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ARTICLES

CONSPIRACY THEORY: DO FEDERAL CRIMES THAT CATEGORICALLY OVERLAP THE GENERIC DEFINITION OF CONSPIRACY REQUIRE PROOF OF AN OVERT ACT?

MAX BIRMINGHAM[†]

I. INTRODUCTION

This Article addresses whether the United States Sentencing Guidelines' (Sentencing Guidelines or Guidelines) definition of a "controlled substance offense" as one that includes "the offense[] of . . . conspiring . . . to commit such offenses" is limited to only those state and federal crimes that categorically overlap the generic definition of a conspiracy—and thus require

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proof of both an overt act and an agreement—as two circuits have held, or whether it does not, as six circuits have held.[1]

One of the most serious issues in imposing a criminal sentence is determining whether a defendant's criminal history triggers an enhancement. To conduct that inquiry, federal courts often apply a categorical approach: a court compares the statutory elements of a defendant's prior conviction with the elements listed in the enhancement. If the former necessarily includes the latter, an enhancement applies. But criminal codes sometimes enhance sentences based on undefined crimes—such as "burglary" or "arson." In those circumstances, the Supreme Court of the United States' (SCOTUS, High Court, or Court) precedent—dating back to *Taylor v. United States*[2]—provides a clear method to interpret the text. The sentencing court identifies "a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.'" [3] The court then compares that generic definition with the elements of the prior conviction.

The Circuits have split 6–2 over how to interpret "the offense[] of . . . conspiring." As first year law students learn—and as is true in the vast majority of states—a criminal conspiracy typically requires proving both the agreement to commit a crime and some overt act in furtherance of the conspiracy. Applying *Taylor* and its progeny, the Fourth and Tenth Circuits have interpreted "the offense of conspiring" to mean just that: a conspiracy offense that requires an agreement and an overt act.[4] In contrast, the First, Second, Fifth, Sixth, Seventh, and Ninth Circuits have all held that the Guidelines only require proof of an agreement—no overt act is necessary.[5]

This Article raises just such an important issue: whether "conspiring" to commit a "controlled substance offense" as defined in the Sentencing Guidelines is limited to only those state and federal crimes that categorically overlap with the generic definition of a conspiracy, which requires proof of both an agreement and an overt act.

The core purpose of the Sentencing Guidelines is to ensure national uniformity in federal sentences, and a core purpose of this Court's review is to

1. *See infra* notes 4–5.

2. 495 U.S. 575 (1990).

3. Shular v. United States, 140 S. Ct. 779, 783 (2020) (quoting Mathis v. United States, 579 U.S. 500, 503 (2016)).

4. *See, e.g.*, United States v. Norman, 935 F.3d 232, 237–38 (4th Cir. 2019); United States v. Martínez-Cruz, 836 F.3d 1305, 1310–14 (10th Cir. 2016).

5. *See* United States v. Rodríguez-Rivera, 989 F.3d 183, 185 (1st Cir. 2021); United States v. Tabb, 949 F.3d 81, 87–89 (2d Cir. 2020); United States v. Rodríguez-Escareno, 700 F.3d 751, 753 (5th Cir. 2012); United States v. Sanbria-Bueno, 549 F. App'x 434, 438 (6th Cir. 2013); United States v. Smith, 989 F.3d 575, 586 (7th Cir. 2021); United States v. Rivera-Constantino, 798 F.3d 900, 903–905 (9th Cir. 2015).

ensure uniformity in federal courts. Yet right now, the circuit in which a defendant is convicted can drastically impact whether a sentencing enhancement applies. Nor is this a trivial problem: because § 846 is a commonly prosecuted federal crime and lacks an overt act requirement, cases just like petitioner's occur frequently. And while this case involves controlled substance offenses, the same problem arises with respect to the Sentencing Guidelines' identical definition of a conspiracy to commit a "crime of violence."[6]

Correct and consistent interpretation of the Sentencing Guidelines is critical because all "sentencing decisions are anchored by the [Sentencing] Guidelines."[7] The conflict among federal courts over this issue undermines the uniformity objective of federal sentencing by conditioning an individual's liberty on the jurisdiction in which that individual happens to be convicted. Nothing could be more arbitrary.

This argument proceeds as follows. Part I provides an introduction. Part II provides context of the United States Sentencing Guidelines. Part III analyzes case law and how the Federal Circuits have interpreted the Guidelines, and whether it requires an agreement and an overt act. Part IV examines indica which strongly suggest that an overt act is necessary. Part V explores a *noscitur a sociis* interpretation of the Guidelines' Commentary. Part VI concludes.

II. FEDERAL SENTENCING GUIDELINES

For approximately one hundred years until 1984, federal district court judges enjoyed wide latitude to sentence defendants who were convicted.[8] This was predicated on the notion that the aforementioned judges had more idiosyncratic insight and exquisite expertise with the persons whom they were sentencing.[9] Ironically, this basis of intimate knowledge of the criminal offenders would then be the pretext for federal district court judges to *not* have discretion in sentencing.[10]

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6. *See, e.g.*, United States v. McCollum, 885 F.3d 300, 309 (4th Cir. 2018).

7. Peugh v. United States, 569 U.S. 530, 541 (2013).

8. Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.").

9. *Id.* at 363 ("Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society. It obviously required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation. As a result, the court and the officer were in positions to exercise, and usually did exercise, very broad discretion.").

10. *See* Frederick J. Gaudet, George S. Harris & Charles W. St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & CRIMINOLOGY 811, 814 (1933); *see also*

In 1975, Senator Edward Kennedy (D-MA) introduced legislation to address the disparities in sentencings.[11] In other words, instead of customized sentencings handed down by the judges before which they appear, there is now a push for the judiciary to have standardized punishments. Nine years later, Congress enacted the Comprehensive Crime Control Act of 1984 (CCCA),[12] and the Sentencing Reform Act (SRA).[13] As an aside, there has been discussion indicating that some felt the SRA was necessary[14] due to repudiating the purported promise of rehabilitation by incarceration.[15]

The United States Congress had two main purposes when it passed the CCCA.[16] The first purpose was "honesty in sentencing."[17] This is a euphemism for abolishing parole.[18] Congress took issue with the manner in which the Parole Commission ran the system, feeling as though there was too much of a gap between what a judge handed down as a sentence and when an offender was let out.[19] The second purpose of enacting the federal sentencing statute in October 1984 was to reduce sentencing disparities, which were characterized as "unjustifiably wide."[20] As a remedy, the SRA created the

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Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893–97 (1990).

11. S. 2699, 94th Cong. 1st Sess. (1975).

12. Pub. L. No. 98-473, 98 Stat. 1837, 1976.

13. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

14. *See* Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 150 (1978); *see also* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29–31 (1972). It is noteworthy that at the time of publication, Mr. Frankel was a federal judge of the United States District Court for the Southern District of New York. *Id.* at 1 n.**.

15. *See* 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ."); *see also* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 ("[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting . . . .").

16. *See* 98 Stat. at 1976.

17. *See* S. REP. NO. 98-225, at 52–57; *see also* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. a, introductory cmt., at 2–3 (U.S. SENT'G COMM'N 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf [https://perma.cc/S78G-7NWR] ("To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing.").

18. *See* S. REP. NO. 98-225, at 52–57; *see also* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. a, introductory cmt., at 3 (U.S. SENT'G COMM'N 2021) ("Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior.").

19. *See* 98 Stat. at 1976, 1987, 2008–09.

20. *See* S. REP. NO. 98-225, at 38; *see also* 18 U.S.C. § 3553(a)(6) (describing the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

United States Sentencing Commission (Commission).[21] The Commission was tasked with creating an appropriate sentencing range for "each category of offense involving each category of defendant."[22]

A party challenged the constitutionality of the SRA, but ultimately it was upheld by SCOTUS.[23] Notwithstanding, the Court's jurisprudence would progressively chip away at the authority of the Guidelines, beginning with the seminal case of *Apprendi v. New Jersey*,[24] and then with *United States v. Booker*.[25] These decisions provided clarity regarding the Sixth Amendment, since this constitutional right requires a jury, not a judge, to be the factfinders to increase the range of a sentence.[26] Instead of striking down the SRA or Guidelines, SCOTUS worked to preserve the by holding that the Sixth Amendment issue could be remedied by making them advisory, not mandatory.[27] One federal judge remarked that the High Court made "Swiss cheese" of the Guidelines.[28]

The Guidelines play a "central role in sentencing" and frequently are determinative of the actual sentence.[29] Because of the centrality of the Guidelines, district courts are required to "remain cognizant of them throughout the sentencing process," and "improperly calculating[] the Guidelines range" constitutes "significant procedural error."[30] The Second Circuit has spoken out both sides of its mouth by confessing that the Guidelines are advisory, yet at the same time, mandating that judges are not allowed to overlook them.[31]

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21. *See* 28 U.S.C. § 991(a).

22. *Id.* § 994(b)(1).

23. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) ("We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.").

24. 530 U.S. 466 (2000).

25. 543 U.S. 220 (2005).

26. *See Apprendi*, 530 U.S. at 466; *see also Booker*, 543 U.S. at 220.

27. *See Booker*, 543 U.S. at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.").

28. Richard G. Kopf, *The Luck of the Draw*, SIMPLE JUSTICE (June 2, 2019), https://blog.simplejustice.us/2019/06/02/kopf-the-luck-of-the-draw/ [https://perma.cc/V676-47KS].

29. Molina-Martinez v. United States, 578 U.S. 189, 199 (2016); *see also* Rita v. United States, 551 U.S. 338 (2007).

30. Gall v. United States, 552 U.S. 38, 50–51, 50 n.6 (2007).

31. *See* United States v. Seabrook, 968 F.3d 224, 233–34 (2d Cir. 2020).

The split among the federal courts as to the question presented in this Article, combined with the diversity of state and federal conspiracy statutes, means that some jurisdictions now impose enhanced sentences that would not be imposed for the same prior conviction in other jurisdictions. Presently, identical offenders are potentially subject to different sentences for precisely the same conduct in violation of precisely the same conditions, based only on the happenstance of their geographic location. In *United States v. Tabb*, Judge Rakoff dryly noted "the career offender enhancement often dwarfs all other Guidelines calculations and recommends the imposition of severe, even Draconian, penalties."[32]

As things stand, the answer to the anxious question to defendants—"What sentence am I facing?"—will depend upon where the accused will be sentenced. In New York, the answer for Mr. Tabb was a Guidelines range of 151–188 months in prison because, in the Second Circuit, the categorical approach did not apply.[33] In Maryland or Colorado, it would have been 33–41 months because, in the Fourth and Tenth Circuits, it does.[34] Fair sentencing should not turn on the happenstance of geography.

The split thus causes especially unfair and significant dissimilarity because it layers needlessly disparate federal treatment atop already existing disparity in state-law definitions of conspiracy crimes whereby a defendant can receive a sentencing enhancement for prior conduct that would not even be a crime in most states—reaching an agreement with no overt act.

The stakes in this issue are high. Whether a prior conviction qualifies as a controlled substance offense can drastically increase a sentence. Meanwhile, the confusion amongst the courts of appeals is broader than just a debate over how to interpret a Guidelines provision. They fundamentally disagree on trans-substantive principles of interpretation: when and how does *Taylor*'s generic-crime approach apply? This confusion will arise any time a federal court must interpret text referencing undefined crimes.

The Guidelines' Commentary states that controlled substance offenses and crimes of violence "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[35] However, the Guidelines do not further define these three inchoate offenses. There is a strong argument that interpreting a controlled substance offense to include inchoate offenses

32. United States v. Tabb, 949 F.3d 81, 83 n.2 (2d Cir. 2020).

33. *See id.*

34. *See id.*

35. *Id.* at 87 (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2021)).

improperly expanded the scope of the Guidelines themselves.[36] This administrative law question is beyond the scope of this Article. With regard to the matter before us, SCOTUS should intervene and resolve this critical question of textual interpretation. The core purpose of the Sentencing Guidelines is to provide uniformity in federal sentencing, and a core purpose of this Court's review is to ensure uniformity in the federal courts. But today, defendants in New York or Los Angeles receive different sentences from those in Denver or Richmond—for no good reason.

III. CURRENT STATE OF THE LAW

A. Courts That Require an Overt Act and an Agreement

1. United States Court of Appeals for the Fourth Circuit

The Fourth Circuit initially addressed the meaning of "conspiring" to determine if conspiracy to commit murder under 18 U.S.C. § 1959 qualified as a conspiracy to commit a crime of violence under the Guidelines.[37] In subsequent decisions, the Fourth Circuit then applied its prior decision to specifically hold that "because [18 U.S.C.] § 846 does not require an overt act, 'it criminalizes a broader range of conduct than that covered by generic conspiracy'" and does not qualify as an offense of conspiring under the Guidelines.[38]

Citing a Ninth Circuit case[39] that had exhaustively surveyed the law, the Fourth Circuit first held that because the Guidelines do not define conspiracy, it should be interpreted with a generic, contemporary meaning.[40] The aforementioned survey, the court opined, sufficiently established the definition of "conspiracy" to require an overt act.[41]

In *United States v. McCollum*, the Fourth Circuit also looked to the plain meaning of the statute to determine that an overt act is required.[42] To define an offense of "conspiring," the Fourth Circuit followed the United States Supreme Court's decision in *Taylor* as establishing the relevant interpretative framework. Under *Taylor*, courts must look to the generic, contemporary

36. *See* United States v. Nasir, 982 F.3d 144, 159–60 (3d Cir. 2020) (en banc), *vacated*, 142 S. Ct. 56 (2021); United States v. Winstead, 890 F.3d 1082, 1091–92 (D.C. Cir. 2018); *see also* United States v. Havis, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc) (per curiam).

37. United States v. McCollum, 885 F.3d 300, 308–09, 308 n.9 (4th Cir. 2018).

38. United States v. Whitley, 737 F. App'x 147, 149 (4th Cir. 2018) (per curiam) (quoting *McCollum*, 885 F.3d at 309); *see* United States v. Norman, 935 F.3d 232, 237–38 (4th Cir. 2019).

39. United States v. García-Santana, 774 F.3d 528, 534–35 (9th Cir. 2014).

40. *McCollum*, 885 F.3d at 307–08.

41. *Id.* at 308.

42. *Id.* ("[T]hirty-six states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands define conspiracy to require an overt act," as does "the general federal conspiracy statute." (first citing *García-Santana*, 774 F.3d at 534–35; and then citing 18 U.S.C. § 371)).

meaning, and not the common law meaning.[43] The court re-emphasized this in the footnotes.[44] In addition, the *McCollum* court astutely noted that deference must be given to state definitions, and the Guidelines do not define "conspiring."[45] The court concluded that, by eliminating the overt act requirement, the statute now criminalizes a broader range of conduct than what the statute prescribes.[46]

2. United States Court of Appeals for the Tenth Circuit

Applying *Taylor* and its progeny, the Fourth and Tenth Circuits have interpreted "the offense of conspiring" to mean just that: a conspiracy offense that requires an agreement and an overt act.[47] The Tenth Circuit rejected two counter arguments.[48] The Tenth Circuit rejected the argument—accepted in the Fifth Circuit—that the generic, contemporary meaning of conspiracy does not require an overt act because a minority of the states[49] have said so.[50] The *Martínez-Cruz* court found this argument unpersuasive because it failed to

43. *Id.* at 304 (citing Taylor v. United States, 495 U.S. 575, 594, 598 (1990)).

44. *Id.* at 306 n.6.

45. *Id.* at 308 n.10 ("The dissent asserts that our approach, which relies on the conspiracy definition adopted by most states, does not give effect to the intent of the federal Sentencing Commission because most federal conspiracies do not require an overt act. But we presume the Commission is aware of precedent when they write the Guidelines*, see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), and the Supreme Court has instructed that determination of the generic, contemporary definition of crimes requires a consideration of *state* definitions. The dissent points to no indication that the Commission did not have this instruction in mind when it chose to leave 'conspiring' undefined. Should the Commission intend another position we hope that it will make that clear.").

46. *Id.* at 309.

47. *See, e.g.*, United States v. Norman, 935 F.3d 232, 237–38 (4th Cir. 2019); United States v. Martínez-Cruz, 836 F.3d 1305, 1310–14 (10th Cir. 2016).

48. *Martínez-Cruz*, 836 F.3d at 1311 ("The government makes two arguments: (1) that we should not apply the categorical approach here at all; and (2) if we apply the categorical approach, we should hold that the generic definition of conspiracy does not require an overt act. In support, the government cites to several cases from other circuits. Although case law from other circuits has persuasive weight, the analyses in the government's cited cases do not persuade us because they offer little supportive analysis.").

49. United States v. García-Santana, 774 F.3d 528, 534–35 (9th Cir. 2014) ("A survey of state conspiracy statutes reveals that the vast majority demand an overt act to sustain conviction. By our count, thirty-six states do so; if the District of Columbia, Guam, Puerto Rico, and the Virgin Islands are included, then the tally rises to forty of fifty-four jurisdictions."); *id.* at 539 ("The government retorts that adopting the contemporary, generic definition of conspiracy—that is, requiring an overt act—is an implausible interpretation of congressional intent, because a 'wide range of criminal conduct . . . would fall outside this reading.' Not so. As we have seen, the predominant majority of state statutes already subscribe to the generic understanding of general conspiracy, as does the general federal crime of conspiracy. Only a small subset of conspiracy convictions, emanating from that minority of jurisdictions that retain the common-law definition of conspiracy, will not trigger adverse immigration consequences.").

50. *See Martínez-Cruz*, 836 F.3d at 1311–12 (citing United States v. Pascacio-Rodríguez, 749 F.3d 353, 363–368 (5th Cir. 2014)).

give proper weight to the federal conspiracy statute, which does require an overt act.[51] Moreover, the court further noted that the majority of states also have such a requirement.[52] The Tenth Circuit also observed that the common law of conspiracy does not require an overt act. As such, the court held that a generic, contemporary definition requires deference to the law's current state.[53]

B. Courts That Do Not Require an Overt Act and an Agreement

1. United States Court of Appeals for the First Circuit

In *United States v. Raymond Rodríguez-Rivera*, the petitioner received a thirty-eight month sentence for firearms charges, based on an enhancement for a prior drug conspiracy conviction that did not require an overt act.[54] In a decision upholding the enhancement, the First Circuit acknowledged the circuit split on the meaning of "the offense of conspiring," and declined to apply a generic-crime analysis.[55] Instead, the First Circuit purported to follow SCOTUS's recent decision in *Shular*.[56] But the First Circuit is wrong. *Shular* directs courts to define a generic crime to interpret terms of art with "common-law history and widespread usage."[57] The offense of conspiring" to commit another crime is just that kind of hornbook term with a long-established legal pedigree and a generic meaning. Astonishingly, the First Circuit acknowledges that it uses a generic definition to define the offense of attempting.[58] But the court below concluded that two of this Court's decisions

51. *Id.* at 1312 ("But the Fifth Circuit focused on 'conspiracy to commit murder' specifically, did not give much weight to the primary federal general conspiracy statute under 18 U.S.C. § 371, and did not give much weight to the more than 2:1 ratio of states that require an overt act for conspiracy." (citing *Pascacio-Rodriguez*, 749 F.3d at 368)).

52. *Id.*

53. *See id.* at 1314 ("The number of federal statutes allowing for conspiracy convictions without proof of an overt act is much larger than those requiring an overt act, but that by itself is not dispositive because of the narrow nature of many of the federal statutes—here, we are defining conspiracy generally (the states also define conspiracy generally). Of the federal statutes which could have applied to Martinez-Cruz's conviction, the broadest federal conspiracy statute, § 371, requires proof of an overt act—while the drug statute, § 846, does not. And while the common law of conspiracy did not require an overt act, as noted in Garcia-Santana, most jurisdictions have jettisoned that doctrine. Under the categorical approach, we look to the law's current state. See Dominguez-Rodriguez, 817 F.3d at 1195 (holding that courts should look to 'the generic, contemporary meaning of the offense'). Therefore, we conclude that the generic definition of 'conspiracy' requires an overt act. Section 846 does not.").

54. *See* United States v. Rodríguez-Rivera, 989 F.3d 183, 185–86 (1st Cir. 2021).

55. *Id.* at 184–85.

56. *Id.* at 188–89.

57. Shular v. United States, 140 S. Ct. 779, 785 (2020).

58. *Rodríguez-Rivera*, 989 F.3d at 190 n.3 ("Rodríguez-Rivera contends that we should be guided by United States v. Benítez-Beltrán, in which this court assessed whether Benítez-Beltran's prior conviction for attempted murder under Puerto Rico law qualifies as a 'crime of violence' under

meant that it should interpret the meaning of the offense of "conspiring" without reference to the generic definition of a conspiracy offense. In its summation, the First Circuit again noted its "*strong sense* that conspiring under section 846 of the Controlled Substances Act was one of many offenses the Sentencing Commission had in mind."[59]

The circuit split not only treats the same defendant differently; it treats differently situated defendants the same. Those involved in a conspiracy where no overt act is proven would be sentenced like those involved in a conspiracy that includes an overt act. The First Circuit is illustrative. Jurisdictions within the First Circuit are split as to whether a conviction for conspiracy requires proof of both an agreement and an overt act. Maine, New Hampshire, and Puerto Rico all require an overt act.[60] Massachusetts and Rhode Island, however, do not.[61] Under the First Circuit's label-based approach to imposing sentencing enhancements, a sentencing enhancement would be imposed for a prior conspiracy conviction under all five state statutes, as well as under § 846, despite the fact that defendants in Massachusetts and Rhode Island had not been convicted of the more culpable conduct involving an overt act in furtherance of the conspiracy.

In contrast, if the First Circuit followed the generic-crime approach set forth in *Taylor*, the sentencing enhancement would be applied only to those defendants with prior conspiracy convictions in the three jurisdictions where an overt act is required for a conspiracy conviction: New Hampshire, Maine, and Puerto Rico. Nothing could be more arbitrary than a sentencing scheme

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the Guidelines. 892 F.3d 462, 465 (1st Cir. 2018). This court applied the categorical approach, as laid out in Taylor, to both the inchoate offense—attempt—and the underlying crime of conviction—murder. Id. at 466. However, Rodríguez-Rivera's comparison to Benítez-Beltran fails to surmount our Shular analysis. Section 4B1.2(a) defines a 'crime of violence' as any offense punishable by more than one year of imprisonment that either 'has as an element the use, attempted use, or threatened use of physical force against the person of another' or is one of several enumerated crimes, including 'murder.' Id. (citing U.S.S.G. § 4B1.2(a) (2016)). As discussed above, section 4B1.2(a) describes offenses with elements, lending itself to the Taylor approach, while section 4B1.2(b) describes conduct, as analyzed above.").

59. *Id.* at 189 (emphasis added).

60. *See* ME. REV. STAT. ANN. tit. 17-A, § 151 (West 2023) (actor must have taken "a substantial step toward commission of the crime" to be convicted of a conspiracy); N.H. REV. STAT. ANN. § 629:3 (West 2024) (requiring that "an overt act is committed by one of the conspirators in furtherance of the conspiracy" for conspiracy conviction); P.R. LAWS ANN. tit. 33, § 4878 (West 2023) ("No agreement, except to commit a first degree or second degree felony, shall constitute conspiracy, except that ulterior or optional act is carried out to execute the agreement by one or more of the conspirators.").

61. *See* MASS. GEN. LAWS ANN. ch. 274, § 7 (West 2023); Commonwealth v. Cerveny, 439 N.E.2d 754, 759 (Mass. 1982) ("The essence of a conspiracy is the agreement. No overt act is necessary to complete the crime; the making of the agreement itself is enough." (citing Commonwealth v. Benefit Fin. Co., 275 N.E.2d 33, 68–69 (Mass. 1971))); R.I. GEN. LAWS ANN. § 11-1-6 Notes of Decision (General) (West 1956) ("The common law crime of conspiracy involves a combination of two or more persons to commit some unlawful act or do some lawful act for an unlawful purpose.").

that results in a defendant in Massachusetts, who has already acquired a conspiracy conviction he never would have acquired just over the state line in New Hampshire, also receiving a federal sentencing enhancement simply because the First Circuit declined to adopt the generic-crime approach.

2. United States Court of Appeals for the Second Circuit

The Second Circuit performs somersaults of statutory interpretation and rejects the notion that a generic definition of a conspiracy requires an overt act.[62] Petitioner Zimmian Tabb pleaded guilty to one count of aiding and abetting the possession of less than four grams of crack cocaine with intent to distribute.[63] The Government asserted that Tabb qualified as a career offender under U.S.S.G. § 4B1.1 based on two prior convictions—one for attempted second-degree assault under New York law, and the other for conspiracy to distribute narcotics in violation of 21 U.S.C. § 846.[64] Tabb objected to the career-offender designation, arguing that the § 846 conspiracy conviction did not qualify as a "controlled substance offense."[65]

The *Tabb* court relies on the categorical approach described in *Taylor*.[66] However, in *United States v. King*, the Second Circuit has previously rejected the categorical approach.[67] In *King*, the court was asked to decide whether the defendant's prior New York conviction for attempted possession of a controlled substance, i.e., cocaine, with intent to sell constituted a serious drug offense under the Armed Criminal Career Act (ACCA).[68] According to the Second Circuit, the use of the term "involving" must be construed as extending the scope of the ACCA's "serious drug offenses" because it is open to a much broader interpretation than the words it qualifies—drug distribution,

62. *See* United States v. Tabb, 949 F.3d 81, 88 (2d Cir. 2020). See also Justice Gorsuch harkening back to Justice Scalia. Transcript of Oral Argument at 10–11, Maslenjak v. United States, 582 U.S. 335 (2017) (No. 16-309), 2017 WL 1495528 ("JUSTICE GORSUCH: So it seems like, linguistically, we have to do some somersaults to get where you want to go, because no one would say that to violate 1425, you have to prove, say, a material genocide, right? . . . JUSTICE GORSUCH: Statement-based ones, I think your position is. That's a lot of linguistic somersaults to add to a—a statute, isn't it?").

63. *See Tabb*, 949 F.3d at 83.

64. *Id.*

65. *Id.*

66. *Id.* at 84 ("To determine whether a state crime falls under the Sentencing Guidelines, the Second Circuit generally uses the 'categorical approach' prescribed by the Supreme Court. Under this abstract approach, a court considers the 'generic, contemporary meaning' of the crime in the guidelines, and then determines whether the crime committed by the defendant falls under this 'generic offense.'" (citations omitted)).

67. United States v. King, 325 F.3d 110, 113 (2d Cir. 2003), *cert. denied*, 540 U.S. 920 (2003).

68. *Id.* at 111–12.

manufacture, or possession.[69] "[T]he proper focus of the inquiry is broader than the mere elements of the crime."[70] It is fascinating as to why the court decided to abandon the categorical approach after the precedent had been set. Moreover, this begs the question as to whether it violates the law of the circuit doctrine.[71]

Surreptitiously, the *Tabb* court avoids the "elements" analysis with respect to the challenge to the conviction under 21 U.S.C. § 846, but it does employ this in the opinion under its attempted assault in the second degree.[72] Trying to hide its reasoning, the Second Circuit resorted to a blend of purposivism and Taylor's generic-crime analysis to conclude that a conspiracy does not require an overt act.[73]

Moreover, there is a commonly understood generic definition of conspiracy. That a definition is so readily available is a strong indication that the

69. *Id.* at 113 ("Subsection (A)(ii) of § 924(e)(2) does not define a serious drug offense simply as a state-law offense of drug distribution, manufacture, or possession with intent to distribute. Rather, it defines a serious drug offense as a state-law offense 'involving' drug distribution, manufacture, or possession with intent to distribute. The word 'involving' has expansive connotations, and we think it must be construed as extending the focus of § 924(e) beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct. *Accord United States v. Brandon*, 247 F.3d 186, 190 (4th Cir. 2001) ('the word "involving" itself suggests that the subsection should be read expansively'); *cf. United States v. James*, 834 F.2d 92, 93 (4th Cir.1987) ('[V]iolations "involving" the distribution, manufacture, or importation of controlled substances must be read as including more than merely the crimes of distribution, manufacturing, and importation themselves.') (discussing 18 U.S.C. § 924(c) (Supp. IV 1986) (referring to 'violations . . . involving the distribution, manufacture, or importation of any controlled substance'), amended by 18 U.S.C. § 924(c) (1988)).").

70. *Id.* at 114.

71. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789 (2012) ("Through a particularly rigid form of horizontal stare decisis, the circuit courts have chosen to adopt 'law of the circuit,' where a prior reported decision of a three-judge panel of a court of appeals is binding on subsequent panels of that court.").

72. *See* United States v. Tabb, 949 F.3d 81, 83 (2d Cir. 2020) ("A. Tabb's Conviction for Attempted Assault in the Second Degree (N.Y.P.L. § 120.05(2)) . . . This qualifies as a 'crime of violence' under the Force Clause (also sometimes referred to as the 'Elements Clause') if it 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021)).

73. *See id.* at 88–89 ("Moreover, as this Court noted in *Jackson*, interpreting 'controlled substance offense' conspiracies to include Section 846 conspiracies harmonizes the Sentencing Commission's intent with congressional intent. This Court upheld Application Note 1 in *Jackson* in part because Section 846 manifested congressional 'intent that drug conspiracies and underlying offenses should not be treated differently' by 'impos[ing] the same penalty for a narcotics conspiracy conviction as for the substantive offense.' 60 F.3d at 133. Reading Application Note 1 as intended to exclude Section 846 conspiracy would place the Sentencing Commission at odds with Congress itself by attaching sentencing enhancements to substantive narcotics crimes but not to the very narcotics conspiracies that Congress wanted treated the same.").

text meant to invoke it.[74] Words are to be understood in their ordinary, everyday meaning–absent context which suggests otherwise.[75] Black's Law Dictionary confirms that "most states" require proof of "action or conduct that furthers the agreement."[76] So does a leading criminal law treatise by which the U.S. Supreme Court has defined generic crimes.[77] Likewise, for all but the most serious crimes, the Model Penal Code's definition of conspiracy requires an overt act.[78] Because § 846 does not require "any overt acts in furtherance of the conspiracy,"[79] its elements do not "match[] those of the generic crime."[80]

As noted *supra*,[81] the Second Circuit made a purposivism argument by holding that its decision is congruent with congressional intent.[82] Yet the court does not point to any legislative history for support. Rather, the court references *United States v. Jackson* which is a previous Second Circuit case.[83] However, *Jackson* does not specify any legislative materials. *First*, the congressional intent discussed in *Jackson* centers on 28 U.S.C. § 994(h), and not on 21 U.S.C. § 846.[84] Section 994 is about the authority and statutory mandate of the U.S. Sentencing Commission.[85] *Second*, the Second Circuit again alleges that congressional history supports its decision but lists the language

74. *See* Shular v. United States, 140 S. Ct. 779, 785 (2020) ("common-law history and widespread usage").

75. United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."); *see also* Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2 (1939).

76. *Conspiracy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

77. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.2(b) (3d ed. 2022); *see also* Taylor v. United States, 495 U.S. 575, 598–99 (1990) (citing a prior version of the leading criminal law treatise to define burglary).

78. *See* MODEL PENAL CODE § 5.03(5) (AM. L. INST. 1985).

79. United States v. Shabani, 513 U.S. 10, 15 (1994).

80. Shular v. United States, 140 S. Ct. 779, 783 (2020) (citing *Taylor*, 495 U.S. at 602).

81. *See supra* note 73.

82. *See* United States v. Tabb, 949 F.3d 81, 88 (2d Cir. 2020) ("Moreover, as this Court noted in *Jackson*, interpreting 'controlled substance offense' conspiracies to include Section 846 conspiracies *harmonizes the Sentencing Commission's intent with congressional intent*." (emphasis added)).

83. *Id.* at 878–89.

84. *See* United States v. Jackson, 60 F.3d 128, 132 (2d Cir. 1995) ("Congress intended that subsection 994(h)(2) be treated as a floor, not a ceiling, for the types of offenses for which the Commission should specify sentences near the maximum." (citing United States v. Heim, 15 F.3d 830, 832 (9th Cir. 1994))).

85. *See id.* at 131 ("Instead, Blackmon argues that the Sentencing Commission exceeded its statutory mandate under 28 U.S.C. § 994(h) by including drug conspiracies as controlled substance offenses.").

of the statute.[86] With regard to intent, Justice Scalia warned that "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[87] It is frightening when courts allege that congressional intent supports their analysis, and there is none to be found.

3. United States Court of Appeals for the Fifth Circuit

Speaking out of both sides of its mouth, the Fifth Circuit has issued decisions that take both approaches. The Fifth Circuit initially released an opinion holding that "conspiring" meant the generic definition of conspiring, including proof of an overt act.[88] But the Fifth Circuit panel *sua sponte* withdrew its first opinion and issued a second opinion—devoid of almost any reasoning—that reached the opposite result.[89]

In a subsequent decision involving a conspiracy to commit a crime of violence, the Fifth Circuit again concluded that the Guidelines' use of the term "conspiring" does not denote a crime requiring an overt act.[90] That opinion largely tracked *Taylor*'s generic-crime analysis.[91] Recall that the Fourth Circuit,[92] applying *Taylor*'s generic-crime approach to sentencing enhancements, concluded that conspiring to commit murder did not qualify as a crime of violence triggering a sentence enhancement under the Guidelines because the conspiracy offense did not require an overt act, and therefore "criminalizes a broader range of conduct than that covered by generic conspiracy."[93]

Conversely, in *United States v. Pascacio-Rodríguez*,[94] the Fifth Circuit analyzed the exact same predicate criminal conduct for enhancement and reached the exact opposite result. The defendant had pleaded guilty to a Nevada state law crime of conspiracy to commit murder, which did not require proof of an overt act.[95] The Fifth Circuit affirmed the defendant's sentencing enhancement nonetheless, concluding that the Sentencing Guidelines did not

86. *See id.* at 133 ("Nevertheless, we find it more relevant that *Congress has manifested its intent* that drug conspiracies and underlying offenses should not be treated differently: it imposed the same penalty for a narcotics conspiracy conviction as for the substantive offense." (emphasis added) (citing 21 U.S.C. § 846)); *cf. Tabb*, 949 F.3d at 88.

87. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

88. *See* United States v. Rodríguez-Escareno, No. 11-41063, 2012 WL 5200190 (5th Cir. Oct. 23, 2012), *withdrawn and superseded by* 700 F.3d 751 (5th Cir. 2012).

89. *See* United States v. Rodríguez-Escareno, 700 F.3d 751 (5th Cir. 2012).

90. *See* United States v. Pascacio-Rodríguez, 749 F.3d 353, 358–66 (5th Cir. 2014).

91. *Id.*

92. *See supra* Section III.A.i.

93. United States v. McCollum, 885 F.3d 300, 309 (4th Cir. 2018).

94. 749 F.3d 353.

95. *Id.* at 355.

require an overt act to trigger an enhancement, even after acknowledging that thirty-four states required an overt act for a conspiracy conviction.[96] The defendant in *Pascacio-Rodriguez* was sentenced to seventy months of imprisonment, nearly double the sentence he would have received without the enhancement.[97] The advisory Sentencing Guidelines range for defendant's sentence would have been 33–41 months without the enhancement for conspiracy to commit a crime of violence.[98]

The Fifth Circuit decided that, to determine the generic definition for the purposes of that case, it "should focus on the particular offense that [was] at issue in [that] appeal, which [was] conspiracy to commit murder."[99] In unusual and bizarre syllogism, the court began by recognizing that a *majority* of the states' laws require an overt act to prove a conspiracy, as does the plain meaning of the word conspiracy.[100] If the language of the statute is plain and unambiguous, it must be applied according to its terms.[101] For some unknown reasons, the court did not begin with plain meaning. Notwithstanding, it still acknowledged that a plain meaning[102] interpretation for conspiracy requires proof of an overt act.[103]

Yet the Fifth Circuit then reversed its course and went on to wax poetic that it cannot "ignore [conspiracy] laws of 16 states, a number of federal laws, and the Model Penal Code, none of which contains an overt-act requirement

96. *Id.* at 367–68.

97. *Id.* at 354.

98. *Id.*

99. *Id.* at 364.

100. *See id.* at 365–66 ("It appears that 34 states require an overt act as an element of all criminal conspiracies, while 13 states do not require an overt act for any conspiracy offense. The three remaining states—Arizona, New Jersey, and Utah—do not require an overt act for certain serious crimes. In Arizona, no overt act is required 'if the object of the conspiracy was to commit any felony upon the person of another," and both first- and second-degree murder are felonies in Arizona. In New Jersey, no overt act is required for 'conspiracy to commit . . . a crime of the first or second degree,' and '[m]urder is a crime of the first degree.' In Utah, no overt act is required when "the offense is a capital felony, a felony against the person, arson, burglary, or robbery.' Murder is a first-degree felony in Utah. Were we to focus solely on the requirements of a majority of the states' laws regarding the necessity of alleging and proving an overt act in furtherance of a conspiracy to commit murder, we would be compelled to conclude that the generic, contemporary definition of conspiracy to commit murder includes the requirement of an overt act." (alterations in original) (footnotes omitted)).

101. Sebelius v. Cloer, 569 U.S. 369, 381 (2013) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000)).

102. Perrin v. United States, 444 U.S. 37, 42–43 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961. In light of Perrin's contentions we consider first the development and evolution of the common-law definition." (citation omitted)).

103. *See Pascacio-Rodríguez*, 749 F.3d at 365–66.

for conspiracy to commit murder."[104] It exhaustively details that the majority of states require an overt act under their respective laws.[105] Notwithstanding, the court inexplicably pivoted and deferred to the minority of states.[106] It also referenced the Model Penal Code.[107] It is ludicrous that the court flagrantly ignored the plain meaning of the statute. Adding insult to injury, the court skipped any analysis of statutory construction. "Courts engage in judicial activism when they interpret laws without regards to a canon of construction."[108] "[J]udicial activism occurs when a court goes beyond the plain meaning of the text that is plain and unambiguous, to promulgate its politics."[109] Even though it deemed this "weight of authority" "slight," the Fifth Circuit nonetheless held "that the generic, contemporary meaning" "does not require an overt act."[110] Statutory analysis begins with its plain meaning.[111]

The Fifth Circuit also rejected its earlier suggestion that the term "the offense of conspiring" could bear different meanings depending on whether a prior conviction was under a federal or state statute.[112] In *Pascacio-Rodríguez*, the court's reasoning is at odds with its conclusion. The court

104. *Id.* at 366 ("However, to do so would ignore the laws of 16 states, a number of federal laws, and the Model Penal Code, none of which contains an overt-act requirement for conspiracy to commit murder. After surveying the various sources typically consulted in applying the categorical approach, it appears to us that, albeit slight, the weight of authority indicates that conspiracy to commit murder does not require an overt act as an element.").

105. *See id.*; *see also* United States v. Garcia-Santana, 774 F.3d 528, 534–35 (9th Cir. 2014).

106. *Pascacio-Rodríguez*, 749 F.3d at 366.

107. *Id.* at 364–66.

108. Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 FLA. A&M U. L. REV. 1, 1 (2017).

109. *Id.* at 4.

110. *Pascacio-Rodríguez*, 749 F.3d at 368.

111. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("Our review of the six claims recognized by the Ninth Circuit requires us to interpret a number of ERISA's provisions. As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (first quoting Estate of Cowart v. Nicklos Drilling Co., 505 U. S. 469, 475 (1992); and then citing Conn. Nat.'l Bank v. Germain, 503 U.S. 249, 254 (1992))); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."); Michael R. Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31, 31 (1979) ("The plain meaning rule is the starting point for virtually every text treatment of the process of statutory interpretation.").

112. *See Pascacio-Rodríguez*, 749 F.3d at 367 ("The text . . . does not draw a distinction between federal and state crimes and does not reasonably permit courts to draw such a distinction." (footnote omitted)).

freely admitted that "conspiracy" and "murder" are not defined in the Guidelines,[113] and decided to look at a number of other sources, all of which are persuasive authority.[114] Withal, it is rare for any court, let alone a federal circuit court of appeals, to withdraw an opinion.[115] To boot, the Fifth Circuit did so without any explanation.[116] The dearth of analysis[117] is extremely disconcerting. This level of judicial activism is terrifying.

4. United States Court of Appeals for the Sixth Circuit

In an unpublished opinion, the Sixth Circuit has similarly concluded that it need not look to the generic definition of a conspiracy because the drafters' intent was "clear."[118] In *United States v. Sanbria-Bueno*, the Sixth Circuit makes a logical leap, to say the least, by holding that because U.S.C. § 841(a)(1) is a federal drug trafficking offense, it is necessarily a conspiracy.[119] Neither the word "conspiracy," nor the word "conspiring," appear under U.S.C. § 841(a)(1).[120] It is frightening that a United States Court of Appeals would intentionally read a word, which is a crime, into a statute which is not present in the text. Moreover, the analysis is subject to *circulus in demonstrando* (circular reasoning).[121] The court is saying that 'it is a conspiracy because defendant was charged with a federal drug trafficking offense. A federal drug trafficking offense entails conspiracy.' The absence of analysis is startling. On top of this, the court cites the Fifth Circuit's decision,[122] yet it conveniently fails to mention the circuit split. If it were to do so, the court

113. *See id.* at 358.

114. *Id.* at 359.

115. *See* Max Birmingham, *Where the Sidewalk Ends: Are Sidewalks, Curbs, Parking Lots, and Other Infrastructure "Services, Programs, or Activities" Under Title II of the American Disabilities Act?*, 48 W. ST. L. REV. 1 (2021).

116. It was simply stated in a footnote. United States v. Rodríguez-Escareno, 700 F.3d 751, 752 n.1 (5th Cir. 2012) ("A prior opinion was filed on October 23, 2012, but then withdrawn on October 29.").

117. *Id.*

118. *See* United States v. Sanbria-Bueno, 549 F. App'x 434, 438 (6th Cir. 2013).

119. *See id.* at 439 ("A violation of § 841(a)(1) is a federal drug trafficking offense as defined in Application Note 1, and no one disputes it. Application Note 5, in turn clarifies that a conspiracy to commit an offense defined in Note 1 is also a 'drug trafficking offense' for purposes of the Guidelines. The Commission expressly intended that a conviction under 21 U.S.C. § 846 for conspiracy to commit a federal drug offense proscribed by § 841 is a 'drug trafficking offense' as defined in the Guidelines." (citations omitted)).

120. 21 U.S.C. § 841(a)(1) ("Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.").

121. DOUGLAS N. WALTON, PLAUSIBLE ARGUMENT IN EVERYDAY CONVERSATION 206 (1992). "Wellington is in New Zealand. Therefore, Wellington is in New Zealand." *Id.*

122. *Sanbria-Bueno*, 549 F. App'x at 438 (citing United States v. Rodríguez-Escareno, 700 F.3d 751, 753–54 (5th Cir. 2012)).

knows that it would need to perform a full analysis, even though it should have.

> If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.
>
> . . . .
>
> *The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses*.[123]

The *Sanbria-Bueno* court knows full well that it is not plain that the generic definition of conspiracy is included in the Guidelines.

In an interesting turn, in another case the Sixth Circuit would later explain that it needs to look solely at the plain text of the Guidelines when determining whether an offense is covered.[124] In *United States v. Camp*, the court declined to adhere to the Hobbs Act for the definition of robbery.[125] The *Camp* court emphatically averred that "we need not look outside the Guidelines to the generic definition of an enumerated offense when Congress or the Commission itself clearly provides a definition."[126] Recall that the Sixth Circuit had no such trouble doing so with "conspiracy" under 21 U.S.C. § 841(a)(1).[127] No wonder the court decided to not publish that opinion.[128]

123. State *ex rel*. Kalal v. Circuit Court, 681 N.W.2d 110, 124 (Wis. 2004) (internal quotation marks and citations omitted) (emphasis added).

124. *See* United States v. Camp, 903 F.3d 594, 600–01 (6th Cir. 2018) ("The Government contends that this 'generic' analysis is unnecessary here because the Sentencing Commission's intent with respect to robbery is clear. According to the Government, because the commentary to USSG § 2B3.1 ('Robbery') includes a cross-reference to 18 U.S.C. § 1951 (the Hobbs Act), the Commission intended to include Hobbs Act robbery when it listed robbery as an enumerated offense in USSG § 4B1.2(a)(2). The Government is correct that we need not look outside the Guidelines to the generic definition of an enumerated offense when Congress or the Commission itself clearly provides a definition. In these cases, however, the clarifying definition is found within the guideline at issue or its commentary. Here, the Government seeks to have us look to a cross-reference in the commentary of a separate guideline in a different, unrelated section of the Guidelines Manual. Under these circumstances, we cannot agree that 'the Commission's intent is clear.'" (citations omitted)).

125. *See id.* at 602.

126. *Id.* at 600 (citing United States v. O'Connor, 874 F.3d 1147, 1156 (10th Cir. 2017)).

127. *See Sanbria-Bueno*, 549 F. App'x at 439; *see also* 21 U.S.C. § 841(a)(1).

128. *See* Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *36 n.95 (5th Cir. Feb. 17, 2022) ("The 'unpublished' device is a clever way of avoiding, or at least trying to avoid, en banc review. We have some judges who are disinclined to grant en banc rehearings except in the most extreme situations. The fact that an opinion is unpublished furnishes just another reason to vote to deny en banc scrutiny. But by today's ruling, the Good Ship Fifth Circuit is afire. We need all hands on deck.").

5. United States Court of Appeals for the Seventh Circuit

Influenced by the Second Circuit's decision in *Tabb*, the Seventh Circuit also resorted to a blend of purposivism and *Taylor*'s generic-crime analysis to conclude that a conspiracy does not require an overt act.[129] It is noteworthy that the Seventh Circuit's plain meaning interpretation went significantly beyond the Second Circuit's. In *United States v. Smith*, the Seventh Circuit held that "[f]irst, the plain language of Application Note 1 *unambiguously includes* conspiracy as a 'controlled substance offense.'"[130] By contrast, the Second Circuit stated that "[t]he plain text of U.S.S.G. § 4B1.2 as interpreted by Application Note 1 *thus appears to include* narcotics conspiracies such as 21 U.S.C. § 846."[131]

6. United States Court of Appeals for the Ninth Circuit

In its controlling opinion, the Ninth Circuit acknowledged that it had previously "defined the generic offense of conspiracy . . . as requiring an overt act" in order to interpret the meaning of a "conspiracy" in the Immigration and Nationality Act.[132] In *United States v. García-Santana*, the Ninth Circuit surveyed "state conspiracy statutes" and concluded that "forty of fifty-four jurisdictions," along with the generic federal conspiracy statute, require an overt act.[133] Further, the court remarked that both the Model Penal Code and Professor LaFave's treatise confirmed the survey results.[134] But *García-Santana* was cast aside when the Ninth Circuit determined whether § 846 conspiracies qualify under the Guidelines. That court then held that it need not look to the generic definition of conspiracy because of its plain meaning.[135]

There are several holes with the Ninth Circuit's analysis. *First*, the court alleges that it defined the word "conspiracy" under its plain meaning.[136]

129. *See* United States v. Smith, 989 F.3d 575, 586 (7th Cir. 2021) ("The Second Circuit recently took a different approach in *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020). The defendant in Tabb argued that Application Note 1 covers only 'generic' conspiracy, and by implication, excludes the broader § 846 narcotics conspiracy. The Second Circuit disagreed. . . . We agree that Application Note 1 encompasses § 846 conspiracy." (citation omitted)).

130. *Id.* (emphasis added).

131. *Tabb*, 949 F.3d at 87 (emphasis added).

132. United States v. Rivera-Constantino, 798 F.3d 900, 903 (9th Cir. 2015) (citing United States v. García-Santana, 774 F.3d 528, 534 (9th Cir. 2014)).

133. *García-Santana*, 774 F.3d at 534–35.

134. *Id.* at 535 ("*These two sources agree that 'conspiracy' to commit an offense now requires proof of an overt act*, and so confirm the results of our survey of contemporary state and federal statutes." (emphasis added)); *see also supra* note 79.

135. *See Rivera-Constantino*, 798 F.3d at 903 (citing *García-Santana*, 774 F.3d 528 at 534).

136. *See id.* at 904 ("But when the plain meaning of a term is readily apparent from the text, context, and structure of the relevant Guidelines provision and commentary, that meaning is dispositive and there is no need to rely on the 'generic definition' framework." (citing Estrada-Espinoza

While the court notes there are different statutes (21 U.S.C. § 846 in *United States v. Rivera-Constantino*, Immigration and Nationality Act in *García-Santana*) at play, the court did not expound on the language as to why it should be distinguished.[137] Rather, the court stands on the ground that since there are two different laws, it necessarily entails that "conspiracy" has a different meaning in each. A clear giveaway that the Ninth Circuit is not relying on the plain language of the opinion, which states in part: "Rather, we conclude that the clear *intent* of the Sentencing Commission in drafting section 2L1.2 and its accompanying commentary was to encompass a prior federal drug conspiracy conviction under 21 U.S.C. § 846."[138] If the language was plain, the court would not have had to defer to the Commentary. And to reiterate, it is not clear that the court has the authority to do so, but that is a discussion for another day.[139]

Second, the court blazons that "the plain meaning of a term is readily apparent from the text, context, and structure of the relevant Guidelines provision and *commentary*, that meaning is dispositive and there is no need to rely on the 'generic definition' framework."[140] This is debatable. The Sixth Circuit and D.C. Circuit have held that the Commission cannot use the Commentary to expand the scope of unambiguous Guidelines language.[141] In *United States v. Crum*, the Ninth Circuit has acknowledged that it "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead."[142] Notwithstanding, the *Crum* court acknowledged that it was bound by circuit

v. Mukasey, 546 F.3d 1147, 1152 (9th Cir. 2008)); *id.* at 906 ("We conclude that we need not rely on a generic definition analysis because the plain meaning of section 2L1.2(b)(1) and related commentary is to encompass 21 U.S.C. § 846 as a predicate offense.").

137. *See id.* at 905–06; *see* Robinson v. Shell Oil Co., 519 U.S. 337, 343–44 (1997) ("Of course, there are sections of Title VII where, in context, use of the term 'employee' refers unambiguously to a current employee, for example, those sections addressing salary or promotions. But those examples at most demonstrate that the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts. Once it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." (citations omitted)).

138. *Rivera-Constantino,* 798 F.3d at 903 (emphasis added).

139. *See supra* Section II ("This administrative law question is beyond the scope of this Article."); s*ee also* United States v. Smith, 989 F.3d 575, 584 (7th Cir. 2021) ("A split of authority exists among many of the circuits as to whether courts are to defer to Application Note 1 when applying § 4B1.2."). *See also infra* Section IV.

140. *Rivera-Constantino*, 798 F.3d at 904 (emphasis added) (citing *Mukasey*, 546 F.3d at 1152).

141. *See* United States v. Havis, 927 F.3d 382, 386–87 (6th Cir.) (en banc) (per curiam), *reh'g denied*, 929 F.3d 317 (6th Cir. 2019); *see also* United States v. Winstead, 890 F.3d 1082, 1090–91 (D.C. Cir. 2018).

142. United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (per curiam).

precedent.[143] Here, the court freely admits that it is referring to the Commentary in its analysis. While stare decisis binds the court in the Ninth Circuit's ability to expand the scope of unambiguous Guidelines language, the *Rivera-Constantino* court was free to define "conspiracy" under § 846. And to be clear, this means that *Rivera-Constantino's* interpretation of "conspiracy" is not "readily apparent"[144] if it is looking to the Commentary.[145]

Third, the court alleged that it used the plain meaning interpretation in its analysis[146] but its reasoning is subject to *argumentum ad lapidem* (appeal to the stone). The court dismisses the counterargument claim as absurd without demonstrating proof for its absurdity. The court claims that defining "conspiracy" to include an overt act[147] would lead to absurd results,[148] such as to exclude drug trafficking offenses.[149] This is richly ironic, as drug trafficking *is* an overt act. The *Rivera-Constantino* court completely misses the issue at hand, which is whether "conspiracy" under § 846 does or does not require an overt act. Moreover, an absurdity argument[150] is not the first place to start a plain meaning analysis.

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143. *Id.* ("Like the Sixth and D.C. Circuits, we are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review. This is especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1." (first citing *Havis*, 927 F.3d at 386–87 (6th Cir. 2019); and then citing *Winstead*, 890 F.3d at 1092)).

144. *See Rivera-Constantino*, 798 F.3d at 904 ("Here, in contrast, it *is* readily apparent that the Sentencing Commission intended section 2L1.2(b)(1) to encompass as predicate offenses federal drug conspiracy convictions that do not require proof of an overt act.").

145. *See id.* at 906. ("We conclude that we need not rely on a generic definition analysis because the plain meaning of section 2L1.2(b)(1) and related commentary is to encompass 21 U.S.C. § 846 as a predicate offense.").

146. *Id.* at 903 ("'We apply the traditional rules of statutory construction when interpreting the [S]entencing [G]uidelines,' *United States v. Flores*, 729 F.3d 910, 914 n.2 (9th Cir. 2013), and '[w]e interpret the Guidelines to give effect to the intent of the Sentencing Commission.' Interpreting a term used in the Guidelines based on its 'generic definition'—the approach urged by Rivera-Constantino and discussed in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)—represents a useful tool for divining legislative intent. But when the plain meaning of a term is readily apparent from the text, context, and structure of the relevant Guidelines provision and commentary, that meaning is dispositive and there is no need to rely on the 'generic definition' framework." (citations omitted)).

147. *See id.* at 904 ("But when the plain meaning of a term is readily apparent from the text, context, and structure of the relevant Guidelines provision and commentary, that meaning is dispositive and there is no need to rely on the 'generic definition' framework." (citing Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1152 (9th Cir. 2008))).

148. *Id.* at 904–05.

149. *Id.*

150. Birmingham, *supra* note 108, at 13 ("The dissent's position is supported by well-established precedents holding that when determining if a term or a statute is ambiguous, the analysis begins with 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))).

IV. TEXTUAL AND CONTEXTUAL INDICATORS FOR THE INTERPRETIVE APPROACH

There are four important textual and contextual indicators which suggest that the Guidelines employ a "generic, undefined word ripe for"[151] *Taylor*'s interpretative approach. In general, where a predicate crime is undefined in the Guidelines, this Court's precedent dictates that the court follow the "generic-crime" approach.[152] Under *Taylor*, courts evaluate such predicate crimes, like burglary, in comparison to a single, nationwide definition of the predicate crime, i.e., the crime's "generic" definition. The "generic" definition of a crime is that "used in the criminal codes of most States."[153] Courts then match the elements of the predicate conviction against the elements of the generic crime. That approach makes sense: even as state and federal laws vary, the Guidelines should have one consistent meaning. Any other approach, the Court recognized in *Taylor*, would result in the varying application of a sentencing enhancement to the exact same conduct depending on what the jurisdiction of conviction labeled that conduct.[154] In other words, it would make the content of federal law dependent on, and vary with, state law. SCOTUS declined to permit the "odd results" triggered by state-by-state inconsistency in the labeling of a predicate crime.[155] Instead, in the interest of consistency and fairness in sentencing, the Court adopted the generic-crime approach to defining predicate offenses. The following indicators further support the interpretive approach.

First, there is a commonly understood generic, contemporary definition of conspiracy, with a "common-law history and widespread usage."[156] "The common law crime of conspiracy involves a combination of two or more persons to commit some unlawful act or do some lawful act for an unlawful purpose; it does not require that any overt acts have been committed in execution of the unlawful agreement."[157] That a generic definition is so readily available is a strong indication that the text meant to invoke it.

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151. United States v. Martínez-Cruz, 836 F.3d 1305, 1313 (10th Cir. 2016).

152. *See* Taylor v. United States, 495 U.S. 575, 578 (1990).

153. *See id.* at 598.

154. *See id.* at 590–91 (demonstrating that without applying generic-crime approach, a federal defendant's sentence enhancement would be "based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary'").

155. *See id.* at 591–92.

156. Shular v. United States, 140 S. Ct. 779, 785–86 (2020).

157. R.I. GEN. LAWS ANN. § 11-1-6 notes of decisions (West 2023); *see also* State v. LaPlume, 375 A.2d 938, 941–42 ("The common law crime of conspiracy involves a combination of two or more persons to commit some unlawful act or do some lawful act for an unlawful purpose. The gravamen of the crime is entry into an unlawful agreement and once that occurs the offense is complete. Rhode Island continues to adhere to the common law definition of this crime and, unlike other

Second, the Sentencing Guidelines use a definite article—*the* offenses of aiding and abetting, conspiring, and attempting—which also strongly suggests a generic term. "[T]he rules of grammar govern statutory interpretation."[158] When a text uses a definite article, it indicates that it qualifies the proceeding language as definite or has been previously specified by context.[159] By contrast, indefinite articles indicate the referent is unspecified.[160] Notably, when this Court recently declined to apply a generic definition in *Shular*, the statute at issue used an indefinite article.[161] The statute at issue defines "serious drug offense" to mean "*an* offense under State law, involving . . . ."[162] By contrast, here, the phrase "*the* offenses of aiding and abetting, conspiring, and attempting"[163] indicates that the listed offenses are definite and settled—because they refer to generic definitions of well-known forms of criminal liability.[164]

Third, in common usage, the gerund "conspiring" is often synonymous with the noun "conspiracy." Both words can refer to a legal offense with multiple elements. Consider examples from criminal codes. In the same paragraph, the Model Penal Code refers to a "person" being "guilty of conspiracy" and being "guilty of conspiring."[165] In its adoption of that Code, Arizona's general conspiracy statute similarly refers to the same "person" as being "guilty of conspiracy" and being "guilty of conspiring to commit the offense."[166] Likewise, Missouri's general conspiracy statute refers both to

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jurisdictions, it does not require that any overt acts have been committed in execution of the unlawful agreement." (citations omitted)).

158. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (2012) (citing Costello v. INS, 376 U.S. 120, 122–26 (1964)).

159. Work v. United States *ex rel.* McAlester-Edwards Coal Co., 262 U.S. 200, 208 (1923) ("If by the words quoted from section 4 of the act it was intended to authorize a new appraisement of the surface reservations, the language would not have been '*the*' appraisement but '*an*' appraisement. The use of the definite article means an appraisement specifically provided for. Such an appraisement of the minerals was provided for in the Act of 1918 and this is mentioned in the same sentence in which 'the appraisement' of the surface land is referred to. Construing the Acts of 1912 and 1918 together, the appraisement can only refer to that so elaborately provided for in 1912.").

160. *See Indefinite Article*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/indefinite%20article#:~:text=%3A%20the%20word%20a%20or%20an,the%22%20is%20a%20definite%20article [https://perma.cc/TW37-M4XP] ("[T]he word *a* or *an* used in English to refer to a person or thing that is not identified or specified. In 'I gave a book to the boy' the word 'a' is an *indefinite article* and the word 'the' is a definite article.").

161. *See Shular*, 140 S. Ct. at 783–84 (interpreting 18 U.S.C. § 924(e)(2)(A)(ii)).

162. *Id.* (emphasis added).

163. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2021) (emphasis added) (stating, in part, "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

164. *See* Nielsen v. Preap, 139 S. Ct. 954, 965 (2019).

165. MODEL PENAL CODE § 5.03(2) (AM. L. INST. 1985).

166. ARIZ. REV. STAT. ANN. § 13-1003(B) (2023).

"the offense of conspiracy to commit" and "a prosecution for conspiring to commit."[167] An Illinois statute also refers to "the offense of conspiring to violate this Article" and a "prosecution for a conspiracy to violate this Article."[168] In any of these examples, and more, "conspiracy" could replace "conspiring"—and vice versa—without changing any meaning.

Fourth, according to the text, "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[169] "Include" means to "comprise as a part of a whole or group."[170] This definition "indicates a congruence" between the larger whole and the subordinate part.[171] In this case, the phrases "crime of violence" and "controlled substance offense"—on one side of the verb "include"—refer to defined "crimes."[172] So too, the subordinate parts on the other side of "include"—the offenses of aiding and abetting, conspiring, and attempting to commit such offenses—refer to distinct "crimes."[173] The First Circuit made a fatal error in its analysis with regard to "include." That is because the court below read *Shular* as imposing a rule of proximity: it assumed that because *Shular* found the Armed Career Criminal Act's (ACCA) definition of "serious drug offense" to reference conduct, anything close to that statute would reference conduct too. The court noted that the Commentary's use of "include[]" "is not so far from" the word "involve[]" used in the ACCA.[174] The court then assumed that the Commentary's use of a "formulation" of words with a rhythm similar to ACCA's somehow "reinforced" the idea that the Commentary referred to conduct. And it noted that the Commentary describing "the offense" of conspiring in § 4B1.2(b) modified a definition of "controlled substance offense" that contained words like ACCA's—words like "manufacture" and distribution.[175] And even though "conspiring" was not among those words, the court deemed its physical proximity to language like ACCA's close enough to suggest it referenced conduct.[176] This is a serious mistake. When it comes to the familiar tools of textual construction, close is not good enough. "Include" is not close to "involve." They mean completely different things. And no matter how *physically* close on the page "conspiring" might appear to terms that *Shular* determined to reference conduct, that proximity cannot make "conspiring" any

167. MO. REV. STAT. § 562.014(1)–(2) (2020).
168. 720 ILL. COMP. STAT. ANN. 5/33G-4 (West 2013).
169. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2021).
170. *Include*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 629 (11th ed. 2004).
171. Shular v. United States, 140 S. Ct. 779, 785 (2020).
172. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2021).
173. *See id.*
174. United States v. Rodríguez-Rivera, 989 F.3d 183, 189 (1st Cir. 2021).
175. *Id.* at 188–89.
176. *Id.* at 189.

less an offense, or any more conduct. Therefore, there needs to be clarity that *Shular* focuses on text—not as some obstacle to be blurred out of existence to create room for speculation, but as the exclusive tool for determining whether conduct qualifies as an offense and thereby becomes subject to *Taylor*'s categorical approach.

V. A NOSCITUR A SOCIIS INTERPRETATION SUGGESTS THAT AN OVERT ACT IS AN ELEMENT OF CONSPIRACY UNDER THE GUIDELINES

Under a *noscitur a sociis*—"a word is known by the company it keeps"—interpretation of "conspiring" pursuant to the Guidelines, this word comes to mean that an overt act is required since it is embedded alongside two other terms of art which likewise reference generic offenses: "aiding and abetting" and "attempting."[177]

SCOTUS has ruled that aiding and abetting refers to a distinct theory of accomplice liability.[178] Aiding and abetting[179] requires an overt act,[180] as at common law and under the federal statute.[181] In *Rosemond v. United States*, the Court discerned that a defendant need not participate in every element of the criminal act,[182] but clearly delineated that an affirmative act is required.[183] It should be noted that since aiding and abetting is not defined under the Guidelines, there is a strong argument that it is vague.[184] Justice Breyer pro-

177. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2021) (stating, in part, "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

178. *See, e.g.*, Gonzales v. Dueñas-Álvarez, 549 U.S. 183, 185–90 (2007) (using the approach from *Taylor* to analyze the generic offense of aiding and abetting).

179. *Aid and Abet*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("To assist or facilitate the commission of a crime, or to promote its accomplishment. [2] Aiding and abetting is a crime in most jurisdictions.").

180. *See* Rosemond v. United States, 572 U.S. 65, 71 (2014) ("The questions that the parties dispute, and we here address, concern how those two requirements—*affirmative act* and intent—apply in a prosecution for aiding and abetting a § 924(c) offense." (emphasis added)).

181. *Id.* ("As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." (citations omitted)).

182. *Id.* at 73 ("That principle continues to govern aiding and abetting law under § 2: As almost every court of appeals has held, '[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense.'" (quoting United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987))).

183. *Id.* at 74 ("Under that established approach, Rosemond's participation in the drug deal here satisfies the affirmative-act requirement for aiding and abetting a § 924(c) violation.").

184. *See* People v. Chiu, 325 P.3d 972, 978 (Cal. 2014) ("(3) As noted, section 31 provides in relevant part that '[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.' It does not expressly mention the natural and probable consequences doctrine. Where the statutory language is vague, 'the statutory

fessed that another term under the Guidelines, the "acceptance of responsibility," is vague because it is undefined.[185] Notwithstanding, it is unambiguous that aiding and abetting requires an overt act.

Attempting requires an overt act. Despite the United States government speaking out of both sides of its mouth, it has admitted as much. "The parties are in disagreement over whether the government can point to a provision making these attempts criminal. The parties agree that, absent a statute providing to the contrary, *an attempt to commit a federal offense is not itself a federal offense*."[186] The government would then try to walk this back by claiming that certain attempts under §§ 846 and 963 are criminal.[187] In *United States v. Meacham*, the Fifth Circuit rejected the government's argument and explicated "We do not believe Congress intended to create four discrete crimes with the three words 'attempts or conspires.' Acceptance of the government's position also would lead to uncertainty concerning the penalties for violations of §§ 846 and 963, which do not establish separate penalties for attempts or conspiracies."[188] Whilst the court does not discuss whether there is an overt act requirement, it narrows the Guidelines by saying that the words are superfluous.[189] Moreover, by reining in the government's authority to charge defendants with broad laws,[190] it is reasonable to presume that it would require an overt act. In a plot twist, the Fifth Circuit initially held

definition permits, even requires, judicial interpretation.' We may, as a court, determine the extent of aiding and abetting liability for a particular offense, keeping in mind the rational function that the doctrine is designed to serve and with the goal of avoiding any unfairness which might redound from too broad an application." (citations omitted)).

185. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28–29 (1988) ("The Guidelines' solution to this problem is to provide a two-level discount (amounting to approximately twenty to thirty percent) for what the Guidelines call 'acceptance of responsibility.' The Guidelines are vague regarding the precise meaning of 'acceptance of responsibility.' The Guidelines state that a court can give the reduction for a guilty plea, but it is not required to do so. In effect, the Guidelines leave the matter to the discretion of the trial court." (footnotes omitted)).

186. United States v. Meacham, 626 F.2d 503, 507–508 (5th Cir. 1980) (emphasis added) (citing United States v. York, 578 F.2d 1036 (5th Cir. 1978)).

187. *See id.* at 508.

188. *Id.*

189. *See* Duncan v. Walker, 533 U.S. 167, 174 (2001) ("Further, were we to adopt respondent's construction of the statute, we would render the word 'State' insignificant, if not wholly superfluous. 'It is our duty "to give effect, if possible, to every clause and word of a statute."' We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting." (first quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955); and then quoting Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995))).

190. *See* Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 169 (2007) ("Previous criticisms of the conspiracy doctrine have called it an unnecessary doctrine, an overambitious prosecutorial tool that ought to be eliminated.").

this, but inexplicably reversed course.[191] Furthermore, unlike aiding and abetting,[192] no general federal attempt statute exists.[193] From nearly a century ago[194] until more modern times, an overt act is required for attempt.[195] The Model Penal Code uses the term "substantial step."[196] *Most of the states follow the same path and define attempt as intent coupled with an overt act or substantial step towards the completion of the substantive offense*.

VI. CONCLUSION

Correct and consistent interpretation of the Guidelines is critical because all "sentencing decisions are anchored by the Guidelines."[197] The conflict among the circuits involves the important choice between using the method prescribed by the Court in *Taylor* for matching elements of offenses or discerning the Sentencing Commission's intent regarding "conduct" as in *Shular*. This is an either/or question, with no room for further percolation.

The split among the federal courts as to the question presented in this Article, combined with the diversity of state and federal conspiracy statutes, means that some jurisdictions now impose enhanced sentences that would not be imposed for the same prior conviction in other jurisdictions. The split thus causes especially unfair and significant dissimilarity because it layers needlessly disparate federal treatment atop already existing disparity in state-law definitions of conspiracy crimes whereby a defendant can receive a sentencing enhancement for prior conduct that would not even be a crime in most states—reaching an agreement with no overt act.

The text of § 4B1.2(b) makes no reference to any inchoate offenses. Application Note 1, however, adds a list of generic inchoate offenses, including "the offense[] of . . . conspiring" to commit a controlled substance offense, to the list enumerated in the text of § 4B1.2(b). The concept of criminal "conspiracy" appears many times in criminal law, and it almost invariably re-

191. *See supra* Section III.B.iii.

192. *See* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

193. There have been proposals to do so. *See, e.g.*, H.R. 1823, 112th Cong. (2011); H.R. 1772, 111th Cong. (2009); H.R. 4128, 110th Cong. (2007); S. 735, 107th Cong. (2001); S. 413, 106th Cong. (1999); S. 171, 105th Cong. (1997).

194. Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 821 (1928) ("But the present generalized doctrine that attempts to commit crimes are as such and in themselves criminal is of comparatively late origin. Nothing of such a doctrine is to be found in the treatises on criminal law prior to the nineteenth century, in spite of the fact that records of cases going back to early times show occasional convictions where the defendant failed to complete the crime attempted.").

195. *See* MODEL PENAL CODE § 5.01(1)(c) (AM. L. INST. 1985).

196. *Id.*

197. Peugh v. United States, 569 U.S. 530, 541 (2013).

quires two things: an agreement to commit a crime and "an overt act in furtherance of the plan."[198] The courts on the other side of the split, not requiring on overt act, subject defendants to sentence enhancements beyond what the plain text of § 4B1.2(b) permits. The single-element concept of conspiracy adopted "criminalizes a broader range of conduct than that covered by [a] generic conspiracy," and therefore brings a greater number of prior convictions within § 4B1.2(b)'s scope than if the court below had applied *Taylor*'s categorical approach and adopted the familiar two-element version of conspiracy instead.[199] That expansion is not confined to prior controlled substance offenses either. The Commentary's reference to "the offense" of "conspiring" also applies to the Guidelines' definition of "crime[s] of violence."[200] And both categories of prior offenses—"controlled substance offense" and "crime of violence"—trigger sentencing enhancements in numerous areas of the Guidelines, adding to sentences for firearm offenses[201] and explosives offenses,[202] and counting towards "Career Offender" enhancements too.[203] The erroneous interpretation of the Commentary therefore affects a broad swath of federal sentencing.

An appropriately text-focused inquiry should have also resolved this case because all the textual clues in § 4B1.2(b) point in the same direction: that the Commission intended to adopt the familiar, widely accepted, two-element conception of conspiracy when it referred to "the offense" of "conspiring" in § 4B1.2(b). These start, of course, with the fact that the comment uses the word "offense" to describe the term, and the fact that it appeared in a list with other offenses. There is also the Commentators' use of the definite article "the"[204] to suggest reference to a defined, well-understood thing, which is further reinforced by the term "including,"[205] which appears in front of the whole sequence of offenses listed in the comment, suggesting that each referred to defined things. And of course, there is the fact that the term "conspiracy" enjoys as "widespread" a usage and as much depth in "common-law history" as any term in criminal law.[206] The familiar principles of textual interpretation required by *Shular* therefore permit only one inference: the

198. LAFAVE, *supra* note 77.

199. United States v. Whitley, 737 F. App'x 147, 149 (4th Cir. 2018) (per curiam) (quoting United States v. McCollum, 885 F.3d 300, 309 (4th Cir. 2018)); United States v. Norman, 935 F.3d 232, 237–38 (4th Cir. 2019) (same).

200. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1. (U.S. SENT'G COMM'N 2021).

201. *Id.* § 2K2.1(a)(1)–(4).

202. *Id.* § 2K1.3(a)(1)–(2).

203. *Id.* § 4B1.1.

204. *See supra* notes 154–60 and accompanying text.

205. *See supra* notes 165–69 and accompanying text.

206. Shular v. United States, 140 S. Ct. 779, 785 (2020).

Commission was referencing a defined thing, the offense of conspiracy, with its familiar dual elements.

SPEEDY TRIAL STATUTE: A BLUEPRINT TO CRIMINAL JUSTICE REFORM IN TEXAS

HARPER HAUGHT[†]

I. INTRODUCTION

No significant legislative change has been made regarding protection of a criminal defendant's constitutional right to a speedy trial since 1979, when the Speedy Trial Act of 1974 was amended. Critical analysis of the constitutional right to a speedy trial stopped after the 1980's.[1] After forty years of

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1. Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 739 (2014).

societal and criminal justice changes, right to a speedy trial is one that must be revisited by legal scholars and legislators.

The leading Supreme Court decision on the right to a speedy trial is *Barker*,[2] which created a four-factor test for determining when a defendant's right to speedy trial has been violated. This test was intentionally created to allow for judicial discretion.[3] The courts in Texas are taking advantage of the amount of discretion allowed by the *Barker* factors to condone the excess time it takes to complete criminal litigation.

Many cases take months to years to complete, resulting in an increased backlog of cases that creates a vicious cycle. These delays are inconsistent with the constitutional right to a speedy trial. As demonstrated by the federal system, it is possible to resolve cases much more efficiently and well within a year. A well-written speedy trial act could shorten criminal litigation length by creating time limits for cases, regulating the investigative process, re-allocating funds or increasing budgets, and imposing work standards for lawyers, courts, police, and other investigative service agents.

These issues facing the Texas courts today are indicative of lower-level institutional failures that can be fixed with implementation of a speedy trial statute. State enactment of an updated Speedy Trial Act is a practical and feasible way to ensure a just criminal system.

II. HISTORICAL BACKGROUND

The right to a speedy trial dates back to the foundations of this nation's legal system.[4] It has been codified into the United States Constitution as well as various state constitutions.

A. U.S. Constitution

The right to a speedy trial in the United States can be found in the Sixth Amendment, the Speedy Trial Act of 1974, and the Federal Rules of Criminal Procedure. This right serves to "[(1)] prevent undue and oppressive incarceration prior to trial, [(2)] to minimize anxiety and concern accompanying public accusation[,] and [(3)] to limit the possibilities that long delay will impair the ability of an accused to [present a defense]."[5] It was incorporated through the Fourteenth Amendment and binds the states.[6] The right attaches at the

2. Barker v. Wingo, 407 U.S. 514 (1972).
3. *See id.* at 515–16.
4. *See id.* at 515.
5. United States v. Ewell, 383 U.S. 116, 120 (1966).
6. Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967).

initiation of the criminal procedural process, either through an arrest or a formal filing of charges.[7] While there is a starting point for time calculation, there is no end point as the Supreme Court has refused to quantify the right.[8] Congress and various states have attempted to codify a specified time period for determination of a speedy trial right violation,[9] but there is no national standard for state courts.

However, the Supreme Court developed an ad hoc balancing test for determining when the right to speedy trial had been violated.[10] If the right is found to be violated, the case must be dismissed with or without prejudice.[11]

1. *Barker* Factors

The Supreme Court in *Barker* enumerated four factors for lower courts to weigh when determining whether a defendant's right to speedy trial has been violated.[12] The four factors were created due to the lack of statutory determination as to the parameters of the right, and refusal to infringe upon legislative authority to do so.[13] The Supreme Court acknowledged that legislatures have enacted such rules and said nothing about the validity of doing such,[14] therefore implying that the legislature has the authority to outline such violations in a specific way. The Supreme Court went on to explain that it found no constitutional basis for allowing the judicial system to make such a rigid interpretation outside of adjudication.[15]

The four *Barker* factors include (i) length of delay, (ii) reason for delay, (iii) defendant's assertion of his right, and (iv) prejudice to the defendant.[16] Each factor can be determined as weighing in favor of the Government, in favor of the defendant, or being neutral.[17] None of the factors taken alone are necessary nor sufficient to find deprivation of a right.[18] Rather, the court must partake in a "difficult and sensitive balancing process."[19]

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7. *Speedy Trial*, 51 GEO. L.J. ANN. REV. CRIM. PROC. 470, 474 (2022).
8. *See Barker*, 407 U.S. at 529.
9. *See, e.g.*, Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (1975) (amended 1979); FLA. R. CRIM. P. 3.191. *Contra* N.C. GEN. STAT. §§ 15A-701–704 (1978) (repealed 1989) (prosecutors were unable to comply).
10. *Barker*, 407 U.S. at 530.
11. *See Speedy Trial*, *supra* note 7, at 494 & n.1367.
12. *Barker*, 407 U.S. at 530.
13. *Id.* at 523.
14. *Id.*
15. *Id.*
16. *Id.* at 530.
17. *See id.* at 531.
18. *Id.* at 533.
19. *Id.*

i. Length of Delay

Length of delay is defined by the Supreme Court as a sort of triggering mechanism.[20] Only after a presumption of prejudice has been made through an inquiry by the court into the timing of the case at hand can the inquiry to the remaining factors commence.[21] The Supreme Court noted the difficulty in determining a presumption of prejudice due to length of delay without a statutory delineation, therefore falling back on a case-by-case inquiry.

Typically, a court will hold that a delay lasting more than one year is presumptively prejudicial.[22] There is no per se rule for a length of time that is presumptively prejudicial, but some delay is required. A presumption of prejudice by a lengthy, unreasonable delay can be undermined by the other factors weighing against the defendant.[23]

ii. Reason for Delay

The reason for delay must be justified by the government.[24] Deliberate attempts to slow litigation or hinder the defense will weigh heavily against the government.[25] However, neutral factors such as overcrowded courts, negligence, and other administrative issues resulting in delay will weigh against the government slightly.[26]

iii. Assertion of Right

Defendant's assertion of right is "entitled to strong evidentiary weight" but "is closely related to the other factors."[27] The Supreme Court stated that the "defendant has some responsibility" in asserting their right while condemning the rigidity of the demand-waiver doctrine.[28] The demand-waiver doctrine provides that a right is waived until demanded and requires a prior assertion of the right.[29] The Supreme Court upheld its prior holdings, requiring the prosecution to prove that the defendant knowingly and voluntarily

20. *Id.* at 530.
21. *Id.*
22. *Speedy Trial*, *supra* note 7, at 475.
23. *See id.* at 479 n.1336.
24. *Barker*, 407 U.S. at 531.
25. *Speedy Trial*, *supra* note 7, at 477.
26. *Id.*
27. *Barker*, 407 U.S. at 531.
28. *Id.* at 529–30.
29. *See id.* at 525.

waived his right through intentional relinquishment and abandonment rather than lack of assertion.[30]

Further, evidence of delay on behalf of or being attributable to the defendant may constitute a waiver of the right.[31] The assertion of right factor and the waiver rule have been heavily scrutinized over the years.[32] This factor is evaluated based on "whether and how frequently" a defendant asserts their right throughout the case.[33]

iv. Prejudice to the Defendant

The Supreme Court recognized three relevant interests in determining prejudice to the defendant: "(1) . . . prevent[ing] oppressive pretrial incarceration; (2) . . . minimiz[ing] anxiety and concern of the accused; and (3) . . . limit[ing] the possibility that the defense be impaired."[34] These are assessed "in . . . light of the interests of [the] defendant[] which the speedy trial right was designed to protect."[35]

When a court finds a speedy trial right violation, a dismissal of charges must be granted. This can be done with or without prejudice under court discretion.[36] Due to the severity of the consequences to finding a speedy trial right violation, the courts are hesitant, if ever willing, to grant such a verdict. Many courts border on abuse of discretion granted by the Supreme Court to see that criminal charges do not get dismissed.[37] The amorphous structure of the *Barker* factors allows for a liberal interpretation of the factors, which often results in upholding the lack of violation or overturning a found violation.

30. *See id.* at 525, 528–29.

31. *See id*. at 529.

32. *See* Seth Osnowitz, Note, *Demanding a Speedy Trial: Re-Evaluating the Assertion Factor in the* Barker v. Wingo *Test*, 67 CASE W. RSRV. L. REV. 273 (2016) (discussing the history of the *Baker* test, various court holdings related to application, and problems that arise from the assertion factor); *see also* Hopwood, *supra* note 1, at 716–19 (discussing court decisions regarding the Speedy Trial Act for criminal defendants); *see also* John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 277–90 (1972) (discussing the decisional process's implication on the individual's right to a speedy trial); *see also* STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES introductory cmt. at 23, § 12-1.2 cmt. at 31, § 12-2.1 cmt. at 40 (AM. BAR ASS'N 2006) (comparing the stringency of statutes or rules implemented under the ABA standards with the four factor test articulated in *Barker v. Wingo*).

33. *Speedy Trial*, *supra* note 7, at 479.

34. *Barker*, 407 U.S. at 532.

35. *Speedy Trial*, *supra* note 7, at 479.

36. *Id.* at 494.

37. *See* Hopwood, *supra* note 1, at 728.

B. Federal Statute

In 1974, Congress originally passed the Speedy Trial Act.[38] This statute specifies time restraints on federal criminal procedure and ensures a federal criminal defendant's right to a speedy trial. The Act prior to amendment contained strict time constraints for deadlines throughout the criminal procedure process. The time constraints were broken up into three categories: (1) sixty days from arrest to indictment; (2) ten days from indictment to arraignment; and (3) 180 days from arraignment to conclusion.[39] The statute was found to be too rigid to be workable in the federal system and therefore was amended.[40]

Through the Speedy Trial Act, Congress authorized two comprehensive reports to be made throughout the United States by gathering information through mandated court reporting to determine the effects of the initial passing of the Speedy Trial Act and to help inform the anticipated amendment process by Congress.[41] This report highlighted many flaws in the system, most of which are unique to the federal court system.[42] The lowest percentage of compliance (79.1%) was found in the ten-day interval between indictment and arraignment; the highest percentage of compliance (95.3%) was found in the 180-day interval between arraignment and trial.[43] Despite the court opposition of implementation of such "rigid" time constraints, most cases were able to be conducted well within the time constraints.

The scheduled amendment took place in 1979 in which Congress retracted the 60-10-180 rule and implemented more amiable time constraints.[44] An "indictment must be filed within thirty days [from the date] of the arrest or service of [the] summons" and the "trial . . . shall commence within seventy days from the . . . date . . . of . . . information or indictment" filed, or from the defendant's first appearance "before a[n] . . . officer of the court in which [the] charge is pending, whichever [is later]."[45]

38. Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (1975).

39. 18 U.S.C § 3161 (amended 1979).

40. *See* Claude Rosser Jr. & James R. Pratt III, *The Speedy Trial Act of 1974: A Suggestion*, 8 CUMB. L. REV. 905, 907 (1978); *see also* ADMIN. OFF. OF THE U.S. CTS., SECOND REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974 (1977).

41. *See* ADMIN. OFF. OF THE U.S. CTS., *supra* note 40, at 1.

42. *Id.* at 4 (noting the time constraints on the criminal litigation system and the pending civil caseload increase of 9.6%).

43. *Id.* at 33.

44. *See* 18 U.S.C. § 3161.

45. *Speedy Trial*, *supra* note 7, at 481 (citing 18 U.S.C. § 3161(c)(1)).

The Act allows for various pretrial delays to be excluded from the calculation of time. These exclusions are built in to account for reasonable delays and other variables that are inevitable within the criminal court system.[46] The Supreme Court and Congress acknowledge the intricacies of bringing a criminal case to trial through their allotment for excluded periods of delay.[47] In any case, the consequence of failing to bring a case to trial within the specified time constraints results in dismissal of the charges and allows court discretion to dismiss, with or without prejudice, based on the factors provided.[48]

In many cases, courts and lawyers have relied on *Barker* to claim that the right to speedy trial cannot be quantified and to highlight the lack of consistency between the Supreme Court and Congress.[49] However, the Supreme Court and Congress are consistent in their interpretations of the parameters of the right to a speedy trial. Congress drafted the Act after *Barker* was decided. Congress allowed for an implementation period and an amendment. There was plenty of time for the Supreme Court to receive and elect to take a case challenging the constitutionality of the Act and strike it down. The Court declined to do so.

Justice Powell, writing for the Supreme Court in *Barker*, stated that defining specific time constraints "would require [the] Court to engage in legislative or rulemaking activity."[50] While Justice Powell stated there is "no constitutional basis for" quantification of the right, he went on to say that legislatures "are free to prescribe . . . reasonable period[s] consistent with constitutional standards," but the Court must remain "less precise."[51]

The Supreme Court's refusal to quantify the right to speedy trial should not be taken as a statement of unquantifiability, but as an adherence to the separation of powers. The Supreme Court in *Barker* honored the limits of its authority by creating an ad hoc balancing test. It did not declare an ever-amorphous right that was beyond the reach of federal and/or state legislatures.

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46. *Id.* at 488–89.

47. *See* Barker v. Wingo, 407 U.S. 514, 520 (1972); *see also Speedy Trial*, *supra* note 7, at 491.

48. 18 U.S.C. § 3162(a)(1).

49. *See* Dennis P. Koeppel, *The Speedy Trial Act: Conflict Among the Circuits*, 29 BUFF. L. REV. 149, 153–54 (1980).

50. *Barker*, 407 U.S. at 523.

51. *Id.*

III. SPEEDY TRIAL IN TEXAS

The right to a speedy trial in Texas can be found in the Texas Constitution[52] and in the Texas Rules of Criminal Procedure.[53]

A. Speedy Trial Act of 1977 and Meshell

Following the lead of the Supreme Court and Congress, Texas passed the Speedy Trial Act of 1977[54] (hereinafter the Texas Act). The Texas Act was modelled after the original federal statute providing three categories with respective time constraints.[55] Texas provided categories based on offense rather than the procedural timeline of the case separated into felonies, misdemeanors punishable by more than 180 days of confinement, and misdemeanors punishable by less than 180 days of confinement.[56] The Texas Act contained a degree of flexibility by way of excluded delays for time computation.[57] Under federal law, the Texas Act was compliant and viable.

In 1987, the Texas Court of Criminal Appeals in *Meshell* declared the Texas Act unconstitutional in terms of the Texas Constitution.[58] The decision in *Meshell* was a groundbreaking decision in the wrong direction regarding protection of the rights of criminal defendants. The Texas Court of Criminal Appeals granted appellant's petition for discretionary review to determine if the Texas Act was compliant with the Texas Constitution by way of deceptive title and/or separation of powers doctrine.[59] The trial court held that the State had violated the Texas Act and the remedy would be dismissal of charges, but ultimately overturned the statute on grounds of unconstitutionality with no further reasoning.[60]

The Texas Court of Criminal Appeals in *Meshell* discussed the statute's readiness requirement that places the burden solely on the prosecutor for obtaining the presence of the defendant for trial.[61] The prosecutor failed to procure the defendant's presence for trial within the statutory time limit thus violating the statute to which the remedy is dismissal of charges.[62]

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52. TEX. CONST. art. I, § 10.
53. TEX. CODE CRIM. PROC. ANN. art. 32A.01 (West 2023).
54. Codified into *id.* art. 32A.01 and *id.* art. 28.061.
55. *See* Daniel C. Brown, Meshell v. State*: The Death of Texas Speedy Trial*, 41 BAYLOR L. REV. 341, 353–54 (1989).
56. *See id.*
57. *See id.* at 354.
58. Meshell v. State, 739 S.W.2d 246 (Tex. Crim. App. 1987).
59. *Id.* at 257.
60. *Id.* at 249.
61. *Id.* at 250.
62. *Id.* at 251.

The court then discussed the state constitutionality of the Texas Act, stating that the defective caption holding of the lower courts was moot[63] and the Act violated the separation of powers doctrine provided in Article II of the Texas Constitution through infringement on exclusive prosecutorial discretion.[64] The separation of powers doctrine provides that the Judicial Branch has the exclusive right to prosecute and adjudicate cases.[65] The legislature has the right to "create new causes of action in favor of the state," may "lodge . . . exclusive duty to prosecute" on the attorney general, and may alter the duties of county or district attorneys.[66]

However, the legislature is barred from "removing or abridging the constitutional duties of county attorneys" unless expressly authorized by the Texas Constitution.[67] The court relied on case law, rather than the text of the Texas Constitution, to formulate the exclusive right to prosecutorial discretion that would be the basis of the declaration of the unconstitutionality of the Texas Act.[68]

The dissent argued that express authority *had* been given through Article V § 25 of the Texas Constitution,[69] which stated "[t]he Supreme Court shall have power to make rules and regulations for the government of said court, and the other courts of the state, to regulate proceedings and expedite the dispatch of business therein."[70] Therefore, the legislature has clear authority to create laws concerning a defendant's assertion of rights in the court.[71] However, this argument was not accepted by the majority due to the prerequisite for the existence of a substantive right, which was not found.[72] Rather, the majority held that the Texas Act was a failed attempt at procedural regulation of a substantive right to speedy trial that did not exist under federal law.[73] Both arguments have been rendered moot as Article V § 25 was repealed November 5, 1985.[74]

The Texas Act invoked the language of "readiness" for trial while the United States Constitution and federal law invoked the language of "commencement" for trial.[75] While acknowledging the intent of the legislature,[76]

63. *Id.*
64. *Id.* at 252.
65. *See id.* at 253.
66. *Id.* at 254.
67. *Id.*
68. *See id.*
69. *Id.*
70. *Id.* (quoting TEX. CONST. art. V, § 25).
71. *Id.* at 255.
72. *See id.*
73. *Id.* at 256.
74. TEX. CONST. art. V, § 25 (repealed Nov. 5, 1985).
75. *Compare Meshell*, 739 S.W.2d at 255–56, *with* U.S. CONST. amend. VI.
76. *Meshell*, 739 S.W.2d at 255 n.15.

the court ultimately found that this slight wording change had drastic implications regarding constitutionality.[77] The choice of words allowed for more intrusion upon prosecutorial discretion than would be required for commencement.[78] The court acknowledged the legislature's right to establish new rights under the law, but distinguished this authority by stating that such a right could not "infringe upon another department's separate power."[79]

Finally, the court referenced *Barker* and the legislature's lack of adherence to the factors as "seriously encroach[ing] upon a prosecutor's exclusive function without the authority of an express [Texas] constitutional provision."[80] The language of the Texas Act, according to the court, did not square with the underlying reasoning or distribution of weight of the *Barker* factors allocated by the Supreme Court.[81] This was a fatal flaw especially when coupled with the lack of consideration given to a defendant's responsibility to assert their own constitutional rights and the presumption of prejudice statutorily awarded to the defendant.

The Texas Act was intended to protect a defendant's rights by shifting some of the burden from the defendant to the State. Ultimately, the court found it to be too broad of an assertion of authority by the legislature. Only some provisions were found to be unconstitutional with the rest of the Texas Act remaining unabridged.[82] However, the provisions that were struck down were effectively the teeth of the Texas Act, thus rendering it relatively useless in terms of protection of a defendant's right to speedy trial.

B. Case Law After Meshell

After *Meshell*, Texas courts reverted to the *Barker* factors. This balancing test allows for incredible judicial discretion that ultimately proves detrimental to the protection of constitutional rights.[83] Texas courts have a long history of refusing to grant speedy trial violations "[b]ecause dismissal of the charges is a radical remedy" and such an application "would infringe upon 'the societal interest in trying people accused of crime, rather than granting them immunization because of legal error.'"[84] The amorphous structure of

77. *See id.* at 255–57, 256 n.16.
78. *See id.* at 256.
79. *Id.* at 255 n.13.
80. *Id.* at 256.
81. *Id.*
82. *See id.* at 257.
83. *See* Brown, *supra* note 55, at 353; s*ee also* Osnowitz, *supra* note 32, at 282. *See generally* Robert L. Hartley Jr., *The Constitutional Guarantee of Speedy Trial*, 8 IND. L. REV. 414 (1974); Rosser Jr. & Pratt III, *supra* note 40.
84. Cantu v. State, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008) (first citing Barker v. Wingo, 407 U.S. 514, 522 (1972); and then quoting United States v. Ewell, 383 U.S. 116, 121 (1966)).

the balancing test was intended to grant court discretion, but it allows for too much. Coupled with the striking down of the Texas Act, criminal defendants rarely get their right to speedy trial acknowledged in court. The two problematic factors that were attempted to be reconciled by the Texas Act are assertion of right and prejudice to defendant.

The trial court has the power to dismiss a case upon finding the violation of one's right to speedy trial.[85] However, the higher courts will likely overturn such a decision.[86] The courts have stated that review of claim will give "almost total deference" to the trial courts' finding of facts,[87] but the holdings indicate the contrary. The higher courts tend to uphold findings of no violation.[88] While the trial courts are more likely to balance the *Barker* factors by way of protecting defendant's rights, the higher courts are less forgiving.

1. Assertion of Right

The assertion factor is unique. A court can find three *Barker* factors present and in favor of the defendant, and still have grounds for denying dismissal due to lack of diligent assertion of right by the defendant.[89] The Supreme Court's illumination of the assertion factor authorizes dangerous court discretion allowing "enough latitude to find the factor to be either determinative or inconsequential."[90] Texas courts have taken full advantage of this loophole.

The burden is on the accused to prove the assertion of right factor in the *Barker* test.[91] This factor is entitled to "strong evidentiary weight," and failure to prove such will make it difficult to prove a violation of the right.[92] In the absence of a speedy trial request, the court will assume the defendant did

85. State v. Donihoo, 926 S.W.2d 314, 315 (Tex. App.—Dallas 1994, no pet.).

86. *E.g.*, State v. Robles, 631 S.W.3d 870 (Tex. App.—San Antonio 2021, no pet.); State v. Lopez, 631 S.W.3d 107 (Tex. Crim. App. 2021); State v. Lampkin, 630 S.W.3d 559 (Tex. App.—San Antonio 2021, no pet.); United States v. Duran-Gomez, 984 F.3d 366 (5th Cir. 2020); State v. Reyes, 162 S.W.3d 267 (Tex. App.—San Antonio 2005, no pet.); Dragoo v. State, 96 S.W.3d 308 (Tex. Crim. App. 2003).

87. *Cantu*, 253 S.W.3d at 282 n.29 (quoting Guzman v. State 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

88. *E*.g., Taylor v. State, 655 S.W.3d 478 (Tex. App.—Corpus Christi–Edinburg 2022, rev. granted, without pet.); Aguirre v. State, No. 08-20-00057-CR, 2022 WL 3225160, at *1 (Tex. App.—El Paso Aug, 10, 2022, pet. ref'd) (mem. op.); Lovelace v. State, 654 S.W.3d 42 (Tex. App.—Amarillo 2022, no pet.); Sample v. State, 653 S.W.3d 287 (Tex. App.—Austin 2022, pet. ref'd); Adkins v. State, No. 03-14-00285-CR, 2017 WL 474058, at *1 (Tex. App.—Austin Feb. 2, 2017, pet. ref'd) (mem. op., not designated for publication); Kelly v. State, 413 S.W.3d 164 (Tex. App.—Beaumont 2013, no pet.); Henson v. State, 407 S.W.3d 764 (Tex. Crim. App. 2013); Starks v. State, 266 S.W.3d 605 (Tex. App.—El Paso 2008, no pet.).

89. Osnowitz, *supra* note 32, at 293.

90. *Id.* at 296.

91. *Cantu*, 253 S.W.3d at 280.

92. Barker v. Wingo, 407 U.S. 514, 531–32 (1972).

not want one.[93] The longer a defendant waits to assert their right, the more a court is inclined to believe that he was indifferent to the preservation of his right.[94]

A defendant must diligently assert the right to a speedy trial from the beginning of the case.[95] Filing a motion to dismiss on speedy trial grounds rather than a motion for a speedy trial will hinder the defendant's case for a right violation because "it shows a desire to have no trial instead of a speedy one."[96] The Texas Court of Criminal Appeals has stated that this right can never be waived, but still must be asserted.[97]

The discretion allowed by *Barker* for the courts to determine the validity of the claim is fatal to the sanctity of the constitutional right. Texas courts attempt to look into the mind of the defendant to determine whether they are raising the claim of a speedy trial violation for the right reasons.[98] The Texas Court of Criminal Appeals has justified denying the declaration of a right violation by stating, "one [can] conclude that appellant did not really want a speedy trial; he wanted only a dismissal."[99]

The implementation of this factor is so problematic that some scholars have even called for a repeal of this factor alone.[100] The burden should not be on the defendant to raise and defend their constitutional rights. The courts have the ability, through *Barker* and in the absence of statute, to look into the mind of the defendant and determine *why* the defendant is making such a claim. No other constitutional right functions this way. The motive of raising constitutional rights requires no inquiry, except in case of speedy trial under the *Barker* factors. Constitutional rights are heavily protected—all but the right to speedy trial.

93. *See* Balderas v. State, 517 S.W.3d 756, 768 (Tex. Crim. App. 2016).

94. *See id.*

95. *Cantu*, 253 S.W.3d at 279 (quoting Cantu v. State, No. 13-04-608-CR, 2007 WL 925541, at *3 (Tex. App.—Corpus Christi–Edinburg Mar. 29, 2007) (mem. op., not designated for publication), *rev'd*, 253 S.W.3d 273, 287 (Tex. Crim. App. 2008)).

96. *Id.* at 283 (citing Zamorano v. State, 84 S.W.3d 643, 651 n.40 (Tex. Crim. App. 2002)).

97. *See* State v. Munoz, 991 S.W.2d 818, 825 (Tex. Crim. App. 1999).

98. *See, e.g.*, *Cantu*, 253 S.W.3d at 286.

99. *Id.*

100. *See* Osnowitz, *supra* note 32, at 300; *see also* Rosser Jr. & Pratt III, *supra* note 40, at 910.

2. Prejudice

Like the assertion of right factor, the burden is on the defendant to prove prejudice.[101] Delay longer than five years is considered presumptively prejudicial.[102] This is different from other states' courts that will likely find a presumption of prejudice after one year.[103] Without a presumption of prejudice, the defendant must show actual prejudice.[104]

When determining actual prejudice, courts review "whether the government or the criminal defendant is more to blame."[105] "[T]he state has the burden of justifying the length of delay [while] the defendant has the burden of . . . showing prejudice."[106] To show prejudice, a defendant must show the government acted in bad faith.[107] The greater showing of bad faith or other length of delay, the less a defendant must show actual prejudice.[108] Essentially, if the State can justify the reason for delay and procure a showing of good faith, then a violation of a defendant's right to a speedy trial will rarely be found regardless of the length of delay.[109]

A finding of presumptive prejudice does not guarantee a finding of actual prejudice against the defendant, but rather marks the beginning of the inquiry into the *Barker* factors.[110] Even when the findings for prejudice are mixed, the courts will typically side with the government and find against a deprivation of right.[111]

IV. IMPLEMENTATION OF A NEW SPEEDY TRIAL ACT

"There is nothing in the Constitution that signals the need to treat the right to a speedy trial different from other constitutional rights," but it does

101. *Cantu*, 253 S.W.3d at 280.

102. United States v. Parker, 505 F.3d 323, 328 (5th Cir. 2007); *see also* United States. v. Canchola, 623 F.Supp.3d 759, 771 (N.D. Tex. 2022).

103. *Speedy Trial*, *supra* note 7, at 475.

104. *See id*. (citing Barker v. Wingo, 407 U.S. 514, 530–34 (1972)).

105. United States v. Duran-Gomez, 984 F.3d 366, 374 (5th Cir. 2020) (quoting Vermont v. Brillon, 556 U.S. 81, 90 (2009)).

106. *Cantu*, 253 S.W.3d at 280.

107. *Duran-Gomez*, 984 F.3d at 379 (citing United States v. Cardona, 302 F.3d 494, 498 (5th Cir. 2002)).

108. *Cantu*, 253 S.W.3d at 280–81.

109. *See* Lovelace v. State, 654 S.W.3d 42, 50 (Tex. App.—Amarillo 2022, no pet.); Starks v. State, 266 S.W.3d 605, 610–11 (Tex. App.—El Paso 2008, no pet.); Zamorano v. State, 84 S.W.3d 643, 655 (Tex. Crim. App. 2002) (Keller, P.J., dissenting) (quoting State v. Munoz, 991 S.W.2d. 818, 821 (Tex. Crim. App. 1999)).

110. *Munoz*, 991 S.W.2d at 821–22 (first quoting Barker v. Wingo, 407 U.S. 514, 530 (1972); and then quoting Doggett v. United States, 505 U.S. 647. 652 n.1 (1992)).

111. *See, e.g.*, Sample v. State, 653 S.W.3d 287, 294–95 (Tex. App.—Austin 2022, pet. ref'd).

not stop the courts from trying.[112] Under the current law, a defendant is responsible for proving half of the *Barker* factors.[113] An inability to carry this burden proves fatal in all Texas cases.[114] Unlike other constitutional rights or any criminal trial, the defendant effectively bears the burden of proof.

A. Rewriting the Texas Act

There is a simple solution: state enactment of a rewritten official Speedy Trial Act. As this has been done once before and held unconstitutional,[115] it would not be enough to mimic the federal statute. Texas would have to revisit the legislation and work around the holding in *Meshell*, absent an overruling.

First, the legislature would have to reevaluate the presumption of prejudice as to avoid conflict with the separation of powers doctrine.[116] One way to do this is to establish criteria for a prima facie presumption of prejudice.[117] In doing this, the burden of proof placed on the defendant would be reduced without suspending it entirely. The government already has the burden of rebutting such a showing; with prima facie showing, defendants would be able to anticipate exactly what needs to be proven. Not only would this streamline the process, but it would take the enormous amount of discretion and subjectivity away from the courts. Doing this would allow for more predictability of holdings and thus more faith in the system.

Another option is to stipulate the amount of time required to trigger a presumption of prejudice.[118] While the courts have established a guideline, it would be more effective to have a statutory mandate to ensure the presumption in certain instances. The legislature would have discretion to decide what the time frame would be and could work with court officials to ensure practicability. This time frame could also be pulled from the federal statute, adjusting the period based on the offense; the American Bar Association (ABA) standards, adjusting the period based on pretrial detention;[119] or the National

112. Seth Osnowitz, *supra* note 32, at 297–98.

113. *See Lovelace*, 654 S.W.3d at 48.

114. *See id.*

115. *See* Act of 1977, 65th Leg., R.S., ch. 787, § 1, 1977 Tex. Gen Laws 1970, 1970–73 (repealed 2005) (formerly codified as TEX. CODE CRIM. PROC. ANN. art. 32A.02); *see also* Meshell v. State, 739 S.W.2d 246, 257–58 (Tex. Crim. App. 1987) (holding that art. 32A.02 is unconstitutional)

116. *See* Brown, *supra* note 55, at 367–68.

117. *Id.*

118. *See id.* at 368.

119. STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-2.1 (AM. BAR ASS'N 2006).

Center for State Courts (NCSC) Model Time Standards.[120] To ensure compliance and achievability, it is advisable to slightly increase the time period from the federal statute.[121]

In either case, periods of exclusion in time calculation should be present.[122] Periods of exclusion are vital because delay in criminal cases is inevitable.[123] Delays and continuances can be used tactically by both the prosecution and defense.[124] For the defense, stalling the case can be useful because of the inevitable fading of witness memory,[125] by allowing more time to prepare,[126] and by allowing more time to receive and review evidence.[127] The prosecution could benefit equally from a continuance by gaining more time to prepare or gather evidence for trial. Serious and complex cases will inevitably require more time to try due to potential difficulty in gathering evidence, obtaining witness testimony, or preparing for trial.[128] Regardless, continuances are the "primary drivers in case-processing time" and should be limited to only those necessary.[129]

Legislatively mandated time constraints for all parties would eliminate needless delay, which infringes upon the right to speedy trial. Additionally, it could allow for the continued use of tactical delays that benefit both parties while eradicating the rampant use.

120. NAT'L CTR. FOR STATE CTS., MODEL TIME STANDARDS FOR STATE TRIAL COURTS (2011), https://www.ncsc.org/__data/assets/pdf_file/0032/18977/model-time-standards-for-state-trial-courts.pdf [https://perma.cc/6T8V-6BDS].

121. *See* BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE CTS., TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 6 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf [https://perma.cc/5SBF-5GAB] (stating that no state courts in the study met current national time standards for disposition of criminal cases).

122. *See* STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-2.3 (AM. BAR ASS'N 2006). *See generally* Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (amended 1979) (prescribing time limits, exclusions, and other items related to speedy trials); Rosser Jr. & Pratt III, *supra* note 40 (discussing issues with exclusions in time calculation under the Speedy Trial Act).

123. *See* Godbold, *supra* note 32, at 265 (listing several factors contributing to widespread delay in criminal cases).

124. *See* Barker v. Wingo, 407 U.S. 514, 521, 533 (1972).

125. *See id.* at 521.

126. *See* United States v. Duran-Gomez, 984 F.3d 366, 372 (5th Cir. 2020).

127. *See* United States v. Canchola, 623 F.Supp.3d 759, 764 (N.D. Tex. 2022).

128. *See Barker*, 407 U.S. at 531.

129. OSTROM ET AL., *supra* note 121, at 6.

B. Goals and Standards

In dealing with the right to speedy trial, it is important to have some level of procedural certainty.[130] This would alleviate some of the unfair burden on criminal defendants[131] and help restore the state's constitutionally mandated burden of bringing a defendant to trial.[132] This cannot be done without implementation of goals and standards for all institutions involved in the criminal justice system, including courts, prosecutors, defense attorneys, and jails.

In coming to the decision to create a statutory provision for the right to speedy trial, Congressman John Conyers stated, "Congress found that individual plans often were designed to perpetuate the status quo rather than advance the interests of either the accused or the public."[133] The American criminal justice system has deep roots in protection of people against the government. The legal system has done a respectable job at upholding this notion in many facets. However, it falls short in respect to the rights of criminal defendants. Much of this has been done in the name of public interest.[134]

There is a way to hold the system accountable, protect the public interest, and ensure a specified right to a speedy trial. The ABA criminal justice standards outline ten interests that should be recognized for the good of the public and criminal defendants alike.[135] These include: preserving the means of proving the charges; maximizing deterrent effects; increasing likelihood of rehabilitation; minimizing periods of anxiety for those involved in criminal litigation; reducing repetitious handling and review of evidence; reducing jail costs; reducing caseloads; better utilization of limited resources; and increasing public trust and confidence in the system.[136]These ten factors can be regrouped into two main categories: efficiency and restoring faith in the system.

The proposed legislation should address each of the factors individually and create specific rules for the affected groups.[137] The new policies could be an elevated codification of the existing standards, or an entirely new set of standards, for each of the aforementioned institutions as well as a consequence for failure to comply.

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130. *See id.* at 11, 20, 31.
131. *See* Osnowitz, *supra* note 32, at 295.
132. *See* Meshell v. State, 739 S.W.2d 246, 256 (Tex. Crim. App. 1987).
133. Rosser Jr. & Pratt III, *supra* note 40, at 909 & n.19.
134. *See* Barker v. Wingo, 407 U.S. 514, 519 (1972).
135. STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-3.1 (AM. BAR ASS'N 2006).
136. *Id.*
137. *See* OSTROM ET AL., *supra* note 121, at 5.

1. Efficiency

A speedy trial statute had the potential to be counterproductive in terms of federal court efficiency,[138] but it is still in place today leading to the conclusion that courts were able to meet the demands. Despite the concerns of the federal courts, this type of statute has the potential to be productive in terms of state court efficiency because it promotes proper function of the system.[139]

It is important to include policies and procedures for effective case management in the language of any statute that aims to be passed.[140] Without giving the courts and other involved institutions guidelines for compliance, it is inevitable that those involved would object to compliance on the basis that it is not feasible.[141] Building in feasibility and workable procedures is a way to ensure compliance and effectiveness throughout the system.

Any potential legislation should include a time limit for the dissemination of complete discovery once an indictment has been issued, a time frame for completion of any forensic testing beginning at the receipt of the sample, and either a requirement for implementation of a desired scheduling program or a hiring requirement and budget allocation for a designated scheduler in every courthouse. It should also impose a consequence such as dismissal of charges, fines, or sanctions. While there are standards among the legal community, legislative action would ensure compliance and allow the wronged party reprieve.

Policies and procedures of the sort would include ways to promote rapid transmission and retrieval of discovery between investigators and attorneys, updated scheduling practices by the courts, and updated and increased accessibility to vital limited resources like investigative services.[142] These procedures are easily achievable through modern technology.[143]

Prompt sharing of discovery on all ends would ensure expedition and validity of the case.[144] It could also encourage quick, fair plea agreements; if all parties are equipped with the same information early in the case, little is left for trial prep and attorneys could make calculated decisions about their preferred outcome. This would be made even easier through the availability of limited resources in investigative services. Many cases lie dormant for

138. *See* Rosser Jr. & Pratt III, *supra* note 40, at 913–14.

139. *See* OSTROM ET AL., *supra* note 121, at 6.

140. STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-4.2 (AM. BAR ASS'N 2006).

141. *See* OSTROM ET AL., *supra* note 121, at 5.

142. STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-4.3 (AM. BAR ASS'N 2006).

143. *See* OSTROM ET AL., *supra* note 121, at 4.

144. *See id.* at 31.

months or even years while awaiting test results regarding evidence or mental evaluations.[145]

Updated and stricter scheduling practices by the courts would ensure a quicker timeline.[146] A court scheduling program that notes case deadlines in one place would reduce the stress of missing deadlines. Additionally, court schedulers could send out deadline reminders to ensure notice for all parties. This could also be used to tackle the growing backlog of cases currently in the Texas courts.[147] One of the main reasons federal courts struggled with the implementation phase was due to lack of technology and problems unique to federal court.[148]

The drawback to this plan is expense.[149] Legislators would have to work closely with all involved institutions and budgeters to create a plan that allocates the needed funds to the proper places. While it might be costly upfront, an efficient court system would save money in the end. The costs to the courts would remain about the same, only requiring the money needed for scheduling. This could be done through a program or creating a position exclusive to scheduling.[150] Jail costs would decrease due to less inmates being housed awaiting trial. Investigative service access would likely require a one-time cost increase for updates and then would plateau.

2. Restoring Faith in the System

Updated statutes and policies regarding the right to speedy trial would help restore public faith in the criminal justice system.[151] The expedition of cases helps ensure fairness to the accused; proper function of the courts and adherence to speedy trial rights; mitigation of harmful psychological effects of the accused, victims, and others involved in or affected by a trial; and maximization of deterrent and rehabilitative effects.[152]

When cases take years, defendants may be desperate for a resolution and take undesirable plea deals instead of waiting for their day in court. This is an unfair result for defendants as they are entitled to their day in court within a reasonable time and should be able to exercise that right without having to weigh the cost of a pending trial and further appeals. This factor was important enough to the Supreme Court to be included in the *Barker* factors

145. *See e.g.*, Sample v. State, 653 S.W.3d 287, 293 (Tex. App.—Austin 2022, pet. ref'd); United States v. Duran-Gomez, 984 F.3d 366, 375 (5th Cir. 2020).

146. *See* OSTROM ET AL., *supra* note 121, at 31.

147. *Cf. id.*

148. *See* Rosser Jr. &. Pratt III, *supra* note 40, at 913–14.

149. Osnowitz, *supra* note 32, at 302.

150. NAT'L CTR. FOR STATE CTS., *supra* note 114, at 42.

151. STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-3.1(j) (AM. BAR ASS'N 2006).

152. *Id.* § 12-3.1.

under prejudice.[153] In many cases, the courts look at the extenuating circumstances of the defendant to determine the level of prejudice. While some circumstances are unavoidable,[154] many would be mitigated if the length of such circumstance was decreased.

Victims could be afforded peace of mind sooner instead of enduring the agony of the unknown for months or even years while the case is pending. Families could be afforded the same. In many cases, those involved simply want a resolution. Again, while some of this is unavoidable, the length of such emotional turmoil could and should be shortened.

The lack of speedy trial minimizes deterrent and rehabilitative effects.[155] Someone who commits a crime may not face the repercussions for years. The discrepancy in time between the crime and the punishment causes a rift in the association and connection of the events in the minds of the defendants or accused. The punishment should come within a reasonable time of the crime for it to serve as a deterrence. For those with mental illness or other condition, such as addiction, the more time elapses, the less likely the individual is to receive adequate help. Without adequate help, the likelihood of reoffending increases. The greater the length of time, the slighter the impact.

In either case, a reoffence introduces the person to the cycle of incarceration. Recidivism rates in America are high, but they increase as the offenses increase. One way to combat this growing issue is to resolve cases quickly to maximize the deterrent and rehabilitative effects of the criminal system.

V. CONCLUSION

Introspection into the right to a speedy trial is gaining traction after decades of near silence. The right to a speedy trial is vital to the criminal justice system for defendants and the public. Texas has a clear ability to ensure fair enforcement of the right to speedy trial while accomplishing criminal justice reform through implementation of a rewritten Speedy Trial Act.

153. *See* Barker v. Wingo, 407 U.S. 514, 531–32 (1972).

154. *See e.g.*, Sample v. State, 653 S.W.3d 287, 295 (Tex. App.—Austin 2022, pet. ref'd); United States v. Canchola, 623 F.Supp.3d 759 (N.D. Tex. 2022).

155. Godbold, *supra* note 32, at 265; *see* STANDARDS FOR CRIM. JUST.: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-3.1 (AM. BAR ASS'N 2006).

THE NEED TO PREPARE FOR THE AFTER-EFFECTS OF A DEFAULT ON THE UNITED STATES' NATIONAL DEBT: THE LEGAL REPERCUSSIONS AND USE OF THE MILITARY SERVICES DURING THIS PERIOD

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ABSTRACT

Few other issues matter as much as the stability of a country during a period of crisis. The United States now faces a stark reality in the near future of a default on its national debt and must begin to prepare for the resulting trouble to ensure that there is a degree of calmness during this time as its citizens find themselves caught in a period of uncertainty. This paper argues that, as the debt becomes unsustainable, the U.S. must make legal preparations to use its Military Services to limit the political violence and bring stability as it transitions from a world power to one that must live within its means. Such legal avenues must include exceptions to the Posse Comitatus Act, the use of the Insurrection Act, and, finally, the imposition of martial law to ensure an organized and well-thought-out recovery will occur. This plan must include the review of powers that the President, Congress, the country, and its citizens have, and must occur before this upcoming event to ensure a smoother transition after the period of default and when the United States once again stabilizes as a country—though one with less influence on the world's agenda.

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I. INTRODUCTION[1]

Political violence has been well documented in regard to the January 6, 2021 events following the speech given by former President Donald J. Trump[2]—such violence has occurred throughout much of world and American history.[3] Realistically, violence during a period of uncertainty would only be magnified several times over in the event of a period in which there was a general economic collapse, far worse than occurred in either the Great Depression (1929–1939)[4] or the more recent Great Recession (2007–2009).[5]

1. This article is a continuation of my article: *see generally* Donald D.A. Schaefer, *The United States' National Debt and the Necessity to Prepare for Its Default*, 41 CAMPBELL L. REV. 457 (2019). Whereas the first looked at the need to prepare for a default on the United States national debt, this article argues for the need to prepare for the aftermath of such a default.

2. *See, e.g.*, Marshall Cohen, *Timeline of the Coup: How Trump Tried to Weaponize the Justice Department to Overturn the 2020 Election*, CNN: POL. (Nov. 5, 2021, 7:04 AM), https://www.cnn.com/2021/11/05/politics/january-6-timeline-trump-coup/index.html [https://perma.cc/574G-L65Y].

3. *See generally* Vera Bergengruen, *The United States of Political Violence*, TIME (Nov. 4, 2022, 6:00 AM), https://time.com/6227754/political-violence-us-states-midterms-2022/ [https://perma.cc/VU76-4SCX].

4. *See generally* Richard H. Pells & Christina D. Romer, *Great Depression*, *BRITANNICA* (July 3, 2023), https://www.britannica.com/event/Great-Depression. [https://perma.cc/T7T6-XJ5C].

5. *See* Brian Duignan, *Great Recession*, *BRITANNICA (Aug. 16, 2023)*, https://www.britannica.com/topic/great-recession [https://perma.cc/T3PA-V4TZ]; *see also* N. Jeanie Santaularia et al., *Violence in the Great Recession*, 191 AM. J. EPIDEMIOLOGY 1847 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10144667/pdf/kwac114.pdf [https://perma.cc/X4WV-H5E9].

When the United States finally defaults[6] on its national debt, a period of uncertainty will likely lead to extreme levels of political violence not seen in the history of the United States, which will have to be contained through the use of force on its citizens by the United States government, and, more specifically, members of the Military Services. This will all play out in a time of increased gun ownership that will add to the fuel of civil unrest as weapons will be used and lives lost.[7]

In many ways, the path through this discourse of violence and the need to use force started with the rising national debt, which now stands at over $32 trillion[8] with an expected rise to $50.7 trillion by 2033.[9] During this same period, the budget deficit is expected to exceed $2 trillion.[10] With interest rates set to continue to rise on this debt[11]—especially given the recent downgrade of U.S. debt from AAA to AA+,[12] the United States has little chance

6. "Default," as stated here, means a complete default whereby the United States agrees that it will no longer pay interest or buy back the bonds that it has issued at any point in the future.

7. This period of gun violence has only increased in a post-pandemic period where people have been buying guns at an ever-increasing rate. *See* Ray Sanchez et al., *A Nation Rocked by Mass Shootings Goes on an Extended Gun-Buying Run*, CNN (Apr. 22, 2023, 4:07 PM), https://www.cnn.com/2023/04/22/us/united-states-rising-gun-sales/index.html [https://perma.cc/A5FX-8Z7N]; *see also* Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2023), https://www.pewresearch.org/short-reads/2021/09/13/key-facts-about-americans-and-guns/ [https://perma.cc/WWV2-LDSB].

8. *Debt to the Penny*, U.S. TREASURY FISCAL DATA (Aug. 7, 2023), https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny [https://perma.cc/V2HH-DF9S]. As of August 3, 2023, the U.S. national debt stood at $32,604,327,644,488.70. *Id.*

9. OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2024, at 168 tbl.S-10 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf [https://perma.cc/KG4J-WRR2].

10. *Id.* at 135 tbl.S-1.

11. In Biden's proposed budget, interest rates on the 10–year Treasury note are expected to rise to 3.9% in 2023, and then lower to 3.6% in 2024 and not rise beyond 3.5% through 2033. *Id.* at 167 tbl.S-9. These assumptions are unrealistic because as the United States takes on more debt, interest rates will rise as investors see higher yields due to increased risks of default. In addition, should the United States either default on its debt and/or see its credit rating on its treasury bonds decrease, major increases in interest rates would be expected. Imagine that the interest rate on the 10–year Treasury was 8%. That would mean that the interest payments alone would be around $4 trillion in 2033 on debt of $50.7 trillion.

12. *See* Vivekanand Jayakumar, *Fitch's Downgrade of US Debt Wasn't a Mistake—It Was Long Overdue*, THE HILL (Aug. 7, 2023, 7:00 AM), https://thehill.com/opinion/finance/4138215-fitchs-downgrade-wasnt-a-mistake-it-was-long-overdue/ [https://perma.cc/39PL-NRWZ]. The original report on Fitch's decision can be found at: *Fitch Downgrades the United States' Long-Term Ratings to 'AA+' from 'AAA'; Outlook Stable*, FITCH RATINGS (Aug. 1, 2023, 5:13 PM), https://www.fitchratings.com/research/sovereigns/fitch-downgrades-united-states-long-term-ratings-to-aa-from-aaa-outlook-stable-01-08-2023 [https://perma.cc/YJ4R-3M4T]. Here, it is stated, in part, "The rating downgrade of the United States reflects the expected fiscal deterioration over the next three years, a high and growing general government debt burden, and the erosion of governance relative to 'AA' and 'AAA' rated peers over the last two decades that has manifested in

of ever achieving a "balanced" budget, perhaps having passed the point of no return in regard to being able to pay its interest and principal without additional borrowing. Plans must be put in place to prepare for this coming default with a "structured" default.[13] As the world moves away from the U.S. dollar and realizes the full extent of the upcoming crisis, members of Congress and the President must address plans not only for this but also for the looming crisis following this default.

It is during this period of chaos that the United States military will find itself pulled in two directions. The first issue is that as cuts to Medicare[14] and Social Security,[15] as well as increases in taxes, will likely not take place (as well as cuts to big-ticket items within the military hardware), the military will be one of the few areas to see major cuts. These cuts to the actual members of the Military Services will likely be significant or equal to those seen following the First and Second World Wars when millions of those service members found themselves no longer employed. The second issue is that those who remain must provide order within the cities and many communities throughout the United States through exceptions to the Posse Comitatus Act, the use of the Insurrection Act, and finally the imposition of martial law. Yet, in the end, this paper will argue that the lives of those who have, are, and will serve in the United States Armed Forces, along with their dependents, must be protected during this transition period of violence within its cities that has not been seen since the Civil War.

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repeated debt limit standoffs and last-minute resolutions." *Id.*; *see also* Christopher Rugaber, *The US Government's Debt has been Downgraded. Here's What to Know*, AP NEWS: BUS. (Aug. 2, 2023, 4:26 PM), https://apnews.com/article/fitch-debt-downgrade-interest-rates-bed220f3876eadd7451df4cbd96f0bc7 [https://perma.cc/LN3T-K3SA].

13. *See* Schaefer, *supra* note 1.

14. *See* Robert A. Berenson, *Medicare's Stewardship Role to Improve Care Delivery: Opportunities for the Biden Administration*, 46 J. HEALTH POL., POL'Y & L. 627 (2021). A question here presents itself on whether and how cuts and work requirements to Medicaid might take place where republicans control the House of Representatives. Biden, as the following article points out, should ensure the well-being of Medicaid. *See* Sara Rosenbaum, *The Future of the Indispensable Insurer: The Biden Administration and Medicaid*, 46 J. HEALTH POL., POL'Y & L. 611 (2021). In the last major debt-ceiling crisis under then President Barack Obama in 2011, cuts to Medicare, Medicaid, and other health services were also debated. *See* Am. Coll. Of Healthcare Execs., *Debt Deal Raises Questions About Healthcare Programs*, 65 J. HEALTHCARE FIN. MGMT. ASS'N 13 (2011).

15. *See* Bruce D. Schobel, *Social Security in the Biden Administration*, 75 J. FIN. SERV. PROS. 38 (2021).

II. PART ONE: WHY WE ARE FACING A CRISIS OVER THE NATIONAL DEBT

A. Political Violence

Perhaps few other issues have polarized the public opinion of America as the insurrection events that occurred on January 6, 2021.[16] Since 2020, America has shifted towards a more aggressive manner when it comes to political violence.[17] This section argues that the level of this political violence and bellicosity has been rising, impacting the lives of those within the United States. This violence will only continue as the Democratic and Republican parties spar over budgetary and other issues. This conflict has been highlighted over the recent debate to raise the debt limit[18] at a cost few could have imagined only a few years ago. On June 3, 2023, President Biden signed into law a bill that allowed the debt limit to be raised,[19] yet the debate remains as Republicans have vowed to cut spending even with H.R. 3746, the Fiscal Responsibility Act of 2023, in place.[20] As this fighting continues prior to a default, it appears that it will only increase further should an actual default occur. This author believes that such violence will reach levels never seen before. Following the default and its aftermath, such violence will need to be addressed in a contingency plan that should be in place that will use the Military Services of the United States to quell the violence and to allow stability to once again play a role in the rebuilding of this country as it transitions from the major world power to one of several dominant countries throughout the world.

Ideally, Americans should support a peaceful transition of government from one administration to another and disapprove of the events that took

16. *See* Jared Sharpe, *UMass Amherst Poll Finds Softening of Some Americans' Views on the Events at the U.S. Capitol on Jan. 6, 2021*, UNIV. OF MASS. AMHERST (Jan. 11, 2023), https://www.umass.edu/news/article/umass-amherst-poll-finds-softening-some-americans-views-events-us-capitol-jan-6-2021 [https://perma.cc/2NNK-TBXF].

17. *See* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160 (2021).

18. *See generally, The Economics of the Debt Ceiling Debate*, BROOKINGS: CMT. (May 26, 2023), https://www.brookings.edu/2023/05/26/the-economics-of-the-debt-ceiling-debate/ [https://perma.cc/6UE4-RFTM].

19. *See* Trevor Hunnicutt, *Biden Signs Debt Limit Bill, Avoiding U.S. Default*, REUTERS (June 5, 2023, 2:42 AM), https://www.reuters.com/world/us/biden-signs-bill-lifting-us-debt-limit-2023-06-03/ [https://perma.cc/JZX8-JS7V]; *see also* Press Release, White House, Bills Signed: H.R. 346, H.R. 3746 (June 3, 2023), https://www.whitehouse.gov/briefing-room/legislation/2023/06/03/press-release-bills-signed-h-r-346-h-r-3746/ [https://perma.cc/74XH-D7EX].

20. *See* Matthew Choi, *In U.S. House, the Far Right Gains a Powerful Spending-Cuts Ally in Texas Republican Kay Granger*, TEX. TRIB. (June 13, 2023, 11:00 AM), https://www.texastribune.org/2023/06/13/kay-granger-congress-spending-cuts/ [https://perma.cc/2GBG-FT48].

place at the Capitol on January 6, 2021,[21] but, realistically, the events of January 6th likely highlight things to come.[22] On that day, as Swol et al. argue, President Trump's comment that he would "go with" the crowd after his speech authorized the violence for many in the crowd,[23] and they go on to argue that the online media[24] played a major role in the incitement and later events that occurred.[25] Online avenues allowed President Trump's supporters to come together in an event that highlighted the rising willingness for violence—from online print media to active online groups. The Internet allows people from common backgrounds to come together even if they live thousands of miles apart, and, in the case of the January 6 insurrection, present and former members of the Military Services got involved. In regards to this attack, Schake and Robinson note that senior military leaders had to account for the presence of active duty and veteran personnel participating in a direct violation of their oaths to protect the Constitution.[26] Around 12% of arrests for federal crimes were actively serving or had served in the U.S. military.[27] The "radicalization" of the military must be addressed within the military and its veterans.[28] In the months and years after a default of the national debt, the military needs clear guidelines to ensure that active-duty members and veterans do put their skills to use outside the commands given to them by the government.

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21. *See* Aaron Weinschenk & Costas Panagopoulos, *Attitudes and Perceptions About the 2020 Presidential Election and Turnout Intentions in the 2022 Midterms*, 20 FORUM 311, 323–24 (2022).

22. The question remains as to what can be learned from those who participated in the January 6, 2021, event. *See* Darin J. Challacombe & Carol L. Patrick, *The January 6th Insurrection at the U.S. Capitol: What the TRAP-18 Can Tell Us About the Participants*, 10 J. THREAT ASSESSMENT & MGMT. 3 (2022).

23. Lyn Van Swol, Sangwon Lee & Rachel Hutchins, *The Banality of Extremism: The Role of Group Dynamics and Communication of Norms in Polarization on January 6*, 26 GRP. DYNAMICS: THEORY, RSCH. & PRAC. 239, 245 (2022).

24. *Id.* at 242 ("To summarize, social media facilitates protest participation by (a) consistently exposing users to like-minded political information/news (both through active search and incidental exposure through algorithms) that would breed and strengthen their negative attitude toward the status-quo through exposure to more arguments; (b) maximizing one's network's effect, where ideologically like-minded individuals can not only share protest-related information and strategies but also emotions, concerns, and grievances (which often precede protest participation); and (c) producing a need for approval and belonging to and social comparison with like-minded ingroup members that may push a participant toward more extremity and even action.").

25. *Id.*

26. Kori Schake & Michael Robinson, *Assessing Civil-Military Relations and the January 6th Capitol Insurrection*, 65 ORBIS 532, 532 (2021).

27. *Id.*

28. *Id.* at 541–43. One the greatest issues is how best to transition a member of the Military Services to civilian life. *See* Rich Morin, *The Difficult Transition from Military to Civilian Life*, PEW RSCH. CTR. (Dec. 8, 2011), https://www.pewresearch.org/social-trends/2011/12/08/the-difficult-transition-from-military-to-civilian-life/ [http://perma.cc/6Z4Y-GLGT].

On January 6, 2021, Trump refused to concede the election and instead argued that it had been "stolen" from him.[29] His attacks on the voting system in the United States and arguments regarding fraud have ensured that countless laws to limit voting access have been passed by Republican legislatures, providing an edge in future elections.[30] To this day, he and his supporters have refused to accept the results of the 2020 election,[31] creating a period of rage whereby he and his supporters have continued with election lies[32] and arguments in such a way that political violence has only accelerated. These attacks have continued through his 2024 presidential election bid,[33] even with his many legal problems.[34] The question remains as to how the events on January 6th will be remembered and how such memories[35] will impact his continued false claims of election fraud. Trump used social media to further his lies and spread false claims of voter fraud and other theories that accelerated his views, adding to the political violence that exists in the realm of the Internet. As Harton et al. point out, the internet provided fuel for the fire Trump started.[36] President Trump was able to use his social media and physical presence to incite the actions of others on January 6th, and his ability to use social media in general has allowed him to succeed in places few others could have expected.

Trump's ability to manipulate audiences through social media—specifically Twitter[37]—illustrates the degree to which people now easily take up

29. *See* Allison M. Prasch, *A Tale of Two Presidencies: Trump and Biden on the National Mall*, 107 Q. J. SPEECH 472, 472 (2021).

30. *See* Gary C. Jacobson, *Driven to Extremes: Donald Trump's Extraordinary Impact on the 2020 Elections*, 51 PRESIDENTIAL STUD. Q. 492, 518–19 (2021).

31. *See* Robert J. Antonio, *Democracy and Capitalism in the Interregnum: Trump's Failed Self-Coup and After*, 48 CRITICAL SOCIO. 937, 943 (2022).

32. *Id.* at 939–40.

33. *See* Michelle L. Price, *What to Know About Trump's CNN Town Hall: Lies About Election and Abortion, Attacks on Accuser*, AP (May 10, 2023, 10:40 PM), https://apnews.com/article/trump-cnn-town-hall-things-to-know-7be863292956dd2663537880dfbd8c3f [https://perma.cc/F7HV-UM4G].

34. *See Tracking the Trump Criminal Cases*, POLITICO (Aug. 16, 2023, 11:59 AM), https://www.politico.com/interactives/2023/trump-criminal-investigations-cases-tracker-list/ [https://perma.cc/8BCQ-N6G2].

35. Damion Waymer & Robert L. Heath, *Explicating the Public Memory Dialectic in Public Relations: The Case of Donald Trump, the Oath Keepers, and January 6, 2021*, 49 PUB. RELS. REV. (2023).

36. Helen C. Harton, Matthew Gunderson & Martin J. Bourgeois, *"I'll Be There With You": Social Influence and Cultural Emergence at the Capitol on January 6*, 26 GRP. DYNAMICS: THEORY, RSCH., & PRAC. 220, 232 (2022); *see also* Jacobson, *supra* note 30, at 501–03 ("Trump's inept handling of the pandemic harmed him less than it might have because Republicans who viewed it negatively defected only if this also led to negative views of his overall performance.")

37. *See* Adam Kriesberg & Amelia Acker, *The Second US Presidential Social Media Transition: How Private Platforms Impact the Digital Preservation of Public Records*, 73 J. ASS'N FOR SCI. & TECH. 1529, 1532–34 (2022).

political violence. COVID-19 and the many conspiracy theories surrounding it have only added to the drama that the world now faces.[38] As Antonio points out, Trump was able to target Biden's campaign and supporters for their social distancing and mask-wearing as signs of weakness or hysteria to his mostly mask-less crowds.[39] His partisan attack on Anthony Fauci and other members of the scientific community[40] only furthered the many conspiracy theories surrounding the COVID-19 virus[41] and continued to add fuel to a fire that burned with resentment over his perceived loss of the 2020 election.

It was in this context that "[s]top the [s]teal"[42] and the violence related to Trump's loss of the 2020 presidential election materialized to a fuller extent. On January 6, 2021, his "We Fight Like Hell" speech[43] called for violence[44] while Biden's inaugural address called for unity as the transition period from one presidential administration to another was in process.[45] Kleinfeld has detailed the steady increase in the level of political violence since Trump's emergence as a presidential candidate to present[46] and associates the willingness to become violent with an attempt at politics-as-usual in

38. Consider the following article as it relates to the impact of capital riots and the spread of Covid-19: Dhaval Dave et al., *Political Violence, Risk Aversion, and Population Health: Evidence from the US Capitol Riot*, 35 J. POPULATION ECON. 1345 (2022). Also see the section on "The Pandemic Catastrophe: Accelerant of the Trumpist Self-Coup" in the following article: Antonio, *supra* note 31, at 939–941.

39. Antonio, *supra* note 31, at 940–41.

40. *Id.* at 940–41.

41. In many ways, Trump failed in addressing Covid-19. Philip H. Mirvis points out that Trump: "(1) Misread and discounted 'early warning signals'[,] (2) Stunted national pandemic response[,] (3) Bungled virus test and testing roll out[,] (4) Uncoordinated crisis plans and management[,] (5) Misleading and mixed messages[,] (6) Systemic failures." Philip H. Mirvis, *Reflections: US Coronavirus Crisis Management–Learning From Failure January–April, 2020*, 20 J. CHANGE MGMT. 283, 283 (2020).

42. Dave et al., *supra* note 38, at 1346.

43. President Donald J. Trump, Address at the Ellipse (Jan. 6, 2021) (transcript available in Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR: POL. (Feb. 10, 2021, 2:43 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/6LFR-GAET]); *see also* Joshua Azriel & Jeff DeWitt, *"We Fight Like Hell": Applying the Brandenburg Test to Trump's Speech Surrounding the Siege at the U.S. Capitol*, 12 CRIM. L. PRAC. 23 (2022).

44. Trump has even gone so far as to attack members of his own party as "weak" and often blamed them for his 2020 election loss. *See* Lorien S. Jordan & Dewey Dykes, *"If You Don't Fight Like Hell, You're Not Going to Have a Country": An Intersectional Settler Colonial Analysis of Trump's "Save America" Speech and Other Messages of (Non)belonging*, 22 CULTURAL STUD. ↔ CRITICAL METHODOLOGIES 443 (2022).

45. Prasch, *supra* note 29, at 473, 476.

46. *See* Kleinfeld, *supra* note 17, at 166–68; *see also* Daniel Rothbart, *Righteous Rage as Political Power*, 27 J. PEACE PSYCH. 681, 681–84 (2021) (noting Daniel Rothbart addresses "righteous rage" as it deals with political violence).

a time of uncertainty with COVID-19 and other factors.[47] Much of this violence has been furthered by right-wing[48] conspiracy theorists[49] and the many groups they are affiliated with. Politically-related violence[50] has only increased with the ease of access to media, where so many users have been able to express themselves.[51] In many ways, the conspiracy theories related to the failed 2020 campaign loss by Trump to Biden has allowed for a dramatic rise in this violence.[52] Umekawa Takeshi points out that ideological polarization rose throughout President Trump's term of office[53] and that Trump, perhaps more than any other president in recent history, has added a layer of polarization to American politics.[54] Jacobson takes Takeshi's point further by associating Trump specifically with the increase in partisan differences,[55] while Takeshi simply points out that this polarization has only continued to rise during the present era.[56] The dramatic rise in online[57] "fringe groups" has changed the nature of political violence, and its rise[58] has allowed this increase in polarization to continue. Such groups[59] have included Q-Anon, whose members have espoused right-wing beliefs[60] that have become more widely distributed through the Internet and chat groups, accelerating the widening of the gap between ideologies.

Trump's rise to his position as President of the United States, his time in office, and his affairs after leaving office have consistently included verbal

47. *See* Kleinfeld, *supra* note 17, at 166.

48. *See* Joshua D. Freilich et al., *Patterns of Fatal Extreme-Right Crime in the United States*, 12 PERSPS. ON TERRORISM 38 (2018) (explaining the rise of far-right appeal has been an ongoing issue); *see also* Sibylle van der Walt, *Populism and the Yearning for Closure: From Economic to Cultural Fragility*, 23 EUR. J. SOC. THEORY 477 (2020).

49. *See* James A. Piazza, *Drivers of Political Violence in the United States*, 42 J. PUB. POL'Y & MKTG. 11, 12 (2023).

50. *Id.* at 11–14.

51. *See* George Lundskow, *Conspiracies and Restorative Violence in American Culture*, 48 CRITICAL SOCIO. 967 (2022).

52. *Id.* at 978–80.

53. Umekawa Takeshi, *Did Donald Trump Change the US Presidency?*, 28 ASIA-PAC. REV. 98, 99 (2021).

54. *See* Thomas Greven, *U.S. Party Politics and the Peculiar Nature of American Populism*, 17 TAIWAN J. DEMOCRACY 67 (2021).

55. Jacobson, *supra* note 30, at 494.

56. Takeshi, *supra* note 53, at 99; *see* Piazza, *supra* note 49, at 11.

57. *See* James Hawdon, Colin Bernatzky & Matthew Costello, *Cyber-Routines, Political Attitudes, and Exposure to Violence-Advocating Online Extremism*, 98 SOC. FORCES 329, 343 (2019) ("Online extremism is a growing concern, especially extremism that directly advocates violence").

58. *See* Kleinfeld, *supra* note 17, at 161–62.

59. There needs to be more attention paid to violent extremist groups that threaten the political culture of the United States. *See* Gary LaFree, Michael A. Jensen, Patrick A. James & Aaron Safer-Lichtenstein, *Correlates of Violent Political Extremism in the United States*, 56 CRIMINOLOGY 233, 235 (2018).

60. *See* Lundskow, *supra* note 51, at 975.

attacks[61] that have only incited others to act. As Nacos et al. point out, Trump's "racist speech" is positively correlated to the rise in hate crimes.[62] It is this hate speech aimed at other politicians, immigrants, and refugees (among others),[63] that has only fueled this increasing rise in violence. The "spontaneous"[64] attacks by right-wing groups[65] have risen and will only continue to do so as the political rhetoric rises on both sides of the aisle as both Democrats and Republicans continue to trade barbs against one another.[66] These attacks against the leadership of the United States and foreign allies have led to a rise against political leaders.[67]

As the United States and others within the world community look back at the topic and impact of political violence, the question remains as to how best move forward. In many ways, one must, as Rothenberg points out, move beyond this moral injury in addressing this violence in an effort to live with traumatic experiences.[68] This process is necessary to gain a foothold again on a level of stability required for the United States government, its citizens, and the world community as a whole to enter a new phase—one that allows reconciliation and a sense of peace during this transition period that will soon come. As will be addressed later, the legal framework that so failed the use of the military, police, and other authorities on January 6th,[69] will need to be utilized more effectively following the events after the United States defaults

61. Perhaps few other areas have been more contentious as Trump's aggressive personal verbal attacks. *See* Brigitte L. Nacos, Robert Y. Shapiro & Yaeli Bloch-Elkon, *Donald Trump: Aggressive Rhetoric and Political Violence*, 14 PERSPS. ON TERRORISM 2, 20 (2020); *see also* Daren G. Fisher, Laura Dugan & Erica Chenoweth, *Does US Presidential Rhetoric Affect Asymmetric Political Violence?*, 12 CRITICAL STUD. ON TERRORISM 132, 139–44 (2019).

62. Nacos et al., *supra* note 61, at 17.

63. *See generally id.*

64. *See* Matthew M. Sweeney & Arie Perliger, *Explaining the Spontaneous Nature of Far-Right Violence in the United States*, 12 PERSP. ON TERRORISM 52, 52–53 (2018).

65. It has been argued that the stronger the attraction to a group, the more likely they are to defend it, as noted by Oluf Gøtzsche-Astrup, in *Dark Triad, Partisanship and Violent Intentions in the United States*, 173 PERSONALITY & INDIVIDUAL DIFFERENCES 1, 3 (2021). The "anti-establishment" side of those who commit political violence has been noted by Joseph E. Uscinski et al., in *American Politics in Two Dimensions: Partisan and Ideological Identities Versus Anti-Establishment Orientations*, 65 AM. J. POL. SCI., 1, 2 (2021).

66. Michael H. Becker has found "a robust relationship between activism attitudes and support for political violence across all models." Michael H. Becker, *Deciding to Support Violence: An Empirical Examination of Systematic Decision-making, Activism, and Support for Political Violence*, 21 CRIMINOLOGY & CRIM. JUST. 1, 12 (2021).

67. *See generally* Ashley Muddiman, Benjamin R. Warner & Amy Schumacher-Rutherford, *Losers, Villains, and Violence: Political Attacks, Incivility, and Support for Political Violence*, 15 INT'L J. COMMC'N. 1489 (2021).

68. *See* Daniel Rothenberg, *Moral Injury and the Lived Experience of Political Violence*, 36 ETHICS & INT'L AFFS. 15, 15 (2022).

69. *See generally* Jill I. Goldenziel, *"Revolution" at the Capitol: How Law Hindered the Response to the Events of January 6, 2021*, 81 MD. L. REV. 336 (2021).

on its national debt. As this section has addressed the impact of Trump's incitements before, during, and after January 6, 2021, there is a growing sense that this political violence will only increase as the polarization between Democrats and Republicans continues. Perhaps this increased violence will reach a point where default on the national debt will be an afterthought to a far greater issue of unity within the United States as this nation once again comes to grips with the reality of change during which the United States is no longer the world's superpower. For this change, leadership at every level, from the President downward, is necessary to ensure a smooth transition both legally and otherwise during the turbulent years ahead.

B. Biden and Trump

Perhaps few other rivalries have played out in the public's view as much as between former President Trump and current President Biden. Each administration expresses a sense of urgency to correct the mistakes of the previous administration regarding economics, health care, taxes, defense spending, and an array of other issues including Social Security and Medicare. As the COVID-19 pandemic has now eased, the global impact of the Trump era, the Biden Administration, and the position of the United States within the world community has weakened. Struye argues that the U.S. international position has weakened consistently since the 2008 recession, with COVID-19 further confirming a deterioration of American strength as it moves away from its allies and further towards nationalism and isolation.[70] Yet, some of the most pressing issues surround the future of the United States as it faces a likely default on its national debt and how such a default would play out both domestically and within the foreign affairs of the United States. Countries like the People's Republic of China (China), those within the European Union (EU), and the Russian Federation (Russia) may well help determine the future of the United States and its allies.

First, though, we must begin when Trump lost the election to Biden and how that loss shaped the events to come. Trump casting himself as the "rightful [P]resident"[71] and arguing that he only lost because of election fraud has led his followers to believe and argue that President Biden is not a rightful President but only occupies the building rather than the true role of the President.[72] One candidate cannot accept his loss, while the other focused on the resiliency of the executive office. As Prasch points out, Biden spoke from the West Front of the U.S. Capitol to demonstrate that the U.S. Constitution and

70. Tanguy Struye de Swielande, *The Biden Administration: An Opportunity to Affirm a Flexible and Adaptive American World Leadership*, 184 WORLD AFFS. 130, 132 (2021).

71. *See* Prasch, *supra* note 29, at 475.

72. *Id.*

the institution of the Presidency were safe from the attacks at that same location two weeks prior.[73] Biden, skilled as a centrist, benefitted from his lengthy legislative and executive experience,[74] focused on the future in the immediate context of the insurrection.[75] Yet, even this administration still had to address many of the issues of the Trump era, including those of relations with China.

This contrast between Trump and Biden appears perhaps most strongly within their respective foreign policies, as Biden in many ways had to "undo" the damage of Trump's previous administration to allies and competitors. [76] A key difference between Trump and Biden revolves around how best to address China. In many ways, the Biden Administration was forced to continue the final policies of the Trump Administration and allowed for a level of isolationism and resentment to continue, which China then used to blame the breakdown of a working relationship entirely on U.S. policy.[77] Glaser and Flaherty's analysis shows how far the policies of the Trump term in office carried on through the next administration, and Schadlow argues that the competition between America and China extends beyond economics and into ideology for both administrations.[78] Perhaps few other areas demonstrated this seemingly irreconcilable ideological difference between the countries than the support that Trump gave to Taiwan—support that continued with Biden.[79] Biden's continued unwavering support for Taiwan (as well as that from other members of his Administration and both Democrats and Republicans) has antagonized China and, in many ways, isolated the United States even further in East Asia.[80] This conflict was pointed out recently in Biden's

73. *Id.*

74. Mihai Zodian, *Biden Versus Trump: Elections, Tensions, and National Security*, 77 STRATEGIC IMPACT 38, 41 (2020).

75. James D. Boys notes, "Biden's inaugural address sought to set a new tone for the incoming administration: It removed the heat from presidential rhetoric, and made overtures to mainstream members of the Republican Party, while repudiating those who sought to sow political discord." James D. Boys, *All Change in the White House? Trump's Legacy and Biden's Challenges*, 12 POL. INSIGHT 29, 31 (2021).

76. This damage control included whole areas of international law: "[W]ithin U.S. foreign policy: (1) a pronounced preference for alternative normative instruments in lieu of multilateral treaties requiring approval by either or both houses of Congress; (2) a more hostile approach towards China; (3) deep skepticism of the world trading system; (4) reliance on trade sanctions to punish 'bad' actors; (5) circumspection towards U.N. system organizations; (6) avoidance of most international courts and tribunals; (7) aversion to never-ending wars and resistance to humanitarian use of force; and (8) ever more ironclad commitments to Israel's security." Jose E. Alvarez, *Biden's International Law Restoration*, 53 N.Y.U. J. INT'L L. & POL. 523, 524 (2021).

77. *See* Bonnie S. Glaser & Kelly Flaherty, *US–China Relations: Continuity Prevails in Biden's First 100 Days*, 23 COMPAR. CONNECTIONS 29, 29 (2021).

78. Nadia Schadlow, *Is There National Security Continuity Between the Trump and Biden Administrations?*, 65 ORBIS 377, 379 (2021).

79. *See* Glaser & Flaherty, *supra* note 77, at 34–35.

80. *See id.* at 34.

comments about Xi Jinping being a dictator after his Secretary of State's first diplomatic trip to Beijing in the wake of accusations of espionage from shooting down a "surveillance balloon" the U.S. accuses China of sending.[81] More recently, the visit by Treasury Secretary Janet Yellen[82] underscored the reality of the financial connection between the two countries but also the reality of the financial stranglehold that this one country may have over the United States' finances, given the level of treasuries that it holds[83]—along with the volume of U.S. currency.[84] China has shown a willingness to say "no" to the Biden Administration, as the recent visit by John Kerry regarding climate change has shown.[85]

In looking at the conflict with China, one is reminded of the old saying: "those who live in glass houses shouldn't throw stones." As the United States seeks assistance from China in avoiding a default on its national debt (through China's possible selling of its U.S. treasuries and dollar holdings), relations with China are critical to the survival of the United States. Therefore, the United States should not antagonize a country that may decide the future of the United States at a time when a threat of default is ever-present, especially in light of America's assistance to Ukraine to resist military efforts by Russia and President Biden's questionable responses to it,[86] in addition to the withdrawal from Afghanistan and current issues concerning undocumented immigrants.

81. Clement Tan, *Biden Labels Xi a Dictator*, CNBC: POL. (June 21, 2023 9:00 AM), https://www.cnbc.com/2023/06/21/biden-labels-chinese-president-xi-a-dictator.html [https://perma.cc/TSK5-9CYZ].

82. Zachary Warmbrodt, *Yellen Says China Talks 'Productive' at end of Beijing Trip*, POLITICO: TRADE (July 9, 2023, 8:01AM), https://www.politico.com/news/2023/07/08/janet-yellen-china-talks-00105311 [https://perma.cc/3KQ3-84R5].

83. *See Major Foreign Holders of Treasury Securities*, U.S. DEP'T OF THE TREASURY (Mar. 15, 2023), https://ticdata.treasury.gov/Publish/mfh.txt [https://perma.cc/YN5K-XC8M] [hereinafter *Major Foreign Holders*].

84. *See China Foreign Exchange Reserves*, TRADING ECON., https://tradingeconomics.com/china/foreign-exchange-reserves [https://perma.cc/333C-5UQF] (providing data that indicates that China owned 3.16 trillion (USD) in U.S. assets in its Foreign Exchange Reserves during August of 2023).

85. *See* Zack Colman, *Kerry's Trip to China Yields no Breakthrough on Climate*, POLITICO: ENERGY & ENV'T (July 19, 2023, 3:40 PM), https://www.politico.com/news/2023/07/19/kerrys-effort-to-secure-climate-deal-with-china-falls-short-00107022 [https://perma.cc/7FGH-RTR3].

86. *See* James D. Boys, *In Charge, but Not in Control: Biden's Foreign Policy*, 13 POL. INSIGHT 4 (2022).

The fraying of relations with China[87] will have other consequences.[88] The recent meeting between U.S. Secretary of State Antony Blinken and China's President Xi Jinping in June 2023 highlighted the need for cooperation, but it also exposed the many areas of tensions between the two countries, "including trade, Taiwan, human rights conditions in China and Hong Kong, Chinese military assertiveness in the South China Sea, and Russia's war in Ukraine."[89] More importantly to the United States, though, China has moved aggressively away from U.S. treasuries[90] in a way that may affect other countries' willingness to buy those treasuries,[91] and consequently, fund the United States' national debt. Even more important than the United States' national debt, however, is the interest rate on that debt[92] because China could "weaponize" its holdings of U.S. treasuries.[93] From January 2022[94] to April 2023,[95] China reduced its holding of U.S. treasuries from $1033.8 trillion to

87. Glaser & Flaherty, *supra* note 77.

88. The United States is already seeing the impact of weakening relations with China. *See* Aidan Connaughton, *Prevailing View Among Americans is that U.S. Influence in the World is Weakening – and China's is Growing*, PEW RSCH. CTR. (June 23, 2022), https://www.pewresearch.org/short-reads/2022/06/23/prevailing-view-among-americans-is-that-u-s-influence-in-the-world-is-weakening-and-chinas-is-growing/ [https://perma.cc/ZG3T-4Y9L] (explaining that more Americans see China as a "competitor" and the influence of the United States as weakening).

89. Matthew Lee, *Blinken and Xi Pledge to Stabilize Deteriorated US-China Ties, but China Rebuffs the Main US Request*, AP: WORLD NEWS (June 18, 2023, 8:52 PM), https://apnews.com/article/us-china-blinken-xi-biden-ce8bf13e5a02977a5291c001761ae0b3 [https://perma.cc/WSK5-JFXX].

90. *See* Jamie McGeever, *China Slips Away from Treasuries but Sticks with Dollar Bonds*, REUTERS (Feb. 23, 2023, 12:00 AM), https://www.reuters.com/markets/asia/china-slips-away-treasuries-sticks-with-dollar-bonds-2023-02-22/ [https://perma.cc/8BHV-K2G9].

91. *See* CAROL BERTAUT & RUTH JUDSON, BD. OF GOVERNORS OF THE FED. RSRV. SYS., FEDS NOTES: ESTIMATING U.S. CROSS-BORDER SECURITIES FLOWS: TEN YEARS OF THE TIC SLT (2023), https://www.federalreserve.gov/econres/notes/feds-notes/estimating-u-s-cross-border-securities-flows-ten-years-of-the-tic-slt-20220218.html [https://perma.cc/39Y5-6GS7]; *see also Major Foreign Holders*, *supra* note 83 (illustrating the decline of major foreign holdings in U.S. treasury securities from January 2022 through January 2023).

92. *See Schaefer*, *supra* note 1, at 463, 467; *see also* Gary E. Clayton, *The Federal Deficit and the National Debt: Why They Matter More Than We Think*, 40 BUS. ECON. 29, 30 (2005) (Clayton has argued that high interest rates on United States debt is an "accident waiting to happen and one that cannot be easily dismissed."); *see also* Joseph DioGuardi, *The Trillion-Dollar Annual Interest Payment*, CPA J., Apr. 2019, at 6 (warning of the trillion-dollar interest payment on the U.S. national debt); *see also* Scott Fullwiler, *When the Interest Rate on the National Debt Is a Policy Variable (and "Printing Money" Does Not Apply)*, 40 PUB. BUDGETING & FIN. 72, 72–73 (2020) (seeing the interest on the U.S. national debt as a policy variable where markets can demand higher yields as borrowing accelerates).

93. Schadlow, *supra* note 78, at 380–81.

94. *Major Foreign Holders*, *supra* note 83.

95. *Tbl. 5: Major Foreign Holders of Treasury Securities*, U.S. DEPARTMENT OF THE TREASURY, https://ticdata.treasury.gov/resource-center/data-chart-center/tic/Documents/slt_table5.html [https://perma.cc/4MDR-FKPV] [hereinafter *Tbl. 5*].

$868.9 billion. Other countries have also moved away from U.S. treasuries,[96] so China may use its holding of these treasuries as a bargaining tool within its foreign policy arena. Additionally, countries around the world are now moving away from the U.S. dollar as a foreign currency,[97] making the transition from the United States as the world's premier superpower to simply one among many ever more likely.

In looking back at the Trump Administration and his continued rise in politics even after so many judgements against him, Trump and Biden may once again face each other in a presidential runoff in 2024. Their foreign policies and economic dilemmas, however, are similar in nature. In many ways, Biden has continued many of the foreign policies on China and Afghanistan even as Trump, Biden, and the political community in general have become ever more polarized.[98] From a domestic perspective, this polarization has caused a deadlock in one of the most crucial areas today: the national debt. Never before has such a scenario played out so effectively within the public sphere, and at no time since the Great Depression have the results been so certain: it is not *if* the United States will default on its national debt, but *how* and *when*.[99] The impact of this default will have worldwide implications that are not yet fully understood as the United States currently remains a global leader. Gallagher has argued that the United States retains its status globally through political, economic, and humanitarian actions,[100] but when the United States defaults how will the image and power be viewed by the rest of the world? Will the United States simply become one of many countries around the world on a more equal basis with other countries like China, Britain, and Russia?

As this paper progresses, the central issue is how best to prepare for when the United States does default in a way that does not allow payments (interest or otherwise) on its debts.[101] This after-effect will challenge the United States and the rest of the world in ways never seen before, as this

96. In that same period, major holders of U.S. treasures reduced their holdings from $7655.9 billion to $7580.8 billion. *Major Foreign Holders*, *supra* note 83; *Tbl. 5*, *supra* note 95.

97. *See* Penny Chen, *Calls to Move Away from the U.S. Dollar are Growing – but the Greenback is Still King*, CNBC: CURRENCIES (Apr. 24, 2023, 4:03 PM), https://www.cnbc.com/2023/04/24/economic-and-political-factors-behind-acceleration-of-de-dollarization.html [https://perma.cc/V7ZN-2PSP].

98. *See* Juan Tovar Ruiz, *La Paradoja de la Política Exterior de Joe Biden* [*Joe Biden's Foreign Policy Paradox*], 132 REVISTA CIDOB D'AFERS INTERNACIONALS 195 (2022).

99. *See* Schaefer, *supra* note 1, at 467–68. In many ways, this paper is a continuation of an article that this author wrote about the need to prepare for a default on the U.S. national debt.

100. *See* John Gallagher, *American Leadership Amidst Complexity and Crisis*, 14 REV. FAITH & INT'L. AFFS. 1, 1 (2016).

101. Once the United States defaults, there will be a downward spiral where states, cities, and municipalities will also likely default on their debts—not to mention other countries around the world following suit—causing a domino effect that will have worldwide repercussions.

nation finds itself in a transition period and need to stabilize its population. Biden will likely need to use all of his resources, including the military, economic sanctions, and soft power.[102] However, he must first understand the legal ramifications that will allow him to ensure the safe transition to a world community of many powerful nations in pursuit of a stabilized world order.[103]

In June 2023, the United States government got ready for a possible default on its national debt for the first time in its history but managed to get out of it with only days to spare.[104] The agreement, entitled *Fiscal Responsibility Act,* did little to address the national debt.[105] Biden and his Administration, along with the leadership of both congressional parties, will need to face the realities of a changing world in times of unprecedented crises.[106] The question remains as to how Biden and his Administration will handle this upcoming gauntlet regarding future government shutdowns and debt ceiling crises that will test the fiscal ability to get through the default and to come out on the other side[107]—undoubtedly as a transformed nation. In that process, the Biden Administration will need to have a flexible leadership to help ensure the United States' position as world leader exists.[108]

102. *See* Struye de Swielande, *supra* note 70, at 141. *See generally* Seyed Mehdi Miri1 & Ali Omrani, *The Impact of Joe Biden's Rise to Power on the US Transatlantic Foreign Policy*, 17 CIMEXUS 219 (2022).

103. Perhaps nowhere else can this be seen as with the United Nations where, under the Trump Administration, there was a sense of withdrawal from the international community—something that the Biden Administration has been working to fix. *See generally* Marko Novaković, *The Differences in US Foreign Policy Towards the UN and ICC in Trump and Biden Administrations*, 74 INT'L PROBS. 611 (2022).

104. Tami Luhby, *Debt Ceiling Package Does Little to Address America's Major Fiscal Problems*, CNN: POL. (June 6, 2023, 8:47 AM), https://www.cnn.com/2023/06/06/politics/national-debt-growth-debt-ceiling/index.html [https://perma.cc/S25P-WU7V].

105. *Id.*

106. *See* Christopher M. Tuttle, *Out of the Debt Ceiling Fire, But Still in the Frying Pan*, COUNCIL ON FOREIGN RELS. (June 2, 2023, 9:46 AM), https://www.cfr.org/blog/out-debt-ceiling-fire-still-frying-pan [https://perma.cc/52TG-K799].

107. When dealing with economic and national security issues combined, what is resolved is often what the President or Members of Congress anticipated. *See* William A. Niskanen, *Slow Down the Political Response to a Perceived Crisis*, 18 GOOD SOC'Y 10 (2009).

108. *See generally* Struye de Swielande, *supra* note 70.

Yet, this will remain a challenge. With a conservative-leaning Supreme Court[109] whose judicial review[110] will directly impact cases[111] with a 6-3 majority of justices,[112] along with a divided Congress and a Democrat presidency, the United States finds itself in a truly difficult position on moving forward with any sense of urgency on matters, including the national debt. Corbett notes many of the struggles of a checks and balances system and the issues of crisis management.[113] One would think that, even when necessity arises (as with a possible default on the national debt), the Biden administration might count on a sense of unity within Congress; yet, as has played out recently with the crisis of the debt ceiling averted,[114] such a unity cannot be

109. Heather Elliott notes that the Republicans under former president Trump have managed to make the Supreme Court even more conservative with the additions of Neil Gorsuch and Amy Coney Barrett (in addition to Brett Kavanaugh) through political maneuvering on the part of Republican Senate majority leader Mitch McConnell, thereby changing the court to one of the most conservative in modern history. *See* Heather Elliott, *A Biden Executive Branch and Its Supporters May Find the Federal Courts an Obstacle*, 16 HARV. L. & POL'Y. REV. 1, 30–31 (2021). This conservative makeup could limit Biden's ability to address changes to laws that would help in a time of crisis and allow challenges to the use of laws allowing regular military members in civilian enforcement measures that could allow stabilization to take place following a period of chaos after a default on the national debt.

110. *See* Lincoln Caplan, *Who Cares About Executive Supremacy?*, THE AM. SCHOLAR (Dec. 1, 2007), https://theamericanscholar.org/who-cares-about-executive-supremacy/ [https://perma.cc/K9PH-B8M7] ("By general agreement for the past half century at least, the Supreme Court has been granted the last word on what the Constitution means, including its meaning with reference to the president's power.").

111. One of the key issues here is how this current Supreme Court will use its power of judicial review to thwart matters that the Biden administration considers key to resolving the national debt crisis and the events that occur afterwards in the transition period following a formal default. *See generally* Arthur H. Garrison, *National Security and Presidential Power: Judicial Deference and Establishing Constitutional Boundaries in World War Two and the Korean War*, 39 CUMB. L. REV. 609 (2009); Dawn Johnsen, *"The Essence of a Free Society": The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467 (2012).

112. *See* Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/WPX7-B37J]. For a full list of the Supreme Court Justices, see *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/ZKL7-48WU].

113. *See* Ross J. Corbett, *Locke and the Challenges of Crisis Government*, 18 GOOD SOC'Y 20 (2009).

114. Even though the President signed The Fiscal Responsibility Act of 2023 on June 3, 2023, many Republicans were not happy with the bill, and the possible future fights over the debt ceiling and government funding that could lead to a default and/or a downgrade of the U.S. Treasuries still exist. *See* Dareh Gregorian, *Biden Signs Bipartisan Debt Ceiling Bill to Avert Government Default*, NBC NEWS (June 3, 2023, 12:50 PM), https://www.nbcnews.com/politics/white-house/biden-signs-bipartisan-debt-ceiling-bill-avert-government-default-rcna87516 [https://perma.cc/3UVZ-YRZ5].

assumed because of Congress or the Supreme Court. The question here remains as to whether Biden himself has the ability to persuade[115] members of Congress and the Supreme Court in times of crises. Given the divided nature of the parties noted earlier, such a reconciliation will likely not occur.

As will be discussed later in more detail, one of the key issues here is the use of the military in times of crisis.[116] Because this use comes at the request of the President of the United States, presidents sometimes can and should use the regular military for domestic purposes in such a way as to stabilize the country. Many of the struggles after the default will center on the ability of the Biden Administration and future presidents to work with states and governors who will likely resist any major authority directed at their state,[117] especially if that authority comes at the hands of those in uniform. Yet, as Bahar points out, the use of the military must be considered when public safety cannot be maintained by legislation or court actions, even if the state-level government is intended to act as another check on federal power.[118] One of the key points that Bahar brings to the forefront is that the military can and should be used, but there are often limitations based upon constitutionally enshrined values where the states have often resisted any form of military intervention. Governors, in particular, have been resistant to intervention under the guise of federalism when it comes to presidential power being used with or without their permission within their states.[119] Many of the questions Bahar raises relate directly to the issues that the President will face once the truly chaotic nature of a complete default materializes. What the President can or cannot do to ensure stability once a formal default occurs is an area that can be described at best as "muddy," existing only as speculation at this point and with no concrete idea on how the final events will unfold. Yet, as will be discussed later, such a premise centers on facing the reality of it now and preparing for such an event.[120] Remember that

115. This power of persuasion is key in a President's ability to get issues resolved and bills passed and signed into law. *See* John Hart, *Presidential Power Revisited*, 25 POL. STUD. 48 (1977).

116. *See* Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT'L SEC. J. 537 (2014).

117. The struggle to enforce laws onto states will be difficult, even after a major crisis such as a default on the national debt. Perhaps nowhere can this be seen as with Hurricane Katrina and the recent Covid-19 pandemic when state governors resisted assistance and directives given by the President. *See* Andrew Rudalevige & Victoria E. Yu, *Pandemics and Presidential Power: A Taxonomy*, 50 PRESIDENTIAL STUD. Q. 690, 701 (2020).

118. *See* Bahar, *supra* note 116, at 537.

119. *Id.* at 539–40.

120. The question that Elliott brings up is the extent to which a conservative-leaning Supreme Court might challenge any memoranda issued by Biden. *See* Elliott, *supra* note 109, at 2–3. Should Biden issue a memoranda on plans to prepare agencies for a default on the national debt, how far would the Justices of the Supreme Court go to stop such plans from becoming a reality?

in times of crisis, time matters[121]: the better one is prepared, the quicker the events will allow for a stabilization brought about through planning and preparation.

C. The U.S. National Debt[122]

Perhaps few other issues have been as important as ensuring that the United States does not default on is national debt. Yet, as this author has argued, it is not *if* but *when* it will do so.[123] Douglas and Raudla have clarified the potential chain reaction from the growing debt that cannot be paid in terms of less demand for Treasuries affecting interest rates and driving investors away from American financial institutions, possibly to the demise of many.[124] One of the key points in this article is that foreign holders of the U.S. national debt,[125] especially China, may exit and sell that debt.[126] The fight over the debt ceiling has only been postponed for about two years once the current agreement ends in January 2025.[127] As long as the debt ceiling has been raised, some argue that the United States cannot default on its debt,

121. See the article by Laura Young, who argues that time matters in crises for the legislative and executive to make unilateral decisions: Laura Young, *Unilateral Presidential Policy Making and the Impact of Crises*, 43 PRESIDENTIAL STUD. Q. 328, 330–32 (2013). Also see the following article on the issue of executive orders when they are used to make unilateral actions: Adam L. Warber et al., *Landmark Executive Orders: Presidential Leadership Through Unilateral Action*, 48 PRESIDENTIAL STUD. Q. 110 (2018).

122. I have studied the politics of the national debt dating back to when I started research on my first senior honors thesis in 1991 for my bachelor's degree in political science. *See* Donald D.A. Schaefer, *The Economic Conversion Process and the Military in Hawaii* (1992) (B.A. thesis, University of Hawaii at Manoa) (on file with author). I also completed a second major and a second senior honors thesis for my bachelor's degree in religion through my Ph.D. dissertation and through one of my most recent articles. *See* Donald D.A. Schaefer, US Foreign Assistance and the Change from Economic to Security-Based Aid: Reagan Through Clinton (1999) (Ph.D. dissertation, University of Michigan) (on file with author); Schaefer, *supra* note 1. Through it all, the debt has changed from $3.7 trillion in 1991 to where it stands today at over $32 trillion. *See* U.S. TREASURY FISCAL DATA, *supra* note 8. As of July 27, 2023, the U.S. national debt stood at $32,659,378,691,249.41. *Id.*; *see also* Kimberly Amadeo, *US National Debt by Year*, THE BALANCE (Jan. 18, 2023), https://www.thebalancemoney.com/national-debt-by-year-compared-to-gdp-and-major-events-3306287 [https://perma.cc/H5GM-CVJF].

123. *See* Schaefer, *supra* note 1.

124. *See* James W. Douglas & Ringa Raudla, *Who is Afraid of the Big Bad Debt? A Modern Money Theory Perspective on Federal Deficits and Debt*, 40 PUB. BUDGETING & FIN. 6 (2020).

125. *See Tbl. 5*, *supra* note 95.

126. *See* Douglas & Raudla, *supra* note 124, at 19–20.

127. *See* Sahil Kapur, *Debt Limit Law Sets Up 'Enormous' Stakes for the 2024 Election with Deadlines for Default, Obamacare and Trump Tax Cuts*, NBC NEWS (June 7, 2023, 7:00 AM), https://www.nbcnews.com/politics/congress/debt-limit-law-sets-enormous-stakes-2024-election-rcna87918 [https://perma.cc/Y5MH-PKJV].

often through a process known as quantitative easing.[128] As Buchanan points out, because the U.S. treasury issues bonds and dollars, default is impossible.[129]

Buchanan goes on to argue, however, that the U.S. deficits may cause other countries to lose confidence in the fiscal stability of this country, and simply stop accepting trades in U.S. treasuries.[130] Once this occurs, the United States may find itself in a position where it has raised the debt ceiling, but no countries outside America are willing to buy Treasuries—thereby bringing a sudden and dramatic end to the United States national debt scenario and forcing a collapse of that debt market. Such a collapse will have worldwide financial impacts that countries should even now look into and prepare for such an event.

The question presented in this paper is how best to address the aftermath of such a default. For now, this section addresses the current crisis—including the battle over the debt limit—and how the Biden Administration has continued to address it. Leadership is key in this area. As Kraft states, a president must leverage their unique rhetorical opportunities to enhance a sense of national belonging and mission.[131] If Biden can bring about change and stability through his leadership, then perhaps one of the greatest catastrophes in modern history may have a light at the end of the tunnel. Regardless, however, America needs to prepare for the default under domestic and international law, as well as put in place a detailed plan[132] to address what happens after a complete default where the United States no longer pays on its interest

128. *See* Nathaniel Frentz et al., *How the Federal Reserve's Quantitative Easing Affects the Federal Budget*, CONG. BUDGET OFF. (Sept. 2022), https://www.cbo.gov/publication/58457 [https://perma.cc/72HB-NQRU].

129. *See* Neil H. Buchanan, *Good Deficits: Protecting the Public Interest from Deficit Hysteria*, 31 VA. TAX REV. 75, 86–87 (2011).

130. *Id.* at 89–90.

131. Luiza Kraft, *Managing Defense Resources. Is There a 'Language of Leadership'?*, 4 J. DEFENSE RES. MGMT. 27 (2013).

132. It is argued here that the best comparison is the plans the president has when launching nuclear weapons in that a list of scenarios are given to him, and it would be the president's complete authority of when to make critical decisions based upon advice given to the president in times of an absolute crisis. It is here that options regarding nuclear strikes are presented, and the president is allowed to then choose one. Once the decision is made, it is quickly acted upon, e.g., orders are sent and people come into play. There is also a clear hierarchy as to who is in charge and who has the authority to make decisions. *See* AMY F. WOOLF, CONG. RSCH. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES (2022), https://sgp.fas.org/crs/natsec/IF10521.pdf [https://perma.cc/56ZJ-4CWP]. In the case argued here, for example, where there was a *complete* default on the national debt that has led to widespread chaos, the president should be given the scenarios of what is taking place and options on how best to use the military and other agencies. Once a decision is made, there should be a clear hierarchy that would allow a specific plan to be quickly implemented.

or principle. As has been noted by this author, a "structured" or planned default is the best option for when the United States does default on its national debt,[133] but the aftermath must also have plans in place to safeguard the country.

One major consideration relates to the debt ceiling and how best to manage the skyrocketing national debt. Perhaps, as Quirk states, America's time of economic prosperity and influence is ending due to partisan politics that ignore the bottom line in favor of ideological grandstanding.[134] Quirk's message is clear in that the polarization of the Democratic and Republican parties has led to an impasse on the national debt and how best to manage it. In the end, the ability of the United States to remain as a world power may come to an end as other countries shy away from the purchasing of U.S. Treasuries and the U.S. dollar,[135] thereby bringing a sudden and dramatic close to what has been the most prosperous country in the world.

Many of the problems of how to deal with the national debt have centered on the willingness to make changes to the "sacred cows"[136] that could help balance the budget—cutting Social Security, Medicare, and defense spending along with raising taxes.[137] Without a willingness for major changes, there is little chance that the national debt will stop rising dramatically; this resistance[138] will only continue until there is a formal default on the national debt. Perhaps one of the silver linings in such a situation would

133. *See* Schaefer, *supra* note 1, at 462, 481–82.

134. *See* Paul J. Quirk, *A House Dividing: Understanding Polarization*, 9 FORUM (SEPARATELY PAGINATED ISSUE) 1 (2011).

135. The U.S. dollar has remained the world's reserve currency but this may be at risk. *See* Warren Matthews & Robert Driver, *Managing Federal Debt: A Two Phased Approach,* 14 J. MGMT. POL'Y & PRAC. 105, 108 (2013). Once a default occurs, the value of the U.S. dollar may collapse due to countries selling off their reserves. A period of hyperinflation will then take place, whereby the prices of U.S. goods will skyrocket to a point of mass riots and other uprisings. This event has occurred in the past. *See* Paul Toscano, *The Worst Hyperinflation Situations of All Time*, CNBC (Jan. 29, 2014, 4:49 PM), https://www.cnbc.com/2011/02/14/The-Worst-Hyperinflation-Situations-of-All-Time.html [https://perma.cc/YX8G-J4RN]; *see also* Steve H. Hanke, *Lebanon Hyperinflates*, NAT'L REV. (July 23, 2020, 4:30 PM), https://www.nationalreview.com/corner/lebanon-hyperinflates/ [https://perma.cc/8XTQ-TDVX] (example from Lebanon); Steve H. Hanke & Charles Bushnell, *On Measuring Hyperinflation: Venezuela's Episode*, 18 WORLD ECONS. 1 (2017) (example from Venezuela).

136. Under President Biden's proposed 2024 budget, there appears to be only increases in Social Security, Medicare, Medicaid, and defense spending, along with few meaningful changes to the taxes collected. *See* OFF. OF MGMT. & BUDGET, *supra* note 9.

137. *See* Schaefer, *supra* note 1. I have argued in this paper that it is not so much the national debt that is important, but the interest rates on that debt. *See also* Matthews & Driver, *supra* note 135, at 108–09; John L. Palmer & Rudolph G. Penner, *The Hard Road to Fiscal Responsibility*, 32 PUB. BUDGETING & FIN. 4 (2012).

138. See Sheldon Richman, *Budget-Cutting Resistance*, 61 THE FREEMAN: IDEAS ON LIBERTY 22, 22-23 (2011).

be that, for the first time in modern history, American leadership will express a willingness to ensure that the United States lives within its means.[139]

Debate has continued over the national debt and, more specifically, raising the debt limit.[140] There have been many arguments for and against the debt ceiling imposed by Congress, which will continue at both the federal and state levels.[141] This debate has plagued the United States for some time.[142] The last major stand-off over the 2011 debt limit crisis under then-President Barack Obama[143] also suffered from a similar type of partisanship[144] that continues today. In comparing the partisanship that took place in both deals to raise the debt ceiling, one can see the limitations that both Obama and Biden have faced as each person had to come to grips with getting his party membership and congressional members from the Republican side of the aisle to agree to a compromise.[145] The politics that were on display were there for the world to see, yet this partisanship (as noted previously) has been at levels not previously seen in modern history. Some differences today, however, may well allow for a default on the national debt in the coming years for the first time in United States history. The debate over how best to address this self-imposed financial crisis over the debt ceiling continues unabated.

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139. Yet, this will not come without pain, frustration, regret, anger, and chaos.

140. *See* Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135 (2005) (examining the history of the debt limit statute and arguing for its continuation).

141. Many states, cities, and municipalities have self-imposed debt limits that affect their ability to borrow money. *See generally* Nadav Shoked, *Debt Limits' End*, 102 IOWA L. REV. 1239 (2017).

142. Lew has noted, "Congress sets a statutory debt limit that restricts the ability of the Treasury Department to issue new debt. Raising the debt limit does not authorize any federal spending; it simply allows the government to pay bills already incurred. For decades, raising the debt limit has been a recurring issue in Congress. Importantly, every debt limit debate has concluded with an increase to the statutory limit, thereby avoiding an unprecedented and catastrophic default on our national debt. However, in recent years, the unthinkable has too often come too close for comfort. What once was a deadline that drove debates on the budget has transformed into a nihilistic platform for some in Congress to promote the very real risk of a default to advance narrow partisan agendas." Jacob J. Lew, *Managing Our National Debt Responsibly: A Better Way Forward*, 54 HARV. J. ON LEGIS. 1, 310, 310 (2017).

143. Much like the ongoing debates today, there were several constitutional debates over Obama's ability to unilaterally raise the debt limit. *See Constitutional Law—Separation of Powers—Congress Delegates Power to Raise the Debt Ceiling.,* 125 HARV. L. REV. 867 (2012). Ultimately, the conservative-leaning Supreme Court may have to decide this important question—can a president unilaterally raise the debt limit under the powers given by the U.S. Constitution? *See* Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L. J. 1227 (2013).

144. *See* Tyler Roberts, *Congressional Partisanship: Déjà Vu All Over Again?*, 27 FIN. EXEC., Sept. 2011, at 18.

145. *See generally* Frances E. Lee, *Presidents and Party Teams: The Politics of Debt Limits and Executive Oversight, 2001–2013*, 43 PRESIDENTIAL STUD. Q. 775 (2013) (providing a brief history of the politics of the debt limits).

The bill signed into law by Biden on ending the fight over the debt ceiling limits national security spending at $886 billion, which is approximately the 3% increase President Biden requested, but it would be capped at $895 billion for the following fiscal year, supplemental spending bills notwithstanding.[146] After the deal, there is still a very strong possibility of further downgrades in the credit ratings—beyond that which occurred on August 1, 2023, by Fitch (which decreased the U.S. debt rating from AAA to AA+)[147] These future downgrades will affect the United States as few could can imagine. Sutton points out that Fitch Ratings, a major credit agency, has informed American leaders that, even with the debt ceiling deal having been reached, partisanship seems to be causing potentially irreparable harm to the U.S. credit rating.[148]

Future downgrades due to the ongoing polarization would rattle the United States' financial system to its core, and would set the United States further along a path of default as interest on the U.S. treasuries would climb to unsustainable levels and would affect households across the United States in unpredictable ways. This will only add to the polarization currently affecting today's politics. With the next ceiling fight to begin on or around January

146. Caroline Coudriet, *Hawks Worry About Defense Caps in Debt Limit Deal*, ROLL CALL (May 31, 2023, 11:20 AM), https://rollcall.com/2023/05/31/hawks-worry-about-defense-caps-in-debt-limit-deal/ [https://perma.cc/GW6S-WHH6]. For a more complete list, see Tami Luhby, *Here's What's In the Debt Ceiling Package*, CNN: POL. (June 2, 2023, 7:13 AM), https://www.cnn.com/2023/05/30/politics/whats-in-the-debt-ceiling-deal/index.html [https://perma.cc/8JNE-HDUX]. For the complete bill, see Fiscal Responsibility Act of 2023, Pub. L. 118-5, 137 Stat. 10 (2023).

147. *See* sources cited *supra* note 12.

148. Sam Sutton, *Biden's Debt Deal Paved the Way for the Next Financial Mess*, POLITICO (June 13, 2023, 4:30 AM), https://www.politico.com/news/2023/06/13/biden-debt-ceiling-credit-downgrade-00101277 [https://perma.cc/43ZH-JZ9E]. Also see my section on the *Underlying Danger* in Schaefer, *supra* note 1, at 463–65, which addresses the potential effects of a downgrade in the rating on U.S. treasuries.

1, 2025,[149] when the current debt ceiling deal expires, the likelihood of a default will only increase. Now is the time to prepare for the likely default,[150] and, more importantly, the transition period that would follow such a default. This time, the United States came close to a default and only narrowly averted it.[151] Next time, the United States may not be so lucky.

There have been calls to raise the national debt limit and thereby allow the United States to borrow as much as it can without any limits, completely bypassing the idea of a debt limit.[152] To begin, there are arguments that the Fourteenth Amendment, Section Four would make it impossible for the United States to default on its national debt[153]:

> *The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned*. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave;

149. The January 1, 2025, deadline is critical and may only add to the likelihood of the start of another default. For now, this deadline is ever-present at a time when there should be bipartisan support for the deal, entitled "Fiscal Responsibility Act of 2023," but whose existent for this support is coming into question as more conservative Republicans balk at the deal already reached. To begin, see the following article as it relates to the background of this Act: Jeremy Diamond & Phil Mattingly, *Veterans, Stalemates and Sleepless Nights: Inside the White House Strategy to Strike the Debt Ceiling Deal*, CNN: POL. (June 3, 2023, 9:38 AM), https://www.cnn.com/2023/06/03/politics/white-house-strategy-debt-ceiling/index.html [https://perma.cc/LCM5-TK8G]. Next, see the following article on Biden signing the Act: Chris Megerian, *Biden Signs Bipartisan Bill that Suspends Debt Limit Until 2025, Cuts Spending*, PBS NEWS HOUR (June 3, 2023, 3:58 PM), https://www.pbs.org/newshour/politics/biden-signs-bipartisan-bill-that-suspends-debt-limit-until-2025-cuts-spending [https://perma.cc/GVV3-BH8P]. See the Act itself at 137 Stat. 10. Finally, see Caitlin Emma & Jennifer Scholtes, *A Debt Deal Twist Is Shifting Congress' Shutdown Gameplan*, POLITICO (June 26, 2023, 4:30 AM), https://www.politico.com/news/2023/06/26/congress-spending-shutdown-mccarthy-biden-00103346 [https://perma.cc/F4WF-SB3Q], for many of the issues surrounding the ongoing conflict regarding this Act.

150. *See* Schaefer, *supra* note 1.

151. *See* Franco Ordoñez, *Biden Signs Bipartisan Deal to Avert Debt Default*, NPR (June 3, 2023, 1:56 PM) https://www.npr.org/2023/06/02/1179658326/biden-debt-ceiling [https://perma.cc/J32R-QJRK].

152. The following article looks at the constitutional options of raising the debt ceiling based upon lessons learned from the 2011 crisis: Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012).

153. The following article makes the argument that defaulting on the national debt is impossible: Zachary K. Ostro, *In the Debt We Trust: The Unconstitutionality of Defaulting on American Financial Obligations, and the Political Implications of Their Perpetual Validity*, 51 HARV. J. ON LEGIS. 2, 253–60 (2014). The reality, however, is that the United States can default on it through a self-imposed crisis of its own making. The following article looks at what happens if Congress fails to raise the debt ceiling, and the legal options available to address this failure: Kelleigh Irwin Fagan, *The Best Choice out of Poor Options: What the Government Should Do (Or Not Do) If Congress Fails to Raise the Debt Ceiling*, 46 IND. L. REV. 1 (2012).

> but all such debts, obligations and claims shall be held illegal and void.[154]

Recently, Biden has considered using this amendment to circumvent Congress in raising the national debt. Frazier has stated that some Democrats are urging President Biden to invoke this section of the Fourteenth Amendment, but others like Janet Yellen have questioned the validity of this strategy, while Senate Minority Leader McConnell has called this possibility "unconstitutional.[155]

Whether the Fourteenth Amendment is used is perhaps only a matter of time, as both the Democrats and Republicans appear to be at far ends of the spectrum when it comes to addressing the debt limit, and it may be the last option in Biden's arsenal should such a crisis occur again in 2025, but many are pushing back against such usage. For example, The US Chamber of Commerce Chief Policy Officer Neil Bradley stated, "It is the Chamber's view that attempting to invoke so-called 'powers' under the [Fourteenth] Amendment would be as economically calamitous as a default by a failure to lift the debt limit in a timely manner."[156] As a result of these legal arguments, it may be up to the conservative-leaning Supreme Court to decide the constitutional validity of the Fourteenth Amendment under judicial review and how it impacts the paying of the national debt—and more importantly, whether the president can use it to circumvent Congress in doing so.

In the end, as Stone writes, even with popular consensus that the budget needs to be balanced, creating a successfully balanced budget on either side of the aisle remains optimistic at best.[157] In looking at the potential for cuts to spending in the federal budgets (and at other state levels), lawmakers need to remember that real people, as Stone so carefully notes, will be affected by those cuts both within and outside the borders of the United States. The danger of the deals from 2011 and the most recent one is that people may perceive this crisis as "the boy who cried wolf"[158] because people heard first that

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154. U.S. CONST. amend. XIV, § 4 (emphasis added).

155. Kierra Frazier, *What You Need to Know About the 14th Amendment and the Debt Ceiling*, POLITICO (May 19, 2023), https://www.politico.com/news/2023/05/19/14th-amendment-biden-debt-ceiling-00097932 [https://perma.cc/AKT5-497X].

156. Matt Egan, *US Chamber of Commerce Argues Invoking 14th Amendment Would Be as 'Economically Calamitous' as a Default*, CNN: BUS. (May 19, 2023, 4:23 PM), https://www.cnn.com/2023/05/19/economy/chamber-of-commerce-14th-amendment/index.html [https://perma.cc/9BKB-BL79].

157. Alec Stone, *The Federal Budget as a Political Document*, 32 ONS VOICE: ADVOCACY (June 15, 2017), https://voice.ons.org/advocacy/the-federal-budget-as-a-political-document [https://perma.cc/8U49-AAP4].

158. Pu Liu, Yingying Shao, & Timothy J. Yeager, *Did the Repeated Debt Ceiling Controversies Embed Default Risk in US Treasury Securities?*, 33 J. OF BANKING AND FIN. 8, 1464, 1465 (2009); *cf.* Aesop for Child*., The Shepherd Boy & the Wolf*, LIBR. OF CONG., https://read.gov/aesop/043.html [https://perma.cc/5FZJ-3RYC] (telling the story of "the boy who cried wolf").

danger was imminent but then were told there was very little to actually worry about—but the wolf may actually come. In the 2011 crisis spending cuts, many of those cuts were watered down, and the actual impact was limited.[159] The question remains as to the lessons that can be learned and what might be expected in the coming months and years after this most recent deal to raise the debt ceiling.[160] This recent game of chicken[161] caught many by surprise, but the next game between Republicans and Democrats may well lead to a default. Yet, once this transition period begins and more lives are affected, a period of austerity[162] will begin where the United States government and others at the state, city, and other levels will have to come to terms of living within ones means.[163]

As the United States and world leaders look back on the consequences of raising the debt limit, a final consideration is how the rest of the world looked at the events that took place. During this period, as Gangitano points out, the debt ceiling fight made the United States look weak and incapable of handling its finances.[164] Remember that there is a difference between how the United States views the world, how the world views the United States, and how the United States thinks that the world views itself.[165] In the end, the

159. *See* Tami Luhby, *Obama Agreed to $2.1 Trillion in Spending Cuts to End 2011 Debt Ceiling Crisis. Here's What Happened Next.*, CNN: POL. (May 30, 2023, 11:43 AM), https://www.cnn.com/2023/05/30/politics/debt-ceiling-obama-spending-cuts/index.html [https://perma.cc/7KNN-AC73].

160. *See id.*

161. *See* Liu et al., *supra* note 158, at 1464.

162. *See* Richard McGahey, *The Political Economy of Austerity in the United States*, 80 SOC. RSCH. 717, 717–718, 742 (2013). The reality is the United States will be forced to live within means. Perhaps one of the greatest issues of contention will be to increase taxes to a level that keeps pace with the outflows of money. One would hope that politicians might start this process sooner than later. The following article argues for reforms to the taxes collected to avoid a budget catastrophe. Daniel Shaviro, *Tax Reform Implications of the Risk of a U.S. Budget Catastrophe*, 50 U. LOUISVILLE L. REV. 577 (2012).

163. Once the United States defaults on its debt, and layoffs persists due to government shutdowns, state, city, and municipalities will also be faced with very tough choices. In essence, the trouble at the federal level will spill downward through the states and local communities. See the following article on state and municipal austerity measures:Robert Pollin & Jeff Thompson, *State and Municipal Alternatives to Austerity*, 20 NEW LAB. F. 22 (2011). It will be a period of severe austerity not seen since the Great Depression that lasted from 1929 to 1941. *See generally* Gary Richardson, *The Great Depression 1939-1941*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-depression#:~:text=The%20Depression%20was%20the%20longest,financial%20crises%20punctuated%20the%20contraction [https://perma.cc/N4LD-DSYY].

164. Alex Gangitano, *Psaki on Debt Ceiling Talks China Probably 'Rooting for Default'*, THE HILL (May 19, 2023 4:40 PM), https://thehill.com/homenews/administration/4012740-psaki-on-debt-ceiling-talks-china-probably-rooting-for-default/ [https://perma.cc/GQ39-2V3H].

165. The impact of world opinion in regard to the debt ceiling is important, as world leaders may have less faith in the U.S. treasuries as the divisiveness continues in Congress. I have argued

events that took place will likely have lasting consequences far beyond what anyone could have anticipated—an event that will only be furthered once it has formally defaulted on its national debt.

D. Financial Crisis and Defaulting on the National Debt

One might think that lessons can be learned from past mistakes; as Durant has stated, "A great civilization is not conquered from without until it has destroyed itself within."[166] The aftermath of the 2008–2009 financial crisis caused a series of actions, including the Dodd–Frank Wall Street Reform and Consumer Protection Act,[167] to ensure that such a financial crisis would never again occur. But how might the next Presidential Administration and Congress react to a similar crisis?[168] Over the years since its enactment, this Act has been watered down[169] to a point where the events of 2008–2009 not only could but likely will happen again. This author believes that a default on the national debt and a major collapse of the banking industry will occur together. Perhaps one the greater mysteries of a default on the national debt

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that world opinion does matter when it comes to world influence and the position of the United States within the world community. *See* Donald D.A. Schaefer, *The International Criminal Court: Former President George W. Bush And World Opinion*, 16 ILSA J. OF INT'L & COMPAR. LAW 39, 68–70 (2009).

166. Will Durant, *Will Durant on the Decay of Civilization,* PRESERVING AMERICA, http://web.archive.org/web/20120311174000/http://preservingamerica.org:80/durant_civilization [https://perma.cc/QA8R-DFZF]. Here, the United States must first be destroyed from within through a complete default on its national debt that leads to widespread chaos. At the same time, other countries and world leaders may be seeing this coming into play and choose not to act. *See Give Someone Enough Rope to Hang Themselves*, THE FREE DICTIONARY BY FARFLEX, https://idioms.thefreedictionary.com/give+someone+just+enough+rope+to+hang+themselves [https://perma.cc/4QWR-2J3C]. In this sense, countries may see that the United States is getting ready to default on its national debt, and have chosen not to interfere—knowing that such a default will bring the downfall of this country through its own means.

167. *See* Douglas D. Evanoff & William F. Moeller, *Dodd-Frank: Content, Purpose, Implementation Status, and Issues*, 36 ECON. PERSPECTIVES 75, 75–77 (2012); *see also* Skyler Splinter, *What Is Left of Dodd-Frank?*, 38 REV. BANKING & FIN. L. 117 (2018); Peter Gruskin, *Dodd-Frank, Bailout Reform, and Financial Crisis Ambiguities*, 13 KENNEDY SCH. REV. 28 (2013); Suk Hi Kim & Connor Muldoon, *The Dodd–Frank Wall Street Reform and Consumer Protection Act: Accomplishments and Shortcomings*, 17 J. APPLIED BUS. & ECON. 92 (2015).

168. At the heart of the next financial collapse is the future interaction between the President, Congress, and the many financial markets that depend upon the stability of the United States system—a system that is currently suffering from major far-left and far-right ideology differences. The interaction between the major components is critical to ensuring that we get through it. *See* Jack H. Knott, *The President, Congress, and the Financial Crisis: Ideology and Moral Hazard in Economic Governance*, 42 PRESIDENTIAL STUD. Q. 81 (2012); *see also* M. Stephen Weatherford, *The President, the Fed, and the Financial Crisis*, 43 PRESIDENTIAL STUD. Q. 299 (2013).

169. *See* Kevin R. Huguelet, Comment, *Death by a Thousand Cuts: How the Supreme Court Has Effectively Killed Campaign Finance Regulation by Its Limited Recognition of Compelling State Interests*, 70 U. MIAMI L. REV. 348, 352 (2015).

is the potential impact that it may have on the banking industry—and, perhaps equally important, is the impact of the banking industry on the financial crisis that will ensue. As this author has argued, it is not so much the national debt that matters but rather the interest on that debt.[170] Further, the highly unregulated derivatives that are by some estimates worth over $600 trillion[171] are often chain-linked[172] through credit-default swaps,[173] which could lead to the collapse of the global financial markets once the United States defaults on its debt.[174] After the default, the question remains as to how long it will take for the United States to get back on its feet.[175] This will differ from the 2008 financial crisis in that the future formal default will be permanent, placing a general freeze on interest and principle payments to its treasuries; in essence, the United States will be filing its own version of a "Chapter 11" whereby its assets and other litigation issues must be resolved in the courts.[176] In addition to the courts' future decisions, the other unknown is how the Federal Reserve[177] will react to a financial meltdown in the face of a banking collapse not seen in the history of the United States financial markets.

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170. Schaefer, *supra* note 1, at 463–65.

171. BANK FOR INT'L SETTLEMENTS, OTC DERIVATIVES STATISTICS AT END-JUNE 2022, at 1 (2022), https://www.bis.org/publ/otc_hy2211.pdf [https://perma.cc/2PBK-8JSR]; *see also* Schaefer, *supra* note 1, at 471–73.

172. A key illustration of the chain-linked nature of derivatives can be seen in a movie clip from the movie *The Big Short* that discusses one type of derivative: Synthetic CDOs. *See* Jose Alberto Lopez Da Silva, *Synthetic CDO*, YOUTUBE (Nov. 7, 2016), https://www.youtube.com/watch?v=EEXTqtH-Oo4 [https://perma.cc/EBJ2-FKK4]; THE BIG SHORT (Paramount Pictures 2015). This same linkage can be found in many forms of derivatives, including credit-default swaps. These derivatives are estimated at over $600 trillion, but may be worth more or less depending upon whom one asks. *See* J.B. Maverick, *How Big Is the Derivatives Market?*, INVESTOPEDIA (Feb. 6, 2024), https://www.investopedia.com/ask/answers/052715/how-big-derivatives-market.asp [https://perma.cc/W9DR-N6SQ].

173. See, for example, the following illustration: Amanda Cooper, *Explainer: What are Credit Default Swaps and Why are they Causing Trouble for Europe's Banks?*, REUTERS (March 30, 2023, 5:21 AM), https://www.reuters.com/markets/what-are-credit-default-swaps-why-are-they-causing-trouble-europes-banks-2023-03-28/ [https://perma.cc/AM9W-JYQD].

174. Schaefer, *supra* note 1, at 478–79.

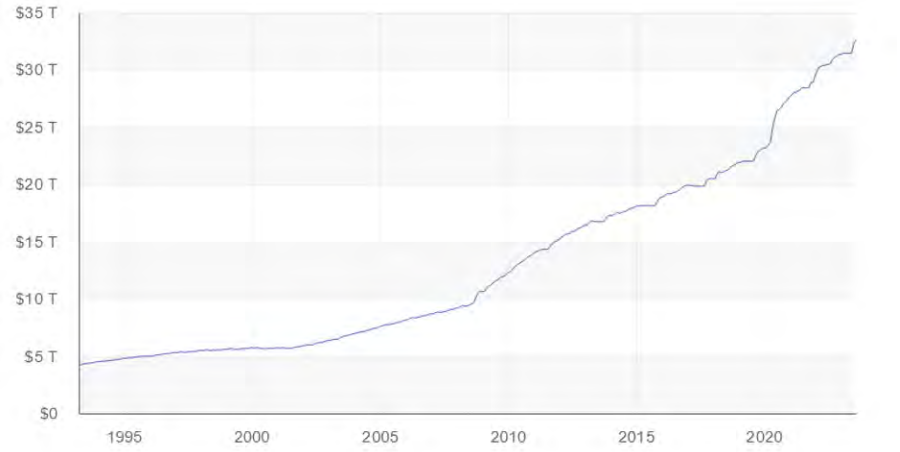
175. The following article looks at whether steep recoveries follow steep recessions: Michael D. Bordo & Joseph G. Haubrich, *Deep Recessions, Fast Recoveries, and Financial Crises: Evidence from the American Record*, 55 ECON. INQUIRY 527 (2017).

176. *See generally Chapter 11 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics [https://perma.cc/HXW5-JQ8N].

177. The Federal Reserve has remained a constant source of stability and should a financial collapse occur due to a default on the national debt (it is believed by this author that the banking industry and such a collapse are intertwined), how it reacts will be critical for the future of the United States and global markets in general. *See* Renee Haltom & Jeffrey M. Lacker, *Should the Fed Have a Financial Stability Mandate? Lessons from the Fed's First 100 Years*, 101 ECON. Q. 49 (2015). It is this financial system, centered in many ways on the Federal Reserve, that should be

E. Biden's Budget

As part of his presidential duty,[178] Biden has submitted his proposed 2024 budget for the United States.[179] Yet, one of the key ongoing, polarizing issues between the Republicans and Democrats has been how best to reign in federal spending.[180] In particular, the national debt,[181] which now stands at over $32 trillion,[182] has been a sticking point in negotiations in how best to control it. Figure 1 illustrates the rise in the national debt:



adjusted in anticipation of another collapse. *See* Gemma Carolillo, Piero Mastroberardino & Claudio Nigro, *The 2007 Financial Crisis: Strategic Actors and Processes of Construction of a Concrete System*, 17 J. MGMT. & GOVERNANCE 453, 481–84 (2013). At this point, the Federal Reserve needs to have plans in place not only in preparation for the coming default and the financial crisis that follows it, but also how to recover from the crisis to ensure a more stable United States financial system. *See* Tadeusz Kowalski & Yochanan Shachmurove, *The Financial Crisis: What Lessons can be Learned?*, 11 POZNAN U. ECON. REV. 48, 62 (2011); Simon Johnson, *The Next Financial Crisis*, 19 CORP. GOVERNANCE: AN INT'L REV. 489 (2011).

178. *See* Louis Fisher, *Presidential Budgetary Duties*, 42 PRESIDENTIAL STUD. Q. 754, 761–62 (2012).

179. OFF. OF MGMT. & BUDGET, *supra* note 9.

180. *See* Peter N. Hess, *More Fiscally Responsible: Democrat or Republican Presidents?*, 45 J. POST KEYNESIAN ECON. 339 (2022). The debt ceiling debate has set in motion many of the debates concerning how best to reign in the national debt, and how best to address the ballooning federal budget. *See The economics of the debt ceiling debate*, BROOKINGS (May 26, 2023), brookings.edu/articles/the-economics-of-the-debt-ceiling-debate/ [https://perma.cc/XM2Q-4MLZ]; *see also U.S. Federal Budget*, N.Y. TIMES, https://www.nytimes.com/topic/subject/us-federal-budget [https://perma.cc/733E-Z4HM].

181. The national debt has been a constant issue in modern history, and how to control it has been one of its key issues. *See* Fisher, *supra* note 178, at 783–86

182. *See* U.S. TREASURY FISCAL DATA, *supra* note 8 (as of August 3, 2023, the U.S. national debt stood at $32,604,327,644,488.70).

Figure 1: Historical record of the outstanding national debt of the United States, in trillions of United States dollars[183]

Congress holds the "power of the purse" under the U.S. Constitution, and it is from here that the budget is ultimately formed (though the President can veto any budget that they may disapprove of).[184] Defense spending is one of the largest areas of the budget, making up about one-sixth of the federal budget[185] or roughly 12% by some estimates;[186] but few within Congress or the President[187] will likely try to decrease it in any significant manner.[188] The military industrial complex[189] that President Dwight D. Eisenhower warned against[190] has continued to play a major role in ensuring that few cuts to defense spending ever takes place. If the United States does default on its national debt, defense is one of the key areas that may see significant cuts.[191] The number of troops and other personnel who may be cut in the process may even exceed the number cut at the end of the Second World War and be put into the civilian world on short notice. Troop withdrawals from around the world will also occur, forever shaping both the power of the United States as

183. *Id.*

184. Ken Winter, *The Federal Deficit and Debt Dilemma: It's Time to Balance the Budget*, 69 J. GOV'T FIN. MGMT. 40 (2020) (explaining the "power of the purse" and arguing for a balanced federal budget).

185. *See Defense and National Security*, CONG. BUDGET OFF., https://www.cbo.gov/topics/defense-and-national-security [https://perma.cc/96V2-64NN].

186. *How Much Has the U.S. Government Spent This Year?*, U.S. TREASURY FISCAL DATA , https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ [https://perma.cc/XA69-FJ7M].

187. The president may choose to back away from some spending on the defense (and other areas) through his limited impoundment powers (but this is unlikely given the overall strong support that defense spending has within both parties). *See* Christian I. Bale, Note, *Checking the Purse: The President's Limited Impoundment Power*, 70 DUKE L. J. 607, 611, 643–47 (2020).

188. The question remains as to what circumstances might cause the defense budget to be cut. *See* Travis Sharp, *Wars, Presidents, and Punctuated Equilibriums in US Defense Spending*, 52 POL'Y SCIS. 367 (2019).

189. *See* Rachel N. Weber, *Military-Industrial Complex*, BRITANNICA (Sept. 14, 2023), https://www.britannica.com/topic/military-industrial-complex [https://perma.cc/ZS4E-KYFP]; *see also* Constantin Gurdgiev et al., *The Budgets of Wars: Analysis of the U.S. Defense Stocks in the Post-Cold War Era*, 82 INT'L REV. ECON. & FIN. 335 (2022).

190. *See* President Dwight D. Eisenhower, Farewell Address to the American People (Jan. 17, 1961), *reprinted in President Dwight D. Eisenhower's Farewell Address,* NAT'L ARCHIVES: MILESTONE DOCUMENTS, https://www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address [https://perma.cc/UPM3-CHB3].

191. By some estimates, according to Craig Cohen, defense spending makes up 60% of federal defense discretionary spending and would likely see significant cuts if Congress could not find a balance between entitlement programs and raising revenue. Craig Cohen, *National Security on a Budget*, 36 FLETCHER F. WORLD AFFS. 57, 57 (2012).

a world leader[192] as well as potentially causing chaos within the military and defense community. The President can make some unilateral changes through the use of executive orders[193] and signing statements,[194] along with budget and other proposals to members of his staff and congressional members. Congress and the President will need to work together to ensure a smooth transition during this period—especially as it deals with troop withdrawals from foreign[195] and domestic soils, as the military members and their families deserve nothing less.

The other key issue that must be addressed is Medicare and how best to deal with it in the future,[196] as it represents 12% of the federal 2022 budget.[197] The White House, in its 2024 budget, has promised to continue to support the program,[198] but it must also be addressed to balance the budget deficits despite its almost-universal popularity[199] and the ensuing difficulties. Currently, the federal government cannot reach a consensus on how best to address this program's future, thus its solvency may only be decided after a default on the national debt occurs. As can be seen with the recent proposal by Biden in the 2024 budget document, there will only be rises in spending for Medicare, Medicaid, Social Security, and defense spending, along with only modest changes to the tax code.[200] With all of this spending in place, the likelihood of a default will only increase as the national debt rises at an unsustainable level.

The upcoming 2024 presidential and congressional elections will decide President Biden's power and influence, should he win reelection. Preparation

192. Perhaps nowhere else can the power of the United States be measured than its military strength. *See* James Jay Carafano, *Measuring Military Power*, 8 STRATEGIC STUD. Q. (AUSTERE DEF. SPECIAL EDITION) 11, 11 (2014). Yet this may also be one of its greatest weaknesses in that once major cuts start to take place, chaos may reign.

193. Warber et al., *supra* note 121, at 111.

194. Todd Garvey, *The Law: The Obama Administration's Evolving Approach to the Signing Statement*, 41 PRESIDENTIAL STUD. Q. 393, 395 (2011).

195. *See* Julian E. Zelizer, *Congress and the Politics of Troop Withdrawal*, 34 DIPLOMATIC HIST. 529, 535 (2010).

196. *See generally* Jonathan Oberlander, *The Political History of Medicare*, 39 GENERATIONS: J. AM. SOC'Y ON AGING 119 (2015).

197. *See Budget Basics: Medicare*, PETER G. PETERSON FOUND. (Apr. 18, 2023), https://www.pgpf.org/budget-basics/medicare [https://perma.cc/JR2L-4R29].

198. *See* Press Release, White House, Fact Sheet on The President's Budget: Extending Medicare Solvency by 25 Years or More, Strengthening Medicare, and Lowering Health Care Costs (Mar. 7, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/07/fact-sheet-the-presidents-budget-extending-medicare-solvency-by-25-years-or-more-strengthening-medicare-and-lowering-health-care-costs/ [https://perma.cc/7BL9-NG8E].

199. Medicare has remained a very popular program. *See* Mollyann Brodie, Elizabeth C. Hamel & Mira Norton, *Medicare as Reflected in Public Opinion*, 39 GENERATIONS: J. AM. SOC'Y ON AGING 134, 134–35, 140 (2015).

200. *See* OFF. OF MGMT. & BUDGET, *supra* note 9.

for this upcoming election should include clear decisions concerning the national debt and how best to deal with it. Such issues as Medicare, Social Security, Medicaid, defense spending, student loans, and taxes (to name a few) will take center stage as he faces off against a list of potential Republican rivals who will view any mistake as a potential game-changer when it comes to winning against him.[201] For this reason, the budgets that he will put forth for the United States can and should reflect his values[202] as opposed to those of his Republican counterparts. The budgets he puts forth are the bottom lines for his agenda, as opposed to his State of the Union address that delineates his goals for the nation's future.[203] In many ways, the fight over the 2024 presidential and congressional elections will mean that there will be no meaningful changes to the largest expenditures such as Medicare, Social Security, defense spending, and taxes. Without such changes, while each presidential candidate will have their owns goals and budget proposals, there will be few changes (in large part due to financial obligations that are directly linked to funding issues and the ability of Super PACs to spend as they wish after the case of *Citizens United v. Federal Election Commission*).[204]

Perhaps few other issues impact each party as much as the need to raise funds. In the 2020 elections alone, presidential candidates raised and spent over $4 billion, with similar results for those running in congressional elections.[205] At issue here is the case of *Citizens United v. Federal Election Commission,*[206] which has allowed special interest groups to spend as much as they want on elections[207] with little duty to disclose whose money was spent through the use of Super PACs[208]: "By a 5-to-4 vote along ideological lines,

201. *See Who's Running for President in 2024? All the Declared Candidates*, THE GUARDIAN (July 28, 2023, 3:12 PM), https://www.theguardian.com/us-news/ng-interactive/2023/jun/17/2024-presidential-candidates-biden-trump-republicans-democrats [https://perma.cc/6KZ2-DQQ5].

202. *See* Ana Tribin, *Chasing Votes with the Public Budget*, 63 EUR. J. POL. ECON. (ELECTRONIC ISSUE) 1, 11 (2020).

203. *See* Annelise Russell & Rebecca Eissler, *Conditional Presidential Priorities: Audience-Driven Agenda Setting*, 50 AM. POL. RSCH. 545, 545 (2022).

204. *See* Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained [https://perma.cc/Y24F-8WW4]. Given the nature of the Supreme Court, with its 6-3 conservative majority, there is very little chance that this case will be overturned and/or modified.

205. *See* Press Release, U.S. Fed. Election Comm'n, Statistical Summary of 24-Month Campaign Activity of the 2019-2020 Election Cycle (Apr. 2, 2021), https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2019-2020-election-cycle/ [https://perma.cc/V8VH-GU4N].

206. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

207. *See* Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 109 (2017).

208. *See* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1649 (2012).

the majority held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited."[209] Perhaps no other case in modern history has affected so many areas of law and the election process as this case.[210] This case has ensured that none of the large budget items will be touched[211] to any real extent until a truly dramatic financial crisis occurs, such as a default on the national debt. Even then, those same groups will try to sway those in Congress and the President to ensure that their budgets will not get cut (or taxes raised). Through it all, the special interest groups will play a role in deciding which items stay and which are cut during a formal default. They will also shape the regulatory process that occurs afterwards.[212] The silver lining in a complete default will be that many of the biggest expenditures (e.g., Medicare, Social Security benefits, defense spending, and taxes) will finally need to be addressed, albeit with many of the special interest groups helping to decide which areas and how much will be cut.

As the United States' leadership looks to its future in these troubling times of increased polarization and political violence, one must realize that the future lies in the ability of those on top to address the coming financial crisis that will occur. As this section has argued, it is not so much when the United States will default on its national debt, but how well this government is prepared to address its aftermath. The political polarization from each party has entrenched views regarding the budget and will not change due to the financial incentives created by *Citizens United v. Federal Election Commission*, causing the financial crises to worsen. What occurs in 2025 when the

209. Summary of the Conclusion in Citizens United v. Federal Election Commission, OYEZ, https://www.oyez.org/cases/2008/08-205 [https://perma.cc/4LDB-MXHB].

210. *See, e.g.*, *Citizens United at 10: The Consequences for Democracy and Potential Reponses by Congress: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. On the Judiciary,* 116th Cong. 1 (2020) (statement of Professor Ciara Torres-Spelliscy, Professor of Law, Stetson University College of Law), https://docs.house.gov/meetings/JU/JU10/20200206/110456/HHRG-116-JU10-Wstate-Torres-SpelliscyC-20200206.pdf [https://perma.cc/8W36-ZS5Z].

211. *See* Schaefer, *supra* note 1, at 479–80.

212. It is the regulatory process that stipulates how the money will be spent and other governing factors that are central to many lobbying groups that focus on the president and members of Congress. *See generally* Frank R. Baumgartner et al., *Congressional and Presidential Effects on the Demand for Lobbying*, 64 POL. RSCH. Q. 3, 3 (2011). Lobbying groups also help shape the reviewing process of the Office of Management and Budget that impact regulations. *See generally* Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015). One of the key reasons for this lobbying of the regulatory process is that the president has so much authority when it comes to the administrative side of purchasing (and therefore can be persuaded one way or another). *See* Daniel P. Gitterman, *The American Presidency and the Power of the Purchaser*, 43 PRESIDENTIAL STUD. Q. 225 (2013)*; see also* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2189 (2016).

current debt ceiling agreement expires is anyone's guess, but the default hanging over all of our heads should usher in a need for planning for a way forward after the United States has defaulted on its debt obligations and during the period immediately after this default occurs. As this next section will argue, any administration will need to use the regular military to stabilize the country during this transition period, and such preparations should begin now as the future of so many Americans and those throughout the world depends upon such planning in advance.

III. PART TWO: HOW BEST TO STABILIZE THE UNITED STATES DURING THE TRANSITION

After the United States formally defaults, the United States will be at its weakest, as chaos will come throughout areas and regions due to mass layoffs and the cutting of benefits to areas like Social Security, Medicare, Medicaid, and defense spending—all of this occurring as the United States is trying to stabilize the mass uprisings that are sure to come as a result. The Los Angeles Riots[213] might be used as a microcosm of what to expect, but at a scale never seen before that must be addressed. It will be argued here that the best way to address such violence at such a widespread level is through the use of regular members of the Military Services (even in the face of diminished forces if their ranks cut to balance the budget) and to live thereafter within the money that the federal government has, not on what it can borrow. It is clear that taxes, Social Security, Medicare, Medicaid, and defense spending will need to be addressed in a way that will allow for a transition period. Adjustments to the first four should be addressed more fully in a separate article; for the purposes of this essay, it will be argued that the men and women of the Military Services should be protected during this transition period and should be used to "stabilize" the United States during a period of extreme chaos. When the military must be used, these same members (and their dependents) will need to be protected during the transition.

This section will review the use of the regular military through the laws governing the Insurrection Act, the Posse Comitatus Act, and Martial Law. Perhaps in no time since the Civil War of 1861–1865 will the United States suffer so much violence within its borders. This article argues that, for the first time in modern history, members of the regular Military Services—along with the National Guard, local and federal police, and community as a whole—will need to be used to stave off the chaos that will result from the

213. *See Los Angeles Riots*, HIST. (Apr. 20, 2021), https://www.history.com/topics/1990s/the-los-angeles-riots (providing a clip for a glimpse of the Los Angeles Riots) [https://perma.cc/3R6G-AEXB].

major financial collapse resulting from the default on the national debt. Such usage should be carefully planned in advance to ensure a stabilized country during this transition period. To begin, this section will address the likely demobilization of the Military Services as the United States will be forced to live within its means. Part of the Military Services will be demilitarized and the other part will be used for the stabilization of the United States; such usage should be widespread and affect every part of the United States.

It is anticipated that America formally defaulting on the national debt will result in chaos from the ongoing widespread violence caused by a major financial collapse and the cuts to the federal budget that will occur on a scale not seen in the United States. While cuts to Social Security and Medicare should be addressed in a separate paper, the cuts to the defense budget and, in particular, to members of the Military Services will be addressed briefly here. It is hoped that, as the United States will find itself having to cut its budget dramatically, the members of the Military Services (and their families) will be protected during this period.

Perhaps few other issues in American history will be as defining as when the United States formally defaults on its national debt and in the process begin a series of shutdowns[214] from the federal levels as well as state and local levels, which will define the United States as a country for centuries to come. The longest and most recent government shutdown occurred under President Trump and was based upon his desire for a wall on the southern border.[215] There is a difference here in that a total default will include a failure to pay interest and principles on its treasuries as well as other payments to

214. *See generally* Allen E. Shoenberger, *A Constitutional Right to a Functioning United States Government? Are Shutdowns Unconstitutional?*, 35 BYU J. PUB. L. 19 (2020) (asking if government shutdowns are constitutional); Ximena Garcia-Rada & Michael I. Norton, *Putting Within-Country Political Differences in (Global) Perspective*, 15 PLOS ONE (ELECTRONIC ISSUE) 1 (2020), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0231794&type=printable [https://perma.cc/3JZM-ENHQ] (addressing the issue of polarization and shutdowns).

215. *See* Gretchen Frazee & Lisa Desjardins, *How the Government Shutdown Compared to Every Other Since 1976*, PBS: NEWS HOUR (Jan. 25, 2019, 4:49 PM), https://www.pbs.org/newshour/politics/every-government-shutdown-from-1976-to-now [https://perma.cc/Y7G9-EQU3]; *see also* Sarah Houlton, *Budget Turmoil*, 83 CHEMISTRY & INDUS. 38, 38 (2019). A question that remains is the impact of Trump during this period of government shutdown, and how he handled it during this confrontation with Congress. *See generally* Laura Ellyn Smith, *Trump and Congress*, 42 POL'Y STUD. 528 (2021). Another question remains is how future shutdowns will be affected by Trump, e.g., even though he is out of office, his influence over matters relating to the United States government are still very much in play. Other key issues will present themselves during this shutdown. *See, e.g.*, Tanner Slaughter, Article, *Government Contracting and Emergency Powers in the Age of Government Shutdowns*, 50 PUB. CONT. L.J. 133 (2020) (looking at contractors and their lack of payments to other contractors). The interesting side of this article points to the use of the government's emergency powers to ensure that payments for contractors are processed. *Id.* This use of government emergency powers should be explored further as it relates to the long-term government shutdown that would follow a formal default.

any number of people, corporations, or governments. As this article argues, the chief consideration of a default is when and under what circumstances it will come about. Throughout the history of the United States, government shutdowns have existed largely upon failures to pass certain financing legislation and have come at various times[216] when compared to the possibility of a default. It is argued here that, when a default causes the shutdowns, the legacy of the United States will forever change. What happens afterwards will depend on the preparations beforehand and determine the future of this country. Plans should, therefore, be in place for the transition period between the default and shutdowns to detail how best to manage this country through processes that allow the President, Congress, and the courts[217] to stabilize the people living within its borders until such a time that the United States can go onto the other side in a more stable manner.

Over the course of the major fight concerning the debt ceiling, Medicare, Social Security, taxes, and defense spending would not see major cuts. In a statement after signing the bill into law, President Biden stated,

> If we had failed to reach an agreement on the budget, there were extreme voices threatening to take America, for the first time in our 247-year history, into default on our national debt. Nothing – nothing would have been more irresponsible. Nothing would have been more catastrophic.
>
> . . . .

216. For a current list of government shutdowns, see Tom Murse, *All 21 Government Shutdowns in U.S. History*, THOUGHTCO. (Jan. 29, 2020), thoughtco.com/government-shutdown-history-3368274 [https://perma.cc/6JMP-4UEJ] (providing a list of all government shutdowns via Congressional Research Service reports) and Frazee & Desjardins, *supra* note 215 (providing a current list of government shutdowns).

217. The Supreme Court will play a major role during this period of chaos after a default as it analyzes through the process of judicial review the U.S. Constitution and other areas of the law, as any number of lawsuits will likely take place. Stephen M. Maurer argues that the U.S. Constitution can be used as a healing document during periods of a hyperpolarized society, stating, "To American ears, statements that legislation requires 'reaching across the aisle' sound self-evident. . . . We are still very much the Framers' children. But the Constitution does little to manage intensity, and this failing has become dangerously destructive in our hyperpolarized society. . . . Rather than ban shutdowns outright, we should reform them to manage anger at less cost. Beyond that we have argued that coercive politics is fundamentally unstable. . . . One hallmark of a sustainable politics is that is avoids and absorbs resentments faster than it generates them. . . . Successful reforms should similarly reward today's congressmen [and congresswomen] for writing laws that minimize anger especially from citizens who will never vote for them." Stephen M. Maurer, *The Healing Constitution: Updating the Framers' Design for a Hyperpolarized Society*, 29 KAN. J.L. & PUB. POL'Y 173, 173, 216–17 (2020). In a like manner, the U.S. Constitution should be used as an instrument by the courts to allow for a more peaceful transition during a period of chaos that will occur following a formal default that will affect any number of lives. It is hoped that through this process of judicial review, the members of the Supreme Court will align themselves toward a more non-polarized society whereby the political views of oneself is put aside for the greater good of the country.

> Default would have been – ha- – have destroyed our nation's credit rating, which would have made everything from mortgages to car loans to funding for the government much more expensive. And it would have taken years to climb out of that hole. And America's standing as the most trusted, reliable financial partner in the world would have been shattered.
>
> . . . .
>
> Look, I've long believed that the only one truly sacred obligation that the government has is to prepare those we send into harm's way and care for them and their families when they come home and when they don't come home. That's why my last budget provided VA hospitals with additional funding for more doctors, nurses, and equipment to accommodate the needs of veterans and more appointments.
>
> . . . .
>
> I can honestly say – I can honestly say to you tonight that I've never been more optimistic about America's future. We just need to remember who we are. We are the United States of America, and there's nothing – nothing we can't do when we do it together.[218]

Realistically, very few noticeable cuts to the defense spending or other areas will take place,[219] and this spending will very likely continue to take the United States toward a default as none of the biggest expenditures would be significantly affected. Yet, this statement and others characterized by Biden illustrate a desire to continue spending on defense. Once the default occurs, defense spending will need to be cut, and members of the Military Services would likely see some of the greatest cuts to its members since the end of the First and Second World Wars.

Once the United States understands that it will have to live within its means, cuts will be made to the defense spending, and in particular the number of troops in the Military Services—from regular to reserve to civilian defense workers. The question is how best to prepare for such reductions ahead of time.[220] This process will be difficult, as opposition will likely come from the President, members of Congress, and citizens through a wide spectrum both in the United States and abroad. Yet, once the default occurs, the

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218. President Joe Biden, Remarks on Averting Default and the Bipartisan Budget Agreement (June 2, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/02/remarks-by-president-biden-on-averting-default-and-the-bipartisan-budget-agreement/ [https://perma.cc/9YL5-AZUN].

219. *See* Bryan Mena, *Debt Ceiling Deal Won't Have Much Impact on the US Economy, Analysts Say*, CNN: BUS. (May 31, 2023, 3:22 PM), https://www.cnn.com/2023/05/31/business/debt-deal-economic-effect/index.html [https://perma.cc/UY7X-2Q27].

220. Schaefer, *supra* note 122 (In my first major publication on the subject, my senior honor's thesis for political science in 1992 looked at the economic conversion process and the military in Hawaii.).

necessity of these cuts will become evident and thus enacted. Plans should be in place to ensure a smooth drawdown of troop levels at a scale not seen since the end of the Second World War.[221] As of 2021, the Military Services are made up of 1,335,848 members.[222] It is evident that drawing down a large number of troops from active duty can be difficult; each year, more than 200,000 service members leave the military,[223] and reintegration of troops into civilian life has been a key factor for those leaving the Military Services.[224]

Following the demobilization[225] after the First World War, as Keene points out, the United States, along with the other Allied Nations, reintegrated their service members into civilian life through a political structure with policies that gave service members a stake in the American condition.[226] The potential for violence from members being "forced" out of the military is something that should be planned for in advance. It was in many ways the events following the First World War that allowed for a greater degree of planning for a demobilization in the Second World War[227] and, as such, the

221. *See The Points Were All That Mattered: The US Army's Demobilization After World War II*, THE NAT'L WORLD WAR II MUSEUM (Aug. 27, 2020), https://www.nationalww2museum.org/war/articles/points-system-us-armys-demobilization [https://perma.cc/ARP7-QWBC]. ("By the time the US Army's demobilization officially ended on June 30, 1947, the Army had decreased from eight million soldiers in 1945 to 684,000 on July 1, 1947. The total number of active divisions also dropped from 89 to 12. Army leaders considered demobilization an overall success. They had completed the orderly drawdown of more than seven million men in just two years while also defeating Japan and occupying former Axis nations.").

222. U.S. DEP'T OF DEF., 2021 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 13 (2021), https://download.militaryonesource.mil/12038/MOS/Reports/2021-demographics-report.pdf [https://perma.cc/7UVG-XMAL].

223. DOD SKILLBRIDGE, PROVIDER'S HANDBOOK 3 (2021), https://skillbridge.osd.mil/docs/SkillBridge-Provider-Handbook-19-Jul-21.pdf# [https://perma.cc/D5YD-5XWD].

224. *See* INST. OF MED., ISBN 0-309-06637-9, STRATEGIES TO PROTECT THE HEALTH OF DEPLOYED U.S. FORCES: MEDICAL SURVEILLANCE, RECORD KEEPING, AND RISK REDUCTION 113 (Nat'l Acad. Press ed. 1999) https://www.ncbi.nlm.nih.gov/books/NBK225094/pdf/Bookshelf_NBK225094.pdf [https://perma.cc/NR9J-SGLU]. There are many ways in which members who will be leaving the military can prepare themselves. *See* Josh Andrews, *15 Things to Do When Leaving the Military*, USAA (May 27, 2022), https://www.usaa.com/inet/wc/advice-military-leaving?akredirect=true [https://perma.cc/A5EF-L59C].

225. *Demobilization*, ENCYCLOPEDIA.COM (May 23, 2018), https://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/military-affairs-nonnaval/demobilization#:~:text=Demobilization%20is%20the%20release%20or,a%20war%20or%20major%20buibuil [https://perma.cc/QFY3-8U57] ("Demobilization is the release or 'draw down' of wartime military forces as the nation resumes peacetime status following a war or major buildup.").

226. *See* Jennifer Keene, *A 'Brutalizing' War? The USA After the First World War*, 50 J. CONTEMP. HIST. 78, 99 (2015).

227. Political activism and other issues faced by returning troops following the end of the Second World War were key factors in the demobilization process, ones that would likely continue

drawdown came even smoother.[228] Much of this planning had to do with keeping those recently released from active duty busy: employment[229] is critical. The difference between the demobilization following the Second World War and the coming default-induced drawdown is that it will likely be forced on members who may wish to stay in the military as it would afford guaranteed employment and benefits during a time of uncertainty. Steps should be taken now to start the process of understanding how, when, and where to undertake such a demobilization. It is important to plan in advance for such an event to ensure that the members of the Military Services are taken care of during this period of transition. How and where those in active duty—as well as their dependents—are to be released[230] should be clearly decided in advance,[231] as well as final pay, unemployment benefits, and other concerns such as college benefits, health care, and relocation costs, although this is not an exhaustive list. This planning is key to ensure the stability of the Military Services and the continuation of the United States.

A final area of concern as one looks at the demobilization process is how other countries will handle this process[232] amid a changing world order based not so much on military strength as on the stability of one's country

today in a similar manner. *See generally* Daniel Eugene Garcia, *Class and Brass: Demobilization, Working Class Politics, and American Foreign Policy Between World War and Cold War*, 34 DIPLOMATIC HIST. 681 (2010).

228. The British had extensive plans to drawdown the troop levels following the Second World War, and, as such, the actual process went smoother. *See* Rex Pope, *British Demobilization After the Second World War*, 30 J. CONTEMP. HIST. 65, 68–79 (1995).

229. Employment from active duty members following their separation from active duty can lessen violence and other issues among those recently discharged. The following article argues that employment can reduce lawlessness and rebellion: Christopher Blattman & Jeannie Annan, *Can Employment Reduce Lawlessness and Rebellion? A Field Experiment with High-Risk Men in a Fragile State*, 110 AM. POL. SCI. REV. 1, 15–16 (2016).

230. Where to "out process" those on active duty was a key issue after the First World War. *See* E. Jay Howenstine, Jr., *Demobilization After the First World War*, 58 Q. J. ECON. 91 (1943).

231. Planning comes in many forms. To start, many of the same issues facing those returning from combat and/or overseas may also be used for those leaving the military. See the following article on those being reintegrated after returning home from combat: Michael E. Doyle & Kris A. Peterson, *Re-Entry and Reintegration: Returning Home After Combat*, 76 PSYCHIATRIC Q. 361 (2005).

232. The numbers of troops that will be downsized following an economic collapse at the global scale is something that can only be imagined as of today. Yet, seeing how such a demobilization might take place is critical to understanding what might occur. See the following case regarding the Irish as one example: Bill Rolston, *Demobilization and Reintegration of Ex-Combatants: The Irish Case in International Perspective*, 16 SOC. & LEGAL STUD. 259 (2007). *See also* ALEJANDRO BENDAÑA, DEMOBILIZATION AND REINTEGRATION IN CENTRAL AMERICA: PEACE-BUILDING CHALLENGES AND RESPONSES (Centro de Estudios Internacionales ed. 1999); Macartan Humphreys & Jeremy M. Weinstein, *Demobilization and Reintegration*, 51 J. CONFLICT RESOL. 531 (2007); Andrea González Peña, *Failure of Peace and the Disarmament, Demobilisation and Reintegration (DDR)*, PAPEL POLÍTICO, 2021, at 1 (Colom.), https://doi.org/10.11144/Javeriana.papo25.fpdd [https://perma.cc/AM9Y-KL83].

following the economic collapse and drawdown of defense forces. Such conflicts as the current war in Ukraine will be directly affected by this drawdown as forces throughout Europe, the United States, and elsewhere are downsized. The focus for those who remain in the Military Services will be to stabilize the United States in manners not seen in the history of this country rather than play a role in international peacekeeping. The surpluses of our military hardware and other items should be integrated for peacetime usage,[233] but also for usage as instruments to limit the chaos that will likely result following such an economic crash. In this next section, the powers of the President and Congress for such usage will be discussed.

A. The Need for a Separate Command During Times of Crises

In the aftermath of a collapse of the financial markets following the formal default of the U.S. national treasuries, chaos will likely reign throughout much of the United States and in parts of the world that previously saw American troop presence. To limit such an onslaught of violence and to regain the sovereignty of the United States, plans need to be in place beforehand that would allow the regular military to be used immediately, effectively, and with clear objectives that would allow for the smooth transition following such an insurrection.

Establishing a clear command within the military that could be used to direct regular military personnel during times of crisis should be initiated in such a way as to be used in quick response to a major chaotic event occurring in the United States. Such a command should be under the control of the President but representative of the various branches of the Military Services, including the reserve and National Guard units. In much the same way that the President is given "options" to use nuclear weapons,[234] similar options

233. What to do with the surplus following the First World War was a key issue and should also be planned for in the event that there is a major downsizing of the U.S. military. *See* William Hoyt Moore, *Termination of Contracts and Disposal of Surpluses After the First World War*, 33 AMER. ECON. REV. 138, 144–149 (1943).

234. *See* U.S. GEN. ACCT. OFF., GAO-91-319, STRATEGIC WEAPONS: NUCLEAR WEAPONS TARGETING PROCESS 12–13 (1991), https://www.gao.gov/assets/nsiad-91-319fs.pdf [https://perma.cc/QN8G-MM8K] (describing the Department of Defense's process for formulating a nuclear war plan and the President's options in using nuclear weapons); *see also Authority to Order the Use of Nuclear Weapons: Hearing Before the S. Comm. on Foreign Rels*., 105th Cong. 7-8 (2017), https://www.govinfo.gov/content/pkg/CHRG-115shrg34311/html/CHRG-115shrg34311.htm [https://perma.cc/YFD2-Z6UT] (statement of General C. Robert Kehler, USAF (Ret.)); Ryan Pickrell, *Here's Where the 'Nuclear Football' Came from and Why it Follows US Presidents Wherever They Go*, BUS. INSIDER (Mar. 1, 2021, 5:45 PM), https://www.businessinsider.com/nuclear-football-history-origins-why-it-follows-presidents-2021-2 [https://perma.cc/K4NC-MMAD] (explaining that the use of the "nuclear football" gives the president authority to launch a nuclear attack against another country).

should be made in advance so that when this chaos finally occurs, the regular military can be called upon and given access to suppress the massive insurrection quickly, effectively, and in a manner that is within the legal boundaries of the U.S. Constitution. Presidents have been given the option to use nuclear weapons and instances when to use them, but timing is a critical element.[235] It is with this timing in mind that planning should begin now on how to use the regular military to suppress a mass insurrection that will likely occur across the United States once the financial collapse begins. Such a scenario should include a direct command within the Military Services that would be preselected to direct the military on how to use the regular military to suppress an uprising. With a single call by the President, those options and specific usage should be able to come into play and be executed quickly, as time is of the essence.

B. The Insurrection Act

The Insurrection Act,[236] first adopted to allow the usage of Military Services to suppress an insurrection in the United States, can be used as a foundation here for the immediate usage of the regular military at a broad scale should a massive outbreak of violence occur across the United States.[237] The President has the legal authority under the Insurrection Act to use the regular

235. *See* Jasmine Owens, *How to Launch a Nuclear Weapon*, OUTRIDER (Oct. 5, 2020), https://outrider.org/nuclear-weapons/articles/how-launch-nuclear-weapon [https://perma.cc/C3SG-4LYD] (explaining that the president will only have about seven minutes to decide whether to use nuclear weapons, and at what level).

236. Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (Apr. 21, 2022), https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained#:~:text=The%20Insurrection%20Act%20authorizes%20the,the%20law%20in%20certain%20situations [https://perma.cc/7D7P-Q2ZS] ("The Insurrection Act authorizes the president to deploy military forces inside the United States to suppress rebellion or domestic violence or to enforce the law in certain situations. The statute implements Congress's authority under the Constitution to 'provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.' It is the primary exception to the Posse Comitatus Act, under which federal military forces are generally barred from participating in civilian law enforcement activities.").

237. *See* Richard K. Sala, *Congress Can Delegate Authority, but Not Responsibility: Accountability for the Domestic Use of the Armed Forces*, 46 VT. L. REV. 24, 53 (2021).

military[238] and may do so with an executive order.[239] Such an event will be chaotic and take time; therefore, planning for this event beforehand is critical to the stability of the United States during this potential transition period.[240] As Banks states,

> Reading the Article I and Article IV clauses harmoniously, if an invasion or insurrection against the national government occurs – in modern settings, conceivably a major terrorist attack threatening the nation as well as one or more states – the Constitution requires that the federal government use military force to protect the state. In the event of an "insurrection" within a state that presents a direct threat to its republican form of government (an attack on the state qua state), the federal government is likewise obligated to use the military to defend the state.[241]

One of the key elements that Banks notes here is the degree of the insurrection: if it is limited in scope, the regular military may not be used, but if it is at a larger scale, the President has clear authority to use the regular military for domestic purposes. Much like with a nuclear threat, the degrees of harm and potential violence is critical in assessing the threat level and in making decisions on how to use the military in response to the specified levels that may occur. The use of an executive order could allow the President to call for the usage of the regular military quickly. From a constitutional authority, the President (as this author has argued) has the right to make use of the Insurrection Act to allow for regular military members to engage in acts to limit riots and other chaos in times of crises:

> An Executive Order concerning the interpretation of the Insurrection Act, however, could allow for the regular military to be used at the immediate and massive scale for catastrophic natural disasters as well as an exception to the PCA . . . .

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238. *See id.* at 26–27. The Insurrection Act is seen as an exception to the Posse Comitatus Act (PCA) and allows for the usage of regular military troops for domestic purposes. *See* Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1310 (2010) ("The most notable exception to the PCA is the Insurrection Act, which authorizes the president, when certain conditions have been met, to deploy the military inside the United States to perform traditional law enforcement functions. When the Insurrection Act has been invoked, the PCA's restrictions are lifted and members of the military, under the command of the president, are free to arrest U.S. citizens for violations of state and federal law." (footnote omitted)).

239. *See* Donald D.A. Schaefer, *The Use of the Regular Militaries for Natural Disaster Assistance: Climate Change and the Increasing Need for Changes to the Laws in the United States, China, Japan, the Philippines, and Other Countries*, 20 SUSTAINABLE DEV. L. & POL'Y 4, 8 (2019).

240. It is envisioned that the Insurrection Act would only be used when there is massive chaos once the United States formally defaults on its treasuries; once it does occur, the time to implement action will be only a short duration of time.

241. William C. Banks, *Providing "Supplemental Security" – The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SEC. L. & POL'Y 39, 41 (2009).

> The use of this executive order to use the regular military as armed police in addition to the National Guard in this capacity would most likely be upheld by the courts if it is given as an exception to the Insurrection Act.[242]

Given this reality, however, the same planning that goes into a potential nuclear threat should also go into planning how best to suppress a massive uprising in the United States. The sooner this takes place, the better prepared the United States government will be to address this uprising in an effective manner so that the United States (and countries around the world for that matter) will be in a position to come out of this transition period in a stable manner. Here it is envisioned that, should a massive financial collapse take place, the President will be given options that will be very quickly acted upon by a specified military command and that members of the Military Services will be deployed throughout the United States and its territories.

C. Martial Law in Times of Crises

Perhaps few other issues would be more contentious in the history of the United States than for a President to declare martial law and to have the military authorities take control over vast areas of the government and the policing of states, cities, and whole areas throughout the United States and its territories. Yet, this paper argues that it is precisely this course of action that should take place once the United States formally defaults on its national debt if a period of chaos reigns. It is critical that planning goes into effect now as to how best to complete this action so that when then the time comes to implement martial law, it will be executed in such a way that is limited in scope and duration. It must have the necessary effect of stabilizing the country until such time that civilian control can once again be instituted in an effective and liberalizing manner, and that the US may once again be a major country and authority within the world, even if it is with a different image once this "transition" is complete.

Understanding what martial law is and how it might be used during this transition period is critical. Anthony posits that martial law is a property of "an exercise of the war powers" with the appropriate justification for military action, which means legal repercussions are not fully knowable ahead of time.[243] Thus a "grey" area of law concerning the use of martial law hinges on what occurs during the time of its use—one that will likely not be decided until such time of its imposition (one that may come sooner than expected). A key question here is not only when to implement martial law, but also when

242. Schaefer, *supra* note 239, at 8.

243. Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477, 492 (1943).

and how to end it. Anthony grapples with this question[244] and brings to light many of the issues that may well be faced in the future at a national level when the United States is faced with unprecedented circumstances after a formal default and the extreme chaos that will follow.

The power of the President to declare martial law[245] at a national scale is still unsettled.[246] It is within the powers of the President to issue an executive order[247] declaring martial law and then seek emergency powers through Congress to follow through with that right. The necessity to engage Congress[248] following such an order will be critical to its success, enforcement, and, ultimately, the future of the United States. Perhaps the best-known example is when President Abraham Lincoln suspended the writ of habeas corpus in 1861 at the start of the Civil War.[249] As time has shown, such actions, whether they occur in places like Guam[250] or Hawaii,[251] have always presented a struggle over the rights of those who remain under the control of the military in a nation founded on civilian rule. As Underhill points out, the Constitution is little help when it comes to martial law.[252] Davies specifies that martial law would have to be a last alternative as it goes beyond typical responses to disaster and enters into local law enforcement.[253] While it may be theoretically possible for a general declaration of martial law in the United States, the actual practice has not been fully attempted to test its viability. The President, as Davies points out, can declare martial law, much like Lincoln did, even though there is no clear language in the Constitution for such

244. *Id*.

245. *See generally* George S. Wallace, *The Need, the Propriety and Basis of Martial Law, with a Review of the Authorities*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 167 (1917); Jacobus tenBroek, *Wartime Power of the Military Over Citizen Civilians Within the Country*, 41 CALIF. L. REV. 167 (1953).

246. *See generally* L.K. Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 CALIF. L. REV. 159 (1924) (discussing the extent of martial law and how it might be used in the United States); Kirk L. Davies *The Imposition of Martial Law In The United States*, 49 A.F. L. REV. 67 (2000).

247. *See* Warber et al., *supra* note 121.

248. *See generally* Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. REV. 1027 (2008) (making the case for such engagement when it comes to the use of military rule).

249. *See* John Fabian Witt, *A Lost Theory of American Emergency Constitutionalism*, 36 L. & HIST. REV. 551, 569–74 (2018) ("The habeas controversy is one of the most storied legal controversies of the war.").

250. *See generally* Scott Barrett & Walter S. Ferenz, *Peacetime Martial Law in Guam*, 48 CALIF. L. REV. 1 (1960).

251. *See generally* Anthony, *supra* note 243 (contending that the martial law in Hawaii was without sanction of the President or Congress); Archibald King, *The Legality of Martial Law in Hawaii*, 30 CALIF. L. REV. 599 (1942) (arguing that the martial law in Hawaii was done within the bounds of the law).

252. Underhill, *supra* note 246, at 170.

253. Davies, *supra* note 246, at 85.

an action.[254] Yet, as Govern argues, current policy has not changed to allow federal military to override local governments or law enforcement.[255] The ability to use military rule should be carefully crafted, as Gardina has pointed out,[256] and engaged so that when the time comes for martial law such support will be given in a timely manner. As Gardina points out, American culture since 9/11 has given increasing power to our military, which is often now a first rather than last alternative, possibly empowering a military as powerful as the ones America's founders sought to escape.[257]

Military rule, therefore, should have a limited time frame from which to operate and also have a clear time frame in which to end its time as a governing force. Civilian rule should be clearly stated at the beginning and ending paperwork concerning this matter as to the role of the military under martial law, as should the time frame when civilian rule will take place. Although, it is envisioned that civilian rule will never be fully eliminated during this time, and that the President will remain as the Commander in Chief of the Military Services. It was during Lincoln's presidency that "flexibility" of the office of the President was key to being a good leader of the Military Services.[258] As Dirck points out, President Lincoln saw the first major test of executive powers of the military in use in domestic affairs and seeking to enact and enforce compliance with laws, despite his own lack of familiarity with warfare at that level.[259] Based on this unique situation, the legacy of Lincoln's wartime success was flexibility and practicality.[260]

The next president, much like with the case of Lincoln during his time in office, should be flexible and pragmatic when it comes to the use of martial law. They should not only learn the lessons taken from Lincoln and others on how such laws have been applied to United States' citizens in Hawaii, but also look to other places where martial law has been applied and see what lessons can be learned.[261] One should, for example, see how life under former Philippine President Ferdinand Marcos[262] used and abused martial law from

254. *Id*. at 88–90.

255. Kevin H. Govern, *"Making Martial Law Easier" in the U.S.*, 1 HOMELAND SEC. REV. 221, 222 (2007).

256. Gardina, *supra* note 248, at 1070.

257. *See id.*

258. *See* Brian Dirck, *Lincoln as Commander-in-Chief*, 39 PERSPS. ON POL. SCI. 20 (2010).

259. *Id.* at 22.

260. *Id.* at 27.

261. On a personal note, I had the opportunity to see firsthand how martial law can be abused during my travels through Romania in 1987 when Nicolae Ceaușescu was in power. The fear and struggles of the local population that I saw firsthand are still with me today. I also traveled through much of the Eastern Block (including the Soviet Union) during this period from 1987–1989 and saw firsthand the plight of people living under some form of martial law.

262. *See Ferdinand Marcos*, BRITANNICA (Sept. 24, 2023), https://www.britannica.com/biography/Ferdinand-E-Marcos [https://perma.cc/4WGC-NRG3].

1972–1981.[263] He used it to stabilize the country starting in September 1972, and during this period the country initially prospered[264] but later also struggled.[265] His rule ran until 1986 and saw corruption and other issues compromise the successes of his strategy.[266] The lessons from previous usage of martial law, whether in the United States or abroad, should be analyzed so that both benefits and problems can be interpreted to fit with such usage in the United States during a period of chaos following a default.

The use of martial law is likely to prove legal during a period of chaos following the formal default of the national debt, yet its uses should be limited in scope and duration—long enough to stabilize the United States but short enough to ensure that corruption does not take place. It is imagined that once the economic collapse of banks and other entities take place, the President should be able to issue an executive order authorizing the use of the regular military under the Insurrection Act as an exception to the Posse Comitatus Act and through the usage of martial law. This request, if given in a period of anarchy, would likely be held up within the courts. The President should then seek congressional authorization for such usage to ensure that the laws and other areas regarding this order are supported through the membership of Congress. They should not wait for planning, therefore it is critical for the future of the United States that planning starts now on how best to use members of the Military Services in conjunction with civilian resources during the period of transition from the time of the default to when the United States is back on its feet and stable as a country.

263. My wife, Crisha, recently immigrated from the Philippines and has now become a U.S. citizen. Her response to how Ferdinand Marcos used martial law starting in 1972 was both good and bad in the sense that while it started out well and the policies helped the Philippines, corruption became an issue later on.

264. *See* Carl H. Landé, *Philippine Prospects After Martial Law*, 59 FOREIGN AFFS. 1147, 1148 (1981) ("Western observers at first sight are most impressed by Marcos' modernizing efforts. Even Marcos Filipino opponents, attuned to traditional values and behavior, agree that many positive achievements can be credited to Marcos and martial law, and this tempers their criticism to some extent.").

265. *See* Portia L. Reyes, *Claiming History: Memoirs of the Struggle Against Ferdinand Marcos's Martial Law Regime in the Philippines*, 33 J. Soc. Issues Se. Asia 457, 459 (2018) ("On 21 September 1972 President Ferdinand Marcos put the Philippines under Martial Law, claiming that the measure was necessary to save the republic and reform society. His government suspended constitutional rights, allegedly to enable it to eliminate the communists who—according to Marcos—had infiltrated all sectors of the society ('Proclamation 1081' 1972). He closed Congress, coralled the judiciary and assumed all governmental powers. He imposed a curfew and censorship and prohibited rallies and demonstrations. Loyal to the president-turned-dictator, the Armed Forces of the Philippines (AFP) embarked on a ruthless campaign of censorship and repression.").

266. *Id.* at 467.

D. The Other Side

Perhaps few other issues will be as difficult as when the United States emerges from a formal default and the ensuing chaos that threatens to upend so much of American history. As a defining moment, the very nature of how money is spent will have changed forever. If planned for in advance, this crossing will be one of anguish but one nonetheless of resilience and perseverance. The President, courts, and members of Congress will all have played their roles, as well as the members of the military, police, and countless Americans who took part in the process. What the other side might look like may now only be in the minds of a few. What is known, however, is that planning is key for this crossing to take place in a smoother manner than otherwise. In the end, it will be countless unknown people stepping up to make a difference that will ultimately decide how the future of the United States will be remembered. For now, it is hoped that the planning will start and the paths made clear, as to what will happen on that fateful day when the default occurs, the markets crash, and decisions are made. With planning, that future will be brighter for everyone involved.

IV. CONCLUSION

> [A]sk not what your country can do for you—ask what you can do for your country.
>
> –John F. Kennedy[267]

We currently face an opportunity to put in place a plan that would use the regular military and other agencies to limit the chaos that would ensue following a collapse in the financial markets caused by a default on our nation's debt, both globally and within the United States. This paper has argued for the creation of a special bureau with a set of command from the military, perhaps under the Joint Chief of Staff,[268] that would allow for the quick deployment of regular military personnel after a request from the President to quell any uprisings during such a period of chaos.

As has been argued, it is not whether the United States government will default on its national debt but when and under what circumstances. The recent fight over the debt ceiling, the downgrade by Fitch of U.S. debt, and

267. *See* President John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in President John F. Kennedy's Inaugural Address (1961)*, NAT'L ARCHIVES: MILESTONE DOCUMENTS, https://www.archives.gov/milestone-documents/president-john-f-kennedys-inaugural-address [https://perma.cc/4JD3-PC3C].

268. *See Chairman of the Joint Chiefs of Staff: Air Force Gen. Charles Q. Brown, Jr.*, U.S. DEP'T OF DEF., https://www.defense.gov/About/Chairman-of-the-Joint-Chiefs-of-Staff/ [https://perma.cc/W6CE-NS2S].

future arguments to come will only bring the United States one step closer to this default. The polarization that has intensified in today's politics has made the issue of budgets and how to best address the growing national debt an issue that may only be resolved through such a crisis. Perhaps no other Supreme Court case has impacted the issue of the national debt as that of *Citizens United v. Federal Election Commission*[269] because of the way it allows special interests to fund proponents of defense spending, Medicare, Social Security benefits, and taxes. This opportunity for outside influence insulates these line items from being modified in any meaningful way as to limit the likelihood of a default. Even the most recent deal to address the debt ceiling was at best only a small step in this direction. Should the United States default in a manner whereby it will no longer pay its interest or principle, the silver lining would be that, for the first time, the United States will be forced to live within its means.

The key issue of this paper has been the topic of *planning*. The federal government needs to put plans in place today that would allow the President to quickly use the regular military based upon an executive order allowing for an exception to the Posse Comitatus Act. Such an order would allow not only for the use of the regular military (and other agencies), but may also allow for the use of martial law during and limited to a period of chaos. Ultimately, the military should play a key role in this transition period but only for a short duration of time. In the end, the individual members of the regular military will be most important to the stabilization process as the United States goes from a period of default to one where it is once again financially stable. As former President Kennedy has noted, it should be the people stepping up and assisting others through difficult times.[270] Yet, current military personnel may see some of the largest cuts in their numbers as reductions are made to the federal budget—it is hoped that these members and families are protected during this adjustment period.

The world has seen the rise and fall of countries, and the United States will likely find itself in a period of transition from the top to one of many powerful nations in the near future as the national debt reaches unsustainable levels. The planning for such an event needs to begin now to ensure that, when it finally does occur, the President has the ability to act quickly with a clear chain of command that will allow for the decisive use of the regular military to quell the chaos of events relating to this period of difficulty. Through such planning and preparation, the United States will be able to move onto the other side, and once again take its place among other truly great countries. Let the planning begin now—for the benefit of all of those

269. 558 U.S. 310 (2010).

270. *See* President John F. Kennedy, Inaugural Address, *supra* note 267.

lives that can be saved, nurtured, and ultimately redeemed through preparation for this coming transition.

SEMICOLON SNAFUS

WILLIAM B. REINGOLD, JR.[†]

ABSTRACT

Case law is replete with disputes arising from punctuation mistakes. The semicolon, in particular, has been front and center in many of these cases. The general consensus is that most people—including lawyers—do not know how or when to properly incorporate them into one's writing. And it may come as a surprise that improperly placed semicolons have engendered serious and profound ramifications, including unjust prison sentences and even overturning a gubernatorial election in 1873. Lawyers do themselves a disservice by not paying attention to semicolons in their drafting. This essay sets forth various considerations that litigants may use when confronted by a dubious semicolon in a statute, contract, insurance policy, will, or any other legal text.

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SEMICOLON SNAFUS

> *"Many of the adults who know nothing about semicolons are very successful. Some are doctors, people who have earned the highest academic degrees; lawyers, graduates of the most prestigious schools; or chief executive officers, masters of the corporate world. Some are even -- this will surely surprise you -- journalists."*
>
> —William G. Connolly & Allan M. Siegal, co-authors of *The New York Times Manual of Style and Usage*.[1]

I. INTRODUCTION

Since its appearance in 1494 when Italian printer Aldus Manutius the Elder made the aberrant decision to repurpose an ancient symbol (originally devised by the Greeks to denote a question) and infuse it with a novel meaning, the semicolon has served as the misunderstood stepchild in our family of punctuation marks.[2] Once extremely popular in the nineteenth century amongst writers,[3] it fell out of favor over time and eventually became stigmatized as *that* symbol signifying pretentiousness and needless complexity,[4] simultaneously innocuous, polarizing, straightforward, and abstruse.[5] Its decline and peculiar reputation is underscored by the fact that, these days, semicolons comprise less than two percent of all punctuation in print.[6]

1. William G. Connolly & Allan M. Siegal, *Between a Comma and a Period*, N.Y. TIMES (Nov. 7, 1999), https://www.nytimes.com/1999/11/07/weekinreview/between-a-comma-and-a-period.html [https://perma.cc/U57A-8G77].

2. *See* LYNNE TRUSS, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION 77 (2003).

3. *See* CECELIA WATSON, SEMICOLON: THE PAST, PRESENT, AND FUTURE OF A MISUNDERSTOOD MARK 46–47 (2019).

4. *See generally* Paul Collins, *Has Modern Life Killed the Semicolon?*, SLATE (June 20, 2008, 4:51 PM), https://slate.com/culture/2008/06/has-modern-life-killed-the-semicolon.html [https://perma.cc/BK5J-JW45].

5. *See generally* Lauren Oyler, *The Case for Semicolons*, N.Y. TIMES (Feb. 9, 2021), https://www.nytimes.com/2021/02/09/magazine/the-case-for-semicolons.html?searchResultPosition=2 [https://perma.cc/2ZYP-RBQ8].

6. Anne Curzan & Rebecca Kruth, *Some People Hate Semicolons; Some Find Them Rather Appealing*, MICH. PUB.: NPR, at 1:35 (Nov. 6, 2016, 3:04 PM), https://www.michiganradio.org/arts-culture/2016-11-06/some-people-hate-semicolons-some-find-them-rather-appealing [https://perma.cc/H6YK-UX4H].

And you may be surprised to learn just how caustic the discourse regarding semicolons can be. Vonnegut called semicolons "transvestite hermaphrodites representing absolutely nothing";[7] Orwell swore off using them in his novel *Coming Up for Air*;[8] Barthelme unapologetically said they are as "ugly as a tick on a dog's belly";[9] Dolnick likened them to "a cherry pitter, theoretically functional, but fussy and unloved and probably destined for the yard-sale table";[10] and so on. Other commentators raise rather theatrical defenses of the semicolon's utility,[11] as in the somewhat specious notion that they "impose order within sentences."[12] Although ostensibly everyone has an overtly colorful commentary that likely distorts the discussion,[13] it is hard to deny that many people deem semicolons to be an unwelcome symbol in today's day and age.[14] Part of the problem stems from lackadaisical writing standards,[15] coupled with the reality that semicolons are unavoidably a stylistic device possessing an air of formality at loggerheads with those in favor

7. KURT VONNEGUT, A MAN WITHOUT A COUNTRY 23 (2006).

8. Letter from George Orwell to Roger Senhouse (Oct. 22, 1947), *in* 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: IN FRONT OF YOUR NOSE, 1945–1950, at 381, 382 (Sonia Orwell & Ian Angus eds., 1968) ("Did you know by the way that this book hasn't got a semicolon in it? I had decided about that time that the semicolon is an unnecessary stop and that I would write my next book without one.").

9. Donald Barthelme, *Not-Knowing*, 39 GA. REV. 509, 520 (1985).

10. Ben Dolnick, *Semicolons: A Love Story*, N.Y. TIMES (July 2, 2012, 9:30 PM), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2012/07/02/semicolons-a-love-story/ [https://perma.cc/W3Q4-CWUU].

11. The New York Times has, over the years, published a spate of articles championing semicolons. *See, e.g.*, Oyler, *supra* note 5; Parul Sehgal, *'Semicolon' is the Story of a Small Mark that can Carry Big Ideas*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/books/review-semicolon-cecelia-watson.html [https://perma.cc/5AZY-4CJ4]; Dan Laidman, *Long Live the Semicolon*, N.Y. TIMES (Nov. 10, 1999), https://www.nytimes.com/1999/11/10/opinion/l-long-live-the-semicolon-359840.html [https://perma.cc/37KT-367D].

12. *Saved by the Semicolon!*, PROB. & PROP., May–June 2021, at 64.

13. *See* Diana Simon, *True Confessions of a Legal Writing Professor: Semicolons Suck*, 57 ARIZ. ATT'Y 20, 20 (2021) ("A review of the literature about the mark shows that, like the reality of global climate change, it has its followers and its detractors."); *cf.* Jen Doll, *The Imagined Lives of Punctuation Marks*, THE ATLANTIC (Aug. 21, 2012), https://www.theatlantic.com/culture/archive/2012/08/imagined-lives-punctuation-marks/324456/ [https://perma.cc/5NC2-M5RU].

14. With the cheeky exception that "[t]hey still live on, though, in emoticons, those graphic emblems of our grins, grimaces and other facial expressions." Sam Roberts, *Celebrating the Semicolon in a Most Unlikely Location*, N.Y. TIMES (Feb. 18, 2008), https://www.nytimes.com/2008/02/18/nyregion/18semicolon.html. [https://perma.cc/NKA7-N974].

15. *See* Gerald Lebovits, *The Worst Mistakes in Legal Writing—Part II*, 90 N.Y. ST. B.J. 62, 62 (2018); *see also* BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 754 (4th ed. 2016).

of casual and/or declarative prose.[16] Writers no doubt are aware of this perception and, accordingly, "the typical advice . . . is to use them sparingly, as if there's a limited supply."[17]

One question, then, is how semicolons fit into legal writing, a discipline often derided for gratuitous legalese and poor drafting.[18] Aside from lists separated by semicolons, the main thing you need to know is a semicolon separates compound sentences, separates an independent clause that could stand as a sentence, and is coordinate to (and therefore modifies) the material that appears before it. They bridge ideas and signal to the reader that related information after the semicolon will contextualize the meaning of the entire sentence.[19] And even if you cannot concretely define or explain the significance of a semicolon, we all probably have a certain *feel* for when to use one. None other than Abraham Lincoln purportedly wrote that "[w]ith educated people, the semicolon is a matter of rule; with me, it's a matter of feeling."[20] The amount of punctuation thrown into a narrative—semicolon or otherwise—should reflect the rhythm and cadences of the overarching structure and purpose of your prose.[21]

But that *feeling* of when it is appropriate to employ a semicolon may greatly affect the meaning of a legal document, especially when imprecise punctuation leads to inadvertent, adverse readings of the text.[22] These types of drafting mistakes are unsettlingly common. And even though the Supreme Court long ago admonished that "[p]unctuation is a most fallible standard by

16. *See* James Harbeck, *In Defense of the Semicolon*, THE WEEK (Jan. 11, 2015), https://theweek.com/articles/460487/defense-semicolon [https://perma.cc/4Z5L-LUR5].

17. Oyler, *supra* note 5.

18. Edward S. Greenbaum, *Lawyers Talk Too Much*, 19 F.R.D. 217, 219 (1956) ("Pride in our work and pride in our profession should impel us to use simpler language. We lawyers are not popular. Our prolix circumlocution is one of the reasons for this.").

19. *See* David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 719 (2002) ("The semicolon actually does not introduce a completely new thought. Instead, it introduces an idea that modifies the first part of the sentence.").

20. William R. Wilson, Jr., *"How I Write" Essays*, 4 SCRIBES J. LEGAL WRITING 79, 79 (1993).

21. For example, Dr. Martin Luther King, Jr.'s, "Letter from Birmingham Jail" contains a 318-word sentence that makes brilliant use of semicolons to reflect and echo the long journey toward civil rights. *See* Letter from Martin Luther King, Jr. to Local Clergymen 2 (Apr. 16, 1963) (electronic reprint on file with California State University, Chico), https://www.csuchico.edu/iege/_assets/documents/susi-letter-from-birmingham-jail.pdf [https://perma.cc/NTB7-J673].

22. *See, e.g.*, Ohio Cnty. Drug Co. v. Howard, 256 S.W. 705, 707 (Ky. 1923) ("The second instruction, authorizing allowance for hospital fees and medical treatment, is also defective in that it does not make it clear that only such expenses as proximately resulted from the mistake in filling the prescription should be allowed, since this latter clause follows another separated by a semicolon from the one relating to such expenses.").

which to interpret a writing[,]"[23] ill-advised semicolons continue to be at the center of legal disputes.[24] Attorneys do themselves a disservice by not paying attention to the nuances of punctuation in their writing.[25] In turn, this kind of attention will pay dividends in identifying the erroneous use of semicolons in legal drafting.[26] This essay therefore serves to spotlight various ways lawyers can approach a semicolon of questionable accuracy in legal documents. Part II of this essay delves into some of the ins and outs of semicolons, punctuation, grammar, and usage. Part III discusses the relationship between punctuation and textualism, a jurisprudence that simply cannot be ignored in this setting. Finally, Part IV outlines various considerations when evaluating a sentence or passage that contains a semicolon, ultimately concluding with a brief synopsis of the infamous "Semicolon Court" from Texas.

II. SEMICOLON USAGE: STYLE, PAUSES, AND PITFALLS

Broadly, semicolons allow for two sentences—i.e., two independent clauses—to be combined into one sentence.[27] The reason being that they are substantively interconnected in a way that warrants bridging them together. "Think of the two clauses as best friends; they want to sit next to each other in every class."[28] As a reader who crosses paths with a semicolon, the question of *why* the writer deployed a semicolon can often be understood by *how* the writer begins the second clause. Consider conjunctive adverbs following the semicolon such as "however," "hence," and "therefore." These are common words to easily signal the purpose for bringing these clauses together. Case law is replete with examples of courts articulating a rule with one independent clause, only to clarify its scope with a conjunctive adverb.[29] Of course, things are not always so simple. Conspicuous conjunctive adverbs, while certainly helpful, are akin to the *Welcome to Fabulous Las Vegas* sign.

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23. Ewing's Lessee v. Burnet, 36 U.S. 41, 54 (1837).

24. *See, e.g.*, *infra* notes 173–83 and accompanying text.

25. *See* Patrick Barry, *The Infinite Power of Grammar*, 67 J. LEGAL EDUC. 853, 856 (2018).

26. *E.g.*, Commonwealth v. George, 717 N.E.2d 1285, 1288 (Mass. 1999) ("Properly read, however, this semicolon acts as a period and concludes the 'any other crime' statute of limitations, and the tolling clause is an independent provision which applies to the previous limitations provisions.").

27. Cameron v. State, 508 S.W.2d 618, 620 (Tex. Crim. App. 1974) (Odom, J., concurring).

28. Jessica Ronay, *A Mother Goose Guide to Legal Writing*, 36 U. LA VERNE L. REV. 119, 138 (2014).

29. *E.g.*, State v. Pappas, 289 P.3d 634, 636 (Wash. 2012) (en banc) ("Previously, we considered whether the victim's injuries fit within the definition of the statute's required element of harm; however, RCW 9.94A.535(3)(y) now requires comparison of the victim's injuries against the minimum injury necessary to satisfy the offense." (citing State v. Stubbs, 240 P.3d 143, 148 (Wash. 2010) (en banc))).

Nobody can miss them. Compare these sentences to those by William Faulkner and they feel formalistic and borderline garish. Faulkner's prose may be idiosyncratic and difficult, but it possesses an inescapable lyricism. Here is just one sentence from his novelette *The Bear* to illustrate how commas and semicolons elevate the spiritual struggle between man and beast:

> It seemed to him that he could never see the two of them, himself and the bear, shadowy in the limbo from which time emerged, becoming time; the old bear absolved of mortality and himself partaking, sharing a little of it, enough of it.[30]

The other core function of the semicolon is to create a calculated pause,[31] "a more important break in the sentence flow than that marked by a comma."[32] This naturally begs the question of *how much more* important? It is a hard question to answer because the semicolon's optionality is distinct from periods, apostrophes, and other necessary symbols that denote essential marks of meaning.[33] (Two famous treatises from the sixteenth and seventeenth centuries advanced an argument for "a pause of one unit for a comma, of two units for a semicolon, and of three for a colon.")[34] The semicolon's pause establishes in readers a sense of fragmentation—an understanding that the sentence is incomplete and underdeveloped unless and until you grasp its full context.[35] There is subtext here.[36] The writer broadcasts their faith in the

30. *See, e.g.*, William Faulkner, *The Bear*, *reprinted in* SATURDAY EVENING POST, May 9, 1942, https://www.gbdioc.org/images/stories/Lay-Ministry/Syllabus/The_Bear_by_William_Faulkner.pdf [https://perma.cc/K2FG-JYR5].

31. *See* People v. Taylor, 194 N.E.3d 41, 52 (Ill. App. Ct. 2022); Paul Bruthiaux, *The Rise and Fall of the Semicolon: English Punctuation Theory and English Teaching Practice*, 16 APPLIED LINGUISTICS 1, 10 (1995).

32. Criswell v. Eur. Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990).

33. Angela Petit, *The Stylish Semicolon: Teaching Punctuation as Rhetorical Choice*, 92 ENG. J., 66, 68 (2003).

34. T. Julian Brown, *Punctuation*, BRITANNICA (Dec. 20, 2023), https://www.britannica.com/topic/punctuation [https://perma.cc/WQH5-ZPS8].

35. *See* Hugh Kenner, *Ever Onward*, N.Y. TIMES (Dec. 18, 1983), https://www.nytimes.com/1983/12/18/books/ever-onward.html [https://perma.cc/VE2G-VH4Y] ("It's the difference between 'She was plump, delightful' and 'She was plump; delightful.' There's a pondering in that second version. 'Plump. But delightful? Well, yes.'").

36. *See id.*; *see also* TRUSS, *supra* note 2, at 124 ("The sub-text of a semicolon is, 'Now this is a hit. The elements of this sentence, although grammatically distinct, are actually elements of a single notion.'").

reader's faculties to comprehend the semicolon's role in the sentence.[37] "Expectation is what these stops are about; expectation and elastic energy."[38]

So that's what the *reader* needs to know. Whether *writers* understand how to use a semicolon is another question. "[A] few adults do understand semicolons; other adults just think they understand."[39] Part of the inherent problem people struggle to understand is the difference between grammar, punctuation, and usage.[40] The semicolon's growth over the years evidences how its usage has evolved:

> [B]efore the 1800s, it had been a pause. By the early 1800s, grammarians began to describe these pauses as a means to delineate clauses properly, such that punctuation served syntax, with its prosodic and musical features secondary. By the mid-1800s, guided by a new generation of grammarians, grammar was tiptoeing towards a natural science model, deriving its rules from observation of English and teaching those rules to students through exercises in which they would be guided to make the same observations and draw general conclusions from them in the form of rules.[41]

Grammar pedagogy has largely been left by the wayside following decades of research indicating minimal worthwhile results.[42] That's not a huge problem for periods and other punctuation marks everyone understands. But "[w]hen you use [a semicolon], you are doing something purposefully, by

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37. Gal Beckerman, *A Civil War Over Semicolons*, THE ATLANTIC (Jan. 5, 2023) https://www.theatlantic.com/books/archive/2023/01/turn-every-page-documentary-robert-caro-robert-gottlieb/672651/ [https://perma.cc/3T5U-ZGLH] ("The insecure writer—a.k.a. every writer—worries that their ideas won't come across clearly, so they overcompensate.").

38. TRUSS, *supra* note 2, at 114.

39. Connolly & Siegal, *supra* note 1. Their reputation as a hifalutin punctuation mark has not done any favors by standard definitions. Merriam-Webster's explanation uses a semicolon in its definition of a semicolon: "a punctuation mark; used chiefly in a coordinating function between major sentence elements (such as independent clauses of a compound sentence)." *Semicolon*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/semicolon [https://perma.cc/55GM-U3UA].

40. WATSON, *supra* note 3, at 43 (describing the relationship between rules and usage as "thorny"). One point of clarification that is perhaps so obvious it requires mention: grammar and punctuation are often coupled together, but they are not synonymous. "Punctuation is the cuing system by which writers signal their readers to slow down, pause, speed up, supply tonal inflections, and otherwise move more smoothly through sentences." GARNER, *supra* note 15, at 746. The term "grammar" broadly "refer[s] to the set of rules that allow us to combine words in our language into larger units." SIDNEY GREENBAUM & GERALD NELSON, AN INTRODUCTION TO ENGLISH GRAMMAR 1 (2d ed. 2002). That said, having a grasp on grammar "is often essential for punctuation" and to establish consistency in how written language is interpreted. *Id.* at 6, 183.

41. WATSON, *supra* note 3, at 48.

42. Aïda M. Alaka, *The Grammar Wars Come to Law School*, 59 J. LEGAL EDUC. 343, 345–46 (2010) [hereinafter *Grammar Wars*]; Lillian B. Hardwick, *Classic Persuasion Through Grammar and Punctuation*, 3 J. ASS'N LEGAL WRITING DIRS. 75, 75 (2006) (quipping that "one sure way to clear a room is to announce a lesson in grammar or punctuation").

choice, at a time when motivations are vague and intentions often denied."[43] Because of the semicolon's comparatively nebulous nature, adherence to grammar rules may well give way to some type of literary osmosis (as happened to one writer who learned how to use semicolons from reading *The New Yorker*).[44] Even intelligent writers flounder. Ludwig Wittgenstein infamously penned one of the most confounding semicolons ever when he wrote "der Philosoph behandelt eine Frage; wie eine Krankheit"; translated, "the philosopher treats a question; like an illness."[45] The rather obvious predicament exemplified by Wittgenstein's semicolon is this: "Improperly placed or omitted punctuation . . . can cause ambiguity, which can easily lead to misunderstanding[.]"[46]

For legislators—many of whom graduated from law school—such ambiguities and misunderstandings can have grave ramifications. "People have lost fortunes and even been put to death because of imprecise punctuation involving semicolons in legal papers."[47] In 1964, one Washington Supreme Court justice advocated for the legislature to hire a grammarian to their technical staff so that poor statutory drafting would not subvert the intent and purpose of the legislation.[48] Further back in 1895, the *New York Times* published the following lament regarding a semicolon at issue before the Supreme Court:

> It appears that, if the matter had been correctly reported, the force of a law before the Supreme Court for construction depends upon a semicolon. That mark of punctuation may change the whole tenor of an important act in the Legislature. It is not the first time that the semicolon has made trouble in laws. A semicolon in two or three sections of tariff laws has led to decisions hostile to the revenue and to home industries. It was some trouble of that nature in the Morrill tariff act which gave the tin-plate industry to Great Britain. It was a semicolon which caused thousands to be refunded to the importers of women's

43. Oyler, *supra* note 5; *see also* Wayne Glausser, *What do Semicolons Mean?*, 53 STYLE 308, 308 (2019) (observing that the semicolon is, on the one hand, "negligible in its functionality—never *really* necessary").

44. *See* Alexander Abad-Santos, *How Jose Antonio Vargas Learned to Use a Semicolon*, THE ATLANTIC (July 13, 2012), https://www.theatlantic.com/politics/archive/2012/07/how-jose-antonio-vargas-learned-use-semicolon/325947/ [https://perma.cc/AM2J-ZTFQ].

45. Mary Norris, *Sympathy for the Semicolon*, NEW YORKER (July 15, 2019), https://www.newyorker.com/culture/comma-queen/sympathy-for-the-semicolon [https://perma.cc/H8J2-24LQ].

46. Ann Nowak, *The Struggle with Basic Writing Skills*, 25 LEGAL WRITING 117, 119 (2021); *cf.* Hardwick, *supra* note 42, at 77 (noting how a lawyer's command of punctuation can convey a professional impression to the reader).

47. Roberts, *supra* note 14.

48. *See In re* Estate of Kurtzman, 396 P.2d 786, 793 (Wash. 1964) (Hill, J., concurring).

> hat trimmings, though the intent of those who passed the law was perfectly clear.
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> . . . [T]hese [new grammar] teachers have been going on making new rules for years until no one can undertake to follow them, but each punctuates according to his pleasure, rather than his familiarity with rules. . . . Unfortunately, the verbosity and intricacy of the language and construction, or lack of construction, in which statutes are written, renders punctuation necessary. This being the case, it seems that so much trouble comes from the indiscriminate use of punctuation marks that there should be a legal treatise on that subject, defining the force of the different marks as they are scattered through the statutes.[49]

The *Times* passage is a peculiar artifact because it might as well have been written yesterday. And it is especially relevant for lawyers who, as discussed next, should read and draft language cognizant of the importance that punctuation can entail.

III. TEXTUALISM AND ITS RELATION TO PUNCTUATION

Generally, the addition of punctuation marks increases the chance of inadvertent ambiguities.[50] "[P]unctuation itself is not meaning but is instead a potential signifier of meaning[,]"[51] meaning that a review of any text may call for attention to the commas, semicolons, and other punctuation marks.[52] It follows that an analysis of punctuation is a form of textualism.[53] This version of textualism tends to be overlooked as compared to focusing on words and phrases,[54] likely because there happens to be a hearty dose of case law

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49. Indianapolis J., *A Semicolon Before a Supreme Court: A Legal Treatise on Punctuation or a Changed Method Needed*, N.Y. TIMES (Dec. 31, 1895), https://timesmachine.nytimes.com/timesmachine/1895/12/31/103379525.html [https://perma.cc/JTV2-BA8D].

50. Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for "Statutory Housekeeping": Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 136 (2007); *see* Hollee S. Temple, *Here's a Scoop for the Law Profs: Teach Your Students to "Think like a Journalist"*, 81 U. DET. MERCY L. REV. 175, 186 (2004).

51. Harold Anthony Lloyd, *Recasting Canons of Interpretation and Construction into "Canonical" Queries: Initial Canonical Queries of Presented or Transmitted Text*, 57 WAKE FOREST L. REV. 353, 388 (2022).

52. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 295 (2002) ("Both grammar rules and punctuation marks thus appear to conspire against the constitutionality of West Virginia."); City of Golden Valley v. Wiebesick, 899 N.W.2d 152, 172–73 (Minn. 2017) (Anderson, J., dissenting) (sampling the punctuation states "use a semicolon to separate the warrant clause from the reasonableness clause in their own constitutions").

53. *See In re* King Mountain Tobacco Co., 623 B.R. 323, 329 (Bankr. E.D. Wash. 2020).

54. *See* Johnson v. Bowen, 95 A. 370, 372 (N.J. Ch. 1915); Tyrrell v. Mayor of New York, 53 N.E. 1111, 1113 (N.Y. 1899); Kesavan & Paulsen, *supra* note 52, at 334–35.

downplaying any emphasis on punctuation.[55] In the 1925 case of *Barrett v. Van Pelt*,[56] the Supreme Court pronounced that "[p]unctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning."[57] The Court followed suit in the 2009 case of *United States v. Hayes*[58] when it ignored Congress's failure to use either a semicolon or a line break in the federal Gun Control Act of 1968.[59] Writing for the majority, Justice Ginsburg concluded that a contrary ruling would defeat the Act's purpose.[60]

But despite *Barrett*, *Hayes*, and other cases with similar viewpoints, squabbles over punctuation persist amongst judges.[61] History shows that many legal arguments have centered upon the effect of a semicolon.[62] So much so, in fact, that an older line of cases holds that where commas were mistakenly used instead of semicolons, courts would treat the comma as a semicolon and "read . . . such stops as are manifestly required" to realize the legislature's intent.[63] Today, however, fiercely dogmatic textualists may pounce on punctuation lacking the precision of a Gaudí painting. Eschewing legislative history, many textualists will "consider[] as context dictionaries and grammar books, the whole statute, analogous provisions in other statutes, canons of construction, and the common sense God gave us."[64] There have been circuit splits over how to read clauses separated by a semicolon in federal statutes,[65] and, in *Hayes*, Chief Justice Roberts wrote in dissent that the majority's revisions "alter the structure of the statute, and we have recognized that structure is often critical in resolving verbal ambiguity."[66]

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55. *See* U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993) ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning.").

56. 268 U.S. 85 (1925).

57. *Id.* at 91 (quoting Chi., M. & St. P. Ry. Co. v. Voelker, 129 F. 522, 527 (8th Cir. 1904)).

58. 555 U.S. 415, 423 (2009).

59. *See id.* at 423–24; 18 U.S.C. § 922(g)(9).

60. *See Hayes*, 555 U.S. at 423.

61. *E.g.*, Lee v. Mercury Ins. Co. of Ga., 808 S.E.2d 116, 134 (Ga. Ct. App. 2017) ("In order to reach this result, however, the dissent must rewrite the policy by removing the semicolon. This we cannot do."); *cf.* People v. Taylor, 194 N.E.3d 41, 51 (Ill. App. Ct. 2022) (Lytton, J., dissenting).

62. *See, e.g.*, Scarborough v. Robinson, 81 N.C. 409, 419 (1879).

63. United States v. Lacher, 134 U.S. 624, 628 (1890) (first citing Hammock v. Loan & Trust Co., 105 U.S. 77, 84 (1882); and then citing United States v. Isham, 84 U.S. (17 Wall.) 496 (1873).

64. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 669 (1990); *see also* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1926 (2015).

65. *See* Kimble v. D.J. McDuffy, Inc., 454 U.S. 1110, 1110 (1981) (White, J., dissenting).

66. United States v. Hayes, 555 U.S. 415, 434 (Roberts, C.J., dissenting).

Punctuation mishaps like those in *Hayes* force courts to balance the awkwardness of subpar drafting with its effect on the relevant text.[67] Of course, the weight assigned to the mishap is in the eye of the beholder.[68] Commentators have chimed in on these debates with their own perspectives on the propriety of holding the drafters' feet to the fire.[69] Justice Scalia and Bryan Garner point out, correctly, that punctuation will rarely alter the meaning of a word, "but it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part."[70] Professor Harold Lloyd frames the issue as follows: "As a matter of interpretation or construction as the case may be, to what degree (if any) does this text's punctuation (or lack thereof) help signify the author's or speaker's meaning? In light of our answer, how should we interpret and construe such meaning?"[71] Scalia and Garner wrote that "rules of grammar govern unless they contradict legislative intent or purpose," but caveat that this is true only if such intent is "manifested in the only manner in which a legislature can authoritatively do so: in the text of the enactment."[72] To them, a presumption of legislative literacy may be rebutted only upon other textual indications of meaning.[73]

No surprise that not everyone agrees with Scalia and Garner. Celia Watson—speaking to their notion that rules and definitions accurately reflect usage and that legislators comport with popular grammar-rule systems—asserts that "there's absolutely no historical grounds for those assumptions."[74] Some judges insist they are not cabined by "strict adherence 'to the niceties of

67. *See id.* at 422–23 (majority opinion); *see also* United States v. Dion, 37 F.4th 31, 37 (1st Cir. 2022) ("We acknowledge that the absence of that punctuation renders the sentence somewhat awkward—but its meaning remains apparent."); Perez v. Zagami, LLC, 94 A.3d 869, 874 (N.J. 2014) ("In large part, the punctuation of the clause confounds its clear meaning.").

68. *Compare* Lee v. Mercury Ins. Co. of Ga., 808 S.E.2d 116, 126 (Ga. Ct. App. 2017) (countering the assertion that "punctuation is never permitted to control" with the assertion that such a claim "must be a remnant of the former denigration of punctuation that had not been adopted by the legislature; in modern times we see not rational basis for such a rule"), *with* United States v. H.B. Claflin Co., 92 F. 914, 916 (2d Cir. 1899) ("[N]either mere awkwardness of expression nor imperfect punctuation are of much weight in the construction of tariff acts."), *and* Lloyd, *supra* note 51, at 391 ("Of course, as a general rule, courts should not swing from giving improper weight to punctuation to giving no weight at all.").

69. *See, e.g.*, David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 706 (2012) ("If the Framers punctuated deliberately, then it is untenable to discard inconvenient punctuation out of hand. To the contrary, since the Framers cared about their punctuation, it follows that we should too.").

70. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 161 (2012).

71. Lloyd, *supra* note 51, at 388 (emphasis omitted).

72. SCALIA & GARNER, *supra* note 70, at 140.

73. *Id.* at 140–41.

74. WATSON, *supra* note 3, at 190.

grammar rules,'"[75] while others acknowledge that looking to punctuation for legislative intent has at least some merit.[76] History suggests that as punctuation became more acceptable for lawyers to scrutinize, so too did case law limiting the emphasis one could appropriately place on it:

> Punctuation marks are rarely, if ever, an infallible token of intention, for punctuation is to a large degree arbitrary and very often a matter of individual taste unrelated to the expression of the intention, and the comma is frequently employed merely to indicate rhetorical pauses and interruptions in continuity of thought and sometimes with an eye to structure without regard to precision in the delineation of the common purpose.[77]

All of that being said, we live in a post-Scalia world, one in which—as Justice Kagan famously noted—"we are all textualists [now]."[78] It would behoove the cautious litigant to heed the grammar and punctuation of any relevant legal text, even if this is just to save face in the event you go before a grammarian-turned judge.

IV. CONSIDERATIONS IN EVALUATING A SEMICOLON'S MEANING

Laypersons may assume that lawyers are well-versed in grammar, splashing persuasive rhetoric onto the page with the flick of the wrist. If only that were so—even a cursory bit of research reveals a literature on the way judges bemoan the writing presented to them by attorneys.[79] "[S]tudents often arrive at law school with a woefully inadequate mastery of the elements of punctuation, grammar, and syntax."[80] For all the reasons already articulated, semicolons tend to be front and center in these disputes. The following subsections delve into these kinds of cases.

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75. Edwards v. Daigle, 10 So. 2d 209, 212 (La. 1942).

76. *See, e.g.*, Casriel v. King, 65 A.2d 514, 516 (N.J. 1949).

77. *Id.*

78. Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017).

79. *See generally* William B. Reingold, Jr., *Lessons in Rhetoric from Older Case Law*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming 2024).

80. Nowak, *supra* note 46, at 119; *cf.* Aïda M. Alaka, *Phenomenology of Error in Legal Writing*, 28 QUINNIPIAC L. REV. 1, 25 (2009) [hereinafter *Phenomenology*] (describing how grade school and undergraduate instructors have been one cause for this issue, because "for some students, the fact that previous assessments had not penalized weak grammar and punctuation skills may have influenced their views").

A. Conjunctions, Ambiguity, and History

An improperly placed semicolon has the potential to create unwanted ambiguity,[81] and one means to analyze this alleged ambiguity is to determine whether they are to be read in the conjunctive or disjunctive.[82] Consider first that "legal argument is often built around legal elements, and multiple elements of legal rules are typically framed either in terms of conjunction or disjunction."[83] This notion branches from text itself, because ordinarily clauses are disjunctive if they are separated by an *or* and conjunctive if they are separated by an *and*.[84] Yet context will normally (if not inevitably) shed light on whether the text should be read in the conjunctive or disjunctive.[85] The drafter's intent may well be distinct from the conjunction used.[86] One option here is to ascertain whether a conjunctive or disjunctive reading renders either an absurd outcome.[87] Courts "are not obligated to engage in a debate on the significance of semicolons and disjunctives when doing so . . . produces a result repugnant to the apparent intent of the legislature."[88] Bald assertions that a semicolon creates ambiguity will not automatically render it so, regardless of the text in dispute.[89] If anything, the addition of semicolons in these situations can ameliorate confusion arising from grammatical gaffes.[90] Some courts will allow for commas to be used instead of semicolons insofar as they "give[] the sense" of what is intended.[91] Even then, however, arguments may emerge as to whether sentences interspersed with semicolons

81. *See, e.g.*, Hill v. Conway, 463 A.2d 232 (Vt. 1983) (per curiam).

82. *See* Fed. Ins. Co. v. Stroh Brewing Co., 127 F.3d 563, 569–71 (7th Cir. 1997); *see also* United States v. Clifford, 197 F. Supp. 2d 516, 519–20 (E.D. Va. 2002).

83. Stephen M. Rice, *Leveraging Logical Form in Legal Argument: The Inherent Ambiguity in Logical Disjunction and its Implication in Legal Argument*, 40 OKLA. CITY U. L. REV. 551, 572 (2015).

84. Silverman v. Silverman, 206 A.3d 825, 832 n.35 (Del. 2019) (first citing Williams v. State, 818 A.2d 906, 912 (Del. 2002); and then citing Concord Steel, Inc. v. Wilmington Steel Processing Co., No. 3369–VCP, 2008 WL 902406, at *7 (Del. Ch. Apr. 3, 2008)).

85. United States v. One 1973 Rolls Royce, V.I.N. SRH–16266, 43 F.3d 794, 815 (3d Cir. 1994).

86. Barr v. Atl. Coast Pipeline, LLC, 815 S.E.2d 783, 786 (Va. 2018); *Ex parte* Jordan, 592 So.2d 579, 581 (Ala. 1992).

87. *See, e.g.*, *Barr*, 815 S.E.2d at 786.

88. Hill v. State, 488 N.E.2d 709, 710 (Ind. 1986).

89. *See, e.g.*, Fed. Ins. Co. v. Stroh Brewing Co., 127 F.3d 563, 570–71 (7th Cir. 1997); *In re* Welsh's Will, 5 N.E.2d 192, 194–95 (N.Y. 1936).

90. *See, e.g.*, Fish v. Kobach, 840 F.3d 710, 741 (10th Cir. 2016); Boothby v. D.R. Johnson Lumber Co., 137 P.3d 699, 702 n.5 (Or. 2006); Azzouz v. Prime Pediatrics, P.C., 675 S.E.2d 314, 318 (Ga. Ct. App. 2009); Swinney v. State, 613 S.W.2d 686, 688 n.4 (Mo. Ct. App. 1981).

91. Leete v. Pac. Mill & Mining Co., 89 F. 480, 481 (D. Nev. 1898).

should be read to modify one another or if they each constitute separate, distinct sentences.[92] One cannot properly discern whether there is ambiguity without understanding whether the semicolon—or comma that should be a semicolon—is intended to create a provision read in the subjunctive or disjunctive.[93]

Context can also be evidenced through legislative history.[94] In *City of Golden Valley v. Wiebesick*,[95] the Supreme Court of Minnesota wrestled with a semicolon in Minnesota's analog to the Fourth Amendment.[96] At issue was whether the federal Fourth Amendment was "textually identical" to Article I, Section 10 of the Minnesota Constitution.[97] For comparison, the two read as follows:

> *The Federal Constitution:* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[98]
>
> *Minnesota's Constitution:* The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.[99]

Do you see the differences? Perhaps not at first. There are a few subtle things, like how "oath" and "warrants" are capitalized only in the federal version. The controversy in *Wiebesick* centered upon how Minnesota's version contains a semicolon after the word "violated," not a comma akin to the Federal Constitution.[100] Despite the difference in punctuation, the majority affirmed that they were identical for three reasons.[101] First, the semicolon at

92. *See* Mills v. State Bd. of Equalization, 33 P.2d 563, 569–70 (Mont. 1934).

93. *See supra* notes 82–84 and accompanying text.

94. *See, e.g.*, State Tax Comm'n v. W. Md. Ry. Co., 52 A.2d 615, 623 (Md. 1947) ("The argument based on the semicolon becomes absurd, when it is shown that this was changed from a comma in codification and the codification was followed in the later act. That is a pure clerical error, and is not entitled to any weight whatever.").

95. 899 N.W.2d 152 (Minn. 2017).

96. *Id.* at 158.

97. *Id.* (quoting State v. Carter, 697 N.W.2d 199, 209 (Minn. 2005)).

98. U.S. CONST. amend. IV.

99. MINN. CONST. art. I, § 10.

100. *Wiebesick*, 899 N.W.2d at 158.

101. Actually, the majority reaffirmed this position as it had twelve years prior in *State v. Carter*, 697 N.W.2d 199, 209 (Minn. 2005), but the dissent and an amicus curiae effectively forced the issue back into the spotlight. *Wiebesick*, 899 N.W.2d at 158.

issue was merely a "historical accident" in which a comma was changed to a semicolon when, in 1905, the semicolon suddenly replaced what had been a comma since 1858 for reasons that are unknown.[102] Second, the clauses in question are connected by the conjunction "and," meaning the clauses are to be read together.[103] Third, it strained credulity to think either the framers or subsequent voters meant to "render most such routine inspections, in the absence of consent or exigent circumstances, unconstitutional."[104]

The dissent, penned by Justice G. Barry Anderson, deemed the punctuation differences between the two constitutions "significant in a novel way."[105] Justice Anderson began by emphasizing how the semicolon establishes two distinct, independent requirements under Minnesota's Constitution.[106] The right to be secure against unreasonable searches and seizures was separate from the mandate that "no warrant shall issue but upon probable cause."[107] In support of his theory, Justice Anderson limned an array of state constitutions that separate the warrant clause from the reasonableness clause through either a semicolon, period, or comma,[108] calling particular attention to two cases from Iowa to underscore how "the semicolon illustrates . . . that in order to avoid being declared 'unreasonable' or unlawful, under [the Iowa Constitution], a warrant is ordinarily required."[109] Next, Justice Anderson rejected the majority's notion that the *and* following the semicolon could be dismissed so nonchalantly, because this *and* acts as a copulative conjunction that signifies an additional fact coordinate to the first clause.[110] Justice Anderson would interpret the latter clause as something "in addition to" the former.[111] Thus, the majority's dismissal of the semicolon was erroneous "as a matter of both history and grammar."[112]

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102. *Id.* at 158–59.
103. *Id.* at 159.
104. *Id.* at 160.
105. *Id.* at 172 (Anderson, J., dissenting).
106. *Id.*
107. *Id.* (quoting MINN. CONST. art. I, § 10).
108. *Id.* at 173.
109. *Id.* (quoting State v. Short, 851 N.W.2d 474, 500–01 (Iowa 2014)).
110. *Id.* The copulative conjunction is discussed in detail next in Part IV(B), *infra*.
111. *Id.*
112. *Id.*

B. Copulative Conjunctions, the Rule of Last Antecedent, and the Series-Qualifier Canon

Let us pause and talk about the peculiar-sounding copulative conjunction, which led Justice Anderson to conclude that Minnesota imposes a reasonableness requirement in addition to the warrant requirement.[113] An 1847 grammar explained that "[a] copulative conjunction connects two or more words engaged in the same office; as, 'Charles *and* John are friends;' 'Two *and* three make five.'"[114] There are various copulative conjunctions besides *and*, such as *both*, *because*, *then*, *so*, etc.[115] Garner cites as examples *also* and *moreover* because this type of conjunction usually provides for another fact related to the first clause.[116] The copulative conjunction's relation to the conjunctive adverb is somewhat hard to descry, because the conjunctive adverb "indicat[es] a logical relationship between two clauses" through a "connective word that combines the functions of a conjunction and an adverb by connecting [the] two clauses while also qualifying a verb."[117] (It does not help that a conjunctive adverb goes by other names—e.g., illative adverb[118]—and these other types of adverbs essentially serve the same function.[119]) Copulative conjunctions may be a simple *and* or *also*, whereas examples of a conjunctive adverb might be *therefore* and *however*.[120] The previously mentioned 1847 grammar distinguished the two from the disjunctive conjunction as follows:

> The copulative or conjunctive conjunction not only connects words and sentences, but it also requires a continuance of the idea, in the same form. The disjunctive conjunction connects the parts of speech, in their grammatical relation, and is so far *conjunctive*; but it admits of an opposition, or change of the sense, and is consequently disjunctive.[121]

So while the word "*and* joins a conjunctive list to combine items,"[122] generally speaking, a copulative conjunction is used to indicate that one statement is simply added to another. The Supreme Court of Louisiana from 1840

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113. *See id.*

114. JOSEPH R. CHANDLER, A GRAMMAR OF THE ENGLISH LANGUAGE: ADAPTED TO THE SCHOOLS OF AMERICA 100 (Philadelphia Thomas, Cowperthwait & Co. ed. 1847).

115. GOOLD BROWN, THE GRAMMAR OF ENGLISH GRAMMARS 430 (4th ed. 1858).

116. BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 997 (4th ed. 2016) ("She is an excellent swimmer; moreover, she knows CPR.").

117. *Id.* at 987.

118. *Id.*

119. I.J. MORRIS, A PHILOSOPHICAL AND PRACTICAL GRAMMAR OF THE ENGLISH LANGUAGE 22 (1858) ("Illatives; as, *therefore, wherefore, then*.").

120. *See id.*

121. *Id.* at 101 (emphasis in original).

122. *Conjunctive/Disjunctive Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

explained well that "in all sound grammatical construction, where two members of a phrase are connected by the copulative conjunction, the order of the members may be reversed, and the meaning remains the same."[123] Like the dissent argued in *Wiebesick*, a copulative conjunction may follow after a semicolon to denote that the second of two connecting clauses is in addition to the first clause. That rationale would align with the Supreme Court of North Carolina's reading of the word *also* following a semicolon in the following statute:

> [T]he party of the first part sell and convey to the party of the second part . . . one bay horse: to have and to hold to the use of the party of the second part, his heirs and assigns forever; *also*, a lien upon each and every of said crops to be cultivated and made during the said year[.][124]

The court highlighted how the function of "also," read against the text surrounding it, can only be read as a copulative conjunction:

> The word is significant and important; it cannot be treated as meaningless or mere surplusage; it must be treated as doing its complete office in connecting two important clauses of the instrument, and having effect in that way. Besides, if it were treated as the beginning of a separate paragraph or sentence, or of an independent subject, or if it should be rejected altogether, it would leave the provision of the deed as to the liens and the crops in an exceedingly awkward if not meaningless condition.[125]

Copulative conjunctions tie into statutory lists as well. "Where several things are referred to in the statute, they are presumed to be of the same class when connected by a copulative conjunction unless a contrary intent is manifest."[126] And this leads us to another grammatical canon of construction that can aid in understanding the propriety of a semicolon: the "rule of the last antecedent," a mainstay in Supreme Court opinions dating back to the eighteenth century.[127] It is the "preferred procedure for clarifying whether modifying language is intended to modify all preceding antecedents or only the final one."[128] The rule provides that a limiting clause or phrase should ordi-

123. Mun. No. 2 v. Hennen, 14 La. 559, 567 (1840).

124. Rawlings v. Hunt, 90 N.C. 270, 272–73 (1884) (emphasis omitted).

125. *Id.* at 273.

126. Roberson v. Phillips Cnty. Election Comm'n, 2014 Ark. 480, at 11, 449 S.W.3d 694, 699–700 (2014) (citing Carson & Co. v. Shelton, 107 S.W. 793 (Ky. 1908)).

127. *See* Lockhart v. United States, 577 U.S. 347, 351 (2016) (citing, amongst other cases employing the rule, Sims' Lessee v. Irvine, 3 U.S. (3 Dall.) 425, 444 (1799)).

128. Newberry Station Homeowners Ass'n v. Bd. of Supervisors of Fairfax Cnty., 740 S.E.2d 548, 554 n.4 (Va. 2013).

narily be read as modifying only the noun or phrase that it immediately follows.[129] Put differently, qualifying phrases are usually to be applied to the immediately preceding words or phrase, "not to be construed as extending to others more remote."[130] Proper use of the rule is therefore predicated on "basic intuition" from the reader.[131]

Here are just a few examples with explanations from the Courts interpreting the text using the rule:

- "It shall be unlawful for (i) any person who has been convicted of a felony . . . to knowingly and intentionally possess or transport any (a) firearm . . . or (b) stun weapon or taser as defined in § 18.2–308.1 except in such person's residence or the curtilage thereof or to knowingly and intentionally carry about his person[.]"[132]
  - ❖ The Supreme Court of Virginia held that "the '*except*' clause modifies only 'stun weapon or taser' and not 'firearm.'"[133]

- "Plan Provider: A Plan Hospital, Plan or Affiliated Physician, or other health care provider that contracts to provide Services to Members (but not including providers who contract only to provide referral Services)."[134]
  - ❖ The Colorado Court of Appeals interpreted this to mean that "the Plan Provider definition suggests the parties intended the final qualifying clause to refer specifically to, and restrict the meaning of, the phrase 'other health care provider that contracts to provide,'" not to "A Plan Hospital" or "Plan Physician" or "Affiliated Physician."[135]

129. Barnhart v. Thomas, 540 U.S. 20, 26 (2003).

130. United States v. Ven–Fuel, Inc., 758 F.2d 741, 751 (1st Cir. 1985).

131. *Lockhart*, 577 U.S. at 351 ("That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all.").

132. Alger v. Commonwealth, 590 S.E.2d 563, 564 (Va. 2004) (emphasis omitted) (quoting VA. CODE ANN. § 18.2–308.2(A) (2001)).

133. *Id.* at 566 (emphasis added) (first citing Keene v. Travelers Indem. Co., 73 F. Supp. 2d 638, 641 (W.D. Va. 1999); and then citing Sun Valley Foods Co. v. Ward, 596 N.W.2d 119, 123 (Mich. 1999)).

134. Chandler-McPhail v. Duffey, 194 P.3d 434, 440 (Colo. App. 2008).

135. *Id.* at 441.

- "Court costs, reasonable attorney fees and other expenses incurred in defending against the legal action as justice and equity may require[.]"[136]
  - ❖ The Court of Civil Appeals of Oklahoma reaffirmed that "[t]he phrase in § 1438(A)(1), 'as justice and equity may require,' applies exclusively to the last antecedent, 'other expenses incurred in defending against the legal action.' The phrase does not convert 1438(A)(1) into a discretionary fee provision."[137]

The rule has been attacked as unrealistic and arbitrary.[138] Chief Justice Marshall spurned its application in *Ex parte Bollman*,[139] opting instead for a "sound construction" predicated on "the true sense of the words" and context of the statute.[140] The rule, "rather than hard and fast, is little more than a presumed 'grammatical practice,' which is flexible enough to avoid an interpretation which 'would involve an absurdity, do violence to the plain intent of the language, or if the context for other reason requires a deviation from the rule.'"[141] Through this lens, it is not a rule in any strict sense of the word.[142] Nevertheless, the rule of last antecedent is met with general approval from courts.[143] Cognizance of this particular canon comes in handy when lists in statutes or other texts are separated by semicolons.[144] These lists may have sentence-like qualities—beginning with a capitalized word and ending with a period—but they are separated by colons and semicolons in such a way that they are more like discreet sentence fragments stitched together.[145] "If there is a comma before the qualifying language," courts will "generally recognize the comma as evidence that the qualifier is intended to apply to all of the previously listed antecedents 'instead of only the immediately preceding

136. Thacker v. Walton, 499 P.3d 1255, 1264 (Ok. Civ. App. 2020) (quoting 12 OKLA. STAT. § 1438(A)(1) (2014)).

137. *Id.* at 1265.

138. *See generally* Jack L. Landau, *Oregon Statutory Construction*, 97 OR. L. REV. 583, 650 (2019) (observing that the canon "assume[s] that language works in ways that make linguists cringe").

139. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

140. *Id.* at 95.

141. Commonwealth v. NC Fin. Sols. of Utah, LLC, 100 Va. Cir. 232, 241 (Cir. Ct. 2018) (quoting Link, Inc. v. City of Hays, 972 P.2d 753, 757–58 (Kan. 1999)).

142. *See In re* Tharaldson Irrevocable Trust II, 984 N.W.2d 375, 379 (N.D. 2023).

143. *Cf.* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 140 tbl.1 (2018).

144. *See, e.g.*, United States v. Letter from Alexander Hamilton to the Marquis de Lafayette, 498 F. Supp. 3d 158, 169–70 (D. Mass. 2020).

145. *See, e.g.*, State v. Pakhnyuk, 926 N.W.2d 914, 922 (Minn. 2019) (noting that the statute is "styled as a single sentence" even though "it is no ordinary sentence").

one.'"[146] On the other hand, "[s]emicolons are stronger indicators of separation than commas"[147] in these settings and may take on a heightened meaning.

To reiterate, these are merely general considerations, and there will always be case law to suggest the opposite given the context surrounding the semicolon's effect on the entire sentence.[148] One such consideration would be the canon most commonly linked to the rule of last antecedent: the series-qualifier canon.[149] "'When,' in a contract or statute, 'there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier following the last item in the list 'normally applies to the entire series.'"[150] Often the question arises as to whether the rule of last antecedent or the series-qualifier canon should govern an issue of statutory interpretation.[151] The nature of the series-qualifier canon prevails over the rule of last antecedent "when there is 'no reason consistent with any discernible purpose of the statute to apply' the limiting phrase to the last antecedent alone."[152] Semicolons signify that the series-qualifier canon may well apply to a contract or statute,[153] meaning you will have to consider both this canon and the rule of last antecedent to thoroughly vet the purpose of the relevant punctuation.

C. The Interplay Between the Semicolon and Surplusage Canon

Would ignoring the semicolon's insertion in the sentence give every word in the text some purpose?[154] If not, then there may be a problem that needs to be addressed. There is a well-trodden path of case law explaining how every word of a statute is presumed to have meaning, and that "no word should be treated as surplusages or rendered nugatory" to the extent feasible.[155] This is known as the surplusage canon, one of the many maxims of

146. State v. Richter, 521 P.3d 303, 308 (Wash. Ct. App. 2022) (quoting State v. Bunker, 238 P.3d 487, 491 (Wash. 2010) (en banc)).

147. *Id.* (citing Dep't of Lab. & Indus. v. Slaugh, 312 P.3d 676, 680 (Wash. Ct. App. 2013)).

148. *See, e.g.*, Three RP Ltd. P'ship v. Dick's Sporting Goods, Inc., No. 17-CV-36-JHP, 2017 WL 4295193, at *4 (E.D. Okla. Sept. 27, 2017).

149. *See* United States *ex rel.* Cent. S. Constr. Corp. v. Gulf Bldg., 568 F. Supp. 3d 1395, 1399 (S.D. Ga. 2021) (describing the rule of last antecedent as the foil to the series qualifier).

150. *Id.* (quoting SCALIA & GARNER, *supra* note 70, at 147).

151. *See, e.g.*, *id.* at 1399–1400; Heyman v. Cooper, 31 F.4th 1315, 1319 (11th Cir. 2022); United States v. Nishiie, 996 F.3d 1013, 1021 (9th Cir. 2021); United States v. Lloyd, 886 F.3d 686, 687–88 (8th Cir. 2018); Downs v. Thompson, 452 P.3d 1101, 1105–06 (Utah 2019).

152. *Lloyd*, 886 F.3d at 688 (quoting Wong v. Minn. Dep't of Hum. Servs., 820 F.3d 922, 929 (8th Cir. 2016) (quoting United States v. Bass, 404 U.S. 336, 341 (1971))).

153. *See* City of Oronoco v. Fitzpatrick Real Est., LLC, 883 N.W.2d 592, 595 (Minn. 2016).

154. *See In re* Mayes, 294 B.R. 145, 160 (B.A.P. 10th Cir. 2003); *see also* Sargent v. Am. Bank & Trust Co. of Portland, 156 P. 431, 433 (Or. 1916).

155. State Bd. of Educ. v. Houghton Lake Cmty. Schs., 425 N.W.2d 80, 86 (Mich. 1988).

interpretation used to ascertain the intent underpinning the text.[156] The basic rationale is that courts strive to give an operative effect to every word employed by a legislature.[157] It is not intended to be an absolute axiom,[158] though this has not stopped commentators from attacking the surplusage as being "weak and ill-founded."[159] Yet because it is inherently linguistic in nature, the reader must take in the meaning of the words as a whole that surround the semicolon (or comma) rather than looking to each word independently.[160]

A semicolon used to separate clauses and establish context has the ability to demonstrate whether coordinate language is surplusage. In *Paschen Contractors, Inc. v. United States*,[161] a contract dispute arose where the plaintiff agreed to construct the United States Courthouse and Federal Office Building in Chicago.[162] One claim specifically addressed the requirement for the plaintiff to cover or insulate certain mixed air supply ducts in hung ceiling spaces at an additional cost of over $161,000.[163] Under the heading "COVERING FOR AIR CONDITIONING DUCTS, ETC.," the applicable paragraph of the contract provided: "The following shall be covered: All supply ducts, casings, etc., from fresh air inlets to room outlets; return ducts in spaces not supplied with conditioned air. Other return ducts including ducts in hung ceiling spaces between conditioned rooms need not be covered."[164]

Both sides appealed to canons of interpretation that supported their respective positions.[165] The court, however, narrowed the issue to whether the above-quoted provision allows for more than one reasonable interpretation.[166] It did not.[167] Under a fair reading, the opening that "[a]ll supply ducts" were to be covered meant that "[e]verything after the semicolon in the first

156. *See* Thomas v. Reeves, 961 F.3d 800, 815–16 (5th Cir. 2020) (Willett, J., concurring).

157. *See* Walters v. Metro. Educ. Enters., 519 U.S. 202, 208 (1997); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988).

158. *See* Lamie v. United States Tr., 540 U.S. 526, 536 (2004); *cf.* SCALIA & GARNER, *supra* note 70, at 178 (explaining that "words with no meaning—language with no substantive effect—should be regarded as the exception rather than the rule").

159. *See* Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000-2015*, 62 WAYNE L. REV. 347, 366 & n.87 (2017) (citing various other commentators and their opinions on the mistaken premise underlying the canon).

160. *See* Stephen C. Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 WASH. L. REV. 1337, 1402 (2019).

161. 418 F.2d 1360 (Ct. Cl. 1969) (per curiam).

162. *Id.* at 1361.

163. *Id.* at 1361–62.

164. *Id.* at 1363.

165. *See id.* at 1367 ("Not untypically, the parties herein cite the same general rules of interpretation, but each to support its respective position.").

166. *Id.*

167. *Id.*

sentence, and in the remainder of the paragraph, quite obviously related to 'return' ducts."[168] If there were no return ducts in the hung ceiling spaces that led to the instant controversy,

> [T]hen everything after that semicolon was surplusage insofar as the hung ceiling spaces were concerned. It is too much to suggest that the adjective "supply" should be inferred between "including" and "ducts" when the two immediately preceding references to ducts were explicit references to "return ducts." This would not be a reasonable inference, and it is not elevated to the level of reasonableness by the application of trade practice nor by any of the other rules of interpretation . . . .[169]

Here, the semicolon itself is not the problem. It acts as a signpost for understanding the purpose of the provision so that the entire text has meaning.[170] As one judge put it in this context, "[t]o ascertain the complete meaning, it is necessary to crossover the semicolon."[171] Doing this leads one to discern whether part of the sentence is superfluous and, if it is, whether the superfluous portion is deceptive, misleading, or already addressed by an appellate court.[172]

Consider the case of *Tower Insurance Co. of New York v. Carranza*.[173] There, Tower Insurance Company issued a homeowner's policy insuring codefendant Maria Carranza for certain real property in Brentwood, New York, even though (1) the deed to the premises listed Carranza as well as codefendant Jose Romero lived at the residence, (2) only Romero lived at the residence, and (3) Carranza's application for insurance did not name Romero as an owner or indicate Carranza resided at the premises.[174] Then, another codefendant, Melva Otero, fell and injured herself on the sidewalk abutting the residence.[175] Otero sued.[176] Tower Insurance thereafter disclaimed coverage to Carranza for Otero's injuries, in part because "the insured premises were not 'residence premises' under the policy."[177] Romero—wanting nothing to do with the suit—tried and failed to dismiss the claims against him.[178]

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168. *Id.*
169. *Id.*
170. *See* Kalloch v. Bd. of Trs. N.H. Ret. Sys., 362 A.2d 201, 203 (N.H. 1976); Bd. of Educ. v. Meridian Educ. Ass'n, 445 N.E.2d 864, 867 (Ill. App. Ct. 1983).
171. People v. Faustin, No. ST-2021-CR-00219, 2022 WL 17832787, at *5 (V.I. Super. Ct. Dec. 16, 2022).
172. *See* Price v. Fox, 295 S.W. 433, 435 (Ky. 1926).
173. No. 653233/2011, 2015 WL 11237025 (N.Y. Sup. Ct. Dec. 24, 2015).
174. *Id.* at *1.
175. *Id.*
176. *Id.*
177. *Id.*
178. *See id.*

With Romero enmeshed in the litigation, Tower Insurance moved for a default judgment against Romero (who failed to answer Tower Insurance's complaint) declaring that it was not obligated to indemnify Romero under Carranza's insurance policy for the claims against him in Otero's personal injury action.[179]

The facts of the case were straightforward and weighed in favor of Tower Insurance: "Romero's legal title to the property that his co-owner Carranza insured through plaintiff establishes only that he, too, owned an interest in the property . . . and does not entitle him to coverage under her policy where he was not named or defined as an insured."[180] But the court went on to explain that the policy would exclude Romero from coverage for Otero's injury even if he was named as an insured:

> The policy provides that it does not apply to bodily injury arising from premises that an insured owns, but are not an "insured location." The policy defines "Insured location" as the "residence premises." The policy's declarations provide that: "The residence premises covered by this policy is located at the above insured address," which is "157 Suffolk Ave Brentwood, NY," "unless otherwise stated below." Below, the policy defines "Residence premises" as:
>
> a. The one family dwelling, other structures, and grounds; or
>
> b. That part of any other building;
>
> where you reside and which is shown as the "residence premises" in the Declarations.[181]

The trial court observed that "applying the phrase 'where you reside' set off below subsections (a) and (b) to both the above subsections renders the semicolons at the end of each subsection superfluous."[182] All the same, the court was bound by precedent, so its observation amounted to run-of-the-mill obiter dictum.[183] Even still, the observation is indicative of—and a blueprint for—how to analyze these issues that arise.

D. The Semicolon Court: Overemphasis on Punctuation

The foregoing subsections have illustrated various ways one can review a semicolon's meaning within a statute or legal text, including a brief discussion regarding how courts aim to avoid absurd results by placing too much

179. *Id.*
180. *Id.* at *4 (citing Brownell v. Bd. of Educ., 146 N.E. 630, 632 (N.Y. 1925)).
181. *Id.* at *5 (citations omitted).
182. *Id.*
183. *See id.* (first citing Vela v. Tower Ins. Co. of N.Y., 921 N.Y.S.2d 325, 326–27 (App. Div. 2011); and then citing Marshall v. Tower Ins. Co. of N.Y., 845 N.Y.S.2d 90, 91 (App. Div. 2007)).

emphasis on punctuation.[184] There is probably no better example of this than the 1873 case of *Ex parte Rodriguez*,[185] in which the Texas Supreme Court nullified the governor-elect's victory based on its reading of a semicolon in the state constitution.[186]

The backdrop is this: Texas was thrust into a state of turmoil in the wake of the Civil War—economically, socially, politically.[187] Black Codes were passed to curb rights for newly-freed slaves,[188] and it took until 1870 for Texas to be readmitted to the Union. After several years of disarray, Republican Edmund Davis was elected to the governorship in 1868.[189] Davis was an interesting character in his own right—a Texan so adamantly anti-secession that he fled to Mexico and ultimately fought for the Union.[190] He was deemed a radical member of the party because he was willing to grant rights to Blacks.[191] That he was voted governor was a triumph, even it was a narrow victory.[192] But resentment toward Lincoln's Republican Party and Reconstruction policies precipitated a wave of Democrats winning state offices in the election of 1873.[193] With regard to the governorship, the Democrats nominated Richard Coke to challenge Davis on the promise that Coke would dismantle the Republican-backed policies advanced in the preceding years.[194] Coke obliterated Davis, winning 67% of the vote[195] in a vitriolic election marred "by fraud and intimidation on both sides."[196]

184. *See supra* notes 85–88 and accompanying text.

185. *Ex parte* Rodriguez, 39 Tex. 705 (1873).

186. *Id.* at 774.

187. Carl H. Moneyhon, *Reconstruction*, TEX. STATE HIST. ASS'N (Aug. 25, 2023), https://www.tshaonline.org/handbook/entries/reconstruction [https://perma.cc/QWD5-KBMP].

188. John McFarland, *Texas Reconstruction and the Semicolon Court*, OIL & GAS LAW. BLOG (Aug. 4, 2020), https://www.oilandgaslawyerblog.com/texas-reconstruction-and-the-semicolon-court/ [https://perma.cc/FJ8C-PS3Z].

189. *See id.*

190. *Id.*

191. *See* Moneyhon, *supra* note 187.

192. *See* McFarland, *supra* note 188.

193. Davenport v. Garcia, 834 S.W.2d 4, 16 (Tex. 1992) (tracing the history that precipitated the *Rodriguez* holding); Katie Whitehurst, *Civil War and Reconstruction*, TEX. PBS: ERAS, https://texasourtexas.texaspbs.org/the-eras-of-texas/civil-war-reconstruction/ [https://perma.cc/7Q3T-DX7U] (summarizing Texas's struggles post-Civil War).

194. *See* Moneyhon, *supra* note 187.

195. Ken Bridges, *Texas History Minute: The Semicolon Case*, WEATHERFORD DEMOCRAT (Nov. 7, 2020), https://www.weatherforddemocrat.com/opinion/columns/texas-history-minute-the-semicolon-case/article_cf47b499-f0bf-5ef0-8089-a344c02ce164.html [https://perma.cc/M3EX-ZG36].

196. Curtis Bishop, *Coke-Davis Controversy*, TEX. STATE HIST. ASS'N (Jan. 12, 2017), https://www.tshaonline.org/handbook/entries/coke-davis-controversy [https://perma.cc/M8M6-4GFC].

The ticking time bomb in our story, however, came in anticipation of the 1873 election. The legislature had passed the Election Act of March 31, 1873, effectively truncating the number of days to vote (as set forth in their constitution) from four to one.[197] Another act was passed in May setting the date for the election in question to be held December 2, 1873.[198] The consequence of the legislature's Election Act remained unknown until Joseph Rodriguez was arrested for voting twice in the election.[199] In a stroke of genius and madness, Rodriguez applied for a writ of habeas corpus claiming his conviction should be vacated because the Election Act's one-day-to-vote pronouncement violated the constitution's four-days-to-vote mandate.[200] In short, Rodriguez argued his arrest was illegal because the election was illegal.[201]

And remarkably, the Texas Supreme Court agreed. The court specifically grappled with interplay of two sentences. The first coming from section 6 of article 3 of the state constitution—

> All elections for state, district and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o'clock A. M. until 4 o'clock P. M. of each day.[202]

—and the second coming from the Election Act—

> That all elections in this state shall be held for one day only at each election, and the polls shall be open on that day from 8 o'clock A. M. to 6 o'clock P. M.[203]

Note the semicolon in section 6 of article 3 of the constitution. The court rested its decision largely upon the fact that the clause prior to the semicolon "is subject to a limitation or condition, whilst the other is not."[204] In the eyes of the court, the second half of the provision indicates that the law governing the time given for the holding of an election "shall never be changed by a legislature."[205] Juxtapose this provision with section 4 of article 3 of the Texas constitution that also contains a semicolon: "The members of the house of representatives shall be chosen by the qualified electors, and their term of office shall be two years from the day of general election; and the sessions of

197. *See* George E. Shelley, *The Semicolon Court of Texas*, 48 SW. HIST. Q. 449, 456 (1945).
198. *Id.*
199. *See id.* at 457.
200. *Id.*
201. *See id.* at 458.
202. *Ex parte* Rodriguez, 39 Tex. 705, 773 (1973) (quoting TEX. CONST. of 1869, art. III, § 6).
203. *Id.* at 773 (1873) (quoting Act of Mar. 31, 1873, 13th Leg., R.S., ch. 19, § 12, 1873 Tex. Gen. Laws 20, 23).
204. *Id.* at 774.
205. *Id.*

the legislature shall be annual at such times *as shall be prescribed by law*."[206] The emphasized language is key. Under this article and the clause following the semicolon, the legislature was authorized control of the time of their meeting and adjournments.[207] However, such express authority was nowhere to be found in section 6 of article 3.[208] The court therefore ruled there was "no valid election having been held at the city of Houston," meaning Rodriguez was not guilty of a felony.[209]

Really, Rodriguez's fate is an afterthought compared to the overturning of an election. Thousands of folks gathered in protest at the state capitol in the ensuing days.[210] Davis, still sitting governor and thrust into unchartered political waters, barricaded himself in his office in a desperate attempt to hold power.[211] He positioned state troops on the lower floor of the capitol,[212] and behind the scenes sought help from the federal government to impose order.[213] President Ulysses S. Grant, however, telegrammed Davis "he did not feel warranted in sending federal troops to keep Davis in office."[214] Davis was placed between a rock and a hard place: he understood well that he suffered a landslide defeat, but could he simply ignore his own Supreme Court?[215] What about the separation of powers?[216]

Coke for his part ignored the court's ruling altogether,[217] and things got even more harrowing when some of the military units Davis summoned "refused to obey the order to protect [him] and instead captured the legislative halls and protected the inauguration of Coke as governor."[218] Coke declared

206. *Id.* at 775 (emphasis added) (quoting TEX. CONST. of 1869, art. III, § 4).

207. *Id.*

208. *See id.* at 775–76.

209. *Id.* at 774.

210. Ken Bridges, *How a Little Semicolon Had a Big Impact on Texas Politics*, LUBBOCK AVALANCHE-J. (Apr. 20, 2019, 9:48 PM), https://www.lubbockonline.com/story/lifestyle/2019/04/21/bridges-how-little-semicolon-had-big-impact-on-texas-politics/5383222007/ [https://perma.cc/LB55-BT8F].

211. *Id.*

212. Bishop, *supra* note 196.

213. *See* Moneyhon, *supra* note 187.

214. Bishop, *supra* note 196.

215. It does bear mentioning that the court, composed of three justices selected by Davis, were anti-secessionist "of the most pronounced type." Shelley, *supra* note 197, at 449.

216. One of the State's attorneys summarized the precarious state of affairs as follows: "If the Legislature can hold the general election law constitutional by seating its members, and this Court can construe it as unconstitutional in passing on the election of other officers, the Constitution will cease to be a bond of order, and become a bond of anarchy!" *Id.* at 460.

217. *See* Moneyhon, *supra* note 187.

218. *Travis Guards and Rifles*, TEX. STATE HIST. ASS'N (Apr. 7, 2018), https://www.tshaonline.org/handbook/entries/travis-guards-and-rifles [https://perma.cc/F4X2-UL4N].

himself the rightful winner and forged ahead as if *Rodriguez* amounted to a no-harm no-foul situation.[219] He was inaugurated on January 15, 1874, even though Davis was still holding onto some hope of maintaining his governorship in the ensuing days.[220] Those days, which surely felt like years, were fraught with mounting tension.[221] Davis still had a few militia men on his side at the capital, so there was the possibility of bloodshed at any moment.[222] Alas, left with no feasible option after President Grant's refusal to intervene, Davis resigned on January 19, 1874—four days after Coke was sworn into office.[223]

Now imagine all that happening today.[224] One of the justices who served on the court after 1873 later confessed that the *Rodriguez* decision caused the court to fall into such disrepute that lawyers were charry to cite the opinions of (what became known as) the Semicolon Court.[225] Even a recent amicus brief to the Supreme Court of the United States mentioned that no lawyer out of Texas likes to cite to the Semicolon Court.[226] One historian offered the following lurid commentary on its legacy:

> In the judicial annals of no other country has there ever been a more lamentable, shameless prostitution of a court of justice to the interest of lawless political conspirators against constitutional government, the right of suffrage, and the liberties of a free people, than that disclosed in *Ex parte Rodriguez*, decided by this Court.[227]

It's a cautionary tale, one that aligns with Justice Breyer's admonition that safeguarding the role of the judiciary is predicated on public acceptance.[228] So while Scalia and Garner may posit that "[n]o helpful aid to interpretation has historically received such dismissive treatment from the courts as punctuation,"[229] solemn adherence to upholding the effect of punctuation could yield absurd outcomes; hence *Ex parte Rodriguez*.

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219. *See* Bridges, *supra* note 195.
220. *See* Bishop, *supra* note 196.
221. *See id.*
222. *See id.*
223. *Id.*
224. Which, in a post-January 6th world, is probably not hard to do given one's political leanings.
225. *See* Moneyhon, *supra* note 187 ("Houston Republicans attempted to overturn the election in the case of *Ex parte Rodriguez* or, as it was popularly called, the Semicolon Case.").
226. *See* Brief for the Governor of Texas as Amici Curiae Supporting Petitioners at 8, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 3127147.
227. Shelley, *supra* note 197, at 467.
228. STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 2 (2021).
229. SCALIA & GARNER, *supra* note 70, at 161.

IV. CONCLUSION

History is replete with drafting mistakes in legislation, wills, insurance policies, and a myriad of other legal texts. Punctuation, in particular, has been a source of oversight that precipitates litigation.[230] And although many commentators and judges find it a fool's errand to "search for a non-existent and unrealistically precise" intent on the part of the drafter,[231] there are those who do not discriminate against punctuation as a means to interpreting the text.[232] With its ups and downs over the last several hundred years, the semicolon unfortunately is susceptible to drafting errors. It is irrefutably a divisive and misunderstood mark that will certainly continue to be misused. Use of interpretive canons, examination of intent and purpose, and mindfulness of context are all means to scrutinize the meaning and effect a semicolon has on the passage in question. Complicated as it may appear, there are only so many uses and ways to interpret a semicolon—after all, "[i]t's the punctuation mark that qualifies, hesitates, and ties together ideas and parts of a life that shot off in different directions."[233] Simple, right?

230. *See, e.g.*, *In re* Insolvency of Hogan, 83 Pa. Super. 221, 222–23 (1924) ("Manifestly a mistake in the punctuation of this act was made in the office of the secretary of the Commonwealth. There ought to be no semicolon after the word 'security' in the 16th line of section one. The words 'or otherwise' refer to the preceding clause so that it should read 'whenever . . . the court having jurisdiction shall commit the defendant to imprisonment, for want of a bond with security or otherwise,' etc." (alteration in original)).

231. Eric Engle, *Legal Interpretation by Computer: A Survey of Interpretive Rules*, 5 AKRON INTELL. PROP. J. 71, 81 (2011); *see also, e.g.*, Grieb v. Nat'l Bond & Inv. Co., 94 S.W.2d 612, 616–17 (Ky. 1936) ("unhesitatingly conclud[ing]" that there were various drafting mistakes in a statute—including the failure to place a semicolon in a specific statutory provision—and holding that courts are authorized "to correct them when so plainly apparent, in order to carry out and enforce what was plainly the intent and purpose of the Legislature, and especially so when it may be done so as not to impair or in any wise modify such intent and purpose").

232. Eskridge, Jr., *supra* note 64, at 664 (first citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989); and then citing S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 528–29 (1987)); *see also* Hill v. Nationwide Mut. Fire Ins. Co., 448 S.E.2d 747, 749 (Ga. Ct. App. 1994) ("Punctuation is an important indicator of meaning." (citing Ga. Int'l Life Ins. Co. v. Bear's Den, Inc., 292 S.E.2d 502 (Ga. Ct. App. 1982))).

233. Jen Doll, *Writers' Favorite Punctuation Marks*, THE ATLANTIC (Sept. 24, 2012), https://www.theatlantic.com/culture/archive/2012/09/writers-favorite-punctuation-marks/323287/ [https://perma.cc/FJL8-S5JA].