ARTICLES AND SURVEYS

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MITCHELL W. BERGER & ZACHARY P. HYMAN

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I. INTRODUCTION

In the United States of America, our Chief Executive is not selected by the people, he—or someday she—is elected by electors, through the Electoral College system.¹ Under this system, electors, or special designees appointed under state law, vote for their choice of President.² Each elector may cast two votes, one for the President and one for the Vice President.³ In most states, a winner take all system is used to select electors so that the

2. Id.
3. Id. Some states require electors to pledge that they will vote for the party that appointed them. See Ray v. Blair, 343 U.S. 214, 215, 227 (1952). Such a requirement is constitutional. Id. at 231.
political party that wins the majority of individual votes in that state gets to appoint all of the electors that will vote for the President—though in Maine and Nebraska electors are decided on a pro rata basis. With rare exception, electors vote along party lines and in some states they are prohibited from voting against the candidate who did not receive the majority of votes.

The number of electors in each state is based on the number of representatives and senators allocated to it. This is based on the population of that state during the United States Census, and each state has a minimum number of votes, regardless of its population. There are a total of 538 Electoral College votes and a presidential candidate must receive 270 Electoral College votes to win the election. Thus, under the Electoral College system, the President’s selection is not by a popular vote, but is based on an antiquated system that dates back to the country’s founding. Because the Electoral College system can result in inequity with respect to the election of a President, between 1889 and 2004, 595 amendments were proposed on the topic of Electoral College reform—which means that more proposed constitutional amendments have been introduced regarding Electoral College reform than on any other subject.

In 2016, President Donald J. Trump received 62,984,825 votes—which is nearly three million votes less than his opponent, Hillary Clinton,

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5. See THOMAS H. NEALE, CONG. RESEARCH SERV., RL32611, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 8 (2017). In the 2016 election, seven electors voted for candidates other than those chosen by their state’s voters in the popular election. Id. at 9. There have been a total of eight electors who did not vote for the presidential candidate selected by their party prior to 2008. David Strömberg, How the Electoral College Influences Campaigns and Policy: The Probability of Being Florida, 98 AM. ECON. REV. 769, 772 n.7 (2008).


who received 65,853,516 votes—yet won the election. President Trump won because he received 74 more votes from the Electoral College than his opponent. President Trump was elected, notwithstanding the will of the majority of voting citizens. This result, in addition to the 2000 presidential election, demonstrates why the Electoral College no longer serves a legitimate purpose. As a result of the most recent election, four proposals to “replace the [E]lectoral [C]ollege with direct popular election” were introduced, but no action beyond committee referral was taken on them. Two resolutions proposing a constitutional amendment to establish a direct popular vote have been introduced to date in the 115th Congress. Such efforts should be advanced, as the Electoral College cannot be reformed to ensure one person, one vote, and, like an infected human appendix, it is a vestige of the past that must be removed before it bursts.

II. The Constitutional Convention

The Articles of Confederation, the predecessor to the United States Constitution, established an ineffective form of government. As a result of the inefficiencies of the Articles of Confederation, representatives of the

14. See id. “[I]n 2000, Bush won by 271 to 266 electoral votes. The margin was so close that all, and only, the [twenty-eight] states that voted for Bush were decisive in the Electoral College.” Strömberg, supra note 5, at 786.
15. NEALE, supra note 10, at 20.
18. See Constitutional Topic: The Constitutional Convention, U.S CONST. (Mar. 12, 2012), http://www.usconstitution.net/consttop_con.html. James Madison had a few problems with the Articles of Confederation. Id. “The states were under no obligation to pay their fair share of the national budget; they violated international treaties with abandon; they ran roughshod over the authority of the Congress; and they violated each other’s rights incessantly.” Id.
states met during the Constitutional Convention to reconfigure the framework of the United States National Government.\textsuperscript{19} James Madison and other Virginian delegates met before the Constitutional Convention to create the Virginia Plan, which mirrored the then-existing form of government in Virginia.\textsuperscript{20} The Virginia Plan called for “[a] bicameral legislature—two houses.”\textsuperscript{21} Both house memberships would be represented in proportion to each state’s population.\textsuperscript{22} The lower house would be elected by the people, via popular election, and the upper house would be elected by the lower house.\textsuperscript{23} The Virginia Plan also called for the election of a National Executive through a vote of the members of the lower house.\textsuperscript{24}

“The [Virginia] Plan corrected the inequality that the one state, one vote [or equal state suffrage] notion inflicted upon the large states” by the Articles of Confederation.\textsuperscript{25} However, states could not agree on how to apportion representation.\textsuperscript{26} Smaller states wanted to maintain the status quo and maintain the equal state suffrage rule of the Articles of Confederation.\textsuperscript{27} Larger states viewed the equal state suffrage system as being “inherently unfair, and were going to do everything they could to abolish it.”\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{19} Id. “No one seemed to want to debate this issue because of the presence in the Convention of George Washington, who everyone assumed would be the first [C]hief [E]xecutive of the nation.” Paul Finkelman, \textit{The Proslavery Origins of the Electoral College}, 23 \textit{Cardozo L. Rev.} 1145, 1151 (2002).
\item \textsuperscript{20} \textit{Constitutional Topic: The Constitutional Convention, supra} note 18.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. In James Madison’s notes on debates in the Federal Convention of 1787, “the rights of suffrage in the [n]ational [l]egislature [were] to be proportioned to the [q]uotas of contribution, or to the number of free inhabitants.” H.R. Doc. No. 398, at 953 (1927).
\item \textsuperscript{23} \textit{Constitutional Topic: The Constitutional Convention, supra} note 18.
\item \textsuperscript{24} Finkelman, supra note 19, at 1151. Madison believed that the lower house should be chosen by popular vote and should therefore have the power to determine the President. \textit{Id}. Madison believed that in order to establish a free government, the legislature, executive, and judiciary powers should be both separately and independently exercised. \textit{Id}. at 1154–55. He believed an Executive determined by the legislature would form a coalition that “would be more immediately [and] certainly dangerous to public liberty.” 2 \textit{THE RECORDS OF THE FEDERAL CONVENTION OF 1787}, at 56–57 (Max Farrand ed., rev. ed. 1966). However, while he thought the people were \textit{the fittest}, there would be difficulty in reaching a consensus because “[t]he people generally could only know [and] vote for some [c]itizen whose merits had rendered him an object of general attention [and] esteem.” \textit{Id}. This led to his assertion that a \textit{substitution of electors}, in the form of the lower house chosen by popular vote, would be the best solution. \textit{Id}. at 57.
\item \textsuperscript{25} \textit{Constitutional Topic: The Constitutional Convention, supra} note 18.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\end{itemize}
On the other hand, smaller states, such as “New Jersey, New Hampshire, Maryland, Delaware, Connecticut, and even New York, felt they had to fear any attempt by the large states of Virginia, Pennsylvania, and Massachusetts to take away equal [state] suffrage” between the states. More importantly, they “feared the Southern [S]tates because of the general belief . . . that [those states] . . . would soon grow to Pennsylvanian-sized populations,” and if slaves were counted that those populations would grow even more quickly.

The disagreement over the terms of state representation in the Senate was hotly contested and there were even “[t]hreats to dissolve the Convention.” Fortunately, Roger Sherman from Connecticut proposed the Connecticut Compromise. Sherman sided with the two-house national legislature of the Virginia Plan but proposed “[t]hat the proportion of suffrage in the [first] branch, [or House,] should be according to the respective numbers of free inhabitants; and that in the second branch, or Senate, each State should have one vote and no more.” This quelled some of the tension and led to an eventual agreement. The small states were steadfast in their stance on “equal suffrage in the Senate.” However, slave-owning states were not willing to agree to such a system unless they could maintain political power derived from slave ownership. As Madison observed: “It seemed now to be pretty well understood that the real difference[s] . . . lay, not between the large [and] small [states], but between the [Northern and Southern] States. The institution of slavery [and] its consequences formed the line of discrimination.”

29. Id.
31. Id. “[T]he Delaware delegation [was] instructed to leave the Convention if equal suffrage in the legislature was compromised.” Id.
32. Id.
33. Id.
34. See Constitutional Topic: The Constitutional Convention, supra note 18.
35. Id.
36. See id.
37. Williams & MacDonald, supra note 17, at 208 (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 295 (1976)). “[M]any of the largest slave holders in the United States were at the Convention.” Constitutional Topic: The Constitutional Convention, supra note 18. At least a third of the Convention’s fifty-five delegates owned slaves, including all of the delegates from Virginia and South Carolina. DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 68 (2007). “But [Madison] contended that the [s]tates were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves.” Juan F. Perea, Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution, 110 MICH. L. REV. 1123, 1137 (2012) (quoting MADISON, supra, at 224). While the Electoral College was intended to protect the interests of small states, only three out of the forty-five
III. THE THREE-FIFTHS COMPROMISE

In the South, slavery would not only propel the South’s agricultural economy, but would help fulfill aspirations of “achieving majority control in the immediate[] foreseeable future.” 38 James Madison had become a proponent of representation by population, with the inclusion of slaves, prior to the Convention, and recommended that representation by population “is recommended . . . to the [S]outhern [States] by their expected superiority.” 39 Nonetheless, Southern delegates feared that they would be divested of representation as a result of slavery—which was the foundation of the Southern economy. 40 To protect its interests, “[t]he South wanted their slaves counted as whole persons [for purposes of allocating representatives], but that would never happen.” 41

Ultimately, the states were able to reach a compromise on legislative representation because of issues related to taxation. 42 During the Convention, delegates proposed that federal tax would be based on the total population of each state—inclusive of slaves. 43 Southern slave-states strongly opposed this, as they felt there would be a crippling tax obligation if slaves were to be counted for purposes of taxes. 44 Slave-owner—and future beneficiary of the Electoral College 45—Thomas Jefferson maintained such taxation would be inequitable as Southern States would be taxed “according to their numbers and their wealth conjunctly, while the [N]orthern [States] Presidents—Zachary Taylor of Louisiana, Franklin Pierce of New Hampshire, and Bill Clinton of Arkansas—hailed from them. Akhil Reed Amar, Some Thoughts on the Electoral College: Past, Present, and Future, 33 Ohio N. U. L. Rev. 467, 468 (2007).


Under the Articles, the North outnumbered the South by eight states to five . . . . Under the Constitution taking shape, . . . [t]he South had to fear an edge given to the North, both in terms of the unit vote in the Senate and the popular vote in the House, since [sixty] percent of the white population was in the North. Counting slaves fully would have made the two regions roughly equal. Id. at 54.

39. Id. at 58.


41. Id.

42. WILLS, supra note 38, at 53.

43. Id. at 51. “[T]he three-fifths count was first proposed, in an entirely different context, as a measure of taxation under the Articles of Confederation, where representation was not at issue.” Id. at 50–51.

44. Id. at 51. “[T]he three-fifths count was first proposed, in an entirely different context, as a measure of taxation under the Articles of Confederation, where representation was not at issue.” Id. at 50–51.

45. See WILLS, supra note 38, at 2. Historians Garry Wills, Leonard L. Richards, and William W. Freehling have written that had slaves not been counted at all, Adams would have won the electoral vote. Id. at 234 n.2.
would be taxed on numbers only.\textsuperscript{46} To alleviate the financial burden associated with slave ownership, reach a compromise, and ensure that the Southern slave-owning States maintained equal representation, Benjamin Harrison proposed a one-half ratio so long as slaves were also counted for purposes of determining representation in the House of Representatives.\textsuperscript{47} In response, several New England delegates proposed a higher three-fourths ratio.\textsuperscript{48} They eventually compromised on the three-fifths ratio proposed by James Madison.\textsuperscript{49}

“Counting [slaves] at three-fifths [of a person] would give the South, which had only [forty-one] percent of the white population, [forty-seven] percent of the delegates in the House of Representatives.”\textsuperscript{50} Indeed, after the Electoral College was enacted, Pennsylvania, which had ten percent more free persons than Virginia, had twenty percent fewer representative votes than its southern counterpart.\textsuperscript{51} The Three-Fifths Compromise also delayed the prohibition of the slave trade in the United States, which guaranteed Southern political influence through slave-based representation.\textsuperscript{52}

In exchange for this concession, the federal government’s power to regulate foreign commerce would be strengthened by provisions that allowed for taxation of slave trades in the international market.\textsuperscript{53} This provision only justified a further increase in the Southern slave population.\textsuperscript{54} With the

\textsuperscript{46} Id. at 51–52. This is because slaves were viewed as property “comparable to such property, held in the North, as cattle, horses, etc.”\textsuperscript{51} Id. at 51. The authors of this Article write this piece in part to denounce the fact that the Electoral College was created as a result of slavery to preserve the power of Southern slave owners. See id.

\textsuperscript{47} WILLS, supra note 38, at 53.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 54; see also DONALD ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765–1820, at 179–80 (1979).


\textsuperscript{53} See WILLS, supra note 38, at 50–51.

\textsuperscript{54} See Table, VOYAGES: TRANS-ATLANTIC SLAVE TRADE DATABASE, http://www.slavevoyages.org/assessment/estimates (set row field for individual years, then set columns field for flag, then set cells field for only disembarked, then select show hyperlink)
assurance of slavery’s continued and strengthened existence, the South was provided opportunities to improve their voting power in both Congress and the Electoral College.\textsuperscript{55} This enhanced power would ensure that if the issue of slavery was revisited, they would undoubtedly have the requisite votes in Congress and through the Electoral College, which influenced the selection of the Executive, to preserve it.\textsuperscript{56}

IV. ORIGINS OF THE ELECTORAL COLLEGE

On May 25, 1787, James Wilson, a prominent Philadelphia lawyer and representative from Philadelphia, suggested that the people elect a single person to act as a National Executive, “giving most energy dispatch and responsibility to the office.”\textsuperscript{57} “The only powers [Wilson] conceived strictly Executive were those of executing the laws, and appointing officers, not—appertaining to and—appointed by the [l]egislature.”\textsuperscript{58} He further advocated an election of the Executive by the people, based on a popular election.\textsuperscript{59} However, Wilson’s proposal was not accepted by Southern delegates who wanted the legislature to select the President.\textsuperscript{60} Among others, “Hugh

\textsuperscript{55} See RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793); Results from the 1860 Census, CIV. WAR HOME PAGE, www.civil-war.net/pages/1860_census.html (last visited May 1, 2019). The slavery population had grown from 29,264, in 1790, to 3,950,528 in 1860—roughly a 13,500% increase. RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, supra, at 3; Results from the 1860 Census, supra. During this period, “[i]n the [United States], on average, a slave mother gave birth to between nine and [ten] children . . . . [Expectantly, by] 1860, ‘less than [ten] percent of the slave population was over [fifty] and only 3.5 percent was over [sixty].’” Henry Louis Gates Jr., Slavery, by the Numbers, ROOT (Feb. 10, 2014, 12:01 AM), http://www.theroot.com/slavery-by-the-numbers-1790874492.

\textsuperscript{56} See WILLS, supra note 38, at 50, 58.


\textsuperscript{58} Id. at 947 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 57, at 66).

\textsuperscript{59} 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 24, at 56.

\textsuperscript{60} Finkelman, supra note 19, at 1153–55. Hugh Williamson of North Carolina asserted that if a popular election was done, there would be “distinguished characters
Williamson of North Carolina openly calculated that direct election of the Executive would place the South at a clear disadvantage. He reasoned that because the South’s ‘slaves would have no suffrage’ in a presidential election, the slave-free Northern states would have a much greater voter population in comparison.” 61 As a result, James Wilson “suggested that each state be divided into ‘districts: [A]nd that the persons qualified to vote in each district’ vote for ‘[m]embers for their respective [d]istricts to be electors of the Executive Magistracy.’” 62 This did not obtain much support. 63 However, it laid the foundation for the creation of the Electoral College. 64

In response to Wilson, Charles Pinckney, a South Carolina representative, claimed that a direct election of the President would result in the largest states being able to select the President. 65 However, Pinckney’s issue was not an issue of representation of small or large states: “The issue here was not population, but the voting population. With about half of South Carolina populated by slaves, Pinckney could not afford to support the direct election of the [P]resident because that would [ultimately harm] his state.” 66 Similarly, James Madison, a slaveholder from Virginia, stated that “right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the

[Such as President George Washington], who [were] known perhaps to almost every man. This [would] not always be the case.” Id. at 1154 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 24, at 32). He thought that eventually people would “vote for some man in their own [s]tate, and the largest [s]tate will be sure to succeed.” Id. (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 24, at 32).

61. Williams & MacDonald, supra note 17, at 209 (quoting 3 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 296 (James McClellan & M.E. Bradford eds., 2d ed. 1991)).


63. Id. at 1154. “Although a conservative on many issues, [on the question of how to choose the National Executive, Wilson] proved to be a radical democrat, arguing for an election by the people, citing the successful experience of the popular election of governors in New York and Massachusetts . . . .” Id. at 1152 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 57, at 68).

64. See id. at 1153.

65. Finkelman, supra note 19, at 1154; Constitutional Topic: The Constitutional Convention, supra note 18. Pinckney submitted his proposal on May 29, 1787, the same day Madison’s Virginia Plan was introduced. Constitutional Topic: The Constitutional Convention, supra note 18. This position was made clear by Hugh Williamson, of North Carolina, who was less articulate than Pinckney, when he noted that Southern slave owners would always wish to vote on behalf of their slaves. Finkelman, supra note 19, at 1154.

66. Id.
Negroes." Ultimately, the concern over slave-derived political power carried the day, and an election of the Executive by popular vote was rejected by the Constitutional Convention, with only six or seven delegates out of forty-two delegates speaking favorably on the issue. This occurred because, among other reasons, Southern States would not permit their slaves to vote and be counted towards the election of the Executive, yet slave owners wanted to exercise political influence through their ownership of slaves.

Ultimately, the Convention agreed to permit the states to select electors to vote for the Executive. The number of electors allocated to each state was based on the representation of Congress, provided slave owners with more power, and had been previously agreed to by the Convention as a fair mechanism to apportion representation. The Electoral College was formed, and as one delegate to the Virginia delegation would say, "seems rather founded on accident than any principle of government I [have] ever heard of."

V. THE CONSTITUTIONAL CRISIS OF 1800 AND THE FORMATION OF THE MODERN ELECTORAL COLLEGE

In its original iteration, the candidate who received the most electoral votes would become the President, and the candidate who received the second most votes would become the Vice President, and each elector was permitted to cast two votes, one for President, and one for Vice President. If no candidate received a majority of votes, the decision of who to elect as President would be left to the House of Representatives, with each state casting a single vote in favor of their chosen candidate, and the majority of votes for the House of Representatives would carry the day.

The 1796 election laid the foundation for the involvement of political parties in the Electoral College. Despite the fact that the

69. Finkelman, supra note 19, at 1155.
70. Id. at 1154–55.
71. Id.
72. Hawley, supra note 68, at 1520 (quoting 3 The Founders’ Constitution 516 (Phillip B. Kurland & Ralph Lerner eds., 1987)).
73. U.S. CONST. art. II, § 1, cl. 3.
74. Id.; see also U.S. CONST. amend. XII.
Federalist candidate, John Adams, received a majority of votes, Federalist electors did not garner sufficient electoral votes for their intended vice presidential candidate to become Vice President.\textsuperscript{76} As a result, Thomas Jefferson, a Democratic-Republican and John Adams’ opponent in the election, became the Vice President, and used the position to undermine Adams’ authority.\textsuperscript{77}

After learning their lesson from the 1796 election, Federalists and Republicans were prepared for the 1800 election, and electors from the different political parties voted for their top two candidates based on party lines to ensure that the Vice President would not be from a different political party.\textsuperscript{78} However, the electors did not contemplate the fact that unless the intended presidential candidate received more votes than the vice presidential candidate, there would be a run-off election in the House of Representatives.\textsuperscript{79} As a result, Aaron Burr and Thomas Jefferson, two Republican candidates who received an equal number of electoral votes, were forced to have a run-off election in the House of Representatives, which—at the time—was comprised mainly of Federalists.\textsuperscript{80}

The House of Representatives met for thirty-six hours casting thirty-five ballots, as Federalist congressmen refused to vote for Jefferson, who they viewed as an enemy to the Republic, or Burr who they viewed with equal disdain.\textsuperscript{81} The process was viewed with such hostility that Pennsylvania and Virginia’s governors made preliminary preparations to mobilize their “states’ militia[s] in the event [that] congressional Federalists

\begin{itemize}
  \item Hamilton, favored a strong central government with the power to control commerce, while Republicans favored a strong local government with a weak federal government. \textit{See id.} at 929–30; Hawley, \textit{supra} note 68, at 1524.
  \item Levinson & Young, \textit{supra} note 75, at 928. At this time, American politics was dominated by two political parties: The Republicans and the Federalists. \textit{Id.; Hawley, supra} note 68, at 1524, 1530.
  \item Hawley, \textit{supra} note 68, at 1536; Levinson & Young, \textit{supra} note 75, at 928–29.
  \item Hawley, \textit{supra} note 68, at 1536; Levinson & Young, \textit{supra} note 75, at 929.
  \item Levinson & Young, \textit{supra} note 75, at 928–29. There are some historical accounts which indicate that Thomas Jefferson, who presided over the counting of electoral votes as the Vice President, manipulated the results of the Electoral College to improperly count certain votes, avoiding a five-person run off. Bruce Ackerman & David Fontana, \textit{Thomas Jefferson Counts Himself into the Presidency}, 90 VA. L. REV. 551, 614–15 (2004).
  \item Hawley, \textit{supra} note 68, at 1536–37. Federalists, on the other hand, were more coordinated, and one Republican elector voted for John Jay, instead of Charles Pickney. Levinson & Young, \textit{supra} note 75, at 929 n.16. Republican electors, who were unaware of how their contemporaries voted, wanted to avoid the results of the 1796 election and all voted for both Burr and Jefferson. \textit{Id.} at 1536.
  \item Hawley, \textit{supra} note 68, at 1536–37; Williams & MacDonald, \textit{supra} note 17, at 215.
\end{itemize}
prevented the ascension of one of the Republican [Presidents].”\(^{82}\) Before a constitutional crisis could occur, the House of Representatives broke for a weekend, and after a weekend of “fierce back room politicking and deal making” the House returned for another vote and Jefferson was elected President.\(^{83}\)

The Federalist congressmen’s conduct during the 1800 election created significant concerns as to whether the legislature could usurp the will of the people through the run-off process originally contemplated in the Electoral College.\(^{84}\) As a result, Congress began to discuss a meaningful reform to the Electoral College, based on the Republican argument that “it was the right of popular majorities to choose the President.”\(^{85}\) To effectuate such a policy, Republicans proposed that votes for the Vice President be cast separately from those for the President, which consolidated presidential authority in the executive branch and reduced the possibility of having elections decided by Congress.\(^{86}\) Federalists opposed this proposal because they knew that “they were unlikely to be able to muster a majority of the electors in the foreseeable future, [and therefore] did their best to preserve the unholy possibility that they might be able to choose between their opponents in the House.”\(^{87}\) In furtherance of their position, Federalists claimed that tying the Vice President’s duties to those of the President would result in a Vice President being selected to curry political favor.\(^{88}\)

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82. Hawley, supra note 68, at 1537.
83. Williams & MacDonald, supra note 17, at 215. Historians believe that Alexander Hamilton played a critical role in preventing Aaron Burr from being elected President. See “Jefferson Is in Every View Less Dangerous than Burr”: Hamilton on the Election of 1800, GILDER LEHRMAN INST. AM. HIST.: HIST. NOW, http://www.gilderlehrman.org/content/jefferson-every-view-less-dangerous-burr-hamilton-election-1800 (last visited May 1, 2019). Indeed, Hamilton is quoted as stating:

Mr. Jefferson, though too revolutionary in his notions, is yet a lover of liberty and will be desirous of something like orderly Government — Mr. Burr loves nothing but himself — thinks of nothing but his own aggrandizement — and will be content with nothing short of permanent power [struck: and] in his own hands — No compact, that he should make with any [struck: other] passion in his [struck: own] breast except [struck: his] Ambition, could be relied upon by himself — How then should we be able to rely upon any agreement with him? Mr. Jefferson, I suspect will not dare much Mr. Burr will [inserted in margin: dare every thing in the sanguine hope of effecting every thing — ].

Id. (alterations in original).
84. Hawley, supra note 68, at 1540.
85. Id. at 1543–44.
86. Id. at 1550–51.
87. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829, 41 (2001); Levinson & Young, supra note 75, at 930.
88. See Hawley, supra note 68, at 1552.
Ultimately, the argument that the President should be a *man of the people* carried the day, and the Twelfth Amendment was enacted. The Twelfth Amendment provided, in relevant part, that each elector could cast one vote for the President and one vote for the Vice President, and that if no presidential candidate received the required majority, then the President would be selected by the House of Representatives and the Vice President would be selected by the Senate.

The Twelfth Amendment transformed the nature of the executive branch and, thus, the importance of the Electoral College. Because the Twelfth Amendment eliminated the possibility of having a politically independent Vice President, it consolidated power for the President by making it difficult for the Vice President “to establish a compelling identity apart from the party apparatus,” and prevented any person, aside from the President, from being the leader of any major political faction within the President’s party. As a result, the Twelfth Amendment transformed the way that a President would campaign and act. Because the President’s power was consolidated, he had the ability to promulgate policy without interference from an opposition Cabinet. Similarly, presidential elections became a nationwide spectacle focused solely on the identity of the presidential candidates, as opposed to the elections of 1796 and 1800, where vice presidential candidates received some attention.

The political power vested in the President through the enactment of the Twelfth Amendment was not contemplated by delegates at the Convention, who envisioned an Executive with limited powers of enforcing legislation of Congress. Had the framers of the Twelfth Amendment realized that the National Executive would have the independent role that he—or she—enjoys today, they may not have compromised and agreed to select the National Executive through the reformed Electoral College system as proscribed by the Twelfth Amendment.

Despite the fact that the Twelfth Amendment was intended to give the voting population an opportunity to participate in the presidential election, prevent the trading of political favors for positions in the President’s Cabinet, and prevent Congress from exercising power over the

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89. *Id.* at 1550.
90. *Whitaker & Neale*, supra note 10, at 5; *see also* U.S. CONST. amend.
91. *Hawley*, supra note 68, at 1501.
92. *Id.* at 1560–61.
93. *See id.* at 1555.
94. *See id.* at 1552.
95. *See id.* at 1555.
96. *Hawley*, supra note 68, at 1506, 1514, 1528.
97. *See id.* at 1506, 1528.
The 1824 election, which was decided under the deadlock provisions of the Twelfth Amendment, resulted in the very conduct that the Amendment sought to prohibit. 99

In 1824, John Quincy Adams, Andrew Jackson, and Henry Clay all ran for President and, unlike modern third party candidates, Clay was able to acquire enough votes to prevent Adams or Jackson from winning the Electoral College outright, causing the election to go to the House of Representatives. 100 During the run-off election, Clay, who was disqualified from consideration as President in the run-off because he did not receive sufficient votes to qualify, agreed to use his position and influence in the House of Representatives to help Adams gain enough votes to be elected in exchange for being appointed as the Secretary of State. 101 Other representatives traded political favors for votes in the run-off election as well and, as a result of back room politics, John Quincy Adams won the run-off election of 1824 without receiving the majority of popular or electoral votes. 102

VI. THIRTEENTH AMENDMENT

Despite Congress’s prohibition of importation of slaves in 1808, slavery continued to grow, increasing the political influence of Southern States. 103 In 1812, slave states had 76 out of 143 members of the House of Representatives—instead of the 59 they would have had, but for the Three-Fifths Compromise— and, in 1833, 98 out of 240 instead of 73. 104 In 1820, slavery continued to expand geographically as the Missouri Compromise permitted slavery in new territories, so long as they were located below the Mason-Dixon Line. 105 As a result, Southern proslavery positions dominated United States policy, and the well-being of Southern interests was preserved.

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98. See id. at 1501, 1506–07.
100. Jenkins & Sala, supra note 99, at 1157–59. At that time, Jackson had the majority of popular votes. Id. at 1160.
101. Id. at 1158–59.
102. Id. at 1157–58.
103. See WILLS, supra note 38, at 6, 53.
104. Id.
through the ability to vote on behalf of slaves, which was only possible thanks to the Electoral College.\footnote{106}{WILLS, supra note 38, at 5–6. “[O]n behalf of white settlers who wanted to grow cotton on the Indians’ land, the federal government [empowered by President Andrew Jackson’s Indian Removal Act] forced [the Natives] to leave their homelands and walk thousands of miles to a specially designated Indian territory across the Mississippi River.” \textit{Trail of Tears}, HIST., http://www.history.com/topics/native-american-history/trail-of-tears (last updated Aug. 29, 2018).}

Prior to the American Civil War, Southern States gained a disproportionate representational advantage, compared to Northern free States.\footnote{107}{WILLS, supra note 38, at 5–6, 53. In 1860, the free population of free states was 18,807,386 in comparison to the 8,425,812 of the free population in slave-owning states. \textit{See Results from the 1860 Census}, supra note 55. Thanks to the Three-Fifths Compromise, the slave states were able to increase their representation by 2.3 million, which undoubtedly assisted their influence in the legislature, as only a simple majority is needed to pass a bill—the first hurdle needed to clear in order to institute or uphold their fundamentally flawed policies. \textit{See WILLS, supra note 38, at 5–6; The Legislative Process, U.S. HOUSE OF REPRESENTATIVES}, http://www.house.gov/the-house-explained/the-legislative-process (last visited May 1, 2019).}

Southern States had a disproportionate influence on the presidency, the speakership of the House, and the Supreme Court in the period prior to the Civil War.\footnote{108}{WILLS, supra note 38, at 5–6.}

In fact, “[f]or [thirty-two] of the Constitution’s first [thirty-six] years, a white slave-holding Virginian occupied the presidency.”\footnote{109}{Akhil Reed Amar, \textit{The Electoral College, Unfair from Day One}, N.Y. TIMES, Nov. 9, 2000, at A2.}

With slavery expanding, which resulted in an increase in the South’s political power, President Abraham Lincoln and the Republican party\footnote{110}{Louise Weinberg, \textit{Dredd Scott and the Crisis of 1860}, 82 CHI.-KENT L. REV. 97, 109–10, 112 (2007). This is a different Republican party than President Jefferson’s which transformed itself to the Democratic party. \textit{See id.; Alana Horowitz Satlin, \textit{Actually, Lincoln Would Be Horrified by Today’s GOP}, HUFFPOST: POL. (Feb. 15, 2016), http://www.huffingtonpost.com/entry/lincoln-modern-gop-republicans_us_56bdea90e4b040245c61bb5.}} did not have the political ability to not interfere with slavery.\footnote{111}{\textit{See Alexander Tabarrok & Lee Spector, Would the Borda Count Have Avoided the Civil War?}, 11 J. THEORETICAL POL. 261, 271–72 (1999). President Lincoln was elected, in part, because he did not campaign against the abolition of slavery. Weinberg, supra note 110, at 101. Instead, he took the position that he opposed the expansion of slavery into new states. \textit{Id.}} Nonetheless, President Lincoln’s election caused many Southern States to fear that they would lose the ability to control the Electoral College to maintain their way of life, and secession from the Union became the alternative.\footnote{112}{\textit{Id.}}
Many Republicans believed that slavery was a primary cause of the Civil War, and believed that for the Union to continue to exist, slavery had to be eliminated. As a result, and since the Democratic party—which was comprised primarily of Southern slave owners—was weak in the remaining Union States because of secession, the Republican party took control of both houses of Congress in 1862 and drafted an anti-slavery amendment in 1864. After General Robert E. Lee surrendered, the Thirteenth Amendment, which abolished slavery, was ratified.

It has been widely recognized that Section 2 of the Thirteenth Amendment gave Congress the power to enforce the Amendment by prohibiting legislation relating to the “badges and incidents of slavery.” The term incident referred to the inability to hold property, testify in court, enforce the rights of the black man, exercise the right of freedom of speech, or obtain an education. Although the term badge had a varying meaning before the Civil War, it generally referred to the skin color of a slave, as only a man of color could be a slave. By the 1860s, the Supreme Court began using the terms to refer to a “broader set of political, civil, and legal disadvantages imposed on slaves, former slaves, and free blacks.”


113. See Weinberg, supra note 110, at 98.


Lee and Grant, both holding the highest rank in their respective armies, had known each other slightly during the Mexican War and exchanged awkward personal inquiries. Characteristically, Grant arrived in his muddy field uniform while Lee had turned out in full dress attire, complete with sash and sword. Lee asked for the terms, and Grant hurriedly wrote them out. All officers and men were to be pardoned, and they [would] be sent home with their private property — most important, the horses, which could be used for a late spring planting. Officers would keep their side arms, and Lee’s starving men would be given Union rations. Shushing a band that had begun to play in celebration, General Grant told his officers, “The war is over. The Rebels are our countrymen again.”

Id.

116. U.S. CONST. amend. XIII, § 1; Longley, supra note 114.


118. McAward, supra note 117, at 572–73.

119. Id. at 576.

120. Id. at 578.
The Electoral College was not successfully challenged as a *badge of slavery*. A plausible constitutional challenge based upon the Thirteenth Amendment may not have been mounted because the Electoral College grew out of a political compromise to allow Southern slave owners to maintain political power derived from slave ownership. Constitutional legal challenges based upon the freshly adopted Thirteenth Amendment after a devastating and divisive civil war did not occur. It is possible that the constitutionality of the Electoral College was not contested because the Fourteenth Amendment was intended to remedy the issues created by it, and because of “skepticism [as to] whether the Thirteenth Amendment itself, in the absence of congressional legislation,” could be enforced.

VII. FOURTEENTH AMENDMENT

Eliminating slavery had the effect of eliminating the provision that counted each slave as three-fifths a person for purposes of allocating taxes and representation. As a result, the former slave states gained fifteen seats in Congress. However, giving black citizens the right to vote did not protect them from the imposition of badges of slavery, as the Constitution did not apply to the states at the time.

After President Lincoln was assassinated and Andrew Johnson became President, many Republicans were concerned that President Johnson would not ensure that slavery was abolished. In the eyes of Republican leadership, President Johnson was more concerned with keeping the country together than with ending slavery. To ensure that slavery would be eliminated before Congress would be flooded by former Confederate States’

121. See id. at 577–78; Amar, *supra* note 37, at 471.
123. See Longley, *supra* note 114.
125. Scruggs, *supra* note 114; see also U.S. CONST. amend. XIII, § 2.
127. See U.S. CONST. amend. XIII, § 1; Scruggs, *supra* note 114.
129. See id.
representatives, Republicans would take any steps needed to fully abolish slavery, and sought to enact the Fourteenth Amendment. 130

The Fourteenth Amendment was enacted to ensure that Southern States would abolish the institution of slavery even if President Johnson and others were not willing to act. 131 Section 1 of the Fourteenth Amendment prohibited any state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States or “den[i]es to any person within its jurisdiction the equal protection of the laws.” 132 Section 1 was added in order to block state legislation that would attempt to implement other forms of servitude in order to replace slavery, such as Black Codes. 133

To further protect against state interference with black votes in the presidential election, Section 2 of the Fourteenth Amendment provides:

Representatives shall be apportioned among the several [s]tates according to their respective numbers, counting the whole number of persons in each [s]tate, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a [s]tate, or the members of the [l]egislature thereof, is denied to any of the male inhabitants of such [s]tate, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such [s]tate. 134

This provision would reduce a state’s representation in Congress and the Electoral College if the state deprived any adult male citizen of his right to vote. 135 Supporters of Section 2 argued that language was necessary to

130. See id.; U.S. CONST. amend. XIV, § 1.
132. U.S. CONST. amend. XIV, § 1; 14th Amendment, supra note 131.
133. 14th Amendment, supra note 131; see also U.S. CONST. amend. XIV, § 1.
134. U.S. CONST. amend. XIV, § 2; 14th Amendment, supra note 131.
135. U.S. CONST. amend. XIV, § 2; 14th Amendment, supra note 131.
allow black men an avenue to effectuate reform and preserve their rights.\textsuperscript{136} It did not apply to women or convicted felons.\textsuperscript{137}

The Southern States, except for Tennessee, rejected the Fourteenth Amendment.\textsuperscript{138} However, readmission into the Union—and, thus, the eventual elimination of the Northern military presence in the South—was conditioned on ratification of the Fourteenth Amendment and the establishment of state constitutions that Congress deemed acceptable.\textsuperscript{139} Because ratification of the Fourteenth Amendment was a condition to being readmitted into the Union, Southern States reluctantly agreed to ratify it, while openly refusing to comply with it.\textsuperscript{140} The South’s refusal to abide by the Fourteenth Amendment made it clear that Section 2 would not be enforced against the former slave holding states, as Northern representatives quickly realized that Southern States “and their enactment of black codes . . . made the condition of the freedmen more deplorable than slavery itself[,]” by criminalizing conduct to limited voting rights and causing former slaves to incur debts they could not pay, thereby forcing them into indentured servitude.\textsuperscript{141} Moreover, if Section 2 was enforced upon enactment, Northern States would have lost significant power because they, like their Southern counterparts, did not permit black citizens to vote.\textsuperscript{142}

\begin{flushright}
\footnotesize
\begin{tabular}{l}
136. U.S. CONST. amend. XIV, § 2; Michael Kent Curtis, The Fourteenth Amendment: Recalling What the Court Forgot, 56 Drake L. Rev. 911, 958 (2008). “Thaddeus Stevens told his colleagues this was the most important provision in the Fourteenth Amendment.” Curtis, supra, at 958. \\
137. See U.S. CONST. amend. XIV, § 2; Gabriel J. Chin, Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 Geo. L.J. 259, 305 (2004); Curtis, supra note 136, at 958. Significant disenfranchisement of black voters occurred as a result of being convicted of crimes. Chin, supra, at 305. \\
139. Id. \\
140. Id.; Chin, supra note 137, at 261. \\
142. U.S. CONST. amend. XIV, § 2; Curtis, supra note 136, at 917.
\end{tabular}
\end{flushright}
To avoid losing political capital as a result of the failure to grant blacks the right to vote, Northern representatives relied on the enactment of the Fifteenth Amendment, which effectively abolished Section 2.\(^{143}\) Indeed, Courts hold and commentators agree that “instead of prohibiting race-based voting restrictions, Section 2 merely established a price for such restrictions.” By contrast, the Fifteenth Amendment categorically prohibits . . . states from discriminating on the basis of race; it “has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice.” . . . As the Supreme Court explained in United States v. Reese,\(^{144}\) before [enactment of] the Fifteenth Amendment, “[i]t was as much within the power of a state to exclude citizens of the United States from voting on [the] account of race, as it was on account of age, property or education. Now it is not.”\(^{145}\)

As a practical matter, enforcement of Section 2 was rendered impossible by the Fifteenth Amendment.\(^{146}\) Once a plaintiff established that he was deprived of his right to vote by a state’s legislature, the Fifteenth Amendment mandated that his rights be restored, eliminating the possibility of a state suffering the consequences built into Section 2.\(^{147}\)

If Section 2 were enforced there would have been severe far-reaching consequences such as a state losing representation in Congress, as well as losing electoral votes for the President.\(^{148}\) However, Section 2 was never enforced.\(^{149}\) Polls taken to determine whether people were losing the right to vote were inaccurate.\(^{150}\) As a result, it was impossible to determine

\(^{143}\) Chin, *supra* note 137, at 274–75; *see also* U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV.

\(^{144}\) 92 U.S. 214 (1876).


\(^{146}\) Id. at 272. States, without specifically mentioning race, imposed onerous requirements onto voters, such as a requirement that a voter pass a literacy test, to prevent former slaves from voting. Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 108–09 (1960).

\(^{147}\) Chin, *supra* note 137, at 263.

\(^{148}\) Chambers, *supra* note 145, at 1417; *see also* U.S. CONST. amend. XIV, § 2.

\(^{149}\) Bonfield, *supra* note 146, at 113; Curtis, *supra* note 138, at 916.

\(^{150}\) George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 111 (1961). In 1871, Congress attempted to determine the number of disenfranchised voters, and determined
the amount of voters that were being disenfranchised. Based on the holding of *Saunders v. Wilkins*, individuals were also precluded from seeking to enforce Section 2 because courts could not address issues related to the allocation of representatives among several states because such issues fell within the exclusive purview of the legislature, notwithstanding the plain language of Section 2.

There was no need to enforce Section 2 until 1876, when the North ended its occupation of the South as part of the agreement to resolve the 1876 Tilden-Hayes presidential election in the House of Representatives, as the occupying Union army ensured that African Americans were permitted to exercise their rights. However, once Northern occupation ended, the South was able to deny blacks the rights the Fourteenth Amendment was meant to guarantee. Southern States enacted laws, such as poll taxes and literacy tests, which were intended to prevent blacks from voting, and were very successful in suppressing the vote, such that in 1954, in Alabama, there were no registered black voters in nine rural counties with a large black population.

Even until today, African Americans are disproportionately denied the right to vote because of state laws that prohibit prisoners, parolees, and ex-felons from voting. These laws, as applied, have caused the incarceration of a significant number of African American voters and resulted in their disenfranchisement. Nonetheless, the laws are upheld under the Fifteenth Amendment because the laws at issue do not discriminate against a person based on their race, without regard to the fact that they were accused of violating the law due to their race or other related issues. Had such laws been analyzed under the context of Section 2, a different result

that in “Southern States, except Texas, the number of adult male citizens who were disenfranchised amounted to less than 0.5[%].” *Id.* at 111–12.

151. See *id.* at 111. The 42nd Congress attempted to produce a census reporting the number of disenfranchised citizens and the passage of a statute authorizing enforcement of Section 2 in the future. *Id.* at 116. However, the census was deemed to be inaccurate and the Congress chose to ignore it. *Id.* Since that time no other Congress has attempted to produce a census reporting the number of disenfranchised citizens in the states.

152. 152 F.2d 235 (4th Cir. 1945).

153. *Id.* at 238; Zuckerman, *supra* note 150, at 130–31.


158. See *id.* at 261–62, 312.

159. See U.S. CONST. amend. XV; Chin, *supra* note 137, at 262–63.
may have occurred, as the Fourteenth Amendment reduces electoral and congressional representation based on the disenfranchisement of votes, regardless of the cause.\textsuperscript{160} Unfortunately, the Electoral College was used as a mechanism that deprives citizens of equal protection and disenfranchises voters without consequence as a result of the Fifteenth Amendment.\textsuperscript{161}

VIII. WHY IS THE ONE PERSON, ONE VOTE UNCONSTITUTIONAL FOR THE STATES BUT CONSTITUTIONAL IN CONNECTION WITH THE ELECTION OF THE PRESIDENT AND VICE PRESIDENT?

The Supreme Court of the United States’ decisions in Reynolds v. Sims,\textsuperscript{162} Gray v. Sanders,\textsuperscript{163} and Bush v. Gore\textsuperscript{164} highlight the constitutional infirmity of the Electoral College.\textsuperscript{165} In the Reynolds and Gray decisions, the Supreme Court ruled that state law which provides for an Electoral College style of voting to choose a state’s Executive was unconstitutional, even though the Electoral College is still in existence today.\textsuperscript{166}

In Gray, the Supreme Court struck down a unit voting system used by Georgia for all statewide offices.\textsuperscript{167} In that system, a governor or senator would win a unit in any county in which they won a majority.\textsuperscript{168} Whoever won the most units would win their election.\textsuperscript{169} The Court found that the foregoing system was unconstitutional because votes for a losing candidate in a particular county were not counted.\textsuperscript{170} The Court held the electoral style voting system violated Section 1 of the Fourteenth Amendment because it gave an unfair weight to votes for the winning candidate in a particular county.\textsuperscript{171}

Georgia argued that its voting system was similar to the Electoral College for the presidency.\textsuperscript{172} However, the Supreme Court rejected that

\begin{itemize}
\item \textsuperscript{160} See U.S. CONST. amend. XIV, § 2; Chin, supra note 137, at 259–60, 263.
\item \textsuperscript{161} Gray v. Sanders, 372 U.S. 368, 377 n.8 (1963); Michael J. O’Sullivan, Artificial Unit Voting and the Electoral College, 65 S. CAL. L. REV. 2421, 2435–36 (1992); see also U.S. CONST. amend. XV.
\item \textsuperscript{162} 377 U.S. 533 (1964).
\item \textsuperscript{163} 372 U.S. 368 (1963).
\item \textsuperscript{164} 531 U.S. 98 (2000).
\item \textsuperscript{165} See id. at 104; Reynolds, 377 U.S. at 587; Gray, 372 U.S. at 378.
\item \textsuperscript{166} Reynolds, 377 U.S. at 585–87; Gray, 372 U.S. at 381; see also Jeffrey W. Ladewig, One Person, One Vote, 43 Seats: Interstate Malapportionment and Constitutional Requirements, 43 CONN. L. REV. 1125, 1138 (2011); O’Sullivan, supra note 161, at 2435–36.
\item \textsuperscript{167} Gray, 372 U.S. at 381.
\item \textsuperscript{168} Id. at 371.
\item \textsuperscript{169} Id. at 372.
\item \textsuperscript{170} See id. at 379–81.
\item \textsuperscript{171} Id.; see also U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{172} See Gray, 372 U.S. at 370–71.
\end{itemize}
argument and noted that, because the Electoral College was established by Article II of the Constitution, it was entitled to special protection, distinguishing it from Georgia’s Electoral College system.\[173\] It is counterintuitive to think the Constitution requires Georgia to disperse its gubernatorial votes equally among the members of the governor’s natural constituency, but it does not require the Electoral College to disperse electoral votes as equally as possible among the members of the President’s natural constituency.\[174\] Nonetheless, and despite the fact that Georgia’s system was nearly identical to the Electoral College, the Court found that it was constitutionally required to uphold one system but not the other.\[175\]

Similarly, in *Reynolds*, the Supreme Court once again used the Equal Protection Clause to impose the *one person, one vote* doctrine on state legislatures.\[176\] The Court reiterated:

To the extent that a citizen’s right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen’s vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.\[177\]

In both *Reynolds* and *Gray*, the Supreme Court of the United States held that an Electoral College system of voting for state officials was unconstitutional because it violated the *one person, one vote* doctrine of the Equal Protection Clause of the Fourteenth Amendment.\[178\]

Like in *Reynolds* and *Gray*, in *Bush v. Gore*, the Supreme Court found that Florida’s system of selecting electors violated the Equal Protection Clause.\[179\] In *Bush v. Gore*, the Supreme Court addressed whether the Equal Protection Clause prevented a recount of the Florida vote during
the 2000 presidential election.\footnote{Bush} Under the circumstances presented by the facts in \textit{Bush v. Gore}, Florida election law mandated a recount in the counties for state electors who were elected under Florida state election laws.\footnote{Id.}

The Supreme Court found that, because Florida’s procedure for recounting votes for their electors was not being uniformly conducted, it violated the Equal Protection Clause of the Fourteenth Amendment.\footnote{Bush} Despite the fact that each county had a different ballot and different voting machines, the Supreme Court found that the recount procedures utilized by the Florida Legislature did not provide “the minimum procedures necessary to protect the fundamental right of each voter” to have his vote counted in the same manner as other similarly situated voters.\footnote{Id. at 109–10.} Thus, the Supreme Court found that, where different counties are being treated differently with respect to the re-tabulation of individual votes in connection with the selection of electors, there was an equal protection violation.\footnote{See id. at 105, 109; Reynolds v. Sims, 377 U.S. 533, 540–41 (1964).} In making its determination, the Supreme Court ignored the fact that different voters in different states, using different voting mechanisms, had already been subjected to equal protection violations—such as the violation described in \textit{Reynolds}.\footnote{Legal Team Led by LULAC and David Boies File Lawsuits Challenging Winner-Take-All Approach to Selecting Electors in Presidential Elections, LULAC, http://www.lulac.org/news/pr/LULAC_File_Lawsuits_Challenging_Winner-Take-All_Approach/ (last visited May 1, 2019); Bill Whalen, Go Ahead and Change the Electoral College, but There’s Still a Trump Presidency, FORBES (Aug. 12, 2018, 7:52 PM), http://www.forbes.com/sites/billwhalen/2018/08/12/go-ahead-and-the-change-the-electoral-college-but-theres-still-a-trump-presidency/.

As further evidence of the constitutional infirmity of the Electoral College, a coalition led by David Boies, of Boies Schiller Flexner and the League of Latin American Citizens, have filed lawsuits in Massachusetts, California, South Carolina, and Texas, challenging the system enacted by those states to select their electors.\footnote{Paul Hond, Ballot Breakdown, COLUM. MAG., Fall 2018, at 28, 35.} The concern expressed in the lawsuit is exacerbated by the fact that in 2020, a significant number of immigrants may not be part of the census, further diminishing the voting power of more urban states.\footnote{187. Paul Hond, Ballot Breakdown, COLUM. MAG., Fall 2018, at 28, 35.} Although the foregoing lawsuits may have the effect of modifying how the Electoral College is implemented on a state by state
basis, it is unclear as to whether they will cause a change in how the Electoral College system is operated nationally in light of *Bush v. Gore*. Other proposed solutions to the winner-take-all system of the Electoral College, such as agreements among states to select electors based on who wins the majority of the popular vote, are also unlikely to result in a national change in the Electoral College either.

IX. IS THE ELECTORAL COLLEGE BIASED?

The Electoral College gives some states a disproportional level of representation in the presidential election. To illustrate, in 2016, “[i]n Wyoming, one electoral vote represented 72,000 ballots cast by actual citizens,” while in California, the same electoral vote represented 270,000 actual votes, “giving a Wyoming citizen nearly four times more power than a California citizen in allocating votes from the Electoral College.”

By way of example, as a result of the Electoral College, “Donald Trump won Pennsylvania and Florida by a combined margin of about 200,000 votes to earn 49 electoral votes. Hillary Clinton, meanwhile, won

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188. *See Bush*, 531 U.S. at 109; *Legal Team Led by LULAC and David Boies File Lawsuits Challenging Winner-Take-All Approach to Selecting Electors in Presidential Elections*, supra note 186. *Bush v. Gore* provided, in relevant part, that it was not to be considered binding precedent. *Bush*, 531 U.S. at 109. “Our consideration is limited to the present circumstances.” *Id.*


190. *See id.*

In 1988, for example, the combined . . . population, 3,119,000, of the seven least populous jurisdictions of Alaska, Delaware, the District of Columbia, North Dakota, South Dakota, Vermont, and Wyoming carried the same voting strength in the Electoral College [twenty-one] Electoral votes as the 9,614,000 persons . . . in the State of Florida.


Massachusetts by almost a million votes but earned only 11 electoral votes.\textsuperscript{192} Similarly, “Clinton won California by over 3 million votes, netting 55 electoral votes. [President] Trump’s combined popular vote margin in Pennsylvania, Florida, Michigan, and Wisconsin was under 250,000, but those victories netted him 75 electoral votes.”\textsuperscript{193}

The Electoral College favors Republican candidates—candidates who are generally favored by rural, less populated regions, giving them a head start in the election process.\textsuperscript{194} There are eleven states where the “support for the [Republican party] outstrips support for the Democratic party by at least [ten] percent. These states have [sixty-five] percent more representation in the Electoral College than . . . if . . . votes were distributed evenly.”\textsuperscript{195} The existence of a Republican bias in the Electoral College is further supported by the fact that the past two Republican Presidents, George W. Bush and Donald J. Trump, lost the popular election by five hundred thousand and almost three million votes respectively, but were elected President thanks to the Electoral College.\textsuperscript{196} Indeed, in 2000,

[H]ad there not been a two-seat bonus for senatorial seats, even with a [President] Bush victory in Florida, a 435 seat Electoral College—without D.C.—would have elected Gore by a margin of 224–211 (51.9%), while a 436 seat Electoral College—with D.C.—would have elected Gore by a margin of 225–211

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\textsuperscript{194} See \textit{American Democracy’s Built-In Bias}, \textsc{Economist} (London), July 14, 2018, at 16. “Places where people live close together vote Democratic, places where they live farther apart vote Republican, . . . [and] nearly half the variance in the county-level vote shares in the presidential election of 2016 could be explained solely by their number of voters per square kilometer[ter].” \textit{The Minority Majority}, \textsc{Economist}, July 14, 2018, at 21, 22. Candidates from the Republican party have 191 projected electoral votes from Southern and other conservative-leaning States without even having to campaign in those states. Nate Silver, \textit{Why a Plan to Circumvent the Electoral College Is Probably Doomed}, \textsc{Fivethirtyeight: Pol.} (Apr. 17, 2014, 5:49 PM), http://www.fivethirtyeight.com/features/why-a-plan-to-circumvent-the-electoral-college-is-probably-doomed/.
\textsuperscript{195} Darling-Hammond, \textit{supra} note 193.
\end{flushright}
(51.6%)—which was used to argue that the Electoral College now has a—small—built-in bias toward the Republicans based solely on greater Republican strength in the smaller states.197

Since 1977, Republicans have appointed ten United States Supreme Court Justices compared to four which were appointed by Democrats, yet without the Electoral College, there would be eight Democratic Supreme Court appointees compared to only six Republican ones.198 Because these judges are appointed by politicians, the Electoral College “embeds this rural bias in the courts as well.”199

In addition, Southern States, the majority of which have voted for a Republican President since 2000, receive significantly more benefits than their Northern counterparts.200

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197. Bernard Grofman & Scott L. Feld, Thinking About the Political Impacts of the Electoral College, 123 PUB. CHOICE 1, 3 (2005).
198. Biographical Directory of Article III Federal Judges, 1789–Present, FED. JUD. CTR., http://www.fjc.gov/history/judges/search/advancedsearch (last visited May 1, 2019); see also American Democracy’s Built-In Bias, supra note 194. The Republican party will soon be appointing an eleventh Supreme Court Justice. See American Democracy’s Built-In Bias, supra note 194.
199. Id.
As set forth in the tables above, Southern States received approximately $25,441,931,402 more in federal aid than they paid in taxes. Western and Midwestern States, which are similarly more rural than the Northeastern States, received $6,881,823,032 and $5,584,135,059 more than they paid in taxes respectively, as well. Thus, in the South, citizens received, in 2016, on an average per capita basis $4,425 per year more than they paid in taxes, which is nearly double what citizens in Western States received, $2,789, on average per capita and nearly ten times what citizens in the Northeast, $516, and Midwest, $569, received on average on a per capita basis, in 2016, in exchange for the taxes they paid. This means that the federal government pays approximately $6,982,535,112 on average

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201. See infra app. A.
202. See infra app. A.
203. See infra app. A.
to Southern States per elector, while spending $5,480,817,164 per elector in the Northeastern States, and $5,124,592,838 per elector in the Midwest. 204

The politicized nature of the Electoral College has further decreased equal political activity and participation amongst states. 205 If a candidate is likely to win in one state, then that candidate will not spend much time there, enabling him to spend time in swing states, or states where the population demographics are diverse, creating uncertainty with respect to how that state’s electors will vote. 206 In fact, in 2012, the swing states—Ohio, New Hampshire, Colorado, Florida, Virginia, Nevada, Iowa, Wisconsin, and Pennsylvania—“collectively had a 98.6 percent chance of determining the Electoral College winner in 2012,” making these nine states seventy times more powerful with respect to the presidential election “than the other [forty-one], which collectively had a 1.4 percent chance of determining the winner combined.” 207 As a result, candidates spend more time in those states. 208

Data from the 2016 campaign shows that:

[Fifty-three] percent of campaign events for [President] Trump, Hillary Clinton, Mike Pence, and Tim Kaine in the two months before the November election were in only four states: Florida, Pennsylvania, North Carolina, and Ohio. During that time, 87 percent of campaign visits by the four candidates were in [twelve] battleground states, and none of the four candidates ever went to [twenty-seven] states, which includes almost all of rural America. 209

Not only do swing states receive more attention in campaigns, but they also receive significantly more funding. 210 In fact, the gross average federal spending in the swing states is $6,517,873,233 per electoral vote compared to $5,659,705,613 per electoral vote in non-swing states. 211 Despite the fact that the Electoral College has caused significant disparate treatment amongst the states, it is still being used today. 212

204. See infra app. A.
205. See Strömberg, supra note 5, at 786.
206. Id. at 781, 786. For example, in 2000, California was forecasted to have a fifty-two percent democratic vote share and a fifty-five percent democratic vote share in 2004. Id. at 781. As a result, much less attention was given to California in 2000 than in 2004. Id.
207. Silver, supra note 194.
208. See Strömberg, supra note 5, at 790.
209. Speel, supra note 192.
210. See Strömberg, supra note 5, at 786, 798; infra app. A.
211. See infra app. A.
212. Darling-Hammond, supra note 193.
X. CONCLUSION

Like an infected appendix, the Electoral College serves no legitimate purpose and must be removed. It was originally intended to create a federal government, which included Southern slaveholding States by allowing slave owners to have a disproportionate say in the Electoral College compared to those permitted to vote, in exchange for the right to tax them based on their slaves. The compromise was carried over from congressional representatives and is now being used to allow rural, less populated states to have a disproportionate say in the election of the Executive. Those states already exercise a sufficient veto over the more populated states by way of the unequal representation in the Senate, and in some instances, the House of Representatives. If the Executive continues to consistently fall into the hands of the candidate receiving less votes than their opponent, as has been the case in 2000 and 2016, and those casting less votes continue to disproportionately receive greater say in judicial appointments, the majority should take action to eliminate the Electoral College in the Twenty-First Century, considering the significant impact that the Electoral College has on federal spending, as well.

The best mechanism to remedy the problem caused by the Electoral College is the enactment of a constitutional amendment eliminating the Electoral College and replacing it with a direct election of the Executive. Direct election would ensure that the Executive is a person of the people, consistent with the values of a modern democracy. Moreover, the historical justifications of the Electoral College—the need to protect small states’ interests or, originally, the interests of slave owners in rural states—no longer exist; slavery and its vestiges were supposed to be abolished through the Thirteenth Amendment, which was to be enforced through the Fourteenth and Fifteenth Amendments. Although the Fourteenth and Fifteenth Amendments should have ensured that there is not a disproportionate treatment of people in connection with the Electoral College, those amendments, because of our post-civil war history, never fully

213. Amar, supra note 109; Silver, supra note 194.
214. See Wills, supra note 38, at 6.
216. Id.
217. See id.; Desilver, supra note 196.
218. See Amar, supra note 109.
219. Id.
220. U.S. CONST. amend. XIII, § 1; Amar, supra note 37, at 471; Carter, supra note 124, at 1347–48; Constitutional Topic: The Constitutional Convention, supra note 18; Finkelman, supra note 19, at 1154–56; see also U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV.
accomplished their purpose.\textsuperscript{221} The rural land mass and small states with less population will still exercise a sufficient check over the majority through the Senate.\textsuperscript{222}

The Electoral College should be eliminated.\textsuperscript{223} The time to excise the infected appendix is now.\textsuperscript{224}

\textsuperscript{221} Carter, supra note 124, at 1368 n.210; Finkelman, supra note 19, at 1156; see also U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV. One interesting alternative is to use a \textit{ranked-choice voting} system, where “voters list candidates in order of preference. After a first count, the candidate with the least support is eliminated, and his or her [voters] are reallocated to those voters’ second choice. This continues until someone has a majority.” \textit{American Democracy’s Built-In Bias}, supra note 194.


\textsuperscript{224} See Lewis, supra note 223; Silver, supra note 194. In the 2009 Dunwody Lecture, Akhil Reed Amar spoke at the prestigious University of Florida and expressed his hope that “the Dunwody Lecturer of 2019 . . . [would] be able to say to [his or her] audience, with truth in [his or her] voice and a smile on [his or her] lips, that the right to vote has made great strides in the new millennium.” Akhil Reed Amar, \textit{Bush, Gore, Florida, and the Constitution}, 61 FLA. L. REV. 945, 968 (2009).
Appendix A – Electoral College Model

<table>
<thead>
<tr>
<th>Swing State</th>
<th>Census Region</th>
<th>U.S. State</th>
<th>Federal Spending</th>
<th>Fed. Spending Per Capita</th>
<th>Rank Per Capita</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-swing South</td>
<td>AL</td>
<td>33,881,189,324</td>
<td>6,967</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Non-swing West</td>
<td>AK</td>
<td>3,489,076,519</td>
<td>4,703</td>
<td>11</td>
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<tr>
<td>Non-swing West</td>
<td>AZ</td>
<td>29,124,597,576</td>
<td>4,202</td>
<td>13</td>
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<tr>
<td>Non-swing South</td>
<td>AR</td>
<td>13,852,243,174</td>
<td>4,636</td>
<td>12</td>
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<tr>
<td>Non-swing West</td>
<td>CA</td>
<td>(6,359,640,090)</td>
<td>(162)</td>
<td>39</td>
<td></td>
</tr>
<tr>
<td>Swing West</td>
<td>CO</td>
<td>2,404,289,383</td>
<td>434</td>
<td>35</td>
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</tr>
<tr>
<td>Non-swing Northeast</td>
<td>CT</td>
<td>(7,739,471,054)</td>
<td>(2,164)</td>
<td>48</td>
<td></td>
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<tr>
<td>Non-swing South</td>
<td>DE</td>
<td>499,543,573</td>
<td>525</td>
<td>33</td>
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</tr>
<tr>
<td>Non-swing South</td>
<td>D.C.</td>
<td>37,553,107,729</td>
<td>55,130</td>
<td>X</td>
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<tr>
<td>Swing South</td>
<td>FL</td>
<td>60,660,393,037</td>
<td>3,943</td>
<td>22</td>
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</tr>
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### Appendix A – Electoral College Model

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Appendix A – Electoral College Model

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Total Spending 551,748,742,077
Appendix A – Electoral College Model

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Total Gross Spending 3,613,669,112,596
Appendix A – Electoral College Model

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<th>Average of Fed Spending Balance</th>
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Appendix A – Electoral College Model

| Row Labels | Average of Fed Spending Balance | WITH DC | | Average of Fed Spending Balance | WITHOUT DC |
|------------|---------------------------------|---------| |---------------------------------|------------|
| Swing      | 20,312,275,991                  | Swing   | 20,312,275,991                  |
| Non-swing  | 8,784,244,242                  | Non-swing | 8,089,564,645                      |
| Grand Total | 10,818,602,786                  | Grand Total | 10,283,912,687                      |

| Row Labels | Average of Fed Spending Balance Per Capita | WITH DC | | Average of Fed Spending Balance Per Capita | WITHOUT DC |
|------------|-------------------------------------------|---------| |-------------------------------------------|------------|
| Non-swing  | 3,732                                     | Non-swing | 2,479                          |
| Swing      | 1,879                                     | Swing   | 1,879                          |
| Grand Total | 3,405                                    | Grand Total | 2,371                          |

| Row Labels | Average of (Votes/Million PPL) | WITH DC | | Average of (Votes/Million PPL) | WITHOUT DC |
|------------|---------------------------------|---------| |---------------------------------|------------|
| Non-swing  | 2.32                            | Non-swing | 2.27                          |
| Swing      | 1.82                            | Swing   | 1.82                          |
| Grand Total | 2.23                            | Grand Total | 2.19                          |

| Row Labels | Average of Gross Fed Spending/Person | WITH DC | | Average of Gross Fed Spending/Person | WITHOUT DC |
|------------|-------------------------------------|---------| |-------------------------------------|------------|
| Non-swing  | 12,894                              | Non-swing | 11,455                         |
| Swing      | 11,169                              | Swing   | 11,169                         |
| Grand Total | 12,590                             | Grand Total | 11,403                         |

| Row Labels | Average of Gross Fed Spending/Electoral vote | WITH DC | | Average of Gross Fed Spending/Electoral vote | WITHOUT DC |
|------------|----------------------------------------------|---------| |----------------------------------------------|------------|
| Swing      | 6,517,873,233                               | Swing   | 6,517,873,233                   |
| Non-swing  | 5,913,761,844                               | Non-swing | 5,659,705,613                   |
| Grand Total | 6,020,369,736                             | Grand Total | 5,814,175,785                   |
Appendix A – Electoral College Model
Appendix A – Electoral College Model
# CAN PRESIDENT TRUMP BECOME HIS OWN JUDGE AND JURY? A LEGAL ANALYSIS OF PRESIDENT TRUMP’S AMENABILITY TO CRIMINAL INDICTMENT AND ABILITY TO SELF-PARDON

Nicolo A. Lozano*

## I. INTRODUCTION

If you knew that President Donald J. Trump (“President Trump”) could have pardoned himself after a criminal indictment at the conclusion of Robert S. Mueller’s (“Mueller”) investigation—in which it could have been

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found that President Trump conspired with Russia to win the 2016 presidential election and he could have obstructed justice by interfering with Mueller’s investigation into Russian interference—would you still have voted for him?\(^1\) The outright threat to exploit an apparent loophole in our criminal justice system by President Trump has a plethora of legal scholars in a frenzy.\(^2\) On June 4, 2018, President Trump tweeted from his @realDonaldTrump Twitter account that he has the absolute right to pardon himself from any criminal conduct, which was presumably directed to Mueller and his team.\(^3\)

According to President Trump, it does not matter if Mueller indicts him over his alleged involvement in Russia’s meddling into the 2016 presidential election because he can simply use his pardon power on himself.\(^4\) Mueller began an investigation into President Trump and his alleged collusion with Russia in the meddling into the 2016 presidential election in which President Trump beat Hillary Clinton for President of the United States.\(^5\)

Politics and personal opinions aside, President Trump has a legally sound argument in using his pardon power on himself.\(^6\) United States


3. Schallhorn, supra note 2; see also Schallhorn, supra note 1.

Presidents enjoy plenary pardon power. Although no sitting United States President has ever exercised his pardon power on himself, previous Presidents have had their legal team research the plausibility behind such action. However, President Trump did not exercise his pardon power on himself prior to Mueller ending the investigation into his alleged culpability in the Russian meddling scandal during the 2016 presidential election.

Legal scholars differ on the Justice Department’s ability to bring forth a criminal indictment against a sitting President. Some commentators, such as Rudolph Giuliani, argue that President Trump is immune from criminal prosecution while in office. While other commentators believe no man is above the law—not even President Trump—and a sitting President is amenable to criminal prosecution. Such legal conflict is a natural byproduct on the lack of guidance from the Supreme Court of the United States because a sitting President has never been criminally indicted.

While foreign powers have indirectly influenced a United States presidential election, Russia’s meddling into the 2016 presidential election and the extended invitation to find Hilary Clinton’s deleted e-mails by

7. See U.S. CONST. art. II, § 2, cl. 1; Rizzo, supra note 6.
8. Nida & Spiro, supra note 6, at 199; see also Rizzo, supra note 6. “The Constitution is silent, however, as to whether the President may grant himself a pardon from prosecution and, if so, when such a pardon may be issued. In the over 20,000 instances that Presidents have used this exclusive power, no President has used this power to pardon himself.” Nida & Spiro, supra note 6, at 199.
9. See Ashley Parker & Joel Achenbach, Giuliani Defends Trump’s Power, WASH. POST, June 4, 2018, at A4. Giuliani said, “[President Trump] has no intention of pardoning himself . . . .” Id.
10. See Schallhorn, supra note 2.
11. Rizzo, supra note 6. “All [Mueller and his team] get to do is write a report . . . [t]hey can’t indict. At least they acknowledged that to us after some battling.” Id.
12. Norman Eisen & Elizabeth Holtzman, Donald Trump Should Not Assume He’s Above the Law. A Sitting President Can Be Indicted, USA TODAY, (May 24, 2018, 4:23 PM), http://www.usatoday.com/story/opinion/2018/05/24/donald-trump-not-above-law-sitting-president-can-indicted-column/634725002/. “Those options, while obviously unpalatable to the president, are consistent with a basic principle of our democracy: No person is above the law.” Id.
13. Keith King, Indicting the President: Can a Sitting President Be Criminally Indicted?, 30 SW. U. L. REV. 417, 422–23 (2001). Former President Richard Nixon’s (“President Nixon”) assertion that he is criminally immune went unanswered as the case never reached the Supreme Court. Id. at 422. Executive criminal immunity “has never been addressed by any court.” Id. at 423.
presidential candidate Trump is unprecedented.\textsuperscript{15} No sitting President has faced the accusations President Trump faces today.\textsuperscript{16} Unfortunately, President Trump’s conduct on the campaign trail had become the basis of Mueller’s investigation into his alleged involvement with the Russian meddling.\textsuperscript{17}

Whether or not a President can use his pardon power on himself has not been addressed by the Supreme Court.\textsuperscript{18} The Court has not directly addressed the amenability of a President to a criminal indictment.\textsuperscript{19} This Comment will discuss the constitutionality of President Trump’s suggested self-pardon ability.\textsuperscript{20} Further, this Comment will discuss the constitutionality of indicting the President.\textsuperscript{21} Lastly, this Comment will discuss the danger of President Trump using his pardon power on himself.\textsuperscript{22}

II. President Trump’s Ability to Self-Pardon

Article II of the United States Constitution is the foundation for the powers of the executive branch and the President.\textsuperscript{23} According to Section Two of Article II, President Trump “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”\textsuperscript{24}

Generally, President Trump enjoys plenary power to grant pardons and reprieves.\textsuperscript{25} Although the Supreme Court has never decided the constitutionality of a presidential self-pardon, the Court has issued decisions

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{17} Schallhorn, supra note 1.
  \item \textsuperscript{18} Nida & Spiro, supra note 6, at 220.
  \item \textsuperscript{19} A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 260 (2000).
  \item \textsuperscript{20} See discussion infra Part II.
  \item \textsuperscript{21} See discussion infra Part III.
  \item \textsuperscript{22} See discussion infra Part IV.
  \item \textsuperscript{23} U.S. CONST. art. II, § 2, cl. 1.
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} See Nida & Spiro, supra note 6, at 221. “[T]he Court has defined the presidential pardon power as unconditional, except for impeachment.” \textit{Id.} “The Constitution does not say what sort of pardon; but the term being generic necessarily includes every species of pardon . . . .” \textit{Ex parte} Garland, 71 U.S. 333, 351 (1866). “To the executive alone is intrusted the power of pardon; and it is granted without limit.” United States v. Klein, 80 U.S. 128, 147 (1871).
\end{itemize}
on the power of a presidential pardon. In those decisions, the Court put few limitations on pardoning, which closely follows the text of the Constitution and the intent of the Framers (“Framers”).

While President Trump pardoning himself would be an unprecedented use of his pardon power, the idea of issuing a self-pardon is not unprecedented. Under the Nixon and Bush administrations, the Presidents’ legal counsel researched the feasibility of such action. Just as President Trump’s legal team concluded that such ability to pardon himself is constitutional, former Presidents Nixon and George H. W. Bush’s (“President Bush”) legal teams reached the same conclusion.

Although seemingly abusive and unprecedented, President Trump’s tweet on his ability to self-pardon does have some constitutional support as it is not expressly prohibited with the only limitation coming in cases of impeachment. Moreover, the Court has not limited the President’s ability to issue pardons. Therefore, President Trump should have the ability to pardon himself because: (i) the Court has not limited such power, (ii) the only constitutional limitation on pardoning is in cases of impeachment, and (iii) Congress lacks constitutional authority to alter President Trump’s ability to pardon.

A. Framers’ Drafting of the Presidential Pardon Power

Although bestowing upon the President a plenary pardon power akin to the King of England seemingly is contradictory to the Framers’ intent of creating a system of checks and balances, there is evidence that the Framers intended for such plenary power. When taking into account the debates on the presidential pardon power during the 1787 Constitutional Convention, it is evident that the Framers intentionally left the only restriction on pardoning

26. See Nida & Spiro, supra note 6, at 220–21.
27. See id.
29. Nida & Spiro, supra note 6, at 212–16.
30. Id.; Schallhorn, supra note 2.
31. Nida & Spiro, supra note 6, at 217; Schallhorn, supra note 2.
32. See Nida & Spiro, supra note 6, at 220–21.
33. U.S. CONST. art. II, § 2, cl. 1; Ex parte Grossman, 267 U.S. 87, 106 (1925); United States v. Klein, 80 U.S. 128, 147 (1871); Ex parte Garland, 71 U.S. 333, 351 (1866); Nida & Spiro, supra note 6, at 206–07. The pardon power was adopted with little limitation similar to the King of England’s power, and the Court thwarted “Congress from interfering with the discretion of the President to issue pardons.” Nida & Spiro, supra note 6, at 206.
for cases of impeachment as all other motions failed and none others were passed.35

During the 1787 Constitutional Convention, various ideas on who would possess pardon power in the United States government were debated.36 Although such discussion was not extensive, the pardon power and its limitations were formed after some debate.37 For example, Roger Sherman and other Framers believed the pardon power should be given to the legislative branch, while some others argued that the pardon power should be bestowed on a combination of the legislative and executive branches.38 Ultimately, however, the power was given to the executive branch as some feared the legislative branch would become too powerful with the ability to create laws and grant reprieves for individuals breaking those laws.39

Once the pardon power was given to the executive branch, the discussion on such power revolved around the limitations to pardon.40 Some advocates argued for a limitation on pardoning an individual only after a conviction of the crime.41 However, it failed because the majority of the Framers agreed that “a pardon before conviction might be necessary” in some instances.42 Others motioned to exclude the President’s pardon power in cases of treason since the President could secretly hide his involvement with the crime by pardoning his accomplices.43 However, this motion failed to garner the majority’s support because the majority believed pardoning to be a necessity in government and placing limits upon it to be inherently

35. Nida & Spiro, supra note 6, at 205–06.
36. Id. at 205.
37. Brian C. Kalt, Note, Pardon Me? The Constitutional Case Against Presidential Self-Pardons, 106 YALE L.J. 779, 786 (1996). “There was little debate on the pardon power—only a few verbal exchanges and a couple of motions.” Id.
38. Id.; Nida & Spiro, supra note 6, at 205. “Some advocates, including Roger Sherman, proposed a plan that placed the pardon power with the Senate...[o]ne factor considered...placed the pardon power in a variety of models, including in the legislature, the executive, or a combination of the two.” Nida & Spiro, supra note 6, at 205.
39. Nida & Spiro, supra note 6, at 205–06.
40. Id. “With little further discussion, the power was assigned to the executive branch, and the discussion then turned to what limitations would be placed in the provision.” Id. at 205.
41. William F. Duker, The President’s Power to Pardon: A Constitutional History, 18 WM. & MARY L. REV. 475, 501–02 (1977). Luther Martin motioned to include the words after conviction in the pardon clause but was persuaded to remove his motion by James Wilson, as Wilson argued that a pardon could be used to get testimony against accomplices. Id.
42. Id.
43. Id. at 502; Nida & Spiro, supra note 6, at 206; Kalt, supra note 37, at 786. Edmund Rudolph argued treason should be excluded as the President himself could be guilty. Kalt, supra note 37, at 786.
dangerous. Ultimately, the only motion passed in amending the President’s pardon power was the inclusion of “except in cases of impeachment” at the end of the clause.

Further, Alexander Hamilton explained such power should resemble the King of England’s pardon power as it is necessary to justice because it is an act of mercy by the government on its citizens. Hamilton supported this argument by pointing out that the Governor of New York has more pardon power because he can pardon in cases of impeachment, yet the President of the United States cannot. If the Governor of New York can have absolute discretion in pardoning an individual, then why is it that the President should not enjoy the same power—except in cases of impeachment—as the President is the leader of a nation of states? Clearly, if the Framers believed the President’s pardon power should have been limited in more circumstances, then they would have ratified more limitations.

Therefore, while some Framers believed the President’s pardon power should not extend to treason cases, a sound argument can be made that the Framers intended for impeachment to be the only restriction on pardoning; the majority of the Framers believed the President should have the ability to pardon in all cases, except those of impeachment, and the only other limitation argued for was cases involving treason.

While elements of President Trump’s presidency are exercised in a manner the Framers could not have envisioned back in 1776, the Framers did have considerable foresight and implemented constitutional provisions that have stood the test of time. Further, the concept of a self-pardon has not

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44. See Duker, supra note 41, at 502; Nida & Spiro, supra note 6, at 206. James Iredell argued that we should lean to strengthening our Executive than weakening our Executive by placing too many limitations on its power. Duker, supra note 41, at 502.
45. See Nida & Spiro, supra note 6, at 217. “The language that was ultimately placed in the Constitution prohibited only the pardoning of an impeachment . . . .” Id. at 206.
46. The Federalist No. 74, at 553–54 (Alexander Hamilton) (John C. Hamilton ed., 1864); see also Nida & Spiro, supra note 6, at 206, 217–18.
47. The Federalist No. 69, supra note 34, at 516 (Alexander Hamilton).
48. Id.
49. Nida & Spiro, supra note 6, at 217; see also The Federalist No. 69, supra note 34, at 516 (Alexander Hamilton).
50. Kalt, supra note 37, at 786–87; see also The Federalist No. 69, supra note 34, at 516 (Alexander Hamilton).
51. See Constitution of the United States, U.S. Senate, http://www.senate.gov/civics/constitution_item/constitution.htm. “Written in 1787, ratified in 1788, and in operation since 1789, the United States Constitution is the world’s longest surviving written charter of government.” Id.; see also Andrew Friedman, Can Constitutional Drafters See the Future? No, and It’s Time We Stop Pretending They Can, 46 Sw. L. Rev. 29, 30 (2016); Schallhorn, supra note 2.
been brought about by an advancement in technology unavailable to the Framers in the 18th century.\textsuperscript{52} Thus, the omission on a President’s ability to self-pardon must carry weight in analyzing the text of the Constitution and the explicit limitations the Framers placed on the power because, if the Framers feared Presidents would begin pardoning themselves, then the Framers would have at the very least debated the issue.\textsuperscript{53}

B. Prior Considerations of Self-Pardon

President Trump’s belief in his ability to self-pardon is not unprecedented.\textsuperscript{54} President Nixon and President Bush considered using their pardoning power on themselves to avoid potential criminal liability for their actions.\textsuperscript{55} President Nixon contemplated his ability to self-pardon following the Watergate scandal.\textsuperscript{56} Meanwhile, President Bush considered self-pardoning during the Iran-Contra arms scandal.\textsuperscript{57}

1. President Nixon’s Consideration of Self-Pardon

On June 17, 1972, “[f]ive men [were] arrested after breaking into the Democratic National Committee headquarters in the Watergate complex in Washington, D.C.”\textsuperscript{58} After an investigation into the break-in, President Nixon’s connection to the crime and subsequent attempt to cover it up

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\textsuperscript{52} Friedman, \textit{supra} note 51, at 30; Kalt, \textit{supra} note 37, at 786–87. While Framers did not directly address a self-pardon concept, the Framers were nonetheless concerned with the presidential self-dealing in cases of treason, which may involve himself and his ability to pardon his cohorts. Nida & Spiro, \textit{supra} note 6, at 206. Thus, the idea of a self-pardon has been around since the formation of our Constitution and not brought about by some technological advancement. Kalt, \textit{supra} note 37, at 786–87; \textit{see also} Friedman, \textit{supra} note 51, at 30.

\textsuperscript{53} \textit{See} Nida & Spiro, \textit{supra} note 6, at 206; Kalt, \textit{supra} note 37, at 790–93. “While not addressing self-pardons directly,” pardons were nonetheless available to protect treasonous accomplices. Nida & Spiro, \textit{supra} note 6, at 206.

\textsuperscript{54} Nida & Spiro, \textit{supra} note 6, at 212 (noting that President Nixon and President Bush considered using a self-pardon); \textit{see also} Kalt, \textit{supra} note 37, at 799–800 (detailing President Nixon’s and President Bush’s consideration of a self-pardon); Jennifer Rubin, \textit{How Democrats Should Address Trump’s Self-Pardon Claim}, WASH. POST: OPINION (June 5, 2018), http://www.washingtonpost.com/blogs/right-turn/wp/2018/06/05/how-democrats-should-address-trumps-self-pardon-claim/.

\textsuperscript{55} Nida & Spiro, \textit{supra} note 6, at 212.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.}

became clear. Fearing removal from office and a potential criminal indictment, President Nixon ordered his legal team to look into his options out of the scandal and presidency as President Nixon believed he would not survive impeachment proceedings.

President Nixon was presented with a handful of options and among them was the option of a self-pardon. In a memorandum authored by Special Counsel James St. Clair, St. Clair advocated for the legality of President Nixon’s ability to pardon himself. Further, while former Solicitor General Robert Bork believed a President is immune from criminal prosecution in office, Bork nonetheless acknowledged “a President could pardon himself for any acts committed... during his term.” Such internal support of President Nixon’s ability to self-pardon led the President to believe he could exercise his pardon power on himself. Ultimately, President Nixon chose against a self-pardon and resigned only to be subsequently pardoned by his successor, President Gerald Ford.

2. President Bush’s Consideration of Self-Pardon

Following President Nixon’s consideration of self-pardon, President Bush and his legal team considered the same action after the Iran-Contra scandal became national news. In November 1986, an illegal plan to free hostages held in Lebanon was revealed. President Bush and his team organized a deal to “sell [weapons] to Iran through Israel” in exchange for freeing United States hostages. The proceeds from the sale would then be used for military action in Nicaragua to combat the rising threat of

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59. See id. “June 25–29, 1973 — Dean testifies before the Senate Select Committee about the White House, and [President] Nixon’s involvement in the Watergate break-in and cover-up.” Id.
60. Nida & Spiro, supra note 6, at 212–13.
61. Id. “[President] Nixon also was asked to consider pardoning himself and resigning or pardoning all Watergate defendants and himself before resigning.” Id.
62. Id. at 212–13.
63. Id. at 213.
64. Nida & Spiro, supra note 6, at 213. President Ford, Vice President under President Nixon, explained President Nixon’s consideration and belief that he could self-pardon was based upon the legal advice given to him from his legal team. Id. President Nixon’s lawyers concluded a self-pardon was constitutional. King, supra note 13, at 433.
66. Id. at 214–15; see also Kalt, supra note 37, at 799.
67. Nida & Spiro, supra note 6, at 214.
68. Id.
communism in Central America. Ultimately, the illegal plan was revealed and spurred an investigation into the Bush presidency.

Independent counsel Lawrence Walsh was in charge of investigating and bringing forth any criminal indictments in connection with the scandal. Walsh began turning up the heat on President Bush’s administration by getting one conviction, three guilty pleas, and two more set to be tried. However, as President Bush neared the end of his presidency, with no possibility of reelection and with a month to go before the trials of the two indicted were set to begin, President Bush granted pardons to six of his alleged partners in the scandal. President Bush’s pardons reversed the penalty of the conviction, prevented Walsh from pursuing the rest of President Bush’s alleged partners, and effectively shut down the investigation altogether. Some believe President Bush effectively issued a self-pardon by relieving the six alleged partners because it prevented President Bush from testifying during the trials and shut down Walsh’s investigation. However, President Bush gave his reasoning for the pardons by stating they were politically motivated to prevent the criminalization of policy differences in the upcoming trials.

While President Bush ultimately decided to issue pardons to only his alleged partners in the scandal, President Bush’s team did consider a self-pardon. Some suggested President Bush’s reasoning in omitting his name

69. Id. at 214 n.123.
70. See id. at 214–15.
71. Id. at 214. “In the midst of the Iran-Contra crisis, Independent Counsel Lawrence Walsh brought forth grand jury indictments against some of President Bush’s aides, who were alleged to have contributed to the breaking of laws regarding the scandal.” Nida & Spiro, supra note 6, at 214.
72. See id. at 215.
73. Id. at 214–15; see also Kalt, supra note 37, at 799; Peter Applebome, Loss of Democratic Vote Imperils Bush in South, N.Y. TIMES, Oct. 18, 1992, at A28. While Walsh claimed the pardons were “an act of friendship or an act of self-protection,” President Bush explained his reasoning behind pardoning his aides by stating:

The prosecutions of individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: [T]he criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.

Nida & Spiro, supra note 6, at 215 (quoting Grant of Executive Clemency, 57 Fed. Reg. 62,145, 62,146 (Dec. 30, 1992)).
74. Nida & Spiro, supra note 6, at 214–15; Kalt, supra note 37, at 799.
75. Nida & Spiro, supra note 6, at 214–15.
76. Id. at 215.
77. Id. at 216. President Bush also considered invoking the Twenty-fifth Amendment to allow Vice President Quayle to pardon President Bush. Id. at 216; see also U.S. CONST. amend. XXV.
from the six pardons was because of his concern for his image and legacy.\textsuperscript{78} While President Bush may deny his actions were in effect a self-pardon, his pardon of his six partners did constructively issue a self-pardon for his actions because it stopped Walsh’s investigation into the scandal.\textsuperscript{79} Moreover, President Bush’s pardons were not challenged or reversed by either the legislative or judicial branches as being an abuse of a President’s pardon power.\textsuperscript{80} Thus, the acquiescence of the government—by choosing not to pursue President Bush for effectively pardoning himself—could support the conclusion that a self-pardon is constitutional.\textsuperscript{81}

C. The Supreme Court of the United States and Presidential Pardons

While the Supreme Court of the United States has not specifically decided the constitutionality behind a self-pardon, the Court has issued various decisions on the President’s ability to pardon.\textsuperscript{82} In \textit{United States v. Wilson},\textsuperscript{83} Chief Justice Marshall defined the presidential pardon power by stating:

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual

\textsuperscript{78} Nida & Spiro, \textit{supra} note 6, at 216.

\textsuperscript{79} See \textit{id.} at 214–16.

\textsuperscript{80} See \textit{id.}; Kalt, \textit{supra} note 37, at 799–800. Although President Bush did not pardon himself, he was still under investigation and could have been indicted following his exit from office. Kalt, \textit{supra} note 37, at 799–800. Ultimately, he was not indicted for misuse of pardon power, nor were the pardons reversed. \textit{id.}

\textsuperscript{81} See Nida & Spiro, \textit{supra} note 6, at 200–01; but see Kalt, \textit{supra} note 37, at 799–800. Kalt argues that President Bush’s pardons were effectively not a self-pardon, but in effect, President Bush’s pardons shut down the investigation into the scandal. Kalt, \textit{supra} note 37, at 799; Nida & Spiro, \textit{supra} note 6, at 214. Furthermore, once President Bush left office months later, Walsh chose not to indict President Bush. Kalt, \textit{supra} note 37, at 780. Also, as Kalt recognizes, those pardoned by President Bush could have still been forced to testify against President Bush, if President Bush was ultimately indicted once out of office, which could have led to President Bush facing conviction. \textit{id.} at 799–800. While Kalt believes such actions were political and not constitutional, the acquiescence of Walsh and the government in allowing President Bush to effectively shut down the investigation into his alleged criminal conduct is a \textit{constructive self-pardon} as he decided to take sole action that would prevent Walsh from continuing to investigate his alleged criminal conduct. \textit{id.}


\textsuperscript{83} 32 U.S. 150 (1833).
for whose benefit it is intended, and not communicated officially to the court.\textsuperscript{84}

The Court went on to explain that pardons may be reviewed by a court, however, such review is limited and the court cannot judge the character of the pardon.\textsuperscript{85} So long as the pardon is executed, delivered, and accepted properly, the President could argue the pardon is valid as an executive order.\textsuperscript{86}

About three decades later, in \textit{Ex parte Garland},\textsuperscript{87} the Court again discussed the President’s ability to pardon.\textsuperscript{88} The Court issued an opinion that upheld and reaffirmed a strict textual argument of Section Two of Article II of the Constitution.\textsuperscript{89} The Court stated that besides the express impeachment prohibition on pardons, “the power is unlimited. It extends to every offence and is intended to relieve the party who may have committed it.”\textsuperscript{90} Furthermore, the Court continued its analysis on the President’s pardon power by stating: “This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.”\textsuperscript{91} This strict interpretation of the President’s pardon power falls in line with the text of Article II, and the Framers’ intent to make such power similar to the King of England, whereby the President may issue it upon anyone for any crime—except cases of impeachment.\textsuperscript{92} The decision in \textit{Ex parte Garland} was upheld in \textit{United States v. Klein},\textsuperscript{93} as the Court prevented Congress from enacting laws that would control the President’s pardoning power.\textsuperscript{94}

In \textit{Ex parte Grossman},\textsuperscript{95} the Court discussed what result would likely occur should a President abuse his pardon power.\textsuperscript{96} The Court stated

\begin{itemize}
  \item \textsuperscript{84} \textit{Id.} at 160–61.
  \item \textsuperscript{85} \textit{Id.; Nida & Spiro, supra} note 6, at 220.
  \item \textsuperscript{86} \textit{Wilson}, 32 U.S. at 161.
  \item \textsuperscript{87} 71 U.S. 333 (1866).
  \item \textsuperscript{88} \textit{Id.} at 380.
  \item \textsuperscript{89} \textit{Id.; see also} U.S. CONST. art. II, § 2, cl. 1.
  \item \textsuperscript{90} \textit{Ex parte Garland}, 71 U.S. at 373.
  \item \textsuperscript{91} \textit{Id.} at 380.
  \item \textsuperscript{92} \textit{See} U.S. CONST. art. II, § 2, cl. 1; \textit{Ex parte Garland}, 71 U.S. at 341, 373.
  \item \textsuperscript{93} 80 U.S. 128 (1871).
  \item \textsuperscript{94} \textit{Id.} at 148; \textit{Ex parte Garland}, 71 U.S. at 333. “Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.” \textit{Klein}, 80 U.S. at 148.
  \item \textsuperscript{95} 267 U.S. 87 (1925).
  \item \textsuperscript{96} \textit{See id.} at 121.
\end{itemize}
that the likely result would be impeachment. In Grossman, the Court opined on the President’s ability to pardon criminal contempt and the problems that may occur in successive pardoning of a particular offense. The Court realized the problems courts may face in carrying out their duties if the President consistently pardons, but the Court believed that the proper recourse in addressing the abusive President is not limiting such pardons, but rather impeachment.

Thus, President Trump has the ability to make a strong precedential argument for his ability to pardon himself because the Court has consistently upheld a strong presidential pardon power. The Court has prevented Congress from interfering with such power and has used strong language that proves such power is plenary. While no self-pardon case has come before the Court—based upon the historical interpretation of the Court’s analysis of the President’s power to pardon—the Court has consistently taken a strict textual position in stating that the only exception to the power is impeachment.

III. PRESIDENT TRUMP’S AMENABILITY TO INDICTMENT

Special Counsel Mueller has indicted twelve Russians for allegedly meddling in the 2016 presidential election, and some within the White House believe Mueller could be targeting President Trump, as well, in connection with the meddling. However, a sitting United States President has never been indicted before. Some legal scholars and commentators

97. Id. at 106. An abuse of the pardon power by the president will likely result in an impeachment rather than the Court narrowing and restraining the construction of the general powers of the Constitution. Id. at 121.
98. Id. at 106, 121.
100. See Nida & Spiro, supra note 6, at 221. While the Court has never addressed a self-pardon directly, strong precedent leans toward the Court refusing to narrow the Constitution. Id.
102. See id.; Nida & Spiro, supra note 6, at 221.
104. See Parker & Achenbach, supra note 9; Schallhorn, supra note 1.
believe the President is immune from criminal prosecution while in office.\textsuperscript{106} Others believe the President is susceptible to a criminal indictment, regardless of being in office, if the President committed a crime.\textsuperscript{107}

Nonetheless, the Constitution specifically lays out how the President should be handled if he has committed egregious acts against the United States.\textsuperscript{108} Accordingly, pursuant to Section Four of Article II, “[t]he President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”\textsuperscript{109}

While the Constitution does not explicitly prohibit the indictment of President Trump, there are several commentators that have supported criminal immunity for President Trump.\textsuperscript{110} For example, Justice Story came to the conclusion that a President is immune from criminal prosecution because a President is unable to be arrested, imprisoned, or detained while he is President.\textsuperscript{111} In addition to Justice Story’s belief, the Justice Department’s Office of Legal Counsel (“OLC”) has issued two separate reports in 1973 and 2000, respectively, that reach the same conclusion.\textsuperscript{112} Although no court has decided the issue, President Trump has strong legal support of his immunity from prosecution while in office.\textsuperscript{113}

This section will argue why President Trump is criminally immune while in office—because a proper trial for President Trump is not held inside

\begin{itemize}
  \item \textsuperscript{106} See id. at 222; King, \textit{supra} note 13, at 422; Douglas W. Kmiec, \textit{Trump Can’t Be Indicted. Can He Be Subpoenaed?}, \textsc{N.Y. Times: Opinion} (June 4, 2018), http://www.nytimes.com/2018/06/04/opinion/trump-lawyers-indicted-subpoena.html. “Indictment and criminal trial derails a presidency by the compromising stigmas harming presidential ability to carry out foreign or domestic duties . . . .” Kmiec, \textit{supra}.
  \item \textsuperscript{107} See King, \textit{supra} note 13, at 417–18; Eisen & Holtzman, \textit{supra} note 12; Schallhorn, \textit{supra} note 1.
  \item \textsuperscript{108} See U.S. CONST. art. II, § 4.
  \item \textsuperscript{109} \textit{Id}.
  \item \textsuperscript{110} See \textit{id.}; King, \textit{supra} note 13, at 418.
  \item \textsuperscript{111} King, \textit{supra} note 13, at 418.
  \item \textsuperscript{112} A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222; Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, Amenability of the President, Vice President & Other Civil Officers to Fed. Criminal Prosecution While in Office 1 (Sept. 24, 1973) (on file with Dep’t of Justice). “[T]he indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions.” A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222.
  \item \textsuperscript{113} See A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 260. “No court has addressed this question directly, but the judicial precedents that bear on the continuing validity of our constitutional analysis are consistent with both the analytic approach taken and the conclusions reached.” \textit{Id}.
\end{itemize}
a courtroom, but rather inside the Senate. Further, this section will argue that a criminal indictment against President Trump while in office would be unconstitutional because the Framers stated impeachment proceedings should come before the filing of a criminal indictment.

A. Who Prosecutes the President?

The prosecution of President Trump while in office is problematic because a state prosecutor would be unable to arrest the [e]xecutive branch, and a federal prosecutor would be acting in a manner contrary to the Constitution. While a sitting President has never been indicted, a state prosecutor would not likely become the first to indict the President as the Supremacy Clause should prevent such action. Further, a federal prosecutor would not likely become the first to indict the President because the Constitution specially bestows the power to try the President upon the legislative branch through impeachment proceedings.

1. State Prosecution

While President Trump could potentially be indicted by a state prosecutor for committing a state crime, it is unlikely such indictment would stand as constitutional. According to Article VI Clause 2, the “Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby” (“Supremacy Clause”). As such, for a state prosecutor to impose state jurisdiction and attempt to bind President Trump to a state judicial system would be contrary to the Supremacy Clause because the state would be acting contrary to the laws in the Constitution by putting state law over federal law; by doing so, a state prosecutor would essentially be arrest[ing] the [e]xecutive branch.

In addition to the apparent contradiction of the Supremacy Clause, the Court has already decided who should prevail in a dispute between the

114. See King, supra note 13, at 434.
115. See id.
116. Id. at 425.
117. See U.S. CONST. art. VI, cl. 2; McCulloch v. Maryland, 17 U.S. 316, 436 (1819); King, supra note 13, at 424–25.
118. See U.S. CONST. art. I, § 3, cl. 6.
119. See King, supra note 13, at 424–25.
120. U.S. CONST. art. VI, cl. 2.
121. Id.
122. See King, supra note 13, at 425 (quoting McCulloch, 17 U.S. at 432).
state and federal government. In *McCulloch v. Maryland*, the Court prevented Maryland from imposing a tax on a federal bank, overturned a Maryland statute that prevented a bank from operating without state approval, and held that the statute was a violation of the Supremacy Clause. The Court supported its holding by reasoning that Maryland burdened the operation of a federal bank, which was to benefit all United States citizens including the citizens of Maryland, by imposing a tax not just on its Maryland constituents, but on the rest of the United States population, as well. Thus, Maryland was unconstitutionally interfering with the operation of the federal government and levying a tax on United States citizens not within Maryland’s jurisdiction.

While *McCulloch* was a dispute over a tax and not a criminal indictment of a sitting President, the principles of federal supremacy still carry. For a state prosecutor to indict President Trump, that state would unduly burden and interfere with the federal government that benefits all United States citizens, not just that respective state’s citizens. Further, the Court expressly stated, “[t]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted.” Thus, if a President is indicted, then the indictment must come from a federal prosecutor because the Supremacy Clause prohibits any state from burdening the operations of the federal government.

2. Federal Prosecution

Pursuant to Article I, Section Three, “[t]he Senate shall have the sole [p]ower to try all [i]mpeachments . . . [w]hen the President of the United States is tried, the Chief Justice shall preside.” Accordingly, a potential separation of powers issue could arise if a federal prosecutor indicts a

124. 17 U.S. 316 (1819).
125. *Id.* at 436–37.
126. *Id.* at 435–36.
127. *Id.* at 435–37.
128. King, *supra* note 13, at 425; see also *McCulloch*, 17 U.S. at 434–35. To allow a state to prosecute the President while in office would be a direct contradiction of *McCulloch* as it would be a single state interfering with the operation of the federal government, which benefits all states. King, *supra* note 13, at 425.
131. See King, *supra* note 13, at 425.
President. 133 The Constitution expressly states the Senate shall have the power to try the President for the alleged misconduct or crime, all while the Chief Justice presides over the trial. 134 For a federal prosecutor to try a President first—before any trial by the Senate—would be a circumvention of the express language in the Constitution. 135 Further, a federal prosecutor, or an agent of the executive branch, and a federal judge, or an agent of the judicial branch, would be acting in place of the legislative branch and the Chief Justice by trying a President for his alleged misconduct, which is a direct contradiction of Article I, Section Three. 136

B. Presidential Immunity from Indictment

While a separation of powers issue is apparent, OLC concluded twice—in 1973 and 2000—that it believes it does not have the constitutional authority to indict its boss, the President of the United States. 137 Although OLC is not a court, nor can it make law through its decisions, the 2000 OLC report (“Report”) on indicting a sitting President sheds light on the Justice Department’s interpretation of its ability to indict the President. 138 The Report reaffirms its 1973 conclusion by stating “the Department . . . would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions” by indicting a sitting President. 139

Although the Report states the Constitution does not expressly prohibit an indictment and subsequent criminal proceeding to occur while the President is in office, 140 the Report recognizes that the burden placed on the President to defend himself from criminal prosecution would be so great that

133. King, supra note 13, at 426; see also U.S. CONST. art. I, § 3, cl. 6. The Constitution specifically states the legislative branch has the power to try and impeach the President. U.S. CONST. art. I, § 3, cl. 6. A federal prosecutor is under the executive branch; thus, it would be the executive branch trying the executive branch. King, supra note 13, at 426.


135. See King, supra note 13, at 427.

136. Id.

137. A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222.

138. Id.

139. Id.

140. Id. at 223. “The memorandum concluded that the plain terms of the [Impeachment] Clause [in Article I, Section 3 of the United States Constitution] do not impose such a general bar to indictment or criminal trial prior to impeachment and therefore do not, by themselves, preclude the criminal prosecution of a sitting President.” Id.
it would impair his ability to carry out his constitutional duties. The Report states three burdens that President Trump would face if indicted:

Three types of burdens merit consideration: (a) [T]he actual imposition of a criminal sentence of incarceration, which would make it physically impossible for [President Trump] to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise [President Trump’s] ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper [President Trump’s] performance of his official duties.142

While the Twenty-fifth Amendment allows for a President to step away if he cannot discharge his constitutional duties while preparing a defense to his criminal indictment, the President’s potentially indefinite absence if he is sentenced to prison for the remainder of his term was not the intention of the Amendment and is in direct contradiction of the Constitution’s process for removing the President from office.143 Moreover, the embarrassment of a criminal indictment would be detrimental to a President in his role as the chief diplomat with foreign nations.144

Ultimately, the Report balanced the omission of presidential criminal immunity with the practicality of indicting a sitting President and concluded that:

[T]he interests in facilitating immediate criminal prosecution of a sitting President against the interests underlying temporary immunity from such prosecution, considered in light of alternative means of securing the rule of law, we adhere to our 1973 determination that the balance of competing interests requires recognition of a presidential immunity from criminal process.145

142. Id.
143. U.S CONST. amend. XXV; A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 248. “None of the contingencies discussed by the Framers of the Twenty-fifth Amendment even alluded to the possibility of a criminal prosecution of a sitting President.” A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 248.
144. See Kmiec, supra note 106.
Moreover, the Report’s conclusion is consistent with former United States Assistant Attorney General Douglas Kmiec’s analysis of President Trump’s ability to be indicted.\textsuperscript{146} Kmiec stated “[i]ndictment and criminal trial derail a presidency by the compromising stigma’s harming presidential ability to carry out [his] . . . duties.”\textsuperscript{147}

Thus, should it be found that a President acted criminally on the campaign trail or otherwise, then the only recourse should be impeachment—as he should experience criminal immunity for his actions while in office because initiating a federal prosecution before impeachment proceedings would be inconsistent with the text of the Constitution and would greatly impair a President’s ability to carry out his duties.\textsuperscript{148}

\textbf{C. Impeachment Instead of Indictment}

The legislative branch has constitutional authority to preside over impeachment proceedings, including the President’s impeachment.\textsuperscript{149} According to Article I, the House of Representatives has the sole power to impeach and the Senate has the sole power to try all impeachments.\textsuperscript{150} If the President is impeached, the Chief Justice of the Court shall preside over the trial.\textsuperscript{151} Moreover, Article I states:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.\textsuperscript{152}

If an investigation concludes the President committed a crime while on the campaign trail or otherwise, then the proper recourse would first be the suggestion of impeachment.\textsuperscript{153} Once impeachment proceedings are finished, then a President would be susceptible to a criminal indictment—regardless of whether removal occurs or not.\textsuperscript{154}

\begin{thebibliography}{99}
\bibitem{146} \textit{Id.} at 260; \textit{see also} Kmiec, \textit{supra} note 106.
\bibitem{147} Kmiec, \textit{supra} note 106.
\bibitem{148} \textit{See} A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 260; King, \textit{supra} note 13, at 434; Kmiec, \textit{supra} note 106.
\bibitem{149} U.S. \textit{CONST.} art. I, § 3, cl. 6.
\bibitem{150} U.S. \textit{CONST.} art. I, § 2, cl. 5; U.S. \textit{CONST.} art. I, § 3, cl. 6.
\bibitem{151} U.S. \textit{CONST.} art. I, § 3, cl. 6.
\bibitem{152} U.S. \textit{CONST.} art. I, § 3, cl. 7.
\bibitem{153} \textit{See} King, \textit{supra} note 13, at 429; Kmiec, \textit{supra} note 106.
\bibitem{154} King, \textit{supra} note 13, at 428.
\end{thebibliography}
1. Constitutional Authority

As discussed in the Presidential Immunity section, President Trump should enjoy criminal immunity while in office.\textsuperscript{155} Despite having criminal immunity, President Trump is nonetheless susceptible to impeachment and removal should he be found to have committed “Treason, Bribery, . . . other high crimes, and Misdemeanors.”\textsuperscript{156} Such immunity falls in line with the text of the Constitution, and is supported by various commentators, including the Justice Department.\textsuperscript{157}

Impeachment and removal from office is the proper recourse for an abusive President.\textsuperscript{158} The constitutional mechanism for checking an abusive President, or one that has committed a serious misconduct, is impeachment.\textsuperscript{159} To circumvent such a process by filing an indictment prior to impeachment contradicts the express language of the Constitution.\textsuperscript{160} Although impeachment proceedings will burden President Trump, similar to a criminal prosecution, such proceedings are what the Constitution put in place to check serious misconduct from the President.\textsuperscript{161} Further, not one United States President that was impeached had a criminal indictment filed before impeachment.\textsuperscript{162} Thus, a strong historical and constitutional argument can be made by President Trump that it would be unprecedented for a President to be indicted before undergoing impeachment proceedings.\textsuperscript{163}

\textsuperscript{155} See supra section III.B.; A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 260.

\textsuperscript{156} U.S. CONST. art. II, § 4; King, supra note 13, at 428–30.

\textsuperscript{157} See U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. II, § 4; Rizzo, supra note 6.

\textsuperscript{158} Nida & Spiro, supra note 6, at 210; see also U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. II, § 4;

\textsuperscript{159} Nida & Spiro, supra note 6, at 210; see also U.S. CONST. art. I, § 3, cl. 7; Kmiec, supra note 106.

\textsuperscript{160} See King, supra note 13, at 427.

\textsuperscript{161} A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222, 257–58. “[W]e recognize that invoking the impeachment process itself threatens to encumber a sitting President’s time and energy and to divert his attention from his public duties. But the impeachment process is explicitly established by the Constitution.” Id.; see also U.S. CONST. art. I, § 3, cl. 6–7.

\textsuperscript{162} Baker & Eilperin, supra note 16; The Impeachment of Andrew Johnson (1868) President of the United States, supra note 16. Clinton was not indicted prior to impeachment. Baker & Eilperin, supra note 16. Johnson was not indicted before impeachment. The Impeachment of Andrew Johnson (1868) President of the United States, supra note 16.

\textsuperscript{163} King, supra note 13, at 418, 423.
a. **Prior Presidential Impeachments**

Only two United States Presidents—former President Andrew Johnson (“President Johnson”) and former President Bill Clinton (“President Clinton”)—have been impeached by the House of Representatives.\(^{164}\) However, both Presidents were acquitted by the Senate.\(^{165}\) President Johnson was the first impeached President and he was impeached for violating the Tenure of Office Act after he replaced Secretary of War Edwin M. Stanton with Thaddeus Stevens.\(^{166}\) President Johnson already had disputes with Stanton and Senate Republicans during the reconstruction era and, after replacing Stanton, congressional leaders drafted eleven articles of impeachment, which included, among others, conspiracy to remove Stanton from office.\(^{167}\) Although Congress deemed President Johnson’s actions criminal, he nonetheless finished out his presidency after being acquitted by the Senate and, most importantly, President Johnson was not indicted for his alleged criminal conduct before or after impeachment proceedings.\(^{168}\)

The second impeached President was President Clinton.\(^{169}\) President Clinton was impeached for committing perjury before a grand jury and obstructing justice.\(^{170}\) President Clinton’s crimes stemmed from a sexual scandal, in which President Clinton lied about having sexual relations with Monica Lewinsky in front of a grand jury, and obstructed justice in a civil suit by lying in a separate lawsuit and to Special Investigator Ken Starr.\(^{171}\) Ultimately, President Clinton was acquitted by the Senate after trial, and, again most importantly, no criminal indictment was introduced after Ken Starr finished his investigation into President Clinton’s criminal conduct.\(^{172}\)

Thus, President Trump had a strong historical argument in opposing a Mueller indictment while in office, as no previously impeached President had to face a criminal indictment for the crimes they committed.\(^{173}\) While the previous impeached Presidents were not alleged to have used a foreign
rival’s power to win the Office, the allegation President Trump faced should not affect the procedure in place in dealing with a President allegedly committing high crimes and misdemeanors.  

### 2. Senate Acquittal and Double Jeopardy

Despite the apparent inability to indict a President while in office, a President can still feel the effects of an investigation into alleged criminal conduct by the President through the threat of impeachment—should the investigation conclude the President committed a crime or serious misconduct. The constitutional mechanism for punishing an elected official begins with impeachment, then removal from office, then indictment. However, as history has shown, impeachment proceedings are partisan and Senators are pressured to vote in support of their political party. Thus, despite the serious or criminal misconduct of the President, he can evade punishment and remain in power if his political party holds the supermajority of Senate seats. Even if President Trump had gotten impeached and faced a Senate trial, the Republican party controls a majority of Senate seats which means President Trump could have been acquitted and remained in office.

However, even if President Trump got acquitted, he could still be susceptible to criminal indictment once he relinquishes the Oval Office if Mueller would have concluded President Trump acted criminally. A Senate acquittal should not bar a criminal indictment once the impeached

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174. See A Sitting President’s Amenity to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 237 n.14; Rizzo, supra note 6. “The constitutional mechanism for addressing serious misconduct (treason or other high crimes) by a sitting president is impeachment.” Kmiec, supra note 106.

175. Kmiec, supra note 106; Schallhorn, supra note 1.


177. See Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34. Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34.

178. See Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34.

179. Parker & Achenbach, supra note 9.

180. See Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 155.
President leaves office. While no court has addressed the issue directly, OLC issued a memorandum in 2000 that analyzed the possibility of double jeopardy attaching to a Senate trial. Ultimately, OLC concluded that double jeopardy should not attach because a Senate trial differs from a criminal trial.

According to the Judgment Impeachment Clause, “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” The Constitution provides the possibility for criminal proceedings to subsequently occur if an impeached official is removed from office. However, the clause is silent on the possibility of criminal indictment for an acquitted official. Thus, President Trump could have made an argument that Senate acquittal bars subsequent criminal prosecution. Such argument falls on the “canon of statutory construction, expressio unius est exclusio alterius, [or in other words,] ‘the expression of one is the exclusion of others.’” The clause’s omission of parties acquitted from impeachment could imply a bar on criminal prosecution of the same offenses. Further, when the clause was originally drafted by the Framers, it was modeled after various states’ impeachment provisions which stated “the party, whether convicted or acquitted.” So, the omission by the Framers to include language which addressed parties acquitted, and not just impeached, is important.

Despite the omission of whether convicted or acquitted, double jeopardy still should not attach to Senate trials, as double jeopardy is intended to protect individuals from repeated trials for the same offenses that threaten to take away life and liberty. Only taking away an individual’s elected position, and disqualifying an individual for future elected positions,
was an American innovation to impeachment. In Britain, impeachment and conviction could result in death. The Framers intentionally avoided such harsh penalties for impeached and convicted officials by only subjecting such individuals to subsequent criminal prosecution for their acts. Impeachment trials were not designed to result in the taking away of one’s life or liberty, which would invoke double jeopardy.

Moreover, the branch of government conducting the trial is an important distinguishing factor. The legislative branch conducts the trial as opposed to the judicial branch, by design. Hamilton addressed this distinguishing factor by claiming the judicial branch could have two trials of an impeached official for the same offenses, which is why the Senate conducts the impeachment trial. Additionally, Senators must play the role of fact finder and interpreter of governing law—hence, judge and jury.

Lastly, double jeopardy should not attach to Senate acquittal because impeachment proceedings are susceptible to partisan loyalties which can affect the Senate’s decisions to convict or acquit. As previously discussed, partisan politics play a decisive role in Senators’ decisions, and going against the Republican Party or President Trump could prove costly in reelection. The Framers also feared impeachments were liable to partisan abuse, to retain an abusive President, or to remove an unpopular President. Therefore, while President Trump should enjoy criminal immunity while in office, he nonetheless is liable to impeachment proceedings and should not

193. Id. at 126–27.
194. Id. at 120, 126.
195. Id. at 126–27.
196. Id. at 129.
197. See Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 132.
198. See id.
199. Id. at 123.
200. Id. at 132.
201. See Baker & Eilperin, supra note 16. Impeachment votes fall largely along party lines. Id.
203. Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34.
be barred from subsequent criminal proceedings if he was found to have acted criminally—regardless of a Senate acquittal.204

IV. CONCLUSION

Taking a strict textual approach to the construction of the Constitution, a self-pardon is not prohibited because the President, historically and intentionally, enjoys plenary pardon power.205 While such plenary power seemingly is abusive, the Court has done little to limit the President’s power to pardon individuals.206 The power was designed to be an act of mercy and similar to the King of England’s power to pardon those guilty of committing a crime.207 While the actual use of a self-pardon is unprecedented, the idea of using a self-pardon is not.208 Previous embattled Presidents reached the conclusion that a self-pardon is not prohibited based upon the text of the Constitution and the Court’s interpretation of the power.209 The sole exception to such power is in cases of impeachment.210 Therefore, President Trump’s threat to Mueller to use a self-pardon has legal support.211 However, such an action would presumably indicate that President Trump is in fact guilty of colluding with Russia to win the election, which President Trump adamantly denies.212

Furthermore, the way for Mueller to hold President Trump responsible for any criminal or serious misconduct is not through use of an indictment—rather a recommendation of impeachment—because an indictment should be unconstitutional.213 President Trump should enjoy criminal immunity while he is in office, not because of partisan beliefs, but in consideration of the instability a criminal indictment would produce.214 Moreover, the Constitution creates a mechanism for combatting serious or

204. A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 224; Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 155.
205. See Nida & Spiro, supra note 6, at 216, 220–21.
206. Id. at 220–21.
207. Id. at 203–04.
208. Id. at 220.
209. See id. at 213, 216.
210. Nida & Spiro, supra note 6, at 217.
211. @realDonaldTrump, supra note 1; Parker & Achenbach, supra note 9; see also Nida & Spiro, supra note 6, at 221.
212. See Schallhorn, supra note 1; Schallhorn, supra note 2; @realDonaldTrump, supra note 1.
213. See A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 223.
214. See id. at 230, 236.
criminal misconduct from the President through impeachment and removal from office.\textsuperscript{215} Although removing a President from office is unprecedented, an acquittal from the Senate should not absolve a President from criminal prosecution once he is out of office.\textsuperscript{216} Barring criminal prosecution after a Senate acquittal would be inconsistent with fundamental principles of justice, and inconsistent with the applied use of double jeopardy because a Senate trial does not carry the same penalty a criminal trial carries.\textsuperscript{217}

Ultimately, although a self-pardon is not prohibited by the Constitution, the danger in President Trump pardoning himself is the seeming abuse of the executive pardon power, which itself could be grounds for impeachment if President Trump obstructs justice through his self-pardon.\textsuperscript{218} Thus, it would be this move by President Trump—rather than the alleged misconduct Mueller investigated—that could have become the impeachable and unpardonable offense committed.\textsuperscript{219}

\begin{itemize}
  \item \textsuperscript{215} U.S. CONST. art. I, § 3, cl. 6, 7; see also A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 258.
  \item \textsuperscript{216} See Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34; Rubin, supra note 54.
  \item \textsuperscript{217} Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 136–38, 155.
  \item \textsuperscript{218} Parker & Achenbach, supra note 9; Rubin, supra note 54. “Exceptional [pardon] cases like [successive pardons of the same offense] if to be imagined at all, would suggest a resort to impeachment . . . .” Ex parte Grossman, 267 U.S. 87, 121 (1925).
  \item \textsuperscript{219} Parker & Achenbach, supra note 9. “[Giuliani] went on to describe [self-pardoning as] unthinkable and said it would probably lead immediately to impeachment.” Id.
\end{itemize}
CRISPR HAS THE POTENTIAL TO CHANGE THE WORLD, BUT FIRST WE HAVE TO GIVE IT A CHANCE

SARAH J. SCHULTZ*

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I. INTRODUCTION

CRISPR is potentially science and medicine’s greatest invention of our generation—it could redefine life as we know it today.\(^1\) CRISPR could be our *secret weapon* for curing and preventing genetically inherited diseases such as cancer, Alzheimer’s disease, sickle cell anemia, Amyotrophic Lateral Sclerosis (“ALS”), and many others.\(^2\) While CRISPR has the potential to eliminate these diseases, it also might have the potential to cause harm.\(^3\)

CRISPR stands for “Clustered Regularly Interspaced Short Palindromic Repeats of genetic information.”\(^4\) CRISPR Therapeutics created a powerful gene-editing tool—known as CRISPR—that can be harnessed to accurately “modify, delete, [and even] correct disease-causing abnormalities at their genetic [foundation].”\(^5\) Human “DNA is [basically] a series of instructions” that controls, for example, our height, eye color, and hair color.\(^6\) These “instructions are written as a series of chemical letters in our DNA,” and just like letters that make up a textual sentence, there can be errors or mistakes.\(^7\) An error in the DNA chain can have no effect at all in one person, but in another, the error of just a single letter can cause a horrific disease.\(^8\) Specifically, CRISPR embodies the Cas9 enzyme, which acts as a pair of *molecular scissors*.\(^9\) The Cas9 enzyme is guided by ribonucleic acid (“RNA”) which leads the Cas9 enzyme to a specific location where the enzyme will then slice the DNA.\(^10\) Once a cut has been made in the DNA, the body’s own natural repair mechanism will trigger the repair of the cut.\(^11\)


\(^2\) Id.

\(^3\) Id.


\(^6\) Crutchfield III, *supra* note 1.

\(^7\) Id.

\(^8\) Id.

\(^9\) CRISPR/Cas9, *supra* note 4.


\(^11\) CRISPR/Cas9, *supra* note 4.
By utilizing the CRISPR-Cas9 technology, it will be possible to delete and correct hereditary diseases.\textsuperscript{12}

CRISPR Therapeutics sought approval from the United States Food and Drug Administration (“FDA”) to begin human genomic editing trials.\textsuperscript{13} However, in May of 2018, the FDA denied CRISPR Therapeutics’ request to move forward with these human trials.\textsuperscript{14} The FDA has stated their reasoning for denying the company’s request involves “certain questions it wants [to resolve] before it gives the go-ahead for the human CRISPR study.”\textsuperscript{15}

CRISPR has gone through numerous lab testing experiments involving non-human trials.\textsuperscript{16} These lab results have been promising enough to suggest that CRISPR is ready to be tested on humans.\textsuperscript{17} But until CRISPR gets the green light to move forward with human trials, “we [cannot] know for sure whether [CRISPR] will work as expected.”\textsuperscript{18} It is important to realize that these trials would not be the first human trials to ever take place.\textsuperscript{19} In 2016, China was the first country to test CRISPR’s effect on humans.\textsuperscript{20} While it is true that we are exploring uncharted territory and should certainly proceed with caution, millions of people in the United States suffer from—and will continue to suffer from—these terrible diseases every day.\textsuperscript{21} The sad truth is that many of those people have exhausted their options for treatment and CRISPR could be their last hope for survival.\textsuperscript{22}

Accordingly, this Comment will first examine how the CRISPR-Cas9 technology works and how it differs from the technology that already exists.\textsuperscript{23} Following this, the many benefits and few legitimate concerns involving CRISPR will be discussed.\textsuperscript{24} In Part III, the analysis will address

\begin{thebibliography}{9}
\bibitem{12} Id.; Crutchfield III, supra note 1.
\bibitem{13} Kristin Houser, \textit{The FDA Puts the Brakes on a Major CRISPR Trial in Humans}, \textit{FUTURISM: HEALTH & MED.} (May 31, 2018), http://www.futurism.com/human-crispr-trial-fda-stops/.
\bibitem{14} Id.
\bibitem{16} See Houser, supra note 13.
\bibitem{17} Id.
\bibitem{18} Id.
\bibitem{19} Id.
\bibitem{20} Id.
\bibitem{21} Houser, supra note 13; \textit{see also} Crutchfield III, supra note 1.
\bibitem{23} \textit{See discussion infra} Part II.A, II.B.
\bibitem{24} \textit{See discussion infra} Part II.C, II.D.
\end{thebibliography}
the central questions of why the current FDA ban was placed on CRISPR human trials and why CRISPR should get the green light. This section embarks on a journey into the regulatory framework of the FDA and why other drugs and devices that have proven to be harmful to consumers—like tobacco products and chemotherapy—are allowed. Are they regulated by the FDA? If so, why are we continuing to allow those dangerous and destructive products on the market, but not CRISPR? Lastly, this Comment introduces the concept of Big Pharma and addresses the question: Is Big Pharma involved here?

In considering each of these moving parts, one thing stays the same—CRISPR might offer life-changing cures that could change the future of mankind. “The catch is we [will not] know for sure until we try.”

II. HOW DOES CRISPR WORK?

In order to understand why the FDA has halted CRISPR human trials in the United States, we first have to understand how the technology works and how it affects the human body. After all, the purpose of the FDA is to protect the general health of the public “by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices.”

A. Explanation of Genome Editing

Genome editing is a process by which scientists can genetically engineer or alter the DNA of an organism—including bacteria, plants, animals, and even humans. Starting small, the first question becomes:

25. See discussion infra Part III.B.
28. See Effects of Tobacco, TOBACCO FREE FLA., http://www.tobaccofreeflorida.com/why-should-i-quit/effects-of-tobacco/ (last visited May 1, 2019); Houser, supra note 13; Nordqvist, supra note 27.
29. See discussion infra Part III.C.
31. Id.
32. See id.; Crutchfield III, supra note 1.
33. What We Do, supra note 27.
What is DNA? DNA stands for *deoxyribonucleic acid* and consists of four different bases: Adenine (“A”), Cytosine (“C”), Guanine (“G”), and Thymine (“T”). DNA exists in the body as a double helix where A must always pair with T, and, similarly, C must always pair with G. This chemical pattern is what makes up our hereditary material. Moving up to the next molecule is the gene. One single gene is made up of DNA. One gene is responsible for one characteristic; for instance, one gene carries the hereditary information that dictates our eye color. The gene responsible for our eye color sits on the same part of the DNA chain in every person, but contains a different make-up of genetic bases. The genome is made up of all of our genes put together.

Just like everything in this world, the human body can make mistakes. Sometimes a DNA mutation occurs where the nucleotide sequence that makes up our DNA becomes altered. For example, during the replication process, “the DNA polymerase could read an A instead of a C and hence add a G instead of a T.”

The idea behind genome editing is to locate the DNA mutation or broken gene, cut out the defect, and repair the DNA chain. Ultimately, by correcting a harmful mutation, scientists could change the activity of targeted genes.

B. How is CRISPR Technology Different?

“Scientists have had the knowledge and ability to edit genomes for many years, but CRISPR technology has brought major improvements to the

35. DNA (Deoxyribonucleic Acid), MYVMC (July 23, 2008), http://www.myvmc.com/anatomy/dna-deoxyribonucleic-acid/.
36. Id.
37. Id.
38. Id.
39. Id.
40. DNA (Deoxyribonucleic Acid), supra note 35.
41. Id.
42. Id.
43. Id.
44. Id.
45. DNA (Deoxyribonucleic Acid), supra note 35.
46. Id.
47. Ian Sample, Gene Editing — and What It Really Means to Rewrite the Code of Life, GUARDIAN, Jan. 15, 2018 at 10. “Scientists liken it to the find and replace feature used to correct misspellings in documents written on a computer. Instead of fixing words, gene editing rewrites DNA, the biological code that makes up the instruction manuals of living organisms.” Id.
48. Id.
speed, cost, accuracy, and efficiency of genome editing.”

The history of the different methods utilized to perform genome editing shows the remarkable progress scientists have been able to make in the field of genetic engineering.

The earliest technique used for gene editing was a process called homologous recombination. This method involves “generating and isolating DNA fragments bearing genome sequences similar to the portion of the genome that is to be edited.” Once these fragments are inside the cell—typically, by injection—“these DNA fragments can then recombine with the cell’s DNA to replace the targeted portion of the genome.” However, this type of editing is severely limited in that it is not efficient in most cell types. Because of this, the success rate of homologous recombination is extremely poor—it “can have as low as a one-in-a-million probability of successful editing.” Further, this type of editing is known to have a high rate of error, as the injection of DNA fragments can be inserted into “unintended part[s] of the genome.”

During the 1990s, scientists created zinc-finger nucleases (‘‘ZFNs’’), which are engineered proteins that are programmed to bind to DNA sequences. Once binding of the protein to the targeted portion of the DNA sequence occurs, the ZFNs cut the DNA. This process allowed for two new possibilities: To delete the faulty DNA or replace the faulty DNA with a new sequence through homologous recombination.

More recently, in 2009, scientists created “a new class of proteins called Transcription Activator-Like Effector Nucleases (‘‘TALENs’’).” TALENs are similar to ZFNs in that they bind to specific sequences of DNA. The only difference between the two is that TALENs are easier to engineer than ZFNs.

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50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
60. Id.
61. Id.
62. Id.
Now, scientists present the groundbreaking technology we call CRISPR or more specifically, the CRISPR-Cas9 system.\(^\text{63}\) So, how does it work?\(^\text{64}\)

With CRISPR, researchers create a short RNA template that matches a target DNA sequence in the genome. Creating synthetic RNA sequences is much easier than engineering proteins . . . required for ZFNs and TALENs. Strands of RNA and DNA can bind to each other when they have matching sequences. The RNA portion of the CRISPR, called a guide RNA, directs Cas9 enzyme to the targeted DNA sequence. Cas9 cuts the genome at this location to make the edit. CRISPR can make deletions in the genome and/or be engineered to insert new DNA sequences.\(^\text{65}\)

C. Benefits of CRISPR

CRISPR, unlike its predecessors, offers a vast array of improvements to the genome editing world.\(^\text{66}\) “One group of scientists found that CRISPR is six times more efficient than ZFNs or TALENs in creating targeted mutations to the genome.”\(^\text{67}\) Of CRISPR’s many benefits, a few of the most noteworthy include the elimination of genetic diseases, cutting down on major health care costs, high rate of precision and accuracy, and an infinite supply of organ donors.\(^\text{68}\)

1. Elimination of Genetic Diseases

It is no secret that perhaps the most obvious benefit of CRISPR would be the fact that it has the ability to literally wipe out deadly genetic diseases.\(^\text{69}\) “There are over 600 diseases—like cancer, sickle cell, Alzheimer’s, Huntington’s, ALS, hemophilia, and many others—that are the

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\(^{63}\) Id.; Sample, supra note 47.

\(^{64}\) Sample, supra note 47; Genome Editing: How Genome Editing Work?, supra note 49.

\(^{65}\) Genome Editing: How Does Genome Editing Work?, supra note 49.

\(^{66}\) Id.; see also Crutchfield III, supra note 1.

\(^{67}\) Genome Editing: How Does Genome Editing Work?, supra note 49.


\(^{69}\) See Sample, supra note 47.
result of defective DNA [and] CRISPR has the potential to prevent and/or cure them all.”  

For example, “5.7 million Americans are living with Alzheimer’s. [And] by 2050, this number is projected to rise to nearly 14 million.”  

Stated another way, someone is diagnosed with Alzheimer’s disease in the United States every sixty-five seconds. That is just one of the diseases that could be eliminated through the use of CRISPR. Imagine how many United States citizens could benefit from this ground-breaking technology—the number could easily be in the millions.

Not only would CRISPR wipe out the disease from the suffering individual, but it would also have the ability to stop the disease from being inherited by future generations. In addition to being able to modify somatic cells—non-reproductive cells in the body—it would also be possible to alter germline cells—egg/sperm cells—producing permanent changes which will be passed down to all future generations. For instance, “sickle-cell anemia is an autosomal recessive disease, which means that an affected individual has inherited a defective hemoglobin gene from both parents, so every one of his or her sets of chromosomes carries [the] defective gene.” It is with scientific certainty then that all offspring of the two parents will be plagued with the disease. Repair of the germline would rid that family’s DNA of sickle-cell anemia for good.

It is of the utmost importance that scientists use precaution with germline editing, “but if we [do not] take the first small step—learning how to modify embryos precisely and reproducibly and implanting them—we will] never reach the goal of ridding families of hideous genetic diseases.”

2. Cutting Down on Health Care Expenses

Not only can CRISPR have an effect on individuals and their families, but the entire nation—meaning even those not suffering from a

70. Crutchfield III, supra note 1.
72. Id.
73. Crutchfield III, supra note 1.
74. See id.
75. Sample, supra note 47.
78. Id.
79. See id.
80. Id.
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CRISPR HASTHE POTENTIAL TO CHANGE THE WORLD

It is not surprising that the United States has become famous for its outrageous over-spending on health care. Once again, using Alzheimer’s disease as an example, “[i]n 2018, Alzheimer’s and other dementias . . . cost the nation $277 billion [and] by 2050, these costs could rise as high as $1.1 trillion.” The math here is simple—if we eliminate the disease, we eliminate the costs associated with that disease.

3. High Rate of Precision and Accuracy

One of the obvious concerns with using new technology on humans is whether the technology is going to be safe and actually function the way it was intended to function. CRISPR has been said to be the Microsoft Word of the genetic editing world.

“‘Genome editing is a little bit like text editing’ . . . ‘You place a cursor where you want it and make local changes in the text [you have] written. We can go in and place our cursor and make a break at one site in the DNA—exactly where we want it.’”

81. Sample, supra note 47.
83. Alzheimer’s and Dementia Facts and Figures, supra note 71.
84. See id.; Crutchfield III, supra note 1.
85. See Nord, supra note 22.
86. MacDonald, supra note 68. “It would hypothetically scan the document, highlight errors, and then correct them.” Id.
87. Id.

CRISPR uses a natural mechanism in bacteria that functions like a primitive immune system. It allows scientists to break parts of DNA on predetermined points so that they can cut areas of DNA with mutations or viruses.
As with any new scientific technology, CRISPR has been tested on mice and other animals before human testing and the results were nothing short of astounding. As with any new scientific technology, CRISPR has been tested on mice and other animals before human testing and the results were nothing short of astounding.88 Scientists have treated mosquitos to disable them from transmitting diseases, such as malaria, and have even treated mice and monkeys who were once blind, but through CRISPR, are now able to see.89 Further “[i]n 2017, testing was done to see if the CRISPR-Cas9 gene-editing method could be used to eliminate [human immunodeficiency virus (“HIV”)] in infected rodents.”90 After just one treatment, “all traces of infection [disappeared] from the mouse’s organs and tissue.”91 Of course, even though CRISPR is praised for its huge improvements in accuracy and precision, it is not completely error free. One of the main worries is that CRISPR may mutate or edit “unintended parts of the genome.”92 However, Dr. Gaetan Burgio noted that “these unintended mutation[s] are likely to have preexisted prior to the injection of [the] CRISPR system.”93

4. Forget the Shortage of Organ Donors

“Currently in the [United States], an average of [twenty-two] people die each day waiting for organ transplants because of donor shortages . . . .”95 But with CRISPR, this is yet another statistic that could change drastically.96 Instead of twenty-two people dying per day while awaiting an organ for transplant, imagine if that number were zero.97
Researchers are now looking to pigs as the newest type of organ donor.98 They may not look like us but “their organs and ours are very much alike.”99 Specifically, the heart, liver, and kidneys have proven to function similarly to that of humans and are roughly the same size.100 A doctor in Massachusetts has opined that pig organs are a real potential replacement for almost all human internal organs.101 “Theoretically, CRISPR-Cas9 could manipulate the pig genes so human bodies [would not] reject them [ultimately resulting in] no shortage of available donor organs.”102

D. Legitimate Concerns

With such advanced technology, there are inevitably going to be concerns.103 While there are legitimate concerns and risks associated with CRISPR, there are logical ways to address them.104 After all, sometimes “[t]he biggest risk is not taking any risk [at all].”105 The key is to take intelligent risks.106

1. Freewheeling Biohackers

One of the concerns being voiced is that because CRISPR is easier and cheaper to use than ZFNs or TALENs, it creates room for biohackers.107 Biohackers are those who are not trained or educated in the field of science, but who believe, nonetheless, that they can use highly advanced
CRISPR is so affordable that biohackers could begin collecting the supplies needed to operate the CRISPR gene editing technology and start selling these kits for large-scale public access. In fact, it is already happening. One of these freewheeling biohackers, Josiah Zayner, sells do-it-yourself CRISPR kits out of his garage in the state of California. Mr. Zayner has compared the use of this gene editing technology to downloading an app. Mr. Zayner then asks the following hypothetical question: “Why [cannot] people use this technology without necessarily completely knowing how it works?” While most can easily see the obvious problem with this convoluted line of thinking, there will always be those who are metaphorically blind to the magnitude of the effects that can come from reckless self experimentation.

2. Designer Babies

Another popular concern is that more and more people will begin to use this technology to create designer babies. “But there are good reasons to think that these fears are closer to science fiction than they are to science.” Although it is possible to alter simple traits with CRISPR, parents have had “the ability to select their child’s sex, eye color, hair color, and skin complexion with preimplantation genetic diagnosis” for years; this is nothing new.

108. Id.; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
109. Russo, supra note 107; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
110. Russo, supra note 107; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
111. Russo, supra note 107; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
112. Russo, supra note 107; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
113. See id.
114. See id.
116. Belluck, supra note 68.
117. Kirkpatrick, supra note 115.
The main fear then becomes whether we can control more “complex traits such as intelligence, personality, or temperament.” For example, could parents custom-order a baby with Usain Bolt’s speed or Beyonce’s vocal range? The answer is simply no because the diseases which CRISPR was made to cure are defects appearing on a single gene or sometimes “an easily identifiable number of genes.” Conversely, a person’s intelligence, personality, or other special skill arises from an incalculable number of genes. Not only are traits such as personality and temperament controlled by a myriad of genes, but in addition, these traits are molded by our environments and by personal experiences. Thus, scientists are nowhere near being able to alter and predetermine such complex traits.

3. What Constitutes a Genetic Problem That Needs Fixing?

Lastly, there is another more complicated issue that is causing growing concern. CRISPR’s whole platform centers around the fact that, with this new technology, we can fix and even eliminate genetic problems that cause diseases. But “who decides what constitutes a genetic problem that needs to be fixed?” For example, is deafness considered a disease? Or dwarfism? There are some people who might think so, but many with

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118. Id.
119. Belluck, supra note 68.
120. Id.
Here is what researchers did: Repair a single gene mutation on a single gene, a defect known to cause—by its lonesome—a serious, sometimes fatal, heart disease.

Here is what science is highly unlikely to be able to do: Genetically predestine a child’s Ivy League acceptance letter, front-load a kid with Stephen Colbert’s one-liners, or bake Beyonce’s vocal range into a baby.

Id.

121. See id. “Even with an apparently straightforward physical characteristic like height, genetic manipulation would be a tall order. Some scientists estimate height is influenced by as many as 93,000 genetic variations.” Id.
122. Kirkpatrick, supra note 115.
123. See Belluck, supra note 68.
124. See Russo, supra note 107; Last Week Tonight with John Oliver: Gene Editing, supra note 106.
125. See CRISPR/Cas9, supra note 4.
126. Last Week Tonight with John Oliver: Gene Editing, supra note 106.
127. Russo, supra note 107; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
128. Russo, supra note 107; see also Last Week Tonight with John Oliver: Gene Editing, supra note 106.
such conditions do not.129 This is a subjective concept which creates a vast gray area.130

Consider the following factual scenario: A young boy named Martin is an albino, meaning “his genes do not give the right instructions for his body’s production of pigment, the dye that colors the skin, eyes, and hair.”131 As a result, Martin was born with extremely pale skin and “is at high risk of sunburn and skin cancer” when exposed to sunlight.132 In addition, his light eyes cause poor vision and harsh light can hurt his eyes.133 Consider also the fact that Martin’s mother is worried about him because he is bullied at school by other children in his class for his skin color and hair color.134 If genetic treatment is made readily available to Martin to produce the average amount of pigmentation in his skin, should he have the treatment?135 “In other words [is] . . . being albino . . . a medical problem that needs fixing? Or . . . is [it] more along the lines of a nose job or face-lift—something nice, but not necessary?”136 And what about the choice Martin’s mother may have to make?137 “If she loves Martin the way he is, how does she explain a decision to have him treated? But if he is unhappy with the way he is, how does she explain a decision not to treat him?”138 These are difficult questions because there is technically no correct answer as everyone may have a different opinion on the issue.139

III. THE CURRENT FDA BAN ON CRISPR HUMAN TRIALS IN THE UNITED STATES

In December 2017, CRISPR Therapeutics officially announced their merger with a biotech company called Vertex.140 Through their partnership, the two companies produced the CTX001—a special version of CRISPR—to treat sickle-cell patients.141 As with all forms of genetic treatment, CRISPR

129. See Russo, supra note 107; Last Week Tonight with John Oliver: Gene Editing, supra note 106.
130. See Russo, supra note 107; Last Week Tonight with John Oliver: Gene Editing, supra note 106.
132. Id.
133. Id.
134. Id. at 9.
135. See id. at 12.
136. BAKER, supra note 131, at 12.
137. Id.
138. Id.
139. See id. at 13.
140. Houser, supra note 13.
141. Id.
CRISPR HAS THE POTENTIAL TO CHANGE THE WORLD

and Vertex collectively sought approval from the FDA to move forward with human trials with consenting adult volunteers. However, after review, the FDA denied the request, “placing a clinical hold on the application.” According to a recent press release held by CRISPR Therapeutics, the FDA has expressed certain questions with regard to CRISPR technology and will not permit the company to proceed with testing on humans.

A. Has CRISPR Been Tested in Other Countries?

China has been conducting human trials for several years now—making China the first country in the world to conduct human trials with CRISPR technology. Dr. Shixiu Wu, head of the Hangzhou Cancer Hospital located in China, is perhaps one of the doctors most heavily associated with the use of CRISPR. Dr. Wu treats many patients with advanced esophageal cancer—one of the most common forms of cancer in China. Typically, Dr. Wu treats his patients in the ways that most of us are probably familiar with, such as chemotherapy and radiation treatments. In one case, Dr. Wu treated a fifty-three year old man suffering from advanced esophageal cancer through many rounds of chemotherapy and radiation, but the cancer just kept spreading. Upon the suggestion of CRISPR, Dr. Wu’s patient expressed interest in this form of experimental treatment. Dr. Wu then explained that the process—called T-cell infusion—would involve “using cells from [the patient’s] own immune system, known as T-cells, after they ha[d] been taken out of his body and genetically altered in a lab by the gene-editing tool called CRISPR.” The cells are modified “so that they zero in on and attack the cancer cells once [they are] infused back into each patient”—basically instructing the immune

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143. Houser, supra note 13.
144. Id.
147. Id.; Nord, supra note 22.
149. Stein, supra note 146.
150. See id.
151. Id.
system to attack the malignant cancerous cells.152 After preparation of the T-cells was complete, the patient was intravenously infused with “millions of genetically modified immune system cells” which flowed into his veins for about an hour.153 After his very first infusion, the patient reported feeling a bit weak initially, but feeling better and feeling very stable soon after.154 Although Dr. Wu is still treating this patient, Dr. Wu remarked that another one of his patients has been doing well after almost a full year of CRISPR treatments.155 Although one of Dr. Wu’s patients decided to discontinue with CRISPR treatments after experiencing a high fever, “[t]he rest appear to be stable or in partial remission [after] . . . undergoing monthly treatments.”156 Dr. Wu reports that a total of nine patients have died in the study, “but Wu says that was from their cancer, not the [CRISPR] treatment.”157

“So far, [twenty-one] patients have participated in the trials [and] [t]he efficiency was about [forty] percent.”158 At first glance, forty percent does not seem like a very high success rate, but the fact is that forty percent is significantly better than zero percent.159

B. Why the FDA Should Allow Human Trials in the United States

Although it is important to have a cautious gatekeeper in place, “[t]he FDA is commonly viewed as a roadblock.”160 “Patients are looking for answers. Biotech is looking for big bucks. Both oppose regulation.”161 While it is no doubt imperative to ensure medical technology is not harming individuals, the question boils down to whether competent and informed adults should be able to subject themselves to risk.162

152. Id.
153. Id.
154. Stein, supra note 146.
155. Id.
156. Id.
157. Id.
158. Nord, supra note 22.
159. See id.
161. Id.
162. Id.
1. Many of Those with Genetic Diseases Are Out of Options

“Clinical research attempts to address a relatively straightforward, and extremely important challenge: [H]ow do we determine whether one medical invention is better than another, whether it offers greater clinical benefit and/or poses fewer risks?” CRISPR is now at the stage where it requires testing with real, live humans. Human testing of any kind poses some kind of risk to the patient “no matter how many laboratory and animal tests have preceded them.” Herein lies the ethical dilemma: When does it become permissible to expose living, breathing human beings to a risk of harm to further medical research?

With medical devices like CRISPR, scientists and medical providers “should be permitted to conduct research and expose subjects to risks provided they obtain [the] subjects’ ‘free, voluntary, and undeceived consent and participation.’” Yet, the FDA does not regard the notion of informed consent as a sufficient basis for human testing. Are the FDA’s limitations “justified, or are they inappropriate infringements on the free actions of competent individuals” who have otherwise run out of options?

Looking at the twenty-one patients who have undergone CRISPR treatments in China, it is easy to see why the country allowed such treatment and why patients were voluntarily subjecting themselves to serve as guinea pigs of the new technology. Every single one of those patients was suffering from an advanced stage of cancer and had already tried surgery, chemotherapy, and radiation to no avail. After exhausting all other methods of killing the cancer cells, these patients would ultimately be told there is nothing further doctors can do. If not for CRISPR, these patients would be out of options and would live each day knowing it could be their last.

The bottom line is that most of the ethical concerns that arise from exposure of humans to CRISPR are shattered when the patient, if of age and
standard mental competence, cannot be helped by any other form of treatment.\textsuperscript{174}

2. But What About These Products?

a. Big Tobacco

Imagine if every product with harmful qualities were regulated in the same way as CRISPR.\textsuperscript{175} The United States is proceeding with the utmost caution in allowing CRISPR human trials, yet we allow products like cigarettes to be sold to the general public every day.\textsuperscript{176} “Causing more than 480,000 deaths each year in the United States, smoking is the leading preventable cause of death in the United States.”\textsuperscript{177} Smoking damages almost every organ in the human body and contributes to serious health issues such as stroke, heart disease, and, of course, lung cancer.\textsuperscript{178} Not only is smoking responsible for causing lung cancer, but it can cause just about any type of cancer imaginable.\textsuperscript{179} “If nobody smoked, one in every three cancer deaths in the United States would not occur.”\textsuperscript{180}

Perhaps even more troubling is the lengthy and frightening list of chemicals found in cigarettes.\textsuperscript{181} “[O]f the [ninety-three] known harmful . . . chemicals [found] in cigarettes,” a few particularly troublesome chemicals include: nicotine, cadmium, lead, acetaldehyde, benzene, ammonia, and carbon monoxide.\textsuperscript{182} These chemicals—many of which are known to be deadly—are contained in each and every cigarette.\textsuperscript{183} This is what our governmental regulatory agencies are allowing to be ingested by United States citizens every day.\textsuperscript{184}

\begin{footnotes}
\textsuperscript{174} See id.
\textsuperscript{175} See Nord, supra note 22.
\textsuperscript{176} See Houser, supra note 13; Effects of Tobacco, supra note 28.
\textsuperscript{177} Effects of Tobacco, supra note 28.
\textsuperscript{178} Id.
\textsuperscript{179} Id. “Such areas include (but are not limited to): [T]he bladder, bloodstream, cervix, colon, rectum, esophagus, kidney, ureter, larynx, liver, oropharynx, pancreas, stomach, trachea, bronchus, and lung.” Id.
\textsuperscript{180} Id.
\textsuperscript{182} Id.
\textsuperscript{183} USFoodandDrugAdmin, Chemicals in Every Puff of Cigarette Smoke — Combustion Stage, YOUTUBE (Feb. 13, 2017), http://www.youtube.com/watch?v=EXdxl0yH904.
\textsuperscript{184} See What We Do, supra note 27.
\end{footnotes}
One of the common reservations with regard to tobacco litigation is: Why should individuals be suing tobacco companies when they are knowingly and willfully smoking cigarettes that have proven to be directly linked to causing lung cancer—that was their choice, right?\textsuperscript{185} In this day and age, when all of this data has been made available to the public, that is certainly a valid question.\textsuperscript{186} And it is this very same logic that should be used when we evaluate tools like CRISPR.\textsuperscript{187} With genetic counseling, and all that is known thus far about CRISPR, individuals can make informed decisions about whether they wish to proceed with the new form of treatment or keep exploring other options.\textsuperscript{188}

One of the reasons tobacco companies are able to continuously market and sell their deadly product is because of how the FDA’s regulatory framework is structured.\textsuperscript{189} Interestingly, the intent of the manufacturer determines whether the FDA will have jurisdiction over a given product.\textsuperscript{190} Where a manufacturer intends for a product to affect the human body in structure or function, it will be labeled a drug or device that is subject to FDA regulation.\textsuperscript{191} For example, CRISPR Therapeutics claims their product can eliminate genetic diseases through the mutation or alteration of genes—making it subject to FDA authority.\textsuperscript{192} The FDA proclaims that their goal is to protect the health and safety of the public by guaranteeing that drugs and devices are safe and effective for their intended use.\textsuperscript{193} While it is true that tobacco companies generally do not make therapeutic claims regarding their products, cigarettes certainly have an effect on the structure and function of the human body—a largely negative one at that.\textsuperscript{194} Nicotine should certainly


\textsuperscript{186} See \textit{Effects of Tobacco}, \textit{supra} note 28. However, that is not a valid question for plaintiffs who qualify for class certification and have standing in regard to the \textit{Engle} progeny cases. \textit{Engle v. Liggett Grp.}, 945 So. 2d 1246, 1267 (Fla. 2006).

\textsuperscript{187} See \textit{Genome Editing: What Is Genome Editing?}, \textit{supra} note 34.

\textsuperscript{188} See \textit{id.}; \textit{Crutchfield III}, \textit{supra} note 1; \textit{Houser}, \textit{supra} note 13.


\textsuperscript{190} Hardin, \textit{supra} note 189, at 439; see also 21 U.S.C. § 321 (2012).

\textsuperscript{191} Hardin, \textit{supra} note 189, at 439; see also 21 U.S.C. § 321.


\textsuperscript{193} \textit{What We Do}, \textit{supra} note 27.

\textsuperscript{194} \textit{Brown & Williamson Tobacco Corp.}, 529 U.S. at 155; \textit{Effects of Tobacco}, \textit{supra} note 28.
qualify as a drug since it has been proven time and time again to have potent, addictive qualities.195

In 1996, however, the FDA did attempt to regulate cigarettes on the grounds that cigarettes are both a drug and a device because they deliver exact and controlled amounts of nicotine to the body to sustain addiction.196 In the famous case, *FDA v. Brown and Williamson Tobacco Corp.*,197 the Supreme Court of the United States found that the FDA was precluded from regulating tobacco products.198 The Supreme Court held that if the FDA were to have jurisdiction over tobacco products, they would be banned from the market as “no measures the agency could take would make tobacco products safe for human use.”199 “The Court reasoned Congress favored informing consumers about adverse health risks of tobacco use over harming the nation’s economy through an outright ban of tobacco.”200

In applying this to CRISPR, there is no doubt that CRISPR makes a therapeutic claim and, thus, constitutes a medical device subject to FDA jurisdiction.201 But what kind of message does it send to allow billions of cigarettes to be sold every day with the knowledge that the FDA would ban them in a heartbeat if they were in the driver’s seat of tobacco’s marketability?202 Perhaps the answer is that the blood of the United States runs green with greed.203 If there were as big a desire to help one another as

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195. The Top 5 Most Addictive Drugs in the World, Recovery First, http://www.recoveryfirst.org/drug-abuse/most-addictive-drugs/ (last updated June 6, 2016). Ranking in at number three, “[n]icotine is considered one of the most addictive substances in the world.” Id.

Part of the reason nicotine is so addictive is that this stimulant decreases appetite, boosts mood, and increases heart rate, blood pressure, and alertness. However, it has a very short life span in the bloodstream, with users typically feeling cravings for nicotine after [two to three] hours. This craving often includes psychological symptoms like anxiety [or] depression, along with headaches or restlessness.

198. Id. at 133.
199. Hardin, supra note 189, at 440 (citing Brown & Williamson Tobacco Corp., 529 U.S. at 135–36) (discussing the FDA’s failed attempt to regulate traditional tobacco).
200. Id. at 440–41; see also Brown & Williamson Tobacco Corp., 529 U.S. at 138–39.
201. See 21 U.S.C. § 321(g)-(h); Crutchfield III, supra note 1; What We Do, supra note 27.
there is to make a profit, maybe CRISPR would already be doing away with genetic diseases.\(^\text{204}\)

b. \textit{Even the Widely Used Chemotherapy}

Another harmful product used on a daily basis is chemotherapy—conceivably the most commonly used and well-known cancer treatment available.\(^\text{205}\) “[C]hemotherapy refers to the drugs that prevent cancer cells from dividing and growing. It does this by killing the dividing cells.”\(^\text{206}\) In essence, the combination of drugs used in chemotherapy will:

[I]mpair mitosis, or prevent cell division . . . ;

[T]arget the cancer cells’ food source, which consists of the enzymes and hormones they need to grow;

[T]riger the suicide of cancer cells, known medically as apoptosis; [and]

[S]top the growth of new blood vessels that supply a tumor in order to starve it.\(^\text{207}\)

Given this wide array of functions, it is not surprising that chemotherapy comes with a long list of side effects and reaching the remission stage is not always guaranteed.\(^\text{208}\) Most are aware of the common and almost inevitable side effects of chemotherapy—nausea, vomiting, alopecia (hair loss), fatigue, and anemia.\(^\text{209}\)

But what about the effects of chemotherapy that are not so common?\(^\text{210}\) “Back in September 2004, the Centers for Disease Control and Prevention (“CDC”) and the National Institute for Occupational Safety & Health (“NIOSH”) . . . warned that working with chemotherapy drugs and other common pharmaceuticals can be a serious danger to your health.”\(^\text{211}\) Ironically, “one of the effects of chemotherapy is that it actually [causes]

\[^{204}\text{See Brown & Williamson Tobacco Corp., 529 U.S. at 139; Crutchfield III, supra note 1.}\]
\[^{205}\text{See Nordqvist, supra note 27.}\]
\[^{206}\text{Id.}\]
\[^{207}\text{Id.}\]
\[^{208}\text{See id.}\]
\[^{209}\text{Id.}\]
\[^{211}\text{Id.}\]
Further, numerous chemical specialists are of the opinion that in reality, chemotherapy does much more harm than it does good.\(^{213}\) “The truth is that chemotherapy is toxic, carcinogenic (causes cancer), destroys erythrocytes (red blood cells), devastates the immune system, and destroys vital organs.”\(^{214}\)

Chemotherapy, as we know, can have catastrophic side effects; in comparison, CRISPR’s are minimal.\(^{215}\) Looking at the human trials performed in China, Dr. Wu has said “the only side effects have been mostly minor—an occasional fever or rash.”\(^{216}\) Just like chemotherapy has proven, the mere fact that a drug produces side effects does not automatically bar it from FDA approval.\(^{217}\) “[E]very new therapy has some potential [for] side effects—[the key is], we need to be aware of what they are.”\(^{218}\)

C. Is This Big Pharma at Play?

Imagine if you had the power to change the world—to rid it of disease, to save millions, to ease someone else’s pain and suffering—all while earning a profit.\(^{219}\) If you were to start up a pharmaceutical conglomerate, this is likely what your end goal would look like.\(^{220}\) Initially, you plan to use your company for good and you truly desire to help the

\(^{212}\) Id.

\(^{213}\) Id. “Dr. Alan C. Nixon, past president of the American Chemical Society writes, ‘As a chemist trained to interpret data, it is incomprehensible to me that physicians can ignore the clear evidence that chemotherapy does much, much more harm than good.’” Id.

\(^{214}\) Bollinger, supra note 210. “The serious toxic effects of chemotherapy have long been ignored by virtually everyone in medicine and the federal government. Chemotherapy drugs have always been assumed to be safe just because [they are] used to treat cancer. This is an outright lie.” Id.

\(^{215}\) See id.; Nord, supra note 22. Dr. Wu stated that “although [he has] only used the technology on a small number of people, it appears much safer than traditional chemotherapy.” Nord, supra note 22.

\(^{216}\) Stein, supra note 146.

\(^{217}\) See Bollinger, supra note 210; Nordqvist, supra note 27.

\(^{218}\) Zareva, supra note 92. Chemotherapy is an invasive treatment that can have severe adverse effects. This is because the drugs often target not only cancerous cells but also healthy cells. The adverse effects can be worrying, but given early, chemotherapy can in some cases achieve a complete cure, making the side effects bearable for many patients. It is important that patients know what to expect before starting treatment.

\(^{219}\) BIG PHARMA, http://www.bigpharmacagame.com (last visited May 1, 2019). Video game inventors even made an online game called Big Pharma with the slogan, “Marketing and Malpractice is the brand new expansion for Big Pharma. . . . [You have] created your wonder drug, now it is time to sell, sell, sell.” Id.

\(^{220}\) See id.
human race. But the *uncomfortable truth* is that “illness is good for business.” This is the world of Big Pharma.

Big Pharma is often used to describe “massive pharmaceutical companies that make literally billions of dollars every year to keep Americans regularly supplied with a medicine cabinet’s worth of pills.” So how do these pharmaceutical companies have an influence on CRISPR?

Due to their extremely high profit margins, Big Pharma has some pretty deep pockets and “[w]ith those pockets comes a strong hand of political and legislative influence.” Even though the FDA has been instituting massive fines, Big Pharma companies are significant contributors to the FDA’s budget, thus “leading to concerns of conflicts of interest and outright bribery.” For these reasons, the pharmaceutical industry is now being referred to as America’s new mafia.

Big Pharma has raised a lot of eyebrows for the money it can throw at doctors and legislators, but perhaps the most serious effect it has had on American healthcare is the epidemic of the overprescription of powerfully addictive drugs . . . The United States makes up only [five] percent of the world’s population but consumes [eighty] percent of the painkillers in the world.

Pharmaceutical companies, theoretically, are “meant to write themselves out of the equation. True success—a world without disease—would also mean a world without drugs and a world without pharmaceuticals.” But when pharmaceutical companies are successful in

221. *See id.*
222. *Id.*
223. *BIG PHARMA, supra note 219.*
225. *See id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Who Are the Players in the Pharmaceutical Industry (Big Pharma)?, supra note 223. “A 2011 survey conducted by the Kaiser Family Foundation revealed that Americans aged [nineteen through sixty-four] were prescribed an average of 11.9 prescriptions, and Americans [sixty-five] and up received an average of [twenty-eight] prescriptions.”* *Id.*
actually curing patients, they no longer have a purpose, “and the market responds to that lost purpose by withdrawing investments.”231 Adam Feuerstein, a national biotech columnist, made a Twitter post stating: “Perhaps the awful, brutally honest lesson here is: Curing disease is great for patients but sucks for business.”232 This is the premise behind Big Pharma— “[s]uccess is not always profitable in the pharmaceutical industry, and [it is] this perspective [that has] fueled numerous conspiracy theories . . . about drug companies intentionally missing their marks.”233

Although CRISPR does not have the ability to cure every disease, it could potentially cure some of health care’s most expensive treatments—HIV, cancers, and Alzheimer’s.234 As mentioned previously, Alzheimer’s disease—along with other forms of dementia—“will cost the nation $277 billion [and] by 2050, these costs could rise as high as $1.1 trillion.”235 “[That is] why Bloomberg is calling CRISPR-Cas9 ‘the discovery of the century’ and Science magazine is calling it ‘the breakthrough of the year.’”236

On the one hand, CRISPR could shatter the conspiracy theory behind Big Pharma.237 Pharmaceutical companies may not be the biggest advocates of CRISPR since CRISPR could have the potential to disrupt their trillion-dollar industry; curing so many diseases might just be bad for business.238

231. Id.

232. Adam Feuerstein (@adamfeuerstein), TWITTER (Feb. 7, 2017, 6:18 PM), http://twitter.com/adamfeuerstein/status/829152296764395520; Adam Feuerstein, STAT, http://statnews.com/staff/adam-feuerstein/ (last visited May 1, 2019). One stock market trader, Dennis Dick, said “[t]he bottom line here is: [D]on’t make your drugs so effective . . . [That is] a sad world we live in when capitalism is going to punish a stock because their drugs are too effective.” Balboa, supra note 230.

233. Id. “Some wonder if pharmaceuticals announce just enough progress to draw in funds while maintaining a safe distance from cure-driven obsolescence.” Id.

234. Perry, supra note 90.

235. Alzheimer’s and Dementia Facts and Figures, supra note 71. In the United States, an average of $173 billion is spent every year on cancer research. Heart disease treatment costs another $200 million annually. Then there is diabetes, which is on the rise and costs Americans $245 billion annually. Those are some big numbers, and they [are not] even the worst. Alzheimer’s, one of the scariest diseases to any aging human—which is all of us—costs Americans $259 billion a year! When you do the math, that means just four diseases are raking up a $1 trillion medical bill. And [that is] just the big boys. Imagine the costs that come with genetic diseases that appear at birth—diseases that parents will pay for throughout their child’s adolescence. Then when that child becomes an adult, they will inherit the costs of a disease they never wanted and [could not] fight. But with CRISPR-Cas9, that could end. In our current war against disease, [it is] Big Pharma that rakes in the dough.

Perry, supra note 90.

236. Id.

237. See id.; Balboa, supra note 230.

238. See Perry, supra note 90.
On the other hand, CRISPR might open up a brand new realm of income that Big Pharma might want in on.239 The still young industry surrounding the CRISPR-Cas9 system “could form the foundation of a billion-dollar gene-editing industry.”240

IV. CONCLUSION

As demonstrated throughout this Comment, CRISPR has massive medicinal potential.241 CRISPR has the ability to rid the world of deadly genetic diseases, make real changes in the cost of healthcare in the United States, make stellar improvements to the accuracy and precision of genetic editing, and even eliminate the growing need for organ donors.242 Although the legitimate concerns expressed should not be taken lightly, many of those concerns “are closer to science fiction than they are to science.”243

Further, there is a lot to learn from the country that has been testing CRISPR on humans for years now.244 This is not to say that the FDA should not keep doing its job; however, when looking at the drugs and devices that are allowed on the market today, the fact that CRISPR is not allowed leaves room for serious questions.245 Is the FDA really the ethical gatekeeper it presents itself to be?246 Or is it actually persuaded by profit?247 With tobacco products and chemotherapy in heavy use in this country, and Big Pharma’s influence, the latter seems to be the winning answer.248

“Hopefully, CRISPR Therapeutics and Vertex are able to answer the FDA’s questions in a way that promotes confidence in the treatment.”249 While it is important to keep in mind that we are exploring uncharted territory and certainly should proceed with caution, the truth is that millions of people throughout the United States, as well as the rest of the world, suffer from diseases that could be cured by CRISPR technology.250

239. See id.
240. Id.
242. Id.; MacDonald, supra note 68; Patterson, supra note 68.
243. Belluck, supra note 68.
244. See Molteni, supra note 160; Stein, supra note 146.
245. See Hardin, supra note 189, at 439, 449; Molteni, supra note 160; Stein, supra note 146.
246. See Molteni, supra note 160.
247. See Who Are the Players in the Pharmaceutical Industry (Big Pharma)?, supra note 224.
248. See id.; Balboa, supra note 230; Bollinger, supra note 210; Effects of Tobacco, supra note 28.
249. Houser, supra note 13.
250. Id.; see also Crutchfield III, supra note 1.
One thing is clear—CRISPR could change the world. The only question that remains is: When will the United States give it the chance?

251. Crutchfield III, supra note 1; see also Houser, supra note 13.

252. See Houser, supra note 13. Just one month after the submission of this Comment, the United States made the decision to sponsor the first CRISPR human trial. Catherine Offord, *US Companies Launch CRISPR Clinical Trial*, THE SCIENTIST (Sept. 3, 2018), http://www.the-scientist.com/news-opinion/us-companies-launch-crispr-clinical-trial-64746. “Although the study itself is to be carried out in a hospital in Germany, it marks the first clinical trial of CRISPR genome-editing technology to be sponsored by [United States] companies, Boston based Vertex Pharmaceuticals and CRISPR Therapeutics, a Swiss biopharmaceutical [company] with labs in Cambridge, Massachusetts.” Id. These companies will “jointly launch[] a trial of an experimental CRISPR-Cas9 therapy for the blood disorder β-thalassemia, according to [an] announcement posted Friday, August 31, [2018].” Id. CRISPR Therapeutics [Chief Executive Officer], Samantha Kulkarni, stated, “Just three years ago we were talking about CRISPR-based treatment as a sci-fi fantasy. . . . But here we are.” Id.
PUNISHING BAD ACTORS: THE EXPANSION OF MORALS CLAUSES IN HOLLYWOOD ENTERTAINMENT CONTRACTS IN THE WAKE OF THE #METOO MOVEMENT

JIHAD SHEIKHA*

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I. INTRODUCTION

Nothing seems to sell a story more than a good scandal. The siren call of celebrity gossip manages to lure the everyday Joe Shmoe and Jane Doe into clicking the latest TMZ article or video on their social media feed, picking up a crumpled US Weekly at the doctor’s office, or for the more open-minded, flipping through the National Enquirer to investigate the latest appearance of Big Foot. “Our appetite for celebrity gossip is . . . insatiable” and we particularly crave two things: Fame and bad news. That is why it is no surprise that the bombshell of #MeToo took the world by storm in late 2017. The #MeToo movement generated story after story of the career-ending malfeasance committed by our most beloved celebrities and public figures, in addition to reports of the steep financial consequences endured by Hollywood’s studios, production companies, and distributors. Soon, a mere social media hashtag instilled fear into the hearts of prominent male celebrities once thought to be untouchable. The upper echelon of Hollywood took notice and scrambled for a means to distance themselves from toxic talent and terminate their existing contracts. However, absent breaching a contract illegally, many Hollywood companies did not have the legal means to end these agreements and, subsequently, lost millions of dollars. As a solution to their woes, Hollywood is now considering the morals clause, a heavily-negotiated provision in a talent agreement that allows for the termination of said agreement under certain circumstances.

The consideration of morals clauses in the wake of the #MeToo movement is not a surprise. These contractual provisions have become

2. Id.
3. Id.
7. See Siegel, supra note 5.
8. Id.
9. Id.
standard practice in advertising, motion pictures, and television agreements and are generally upheld by the courts. “Morals clauses give [an] employer . . . the right to terminate a talent [contract]” if the talent fails to conduct himself according to the moral standards of society, thereby tarnishing his own reputation and the reputation of his employer. For example, a contract could have a morals clause allowing for the termination of the agreement in the event that the hired talent is convicted of a drug offense. Upon the talent’s conviction, the morals clause is triggered and the talent’s employer has the right to terminate the contract.

In the midst of countless celebrity accusations of sexual impropriety, morals clauses seem to be an effective tool Hollywood can use to combat negative publicity generated by toxic talent who have lost their status and, most importantly, their value. In light of the recent wave of sexual assault allegations that rocked Hollywood, studios and production companies plan to use morals clauses more often and broaden their language to account for possible accusations of sexual assault and violence committed by their talent. By including language that allows for the termination of a talent agreement if allegations of sexual misconduct come to light, Hollywood studios can effectively mitigate potential financial losses associated with these accusations. However, some fear that broader morals clauses that are triggered upon mere accusations set a bad precedent for the industry because they could be used unfairly or even be abused by studios and production companies.

This Comment will address these concerns and others that arise out of the use of broader and more expansive morals clauses. In addition to defining the morals clauses and identifying its components, this Comment will explore the historical evolution of morals clauses from the 1920s up to the modern era. This Comment will also provide useful background

14. Id.
15. See id. at 244 (discussing the value of morals clauses in the television and motion picture industry); Gallagher, supra note 10, at 90.
17. Id.
18. Id.
19. See discussion infra Part II–IV.
20. See discussion infra Part II.
information of the #MeToo movement and its effects on Hollywood by providing in-depth case studies on the Harvey Weinstein, Kevin Spacey, and Louis C.K. allegations that led to their pariah status in the entertainment industry and cost their employers millions of dollars. Ultimately, this Comment’s proposition is that we should have little concern over broader morals clauses because they are in essence very similar to past morals clauses that were upheld by the courts, will likely not be abused, and will facilitate the necessary shift in cultural norms in Hollywood by shedding light on the epidemic of workplace sexual harassment and assault.

II. A BRIEF OVERVIEW OF MORALS CLAUSES

A. Morals Clauses Defined

In contract law, morals clauses are contractual provisions that give the employer the right to terminate the agreement in the event that the employee behaves in a way that negatively impacts his or her own public image and thereby damages the reputation of the employer by association. Morals clauses are sought after by many contracting companies in an effort to protect themselves from the immoral and reckless conduct of the employee—commonly called the talent—and to ensure that the value of the film or television program is not compromised. Additionally, morals clauses are used “to quickly disconnect the celebrity/product association in the consumer’s mind.” There are two elements of a morals clause: The immoral behavior deemed to trigger the morals clause and the employer’s options after the clause has been triggered. The subjective nature of morals is a point of frequent contention in entertainment contract negotiations and consequently leads talent to seek legal recourse to deny being bound to its language.

1. Negotiating Morality

Morals clauses in contracts cover conduct that disregards public morals and decency, shocks or insults the community, or casts a negative

21. See discussion infra Part III–V.
22. See discussion infra Part VI.
24. Id.; see also Kressler, supra note 11, at 244.
27. Gallagher, supra note 10, at 90–91 (discussing how the subjective nature of morals clauses leads to litigation).
light on the talent themselves, “the financier, the producer, the employer, or the distributor.” However, due to the inherent subjectivity of the term morality, it can be quite difficult to pinpoint what public morals or decency actually refers to. This ambiguity lies in the fact that the nature of morality is rooted in community customs that vary from community to community and from generation to generation. In fact, yesterday’s societal taboos may be socially accepted today. For example, in the past, an employee’s homosexuality might have been the triggering offense that terminated a contract, while, in the present, an employee making homophobic statements might be the trigger. Thus, there is no uniformly accepted legal definition of a moral standard nor can there truly be one single accepted definition due to the constant evolution of moral standards in society. Naturally, Hollywood studios typically adopt an “I know it when I see it” approach when evaluating their employees conduct. In an attempt to deal with this

30. Pinguelo & Cedrone, supra note 29, at 352 (discussing how moral standards change over time); see also Michael Moore, Moral Reality, 1982 WIS. L. REV. 1061, 1096 (1982) (discussing how societal values change and will continue to change). “History teaches us that systems of values evolve, and there is no reason to think that the process is at an end.” Moore, supra.
31. Gallagher, supra note 10, at 91. “As everyone knows, moral standards seem to ebb and flow with the times. In many cases what was thought to be improper in 1951 is deemed perfectly acceptable in 2016.” Id.
32. Moore, supra note 29.
33. Gallagher, supra note 10, at 91; see also Moore, supra note 30, at 1096; Pinguelo & Cedrone, supra note 29, at 352 (discussing the inherent subjectivity of morality). “The skeptical conclusion is that our present system of values cannot be regarded as right or objective because we know it will change in the future.” Moore, supra note 30, at 1096.
34. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). I have reached the conclusion, which I think is confirmed at least by negative implication in the Court’s decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id.
moral conundrum, a test has been established to evaluate whether an employee’s conduct meets the requirement of being immoral.35 “The test is ‘not morality in the abstract, but whether taking the nature of the plaintiff’s employment into account the acts complained of rendered the plaintiff unfit to perform the duties which he had undertaken.’”36 Thus, an employee’s actions showing dishonesty and untrustworthiness justifies the employee’s dismissal because the employer “can no longer place faith and trust in the employee . . . or, as a result of the employee’s behavior, the public would be disposed to curtail business relations with the employer.”37 Therefore, the triggering offense that gives the employer the right to terminate the contract is usually conduct that is likely to damage the employer’s reputation and potentially hurt the company financially.38

During the negotiation process, talent typically seek to have morals clauses narrowly tailored to be triggered only in the event of specific reprehensible conduct, such as conviction of a felony, making it more difficult to trigger the morals clause.39 On the other hand, the employer seeks to draft broader clauses that allows for the termination of the contract for various offenses such as accusations, arrests, and public indecency.40 Broader language gives the employer greater discretion over when the morals clause is invoked and thus when the contract is terminated.41

2. Termination and Defenses

Invoking a morals clause in an entertainment contract is a complex business decision that must consider whether the employee’s actions are sufficiently likely to damage the employer-employee relationship so that a continued relationship would cause harm to the employer or their investment.42 Employers typically consider the severity of the employee’s conduct and the overall investment in the project.43 However, “[a] morals clause [can] also be [triggered by] the perception of wrongdoing, rather than

36. Id.
37. Id. at 633.
38. See Gallagher, supra note 10, at 90, 104.
39. ZWEIG, supra note 26, at 768.
40. Id.
41. Id.
42. Id.
43. Id.
actual” evidence of wrongdoing. Past misconduct that becomes public can also trigger a clause. While it can be argued that morals clauses give the contracting company immense power over the agreement, the talent is not without legal recourse. “[L]itigation often comes in the form of a suit for wrongful termination or in a breach of an employment contract claim because the talent believes that his or her behavior did not trigger the clause due to either ambiguity in the clause itself or a lack of required notice.”

B. A Brief History of the Morals Clause

“[M]orals clauses have [appeared] in ... contracts for nearly a century.” Introduced in the early 1920s, morals clauses have been prevalent in entertainment contracts and have been “generally upheld by the courts.” However, the type of immoral conduct these clauses targeted have changed over the years. Initially, morals clauses were used to aid in the pre-World War II era crusade against celebrity sin. Then, studios attempted to stamp out the alleged Communist invasion in Hollywood during the McCarthy era by invoking morals clauses. Finally, today, morals clauses are primarily used to uphold the ethical standards that contracting companies are expected to live up to by the public. Today, there is a shift in application of morals clauses where studios and production companies now seek to target Hollywood’s prevalent problem of rampant sexual assault accusations against prominent male celebrities. Nevertheless, throughout the course of history, there has been a consistent theme regarding the addition of morals clauses: Protecting the company’s image in the public eye.

45. Id.
47. Id.
48. Robehmed, supra note 16.
49. Gallagher, supra note 10, at 88; Robehmed, supra note 16.
51. Gallagher, supra note 10, at 92.
52. Epstein, supra note 50, at 76.
53. Gallagher, supra note 10, at 92.
54. See Robehmed, supra note 16.
55. Epstein, supra note 50, at 75. “Businesses spend considerable sums of money to cultivate the ideal image, and negative associations can wreak havoc upon their efforts.” Id.
1. The Origin of the Morals Clause

In the early 1920s, Hollywood was frequently at odds with the religious sentiment of the rest of the United States, which viewed Hollywood as a cesspool of celebrity sin. Many theorized that this perception led to a dip in movie ticket sales which stagnated the motion picture industry. This slump in sales was further exacerbated by the “Fatty” Arbuckle incident—Hollywood’s first celebrity scandal. In 1921, beloved comedian Roscoe “Fatty” Arbuckle signed a multi-year, “[$3,000,000] contract with Paramount Pictures.” That year, the popular comedian hosted a Labor Day party in his San Francisco hotel suite where actress Virginia Rappe was later found to be severely injured and subsequently died of her injuries. After Rappe’s death, Arbuckle was charged with her murder and accused of rape. Arbuckle was ultimately acquitted of this charge but could not free himself from the shackles of the negative public perception that lingered. Learning at the expense of Paramount Pictures, Universal Film Company executives enacted a new company policy stating “that morals clauses would be added to all existing and new actor agreements.” These new clauses permitted the contracting company to discontinue talents’ salaries if they “forfeit[ed] the respect of the public.” The provision stated:

The actor—actress—agrees to conduct himself—herself—with due regard to public conventions and morals and agrees that he—she—will not do or commit anything tending to degrade him—her—in society or bring him—her—into public hatred, contempt, scorn, or ridicule, or tending to shock, insult or

57. Id.
59. Epstein, supra note 50, at 76.
60. Sheerin, supra note 58. “The star, thought to have weighed about [two hundred and sixty pounds] . . . was portrayed as a fat brute who had pinned down his prey, rupturing her bladder.” Id.
61. Id.
63. Gallagher, supra note 10, at 93.
offend the community or outrage public morals or decency, or
tending to the prejudice of the Universal Film and Manufacturing
Company or the motion picture industry.\textsuperscript{65}

Universal Studios sought to use morals clauses to achieve three
specific goals to mitigate the public admonishment of Hollywood.\textsuperscript{66} First,
the new provisions were thought to remedy the perceived morally decrepit
celebrity lifestyle by acting as a \textit{restraining influence} on actors and
actresses.\textsuperscript{67} Second, the clauses were intended to reassure the public that
their screen idols were exemplary moral figures.\textsuperscript{68} Third, the morals clauses
were drafted to protect Universal Studios’ investment worth hundreds of
thousands of dollars at the time.\textsuperscript{69} The morals clauses of today still mirror
the language used by Universal Studios in 1921 and are used in essentially
the same manner.\textsuperscript{70}

2. The Clauses Confront Communism

Beginning in late 1947 to the 1950s, morals clauses expanded to
brand new territory—the political arena.\textsuperscript{71} This era marked the evolution of
the morals clause where they were employed as tools to stifle political
ideology and affiliation, rather than to target actual immoral conduct.\textsuperscript{72}
During this era of United States history, Americans were deeply concerned
with the spread of Communist ideas to the United States.\textsuperscript{73} In response to
this Red Scare, the House Committee on Un-American Activities (“HUAC”)
was created and tasked with investigating private citizens, employees, and
organizations for potential ties to Communism.\textsuperscript{74} In addition to targeting
government officials and labor unions, HUAC eventually turned its suspicion
to Hollywood.\textsuperscript{75} HUAC served forty-three subpoenas upon studio directors,

\textsuperscript{65} Id.
\textsuperscript{66} See id.
\textsuperscript{67} Id.
\textsuperscript{68} See id. The exact quote reads: “[I]t will reassure the public, who for the
moment may be inclined to fear . . . their screen idols have feet of clay . . . .” Morality Clause
for Films: Universal Will Cancel Engagements of Actors Who Forfeit Respect., supra note 64.
\textsuperscript{69} Id.
\textsuperscript{70} Gallagher, supra note 10, at 97.
\textsuperscript{71} SELZ ET AL., supra note 56, at § 9:106.
\textsuperscript{72} Pinguelo & Cedrone, supra note 29, at 355.
\textsuperscript{73} See House Un-American Activities Committee, ELEANOR ROOSEVELT
PAPERS PROJECT, http://www2.gwu.edu/~erpapers/teaching/author/glossary/huac.cfm (last visited
May 1, 2019).
\textsuperscript{74} Kressler, supra note 11, at 238; House Un-American Activities Committee,
supra note 73.
\textsuperscript{75} Kressler, supra note 11, at 238.
writers, and actors seeking to uncover an alleged Communist infiltration of Hollywood.\textsuperscript{76} Ten of these individuals were deemed \textit{unfriendly} by the HUAC for their failure to testify about their political affiliation.\textsuperscript{77} These ten later came to be known as the \textit{Hollywood Ten}.\textsuperscript{78} This notoriety caused three of the ten writers, Lester Cole, Ring Lardner, and Robert Scott, to be terminated from employment by their respective studios due to their morals clauses being triggered.\textsuperscript{79}

The McCarthy era marked the first time morals clauses had been litigated in court which ultimately ensured that morals clauses would gain enough judicial acceptance to endure into the modern age.\textsuperscript{80} In \textit{Loew’s, Inc. v. Cole},\textsuperscript{81} Lester Cole brought suit against his former employer, Loew’s (under the trade-name MGM), for the termination of his contract after he refused to testify in front of the HUAC.\textsuperscript{82} Cole brought an action against MGM seeking a declaratory judgement that MGM did not have the right to terminate the contract.\textsuperscript{83} MGM contends that Cole’s failure to testify to the HUAC brought him under public disrepute and invoked his morals clause.\textsuperscript{84}

\begin{itemize}
  \item [76.] Pinguelo & Cedrone, \textit{supra} note 29, at 355.
  \item [77.] \textit{Id.}; Kressler, \textit{supra} note 11, at 238.
  \item [78.] Kressler, \textit{supra} note 11, at 238.
  \item [79.] \textit{Id.}.
  \item [80.] Gallagher, \textit{supra} note 10, at 94–96; see also Pinguelo & Cedrone, \textit{supra} note 29, at 356.
  \item [81.] 185 F.2d 641 (9th Cir. 1950).
  \item [82.] \textit{Id.} at 645.
  \item [83.] \textit{Id.} at 647.
  \item [84.] \textit{See Cole,} 185 F.2d at 645.
\end{itemize}

On December 2, . . . [Cole] was sent a notice of suspension reading as follows: “Dear Mr. Cole: At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee. By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us
Cole argued that his conduct did not invoke the morals clause because his failure to testify was political conduct rather than immoral conduct. Nonetheless, the court found that failure to testify to a congressional committee was sufficiently immoral to invoke the morals clause since Cole did not conduct himself with due regard [for] public conventions. Thus, in upholding the clause within the contract, the court legitimized the existence of morals clauses and acknowledged their value in curbing immoral conduct.

Similarly, in *RKO Radio Pictures, Inc. v. Jarrico*, motion picture screen writer Paul Jarrico, refused to testify before the HUAC about his alleged Communist ties. RKO brought a declaratory judgement action, seeking a determination that the company had no obligation to give Jarrico screen credit based on the invocation of the morals clause in their contract. RKO alleged that the morals clause was triggered because Jarrico had “brought himself into public disrepute” by invoking the Fifth Amendment during the HUAC proceedings. The court held that Jarrico violated the morals clause and thus he was not entitled to screen credit because his refusal to testify in front of the HUAC qualified as immoral conduct. Thus, the California Second District Court of Appeal upheld the clause in the contract and further legitimized morals clauses in the Hollywood entertainment industry.

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as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.”

*Id.* at 928–29.

85. *Id.* at 647.

86. *Id.* at 648–49.

87. *See id.*


89. *Id.* at 929.

90. *See id.*

91. SELZE ET AL., supra note 56, at § 9:106; *see also RKO Radio Pictures, Inc.*, 274 P.2d at 929–30.


93. *See id.*
Consistent with the holdings of *Loew’s* and *RKO*, the Ninth Circuit also upheld morals clauses in similar entertainment contracts. Even after Americans’ fear of a looming communist invasion dwindled, these clauses continued to be used against ostracized celebrities due to increased judicial acceptance.

### 3. The Modern Morals Clause

Morals clauses, once created to improve the low public perception of Hollywood and out concealed communists, are now standard provisions in motion picture and television talent agreements thanks to the judicial legitimacy afforded to them in the 1950s. This newfound judicial acceptance helped fashion morals clauses to be efficient tools in the modern age; tools used to terminate an agreement after public perception of talent took a turn for the worst. However, the changing moral landscape has not only changed the way morals clauses are used but also how frequently they are used. Today, these types of clauses are widely upheld but now focus on battling deviations from modern ethical standards. By examining this morphology, this Comment will discuss how the modern use of morals clauses will be used to fight an emerging ethical dilemma—rampant sexual misconduct in Hollywood. In order to understand how morals clauses will be used in the future, it is prudent to have background information on the catalyst for this change, the #MeToo movement—its inception, its influence, and its impending change to Hollywood entertainment contracts.

### III. The #MeToo Movement

Hollywood has had its fair share of celebrity scandals, but it has never experienced anything like the #MeToo movement. “The phrase and hashtag [#MeToo] has been one of the most viral and powerful [trends] in

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94. *See id.* at 930; Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 847–48 (9th Cir. 1954); *Loew’s*, Inc. v. Cole, 185 F.2d 641, 658 (9th Cir. 1950).
96. *See id.* at 94–96; Kressler, *supra* note 11, at 250.
98. *See Robehmed,* *supra* note 16.
100. *See Robehmed,* *supra* note 16.
101. *See Gallagher,* *supra* note 10, at 98; Robehmed, *supra* note 16.
103. *See Morris,* *supra* note 4.
The movement, started by activist Tarana Burke nearly a decade ago, was *catapulted* from a small grassroots organization into an international powerhouse in a matter of months. Since its inception, the movement has sought to advocate for the survivors of sexual violence in low income communities and promote a more substantive discussion on sexual violence in the workplace. In less than six months, Hollywood’s rampant sexual harassment epidemic was thrust into the national and international discourse by victims, their allies, and supporters.

The unprecedented maelstrom that is the #MeToo movement began when actress Ashley Judd came forward about her experience with Hollywood producer and film mogul Harvey Weinstein in which she divulged that Weinstein made sexual advances towards her in exchange for a boost in her career. Since Judd’s revelation, eighty-seven women have come forward accusing Weinstein of sexual impropriety, including rape, over a span of two decades. These allegations led to Weinstein’s termination as chief executive officer (“CEO”) of the Weinstein Company, the Weinstein...
Company’s subsequent bankruptcy,\textsuperscript{111} and the filing of formal charges against Weinstein.\textsuperscript{112} In June 2018, Weinstein pleaded not guilty to two counts of rape and one count of first degree criminal sex act in the Supreme Court of New York.\textsuperscript{113}

The #MeToo movement truly became an international phenomenon when, in the aftermath of the Weinstein scandal, actress Alyssa Milano encouraged her Facebook and Twitter followers to share their experiences by replying \textit{me too} to her post.\textsuperscript{114} “The hashtag was [retweeted] nearly a million times in [forty-eight] hours . . . .”\textsuperscript{115} On Facebook, there were approximately twelve million posts and comments about #MeToo in less than twenty-four hours.\textsuperscript{116} Internationally, more than eighty-five countries registered tweets exceeding one thousand, with the hashtag totaling approximately 1.7 million tweets world-wide.\textsuperscript{117} But the movement did not stop with Harvey Weinstein.\textsuperscript{118} Since the hashtag went viral, more than eighty celebrities and other public figures have been accused of sexual misconduct, harassment, or assault,\textsuperscript{119} including Kevin Spacey,\textsuperscript{120} Louis C.K.,\textsuperscript{121} Bill O’Reilly,\textsuperscript{122} Bill

\begin{itemize}
  \item[113.] \textit{Id.}
  \item[116.] \textit{Id.}
  \item[117.] Radu, supra note 114.
  \item[118.] Samantha Cooney et al., \textit{Here Are All the Public Figures Who’ve Been Accused of Sexual Misconduct After Harvey Weinstein}, TIME (Oct. 4, 2018, 12:01 PM), http://www.time.com/5015204/harvey-weinstein-scandal/.
  \item[119.] \textit{Id.}
\end{itemize}
Cosby, and Morgan Freeman. The movement, in fact, gained so much attention that it even expanded out of Hollywood and into politics, academia, and other industries. Due to the all-encompassing scope of the movement, it is not surprising that #MeToo has had an effect on...


In recent months alone, at least twenty-nine powerful men in entertainment, business, and the news media have been publicly condemned for their alleged sexual misconduct and many have lost their jobs as a result. The backlash and national conversation have spurred a chorus of voices joining the #MeToo movement. That focus has lately turned to national politics. The allegations, reactions, and consequences span a wide range. Al Franken resigned as a U.S. senator for Minnesota, while Alabama Senate candidate Roy Moore continued to campaign, even garnering the support from President Donald Trump, himself the target of at least sixteen sexual misconduct allegations. Id.

Hollywood’s talent and finances. Since the inception of morals clauses, Hollywood studios and production companies have always paid close attention to how the public perceives the celebrities they contract with and, in turn, their own reputation. The shift in norms pertaining to reporting sexual harassment and assault have put Hollywood film and television companies in a difficult situation as many of the celebrities they contracted with have become toxic. This Comment will address this issue and explain how the #MeToo movement has affected Hollywood film and television companies and the ramifications it has had for the celebrities accused of sexual impropriety.

IV. #MeToo’s Effect on Hollywood’s Talent and Finances

The accusations of sexual assault against popular celebrities have hit Hollywood studios right where it hurts—their pockets. In the wake of the #MeToo movement, several celebrities have had their careers ended or have had their future projects terminated. This section will address the effect of the #MeToo movement on Hollywood and talent to better understand why Hollywood studios are looking to expand the use of morals clauses, and draft them in a way that allows for termination of the contract in light of serious accusations of sexual misconduct or assault, instead of just charges or convictions of these offenses. Case studies on the Harvey Weinstein, Kevin Spacey, and Louis C.K. accusations will be used to illustrate this expansion of the morals clause. As this Comment addresses, some of these celebrities did not have a morals clause inserted into their talent agreements—an issue Hollywood now plans to remedy.

A. Weinstein’s Termination

In the incident that catapulted the #MeToo movement, the Weinstein case shows just how much a Hollywood company can lose in the face of

128. Siegel, supra note 5; Wood, supra note 127.
129. See Epstein, supra note 50, at 75–76.
130. See Siegel, supra note 5.
131. Id.
132. Id.
133. Id.
134. Robehmed, supra note 16.
135. See Ryzik et al., supra note 121; Siegel, supra note 5.
sexual harassment allegations made against an employee. Weinstein was terminated as chairman of the Weinstein Company after more than eight women accused him of sexual misconduct, including rape. The film producer had a loose morals clause in his contract with the Weinstein Company that could only have been triggered if he failed to pay fines and any costs incurred by the company due to his behavior. This behavior allegedly included sexual harassment and other misconduct, giving the film producer a contractual loophole to avoid termination of the contract if he was accused. However, Weinstein was still able to be terminated by the company who forced him out in late 2017. Following Weinstein’s termination, the company planned to undergo an internal investigation of the allegations which could cost the company approximately twenty million to forty million dollars. Additionally, New York Attorney General Eric Schneiderman filed charges against Harvey Weinstein and Bob Weinstein, his brother and co-chairman of the company, alleging that “the company failed to respond” to sexual harassment allegations in the past and even contractually shielded Harvey from termination.

139. Sullivan, supra note 136.
140. Richard Morgan, Board Approval Harvey’s Contract Suggests TWC Complicity, N.Y. POST, June 7, 2018, at 29. “According to the contract, which Weinstein signed in 2015, a first offense would cost him $250,000, a second $500,000 and a third $750,000. For each additional instance, the contract continued, the cost to Weinstein would level out at [one] million [dollars].” Id.
141. Galuppo & McClintock, supra note 137.
143. DiNapoli, supra note 138.
against Weinstein increased, the reputation and value of his former company decreased.\textsuperscript{144} After months of legal and financial troubles, the Weinstein Company filed for bankruptcy in March 2018.\textsuperscript{145}

B. Spacey’s Termination

In the case of Kevin Spacey, the Oscar winning actor and \textit{House of Cards} star was accused by over thirty men of sexual assault.\textsuperscript{146} On October 30, 2017, actor Anthony Rapp was the first to make an accusation against Spacey, claiming that he was fourteen and Spacey was twenty-six when Spacey made a sexual advance towards him in 1986.\textsuperscript{147} Rapp alleged that “Spacey laid on top of him” and tried to seduce him at Spacey’s apartment.\textsuperscript{148} The next day, “Netflix, the network behind Spacey’s \textit{House of Cards} drama, [stated that it was] deeply troubled by the [allegations].”\textsuperscript{149} On November 3, 2017, Netflix severed ties with Spacey while \textit{House of Cards} was in production in its sixth season.\textsuperscript{150} The streaming service publicly announced that it will “not be involved with any further production of \textit{House of Cards} that includes Kevin Spacey.”\textsuperscript{151} This severance of the Netflix/Spacey relationship included the decision to not release the film \textit{Gore}, the Gore Vidal biopic, which was in postproduction at the time.\textsuperscript{152} Spacey contested his termination and claimed that “Netflix [could not] legally fire him because his contract did not contain a moral[s] clause.”\textsuperscript{153} According to Spacey’s contract, he can only be suspended or terminated “if he becomes unavailable or incapacitated.”\textsuperscript{154} However, Spacey was neither

\textsuperscript{144.} See id.

\textsuperscript{145.} Id.


\textsuperscript{147.} Id.

\textsuperscript{148.} Id.; see also \textit{House of Cards}, supra note 146.

\textsuperscript{149.} Id.; see also \textit{House of Cards}, supra note 146.


\textsuperscript{151.} Id.

\textsuperscript{152.} See Kevin Spacey Timeline: How the Story Unfolded, supra note 146; Phillips, supra note 150; see also \textit{House of Cards}, supra note 146.

\textsuperscript{153.} Sullivan, supra note 136.

unavailable or incapacitated since “he voluntarily checked himself into treatment in Arizona” after the accusations against him surfaced. Netflix and the production company, Media Rights Capital, were able to circumvent this issue by suspending the actor based on a sexual harassment policy. Nonetheless, the decision to remove Spacey from Cards and not release the feature film Gore reportedly cost Netflix $39,000,000. Additionally, Spacey was also set to star in the Ridley Scott-directed film All the Money in the World, but was ultimately cut due to the allegations and the role was recast to another actor, Christopher Plummer. The decision to cut Spacey out of a film that had already wrapped and replace him with another actor was unprecedented, since the film was due to be released just six weeks after the decision. Imperative Entertainment, which produced the film, reportedly spent $10,000,000—a quarter of the movie’s original budget—to reshoot Spacey’s scenes.

C. Louis C.K.’s Termination

On November 9, 2017, approximately a month after the Weinstein accusations and a week after Spacey’s, the New York Times published a story regarding sexual misconduct accusations made by five women against famed comedian and actor, Louis C.K. Dana Min Goodman and Julia Wolov, a Chicago comedy duo, alleged that during a 2002 visit to C.K.’s hotel room, he got completely undressed and masturbated in front of them. Similarly, comedian Rebecca Corey was asked by C.K. if he could masturbate in front of her. A day after these accusations surfaced, the

155. Id.
156. Id.
159. Lang & Kroll, supra note 158.
162. Ryzik et al., supra note 121.
163. Id.
comedian came forward and admitted to his sexual misconduct. FX Productions subsequently cut ties with Louis C.K. and will no longer credit him as executive producer; he will also no longer receive compensation for the four shows the comedian was producing for the FX network, including the critically acclaimed series Louie. HBO cancelled C.K.’s appearance on Night of Too Many Stars: America Unites for Autism Program and refused to show his past projects on its on-demand services. Additionally, C.K.’s film I Love You, Daddy, initially slated for release the week the allegations surfaced, had its premiere cancelled and was not released domestically or internationally. Following a setback, the Orchard, who initially bought the right to the film for $5,000,000, pressed Louis C.K.’s attorneys for a return deal. Netflix also cancelled a standup special deal with the comic, estimated to have been worth nearly $30,000,000. However, because the agreement contained a morals clause, the service provider only paid the comic for the special that was filmed, saving the company millions.

D. Analysis

The Weinstein, Spacey, and C.K. incidents shed light on the motivations of Hollywood studios and executives in their push to include broader morals clauses in future entertainment contracts. In Weinstein’s


166. Berg, supra note 165; see also Night of Too Many Stars: America Comes Together for Autism Programs (Comedy Central broadcast Mar. 8, 2015).

167. Izadi, supra note 164; I LOVE YOU, DADDY (Circus King Productions).


170. Berg, supra note 165.

171. Id.

172. Robehmed, supra note 16.
case, the accusations leveled against him led to his fall from grace in Hollywood and the filing of criminal charges against him.\textsuperscript{173} Additionally, the accusations led to a well-established and profitable company like the Weinstein Company to fall in a matter of mere months.\textsuperscript{174} Just a few weeks later, Kevin Spacey, a critically acclaimed and Oscar award winning actor, went from one of the most highly paid celebrities in 2016 to a social pariah in a matter of days.\textsuperscript{175} Additionally, Spacey was paid for the entire final season of \textit{House of Cards}, even though he does not appear in a single episode.\textsuperscript{176} Similarly, Louis C.K., beloved comic and powerhouse of the comedy industry, lost nearly every means of his former income in the span of days, however, he was still paid for the first Netflix stand up special which has never been released.\textsuperscript{177} Although the indie film company, The Orchard, managed to recoup the cost of the film by buying and reselling \textit{I Love You, Daddy} back to C.K, the company could not recoup the revenue the film would have generated if the film had been released.\textsuperscript{178} Thus, in light of these financial pitfalls, Hollywood is ready to turn to morals clauses once more.\textsuperscript{179}


From high-ranking movie executives to movie stars, rampant sexual harassment and rape are now altering how business in Hollywood is conducted.\textsuperscript{180} The fear of financial loss and declining public perception has led some Hollywood studios and executives to consider the addition of broad morals clauses in entertainment contracts as a solution to their woes.\textsuperscript{181} These broad morals clauses will be drafted in such a way as to account for accusations of sexual harassment or rape, not just formal charges and convictions for these offenses.\textsuperscript{182} Fox is one studios that is attempting to insert broad morals clauses into talent agreements.\textsuperscript{183} The Fox provisions

\begin{itemize}
  \item[173.] See id.
  \item[174.] See DiNapoli, supra note 138.
  \item[176.] Siegel, supra note 5.
  \item[177.] See Berg, supra note 165.
  \item[178.] See D’Alessandro, supra note 169.
  \item[179.] Siegel, supra note 5.
  \item[180.] Robehmed, supra note 16.
  \item[181.] See id.
  \item[182.] Id.
  \item[183.] Siegel, supra note 5.
\end{itemize}
would allow for the termination of the talent agreement “if the talent engages in conduct that results in adverse publicity or notoriety or risks bringing the talent into public disrepute, contempt, scandal, or ridicule.”\textsuperscript{184} Paramount Pictures is another studio eyeing the inclusion of broad morals clauses in entertainment contracts with talent.\textsuperscript{185} Further, several smaller distributors have already started to include them in their contracts.\textsuperscript{186} An example of a broad morals clause already added to a talent agreement by one film distributor is:

\begin{quote}
In the event Distributor becomes aware of a violation or alleged violation of Distributor’s policy by any key individual whether or not such violations occurred prior to, during, or after such services were provided, or Distributor becomes aware that a Key Element has committed or has been charged with an act considered under state or federal laws to be a felony or crime of moral turpitude, then Distributor shall have the right to: (i) cease distribution of the Picture; (ii) delete any credit given to such Key Element in connection with the picture; and/or (iii) modify, edit, and/or reshoot the Picture to the extent necessary to remove the Key Element from the Picture.\textsuperscript{187}
\end{quote}

However, these clauses will not just affect talent.\textsuperscript{188} Morals clauses will also be added to cover Hollywood executives too, since directors and talent can also be detrimentally affected by the actions of high-ranking executives, like Harvey Weinstein, especially if those figures become associated with sexual impropriety.\textsuperscript{189}

The inclusion of these morals clauses in Hollywood contracts is already under fire.\textsuperscript{190} The Directors Guild of America and the Writers Guild of America are labor unions that have long banned morals clauses in member agreements and are especially wary of the incoming wave of broader morals clauses.\textsuperscript{191} Many others hypothesize that broader morals clauses in contracts

\begin{quote}
We are also hearing reports as well of more widespread use of increasingly onerous morality clauses, and that is obviously a significant concern for us . . . . While we do not have contract language directly prohibiting these clauses, we will be taking a close look at this issue to ensure that the union is taking all appropriate measures to protect our members.
\end{quote}
are bad precedent because they allow for an agreement’s termination in the event that the talent or executive is merely accused of sexual misconduct or rape and not formally charged with any crime. Additionally, some argue that broad morals clauses can once again be used to target innocent individuals, like the Hollywood Ten scandal of the McCarthy era, and lead to unfair termination. This Comment will address these concerns and opine that this new era of broader morals clauses are here to stay.

VI. THE NEW MORALS CLAUSES ARE HERE TO STAY

Hollywood’s push for broader morals clauses in the wake of the #MeToo movement may strike some as a truly unprecedented move. While it is true that the #MeToo movement has reverberated throughout the entertainment industry in a way no other movement has, broad morals clauses are nothing new and remain consistent with the morals clauses of the past. The new morals clauses are here to stay for three reasons: first, they are very similar to the morals clauses of the early and mid-1900s and will be used in consistence with the morals clauses of the past. Second, like the morals clauses of the twentieth century, the new wave of broader and more expansive morals clauses will be upheld by the courts since previous courts have upheld similar provisions. Third, public policy calls for the inclusion of broader morals clauses to help remedy the epidemic of rampant sexual misconduct in Hollywood.

A. Broad Morals Clauses Are Nothing New

Since the inception of the morals clause, morals clauses have typically been drafted broadly giving the contracting employer the power to terminate the contract in the event that the talent commits an offense that

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192. See id.
193. Id.; see also Epstein, supra note 50, at 76–78.
194. See discussion infra Part VI.
195. Siegel, supra note 5. Lawyer Linda Lichter said, “[t]his is a whole new territory.” Id.
196. See Gallagher, supra note 10, at 92–93.
197. Id.
198. Id. at 96; see also Epstein, supra note 50, at 77; Kressler, supra note 11, at 245–46.
brings them or the company in public disrepute.\textsuperscript{200} The Universal Film Company’s first morals clause in 1921 did not include the exact conduct that would trigger the provision, such as a conviction of a specific type of felony.\textsuperscript{201} Instead, the clause conveyed broad sweeping language that allowed for the termination of the contract for a variety of reasons.\textsuperscript{202} For example, the 1921 Universal morals clause was drafted in a manner that allowed for the termination of the contract if the talent did not “conduct himself—he herself—with due regard to public conventions and morals.”\textsuperscript{203} Further, the clause also gave the employer the right to terminate the contract if the talent engaged in conduct that tended to “shock, insult, or offend the community or outrage [the] public morals [and] decency.”\textsuperscript{204} The recently proposed Fox morals clause is similarly drafted in an all-encompassing manner, allowing for the termination of the agreement if the talent’s behavior results in “adverse publicity or notoriety or risks bringing the talent into public disrepute, contempt, scandal or ridicule.”\textsuperscript{205} Thus, the new broader morals clauses are not a novel phenomenon in the entertainment industry and are consistent with the broadly tailored morals clauses of the past.\textsuperscript{206}

B. **Broader Morals Clauses Will Be Used as Originally Intended**

The new wave of broad morals clauses will also be used as originally intended—as a tool the contracting employer equips against negative public perception of the talent or, by association, the company.\textsuperscript{207} Much like the aftermath of the Fatty Arbuckle scandal of 1921, contracting employers of today see morals clauses as a method to protect themselves from financial ruin.\textsuperscript{208} As the #MeToo movement has shown Hollywood, sexual assault and rape accusations made against talent hurt their employers financially because of the talent’s negative perception in society.\textsuperscript{209} Thus, these broader morals

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\begin{itemize}
  \item \textsuperscript{200} Gallagher, supra note 10, at 92–97. “[T]he language of morals clauses has only been slightly altered over time . . . .” \textit{Id.} at 92. “[M]orals clauses today are not all that different from the original one instituted by Universal Film Company in 1921.” \textit{Id.} at 97.
  \item \textsuperscript{201} \textit{Id.} at 93.
  \item \textsuperscript{202} \textit{Id.}
  \item \textsuperscript{203} Gallagher, supra note 10, at 93; Morality Clause for Films: Universal Will Cancel Engagements of Actors Who Forfeit Respect., supra note 64.
  \item \textsuperscript{204} Gallagher, supra note 10, at 93; Morality Clause for Films: Universal Will Cancel Engagements of Actors Who Forfeit Respect., supra note 64.
  \item \textsuperscript{205} Siegel, supra note 5; see also Gallagher, supra note 10, at 93.
  \item \textsuperscript{206} Gallagher, supra note 10, at 93–94 (discussing that the language of morals clauses has remained largely unchanged since the 1920s).
  \item \textsuperscript{207} Pinguelo & Cedrone, supra note 29, at 352; Gallagher, supra note 10, at 88, 97.
  \item \textsuperscript{208} Gallagher, supra note 10, at 88, 93.
  \item \textsuperscript{209} Fiegerman, supra note 157; Robehmed, supra note 16.
\end{itemize}
\endgroup
clauses are merely tools to stymie the probability of financial loss in the event of an accusation of sexual ignominy.\textsuperscript{210} However, there are those who fear that broader morals clauses set a bad precedent because they could be used inappropriately.\textsuperscript{211} Those who share this opinion about broad morals clauses assert that they can be used in malicious ways to target innocent people and refuse them pay.\textsuperscript{212} These individuals allude to the inappropriate usage of the morals clause in the late 1940s and 1950s, when morals clauses were used to target suspected communists.\textsuperscript{213} However, the comparison between the #MeToo and the Red Scare is a false dichotomy because where #MeToo sought to help the victims of an industry infected by the epidemic of sexual harassment and rape, the McCarthy era was wrought with the malicious targeting of individuals merely due to political intolerance.\textsuperscript{214} Further, it is unlikely that targeting those accused of sexual misconduct will lead to a witch hunt and the unnecessary termination of talent contracts because this would be a counterintuitive business venture of the employer.\textsuperscript{215} An employer would likely only use the morals clause to terminate an agreement if there is a substantial reason to do so, including multiple allegations of sexual assault or rape or a single allegation with valid and unequivocal evidence.\textsuperscript{216}

C.\textbf{ Broader Morals Clauses Will Be Upheld in Court}

Like the morals clauses of yesterday, it is likely that the new wave of broader morals clauses will similarly be upheld by courts.\textsuperscript{217} In fact, litigants typically allege that morals clauses are broadly or ambiguously drafted to such a degree that they did not have knowledge of what conduct would trigger the clause.\textsuperscript{218} These allegations are commonly dismissed as without merit.\textsuperscript{219} For example, in \textit{Nader v. ABC Television, Inc.},\textsuperscript{220} a United States

\begin{itemize}
\item \textsuperscript{210} Robehmed, \textit{supra} note 16.
\item \textsuperscript{211} Siegel, \textit{supra} note 5.
\item \textsuperscript{212} See Robehmed, \textit{supra} note 16.
\item \textsuperscript{213} "[I am] all for [#MeToo]. I totally support it. But I think [broad morality clauses] create a bad precedent," says attorney Linda Lichter. "[It is] one thing to say someone is a criminal. [It is] another thing to say someone has been accused by someone and you can fire them and not pay them."
\item \textsuperscript{218} See id. at **2, **5–7.
\item \textsuperscript{219} See id. at **2, **5–7.
\end{itemize}
Court of Appeals upheld a morals clause in a talent agreement between Michael Nader, an actor on soap opera *All My Children*, and his employer, American Broadcasting Company (“ABC”). After Nader was arrested for “one count of criminal sale of a controlled substance . . . and one count of resisting arrest,” ABC subsequently terminated him from employment and Nader was written out of the show for violation of his morals clause. Nader filed a lawsuit against ABC alleging the morals clause was ambiguous, overly broad, and vague on its face. The trial court granted summary judgement for ABC holding that Nader’s arrest was a proper trigger for the clause. On appeal, the Second Circuit agreed with the trial court’s decision that morals clauses have long been upheld as valid and enforceable. Further, the court held that Nader’s actions were a proper trigger for the morals clause because his conduct generated negative media attention upon ABC. It is implied in the court’s reasoning that the assertion that the clause was overbroad was meritless because, although there wasn’t specific language in the contract that stated that the agreement could be terminated in the event of an arrest, the language did specifically state that any conduct that damages the reputation of the employer could trigger the clause. Thus, regardless of any formal charges, a morals clause will be upheld if the employee’s behavior adversely affects the employer’s reputation.

Similarly, in *Galaviz v. Post-Newsweek Stations*, the Fifth Circuit upheld a morals clause in an employment contract holding that a plaintiff’s behavior that adversely affects the employer’s reputation is a sufficient trigger for a morals clause. In this case, Virginia Galaviz, a television...
news reporter, was terminated by her employer, Post-Newsweek Stations, for triggering her morals clause after a domestic dispute led to her arrest.\textsuperscript{231} The morals clause did not specifically include language that stated that an arrest would trigger the morals clause.\textsuperscript{232} Galaviz filed a lawsuit against her former employer and the district court granted summary judgment in favor of Post-Newsweek.\textsuperscript{233} On appeal, Galaviz claimed that her morals clause was broad and ambiguous.\textsuperscript{234} Nonetheless, the Fifth Circuit held that her conduct was a sufficient trigger for the morals clause and that it was not broad nor ambiguous.\textsuperscript{235} The court reasoned that since her morals clause included language allowing for the termination of the agreement if the employee’s behavior “adversely affects the reputation or business of [the station] or the standing of [the station]” and Galaviz’s conduct did result in the negative publicity of the company, then the termination of Galaviz was wholly justified.\textsuperscript{236} Thus, regardless of an arrest, an employee’s conduct that negatively impacts the reputation of the employer will be sufficient to trigger a morals clause.\textsuperscript{237}

Regarding the new wave of broader morals clauses after the #MeToo movement, the clauses will allow for the termination of the agreement even if the talent is merely accused of sexual harassment or rape.\textsuperscript{238} It is the employer’s discretion to determine whether the accusations warrant the termination of the agreement.\textsuperscript{239} However, unlike Nader and Galaviz, the new wave of morals clauses will include language that specifically states that accusations of sexual harassment or rape could ultimately trigger the morals clauses.\textsuperscript{240} It is worth noting that the contracts in both Nader and Galaviz did not include specific language that arrests would trigger their respective

\begin{itemize}
\item 231. Id. at **2.
\item 232. Id.
\item 233. Id.
\item 234. Id. at **5.
\item 235. Id. at **2, **5 (alteration in original).
\item 236. See id.
\item 237. Siegel, supra note 5.
\item 238. Gallagher, supra note 10, at 91.
\item 239. See also Galaviz, 2010 U.S. App. LEXIS 11790, at **2; Nader v. ABC Television, Inc., No. 04-5034, 2005 U.S. App. LEXIS 19536, at **6 (2d Cir. 2005).
\end{itemize}
morals clauses and yet the courts still upheld these clauses, reasoning that any action that adversely affects the employer is sufficient to trigger the moral clauses and terminate the agreement.\(^\text{241}\) It is likely that since modern entertainment agreements will specifically state that accusations are enough to trigger a clause, future talent cannot successfully claim that the new morals clauses in their contracts are overly broad and ambiguous since they will receive ample notice of these triggers.\(^\text{242}\) Thus, it logically follows that if the broad morals clauses of the past have been upheld by the courts, then it is likely that the new wave of broader morals clauses that account for sexual misconduct and rape allegations will similarly be upheld by the courts, so long as the conduct adversely impacts the employers reputation.\(^\text{243}\)

D. **Broader Morals Clauses Make Sense**

Given the significant implications sexual assault and rape have on victims, it is prudent that Hollywood, and other companies, adopt broader morals clauses in entertainment contracts that can be terminated by legitimate allegations of sexual misconduct or assault.\(^\text{244}\) Broader morals clauses will better serve public policy because they can help shed light on the sexual harassment and assault culture in Hollywood and serve as a restraining influence on talent to prevent future sexual misconduct.\(^\text{245}\) #MeToo’s modus operandi is to help victims of sexual assault and violence by shedding light on workplace misconduct and broader morals clauses in Hollywood contracts can help assist in this endeavor.\(^\text{246}\) Hollywood has already seen an unprecedented shift in culture in the wake of #MeToo.\(^\text{247}\) Influential organizations have updated their codes of conduct and are implementing new rules to curb talent’s misbehavior.\(^\text{248}\) Additionally, Hollywood’s culture of silence on sexual violence has been breached and handed legal artillery in the war against sexual violence in the form of Time’s Up.\(^\text{249}\) The Time’s Up Legal Defense Fund offers legal and financial support


\(^{242}\) See Robehmed, supra note 16; Siegel, supra note 5.

\(^{243}\) See Gallagher, supra note 10, at 88; Sullivan, supra note 136.

\(^{244}\) See Dorsey, supra note 199.

\(^{245}\) See id.

\(^{246}\) See Siegel, supra note 5.


\(^{248}\) Id.

\(^{249}\) See Langone, supra note 105.
for men and women who desire to fight sexual misconduct by use of the justice system. Legal and financial support coupled with a broader morals clause can help victims of sexual misconduct find justice in the courtroom.

Additionally, these types of morals clauses can serve as a deterrent to misbehavior by providing an incentive for talent to conduct themselves in a manner that would not trigger the clause. Morals clauses have always been intended to serve as a restraining influence on talent conduct and broader morals clauses are consistent with this intention. In the midst of the #MeToo era, the effects that sexual assault and rape allegations have on a celebrity’s career are apparent. The #MeToo effect on workplace culture is, in part, due to celebrities acknowledging the career ending implications of these allegations. Specifically inserting language into a provision of a contract further provides an incentive not to engage in these frowned upon behaviors by solidifying the exact type of behaviors that would ultimately trigger a morals clause.

VII. CONCLUSION

Morals clauses have been around for nearly one hundred years and have been sought out by employers as a means to protect their reputation in the public eye. For this reason, it is no surprise that in the wake of the #MeToo movement, Hollywood studios and executives turned their attention once again to morals clauses in an attempt to distance themselves away from toxic talent who were being tried in the court of public opinion. Whether these Hollywood companies are genuine in their sentiments against workplace sexual misconduct is beside the point. These companies are businesses like any other whose primary focus is to be as profitable as possible and aim to avoid financial ruin. Showing solidarity with the recent cultural trend of breaking the silence on workplace harassment is but a means of avoiding financial ruin. However, some feel uneasy about the prospect of terminating an agreement solely on the basis of mere allegations.

250. Id.
251. Id.; see also Robehmed, supra note 16.
252. Rosenbaum, supra note 44, at 131.
253. See id. at 151.
254. See Corey, supra note 125; Thorpe, supra note 104.
255. See Robehmed, supra note 16; Thorpe, supra note 104.
256. See Robehmed, supra note 16; Siegel, supra note 5.
257. Gallagher, supra note 10, at 88–89; Robehmed, supra note 16.
258. See Robehmed, supra note 16; Siegel, supra note 5.
259. See Robehmed, supra note 16; Siegel, supra note 5.
260. Siegel, supra note 5; see also Robehmed, supra note 16.
261. See Atkinson, supra note 247.
of misconduct.\textsuperscript{262} While these arguments mean well, they fail to take into account the nature of businesses as rational entities that would not terminate an agreement solely on the basis of a single unsubstantiated allegation with little public condemnation.\textsuperscript{263} A blog post on \textit{babe.net}\textsuperscript{264} accusing comedian and actor Aziz Ansari of sexual misconduct failed to lead to Ansari’s termination from Netflix.\textsuperscript{265} It is likely that Netflix, the streamer of Ansari’s show \textit{Master of None}, acknowledged that the allegations made against him were unsupported and did not cause the public to turn against him.\textsuperscript{266} It is even more likely that the streaming service took note of the public conversation that followed the accusation and determined that it did not rise to level of the allegations made against Kevin Spacey and Louis C.K.\textsuperscript{267} As of July 2018, \textit{Master of None} is available for streaming on Netflix.\textsuperscript{268}

This Comment has not attempted to tout what these actors do or do not deserve in light of these allegations.\textsuperscript{269} Nor has this Comment opined on the fairness of punishing these stars by terminating their contracts.\textsuperscript{270} This Comment has simply attempted to address the way in which societal shifts in norms and values affect talent contracts and the manner in which deals are made in Hollywood.\textsuperscript{271} The coming wave of broader morals clauses in Hollywood entertainment contracts in the wake of #MeToo is but an example of this phenomenon.\textsuperscript{272} The #MeToo movement is an illustration of how societal norms and values shape the law, but also serves as an example of how the law shapes society by including morals clauses in contracts, which may deter conduct and shed light on the phenomenon of workplace sexual misconduct.\textsuperscript{273} Therefore, the arguments made herein—that broader morals

\begin{footnotes}
\footnote{262. See Robehmed, \textit{supra} note 16; Siegel, \textit{supra} note 5.}
\footnote{263. See \textit{ZWEIG}, \textit{supra} note 26, at 768.}
\footnote{264. See Katie Way, \textit{I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life}, \textit{BABE} (Jan. 13, 2018), http://www.babe.net/2018/01/13/aziz-ansari-28355.}
\footnote{267. See \textit{id}.}
\footnote{268. \textit{Master of None} (3 Arts Entertainment 2015).}
\footnote{269. See discussion \textit{supra} Part IV.}
\footnote{270. See discussion \textit{supra} Part IV.}
\footnote{271. See discussion \textit{supra} Part V.}
\footnote{272. Siegel, \textit{supra} note 5.}
\footnote{273. See \textit{id}; Temin, \textit{supra} note 127.}
\end{footnotes}
clauses are not a new phenomenon—will not be abused, will be upheld in court, are consistent with public policy, and serve to alleviate several concerns about the broadening of morals clauses to account for allegations and accusations of sexual misconduct and assault. 274

274. See Gallagher, supra note 10, at 88, 104–05; Dorsey, supra note 199; Siegel, supra note 5.