a treaty would bind only the ratifying parties, which would address a frequent criticism of CIL—that CIL is undemocratic because it binds even parties that do not explicitly consent.⁸⁶⁰ Although there is no Vienna Convention on CIL formation rules,⁸⁶¹ the idea to codify CIL itself is an old one. In 2018, the International Law Commission concluded a six-year project to create a sort of Restatement of the Law for CIL formation rules,⁸⁶² with some scholars hailing the result as “strengthen[ing] the international rule of law by instilling international law with clear, certain, and predictable secondary rules on sources.”⁸⁶³

Notwithstanding the potential of such a project, however, the ILC’s restatement of CIL formation rules suffers from a significant practical limitation: it does not involve any states, the stakeholders in any serious discussion of CIL formation rules. Much like restatements of law written by domestic bodies such as the American Law Institute, the ILC’s restatement of CIL formation rules is a scholarly document purporting to ameliorate the theoretical confusion over CIL. However, the frequent lack of clarity in international law is not solely or even mostly because states needed more scholarly advice. Rather, international law often ends up being nebulous in both substance and procedure due to *realpolitik*. For example, treaty negotiations and implementation often end up as a battle for naked self-interest, no matter how noble a treaty’s

⁸⁶⁰ *Id.*

⁸⁶¹ SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 92 (2006) (“There is no single place to look for the rules on formation of customary international law; there is no ‘Vienna Convention on Customary International Law.’”).

⁸⁶² *Report of the International Law Commission*, Int’l Law Comm’n, 64th Sess., May 7-June 1, July 2-Aug. 3, 2012, 8, UN Doc. A/67/10 (2012) (identifying “[f]ormation and evidence of customary international law”) as a “[s]pecific issue[] on which comments would be of particular interest to the Commission), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/621/23/PDF/G1262123.pdf?OpenElement>; *Report of the International Law Commission*, Int’l Law Comm’n, 70th Sess., Apr. 30-June 1, July 2-Aug. 10, 2018, 133, UN Doc. A/73/10 (2018) (draft conclusions on the rules governing the identification of customary international law), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/252/67/PDF/G1825267.pdf?OpenElement>

⁸⁶³ Danae Azaria, *The International Law Commission’s Return to the Law of Sources of International Law*, 13 FIU L. REV. 989, 991 (2019)

ostensible objective.⁸⁶⁴ For this reason, a scholarly restatement of CIL formation rules in which states did not participate faces a dilemma: a restatement that does not offend any stakeholders by saying little that is meaningful, or one that stakeholders will reject because it is meaningful.

The ILC, as “a fundamentally conservative organization,” appears to have chosen the risk-averse route by “reflect[ing] the conventional view.”⁸⁶⁵ As such, the ILC report does not clarify the confusion surrounding CIL formation rules in the present, or identify any formation rules that the status quo lacks. For example, the ILC defines “general practice as a constituent element of [CIL]” as “the practice of States that contributes to the formation . . . of rules of [CIL,]”⁸⁶⁶ which is tautological. State practice “may take a wide range of forms[,]” which can include “physical and verbal acts” as well as “inaction.”⁸⁶⁷ The report requires state practice to be “sufficiently widespread[,] representative, as well as consistent” in order to become CIL, without any further specificity.⁸⁶⁸ Again, the nebulous nature of the ILC’s restatement of CIL formation rules should not be surprising; had states attempted to codify CIL formation rules in a treaty with the intention of using them, they would likely have included parameters that were at least specific enough to be actually applied.

One may question why treaties are discussed as a means of codifying CIL formation rules, given that this Article proposes legislating CIL as a solution to the difficulty of negotiating environmental treaties. However, a treaty to codify CIL formation rules would be fundamentally different from environmental treaties. Compared to environmental treaties, which offer uncertain benefits in the distant future in exchange for high costs in the present,⁸⁶⁹ a treaty codifying CIL formation rules is likely to elicit much greater participation: the ability to write the rules of the game almost invariably generates a large amount of profit and prestige in the present or near future.⁸⁷⁰ Granted, despite these gains expected by the states that write CIL formation rules, a

⁸⁶⁴ See Maria L. Banda, *Climate Adaptation Law: Governing Multi-Level Public Goods Across Borders*, 51 VAND. J. TRANSNAT’L L. 1027, 1044 (2018) (“If states engage in self-interested behavior, there is very little to stop them, as the US withdrawal from the Paris Agreement in 2017 or Canada’s abandonment of the Kyoto Protocol . . . shows.”).

⁸⁶⁵ Daniel Bodansky, *Does Custom Have A Source?*, 108 AJIL UNBOUND 179, 182-83 (2015).

⁸⁶⁶ ILC Report 70th Session, *supra* note 306, at Conclusion 4, Item 1.

⁸⁶⁷ *Id.* at Conclusion 6, Item 1.

⁸⁶⁸ *Id.* at Conclusion 8, Item 1.

⁸⁶⁹ See Bernauer et al., *supra* note 18, at 522.

⁸⁷⁰ Cf. Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT’L L. 1, 54 (2013) (“United States tax treaties are heavily based on the model treaties. Essentially, the model treaty writers enjoy the first-mover advantage and therefore cabin the discretion later exercised by the [U.S.] House [of Representatives].”).

global treaty for that purpose may be infeasible because a holdout problem becomes highly likely beyond a certain number of participants.⁸⁷¹ A more likely scenario would be CIL formation rules getting codified in bilateral or regional treaties, and those treaties diffusing⁸⁷²—just as BITs were initially created by a small number of states but diffused to effectively the entire world.⁸⁷³

An objection to the diffusion of bilateral or regional codification of CIL formation rules may be that CIL must be universal, which is apparent in the standard definition: CIL is “general and consistent practice of states followed by them from a sense of legal obligation[.]”⁸⁷⁴ Hence, if CIL formation rules are codified bilaterally or regionally, the end result may be a kind of CIL that is not accepted globally. However, even the norms that seem self-evidently obvious today rarely command universal support from the beginning, if any ever did: for example, the prevailing idea of human rights began as a minority opinion,⁸⁷⁵ and even now cannot be said to have universal support.⁸⁷⁶ Moreover, insistence on universal agreement may effectively prevent agreement on any formation rule, as illustrated by the holdout problem. I argue that beginning the codification of CIL formation rules bilaterally or regionally and aiming for the diffusion of a superior model into a global standard is a much more practical course of action, despite incompatibility with the ideal image of CIL.

2. By United Nations Security Council Resolutions

An alternative possibility for codifying CIL formation rules is by United Nations Security Council resolutions. On their face, UNSC resolutions may seem to avoid a significant downside

⁸⁷¹ See, e.g., Joel P. Trachtman, *The Crisis of International Law*, 44 CASE W. RES. J. INT’L L. 407, 409 (2011) (describing how the holdout problem can make it “difficult to create effective international legal rules and organizations.”).

⁸⁷² See, e.g., Ching-Fu Lin, *SPS-Plus and Bilateral Treaty Network: A “Global” Solution to the Global Food-Safety Problem?*, 29 WIS. INT’L L.J. 694, 732 (2012) (“[A] pool of bilateral treaties can serve as a greenhouse for regulatory experimentation and facilitate future multilateral undertakings.”).

⁸⁷³ See Tim R. Samples, *Investment Disputes and Federal Power in Foreign Relations*, 59 COLUM. J. TRANSNAT’L L. 247, 275-76 (2021) (“Prior to 1990, only about 500 international investment treaties had been signed. . . . [A]s of 2020, over 3,300 treaties have been signed.”)

⁸⁷⁴ *Chubb & Son*, 214 F.3d at 307-08.

⁸⁷⁵ *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring) (observing that “there was no concept of international human rights” when Congress passed the Alien Tort Claims Act in 1789).

⁸⁷⁶ See, e.g., *Taliban Pledge Peace and Women’s Rights Under Islam as They Strike Conciliatory Tone*, REUTERS, Aug. 18, 2021, available at <https://www.reuters.com/world/asia-pacific/evacuation-flights-resume-kabul-airport-biden-defends-us-withdrawal-2021-08-17/> (“The Taliban . . . they wanted peaceful relations with other countries and would respect the rights of women within the framework of Islamic law[.]”).

of codifying CIL formation rules by treaty. As discussed, codifying CIL formation rules by a global treaty is infeasible due to the holdout problem, but codifying CIL formation rules by bilateral or regional treaties may contradict CIL's mandate to be universal. If successful, UNSC resolutions would resolve both of these problems: negotiation among the fifteen Security Council members would seem to be much more manageable than negotiation among all sovereign states, and UNSC resolutions can ostensibly bind all UN member states.⁸⁷⁷ Perhaps unsurprisingly, many scholars have recommended UNSC resolutions as an avenue for creating a variety of rules that bind the global community or the Security Council itself.⁸⁷⁸

However, just as many scholars have dismissed UNSC resolutions as effectively impossible to pass regardless of purpose, given the permanent member states' veto power.⁸⁷⁹ This long record of the permanent member states' obstructive behavior dents the argument that UNSC resolutions would be meaningfully less vulnerable to the holdout problem than globally negotiated treaties would be. Yet, many scholars have argued that the veto power can be circumvented. Article 27(2) of the UN Charter states that “[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members[,]”⁸⁸⁰ which apparently does not require support from any of the permanent member states and is not subject to their veto; “the concurring votes of the permanent members” is explicitly required only for “all other

⁸⁷⁷ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion ¶ 94 (Int'l Ct. Justice July 22, 2010) (“Security Council resolutions can be binding on all Member States, irrespective of whether they played any part in their formulation.”); *but see* James A.R. Nafziger & Edward M. Wise, The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter, 46 AM. J. COMP. L. 421, 429 (1998) (“not all Security Council resolutions under Chapter VII are legally binding on member states: Some resolutions, by their own terms, constitute non-binding ‘recommendations.’”).

⁸⁷⁸ *See, e.g.*, David A. Koplow, *Exoatmospheric Plowshares: Using A Nuclear Explosive Device for Planetary Defense Against an Incoming Asteroid*, 23 UCLA J. INT'L L. & FOREIGN AFF. 76, 80 (2019) (arguing that “a binding Security Council resolution offers the best way forward[]” to address “the specter of asteroid danger[.]”);

⁸⁷⁹ *See, e.g.*, Paul M. Powers, *Unilateral Humanitarian Intervention and Reform of the United Nations Veto: A Pilot Program Aimed Towards International Peace and Increased Security Worldwide*, 4 HOMELAND & NAT'L SECURITY L. REV. 79, 92 (2016) (“The permanent members of the Security Council have been accused of abusing their power of the veto, and rightly so.”)

⁸⁸⁰ U.N. Charter art. 27(2).

matters[.]”⁸⁸¹ Given the unclear definition of “procedural matters[.]”⁸⁸² some scholars argue that UNSC resolutions can be used to codify a wide range of binding rules.⁸⁸³

Despite superficial appeal, codifying CIL formation rules (or other kinds of globally binding rules) by UNSC resolutions appears infeasible. Given the lack of a reliable enforcement mechanism, the success of international law too often depends on whether it gives states sufficient incentive to comply, not on whether it is theoretically binding. The importance of a state’s willingness to comply becomes even more important when it comes to the permanent members, which tend to be much more capable than the typical state is of defying global political pressure.⁸⁸⁴ Unsurprisingly, the permanent members have a long record of bending, or outright breaking, the rules governing the passage UNSC resolutions.⁸⁸⁵ As such, the prospect of codifying globally binding rules by UNSC resolutions appears much poorer than the technical procedural requirements may make it seem.

CONCLUSION

This Article has identified the CIL catch-22—that globally reaching, meaningfully enforced environmental treaties effectively require CIL against transboundary pollution, but CIL against transboundary pollution effectively require globally reaching environmental treaties. This Article proposed to exploit existing treaties to legislate CIL, so as to avoid the catch-22 of having to create new environmental treaties in order to create new environmental treaties. Although the direct subject matter of this Article is environmental law, legislating CIL has potential use in

⁸⁸¹ U.N. Charter art. 27(3).

⁸⁸² See, e.g., Frederic L. Kirgis, Jr., *The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 510 (1995) (describing disputes between the permanent member states as to the definition of “procedural matters” in the context of Security Council resolutions).

⁸⁸³ See, e.g., Anna Spain, *The U.N. Security Council’s Duty to Decide*, 4 HARV. NAT’L SEC. J. 320, 326-27 (2013) (proposing to pass procedural reforms for the Security Council relying on nine affirmative votes from non-permanent member states, because “a P5 member could not block a vote using the veto because the veto does not apply in procedural matters.”).

⁸⁸⁴ See, e.g., Yu-Jie Chen, *China’s Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT’L L. & POL. 1179, 1200-01 (2019) (describing China’s resistance to global pressure regarding its human rights practices); *Recent Publications*, 37 YALE J. INT’L L. 479, 494 (2012) (“[T]he United States invaded Iraq in clear and largely-unexplained defiance of the Security Council’s intent.”).

⁸⁸⁵ See Kirgis, *supra* note 326, at 511 (describing permanent member states’ violation of the requirement to abstain from Security Council resolution votes when they are parties to the underlying dispute, by claiming that the underlying dispute is not in fact a dispute but a “situation.”).

international law more broadly, assuming the existence of treaties that could be used to legislate CIL in various subfields of international law. The perceived difficulty of negotiating environmental treaties and the perceived nonexistence of CIL contribute significantly to the perceived ineffectiveness of international law as a whole, regardless of the accuracy of those perceptions.⁸⁸⁶ If successful, the legislation of CIL would ameliorate the bleak prospects of both environmental treaties and CIL.

⁸⁸⁶ See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (citing both CIL and treaties as evidence of the claim that international law is merely a coincidence of interest, not law).

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