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A MOST UNDEMOCRATIC PRACTICE: FELONY DISENFRANCHISEMENT AND ITS EFFECTS ON COMMUNITIES OF COLOR

Stephanie L. Williams*

I. INTRODUCTION

"Keeping people from voting has been an American tradition from the nation’s earliest days, when the franchise was restricted to white male landowners. Today, only one group of Americans may be legally barred from voting — those with felony records, a cruel and pointless restriction that disproportionately silences people of color."

Voting is often seen as the cornerstone of democracy and the epitome of a fundamental right. Despite this sentiment, millions of people in the United States are denied the right to vote due to "felony disenfranchisement." Felony disenfranchisement refers to when an otherwise eligible citizen is denied the right to vote due to a felony conviction. A felony — by definition — is a crime that is punishable by a year or more in prison and is generally reserved for more serious crimes. A consequence of a felony conviction in a vast majority of states is felony disenfranchisement. This consequence is characterized in the legal system as administrative rather than punitive, perhaps explaining why the practice is so prevalent throughout the country. If the practice were labeled as punitive, those affected would likely have more protections because there are constitutional safeguards against excessively punitive measures applied to criminal offenses.

Restrictions imposed by state-level disenfranchisement laws vary dramatically. Each state has the ability to determine how restrictive their felony disenfranchisement laws will be. Some states permanently deny citizens the right to vote long after they have paid their debt to society and have returned to their*

Stephanie L. Williams

5. See U.S. Const. amend. VIII.
communities to work, raise families, pay taxes, and otherwise live as law-abiding citizens. Illustrating an extreme opposite position, some states actually allow citizens serving time in prison to exercise their right to vote. State laws greatly impact their citizens and create huge disparities over felon rights throughout the country. In addition to the various levels of restrictions imposed on felons, felony disenfranchisement has a disproportionate effect on communities of color across the United States, specifically African Americans.⁶

Challenges to the constitutionality of these policies have made it all the way to the Supreme Court, where the Court held “that a state may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment.”⁷ The Fourteenth Amendment allows for felony disenfranchisement through its language in section two, which says the right to vote cannot be denied “except for participation in rebellion, or other crime.”⁸ The broad language used in this section, specifically “or other crime,” has allowed felony disenfranchisement policies to persist.⁹ The Fourteenth Amendment, along with the Thirteenth and Fifteenth, are collectively known as the Reconstruction Amendments and were adopted between 1865 and 1870, the five years immediately following the Civil War.¹⁰ These amendments were intended to extend constitutional protections to blacks following the end of the War and the abolishment of slavery, protections including the right to vote.¹¹

In this paper, I will argue that although the plain language of the Fourteenth Amendment allows for felony disenfranchisement, the original intent of the amendment was to expand suffrage. Pursuant to the original intent of the Fourteenth Amendment, upon full completion of a sentence voting rights should be restored to persons convicted of a felony. The restoration of voting rights would apply to states that do not restore voting rights to felons once they have completed their prison sentences along with any associated probation or parole.

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⁷. Richardson v. Ramirez, 418 U.S. 26, 56 (1974) (Marshall, J., dissenting to the Court’s holding while expressing why it is based on unsound historical analysis which has already been rejected by the Court).
⁹. Id.
¹¹. See Slaughter-House Cases, 83 U.S. 57, 71 (1872) (in reference to former slaves: “They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage. Hence the fifteenth amendment, which declares that “the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude.” The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.”)
There are three major reasons for this argument: modern day felony disenfranchisement policies function as voter suppression methods similar to what was used during the Jim Crow era, when state and local laws were used to enforce racial segregation resulting in inferior treatment for blacks,12 and violate the Equal Protection Clause; an original intent of the Fourteenth Amendment, subsequent constitutional amendments, and congressional acts support the expansion of suffrage; and felony disenfranchisement policies are subject to changes in political climate and leadership. I will also argue that felony disenfranchisement laws may be challenged under the Cruel and Unusual Punishment Clause of the Eighth Amendment.

A. Supreme Court Challenges to Felony Disenfranchisement

The landmark case concerning felony disenfranchisement, which essentially ended equal protection challenges, is Richardson v. Ramirez, where three California citizens sued for the restoration of their voting rights after serving their felony sentences.13 The argument presented was that the denial of these rights violated their right to “equal protection” under the Fourteenth Amendment. The Court denied this argument, citing language from Section Two of the Fourteenth Amendment allowing for the denial of voting rights “for participation in rebellion, or other crimes.”14 Courts have also relied on the reasoning that because a majority of states allow felony disenfranchisement and because these laws were written into a majority of state constitutions, they do not run afoul of the Fourteenth Amendment.15

In Hunter v. Underwood, the Court stated that felony disenfranchisement laws violate the Constitution if they have “both an impermissible racial motivation and racially discriminatory effect.”16 An Alabama statute was challenged in Hunter. The statute made offenses of “moral turpitude” eligible for disenfranchisement, including misdemeanors. The Court found that the crimes selected for inclusion were believed to be more frequently committed by blacks, resulting in “purposeful racial discrimination.”17 In fact, estimates placed the rates of disenfranchisement of blacks at ten times higher than whites based on the statute.18

14. Id. at 56.
15. Id. at 51-52.
17. Id. at 233.
18. Id. at 227.
The Voting Rights Act (VRA) is a landmark civil rights law passed in 1965 and was the pinnacle of the Civil Rights Movement. The VRA offered protections against discriminatory voting practices on the state and federal levels. The VRA was a necessary response to blatant discrimination and violence aimed primarily at African Americans throughout the 1950s and 60s. In general, courts have decided that the VRA was not intended to interfere with the right of states to disenfranchise felons. \footnote{19} \textit{Farrakhan v. Gregoire} is an exception to that general view. There, minority citizens of Washington state challenged a provision of the state’s constitution that automatically disenfranchised felons. \footnote{21} They argued that “minorities are disproportionately prosecuted and sentenced, resulting in their disproportionate representation among the persons disenfranchised under the Washington Constitution.” \footnote{23} They alleged that the disenfranchisement laws restricted and diluted voting rights on the basis of race and in violation of the VRA. \footnote{24}

Expert witnesses in the case established that racial disparities in the state’s criminal justice system could not be explained by legitimate factors; there was evidence of unwarranted racial disparities in vehicle search rates; there were observable racial differences in the processing of criminal cases; and blacks and Latinos were overrepresented while whites were underrepresented among drug arrestees. \footnote{25} The Court considered nine factors when determining whether, under the totality of the circumstances, a voting practice results in a race-based denial of the right to vote. \footnote{26} These factors include: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political

\footnote{20}{Id.}
\footnote{22}{Farrakhan v. Gregoire, 590 F.3d 989, 993 (9th Cir. 2010).}
\footnote{23}{Id.}
\footnote{24}{Id.}
\footnote{25}{Id. at 994-995.}
\footnote{26}{Id. at 998.}
campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.27

The Court held that the plaintiffs demonstrated that the discriminatory impact of the state’s felony disenfranchisement laws are attributable to racial discrimination and in violation of the VRA.28 Farrakhan was the first case to find a felony disenfranchisement law to be a violation of federal law due to racial discrimination found in a state’s criminal justice system.

B. Effects on Communities of Color

Felony disenfranchisement laws affect millions of people in the U.S. but the largest proportion of people negatively affected are people of color, namely African Americans. The next sections will discuss mass incarceration and felony disenfranchisement in the U.S. The state of Kentucky will also be discussed separately, as it is the state with the highest disenfranchisement rate for African Americans in the country. The rise of mass incarceration is directly related to felony disenfranchisement and it has been well-established that people of color are disproportionately represented in prisons and jails across the country.29

1. Mass Incarceration and Race in the United States

The U.S. incarcerates more people than any other country in the world and has almost twenty-five percent of the world’s prison population.30 This incarceration rate establishes that not only does the U.S. have the largest overall number of people behind bars, but it also incarcerates a larger share of its population than any other country.31 The U.S. remains the country with the highest incarceration rates despite the fact that crime and incarceration rates

27. Id. at 998-999.
28. Id. at 1016.
have declined drastically in recent decades. These gross incarceration rates have led to the country's current state of mass incarceration.\textsuperscript{32} In 1972, the jail and prison population was less than 200,000 but today is over 2.2 million.\textsuperscript{33} Incarceration rates in the U.S. have increased by more than 500% in the last forty years.\textsuperscript{34} Mass incarceration does not affect all communities in the same way. For example, an average U.S. male born in 2001 has a one in nine chance of being imprisoned in his lifetime.\textsuperscript{35} That chance is highly dependent on race: if he is white, that chance is one in seventeen; if he is Latino, one in six; and if he is black, one in three.\textsuperscript{36} These racial disparities exist at every level of the criminal justice system and result in a disproportionate percentage of racial minorities serving time behind bars and ultimately subject to felony disenfranchisement laws.

Currently, African Americans make up 13.4 percent of the U.S. population and whites make up 76.6.\textsuperscript{37} Whites are the overwhelming racial majority in the U.S. at this time yet African American males are six times more likely to be incarcerated than white males.\textsuperscript{38} Racial disparities also exist among females but are not as significant as with males.\textsuperscript{39} Many incarcerations in the U.S. are due to felonies and, as mentioned before, a consequence of many of these felonies is disenfranchisement.\textsuperscript{40}

2. Felony Disenfranchisement in the United States

States vary in the severity of restrictions on voting, from no restriction to a permanent voting prohibition. There are four categories of felony disenfranchisement: no restriction (two states); restriction while in prison (fourteen states); restriction while in prison or on parole and/or probation (twenty-one states); and restriction while in prison, on parole, probation, post-sentence, and ultimately permanent revocation (thirteen states).\textsuperscript{41} Only Maine and Vermont have no restrictions on voting and even those in prison are permitted to vote. Notably, these are the two states with the lowest minority

\textsuperscript{32} Id.
\textsuperscript{33} Mass Incarceration (Last visited July 12, 2018), EQUAL JUST. INIT., https://eji.org/mass-incarceration.
\textsuperscript{34} Criminal Justice Facts, SENT'G PROJ., https://www.sentencingproject.org/issues/incarceration/.
\textsuperscript{36} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Wagner & Sawyer, supra note 31.
populations in the country. There are six states where more than seven percent of the adult population is disenfranchised: Florida, Kentucky, Alabama, Mississippi, Tennessee, and Virginia.

Estimates as of 2016 placed the number of disenfranchised Americans at around 6.1 million people. Some states are far greater offenders than others. For example, as of 2016, Florida led the nation in the number of disenfranchised felons, with a staggering number close to 1.5 million. Of those 1.5 million disenfranchised voters, over twenty percent—or one in five—were black. Twenty-seven percent of all disenfranchised felons in the country lived in Florida and forty-eight percent of them had completed their sentences and were still barred from voting. On November 6, 2018, Florida voters approved a constitutional amendment that will automatically restore the right to vote for persons with felony convictions upon the completion of their sentence. This amendment will affect 1.4 million individuals within the state.

The disenfranchisement rate for African American men in the U.S. is seven times higher than all other groups and almost thirteen percent of black men are disqualified from voting due to a felony conviction. The disenfranchisement rate for African Americans also varies significantly by state. In four states more than one in five African Americans are disenfranchised. Those four states include Florida, Kentucky, Tennessee, and Virginia. Kentucky’s rate of African American disenfranchisement is the highest, at twenty-six percent.

3. Felony Disenfranchisement in Kentucky

Felony disenfranchisement policies are affecting minorities across the country at highly disproportionate rates but Kentucky has the highest disenfranchisement rate for African Americans nationwide. The statistics in the
bluegrass state are alarming. African Americans in Kentucky make up less than eight percent of the population yet account for twenty-one percent of the prison population and twenty-six percent are barred from voting. These numbers show that African Americans are grossly overrepresented in incarceration and felony disenfranchisement rates when compared to their population.

When it comes to felony disenfranchisement policies, Kentucky falls into the most restrictive category and is one of only four states that permanently ban former felons from voting in its constitution. Due to the recently approved constitutional amendment in Florida, Kentucky will be only one of three states with this harsh restriction. The permanent ban on voting means that if a person is convicted of a felony while below the legal voting age, that person may never be able to vote in their lifetime. Kentucky also has the third highest disenfranchisement rate in the U.S. overall. Kentucky will likely move to the second highest disenfranchisement rate following the recent change to Florida’s policy. When compared to the U.S. as a whole, Kentucky’s disenfranchisement laws affect communities of color more harshly. Nationwide, one in every thirteen African Americans has lost their right to vote because of felony disenfranchisement laws, compared to one in four in Kentucky. These numbers are in stark contrast to non-black voters, who are disenfranchised at a rate of one in fifty-six.

The Kentucky’s Secretary of State web site allows one to register to vote as an individual. In order to do so, six criteria must be affirmatively endorsed: confirming one’s U.S. citizenship status; confirming current residency in Kentucky; confirming that one is at least 18 years of age on or before the next general election; confirming one has not been judged “mentally incompetent” in a court of law; confirming one does not claim the right to vote anywhere outside of Kentucky; and confirming one is not a convicted felon, or if one has been convicted of a felony, that civil rights have been restored by executive pardon.

Voting rights for those convicted of felonies in Kentucky change with its political leadership. In 2015 then-Governor Steve Beshear restored voting rights to individuals with former non-violent felony convictions via executive order,

58. See UGGEN, LARSON, & SHANNON at 3.
59. Felony Disenfranchisement Up 68 Percent in Kentucky, supra note 56.
60. Chung, supra note 45.
61. Id.
restoring rights to nearly 180,000 Kentuckians. The order automatically restored voting rights to certain offenders once all terms of their sentences had been satisfied; the order excluded persons convicted of violent or sex crimes, bribery, or treason. Shortly after taking office, current Governor Matt Bevin reversed this executive order.

Many states automatically restore voting rights for many non-violent offenders who have completed their terms but Kentucky’s constitution only grants the governor that power. This can leave those with felonies with uncertainty surrounding their voting rights. Kentucky’s current policy for the restoration of rights is as follows, “[p]ersons convicted of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.” The Department of Corrections is required to promulgate administrative regulations for restoration of civil rights to eligible felony offenders.

III. RATIONALE FOR EXTENDING VOTING RIGHTS TO FELONS

There are numerous reasons for extending voting to felons. First, an original intent of the Fourteenth Amendment was to expand suffrage and provide equal protection for all citizens. Felony disenfranchisement laws are functioning as voter suppression tactics reminiscent of Jim Crow laws and, as shown above, are disproportionately affecting communities of color. Constitutional amendments and acts of Congress have continuously expanded voting rights, demonstrating support for the idea that expanded suffrage is beneficial for society. Second, although equal protection challenges have thus far been unsuccessful, law enforcement tactics such as selective enforcement and racial profiling may demonstrate the validity of these challenges. Third, felony disenfranchisement laws are subject to changes in political climate and leadership. A fundamental right is at stake with these laws and they should not be subject to these changes. Finally, challenges to these laws as cruel and unusual under the Eighth Amendment may have merit. Although felony disenfranchisement is not

67. Id.
generally regarded as a punishment, it is unduly punitive and burdensome on racial minorities.

A. Original Intent of the 14th Amendment and Its Effect on Racial Minorities

The Fourteenth Amendment to the Constitution was ratified in 1868 and prohibits states from denying any person within their jurisdiction the equal protection of the law and gives Congress the power to enforce the amendment through appropriate legislation.\textsuperscript{69} The intent of the Reconstruction Amendments, including the Equal Protection Clause, was to provide equal protection of the law for all citizens and includes the right to vote. The notion that the right to vote was intended for all citizens was strengthened by the passage of the Voting Rights Act in 1965, which dismantled many of the Jim Crow tactics that had effectively barred blacks from exercising their right to vote through methods of voter suppression.\textsuperscript{70}

1. Voter Suppression

Voter suppression is the act of keeping eligible voters from exercising their right to vote.\textsuperscript{71} Voter suppression has and does manifest in various ways and has historically been a method used by Republican leaders to suppress minority voters, most of whom tend to vote for the Democratic party.\textsuperscript{72} Voter suppression methods have progressed throughout the years as society has become more modern. Common voter suppression methods used primarily against African Americans prior to and following the Civil Rights Movement were intimidation, physical violence, Jim Crow laws, and gerrymandering.\textsuperscript{73} Courts have recognized some of these tactics and voter suppression methods have become more subtle and sophisticated.\textsuperscript{74} The election of Barack Obama, the first black president and a Democrat, resulted in nearly half of the states in the country passing laws

\textsuperscript{69}. U.S. Const. amend. XIV, § 1.
\textsuperscript{72}. N.C. State Conf. NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. N.C. 2016).
\textsuperscript{73}. Michael Waldman, \textit{The Fight to Vote} 228 (2016).
\textsuperscript{74}. N.C. State Conf. of the NAACP v. McCrory, 831 F. 3d 204, 242 (4th Cir. N.C. 2016)(Referring to changes in North Carolina’s voting practices, such as voter identification, early voting, and registration changes the court stated, “Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State’s true motivation.”)
making it harder to vote; the states with these changes were primarily led by Republican elected officials.\textsuperscript{75}

Felony disenfranchisement laws are functioning as modern-day voter suppression methods. One in thirteen black adults of voting age in the U.S. is barred from voting due to these laws.\textsuperscript{76} In four states—Florida, Tennessee, Virginia, and Kentucky—more than one in five black adults is disenfranchised.\textsuperscript{77} Many of the disenfranchisement laws were created following the Civil War during the late 1860s and 1870s, during the Reconstruction Era, and after the Fifteenth Amendment guaranteed that black males could vote.\textsuperscript{78} States with higher populations of minorities also tend to have stricter felony disenfranchisement laws.\textsuperscript{79} The modern intent of these laws, debatably, may not be to silence the political power of minority communities, but the end result is a discriminatory effect on minority communities.

Confusing felony disenfranchisement policies can even deter eligible voters from voting.\textsuperscript{80} Some policies are so complex that even election officials misinterpret them and convey inaccurate information to voters, sometimes resulting in eligible voters being told that they are ineligible.\textsuperscript{81} Studies have determined that states with lifetime disenfranchisement policies have lower voter turnout rates among black non felons, thus increasing the effect that felony disenfranchisement laws have on communities of color.\textsuperscript{82} For the 2016 presidential election, black voter turnout rates fell; Latino voter turnout rates remained constant compared to prior years; and white voter turnout rates increased.\textsuperscript{83} It is now commonplace in the U.S. for felons to be ineligible to vote and felony disenfranchisement is estimated to have affected multiple elections in

\begin{thebibliography}{99}
\bibitem{77} Id.
\bibitem{81} Id.
\end{thebibliography}
recent decades. Studies indicate that at least seven Senate races and one presidential election have been affected by these practices.

2. Laws Expanding Suffrage

Amendments made to the Constitution and acts of Congress have continuously expanded voting rights, demonstrating support for the idea that expanded suffrage is beneficial for society and bolstering the notion that all citizens should be able to participate in this democratic practice. There have been four constitutional amendments ratified that expand the right to vote for U.S. citizens. The Fifteen Amendment grants African American men the right to vote. It declares that "the right to vote cannot be denied on account of race, color, or previous condition of servitude." The Nineteenth Amendment grants women the right to vote, the Twenty-Fourth Amendment prohibits the denial of the right to vote for failure to pay a poll tax or any other tax, and the Twenty-Sixth Amendment grants the right to vote to citizens eighteen years and older. Over time Congress and the states removed barriers that kept citizens from the polls. The Constitution is the supreme law of the land and these four amendments are solid evidence that the right to vote is a right that should be bestowed on all eligible citizens.

In addition to constitutional amendments, Congress has enacted legislation to protect and expand the right to vote for U.S. citizens with the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). The NVRA's purpose is to enhance the ability of all Americans to vote and ease the registration process. The NVRA, also referred to as the Motor Voter bill, requires states to provide three procedures for voter registration in federal elections: the ability to register by mail, the ability to register at designated public agencies, and the ability to apply for a driver's license and register to vote at the same time. These requirements are in addition to current state laws regarding

85. Id.
86. U.S. CONST. amend. XV, § 1.; id. amend. XIX, § 1.; id. amend. XXIV, § 1.; id. amend. XXIV, § 1.
88. Id.
89. U.S. Const. amend. XIX, § 1.
90. U.S. Const. amend. XXIV, § 1.
91. U.S. Const. amend. XXVI, § 1.
voter registration methods. The NVRA took effect in 1995 and within two years, over nine million new voters were registered.

The HAVA was passed following the 2000 election and aimed to streamline voting processes by establishing guidelines for states to follow regarding election administration, among other things. The Act requires that states create a computerized database of registered voters and ensure that only eligible citizens are included in the database. These Amendments and Acts are evidence that the expanded ability to vote is something that the legislature supports and has consistently made actionable law to encourage.

B. Equal Protection Challenge

Equal protection challenges have thus far been unsuccessful but law enforcement tactics such as selective enforcement and racial profiling may demonstrate the validity of these challenges. A factor that must be established for an equal protection challenge is that a policy or practice has a discriminatory intent. One problem with felony disenfranchisement policies is that while they have the greatest impact on racial minorities, it can be difficult to prove the intent behind these policies. The test for determining whether an action is unconstitutional under the Equal Protection Clause is provided in Village of Arlington Heights v. Metropolitan Housing Development Corporation. The Supreme Court held that a resulting racially discriminatory effect is not enough; racially discriminatory intent must also be shown.

The Court identified five factors to determine whether a particular decision was made with a discriminatory purpose and now requires courts to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. Those factors include: the historical background of the decision, the specific sequence of events leading up to the decision, procedural departures, substantive departures, and legislative history, especially where there are contemporary statements by members of the decision-making body. Legislators’ awareness of a disparate impact on a protected group is not enough: the law must be passed because of that disparate impact.

The challenger must prove that racial discrimination was a motivating, or substantial factor, behind enactment of the law. If the challenger is successful the
burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor. The Court also established that laws having a racially discriminatory effect are only unconstitutional if they contain both a discriminatory purpose and a discriminatory impact. Most states do not distinguish between specific felonies when administering felony disenfranchisement policies and these laws are facially neutral; however, a disproportionate number of racial minorities are involved in the criminal justice system from arrest to conviction and are then subject to felony disenfranchisement.

Tactics such as selective enforcement, when police officers encounter the same situation yet proceed differently depending on the race of the person encountered, and racial profiling result in more racial minorities being swept into the system and ending up with felony convictions. Selective enforcement results in more people of color being charged with felonies. Drug enforcement laws and traffic stops demonstrate the effects of selective enforcement and racial bias particularly well. Between 1980 and 2000, drug arrest rates among blacks rose from 6.5 to 29.1 percent while the same arrest rates for white rose from 3.5 to 4.6. Data does not support the assertion that blacks are using or selling drugs at higher rates than whites as one might assume from the statistics. Studies show that black and white drivers are stopped at similar rates nationally yet black drivers are three times more likely to be searched during a stop than white drivers and twice as likely to experience the use or threat of violence from police officers. These tactics may be used to argue a racially discriminatory intent in an equal protection challenge. A similar argument can be made against felony disenfranchisement policies due to the disproportionate effect these policies have on communities of color.

C. Political Climate and Leadership

Felony disenfranchisement policies are subject to the political climate and to changing leadership. However, the right of American citizens to vote should not be so vulnerable. At the state level, governors have the power to restore voting rights to people with felony records by issuing pardons for the convictions.
Governors are elected officials who each have their own platform on criminal justice issues and the restoration of voting rights often differs dramatically when political party and leadership changes occur.\textsuperscript{114} Kentucky, the state disenfranchising the most African Americans in the country, is an example of how political climate and leadership changes affect felony disenfranchisement policies. The differing agendas of governors has resulted in some states going back and forth between reform and regression, as evidenced in Kentucky when then-Governor Steve Beshear’s executive order restoring voting rights to many felons was reversed by now Governor Matt Bevin.\textsuperscript{115} A felony expungement bill providing a path towards expungement for certain Class D felonies was later signed by Governor Bevin\textsuperscript{116} and he restored voting rights to a limited number of ex-felons through executive pardons\textsuperscript{117} but the reversal of the former governor’s executive order affected thousands of Kentuckians.

Governors are elected to four-year terms. In the past fifteen years, the number of restorations has varied considerably depending on the party in office. The restorations of two recent governors of Kentucky demonstrate this disparity. Governor Beshear, a Democrat, issued more than 9,000 restorations during his two terms in office, from 2007 to 2015. By contrast, Governor Ernie Fletcher, a Republican, issued 1,108 restorations during his single term in office, from 2003 to 2007.\textsuperscript{118} Averaging those numbers per term, one governor issued four times as many restorations than the other. Governor Bevin, the current Republican governor, issued zero restorations during the first year of his term and restored voting rights to 284 Kentuckians with felony criminal records between December 2015 and June 2017.\textsuperscript{119}

Kentucky is not the only state where this has happened. Between the years 1997 and 2016, twenty-four states made changes to their policies surrounding felony disenfranchisement.\textsuperscript{120} These changes resulted in expanded voter


\textsuperscript{115} Id., supra note 45.


\textsuperscript{117} Barton, supra note 115.


\textsuperscript{119} Barton, supra note 115.

\textsuperscript{120} Chung, supra note 45. (The list of states that modified felony disenfranchisement policies from 1997-2016: Ala., Cal., Conn., Del., Fla., Haw., Iowa, Ky., La., Md., Neb., Nev., N.J., N.M., N.Y., N.C., R.I., S.D., Tenn., Tex., Utah, Va., Wash., & Wyo.)
eligibility and included changes like simplifying the clemency process, establishing procedures that require state agencies to notify persons of the voting rights restoration process, restoring voting rights to persons on probation or parole, and repealing lifetime disenfranchisement. However, not all of the changes resulted in positive outcomes for felon voting rights.

Virginia is another state that bars felons from voting for life. In 2016, Democratic Governor Terry McAuliffe issued an executive order restoring voting rights to persons with felonies who had completed parole. This order would have restored voting rights to over 200,000 people in the state but was challenged by Republican leaders and the Virginia Supreme Court blocked the group restoration, requiring that restorations be made on an individual basis. By the final weeks of the governor’s term, at least 172,298 people had their voting rights restored. Forty-six percent of those with restored voting rights were black, even though less than twenty percent of the state’s population is black.

The state leading the nation in disenfranchisement rates, Florida, has also been affected by changing leadership and political climate. As previously mentioned, a recently approved constitutional amendment is poised to restore voting rights to millions of Floridians who were stripped of voting rights following a felony conviction. Prior to the 2018 election results, in 2007 the Florida clemency board voted to automatically restore voting rights for felons with non-violent convictions. In 2011, the 2007 decision was reversed and non-violent felony offenders were required to wait at least five years following the completion of their sentence to apply for restoration of voting rights. In 2018, a federal judge struck down Florida’s voting restoration system as unconstitutional and potentially tainted by racial, political, or religious bias. Similarly, in Iowa, a Democratic governor automatically restored the voting rights to all persons who had completed their sentences in 2005, only to have that order rescinded by the next Republican governor six years later. These examples

121. Id.
124. Newkirk supra note 123.
125. Laura Vozzella, McAuliffe study: Nearly 80 percent of felons allowed to vote were non-violent (May 11, 2016), WASH. POST, http://wapo.st/1NqCpEL?tid=ss_mail&utm_term=.b96ab6c99c7c; Quick Fact, Virginia, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/va/PST045217.
126. Chung, supra note 45.
127. Id.
129. Chung, supra note 45.
illustrate that the political climate and changing leadership greatly impact felony disenfranchisement policies.

IV. CRUEL AND UNUSUAL CHALLENGE

In addition to disproportionately affecting minority communities, felony disenfranchisement is also a cruel and unusual punishment violative of the Eighth Amendment. The route to challenging this practice might prove more successful than the challenges mounted pursuant to the Equal Protection Clause and the Voting Rights Act.\(^{130}\)

The U.S. Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\(^{131}\) The Cruel and Unusual Clause is the most ambiguous and controversial part of the Eighth Amendment because it does not clearly state what is being protected, resulting in much scholarly debate on what constitutes cruel and unusual punishment.\(^{132}\) The permanent stripping of voting rights to a person whose debt to society has been paid certainly seems cruel and unusual. Returning citizens convicted of a felony are expected to positively contribute to society but no longer have a say in who is governing them on a state and national level. Felony disenfranchisement is not considered a punishment imposed by the courts but is, in fact, punitive in nature. Interpreting the cruel and unusual clause under a modern viewpoint would allow the courts’ interpretation to be based on “evolving standards of decency that mark the progress of a maturing society.”\(^{133}\)

The permanent revocation of voting rights has been compared to the medieval practice of “civil death.”\(^{134}\) Indeed, in a recent report, the United Nations Human Rights Committee asserted that the U.S. felony disenfranchisement policies are discriminatory and violative of international law.\(^{135}\) Specifically, the HRC noted that felony disenfranchisement laws disproportionately affect minorities and “urged the United States to restore voting rights to citizens who have served their sentences or who are released on parole.”\(^{136}\)


\(^{131}\) U.S. Const. amend. VIII.


\(^{134}\) Mark Haase, Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota, 99 Minn. L. Rev. 1913, 1913 (2015).


In an international comparison of felon voting laws among forty-five countries, the U.S falls squarely in the most restrictive category.\footnote{International Comparison of Felon Voting Law (Last updated Apr. 11, 2018 5:02:48 PM PST), PROCON.ORG., https://felonvoting.procon.org/view.resource.php?resourceID=000289.} Twenty-one countries have no restrictions and felons can vote even while in prison, including Canada, Germany, Spain, and South Africa.\footnote{Id.} Fourteen countries have selective restrictions, meaning some felons may be banned from voting while in prison, including France, Italy, and Australia.\footnote{Id.} Ten states have a complete ban on voting while in prison but felons can vote upon release, including the United Kingdom, Russia, and India.\footnote{Id.} Only four countries have post-release restrictions, meaning that felons are banned from voting even after release from prison. These countries are the U.S., Armenia, Belgium, and Chile.\footnote{Id.} Over ninety percent of the countries compared do not restrict felons' voting rights upon release from prison, if there are restrictions at all. As the foregoing shows, the U.S. is out of step with many of its most closely allied states, European countries, when it comes to the way felon rights are handled. This anomaly strengthens the case for a cruel and unusual challenge.

A. Successful Cruel and Unusual Challenges

Other scholars agree that felony disenfranchisement may be challenged under the Cruel and Unusual Clause of the Eighth Amendment.\footnote{See generally, Amy Heath, Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote, 25 AM. U. J. GENDER, SOCIEry, & L. 327 (2017); Mark E. Thompson, Don’t do the Crime if you ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 SETON HALL L. REV. 167 (2002).} Courts have historically reasoned that felony disenfranchisement challenges should be addressed through the Fourteenth Amendment or the Voting Rights Act yet, as noted above, these challenges have been repeatedly rejected.\footnote{Heath at 347.} Because these avenues have largely been ineffective, a challenge through the Eighth Amendment should have merit. This will not be easy because there have only been three times when the Supreme Court has upheld non-traditional challenges as cruel and unusual. Some of the more traditional cruel and unusual challenges refer to cases concerning the death penalty,\footnote{See Roper v. Simmons, 542 U.S. 551 (2005)( 5-4 decision holding that the execution of minors constitutes cruel and usual punishment); Atkins v. Virginia, 536 U.S. 304 (2002)(6-3 decision holding that the execution of mentally disables persons constitutes cruel and unusual punishment).} excessive use of force,\footnote{See Hudson v. McMillian, 503 U.S. 1 (1992)(7-2 decision holding that significant injury is not required in an excessive use of force case to establish an argument for cruel and punishment).} and
The first time a non-traditional challenge was upheld was in 1910, when a man was sentenced to fifteen years in prison for falsifying a public and official document during his tenure as a disbursement officer in the Philippines.\textsuperscript{146} The second time was in 1958, when the Court, in \textit{Trop v. Dulles}, held that revoking citizenship as punishment for a crime was cruel and unusual.\textsuperscript{148} In that case, an Army private was subjected to expatriation after he escaped and ultimately surrendered following a disciplinary action.\textsuperscript{149} The third time was in 1962, when a California statute made addiction of narcotics a criminal offense.\textsuperscript{150} The Court reasoned that this was analogous to punishing someone for having a common cold and was deemed cruel and unusual.\textsuperscript{151}

\textit{Trop} gives us the nearest definition of how to interpret the cruel and unusual clause in modern times and is more closely aligned with felony disenfranchisement laws than the other two cases. In \textit{Trop}, Chief Justice Earl Warren wrote, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{152} The opinion further stated that for a punishment to be found cruel and unusual, there need not be a physical mistreatment but instead a destruction of one's status in organized society.\textsuperscript{153} People who cannot vote are politically silenced. They have no say in who is elected to govern them on a state or federal level and common sentiment follows that if you do not vote, you have no right to complain.\textsuperscript{154} Permanent felony disenfranchisement removes one completely from an important aspect of citizenry and of organized society, made manifest through political participation.

\textbf{V. Policy Recommendations}

An overwhelming majority of disenfranchised voters have returned to and are living in their communities. Estimates place the rate at nearly seventy-seven percent.\textsuperscript{155} African Americans of voting age are four times more likely to lose their voting rights when compared to the voting-age population of all Americans and

\textsuperscript{146} Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.")

\textsuperscript{147} Weems v. United States, 217 U.S. 349, 359 (1910).

\textsuperscript{148} \textit{Trop} at 103.

\textsuperscript{149} Id. at 87.

\textsuperscript{150} Robinson v. California, 370 U.S. 660, 660.

\textsuperscript{151} Id. at 666.

\textsuperscript{152} \textit{Trop} at 101.

\textsuperscript{153} Id.


\textsuperscript{155} Chung, supra note 45.
Kentucky has the highest rate of disenfranchised African Americans in the entire country. In Kentucky, more than 300,000 people are disenfranchised, a sixty-eight percent increase since 2006.\footnote{Felony Disenfranchisement Up 68 Percent in Kentucky, supra note 56.} Seventy-eight percent of disenfranchised voters in Kentucky have completed their sentence.\footnote{Id.}

It is firmly within each state's right to determine the voting laws for their jurisdiction.\footnote{U.S. CONST. art. II, § 2.} However, permanently barring a felon from exercising the right to vote does not appear to serve any state interest. Proponents of felony disenfranchisement policies argue that these policies are race neutral and proffer state's rights arguments.\footnote{Christopher Uggen, Jeff Manza, & Angela Behrens, Felony Voting Rights and the Disenfranchisement of African Americans, 3 SOULS 48, 48 (2003).} When balancing the costs and benefits of felony disenfranchisement, it seems obvious that the costs outweigh the benefits because this practice is not a standard across the country nor internationally. There are two extreme ends of the spectrum in the U.S.—two states have no restrictions on the voting rights of persons with felony conviction, even those in prison—yet thirteen states impose restrictions even after persons convicted of a felony have completed their punishment.\footnote{Chung, supra note 45.} A majority of states restrict voting rights while a convicted felon is either in prison or on parole or probation.\footnote{Id.} The largest groups of people affected by these policies are racial minorities.

Voting rights should be restored to felons upon full completion of their sentence. At that point, the person has returned to their community and is expected to be a full participant in society. Depriving reintegrated persons of the right to vote is alienating and excessively punitive.\footnote{Christopher Uggen & Jeff Manza, Symposium on Race, Crime, and Voting: Social, Political, and Philosophical Perspectives on Felony Disenfranchisement in America: Voting and Subsequent Crime and Arrest: Evidence from a Community Sample, 36 COLUM. HUMAN RIGHTS L. REV. 193, 212 (2004).} Political participation is universally seen as a human right and violations of such rights have been shown to produce negative consequences physically, socially, and mentally.\footnote{Purtle at 632.}

VI. CONCLUSION

The disproportionate effect felony disenfranchisement policies have on communities of color is undeniable. To correct any disparities, states should make policy changes to allow for the restoration of voting rights to those convicted of felonies who have completed their sentences. This would potentially affect millions of U.S. citizens and would have the greatest impact on communities of color.
This act would align with the original intent of the Fourteenth Amendment to expand suffrage. Current felony disenfranchisement laws are either intentionally or unintentionally functioning as voter suppression methods, resulting in a disproportionate effect on communities of color. As a matter of social justice and to provide equal protection for all citizens, voting rights should be restored upon sentence completion. Additionally, the determination of whether a citizen can vote in the U.S. should not be impacted by politics. Current felony disenfranchisement policies do not reflect the preferences of the people. Public opinion surveys show that eight in ten Americans support restoring voting rights to people convicted of felonies who have completed their sentences. Support for felon voting restoration overall is almost two-thirds. A majority of Americans agree that felons who have paid their debt to society should regain full benefits of citizenship, which, in a democratic nation, includes the right to vote.

164. Chung, supra note 45.
165. Id.
166. Id.
A CHANCE TO STAND: WHY “LOSS-OF-CHANCE” SHOULD REPLACE THE “CERTAINLY IMPENDING” FRAMEWORK FOR DATA BREACH CASES

Nathaniel Truitt*

I. INTRODUCTION

Data misuse has become a major concern for Americans as billions of personally identifiable records have been compromised within the last decade.¹ To make matters worse, data breach victims often have no legal remedy because courts have inconsistently determined whether victims have Article III standing to sue.² In particular, many courts have held that, absent data misuse, data breach victims cannot satisfy Article III standing requirements because the increased risk of identity theft or data misuse is not sufficiently imminent.³ Other courts have come to the opposite conclusion and have found that standing exists if data breach victims can demonstrate a “substantial risk” of future harm.⁴ These inconsistent decisions are not simply the result of diverse judicial perspectives. Instead, these decisions are evidence that the current framework for analyzing data breach claims is outdated. Instead of deciding whether a victim’s increased risk of data misuse is “certainly impending,” courts should utilize loss-of-chance principles to determine Article III standing. Loss-of-chance is better suited for data breach cases because increased risk of data misuse is a present injury, and loss-of-chance appropriately recognizes and values that increased risk. By recognizing the injury that data theft victims incur through increased risk, courts can resolve the contradiction between common-sense understandings of injury and the traditional, legal definition of injury as applied in the data security context.

II. NAVIGATING THE MORASS

Article III of the Constitution limits the jurisdiction of federal courts to “cases” and “controversies,” and these limitations comprise the essence of the doctrine known as “standing.”⁵ Over time, the Supreme Court has established three minimum requirements to satisfy Article III standing: (1) the plaintiff must suffer

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* Nathaniel Truitt

4. Id.
an injury-in-fact, (2) the injury must be “fairly traceable to the challenged conduct,” and (3) the injury must likely be redressable should the plaintiff ultimately prevail.6 The controversy regarding standing and data breach cases centers around the first of these requirements – injury-in-fact – which consists of two subparts: (a) the injury must be “concrete and particularized,” and (b) the injury must be “actual or imminent, not conjectural or hypothetical.”7 In data breach cases where victims have not yet suffered data misuse, the discrete issues are whether the victim has suffered a concrete injury or whether the increased risk of data misuse is sufficiently imminent.8

The Supreme Court’s attempt to clarify these two issues have been less than successful. The Court decided two cases that addressed imminence and concreteness in the data security context – Clapper v. Amnesty International USA, and Spokeo Inc. v. Robins.9 However, neither of these cases resolved the question whether the increased risk of data misuse, as a matter of law, constitutes an injury-in-fact for purposes of Article III standing.10

A. Clapper v. Amnesty International USA

In Clapper, the Supreme Court addressed whether an alleged future injury was sufficiently imminent to constitute an injury-in-fact.11 Human rights organizations sued the United States, challenging amendments to the Foreign Intelligence Surveillance Act (FISA), which granted greater privileges to the government to surveil foreign targets.12 The plaintiffs alleged that their work required them to communicate with individuals they feared were targets of government surveillance under the FISA amendments.13 The plaintiffs argued they had standing to sue on two bases: (1) there was an “objectively reasonable likelihood” their communications would be intercepted, and (2) they had suffered a present injury because they had incurred extra expenses to avoid government surveillance of their communications.14
The Court rejected the plaintiffs' allegation of future injury as "too speculative to satisfy the well-established requirement that threatened injury must be certainly impending."\(^\text{15}\) In particular, the Court concluded that the plaintiffs' theory relied on a "highly attenuated chain of possibilities."\(^\text{16}\) The Court reasoned that five events would have to occur for the plaintiffs' fear to materialize: (1) the government would have to decide to target the communications of one of the plaintiffs' contacts, (2) the government would have to invoke its authority under FISA, (3) the FISA Court would have to approve the government's request to surveil, (4) the government would have to successfully obtain the target's communications, and (5) one of the plaintiffs would have to participate in that particular communication.\(^\text{17}\) The probability of all these events happening was simply too remote for the Court to view the threat as sufficiently imminent to constitute an injury-in-fact.\(^\text{18}\)

The Court also rejected the plaintiffs' claim of present injury, as a result of incurring mitigating expenses, because these expenses were based upon "speculative" harm, not "certainly impending" harm.\(^\text{19}\) In other words, the Court considered mitigating expenses to be legitimate only so far as the underlying threat was "certainly impending."\(^\text{20}\) Because the threat of future harm was "speculative," the mitigating expenses were unwarranted and could not independently satisfy the injury-in-fact requirement for standing.\(^\text{21}\) The Court also reiterated that allegations of future injury must be evaluated using a "certainly impending" standard, not the "objectively reasonable likelihood" standard the Second Circuit had used.\(^\text{22}\) The Court therefore reversed the Second Circuit's determination that the plaintiffs had standing to sue.\(^\text{23}\)

\(^\text{15}\) Id. (internal quotation marks omitted).
\(^\text{16}\) Id. at 410.
\(^\text{17}\) Id.
\(^\text{18}\) KAREN A. POPP & EDWARD R. McNICHOLAS, supra note 9, at § 122:28.
\(^\text{19}\) Clapper, 568 U.S. at 401-02.
\(^\text{20}\) Allison Holt et al., supra note 10, at 10.
\(^\text{21}\) Karen A. Popp & Edward R. McNicholas, supra note 9, at § 122:28.
\(^\text{22}\) Clapper, 569 U.S. at 410. Despite the Supreme Court's predominant use of the "certainly impending" language in Clapper, the Court has also used the "substantial risk" standard for assessing standing for alleged future injury. See Susan B. Anthony List v. Direhaus, 134 S. Ct. at 2334, 2341 (2014) (stating that an "allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur") (internal quotation marks omitted). Courts also seem to presuppose that both standards have equal relevance in the context of data breach cases. See, e.g., Galaria v. Nationwide Mutual Ins. Co., 663 F. App'x 384, 388 (6th Cir. 2016) (stating that the "Supreme Court has also found standing based on a substantial risk that the harm will occur") (internal quotation marks omitted); Attias v. Carefirst, Inc., 865 F.3d 620, 626-27 (D.C. Cir. 2017) (stating that in "Susan B. Anthony List v. Direhaus, the [Supreme Court] clarified that a plaintiff can establish standing by satisfying either the "certainly impending" test or the "substantial risk" test). This note will use both standards interchangeably.
\(^\text{23}\) Clapper, 569 U.S. at 410.
B. Spokeo Inc. v. Robins

Where Clapper attempted to clarify when the threat of future injury constitutes an injury-in-fact, the Court in Spokeo attempted to clarify what constitutes a "concrete" injury.24 Thomas Robins sued Spokeo under the Federal Credit Reporting Act (FCRA) for allegedly presenting misinformation about him on its website.25 Spokeo provided a service allowing users to request a search using a person's name, email, or phone number, and Spokeo would then search a variety of databases to find information on the requested individual.26 Mr. Robins asserted that Spokeo presented false information about him that negatively affected his employment prospects.27 In particular, Mr. Robins alleged that Spokeo overstated his affluency by, inter alia, indicating he was married, had children, and held a graduate degree.28

The district court had dismissed Mr. Robins's suit, but the Ninth Circuit reversed and remanded the case back to the district court.29 In concluding that Mr. Robins suffered an injury-in-fact, the Ninth Circuit noted two facts: (1) Spokeo violated Mr. Robins's statutory rights, and (2) the statutorily protected interests were sufficiently concrete and particularized for Congress to elevate them to the "status of legally cognizable injuries."30 The Ninth Circuit therefore concluded that the "alleged violations of Robins's statutory rights [were] sufficient to satisfy the injury-in-fact requirement of Article III."31

On appeal, however, the Supreme Court reversed the Ninth Circuit and held that plaintiffs cannot allege a "bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."32 The Court concluded that the Ninth Circuit had addressed the particularization requirement, but failed to "fully appreciate the distinction between concreteness and particularization" and had inadequately addressed whether Mr. Robins's injury was concrete.33 The Court declined to determine whether Robins's alleged injury was adequately concrete to constitute an injury-in-fact and instead remanded the case for the Ninth Circuit to determine that issue.34

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26. Id.
27. Id.
28. Id.
30. Id. at 413 (quoting Lujan, 504 U.S. at 578).
31. Id. at 413-14.
32. Spokeo, 136 S. Ct. at 1549. To constitute an injury-in-fact, the alleged injury must be (a) "concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
33. Spokeo, 136 S. Ct. at 1550; Perreault, supra note 2, at § 8:4.
34. Spokeo, 136 S. Ct. at 1550.
On remand, the Ninth Circuit found that Mr. Robins’s complaint sufficiently alleged a concrete injury. In coming to this conclusion, the court distinguished Clapper by noting that, unlike in Clapper, “both the challenged conduct and the attendant injury [had] already occurred.” In other words, Clapper did not apply because Clapper addressed the “imminence” requirement of an anticipated injury, and the issue in Spokeo was whether the intangible injury already suffered was sufficiently “concrete.” The Supreme Court denied certiorari.

Clapper and Spokeo provide two key rules for determining whether data breach victims have Article III standing to sue: (1) allegations of future injury must be “certainly impending,” and (2) the alleged injury must be “concrete,” even in the context of statutory violations. Because most data theft victims have not yet experienced data misuse when they sue, the majority of cases hinge on whether the increased risk of data misuse is “certainly pending.” Unfortunately, it remains unclear how Clapper and Spokeo apply to data breach cases, and as a result, courts have inconsistently applied these holdings.

These inconsistencies have prompted courts and scholars alike to opine on the existence of a circuit split that the Supreme Court should resolve. While data breach cases are fact intensive, undermining the proposition of a circuit split per se, the results have undoubtedly been disparate. The Sixth, Seventh, Ninth, and D.C. Circuits have affirmed standing for increased risk of data misuse; while the First, Second, Fourth, and Eighth Circuits have come to opposite conclusions. Additionally, the Third Circuit has both affirmed and rejected

36. Id. at 1118.
37. Id.
38. Id.
39. Perreault, supra note 2, at § 8:4; Clapper, 568 U.S. at 410; Spokeo, 136 S. Ct. at 1549.
40. See Allison Holt et al., supra note 10, at 2-3.
42. See Beck v. McDonald, 848 F.3d 262, 273 (4th Cir. 2017) (stating “[o]ur sister circuits are divided on whether a plaintiff may establish an Article III injury-in-fact based on an increased risk of future identity theft”); Brandon Ferrick, No Harm, No Foul: The Fourth Circuit Struggles with the “Injury-in-Fact” Requirement to Article III Standing in Data Breach Class Actions, 59 B.C.L. REV. E-SUPPLEMENT 462, 480 (2018) (stating that a recent “decision deepened a circuit split surrounding what allegations are sufficient to show that identity theft is imminent following a data breach”); 1 Lisa Rivera, Health L. Prac. Guide § 58:17 (2018) (noting that because “the circuit split on the issue of standing in data breach class action continues, it is anticipated that the Supreme Court will be asked to resolve this issue in the future”); but see Alison Frankel, 25 No. 02 Westlaw Journal Class Action 06, (2018) (noting that the Ninth Circuit implies there is no circuit split).
43. Galaria v. Nationwide Mutual Ins. Co., 663 F. App’x 384, 385-86 (6th Cir. 2016); Remijas v. Neiman Marcus Group, LLC 794 F.3d 688, 694 (7th Cir. 2015); In re Zappos.com, Inc., 888 F.3d 1020, 1029 (9th Cir. 2018); Attias v. Carefirst, Inc., 865 F.3d 620, 628 (D.C. Cir. 2017); Katz v. Pershing, 672 F.3d 64, 80 (1st Cir. 2012); Whalen v. Michaels Stores, Inc., 689 F. App’x 89, 90 (2d Cir. 2017); Beck v. McDonald, 848 F.3d 262, 267 (4th Cir. 2017); In re SuperValu, Inc., 870 F.3d 763, 772 (8th Cir. 2017).
standing for victims of data theft – one in the context of increased risk and the other in the context of FCRA violations.\(^{44}\)

C. Circuits Affirming Article III Standing for Increased Risk of Data Misuse

The Sixth Circuit held in *Galaria v. Nationwide Insurance Company* that Nationwide’s customers had standing to sue where hackers stole the personal information of over one million customers.\(^{45}\) The stolen information included Social Security and driver’s license numbers.\(^{46}\) In response to the data breach, Nationwide provided one free year of credit monitoring and identity theft protection; and Nationwide also recommended that customers place a security freeze on their credit reports.\(^{47}\)

In addressing whether the customers had satisfied the standard set in *Clapper*, the court noted succinctly that “[t]here is no need for speculation where Plaintiffs allege that their data has already been stolen and is now in the hands of ill-intentioned criminals.”\(^{48}\) The court continued: “Indeed, Nationwide seems to recognize the severity of the risk, given its offer to provide credit-monitoring and identity theft protection for a full year.”\(^{49}\) The court therefore reversed the district court’s dismissal of the case and held that Nationwide customers had sufficiently pled a substantial risk of identity theft and had therefore suffered an injury-in-fact.\(^{50}\)

Similarly, the Seventh Circuit concluded in *Remijas v. Neiman Marcus Group, LLC* that the department store’s customers had standing to sue following a data breach.\(^{51}\) Hackers used malware on Neiman Marcus’s computer systems to steal credit card numbers, but other personal information such as Social Security numbers and birth dates were not compromised.\(^{52}\) Additionally, 9,200 of the 350,000 compromised credit cards incurred fraudulent charges, although Neiman Marcus reversed those fraudulent charges.\(^{53}\) Neiman Marcus also provided free credit monitoring service to its customers in response to the data breach.\(^{54}\) In concluding that the threat of identity theft was imminent enough to satisfy standing, the court noted several factors that underscored the imminence of the threat: (1) the presumed motive of the hackers in obtaining customer information, (2) the fact that Neiman Marcus provided credit monitoring and

\(^{44}\) Reilly v. Ceridian Corp., 664 F.3d 38, 46 (3d Cir. 2011); In re Horizon Healthcare Servcs. Inc. Data Breach Litigation, 846 F.3d 625, 635 (3d Cir. 2017) (“In re Horizon II”).

\(^{45}\) Galaria, 663 F. App’x at 385-86.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Allison Holt et al., *supra* note 10, at 8.

\(^{49}\) Galaria, 663 F. App’x at 388.

\(^{50}\) Id. at 391.

\(^{51}\) Remijas v. Neiman Marcus Group, LLC 794 F.3d 688, 694 (7th Cir. 2015).

\(^{52}\) Id. at 690.

\(^{53}\) Id. at 690, 92.

\(^{54}\) Id. at 690.
identity theft protection to its customers, and (3) the ongoing nature of fraud risks.\(^{55}\)

The court was also careful to distinguish \textit{Clapper} by noting that \textit{Clapper} does not foreclose "any use whatsoever of future injuries to support Article III standing."\(^{56}\) According to the court, \textit{Clapper} was "addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs," whereas all of the plaintiffs in \textit{Remijas} were victims of data theft.\(^{57}\) The court therefore affirmed that the customers’ increased risk of data misuse was imminent enough to constitute an injury-in-fact.\(^{58}\)

In another case involving a retailer, the Ninth Circuit held in \textit{In re Zappos.com, Inc.} that the online retailer’s customers had standing to sue after hackers allegedly stole personal customer information from its servers.\(^{59}\) The stolen information included customers’ “names, account numbers, passwords, email addresses, billing and shipping addresses, telephone numbers, and credit and debit card information...”\(^{60}\) The plaintiffs alleged that, because of the data breach, the increased risk of data misuse was sufficiently imminent to satisfy standing.\(^{61}\) The court concluded that the sensitive nature of the stolen data required it to conclude that the plaintiffs alleged a “threat of real and immediate harm...”\(^{62}\) The court also dismissed the retailer’s contention that too much time had passed for the increased threat of identity theft to be imminent (approximately six years).\(^{63}\) The court affirmed that the plaintiffs had standing to sue because there remained a “substantial risk that the Zappos hackers will commit identity fraud or identity theft.”\(^{64}\) The court therefore reversed the district court’s dismissal of the case.\(^{65}\)

Lastly, the D.C. Circuit held in \textit{Attias v. CareFirst, Inc.} that the health insurer’s clients suffered a “substantial risk” of future injury following a data breach.\(^{66}\) Hackers breached twenty-two of CareFirst’s computers and were able to access approximately one million customers’ sensitive information, including Social Security and credit card numbers, and health insurance policy information.\(^{67}\)

\begin{footnotesize}

55. \textit{Id.} at 693-94.
56. Allison Holt et al., \textit{supra} note 10, at 6.
57. \textit{Remijas}, 794 F.3d at 694.
58. \textit{Id.} at 697.
59. \textit{In re Zappos.com, Inc.}, 888 F.3d 1020, 1029 (9th Cir. 2018).
60. \textit{Id.} at 1023.
61. \textit{Id.; see generally} Charles A. Wright, et al., \textit{Injury in Fact}, in 13A \textit{FED. PRAC. \\& PROC. JURIS.} § 3531.4 (2018) (stating that increased delay or expense” incurred by a business firm would likely be a cognizable injury-in-fact).
62. \textit{In re Zappos.com, Inc.}, 888 F.3d at 1027 (citing Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010)).
63. \textit{Id.} at 1028.
64. \textit{Id.} at 1029.
65. \textit{Id.} at 1030.
66. \textit{Attias v. CareFirst, Inc.}, 865 F.3d 620, 628 (D.C. Cir. 2017).
67. \textit{Id.} at 623.
\end{footnotesize}
court also distinguished *Clapper* by noting that *Clapper* involved a “highly attenuated chain of possibilities.” The court reasoned that, “at the very least, it is plausible” that hackers have motive and ability to misuse stolen data because, “[p]resumably, the purpose of the hack is, sooner or later, to make fraudulent charges...” The court therefore reversed the district court’s dismissal of the case for lack of standing.

While there are not enough cases from which to draw definitive conclusions, these appeals courts’ decisions do share some similarities. First, these courts tended to assume ill-intent on the part of the hackers. Second, the courts seemed to find the breach of the plaintiffs’ personal data to be dispositive in distinguishing *Clapper* because the plaintiffs in *Clapper* could not assert that their private communications had actually been surveilled. For these reasons, and others, the Sixth, Seventh, Ninth, and D.C. Circuits all affirmed Article III standing in the data breach context.

**D. Circuits Rejecting Article III Standing for Increased Risk of Data Misuse**

In contrast to these decisions affirming Article III standing for data breaches, other circuits have come to opposite conclusions. The First, Second, Fourth, and Eighth Circuits have held that the increased risk of data misuse does not satisfy standing.

The First Circuit’s position is less clear because in *Katz v. Pershing, LLC*, the plaintiff could not specifically plead that data theft had actually occurred. The plaintiff alleged, *inter alia*, that a brokerage account failed to adequately protect personal information and that a “massive number of breaches of security [had] invariably occurred.” However, because the plaintiff could not demonstrate that her personal data had been wrongfully accessed, the court concluded that her threat of injury was not sufficiently impending to satisfy standing. However, the court seemed to imply that satisfy standing requirements might be satisfied where data theft has been demonstrated, noting that the lack of data theft was

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68. *Id.* at 626 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013)).
69. *Id.* at 628-29 (quoting *Remijas v. Neiman Marcus Group, LLC* 794 F.3d 688, 693 (7th Cir. 2015)).
70. *Id.* at 629.
71. *Galaria v. Nationwide Mutual Ins. Co.*, 663 F. App’x 384, 388 (6th Cir. 2016) (stating that there is a “reasonable inference” that hackers will use the victims’ data for fraudulent purposes); *Remijas*, 794 F.3d at 692; In re Zappos.com, Inc., 888 F.3d 1020, 1029 (9th Cir. 2018); *Attias*, 865 F.3d at 626.
72. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2018); *Galaria*, 663 F. App’x at 388; *Remijas*, 794 F.3d at 693; In re Zappos, 888 F.3d at 1026; *Attias*, 865 F.3d at 626.
73. *Katz v. Pershing*, 672 F.3d 64, 80 (1st Cir. 2012); *Whalen v. Michaels Stores, Inc.*, 689 F. App’x 89, 90 (2d Cir. 2017); *Beck v. McDonald*, 848 F.3d 262, 267 (4th Cir. 2017); In re *SuperValu, Inc.*, 870 F.3d 763, 772 (8th Cir. 2017).
74. *Katz*, 672 F.3d at 80.
75. *Id.* at 79.
76. *Id.* at 80.
the “fatal” flaw in the plaintiff’s case.\textsuperscript{77} The court therefore affirmed the district court’s dismissal of the case.\textsuperscript{78}

Similarly, the Second Circuit in \textit{Whalen v. Michaels Stores, Inc.} also held that a customer did not have standing to sue after a Michaels store suffered a data breach.\textsuperscript{79} In addition to the data breach, the customer also alleged that she incurred two fraudulent credit card charges.\textsuperscript{80} In response to the data breach, Michaels provided one year of credit monitoring to all affected customers.\textsuperscript{81} However, because the customer had subsequently canceled her credit card, and because the hackers did not obtain other personally-identifying information, such as Social Security numbers or birth dates, the court reasoned the plaintiff could not “plausibly face a threat of future fraud.”\textsuperscript{82} Even though Michaels had offered a free year of credit monitoring and the plaintiff alleged lost time and expense monitoring her credit, the court noted that she pled “no specifics” about these efforts or expenses.\textsuperscript{83} As a result, the court found that the named customer’s claim of future injury was not sufficiently imminent to constitute an injury-in-fact and affirmed the district court’s dismissal of the suit.\textsuperscript{84}

Additionally, the Fourth Circuit held in \textit{Beck v. McDonald} that patients did not have standing to sue a medical center after a laptop containing their unencrypted personal information was likely stolen.\textsuperscript{85} The laptop contained medical information of approximately 7,400 patients, including the last four digits of patients’ Social Security numbers.\textsuperscript{86} The court concluded that the threat of future data misuse was simply too “speculative” to constitute an injury-in-fact.\textsuperscript{87} Drawing from \textit{Clapper}, the court reasoned that the patients’ theory of future injury required an “attenuated chain of possibilities” because there was no evidence that personal information had been accessed or misused—or even that the thief had the intent to steal private information.\textsuperscript{88} The court therefore affirmed the district court’s dismissal of the suit.\textsuperscript{89}

Finally, the Eighth Circuit held in \textit{In re Supervalu, Inc.} that the grocery store’s customers did not sufficiently allege a “substantial risk of identity theft” after the grocery store suffered a data breach.\textsuperscript{90} Hackers were able to breach Supervalu’s network for processing credit card transactions for over one thousand of its

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 81.
\textsuperscript{79} Whalen v. Michaels Stores, Inc., 689 F. App’x 89, 90 (2d Cir. 2017).
\textsuperscript{80} Id. at 90.
\textsuperscript{81} Id.
\textsuperscript{82} Id.; CYBERSECURITY AND DATA BREACH LITIGATION, in E-COMMERCE AND INTERNET LAW § 27.07 (2017).
\textsuperscript{83} Whalen, 689 F. App’x at 90-91.
\textsuperscript{84} Id.
\textsuperscript{85} Beck v. McDonald, 848 F.3d 262, 267 (4th Cir. 2017).
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 274.
\textsuperscript{88} KAREN A. POPP & EDWARD R. McNICHOLAS, supra note 9, at § 122:28.
\textsuperscript{89} Beck, 848 F.3d at 278.
\textsuperscript{90} In re Supervalu, Inc., 870 F.3d 763, 771-72 (8th Cir. 2017).
stores.\footnote{Id. at 771-72.} Approximately two months later, the hackers breached Supervalu servers a second time using different malware.\footnote{Id.} Supervalu customers alleged that their credit card information was stolen in the breach, and one of the named plaintiffs alleged that he incurred a fraudulent credit card charge.\footnote{Id.}

The court concluded that because the hackers only accessed credit card information, and not Social Security numbers, there simply was not a substantial risk the hackers could fraudulently open new accounts.\footnote{Id.} The court opined that data thefts containing Social Security numbers were "the type of identity theft generally considered to have a more harmful direct effect on consumers."\footnote{Id.} The court therefore affirmed the district court's dismissal of the case, except for the named plaintiff which incurred the fraudulent charge.\footnote{Id.}

These appeals court decisions also share some similarities. First, the courts seemed to scrutinize the type of data obtained, concluding, for example, that a thief's failure to obtain Social Security numbers made it implausible that the plaintiffs' risk of future injury was imminent.\footnote{Whalen v. Michaels Stores, Inc., 689 F. App'x 89, 90 (2d Cir. 2017); In re SuperValu, Inc., 870 F.3d at 766.} Second, the courts found the theory of standing to be too attenuated where plaintiffs could not prove the thieves had actually accessed their personal data or that the thieves intended to misuse the data.\footnote{Katz v. Pershing, 672 F.3d 64, 74 (1st Cir. 2012); Beck v. McDonald, 848 F.3d 262, 275 (4th Cir. 2017).} As a result, the First, Second, Fourth, and Eighth Circuits have rejected standing in the data breach context.

\subsection*{E. The Third Circuit}

The Third Circuit is unique because it has both affirmed and rejected standing in data breach cases — although each case was decided under different bases. In \textit{Reilly v. Ceridian Corp.}, the court held that employees' allegations of future injury were "hypothetical" where a hacker accessed a payroll firm's computer system.\footnote{Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011).} The hacker potentially gained access to the personal information of approximately 27,000 employees.\footnote{Id. at 40.} In response to the breach, the payroll firm offered one year of identity theft protection.\footnote{Id.} The court reasoned that the employees had to speculate whether the hacker (1) read or understood the
information, (2) intended to misuse the information, and (3) was capable of misusing the information.\textsuperscript{102} Additionally, the court reasoned that because the employees had “yet to suffer any harm, [] their alleged increased risk of future injury is nothing more than speculation” and not “certainly impending.”\textsuperscript{103} The court was not persuaded by the plaintiffs’ appeal to Seventh and Ninth Circuits’ cases affirming standing for increased risk of identity theft, noting that these courts’ rationale on standing was “skimpy.”\textsuperscript{104} The court therefore affirmed the district court’s dismissal of the case for lack of standing.\textsuperscript{105}

However, in \textit{In re Horizon Healthcare Services, Inc. Data Breach Litigation}, the court found standing, but in the context of an FCRA violation.\textsuperscript{106} Two laptops were stolen from a health insurance company, and the laptops contained unencrypted personal information of approximately 839,000 policy holders.\textsuperscript{107} The compromised data included policy information, and in some instances, Social Security numbers.\textsuperscript{108} One of the named plaintiffs also alleged that someone subsequently filed a fraudulent tax return in his name, and another named plaintiff was allegedly denied credit because his Social Security number had been “associated with identity theft.”\textsuperscript{109}

The plaintiffs alleged that they had standing to sue for two reasons: (1) the violation of their statutory rights under FCRA, and (2) the increased risk of identity theft.\textsuperscript{110} The district court, in a decision prescient of the then-pending \textit{Spokeo} case, rejected the plaintiffs’ first argument because they did not allege “any specific harm,” and plaintiffs “may not rest on mere violations of statutory...rights to maintain standing.”\textsuperscript{111} Citing the Third Circuit’s decision in \textit{Reilly}, the district court also rejected the plaintiffs’ theory of standing due to the increased risk of data misuse, reasoning that the alleged future injury was speculative because the

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{102} \textit{Id.} at 42; \textit{but see} Attias v. Carefirst, Inc., 865 F.3d 620, 628 (D.C. Cir. 2017); Remijas v. Neiman Marcus Group, LLC 794 F.3d 688, 693 (7th Cir. 2015); Galaria v. Nationwide Mutual Ins. Co., 663 F. App’x 384, 389 (6th Cir. 2016) (all presuming that hackers steal personal information to misuse the data).
\item[\textsuperscript{103} \textit{Id.} at 44.
\item[\textsuperscript{104} \textit{Id.} at 46.
\item[\textsuperscript{105} \textit{In re Horizon Healthcare Servcs. Inc. Data Breach Litig.}, 846 F.3d 625, 629 (3d Cir. 2017) (“\textit{In re Horizon II}”).
\item[\textsuperscript{106} \textit{Id.} at 629-30.
\item[\textsuperscript{107} \textit{Id.} at 30.
\item[\textsuperscript{108} \textit{Id.}
\item[\textsuperscript{109} \textit{Id.} at 631
\end{enumerate}
\end{footnotesize}
plaintiffs had not yet suffered identity theft. The district court concluded that "Reilly [was] both squarely on point and binding on this Court."

On appeal, the Third Circuit reversed the district court and agreed with the plaintiffs’ first argument – that they had standing to sue because the insurance company had violated their statutory rights under the FCRA. The court notably did not address the potential ramifications of its holding in Reilly, however. The court began by reaffirming its belief that "so long as an injury affects the plaintiff in a personal and individual way, the plaintiff need not suffer any particular type of harm to have standing." The court elaborated further: “[T]he actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing...”

The Third Circuit’s conclusion is puzzling because the Supreme Court had decided Spokeo during the appeal process and was controlling precedent by the time the court decided the case. However, the court distinguished Spokeo with careful wordsmithing, stating that Spokeo only held that a “bare procedural violation, divorced from any concrete harm” is not enough to provide standing. In other words, a “mere technical violation of a procedural requirement of a statute cannot, in and of itself, constitute an injury in fact.” While recognizing the possibility of interpreting Spokeo as “creating a requirement that a plaintiff show a statutory violation has caused a material risk of harm,” the court concluded that the Supreme Court did not intend to change the traditional rules for Article III standing. In the court’s view, Spokeo was reemphasizing Congress’s “power to define injuries that were previously inadequate in law.”

These cases demonstrate that the “courts of appeals have evidenced some disarray about the applicability of...increased risk [!] in data privacy cases.” Courts have simply been inconsistent in their rationale on whether the increased risk of identity theft is an injury-in-fact, and at times they arguably make instinctual decisions and adapt their analysis accordingly. These inconsistent results are not only the result of diverse perspectives, they are also the result of courts utilizing an outdated framework to analyze data breach cases.

113. Id.
114. In re Horizon II, 846 F.3d at 635.
115. See generally id. at 635.
116. Id. at 636 (quoting In re Google Inc. Cookie Placement Consumer Privacy Litigation, 806 F.3d 125, 134 (3d Cir. 2015)) (internal quotation marks omitted).
117. Id. (quoting In re Google, 806 F.3d at 134 (internal quotation marks omitted) (emphasis in original).
118. See Spokeo, 136 S. Ct. 1540 (decided May 16, 2016); In re Horizon II, 846 F.3d at 625 (decided January 20, 2017).
119. In re Horizon II, 846 F.3d at 637 (quoting Spokeo, 136 S. Ct. at 1549).
120. Id. at 638.
121. Id. at 637 (quoting Spokeo, 136 S. Ct. at 1550).
122. Id. at 638 (quoting Spokeo, 136 S. Ct. at 1549).
123. Katz v. Pershing, 672 F.3d 64, 80 (1st Cir. 2012) (internal quotation marks omitted).
III. THE "CERTAINLY IMPENDING" FRAMEWORK

The primary issue with the current approach to data breach cases is that courts are largely confined to analyzing them through the "certainly impending" framework, and this framework is simply inadequate. First, it is a vague, all-or-nothing proposition. Courts must weigh individual facts in each case and attempt to determine when victim's increased risk of data misuse crosses the magic threshold to be considered "certainly impending." Second, the "certainly impending" framework fails to recognize an instinctive truth: the non-de minimis, increased risk of data misuse is a current, concrete injury per se. Courts struggle to navigate the sometimes-obvious contradiction between the legal and commonsense understandings of injury in this context, often to the point of being nonsensical. 124

Because of these tensions, courts sometimes over-emphasize specific facts to justify differing conclusions. For example, in Krottner v. Starbucks Corp., the Ninth Circuit found that Starbucks employees “alleged a credible threat of real and immediate harm” after a company laptop was stolen containing unencrypted employee data. 125 Additionally, one of the plaintiffs alleged that someone had attempted to fraudulently open a bank account in his name. 126 The court indicated that the laptop being stolen, as opposed to being lost, weighed heavily in determining that employees had standing to sue, even though no identity theft had yet occurred. 127

Despite nearly identical facts in Beck, the Fourth Circuit reached the opposite conclusion and held that patients did not have standing to sue after a laptop containing unencrypted personal information was most likely stolen. 128 The court relied heavily on Clapper to conclude that the plaintiffs did not incur a “substantial risk” of harm, and it distinguished Krottner by pointing out that, unlike in Krottner, none of the plaintiffs in Beck had alleged a fraudulent attempt to open a bank account. 129

Both cases involved a presumably-stolen laptop containing unencrypted personal information, and the fact given to justify the differing result was the attempted opening of one fraudulent bank account. 130 In an all-or-nothing framework, this becomes an enormously weighty "straw" that breaks the proverbial camel’s back. Indeed, the distinction is inconceivable considering that

124. See, e.g., In re Zappos.com, Inc., 108 F. Supp. 3d 949, 961 (D. Nev. 2015) (acknowledging the “frustrating result where Plaintiffs’ fears of identity theft and fraud are rational” and noted that “purchasing monitoring services is a responsible response to a data breach. Nevertheless, costs incurred to prevent future harm is not enough to confer standing, even when such efforts are sensible”) (internal quotation marks omitted).
125. Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010).
126. Id. at 1141.
127. Id. at 1140-41, 1143.
129. Id. at 274-76.
130. Id. at 274.
both courts seemingly assumed causation. This approach to standing analysis in data breach cases potentially means that an unverified attempt to misuse a plaintiff's identity becomes dispositive to determining whether the data breach victims have standing to sue.

The current approach also has the puzzling result of permitting defendants to tacitly admit the existence of injury while simultaneously deny that the victim's suffered an injury-in-fact. This is most recognizable where companies provide free credit monitoring and identity theft protection following a data breach. Concededly, there are public relations motives for providing this free service, but this is unlikely the primary factor because companies offer free credit monitoring in response to data breaches as a general practice.

If public relations was the primary motive, there are more economical – and potentially more effective – means of expressing customer appreciation and corporate contrition. It seems much more likely that companies consistently provide free credit monitoring in response to data breaches because it most effectively mitigates the increased risk of data misuse. This is a tacit admission that data breach victims' increased risk is, at a minimum, substantial enough to justify some remediation. It follows, then, that justified mitigation costs are proof of an injury – regardless of whether some courts conclude that the increased risk fails to constitute a legally-recognizable injury.

These inconsistencies highlight the need of a new framework in which to analyze data breach cases – ideally a framework that adequately recognizes the existence of injury while not unfairly holding defendants responsible for speculative harm. There are, undoubtedly, reasonable motivations for wanting to restrict data breach claims, but the existing framework is simply producing unsatisfactory results. Perhaps the all-or-nothing "certainly impending" framework better satisfies traditional notions of standing jurisprudence, but to borrow the words of Judge Owen, "[t]he injustice of such a doctrine sufficiently

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131. See id. at 267; Krottner, 628 F.3d at 1141.
132. Allison Holt et al., supra note 10, at 11 n.41.
133. Vincent R. Johnson, Credit-monitoring Damages in Cybersecurity Tort Litigation, 19 Geo. Mason L. Rev. 113, 128 (Fall 2011) (noting that "report issued by the federal government stated that 'a representative of a large financial management company noted that offering free credit monitoring services after a breach has become standard industry practice'").
134. This general practice should not, however, undermine the need to change the current framework. The level of increased risk varies from case to case, and plaintiffs should be permitted to challenge the adequacy of the proposed remedy is they so choose. Regardless, these potential practical implications do not address the incongruity of the current law.
135. Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 694 (7th Cir. 2015) (noting that it was "unlikely" the defendant department store offered free credit monitoring “because the risk is so ephemeral that it can safely be disregarded”); Galaria v. Nationwide Mutual Ins. Co., 663 F. App'x 384, 388 (6th Cir. 2016) (noting that the defendant insurance company seemed to “recognize the severity of the risk, given its offer to provide credit-monitoring and identity theft protection for a full year”); but see Beck v. McDonald, 848 F.3d 262, 276 (4th Cir. 2017) (stating that “[c]ontrary to some of our sister circuits, we decline to infer a substantial risk of harm of future identity theft from an organization’s offer to provide free credit monitoring services to affected individuals”).
impeaches the logic upon which it is founded."¹³⁶ The current approach bars
millions of victims from seeking redress for injuries that are readily apparent to
most people – and even to many of the courts that nonetheless find that no injury
exists.¹³⁷ The loss-of-chance doctrine is well suited to resolve these tensions.

IV. THE LOSS-OF-CHANCE DoCTRINE

In 1981, Professor Joseph H. King, Jr. wrote a landmark article summarizing
the development of the so-called “loss-of-chance” doctrine that attempted to
address dissatisfaction with the traditional, all-or-nothing approach to tort
recovery.¹³⁸ King’s thesis was that “the loss of a chance of achieving a favorable
outcome or of avoiding an adverse consequence should be compensable and
valued appropriately, rather than treated as an all-or-nothing proposition.”¹³⁹
Most commonly applied in the medical malpractice context, loss-of-chance
allows recovery for patients whose chance for recovery was reduced by any
amount – assuming, of course, that plaintiffs provide adequate proof.¹⁴⁰

Suppose a cancer patient has only a thirty percent chance of survival with
timely surgery, but because of the physician’s negligence, surgery is no longer
feasible.¹⁴¹ Under the traditional, all-or-nothing approach, the patient could not
recover for the physician’s negligence because it was not more-probable-than-
not (the standard of proof) the physician’s negligence caused the patient’s
ultimate demise.¹⁴² Stated another way, no matter how gross the physician’s
negligence, the physician’s potential contribution to the patient’s death could not
exceed thirty percent (the initial chance of survival), thus guaranteeing that the
patient could never establish the burden of proof necessary to permit recovery.¹⁴³
Under the traditional approach, the patient could not be compensated for even
a fifty percent reduction in her chances of recovery, but a fifty-one percent
reduction would permit the patient to recover the entire valuation for wrongful

¹³⁷. Space does not permit even a short defense of legal pragmatism, but Steven Platt’s
compilation from Justice Cardozo and Judge Posner provides a succinct expression of this viewpoint:
“Few rules in our time are so well established that they may not be called upon any day to justify
their existence as a means adopted to an end. The function of law is to ensure justice and
equilibrium. The origin of the law is not the main thing – the goal is. There can be no wisdom in
the choice of legal path unless we know where it will lead.” Steven Platt, Philosophy of Legal
¹³⁹. Joseph H. King, Jr., Causation, Valuation, and Change in Personal Injury Torts Involving
¹⁴⁰. Id. at 1364.
¹⁴¹. King I, supra note 139, at 1363.
¹⁴². Id.
¹⁴³. Id.
death. This all-or-nothing approach runs contrary to intuitive understandings of value, and it often produces unjust results. As one of the early decisions addressing the loss-of-chance doctrine noted, the all-or-nothing rule provides a “blanket release from liability for [defendants]...regardless of how flagrant the negligence.”

In contrast to the traditional approach to tort recovery, loss-of-chance permits recovery for any lost chance of recovery because of a physician’s negligence, so long as plaintiffs provide adequate proof. As a result, the cancer patient that wrongfully lost her thirty percent chance of survival could now recover thirty percent of the valuation of a wrongful death, and so on. This approach helps resolve the tension between common-sense understanding of injury and the traditional all-or-nothing approach of tort law.

The loss-of-chance doctrine has become remarkably popular since Professor King’s article, and by 2015, twenty-two state supreme courts had adopted it in some fashion. Despite its dominance in medical malpractice cases, the loss-of-chance doctrine is also applicable to many types of cases involving chance. Data breach cases are well suited for applying loss-of-chance principles instead of the all-or-nothing “certainly impending” framework.

V. LOSS-OF-CHANCE SHOULD APPLY TO DATA BREACH CASES

Loss-of-chance is well suited for data breach cases because the principle underlying loss-of-chance is that risk has value, and tortious shifts in risk should be redressable. Indeed, this concept is instinctual. Consider a simple example that Professor King provided in making his case for loss-of-chance – the lottery

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144. See, e.g., Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97, 103-04 (Ohio 1971) (affirming a directed verdict for the defendant even though some evidence was presented that the patient had a fifty percent chance of survival with a timely diagnosis; and holding that the plaintiff must prove it was probable (more than fifty percent) that timely diagnosis would have permitted the patient’s survival) overruled by Roberts v. Ohio Permanente Med. Grp., Inc., 668 N.E.2d 480 (Ohio 1996).

145. Cooper, 272 N.E.2d at 103 (acknowledging the tension between the intuitive understanding that a loss of chance of survival was a compensable injury and the legal standards preventing such recovery, despite siding with the status quo: “The strong intuitive sense of humanity tends to emotionally direct us toward a conclusion that in an action for wrongful death an injured person should be compensated for the loss of any chance for survival, regardless of its remoteness. However, we have trepidations that such a rule would be so loose that it would produce more injustice than justice”).


148. King I, supra note 139, at 1364.

149. Curran, supra note 138, at 33.

150. Id. at 31.

151. King I, supra note 139, at 1354.
ticket.152 "Obviously, when a chance to win a contest has a clearly defined market value...there is little difficulty in viewing the chance as an asset."153 Courts should not be any less willing to recognize injury incurred by data breach victims because of the increased risk of data misuse. Perhaps some might object that there is no clear market value assigned to the increased risk that victims experience. This potential objection misses the point, though. An injury might perhaps be non-compensable for lack of measurability, but that does not speak to the concreteness of the injury.

Admittedly, Professor King did not think loss-of-chance should apply for increased risk of future harm.154 Instead, he believed the "doctrine should be suspended until the harmful effects actually materialize."155 Regardless, there are strong reasons why the loss-of-chance doctrine should apply to data breach cases. First, applying loss-of-chance principles to data breach cases closely satisfy the very criteria Professor King believed should determine the doctrine’s application. Second, there is precedent for applying loss-of-chance for the increased risk of future harm.156 Third, increased risk, at least in the data security context, is a present injury and should be redressable. For these reasons, data breach cases are well suited for applying the loss-of-chance doctrine.

A. Data Breach Cases Closely Satisfy Professor King’s Criteria for Applying Loss-of-Chance

Future injuries in the context of data breaches closely satisfy Professor King’s criteria for implementing the loss-of-chance doctrine. Professor King believed loss-of-chance should apply whenever the following four criteria were satisfied:

(1) the defendant tortiously failed to satisfy a duty owed to the victim to protect or preserve the victim’s prospects for some more favorable outcome; (2) either (a) the duty owed to the victim was based on a special relationship, undertaking, or other basis sufficient to support a preexisting duty to protect the victim’s likelihood of a more favorable outcome, or (b) the only questions was how to reflect the presence of a preexisting condition in calculating the damages for a materialized injury that the defendant is proven to have probably actively, tortuously caused; (3) the defendant’s tortious conduct reduced the likelihood that the victim would have otherwise achieved a more favorable outcome; and (4) the defendant’s tortious conduct was the reason it was not feasible to determine precisely whether or not the more

152. Id. at 1378.
153. Id.
154. King II, supra note 147, at 496.
155. Id.
156. Id. at 502-04.
favorable outcome would have materialized but for the tortious
conduct.157

Applying Professor King's criteria to data breaches reveals that loss-of-chance
is functionally the same as applied to preexisting conditions. Professor King's first
criterion consists of two parts: (1) the defendant's duty to protect or preserve
victims' chances, and (2) the nature or purpose of the chance – achieving a more
favorable outcome.158 Data breach cases easily satisfy the first part of that
criterion because corporate defendants are legally responsible to protect others' personal
data.159 However, a distinction exists on the second prong of this
criterion because companies do not have a duty to preserve the victim's chances
of achieving a more favorable outcome.160 Instead, their duty is to preserve the
victims' chances of avoiding a worse outcome, i.e. avoiding data theft and misuse.

Refusing to apply loss-of-chance principles because of this distinction is
unwarranted because in either scenario the defendants' duty remains the same
– to preserve victims' chances. Under the loss-of-chance framework, this duty to
preserve victims' chances is a basis for determining whether a compensable
injury exists, and this duty should have the same import in data breach cases
despite having a different purpose for its imposition. If a party has a duty to
preserve another's chances, and negligently fails to fulfill that duty, the lost
chance should be a compensable injury.

B. Courts Have Applied Loss-of-Chance to Increased Risk of Future Harm

As already stated, Professor King believed courts should apply loss-of-chance
retrospectively, that is, after the harmful effects have materialized.161 There is
precedent, however, for applying loss-of-chance prospectively, a fact that
Professor King readily conceded.162 A common example of prospectively applying
loss-of-chance typically occurs in medical monitoring cases where victims were
exposed to potentially harmful substances.163

A leading case on prospectively applying loss-of-chance principles is Petriello
v. Kalman, a 1990 Connecticut Supreme Court case.164 In Petriello, the defendant

157. Id. at 495.
158. Id.
159. See, e.g., The Fair Credit Reporting Act, 15 U.S.C. § 1681 (2018); Vincent R. Johnson, supra
note 133, at 119-21.
160. Vincent R. Johnson, supra note 133, at 119 (stating that data processors have "a duty to
protect the personal information of others from unauthorized access...[and] [t]hese duties are
rooted in common law principles").
161. King II, supra note 147, at 496-502.
162. Id. at 502-04.
163. Allan L. Schwartz, Annotation, Recovery of Damages for Expense of Medical Monitoring to
Detect or Prevent Future Disease or Condition, 17 A.L.R. 5th 327, § 4 at 343-46 (1994) (listing cases
in which courts allow medical monitoring damages absent a present injury).
164. J. Brian Manion, Damages for Increased Risk of Future Injury: Can Illinois Courts See into
physician was using a suction device to remove a dead fetus from a patient.\textsuperscript{165} The physician used excessive force, however, and perforated the patient's uterus, sucking a portion of her intestines into her vagina.\textsuperscript{166} To correct the mistake, the patient underwent a bowel resection, a procedure where a portion of intestine is removed and the two remaining ends are re-attached.\textsuperscript{167} The patient sued the physician and an expert testified that, because of the bowel resection, the patient's chances of developing a bowel obstruction had increased eight to sixteen percent.\textsuperscript{168}

The jury awarded damages for this increased risk, and the defendant's primary claim on appeal was that the trial judge erred in instructing the jury that it could compensate that increased risk.\textsuperscript{169} The Connecticut Supreme Court affirmed the judgment and held that in "a tort action, a plaintiff who has established a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm is entitled to compensation to the extent that the future harm is likely to occur."\textsuperscript{170} Importantly, the court explained that this approach was an attempt to establish present injury and not a claim for future injuries.\textsuperscript{171} In other words, the patient was not being compensated for experiencing a bowel obstruction, she was being compensated for the present risk of experiencing a bowel obstruction.\textsuperscript{172}

\section*{C. Increased Risk is a Present Injury}

Understanding the distinction between compensation for present risk of harm and the future harm itself is key because increased risk can be just as "concrete" as a traditional injury. This concept is perhaps more recognizable in the context of insurance actuaries. Suppose that Mary is exposed to a toxin that causes serious illness or death in five percent of individuals exposed to it. Now suppose the symptoms are latent, and there are no other indicators to suggest whether the victim is one of the five percent that may become ill or die as a result of the exposure. Using the "certainly impending" framework, a five percent chance of future injury would clearly not constitute an injury-in-fact.\textsuperscript{173}

\begin{footnotes}
\item[165.] Petriello v. Kalman, 576 A.2d 474, 476 (Conn. 1990).
\item[166.] Id.
\item[167.] Id.
\item[168.] J. Brian Manion, supra note 164, at 205.
\item[169.] Petriello, 576 A.2d at 482-83.
\item[170.] Id. at 484.
\item[171.] Manion, supra note 164, at 205 (emphasis added).
\item[172.] Petriello, 576 A.2d at 395-96.
\item[173.] See, e.g., Beck v. McDonald, 848 F.3d 262, 275-76 (4th Cir. 2017) (holding that statistic demonstrating 33\% of the plaintiffs would become victims of identity theft because of the data breach fell "far short of establishing a 'substantial risk' of harm"); Khan v. Children's Nat'l Health Sys., 188 F. Supp. 3d 524, 533 (D. Md. 2016) (holding that allegations that 19\% of data breach victims suffer identity theft failed to establish a "substantial risk" of harm).
\end{footnotes}
Now suppose that Mary attempts to renew her health or life insurance policy and incurs an increase in her premiums because of her exposure to the toxin. It seems likely that most courts would now find that Mary has suffered an injury-in-fact – the premium increase – even though Mary’s risk of injury remains at five percent. In this scenario, the only difference is that a third party has valued Mary’s increased risk and imposed that value upon her in the form of higher insurance premiums.

Courts often reject this very type of reasoning, however, when data breach victims attempt to estimate or mitigate their increased risk of data misuse. For example, the Third Circuit in Reilly concluded that credit monitoring expenses “do not establish standing, because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more ‘actual’ injuries than the alleged ‘increased risk of injury’ which forms the basis for [the plaintiff’s] claims.” In fact, most courts have similarly held that mitigation costs are unrecoverable where the future injury is not sufficiently imminent to satisfy standing. Re-stated in the context of percentages, mitigation costs are only justified when the underlying risk is much higher than fifty percent. This is simply non-sensical. Few, if any, would fail to take remedial measures for such risks.

These types of results are unfortunate because courts seem to intuitively recognize the reasonableness of mitigation costs, despite often finding them to be non-compensable. For example, the court in In re Zappos.com acknowledged the “frustrating result where plaintiffs’ fears of identity theft and fraud are rational,” and noted that “purchasing monitoring services is a responsible response to a data breach.” The court went on to conclude, however, that “costs incurred to prevent future harm is not enough to confer standing, even when such efforts are sensible.” Reasonable credit monitoring expense in response to a data breach should not be “responsible” and “sensible,” yet unqualified for redress because the threat of data misuse is “speculative.”

Even in cases like Beck, where the length of litigation might undermine the imminence of possible data misuse, loss-of-chance principles should still apply because the lost chance should be valued at the time of injury. It is irrelevant whether the victim ultimately suffers data misuse, because the victim is not being

174. See, e.g., Clapper v. Amnesty Int’l USA, 568 U.S. 398, 402 (2013) (stating that plaintiffs cannot “manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending”); Beck, 858 F.3d at 276-77 (finding that mitigative costs were “merely a repackaged version of [future injury] theory of standing...[and] [s]imply put, these self-imposed harms cannot confer standing”) (internal quotation marks omitted); Reilly v. Ceridian Corp., 664 F.3d 38, 46 (3d Cir. 2011) (stating that “prophylactically spen[ding] money to ease fears of [speculative] future third-party criminality ... is not sufficient to confer standing”).
175. Reilly, 664 F.3d at 46.
176. Scott, supra note 3, at § 16.28; see, e.g., Remijas v. Neiman Marcus Group, LLC 794 F.3d 688, 694 (7th Cir. 2015) (stating that “[m]itigation expenses do not qualify as actual injuries where the harm is not imminent”).
178. Id. (internal quotation marks omitted).
compensated for *actual* data misuse. Because the *increased risk* of data misuse is the compensable injury, the *occurrence* of data misuse is a non-factor in the suit. Victims must make decisions on how to best address the increased risk they incur as a result of data breaches, and loss-of-chance principles appropriately recognizes that the increased risk of data misuse is a current injury. As a result, loss-of-chance principles would appropriately compensate data breach victims for that injury, including reasonable mitigation costs.\(^\text{179}\)

VI. CONCLUSION

The increasing importance of data security, and the accompanying threat of its theft and misuse, has brought new legal challenges that courts have not been equipped to adequately address. In data breach cases where data misuse has not yet occurred, most victims must prove that the increased risk of data misuse is "certainly impending" to satisfy the injury-in-fact requirement for standing. This framework has proven unwieldy because determining when victims magically cross the "substantial risk" threshold has proven to be all but impossible. Additionally, this framework has the unfortunate result of conceding the reasonableness of mitigating expenses while simultaneously finding them to be non-compensable.

Instead of trying to analyze data breach cases through the all-or-nothing "certainly impending" framework, courts should instead apply loss-of-chance principles. Loss-of-chance is well suited to data breach cases because, even applied prospectively, it largely satisfies the very criteria that has justified its application to other claims involving loss of chance. Loss-of-chance appropriately recognizes that the increased risk of data misuse is a present injury, and loss-of-chance more appropriately values – and remedies – that injury than the current all-or-nothing approach.

\(^{179}\) While valuations of reasonable mitigation costs are beyond the scope of this note, there might be some unwitting consensus as to what that might generally be. Companies often appear to believe that one or two years of free credit monitoring is sufficient to ameliorate the increased risk of identity theft; victims often cite credit monitoring costs as a reasonable mitigative measure; and courts seem to recognize the reasonable of this expense. See Vincent R. Johnson, *supra* note 133, at 124-32.
KINKOS FOR YOUR KIDNEYS: A LEGAL BLUEPRINT FOR THE REGULATION OF BIOPRINTED ORGANS

Lauren M. Lentsch

Abstract: Three-dimensional ("3D") printing has revolutionized the manufacturing process. With the press of a button, a blueprint of a product generated from custom measurements on a computer becomes a reality. Biomedical engineers have taken this method a step further to innovate modern medical practice by using biological materials as the substrates for 3D printing. In only a few years, 3D printers are expected to have the capability to produce human organs including kidneys, hearts, and livers using a patient’s own cells. This seemingly futuristic ability to produce functional organs on demand could save the lives of the hundreds of thousands of people on the organ donor waiting lists. However, given the unprecedented nature of a manufactured organ and its promise to medicine, a major disruption in the law may be on the horizon.

There is much scholarly debate as to the future of manufactured organs under the current law. The primary question at the center of the issue is whether the National Organ Transplant Act ("NOTA"), which regulates the use of donated organs for transplantation, will prohibit the procurement or use of these organs. Additionally, the significance of a functioning human organ used for transplant lends itself to federal regulation in order to ensure the safety of its usage. Currently, the Food and Drug Administration ("FDA") regulates a handful 3D printed medical devices, including some biological products. Medical devices are regulated under the Medical Device Amendments of 1976 ("MDA") which places the devices into one of three classes based primarily upon the risk of injury or illness from its use and dictates the requirements of the approval process. The MDA also contains an express preemption provision prohibiting a state from establishing any requirement different from or in addition to those required by the act itself. Specifically, this poses an issue for persons who wish to bring state law products liability actions. The Supreme Court of the United States has considered the scope of this preemption provision in two cases, Medtronic, Inc.

* Lauren M. Lentsch
2. Id. at 776.
6. Id.
v. Lohr and Riegel v. Medtronic. These cases provide that preemption hinges on
whether the state law action is based on different or additional safety
requirements enacted by the state.

This note will argue that the procurement of a bioprinted organ for transplant
use is not barred by Title III of NOTA. Second, it will argue that under present law,
manufactured organs should be classified as Class III devices, and are therefore
subject to the premarket approval process. Last, this note will propose
modifications to the existing law tailored specifically for the manufacture of
organs to ensure they are afforded the same protections as other biological
products and devices.

I. INTRODUCTION

In an era of unprecedented technological growth and advanced medical
practice, novel therapeutics are eradicating life-threatening diseases, curing
certain forms of cancer, and greatly improving the lives of millions of people.
Today’s capabilities are historically unmatched. However, despite these
advances, we remain helpless when it comes to organ failure. As of 2017, there
are 115,000 men, women, and children awaiting lifesaving organ transplants and
every ten minutes, another person is added to the list. Eight-thousand people
die each year in the United States because the organs they require are not
donated in time.

3D printing is expected to make significant inroads in reducing the number of
people who die waiting for organ transplants. Researchers have estimated that
organs manufactured by 3D printers will be capable of transplantation within the
next ten years. Patients will be able to give a cell sample, which will then be
expanded and used as the substrate, similar to ink used by a traditional printer.
The outcome will be functioning human organs composed of living cells which are
specific to each patient. These will be the first synthesized organs that are actually
composed of the patient’s own cells, eliminating the risk of organ rejection
following the transplant, which not only can be fatal, but often requires complex
regimens of immunosuppressive drug therapy.

These bioprinted organs may revolutionize transplantation; however, given
the unique quality of bioprinted organs, they have been subject to newly sparked
legal debate. Some wonder if manufacturers will be able to obtain patent
protection for blueprints used in printing even though the organ’s design is a
“product of nature.” Others have debated the property rights in one’s cells and
the organs created with them. Another source of debate has been how
regulations may ensure safety given the dependency humans have on functional
organs.

10. Id.
This note will discuss the federal regulation of bioprinted organs under the existing regulatory framework, the impact of these regulations, and will make suggestions for a more tailored approach for regulation. The note will first explain the mechanism of 3D printing and, more specifically, bioprinting. It will then give an overview of the current law regarding organs, blood products, and medical devices. This note will then consider how bioprinted organs should be regulated under the existing law. It will argue that bioprinted organs should be classified as “human organs” and will therefore be subject to the National Organ Transplant Act. This note will then explore the different avenues of federal regulation under the different categories of the Food and Drug Administration, ultimately arguing that bioprinted organs should be regulated as medical devices. With this designation, bioprinted organs will be subject to the most rigorous approval process and will be subject to a federal preemption provision which could impact consumers' ability to bring state law claims against the manufacturers of the organs. Finally, this note will propose modifications to the existing regulatory framework that would more directly address this new biotechnological advance and be a better fit considering congressional intent, consumer awareness, and safety.

II. A BACKGROUND OF BIOPRINTING

3D printing is simply a slight modification to the two-dimensional (“2D”) printing of words and images on paper. Similarly, bioprinting is only a slight modification to 3D printing. The differences lie between the substrates used. For 2D printing, simple ink is utilized. 3D printing operates on the same principle as a traditional household 2D printer. Rather than ink, it prints with substrates such as liquid, powder, or sheet material.1 Bioprinting, on the other hand, uses biological materials such as active cells and lipids.12 These are only the most basic differences.

Researchers hope that bioprinting techniques may be mastered in an effort for biologically active organs to go from science fiction to reality. In order to understand how to go from digital blueprint to functioning organ, the principles behind 3D printing provide the foundation for the understanding of bioprinting.

A. Three-Dimensional Printing

The term “manufacture” comes from the Latin expression manu factus, which quite literally means made by hand.13 With the use of machines and other technology in the manufacturing process, this etymology hardly holds true to the

12. Murphy & Atala, supra note 1, at 773.
use of the word today. One clear example of this change in production technique is 3D printing. Over the last few decades, printing capabilities have advanced from printing two-dimensional words and images on pieces of paper to printing three dimensional shapes and products.\textsuperscript{14} The production of 3D objects via printing is accomplished through a process called "additive" manufacturing.\textsuperscript{15} Through additive manufacturing, an object is constructed by adding layer after layer of a selected substrate.\textsuperscript{16}

While many understand 3D printing to be a new technology, 3D printing was actually invented by Charles Hull in the early 1980's.\textsuperscript{17} Hull called the process "stereolithography," which used an .stl file format to interpret the data in a Computer-Assisted Design ("CAD") file.\textsuperscript{18} The CAD files are still utilized in today's 3D printing process and contain the blueprint to be communicated electronically to the 3D printer.

Despite the fact that there are dozens of mechanisms for 3D printing, the general process is the same.\textsuperscript{19} The 3D printer follows the instructions in the CAD file to produce the foundation for the product by moving the print-head along the x-y plane of the printing space.\textsuperscript{20} Once the foundation is developed, the print head can move through the z axis, adding layer by layer and building the product up vertically.\textsuperscript{21}

There are a variety of different 3D printers available to consumers in today's market. The type of 3D printer utilized for a particular product typically depends on the materials that will be used, the substrate, and how the layers of the finished product will be bonded.\textsuperscript{22} For example, the Selective Laser Sintering printers traditionally use powdered material as the substrate, Thermal Inkjet printers utilize "ink"-like materials with thermal and electromagnetic technology to deposit tiny droplets, and Fused Deposition Modeling use beads of heated plastic.\textsuperscript{23} Today, 3D printers are used both commercially and by consumers in their own homes.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{14} Murphy & Atala, supra note 1, at 773.
\item \textsuperscript{15} Theirry Rayna & Ludmila Striukova, From Rapid Prototyping to Home Fabrication: How 3D Printing is Changing Business Model Innovation, TECHNOLOGICAL FORECASTING AND SOCIAL CHANGE, 214, 215 (2016).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 705.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Rayna & Striukova, supra note 15, at 216.
\end{itemize}
B. Bioprinting Basics

3D bioprinting operates through a similar mechanism as conventional 3D printing. With bioprinting, the substrate is a biological material such as proteins, sugars, lipids, biochemicals, and living cells.25 The most prominent mechanisms for bioprinting include biomimicry, autonomous self-assembly, and mini-tissue building blocks.26 Thermal inkjet printers are widely used in bioprinting.27 These printers function by electrically heating the print head to trigger pulses of pressure that force droplets from the nozzle.28

To generate a tissue or organ, an engineer begins by isolating stem cells.29 Stem cells are widely known as cells that are not yet differentiated, or not yet a specialized cell with specialized function, allowing great flexibility in clinical settings.30 Because they are not differentiated, they can be influenced by proteins and other cells to become a specific kind of cell, i.e. hepatocyte, or liver cell.31 The stem cells are then treated with growth factors and allowed to proliferate in a laboratory.32 The cells are then seeded onto scaffolding by the printer head.33 It is important that the scaffolding material is compatible with the biological materials and the printing process.34 Generally, the scaffolding is constructed from naturally derived polymers or synthetic molecules.35 Once the cells are aligned in place, nature takes over. The cells begin to fuse and form more complex tissue structures.36 The scaffolding directs further proliferation of the cells and aids in their differentiation into specialized, functioning tissues before collapsing upon itself leaving only the interconnected tissue networks behind.37

However, the scaffolding alone does not produce the complex vasculature required by a functioning organ. Without vasculature, bioprinted organs tend to be hollow and thin.38 Most cells needed for transplantation such as hearts, livers, and kidneys are thick and certainly require vasculature to supply the cells with oxygen/gas exchange, nutrients, growth factors, and waste product removal—all of which are imperative for a proper functioning organ.39 This is a wrinkle in the

25. Murphy & Atala, supra note 1, at 773.
26. Id.
27. Id. at 775.
28. Id.
31. Id.
32. Ventola, supra note 11, at 706.
33. Id. at 707.
34. Murphy & Atala, supra note 1, at 778.
35. Id.
37. Id.
38. Id. at 707.
39. Id.
process that engineers are working to figure out. Thermal inkjet printers are the most promising printer for this task. In fact, they have already created some vasculature with complex geometries involving branches and numerous channels. This is certainly considered a stride toward a successful, functioning, manufactured organ.

III. CURRENT FEDERAL LEGISLATION

Though States typically handle health related matters, organ donations and most medical products and devices are federally regulated. While federal regulation would likely be required to ensure safe practices, the unique quality of bioprinted organs calls into question under which realm they should be regulated. They operate as human organs, though they are manufactured as a product. Organ transplants are currently regulated pursuant to the National Organ Transplant Act ("NOTA") while the FDA handles the regulation of devices, drugs, vaccines, and biologics, to name a few. Bioprinted organs would seem to fall under both, which sparks the debate as to which would be the prevailing regulatory framework, and/or how additional provisions may be needed to guide their regulation by both acts.

A. A Brief Overview of NOTA

Approved on October 19, 1984, and amended in 1988 and 1990, NOTA brought comprehensive reform to the law regarding organ donation and transplantation by, amongst other things, establishing a task force on organ procurement and transplantation and outlawing the sale of human organs. NOTA is composed of four titles which, collectively, organize detailed research on the science and ethics of organ transplantation, establish organizations for the procurement of organs, institute systems for matching donor organs with recipients, and criminalize the sale of human organs.

Title I of NOTA directed the Secretary of Health and Human Services to establish a Task Force on Organ Transplantation. The Task Force would be tasked with the compilation of data on safety, effectiveness, and costs of various transplant treatments. Additionally, the task force was directed to study immunosuppressive medications and their impact on organ rejection prevention, as well as the medical, legal, ethical, economic, and social issues presented by the

40. *Id.*
42. *Id.*
44. *Id.*
procurement and transplantation of organs.\textsuperscript{45} The Task Force conducted its required studies, submitted its final report in April 1986, and was dissolved.\textsuperscript{46}

Title II called for the creation of two organizations: Organ Procurement Organizations ("OPOs") and the Organ Procurement and Transplantation Network ("OPTN").\textsuperscript{47} The OPOs were designed to identify potential donors, acquire all usable organs from the potential donors, arrange the acquisition and preservation of the donated organs, and systematically allocate donated organs among transplant centers and patients.\textsuperscript{48} NOTA also tasked the OPTN with a number of responsibilities. The OPTN was created to establish a national list of individuals in need of organs and to create a system of matching those individuals with available organs.\textsuperscript{49} Further, they were charged with the creation and adoption of standards of quality for acquisition and coordination of transportation of organs from OPOs to transplant centers, providing information to health professionals regarding organ donation, and collecting, analyzing, and publishing data relative to organ procurement and transplantation.\textsuperscript{50} Currently, the United Network for Organ Sharing ("UNOS"), a private, non-profit organization, administers the OPTN.

Perhaps the most notable segment of NOTA, Title III outlaws the sale of human organs.\textsuperscript{51} The prohibition specifically states as follows: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."\textsuperscript{52} Punishment for violation of this section is outlined as a fine of not more than $50,000, imprisonment for not more than five years, or both.\textsuperscript{53}

Finally, Title IV creates a national registry for voluntary bone marrow donors.\textsuperscript{54} The registry requires that the volunteers give informed consent to the donation of the bone marrow and that the names of the donors be kept confidential.

NOTA brought sweeping changes to an area of law that was previously quite unsettled. Currently, NOTA applies to donated organs exclusively. Nevertheless, the possibility remains that artificial organs may be determined to be within the scope of this law and subject to its practices.

\begin{enumerate}
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item See Id. §274e.
  \item Id.
  \item Id.
\end{enumerate}
B. A Look into Federal Regulation by the Food and Drug Administration

The FDA was established in 1906 due to an outpouring of consumer concern with the safety of products on the market.55 Today, the FDA regulates a myriad of products under designations such as food, drugs, medical devices, radiation-emitting products, vaccines, blood and biologics, animal and veterinary, cosmetics, and tobacco products.56 Aside from pharmaceutical products, the vast majority of medical products are regulated as vaccines, blood & biologics, human cell and tissue products, or medical devices.57 Relevant to human organs, are products regulated as human cell and tissue products or medical devices.

1. FDA Regulation of Human Cell and Tissue Products

Basic biological definitions state that collections of cells form tissues and that collections of tissues form organs. With regard to federal regulation under the FDA, human tissues fall under the broad biologic product category of Human Cells and Tissue Products ("HCT/Ps").58 The FDA regulates these products utilizing the "Tissue Rules" which were established on May 25, 2005 and are under Section 361 of the Public Health and Safety Act.59 This section provides the authority of the FDA to establish regulatory requirements for marketing HCT/Ps.60

The FDA’s Center for Biologics Evaluation and Research regulates HCT/Ps under 21 CFR §1270 and §1271.61 These sections require tissue establishments to screen and test donors, to maintain appropriate procedures for the prevention of the spread of communicable diseases, and to keep sufficient records.62 Section 1271 in particular sets out guidelines in order to determine the appropriate group by which a product should be regulated.63 21 CFR §1271.10(a) presents four criteria used to determine whether a product will be regulated solely under Section 361 of the Public Health and Safety Act.64 Those products that satisfy the criteria do not require Pre-Market Approval, as they are deemed to be low risk products.65 Products that otherwise do not satisfy the four criteria are regulated as a drug, device, and/or biological product.66

57. Id.
59. Id.
62. Id.
64. See Id. §1271.10 (2018).
65. Id.
2. FDA Regulation of Medical Devices

The FDA’s Federal Food, Drug, and Cosmetic Act was amended on May 26, 1976 to include the Medical Device Amendments of 1976 (“MDA”).67 These amendments prescribe the guidelines under which medical devices are regulated. The MDA accomplishes this by outlining the distinctive classifications of devices, performance standards, and the pre-market approval process.68 In addition to listing the processes and procedures required to place devices on the market, the MDA also includes a federal preemption provision which can bring significant impact on persons wishing to bring products liability actions in state court.69

The MDA organizes medical devices into three distinct categories based, in large part, on the risk associated with the device or its utility. Class I devices encompass those that present no unreasonable risk of illness and/or injury.70 Because of the low risk, they are only subject to “general controls” which apply to all devices and include the registration of manufacturers, record-keeping requirements, and labeling requirements.71 Generally, Class II devices present an increased degree of risk.72 Consequentially, additional safeguards are needed because general controls are insufficient to ensure safety. While they are still subject to the general controls, they also have “special controls” including performance standards, post market surveillance, patient registries, guidelines, and recommendations.73 Class III devices either “present a potential unreasonable risk of illness or injury,” or are “purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health.”74 These devices must undergo an extensive premarket approval process to provide reasonable assurance of its safety and effectiveness.75

Manufacturers seeking premarket approval for a Class III device must submit an application.76 The application requires a full report of all information known about the device, including details regarding any investigations or studies conducted on the device.77 The application must also include a detailed explanation of the mechanism of operation of the device, and a full statement of all components, ingredients, and properties.78 Manufacturers seeking approval must also provide a description of the manufacturing methods and facilities,

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68. Id.
69. Id.
72. Id.
73. Id.
75. Id.
76. See Id. §360e(c)(1) (1976).
77. Id.
78. Id.
applicable performance standards, and samples of the device.\textsuperscript{79} Once the application is submitted, the FDA has 180 days to issue an order approving or denying the application.\textsuperscript{80}

The MDA provides an exception to the premarket approval process in order to permit the investigational use by experts to investigate the safety and effectiveness of the device.\textsuperscript{81} Additionally, those devices that are "substantially equivalent" to those which were introduced into interstate commerce for commercial distribution before the enactment of the MDA can be approved through the premarket notification process rather than the premarket approval process.\textsuperscript{82} The premarket notification, also known as 510(k), is a premarket submission made to the FDA to demonstrate that the device to be marketed is at least as safe and effective as a legally marketed device that is not subject to premarket approval.\textsuperscript{83}

The MDA also includes a preemption provision.\textsuperscript{84} It prohibits states from establishing any "requirement" which is different from, or in addition to, any requirement applicable to medical devices under the Federal Food, Drug, and Cosmetic Act.\textsuperscript{85} There is an exemption for states that seek to assert requirements which are more stringent than those provided in the Federal Food, Drug and Cosmetic Act.\textsuperscript{86}

The Supreme Court of the United States considered this provision in two landmark cases: \textit{Medtronic, Inc. v. Lohr} and \textit{Riegel v. Medtronic, Inc.}\textsuperscript{87} In \textit{Lohr}, the plaintiff's wife's pacemaker failed and he brought state law claims against the manufacturer.\textsuperscript{88} Ultimately, the Supreme Court held that the MDA did not preempt a state action for strict liability and negligence against the manufacturer.\textsuperscript{89} The Court cited 21 CFR 808.1, noting that state requirements are only preempted when the FDA has established "specific counterpart regulations" or requirements applicable to a particular device.\textsuperscript{90}

In \textit{Riegel}, the plaintiff brought suit against the manufacturer after a catheter ruptured in his coronary artery during surgery.\textsuperscript{91} The catheter was a Class III device which had received premarket approval from the FDA.\textsuperscript{92} The Supreme Court expressed that while the 510(k) approval places its focus on a device's

\textsuperscript{79} Id.
\textsuperscript{80} See id. §360e(d)(1) (1976).
\textsuperscript{81} See id. §360(g)(1) (1976).
\textsuperscript{82} See id. §360c(f)(3) (1976).
\textsuperscript{83} 21 CFR 807.92(a)(3)
\textsuperscript{84} 21 U.S.C.A §360k(a) (1976).
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{89} Id. at 484.
\textsuperscript{90} Id. at 483.
\textsuperscript{92} Id.
equivalence to an available device, the premarket approval process is hyper focused on the safety of the device.\textsuperscript{93} Once a device is granted premarket approval, any changes made to the device must be submitted to the FDA for approval in order to ensure the safety of the device.\textsuperscript{94} By nature, the premarket approval process imposes device-specific requirements as discussed in \textit{Lohr}.\textsuperscript{95} Because the catheter was granted premarket approval, the FDA had imposed specific regulations on the device. Therefore, the Supreme Court held that the MDA preempted the state claims.\textsuperscript{96} However, the Court went on to provide an exception for circumstances when the state duties are “parallel” rather than additional to the regulation requirement.\textsuperscript{97} When the requirements are parallel, a state may provide a remedy for claims that are premised on violations of the FDA regulations.\textsuperscript{98}

\textbf{IV. Analysis}

Given the unprecedented nature of the development of bioprinted organs, there are no laws or regulations that one can apply with absolute certainty. In all likelihood, Congress or Congressionally created agencies such as the FDA will consider new legislation to accommodate this product. Certainly, there will be a significant public policy interest to consider given the current demand for organs, such as kidneys and hearts, that people need to survive. This interest should be taken into account, and legislation passed specifically for this product.

However, because lives will depend bioprinted organs transplanted into real persons, they must be perfected before they can reach consumers. Additionally, legislation tailored to the product cannot be constructed until they are complete and prepared to reach the market. Therefore, one cannot expect Congress or federal agencies to prematurely legislate for a presently experimental product. If subjected to the current laws and regulations, bioprinted organs will likely be subject to NOTA and regulated by the FDA as a medical device. However, modifications to these regulations would provide Congress and federal agencies the ability to construct more suitable regulations for bioprinted organs.

\textit{A. Bioprinted Organs and NOTA}

Currently, NOTA sets up the regulatory framework regarding human organs and their transplantations. While it is likely that bioprinted organs will not be subject to NOTA’s donation and logistic regulations, as they will not be donated,
the biologic characteristic of bioprinted organs may subject them to Title III. NOTA's Title III provision provides as follows:

(a) It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

(b) Any person who violates subsection (a) shall be fined not more than $50,000 or imprisoned not more than 5 years, or both.99

Whether NOTA or, more specifically, this particular provision of NOTA, applies to bioprinted organs first hinges on whether bioprinted organs can be classified as "human organs." Fortunately, NOTA provides the following definition for the term: "The term human organ means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."100 The referenced regulation adds the intestine, esophagus, and stomach to the list of human organs.101

Bioprinted organs should be subject to Title III of NOTA because they meet the definition of "human organs." Bioprinted organs are constructed from human cells which are both a derivative from a fetus and a biological "subpart" of an organ. Additionally, the self-collapsing scaffolding allows the end product to not only be composed entirely of the patient’s tissues, but also contain the complex architecture and vasculature that is characteristic of human organs. Furthermore, because of their design, they are purported to function exactly as human organs once incorporated into the body. It can certainly be argued that the use of the term "human" has the implication that Congress is referring to those organs from another human person which developed organically from the womb until adulthood. Despite the fact that bioprinted organs are not the first manufactured biologic product to match the capabilities of human cells and tissues, Congress has yet to amend the terminology, leaving it open for interpretation of what exactly is "human." While bioprinted organs fit into the NOTA framework at this time, Congress need only to amend the definition of "human organ" to exclude bioprinted organs should they wish to exclude bioprinted organs from regulation under NOTA.

The classification of bioprinted organs as human organs will, of course, leave them subject to the prohibition provision.102 Therefore, the issue arises as to whether the sale of the bioprinted organ would be prohibited by NOTA. Pursuant to Title III of NOTA, it will be illegal to sell bioprinted organs for valuable consideration if the transfer affects interstate commerce.103

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100. Id.
103. Id.
sale depends on whether the exchange of monies for the organ would be considered valuable consideration.

NOTA lists reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of the human organ or the expenses of travel, housing, and lost wages incurred by a donor as costs not labeled as “valuable consideration.”104 This language leaves the actual exchange of money for organs illegal, while the costs surrounding the transfer are seemingly permitted. While replacement organs used in transplantation are typically donated, the exchange is lawful. However, where manufacturers must make a profit, the sale of a bioprinted organ seems to be unlawful. It is yet to be determined whether the manufacture of organs will be a service provided by hospitals or sold by private manufacturers. Should a hospital provide the organ, printed from the patient’s own cells, and charge only for the transplantation and related procedures, the transfer should be legal. They may also be capable of charging for the printing service, rather than the organ itself. While legality will be more difficult should private manufacturers provide the organs, they too should be able to legally sell the printing service to hospitals requesting the organs.

Bioprinted organs meet the definition of “human organs” provided by NOTA. The prohibition of the sale of organs in Title III is arguably the only section of NOTA that could be applicable to bioprinted organs as they are not donated or transported from one body to another. Despite this applicability, their sale will be lawful under Title III because manufacturers and/or hospitals can charge consumers/patients for the printing service. While the sale will be restricted by the phrase “valuable consideration”, so long as consumers are paying manufacturers for the service alone, there should be no valuable consideration for the organ itself to result in the prohibition of the sale.

B. Regulation of Bioprinted Organs by the FDA

The previous section estimates that bioprinted organs will be subject to NOTA given the provided definition of “human organ.” However, NOTA regulates the donation of organs and provides methods the transportation of organs from donor to donee. Before bioprinted organs, there was no need for NOTA to provide regulations speaking to safety of the organ itself. Therefore, there are no regulations in NOTA that can guarantee the safety of the operation of bioprinted organs. To ensure safety, the manufacture of bioprinted organs should be regulated by the FDA.

The FDA contains numerous divisions by which it organizes products. Under the existing law, bioprinted organs may fit well in one of two categories: Blood and Biologics: Human Cell and Tissue Products or Medical Devices.

104. Id.
1. Regulation of Human Cell and Tissue Products

Ligaments, bone, tendons, fascia, and cartilage are only a few examples of HCT/Ps that are regulated under Blood and Biologics. As bioprinted organs, like natural organs, are composed of collections of tissues, it would make sense that bioprinted organs be regulated as HCT/Ps. However, Blood and Biologics only regulate those products that satisfy all of the qualifying criteria pursuant to 21 C.F.R. §1271. Any products that satisfy these criteria are therefore regulated by section 361 of the Public Health and Safety Act. Those that do not qualify are redirected to 21 C.F.R. §1271.20 for guidance regarding the regulation of the non-qualifying product. 21 C.F.R. §1271.10 provides as follows:

(a) An HCT/P is regulated solely under section 361 of the PHS Act and the regulations in this part if it meets all of the following criteria:

1. The HCT/P is minimally manipulated;
2. The HCT/P is intended for homologous use only, as reflected by the labeling, advertising, or other indications of the manufacturer’s objective intent;
3. The manufacture of the HCT/P does not involve the combination of the cells or tissues with another article, except for water, crystalloids, or a sterilizing, preserving, or storage agent, provided that the addition of water, crystalloids, or the sterilizing, preserving, or storage agent does not raise new clinical safety concerns with respect to the HCT/P; and
4. Either:
   i. The HCT/P does not have a systemic effect and is not dependent upon the metabolic activity of living cells for its primary function; or
   ii. The HCT/P has a systemic effect or is dependent upon the metabolic activity of living cells for its primary function, and:
      a. Is for autologous use;
      b. Is for allogeneic use in a first-degree or second-degree blood relative; or
      c. Is for reproductive use.105

Bioprinted organs do not fit the framework for HCT/Ps as they do not satisfy all of the criteria. First, “minimal manipulation” is defined as follows: “for structural tissue, processing that does not alter the original relevant

105. 21 C.F.R. §1271.10
characteristics of the tissue relating to the tissue's utility for reconstruction, repair, or replacement; and for cells or nonstructural tissues, processing that does not alter the relevant biological characteristics of the cells or tissues." Bioprinted organs would satisfy this criterion because at the very most, the cells would be treated with a human growth factor to make them differentiate and proliferate. However, the biological characteristics of the cells would not be altered.

The second criterion requires that the HCT/P be used exclusively for homologous use. Simply put, this means that a patient's cells would be used as a substrate for an organ printed solely for his or her own transplantation. This too, is satisfied as each organ would be patient specific in order to prevent rejection and obviate the use of immunosuppressive drugs.

Bioprinted organs cannot satisfy the third criterion. In order to construct organs with the complex vasculature necessary to be incorporated into the human body, bioprinters require scaffolding which the cells surround until it collapses. This scaffolding is generally a synthetic polymer, which violates this criterion as they are not made of any of the accepted materials.

Bioprinted organs actually can satisfy the fourth criterion as they are dependent upon the metabolic activity for their primary function and would be for autologous use. However, they still cannot be included in the class of HCT/Ps because they require the addition of another material during the manufacture process. 21 C.F.R. §1271.15 provides some exceptions for HCT/Ps such as those that are used solely for nonclinical scientific or educational purposes, or if the HCT/P will be removed and implanted in the same surgical procedure. Bioprinted organs do not meet any of the prescribed exceptions and are redirected to 21 C.F.R. §1271.20, which provides the following:

If you are an establishment that manufactures an HCT/P that does not meet the criteria set out in § 1271.10(a), and you do not qualify for any of the exceptions in § 1271.15, your HCT/P will be regulated as a drug, device, and/or biological product under the act and/or section 351 of the PHS Act, and applicable regulations in title 21, chapter I. Applicable regulations include, but are not limited to, §§ 207.9(a)(5), 210.1(c), 210.2, 211.1(b), 807.20(d), and 820.1(a) of this chapter, which require you to follow the procedures in subparts C and D of this part.

Therefore, bioprinted organs do not qualify for regulation as HCT/Ps in Blood and Biologics with the FDA and may be better suited for regulation as medical devices.

106. See id. §1271.3(f).
107. 21 C.F.R. §1271.10
108. Id.
109. Id.
110. See id. §1271.20.
2. Regulation of Medical Devices

The Medical Device Amendments of 1976 established three classifications for medical devices: Class I, Class II, and Class III.\textsuperscript{111} Bioprinted organs do not qualify for a Class I or a Class II designation and therefore are not entitled to the smooth 510(k) approval process. Class I medical devices present no unreasonable risk of illness and/or injury and are only subject to “general controls” which apply to all devices.\textsuperscript{112} Class II devices present an increased degree of risk and require “special controls.”\textsuperscript{113} While there is not much guidance offered on these classifications, the Class III generalization is much more descriptive, providing that the devices either “present a potential unreasonable risk of illness or injury,” or are “purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health.”\textsuperscript{114} Bioprinted organs transplanted into the human body would be tasked with supporting and sustaining human life. This life sustaining function is the reason that bioprinted organs may be seen as presenting an unreasonable risk of illness or injury. A malfunctioning manufactured organ could have fatal consequences. Certainly, this categorizes them as Class III devices.

While some Class III devices may qualify for exceptions to the premarket approval process, it is unlikely that bioprinted organs will side-step the rigorous process. Because of the life-saving capacity of the devices, investigational use will only be a temporary process which will not provide an exception to the premarket approval process. Additionally, bioprinted organs cannot undergo the 510(k) notification process as they will be the first device of their kind. In fact, pursuant to NOTA, the bioprinted organs are equivalent to human organs. However, human organs are not a marketable product and there is no assurance of safety with bioprinted organs solely through comparison to a natural organ.

Under existing law, bioprinted organs fit the framework for Class III medical devices required to undergo the premarket approval process. While this process will certainly suspend the time before the organs are on the market, it will ensure the safety of these organs in which we will place so much trust.

C. Recommendations for Modification to the Current Law in Response to the Availability of Bioprinted Organs

While bioprinted organs certainly fit into the framework of some current laws and regulations, regulation of bioprinted organs under same may not be best in practice. Bioprinted organs are a unique technological innovation which have the potential to save lives. This particular characteristic of bioprinted organs should provide substantial weight in favor of regulations specifically tailored in an

\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
attempt to ensure the safety of those in the vulnerable position of requiring them. Upon the entry of bioprinted organs into the market, Congress should consider modifications to NOTA to exclude bioprinted organs from regulation under the Act. Additionally, while bioprinted organs may be regulated by the FDA as medical devices, the FDA may consider a new category of regulation for bioprinted organs and other products to ensure the best approval processes and safety practices.

1. Suggested Modifications to Title III of NOTA in Response to Marketable Bioprinted Organs

As explained above, there are strong arguments which claim that bioprinted organs are “human organs” and therefore subject to NOTA. While bioprinted organs fit this obligation, it is not necessarily best that NOTA govern bioprinted organs. NOTA was enacted in order to regulate the transplant of donated organs including their storage and transportation from donor to donee. Because bioprinted organs are not donated but manufactured specifically for a particular patient, NOTA, with the exception of Title III, provides no guidance with respect to the regulation of bioprinted organs. Therefore, just because the bioprinted organs fit the description for those regulated under NOTA, does not necessarily mean that they should be regulated by NOTA.

While Title III does seem to be applicable to bioprinted organs, it is unnecessary. Congress enacted Title III of NOTA for policy reasons regarding the sale of human organs originating from a person. Certainly, it is unlikely that Congress considered bioprinted organs when enacting this legislation in 1984 or amending it in 1988 and 1990. Because bioprinting requires only a cell sample to develop an organ, the policy arguments behind Title III of NOTA do not hold water when applied to bioprinted organs for obvious reasons. Striking Title III, NOTA does not contain any provisions that are truly valuable to the regulation of bioprinted organs. Therefore, upon release of bioprinted organs into the market, Congress should amend NOTA to specifically exclude bioprinted organs to better serve its own purposes and to allow proper regulation of bioprinted organs through other organizations such as the FDA.

In response to marketable bioprinted organs Congress can easily exclude bioprinted organs from NOTA in two ways: First, Congress could adjust the language provided in Title III of NOTA.

Currently, Title III of NOTA provides the following:

(a) It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.\footnote{42 U.S.C. 274e.}
To exclude bioprinted organs from NOTA, Congress could change this provision as follows:

(a) It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ, naturally developed within the human body, for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

Second, in the alternative, Congress could include an additional provision which specifically provides that human organs formed by bioprinting, or other similar synthetic processes are excluded from the Act. This additional provision could be added to subsection (a) or could be included with the definitions provided in the act. Although it was previously determined above that Title III of NOTA would not actually prohibit the sale of bioprinted organs, these recommendations would provide clear guidelines of what is intended to be regulated by NOTA.

2. Recommendations for FDA Regulation of Bioprinted Organs

While bioprinted organs surely fit into the classification of medical devices regulated by the FDA, the regulation of bioprinted organs may be better suited in a category specific to bioprinted devices or other biologically active products. A group that contains sophisticated devices, such as patient-specific bioprinted organs, as well simple devices, such as menstrual cups, may be too broad a class for appropriate regulation.

In response to the arrival of marketable bioprinted organs, the FDA should consider forming a new category for bioprinted products and materials. This would allow more specific regulation, which could improve the safety and effectiveness of the products. Specifically, a category composed of all bioprinted products may have regulations specific to the digital blueprints utilized, specific printer requirements, the printing process, the shipment of the product if applicable, and even their transplant in surgery as some products may require.

VI. CONCLUSION

There is no question of the lives that could be saved by the manufacture of human organs through bioprinting. Patients in need of a transplant could obtain a healthy organ to save their life in no time, compared to the wait they face at this time. Additionally, they could have transplantations without risk of the serious side effects such as organ rejection. Because the manufactured organs would be made from the patients own cells, the body would recognize the organ as part of itself, eliminating the need for immunosuppressive drugs. However, the organs must be fine-tuned and have their safety ensured before they reach these patients.

Placing bioprinted organs into categories within the existing law before they arrive on the market is speculative to say the least. On one hand, it seems as
though they will be subject to NOTA and could be subject to regulation by the FDA as medical devices. Based on this approach, however, bioprinted organs are operating under the umbrella of statutes and regulations enacted without comprehension of the possibility of their existence. Because of this, bioprinted organs, which would be subject to NOTA, would have to be marketed pursuant to Title III, which was enacted to prevent persons from selling their own organs. This places too many limits and restrictions on bioprinted organs without good cause, as the policy reasons behind NOTA do not apply to these manufactured organs. Also, regulation as a medical device, while possible, is not ideal as this category is simply too broad to afford all the safeguards necessary for an effective, safe, and complex product.

Upon the entry of bioprinted organs into the marketplace, Congress should amend the language of NOTA. NOTA's provisions should explicitly state that the only organs subject to it are those naturally grown inside the human body from conception to adulthood, thereby excluding bioprinted organs from its authority. Further, the FDA could take a proactive approach and add a new category of regulation specifically tailored for bioprinted products, such as organs, tissues, and other biologically active parts. This would reflect a more targeted group of products and ensure that their safety through regulations designed specifically for their purposes.
LOOT BOXES: “IT’S A TRAP!”

Rebecca E. McDonough*

I. INTRODUCTION

A microtransaction is “a business transaction that involves a very small amount of money, typically under about $5.00.” In the context of video games, microtransactions enable players to purchase customized content, accessories or other game advantages beyond the initial purchase price of the game. A global outcry sounded throughout the video game community in November 2017 after the beta release of Star Wars Battlefront II (“Battlefront II”) because of microtransactions featured in the game. Beta test players discovered that they could more easily purchase their wins in the video game than earn them through game-play. The nucleus of player complaints stemmed from game developer, Electronic Arts, incorporating “loot boxes” as a means of purchasing hero characters such as Darth Vader and Luke Skywalker to bypass the hours of game play required to earn them.

Whereas 4,500 hours of playing time could unlock all of the game content, players could more easily buy it for $2,100, thirty-five times the initial purchase price of the game. Restricting access to two of the most iconic characters of a much-beloved franchise prompted a Change.org petition for Lucasfilm to revoke the game developer’s licensing permissions. In Battlefront II and other games, players can either play to earn or use real money to purchase digital game items held in these loot boxes.

In response to player backlash, Electronic Arts made all Battlefront II loot boxes free to open. This controversy heightened awareness and concern for video

* Rebecca E. McDonough
2. RAMESH BANGIA, DICTIONARY OF INFORMATION TECHNOLOGY 358 (2nd ed. 2010).
6. Gilbert, supra note 5.
8. PHYS.ORG, supra note 4.
game regulation beyond the gaming community. Combined with the fact that many loot boxes mimic the visual and auditory stimulations of slot machines, requiring players to pay for the chance to win something has led players and lawmakers to draw parallels between loot boxes and gambling. There are three elements required to classify an activity as ‘gambling’—consideration, chance and prize. In this context, “consideration refers to participants risking something of value on the activity, chance describes the elements of uncertainty in the activity, and prize is the potential reward or outcome.”

This issue received considerable international concern prior to the release of Battlefront II. The Chinese Ministry of Culture and the State Administration of Publication, Press, Radio, Film and Television enacted microtransaction regulations as early as 2012. Findings of the National Gambling Impact Study Commission of 1999 determined that “new mechanisms for enforcing gambling on the Internet are necessary because traditional law enforcement mechanisms are often inadequate...especially where such gambling crosses State or national borders.” It was not until December 2018 that individual states, like Hawaii and New York, began to propose legislation addressing loot boxes. In February 2018, Senator Maggie Hassan questioned Federal Trade Commission nominees about the future of loot box regulation and effectively raised the issue to the federal level.

This article will argue that video games featuring loot boxes or loot box-like mechanisms requiring a player to pay to receive an unknown prize constitute gambling. As such, these games require heightened regulations to protect all consumers, but most importantly consumers within applicable vulnerable populations like children and adolescents. Part I of this article examines the...
concept of a loot box, the experience of opening a loot box, and the potential
content of such boxes. Part II addresses the international response to loot box
regulation, with specific focus on government regulation in Asian and European
countries. Part III discusses class action lawsuits against collectible and trading
card manufacturers and how these cases differ from those that could be brought
against video game developers. Part IV explores more recent caselaw applicable
to loot boxes as well as legislative responses to the loot box controversy at the
state level. Finally, Part V highlights the correlation between the gambling nature
of loot boxes and the propensity for addictive or gambling behaviors in vulnerable
populations.

II. THE CONCEPT, EXPERIENCE, AND CONTENTS OF LOOT BOXES

Loot boxes, or sometimes referred to as loot crates, are digital packages
embedded within a video game.18 Players either encounter these boxes through
game play or acquire them from an in-game shop.19 While there are loot boxes
that can be purchased with game credits or currency earned as a player advances
through the game, theses loot boxes are not at issue here. The loot boxes at issue
here are those which a player purchases by entering his payment information or
confirming a purchase with the payment information linked to his account. These
microtransactions occur when the player encounters a loot box through game

18. Benjamin Pu, What are Loot Boxes? FTC will Investigate $30B Video Game Industry,
NBCNews (Nov. 28, 2018), https://www.nbcnews.com/tech/tech-news/loot-boxes-gambling-video-
games-ftc-look-it-n941256.

19. Fraser Brown, Quake Champions is Getting Rid of Loot Boxes and Overhauling its Economy,
PCGamer (Dec. 6, 2018), https://www.pcgamer.com/quake-champions-is-getting-rid-of-loot-boxes-
and-overhauling-its-economy/.
play or purchases the loot box from the in-game shop. A player has no information regarding the loot box’s contents when he purchases it.

Screenshot of Battlefront II virtual currency packages required to purchase loot boxes

prior to making the boxes free to open.

Opening a loot box is visually, physically and auditorily stimulating. A click of the controller sets the process into motion. As suspenseful music builds in the background, the gaming controller begins to vibrate, and both culminate in the box exploding open. Depending on the game, the contents shoot into the air and descend to the foreground or jump to the foreground and spin across the screen while fireworks, confetti or coins fall in the background. At the close of


25. Id.
these animated theatrics, the player surveys the contents and moves on with his
game balancing “on the knife-edge between feeling hungry and feeling
rewarded.”

What the player gains from the loot box is often not as exciting as the process
of opening it. “Skins,” decorative items that change a character’s or weapon’s
appearance, are the most common loot box items. Although these aesthetic
features do not necessarily contribute to how far the player advances through
the game, such features add to the player’s overall enjoyment or amusement
experience, especially when the player has the same “skins” as internet-famous
video gamers. Other potential loot box items include weapons, armor or game
characters, with the chances of getting a rare item in these categories being
unpredictable. Depending on the game, the loot box item is determined
by a random number generator (RNG) or other randomization algorithm programmed
in the game and “no odds of winning are communicated.”

Without knowing how objective the RNG is, players continue to play for and
purchase loot boxes. One game designer, paralleling loot boxes to a slot machine,
stated “[i]t’s the possibility you might get extremely lucky...You like what you get
but there’s always something else you kind of want to get.” It is this “something
else” which keeps players coming back to the video game and opening more loot
boxes.

III. INTERNATIONAL EFFORTS TOWARD LOOT BOX REGULATION

Regulatory responses to loot boxes occurred more rapidly abroad than in the
United States, with several Asian and European countries conducting
government-sponsored studies prior to 2017. These countries examined the
legality of loot boxes under existing gambling law to determine if greater
restrictions were required to comply with the law and if specific games should be
banned until they could be in compliance. While some countries, such as Great

27. Mattha Busby, ‘Easy trap to fall into’: Why Video-Game Loot Boxes Need Regulation, THE
29. FPS JUSTICE GAMING COMMISSION (BELG.), Research Report on Loot Boxes (Apr. 2018), at 8,
31. Joe Donnelly, Australian Senate Backs Loot Box Investigation, PC GAMER (Jun. 28, 2018),
32. GAMING AUTHORITY (NETH.), Study into Loot Boxes A Treasure or a Burden? (Apr. 10, 2018),
Britain, found that loot boxes did not qualify as gambling and therefore did not need greater regulation, others, like Belgium, banned certain video games featuring loot boxes.

A. Government Sponsored Studies and Action in Great Britain and the Isle of Man

As early as August 2016, the British Gambling Commission issued a discussion paper examining the use of virtual currency in video games. Referring to these as “skins,” or rather “game items that provide aesthetic upgrades to a player’s game play,” the Commission recognized that these items could be sold or traded through game or third-party marketplaces.\(^{34}\) The Commission concluded, and reaffirmed in 2017, that where game items could be traded or sold “for money or money’s worth outside a video game, they acquired monetary value and are themselves considered money or money’s worth.”\(^{35}\) Seeking to apply some form of regulation, the Commission recommended a licensing requirement for game or third-party gambling platforms that allow for or promote gambling with game items.\(^{36}\) Video games that feature loot boxes do not necessarily also include “readily accessible opportunities to cash in or exchange those awarded game items for money or money’s worth,” therefore they do not automatically qualify as a gambling activity.\(^{37}\) Having determined that loot boxes, individually, are not a form of gambling, the Commission cautioned that it would maintain a relationship with game developers and designers to prevent and avoid criminal activity on a case-by-case basis.\(^{38}\)

Conversely, the Isle of Man, a British territory, amended its statutory regulation of online gambling to include “anything which has a value in money’s worth.”\(^{39}\) The Gambling Supervision Commission adopted regulation applicable to loot boxes in its interpretation of “something of value.” For the purposes of the regulations, a game item has value if “(a) it is capable of conversion into currency used anywhere in the world; or (b) it is capable of acceptance by an operator as a deposit (in the form of a store of value) for the purposes of online

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36. Id. at 6.
37. Id. at 7.
38. Id. at 8.
gambling.\textsuperscript{40} This regulation therefore applies to convertible virtual currencies like Bitcoin and non-convertible currencies like game items won or purchased through loot boxes.\textsuperscript{41} Allowing players to operate video game accounts with real or virtual currencies that have monetary value, without regard to the transferability of these currencies, led the Gambling Supervision Commission to ban video games with loot boxes.

The difference between the British Gambling Commission and the Gambling Supervision Commission of the Isle of Man is striking considering that one is a territory of the other. The Gambling Commission focuses on the transferability of game items on third-party marketplaces, while the Gambling Supervision Commission specifically makes reference to game items as a form of virtual currency. The Gambling Commission, like U.S. courts overlooks the existence of third-party sites that allow game items to be used as currency. Although some of these sites are not directly affiliated with the specific video game, they are products of the game’s existence and allow players to “cash in” their game items and in some instances, entire gaming accounts.\textsuperscript{42} The more encompassing approach by the Isle of Man offers greater protections for consumers and clarity in enforcement.

\textbf{B. Legislative Action in China and Japan}

The Chinese Ministry of Culture recently updated existing legislation that previously banned developers from including pay-to-play mechanisms like loot boxes.\textsuperscript{43} Now the Ministry of Culture requires developers to disclose the odds of a player receiving specific game items from a loot box.\textsuperscript{44} Developers must “publicly announce information about the name, property, content, quantity and draw probability of all virtual items.”\textsuperscript{45} Advancing these regulations, the State Administration of Publication, Press, Radio, Film and Television prohibits “any game content that induces users to directly or indirectly spend real money to acquire virtual items or services in a randomized way without detailed rules

\begin{itemize}
  \item \textsuperscript{41} Id.
  \item \textsuperscript{42} For instance, third party marketplaces advertise Fortnite accounts by the number of wins, rare skins and V-Bucks (game currency) associated with the account and sell such accounts at prices nearing, and sometimes exceeding, $1,000.00.
  \item \textsuperscript{43} Gartenberg, supra note 14.
  \item \textsuperscript{44} Tracey Tang, A Middle Ground Approach: How China Regulates Loot Boxes and Gambling Features in Online Games, Mondaq (May 16, 2018), http://www.mondaq.com/china/x/672860/Gaming/A+MiddleGround+Approach+How+China+Regulates+Loot+Boxes+and+Gambling+Features+in+Online+Games.
\end{itemize}
explicitly being provided to users.46 Mandatory compliance forces developers to modify game content if they want to stay in the Chinese market. Consequently, several large American and Asian game developers, like Blizzard Entertainment and Tancet, published loot box odds in their games and on their respective internet platforms.47

Japan similarly took preemptive action against loot boxes in video games; however, regulation of these game items and mechanisms began as early as 2012 when the Japanese Consumer Affairs Agency began investigating the “complete gacha” systems in two popular games.48 The Japanese gacha system is modeled after a child’s vending, or colloquially “junk,” machine where one inserts a coin, turns the dial and receives a bouncy ball, mood ring or something of the like in return.49 In video games, it is the same concept with the player paying for the opportunity to spin the virtual dial and receive a random game item.50 Because the game item is unknown to the player prior to activating the gacha, “players may have to activate the gacha several times before receiving the item or character they want most.”51 Government intervention occurred after the passage of the Act Against Unjustifiable Premiums and Misleading Representations.52 The Act defines “premiums,” or prize categories as:

Any article, money, or other source of economic gain given as a means of inducing customers, irrespective of...whether or not a lottery system is used, by an Entrepreneur to another party, in connection with a transaction involving goods or services which the Entrepreneur supplies and which are designated by the Prime Minister as such.53

Similar to regulations in the Isle of Man, expanding the definition of “premium” to include other sources of economic gain, such as virtual currency or game items, allows for greater oversight to protect consumers. Such oversight allows the Japanese Prime Minister to place limitations on the values of premiums, to

46. Tang, supra note 44.
50. Id.
51. Kanerva, supra note 49.
restrict the quantity that may be offered by the player or received by the game, or to prohibit premiums altogether.\textsuperscript{54} Seeking to protect a consumer’s “voluntary and rational-choice making” processes, games of chance, like the gacha systems and loot boxes, were effectively banned by this Act.\textsuperscript{55}

Having initially developed in the Asian gaming market, it is not surprising that China and Japan have the most comprehensive consumer protection laws regulating loot boxes. Developers have already modified games to meet these international requirements; however, the same changes have not been made to games distributed in the United States. If greater legal protections existed domestically, American consumers would not only have the same immersive gaming experience, but also the relevant facts and information applicable to that experience.

C. Government Studies and Subsequent Video Game Bans in Belgium and the Netherlands

Belgium was the first European country to ban video games featuring loot boxes following the Battlefront II fallout. Seeking to determine if loot boxes constitute gambling, the Belgian Gaming Commission examined the correlation between microtransactions and the online element of the game itself.\textsuperscript{56} The online connectivity of certain games creates a virtual community which can lead younger and more naïve players to “erroneously believe that certain achievements [of other players] are based on skill and not on randomness and luck.”\textsuperscript{57} The Gaming Commission examined four video games, Overwatch, Battlefront II, FIFA 18, and Counter-Strike: Global Offensive, to determine whether a wager is placed for the chance of losing that wager or winning anything.\textsuperscript{58}

The Commission’s findings identified the existence of an “emotional profit expectation” in players after being exposed to loot boxes.\textsuperscript{59} It found that the “uncertainty about the content of the loot box, combined with the accumulation of the player’s hoped-for profit by opening the box, encourages the players to purchase a new loot box.”\textsuperscript{60} Without knowing what they might receive, players become driven to continue playing for or purchasing loot boxes with the hope of receiving a rare or desirable game item. This cycle of chasing the next best game item quickly becomes predatory when developers restrict access to coveted character or items by placing them in loot boxes.\textsuperscript{61} Restricting access to certain

\textsuperscript{54} Id. at art. 4.
\textsuperscript{55} Id. at art. 1.
\textsuperscript{56} FPS JUSTICE GAMING COMMISSION (BELG.), supra note 30. at 5.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 8.
\textsuperscript{59} Id. at 6.
\textsuperscript{60} Id. at 6.
\textsuperscript{61} Id. at 7.
characters and creating a "fear of missing out" mindset encourages players to purchase loot boxes whenever they are offered. Other games, such as the NBA 2K and FIFA series, use specifically timed opportunities to purchase "limited edition" loot boxes. These timed opportunities amplify the "fear of missing out" mindset and encourage players to purchase loot boxes, limited or otherwise, at all times.

The Gaming and Betting Act defines a game of chance as:

[Any game by which a stake of any kind is committed, the consequences of which is either loss of the stake by at least one of the players or a gain of any kind in favour of at least one of the players, or organizers of the game and in which chance is a factor, albeit ancillary for the conduct of the game, determination of the winner or fixing of the gain.]

If a game, video or otherwise, requires a wager or bet to be placed and results in a loss of that wager or win of any kind for the player, then it is a game of chance under Belgian law. The Gaming Commission found that any type of wager, be it real or virtual currency, was enough to constitute a bet. While other nations, including the United States, focus on the wager being a thing of value, the Gaming Commission determined that "[v]alue can be defined as the degree of usability.

Therefore, if a player uses real currency to purchase the loot box directly or purchases virtual currency to then purchase the loot box, both suffice as wagers under Belgian law.

The loot box itself also constitutes a gain of any kind. Developers emphasize the necessity of game items to advance in the game causing players to attach value to the loot boxes and their contents. For players, the reward includes not only the game item, but also any advantages provided by that item. The chance element is satisfied with loot boxes because the contents and the odds of receiving specific game items are not disclosed nor can the player determine

63. Id.
65. FPS JUSTICE GAMING COMMISSION (BELG.), supra note 30, at 9.
66. Id.
67. Id. at 10.
68. Id. at 11.
them. Having concluded that loot boxes are gambling, the Gaming Commission required their removal from any game sought to be distributed in Belgium.

Like the Belgian Gaming Commission, the Netherlands Gaming Authority studied specific games to determine if loot boxes were illegal under the Betting and Gaming Act. In its analysis, the Authority studied three populations of video game players, which it defined as: recreational, problem and addicted. These populations were determined by each player’s amount of time spent playing video games and the amount of money spent through microtransactions. The Gaming Authority found that “the game of chance will increasingly rule their (the player’s) lives to the point that, for instance, money is borrowed to be able to play the game of chance.” Of greatest concern following this study were games that allowed players to consecutively purchase and open loot boxes all while accompanied by auditory and visual stimulations similar to those of a slot machine.

Four of the ten games studied by the Gaming Authority were found to be in violation of the Betting and Gaming Act. Loot boxes that contained transferable game items, transferred either in the game or on third-party marketplaces, led the Authority to conclude that these game items attained a market value because of their transferability. For this reason and because the loot box contents are determined without skill and by coincidence, the Authority concluded that loot boxes are games of chance and require a license to be distributed in the Netherlands.

69. Id. at 12.
71. See id. (Developers found to be in violation by failing to remove loot boxes or releasing new games with loot boxes are subject to €800,000 in fines (approximately $927,928.80) and up to five years in prison).
72. See FPS JUSTICE GAMING COMMISSION (BELG.), supra note 30, at 16 (In an effort to end predatory practices against minors, the Gaming Commission retained the discretion to double the penalties if the affected player was under the age of 18).
73. GAMING AUTHORITY (NETH.), supra note 33, at 3.
74. Id. at 6.
75. Id. at 6.
77. Id.
78. GAMING AUTHORITY (NETH.), at 14.
79. GAMING AUTHORITY (NETH.), Kansspelautoriteit ontvangt klachten over blokkade online items [Gaming Authority Receives Complaints about Blockade Online Items], (Jun. 22, 2018), https://kansspelautoriteit.nl/nieuws/nieuwsberichten/2018/juni/kansspelautoriteit-0/ (translated from original Dutch).
80. See id. (Developers of the four violating games had until June 20, 2018 to comply with applicable law and obtain a license or remove the loot boxes).
81. See Lanier, supra note 76 (After June 20, violators became liable for fines up to €830,000.00 (approximately $962,726.13), or criminal prosecution).
While the Belgian Gaming Commission relied on findings which supported a correlation between loot boxes and the individual components of gambling, the Netherlands Gaming Authority focused on the psychological effect of opening loot boxes and the transferability of loot box items. U.S. regulators and lawmakers should consider all of these factors when developing specific regulations for loot boxes. The elements of gambling are present, but to move beyond outdated definitions of the law, regulations must address the human impact loot boxes have on consumers and the technological sophistication of modern video games.

With origins from the Japanese "gacha" system and well-established legislation abroad, the U.S. should look to these examples for guidance on how to regulate loot boxes. The fact that some of these consumer protection laws have existed since 2012 without major industry pushback, suggests that they are effective and efficient measures for limiting the predatory effect of loot boxes. Although Great Britain is only willing to define loot boxes as gambling if there is a third-party marketplace tied directly to the video game, other nations understand that if a consumer wants to sell something, he or she will find or create a market for it. Recognizing the value given to game items bought and sold in the video game itself or on third-party marketplaces, demonstrates that these governments understand the real-world value of such items and want to protect consumers by any available means. Consumer protection is not necessarily the supreme goal of the law; however, promotion of the general welfare and providing for the common defense of American citizens are. These paramount goals of the law provide the umbrella under which consumer protection sits.

IV. UNITED STATES CASE PRECEDENT APPLICABLE TO LOOT BOXES

Trading cards such as those with one’s favorite baseball player or fictional super creature have been, and remain, popular collector’s items. An enthusiast’s chase for the rarest cards, like the T206 Honus Wagner or Pikachu Illustrator, can quickly shift purchasing card packs from a hobby to an obsession. Several collectors have gone so far as to sue card manufacturers under the RICO Act to recover their perceived losses. 82 It is not difficult to draw comparisons between the chance element of attaining a rare trading card and that of attaining rare game items from a loot box. Recent lawsuits against Apple and Google regarding in-app purchases also parallel legal arguments that can be made in support of qualifying loot boxes as gambling. The most direct changes in applicable loot box law are occurring at the state level. Case precedent and state efforts signal the need for greater external regulation of the video game industry to protect all players, but most importantly players from vulnerable populations such as children and adolescents.

A. Connections between Loot Boxes and the Trading Card Industry

In the mid to late 1990s, baseball card collectors began filing class action lawsuits against card manufacturers alleging that manufacturers violated the Racketeer Influenced and Corrupt Organizations Act by including rarer cards in card packs. Manufacturers produced card packs ranging between six and twenty cards with one or more rarer cards included at random. Unlike loot boxes, the odds of receiving one of the rarer cards were printed on the box or cellophane wrapping. The classes sued under the RICO Act because they believed the marketing and distribution of the cards were a form of unlawful gambling and therefore a RICO violation. Arguing that they “paid at least a portion of the purchase price for the chance to win an insert card,” the classes sought to prove that the required elements of gambling—consideration, chance and prize—existed. These consumers purchasing packs with the primary purpose of obtaining cards and the secondary purpose of potentially obtaining a rare card parallel their video gaming contemporaries who purchase loot boxes with the primary purpose of obtaining a game item and the secondary purpose of potentially obtaining a rare game item.

Sustaining a civil action under RICO requires a defendant to have engaged in conduct of an enterprise, through a pattern of racketeering activity that resulted in injury to the plaintiff’s business or property. A majority of the RICO cases resulted in dismissal because the courts held that an “[i]njury to mere expectancy interests or to an ‘intangible property interest’ is not sufficient to confer RICO standing.” The Ninth Circuit specifically held that not receiving a rare card is not a recoverable injury under RICO because “disappointment upon not finding an insert card is not an injury to property.” Disappointment is not a legally cognizable injury. However, existing law does not adequately reflect technological advancements and the sophistication of modern video games.

While U.S. courts recognize that the chance element of obtaining a rare card is present and the collectors pay consideration for the card pack, and in turn receive the pack, the collectors did not suffer a financial loss. Similar reasoning

84. Id. at 604.
85. Id.
86. Chaset v. Fleer/Skybox Intern., LP., 300 F.3d 1083, 1086 (9th Cir. 2002).
90. Price, 138 F.3d at 607.
91. Chaset, 300 F.3d at 1087.
92. Major League Baseball Properties, Inc., v. Price, 105 F.Supp.2d 46, 51 (E.D.N.Y 2000); See also Adell v. Macon County Greyhound Park, Inc., 785 F.Supp.2d 1226 (E.D.Ala. 2011)(plaintiffs failed to support assertions that their gambling losses were the result of the alleged RICO violations).
can be applied to arguments for heightened loot box regulations when one considers European and Asian interpretations of "something of value."

B. Class Action Lawsuits Against Video and Online Game Developers Under the RICO Act

Following in the footsteps of trading card collectors, video game players filed a class action lawsuit under the RICO Act against Valve Corporation, developer of Counter Strike: Global Offensive. In providing an affiliated marketplace to buy, sell and trade game items, the class alleged that Valve effectively operated and promoted "an illegal online gambling market." Echoing the findings of the Netherlands Gaming Authority, the class argued that the transferability of game items for cash on third-part marketplaces constituted gambling. However, in adopting precedent set by trading card RICO cases, the court held that the alleged gambling losses were not recoverable under the RICO Act.

It is important to highlight that Valve's operation and promotion of an affiliated marketplace is what made Counter Strike: Global Offensive illegal in the Isle of Man and the Netherlands. Allowing game items to be transferred directly to cash gives game items a value no matter whether or not a player plans to buy, sell or trade on an affiliated or third-party website. While other countries recognize that providing a marketplace whereby players effectively "cash out" their winnings constitutes regulable gambling, the United States does not. Instead, U.S. courts emphasize the virtual nature of game items rather than recognizing their monetary value.

C. The Failure to Recognize the Real-World Value of Virtual Items in U.S. Courts

More recently, in Soto v. Sky Union, LLC., online game players filed a class action lawsuit against developers for facilitating gambling through a game initially marketed as a game of skill. The players downloaded a "free-to-play" game, but subsequently purchased virtual currency to unlock undisclosed characters and features. With the developer placing limitations on game content through a low-value weighted randomizing algorithm, players found themselves spending

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94. Id. (quoting Dkt. No. 11 at ¶¶ 3, 21).
95. Id.
96. Id. at *8.
98. See Gaming Authority (Neth.), supra note 33, at 9.
100. Id. at 875.
real currency to purchase access to different levels of the game or to purchase opportunities to win characters. Despite always winning something, players were far more likely to win a low-value item. The court’s analysis of the three elements of California Penal Code § 330b(d) focused on whether players were entitled to a ‘thing of value’ following their purchase of virtual currency or game content. The court reasoned that game items were not a thing of value because they are “imaginary rewards,” not directly exchangeable for money, and it further reasoned that enhanced game play or enjoyment lacked a calculable value and could not be a ‘thing of value’ under applicable law.

Basing its argument for dismissal on the conclusion that game items are not transferable for real money, the court shows a lack of understanding for the video game community. Successful players will find ways to sell their accounts either on affiliated websites, like that of Valve Corporation, or third-party marketplaces. The price of a game account is directly linked to how many and what quality game items the account has. Therefore, if a market to buy or sell game items individually or as part of an entire account exists, then these game items are things of value.

V. CLASS ACTION LAWSUITS AGAINST GAME DEVELOPERS UNDER STATE CONSUMER PROTECTION LAWS AND THE RECENT PUSH FOR FORMAL LEGISLATION

Basing legal arguments under the RICO Act against video game developers will be unsuccessful, as demonstrated by case precedent. Since 2017, video game players have shifted away from the RICO Act and toward bringing actions under individual State loss recovery statutes. These complaints concern ‘free to play’ online games or mobile applications that are free to download but require microtransactions to access advanced content. While many of these cases were

101. Id.
102. Id.
103. Id. at 878.
104. Id. at 879-880.
105. See, e.g., Steely v. Commonwealth, 164 S.W.2d 977 (Ky. Ct. App. 1942)(pinball machine free replays constitute a win under gambling laws because “other thing” of value “is not confined to money, nor to corporeal articles of money value...the player, if successful, wins the value of the nickel invested in such an engagement”); and Kraus v. City of Cleveland et al., 19 N.E.2d 159 (Ohio. 1939)(extending the definition of “thing of value” to include the intangible, “[a]musement is a thing of value...[t]he greater the amount of amusement received, the more valuable the prize”).
106. Soto, 159 F.Supp.3d 871 at 880.
108. Id.
brought by players, others were brought by parents on behalf of their minor children.

A. Virtual Casinos in Free to Play Online Games

Machine Zone, Inc. developed Game of War, an online game in which players build virtual empires.111 Although the game may be played for free, players can buy virtual currency to either purchase game items directly or to place bets in the game’s virtual casino for chances to win random game items.112 The plaintiffs argued that with no control over or skill to determine the game items from the casino, Machine Zone operated an illegal gaming device under applicable loss recovery statutes.113 Like the district court in Soto, the district courts in the Game of War cases found that the virtual casino only gave “players something that has value in the game: once the player buys the gold, it can only be used in the game, whether to buy chips and play in the Casino or to buy items in the virtual marketplace.”114 Finding that loss recovery statutes did not include “virtual gold and other virtual resources” received by Game of War casino players, the plaintiffs could not support their actions.

Furthermore, following Illinois case precedent, one court reasoned that it was not the court’s responsibility to retroactively protect players from playing in the casino, and like the plaintiff in Phillips v. Double Down Interactive, LLC., who brought a similar action against a virtual casino, “[s]he could have avoided the cost of buying more chips by either opting for alternative entertainment when she ran out of chips, or by stopping play and waiting a day for an additional allotment of free chips.”115 Because the plaintiffs chose to continue playing for and purchasing game items, they could not sustain an action under their applicable State loss recovery statutes.

Disregarding the value of virtual currency, courts continue to misinterpret the growing number of wager-like payments made by players and instead, appear to interpret them as good faith investments for the game developers. Judicial interpretation of factually similar cases diverge when children are the ones purchasing the game items.

B. Class Action Lawsuits Brought by Parents on Behalf of Their Minor

111. See Mason, 851 F.3d at 317.
112. Id.
113. Id. at 318.
Children

Google and Apple provide mobile device users with stores where they can purchase applications for the specific operating system. Both operating systems require the purchaser to log into his account prior to downloading any applications, free-to-play or otherwise. After initially entering one’s account information, the user stays logged-in for thirty minutes on Google operating systems, and for fifteen minutes on Apple systems. During this time, account information does not have to be entered again to make subsequent downloads, purchases or other transactions on the account or in previously downloaded applications (“in-app purchases”).

In the Google cases, parents brought suit after downloading free to play or nominally priced, typically $0.99, games for their children only to discover, shortly after giving the mobile device to their child, their accounts were charged for purchases of virtual content. One parent brought a class action against Google seeking relief under the California Consumers Legal Remedies Act (CLRA) as well as State contract and administrative law. The plaintiff’s complaint for breach of the implied covenant of good faith and fair dealing alleged that Google “conceal[ed] the ability to use real-world currency to purchase game currency in gaming Apps labelled as ‘free,’ with the intent of inducing minors to purchase said game currency” and that Google had an affirmative duty to “disclose material facts about the game currency in Apps...promoted to children as ‘free.’”

Although Google argued that its Terms of Service agreements relieve it of liability for purchases made through a user’s account, the court found that Google promoted subsequent in-app purchases by children without notifying the account holder. Based on this conduct, the court held that the plaintiff sufficiently demonstrated how Google’s conduct breached its duty of good faith and fair dealing by engaging in acts that “frustrate the common purpose of the agreement by forcing parents to pay for purchases that Google induced parents’ minor children to make.” However, the court found that Google had not violated the CLRA because the plaintiff failed to demonstrate that she acted in reliance on Google’s misrepresentations or would have acted differently had she known of such misrepresentations.

117. Id. at *4.
118. Id.
120. Imber-Gluck, No. 5:14-CV-01070-RMW, at *4.
121. Id.
122. Id. at *12.
123. Id. at *27.
124. Id. at *27-*28
125. Id. at *17.
Conversely, just two years prior to the Google litigation, the same court held that Apple violated CLRA, but not the implied covenant of good faith and fair dealing for substantially similar conduct. Like the plaintiff in the Google litigation, the plaintiff class against Apple alleged that their children made in-app purchases of game items and virtual currency featured in free-to-play games without their knowledge or authorization.\textsuperscript{126}

In its analysis of Apple’s CLRA violations, the court held that the plaintiffs sufficiently alleged that they acted based on misrepresentations made by Apple because it “actively advertis[ed], market[ed] and promot[ed] its bait Apps as ‘free’ or nominal.”\textsuperscript{128} Having demonstrated that they incurred unauthorized charges as a result of Apple’s unlawful business acts and practices, the plaintiffs supported an independent cause of action under California’s Unfair Competition Law.\textsuperscript{129} Nevertheless, the court held that the plaintiffs failed to demonstrate that Apple’s conduct “was intended to and did frustrate the common purpose of the agreement” because under Apple’s Terms and Conditions agreement, the plaintiffs assumed responsibility and accountability for the activity of and purchases made through their accounts.\textsuperscript{130}

These cases demonstrate that it is possible to sustain an action against a game developer or operator under state law. Both class actions collectively returned $51.5 million in settlements for consumers.\textsuperscript{131} The same arguments made by plaintiffs against Google and Apple can be applied to potential cases against video game developers. After paying the initial purchase price and without knowledge that the game microtransactions, consumers do not receive the product for which they paid. Furthermore, by restricting access to game content and characters, developers misrepresent the product they distribute. It would not be far reaching for consumers to bring class actions against developers if the consumers relied on representations in advertising materials that feature content or characters that can only be acquired through loot boxes or other microtransactions.\textsuperscript{132}

Considering that Apple now requires mobile applications featuring loot boxes to disclose the odds of receiving specific game items, video game developers should interpret this as a signal that players and operators have been put on

\textsuperscript{126} In re Apple In-App Purchase Litigation, 855 F.Supp.2d 1030, 1033 (N.D.Cal. 2012).
\textsuperscript{127} Id. at 1033.
\textsuperscript{128} Id. at 1039 (quoting Docket Item No. 28, at ¶ 72).
\textsuperscript{129} Id. at 1040.
\textsuperscript{130} Id. at 1042.
\textsuperscript{132} Rosenthal and Simon, supra note 9, at 8.
notice that a cause of action could arise linking loot boxes to gambling. While developers are making efforts to mitigate potential liability for misrepresentation by including “Game Purchases” labels on the physical boxes of games with loot boxes and other microtransactions, this is not enough. If Apple, one of the world’s largest information technology companies, can require its digital application developers to include loot box odds, the video game industry should be able to do so as well.

C. State Efforts to Enact Loot Box Legislation

Following the release Battlefront II, Hawaiian House of Representative members were the first lawmakers to raise concerns over loot boxes as a form of gambling. Citing concerns over developers “employ[ing] predatory mechanisms designed to exploit human psychology to compel players to keep spending money in the same way that casino games are designed,” several bills were proposed to the Hawaii legislature in early 2018. Other states, such as California, Indiana and Washington, followed Hawaii’s example and began proposing either direct legislation or state-sponsored studies regarding potential loot box regulation under consumer protection laws.

1. Hawaii

Hawaii’s proposed legislation is primarily focused on imposing an age restriction of twenty-one years for the purchase of video games with randomized rewards, like loot boxes. With the support of the Hawaii Youth Services Network, concerned with the likelihood of children and youth developing behavioral addictions to gambling, House members seek to impose disclosure requirements on games that may “contain predatory, potentially harmful loot boxes and gambling-like mechanisms.” Although the legislation initially failed to pass, the Hawaiian House of Representatives did pass a Concurrent Resolution establishing the Digital Gaming Advisory Group to examine potential predatory

137. Gilbert, supra note 135.
138. S.B. 3024.
139. Id.
practice in video games and to report its findings prior to the 2019 Regular Session.\textsuperscript{140}

The legislature further sought to require the Entertainment Software Rating Board ("ESRB"), the only regulatory body of video games, to increase oversights on games with loot boxes.\textsuperscript{141} As the only entity that controls video game ratings, the Hawaiian legislature recognizes the power the ESRB wields in the industry. Seeking to impose greater oversight, the legislature proposed several new regulations directly applicable to the ESRB.\textsuperscript{142} To prevent individuals under twenty-one years of age from purchasing video games with loot boxes, House Concurrent Resolution 245 sought to require the ESRB to rate games with loot boxes as "Adult," label such games with a separate and distinct "game purchases" label, and disclose the odds of receiving any possible game item from a loot box.\textsuperscript{143}

2. New York

The New York state legislature also sought to impose an age restriction on video games and label requirements to "make customers aware of the potentially harmful and addictive game purchases and gambling-like mechanisms."\textsuperscript{144} To protect consumers, New York proposed red warning labels, publication of the odds of winning specific game items and an auditing of the video games to ensure the developer published odds are accurate.\textsuperscript{145} Finding that consumers are "essentially putting money in for something without being guaranteed to receive something of equal value or more in return," New York lawmakers want to ensure that consumers are protected from predatory and potentially "harmful and addictive gambling-like mechanisms and game purchases."\textsuperscript{146}

3. California

Under current California law, video game retailers must only post information about the video game rating system and provide explanatory material upon request.\textsuperscript{147} A new law proposed in early 2018 would require manufacturers to include "a clear disclosure that the video game includes the opportunity to engage in microtransactions on the physical box the video game is sold in."\textsuperscript{148} The

\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Memorandum from Jeffrey Dinowitz in Support of Legislation, A.B. 10075 (2017)(proposing that the Washington State Gambling Commission conduct a study of loot boxes and similar microtransaction mechanisms in video games) (LEXIS).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{148} Id.
bill seeks to protect consumers from predatory video game practices where "what used to be 'extra' content is now becoming 'required' content."\textsuperscript{149} Seeking to ensure that consumers are making informed purchases and getting the material for which they pay at initial purchase, California lawmakers only want to require specific box labels on games with microtransactions.\textsuperscript{150}

If such legislation were enacted, any game in which a player can "use real-world currency to purchase, download and/or unlock content within a video game" would require a specific label.\textsuperscript{151} Lawmakers do not seek to end microtransactions, only to disclose the practice to consumers so that they can make informed purchasing decisions for themselves or on behalf of their children.\textsuperscript{152} The hidden microtransactions appear minute when one considers a single $2.00 transaction; however, when you multiply that same transaction by the number of games sold just in the United States, it amounts to millions of dollars in revenue for the game developer.\textsuperscript{153} For example, one nineteen year old gamer spent over $17,000 purchasing game content in attempts to get an edge over his competitors.\textsuperscript{154} While there are existing civil penalties available in California, lawmakers want directly applicable legislation in hopes that it would incentivize developers to make legally adequate disclosures on game boxes.\textsuperscript{155}

\textbf{D. The Video Game Industry's Response to Legislative Efforts}

The ESRB disagrees that loot boxes are a form of gambling and opposes all attempts to regulate them as such.\textsuperscript{156} Adding a label that discloses a video game contains microtransactions has been interpreted as a means only to appease lawmakers and lacks any guarantee that consumers will notice, understand and then make informed purchasing decisions.\textsuperscript{157} Believing that its self-imposed measures are enough to protect consumers, the ESRB argues that loot boxes cannot be a form of gambling because players always receive something in return, or phrased differently, the house never wins.\textsuperscript{158} In response to legislative attempts, the Entertainment Software Association continually emphasizes that purchasing and opening loot boxes is a voluntary act by the player and in no way

\begin{flushleft}
\textsuperscript{149} Id. \\
\textsuperscript{150} Id. \\
\textsuperscript{151} Id. \\
\textsuperscript{152} See id. \\
\textsuperscript{156} See S.B. 3024, Haw. 29th Leg., Reg. Sess. (Haw. 2018). \\
\textsuperscript{157} See A.B. 2194, supra note 155. \\
\textsuperscript{158} Gilbert, \textit{supra} note 135. 
\end{flushleft}
do the games force or require him to have the loot box item.\textsuperscript{159} This argument completely overlooks the original controversy which sparked loot box outrage. Battlefront II was released without two of its central characters readily available for gameplay.\textsuperscript{160} Utilizing these characters went beyond voluntarily pushing the START button, to essentially requiring players to enter their credit card numbers.\textsuperscript{161} The video game industry’s failure to recognize that for some players, purchasing loot boxes stops being voluntary and becomes addicting should be of great concern to lawmakers.

Enacting directly applicable consumer protection laws at the state and, eventually, federal levels will be the most effective way to protect players from predatory gaming and from the potentially addicting nature of loot boxes. As much as the ESRB and Entertainment Software Association claim to act in the best interest of players, it cannot be forgotten that video games are part of a billion-dollar industry.\textsuperscript{162} As demonstrated by the ESRB’s existing efforts to include an “Game Purchases” label, it is not difficult to accomplish change.\textsuperscript{163} It is unclear at this time what these labels will look like and where they will be placed on the video game box. Although this is a step in the right direction, the ESRB should also adopt some of the proposed legislative recommendations.

The ESRB should take affirmative steps to avoid potential liability under existing consumer protection laws so that if legislation is passed, compliance will be less costly and more streamlined for video game developers, manufacturers and distributors. With the Federal Trade Commission securing $32.5 million from Apple and $19 million from Google for consumers as a result of litigation surrounding in-app purchases made without authorization,\textsuperscript{164} the same legal arguments could be made by parents or guardians of children who purchase game items without their knowledge or authorization. Because loot boxes have the elements of consideration, chance and prize, they are a form of gambling and must be regulated as such. While an age restriction of twenty-one is respectable, eighteen is more reasonable.\textsuperscript{165} A separate, readily noticeable label of such games should also be required on the front of the box, such as a red warning label or

\textsuperscript{160} PHYS.ORG, supra note 4 (explaining that Battlefront II prompted players to pay for loot boxes that held either essential game items or “coveted characters” like Luke Skywalker or Darth Vader).
\textsuperscript{161} Gilbert, supra note 5 ([F]ans feel that the game’s developer is putting important content behind a gate that can be unlocked only by spending an exorbitant amount of time or real money).
\textsuperscript{162} Jason M. Bailey, A Video Game ‘Loot Box’ Offers Coveted Rewards, but is it Gambling?, N.Y. TIMES (Apr. 24, 2018), https://nyti.ms/2FcnvyA.
\textsuperscript{163} See ENTERTAINMENT SOFTWARE RATING BOARD, supra note 134.
\textsuperscript{164} Good, supra note 131.
\textsuperscript{165} See S.B. 4042, 90th Leg., 2d Reg. Sess. (Minn. 2018) (prohibiting the sale of “a video game containing a system that permits the in-game purchase of (1) randomized reward or rewards, or (2) a virtual item that can be redeemed to directly or indirectly receive a randomized reward or rewards” to person under 18 years of age).
packaging of a distinct and distinguishable color.166 Especially considering the growing concerns for addictive and gambling behaviors exhibited by youths exposed to loot boxes, the time for heightened regulation is now.

VI. PUBLIC HEALTH CONCERNS FOR INTERNET GAMING DISORDER AMONG CHILDREN AND ADOLESCENTS

Children and adolescents are becoming increasingly more exposed to digital media and content in the advent of the smart phone. In 2011, 91% of children ages 2-17 participated in some form of mobile or internet gaming.167 By 2013 Internet Gaming Disorder (IGD), defined as “persistent and recurrent use of the Internet to engage in games, often with other players, leading to clinically significant impairment or distress,” was added to the Diagnostic and Statistical Manual, Fifth Edition (DSM-5).168

A. Internet Gaming Disorder Diagnostic Criteria

An IGD diagnosis requires a player to exhibit five or more of nine specific criteria within a one-year period.169 Such criteria includes: preoccupation with the game, withdrawal symptoms when removed from the game, tolerance (spending hours playing the game), inability to disconnect from or stop playing the game, loss of interest in real-life activities, relationships or other entertainment, continuing to play with knowledge of one’s psychosocial problems, lying to or deceiving family or friends about the amount of gaming, using games to alleviate a negative mood, and jeopardizing or losing a relationship, job or other opportunity because of the game.170 Some academics find this criteria to be inadequate and in need of additional behavioral markers specific to video gamers; such additions have not be made at this time.171

Continuing research has revealed that the lives of young people are becoming increasingly consumed by online gaming and manifest in physical and psychological health risks.172 Internationally, countries such as China, Iran and Switzerland have designated excessive gaming as a public health issue and

168. Douglas A. Gentile et al., Internet Gaming Disorder in Children and Adolescents, 140 PEDIATRICS s81, s82 (Nov. 2017) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013)).
169. Id. at s82.
170. Id.
established clinics to provide education and treatment services.\textsuperscript{173} Population studies of the neurobiology of IGD show the areas of the brain triggered by drug and gambling addictions are similar to those triggered by IGD and subjects exhibited neurological responses similar to those exhibited during a drug craving.\textsuperscript{174} If players are already exhibiting neurological responses similar to those of drug and gambling addicts and developers add gambling mechanisms, the probability of a player becoming addicted to gambling through purchasing loot boxes is unquestionably high.

B. The Need for Greater Protections at Home

Rather than hold video and online game developers responsible for the positive correlation between IGD and gambling addiction among youths, the medical community sees pediatricians, nurses and parents as “first responders” to mitigate excessive gaming.\textsuperscript{175} Enacting an age requirement for purchasing video games with microtransactions can only do so much if parents continue to buy such games for their minor children. If video game regulatory bodies are expected to act to protect children from developing addictive and gambling behaviors, parents must also make an effort. Providing healthy screen-free or video game-free behavioral examples are key to teaching youths balance between the real and the virtual worlds.\textsuperscript{176} Setting limits and using non-virtual interactions will teach children when to step way from the game and engage the world and individuals outside the screen.

Parent-child relationships and interactions are essential to child development and cannot be replaced by online content or video games.\textsuperscript{177} Controlling a child’s access to online or video games “is not an overbearing human rights affront to children.”\textsuperscript{178} Parents should try to model healthy online or video game behaviors and teach children when to stop playing.\textsuperscript{179} While it is easy to pass a child a smart phone or game controller, the lasting effects of this simple action are unknown and could be potentially harmful in the long term.

VI. CONCLUSION

In 2017, microtransactions and other game purchases accounted for 81% of the approximately $36 billion generated in revenue for the video game industry in the U.S. market alone.\textsuperscript{180} Without regulations and legislative oversights in place, the quantity and cost of video game loot boxes is likely to increase. The
efforts of the ESRB are steps in the right direction to protect consumers but being part of the industry it regulates presents a conflict of interest. It is unclear why legislative efforts at the state level are unsuccessful. Uniform laws at the State level and eventual federal regulation would allow the industry to continue to self-regulate through the ESRB but know that there are limits to the type of digital mechanisms that can be included in video games.

If state legislation continues to falter, it is in the best interests of the ESRB and video game developers to incorporate clear and distinct labeling on physical boxes and an age restriction of eighteen years. Furthermore, with these measures in place going forward, developers would not expose themselves to potential liability under existing consumer protection laws if they adequately disclose the inclusion of microtransactions in a manner beyond what the ESRB currently requires.

The United States must look to the more modernized and encompassing consumer protection laws applicable to loot boxes in Asian and European countries. It must be acknowledged that game items have value beyond the video game and in the real world. The existence of websites and online marketplaces that allow players to buy and sell game items and entire gaming accounts are evidence of this phenomena that the courts fail to understand.

Finally, living in the digital age where most children are spending more time in front of screens, the need for heightened consumer protections is greater than ever. In-app purchases are the same as buying loot boxes in a video game. The user is buying content beyond the initial purchase price without first being afforded the knowledge that doing so is essentially a requirement to play the game. These deceptive business practices are putting children at risk of developing addictive and gambling-like behaviors at an age when they lack the maturity and neurological development to recognize when to stop. While video games can provide children with entertainment, the lasting effects of exposure to loot boxes is likely to do more harm than good.

Michael Votel*

Abstract: The Fifth Amendment provides: “No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...”

In Chavez v. Martinez, Justice Thomas wrote in his plurality opinion that compelling a confession does not violate the Fifth Amendment right against self-incrimination unless and until the government uses the confession in a “criminal case.” Three other Justices joined Justice Thomas’s plurality opinion which found that, “mere coercion does not violate the text of the Self-incrimination Clause absent use of the compelled statements in a criminal case against the witness.” However, Justice Thomas declined to define the precise moment when a “criminal case” begins. Fortunately, the Court did not leave it there. Two additional Justices joined the portion of Justice Thomas’s plurality opinion which found that a “criminal case,” at the very least, requires the initiation of legal proceedings. However, Justice Thomas’s dicta strongly suggested that the right against self-incrimination is solely a trial right.

Following Chavez, a circuit split began to form regarding when a “criminal case” truly begins, with some circuits favoring a strict, narrow interpretation of “criminal case,” and others favoring a broad interpretation. At present, the Third, Fourth, and Fifth Circuits have strictly defined a “criminal case” to be limited to use of compelled statements at trial. Conversely, the Second, Seventh, Ninth, and Tenth Circuits have developed a much broader definition of “criminal case” that includes use of compelled statements at certain pretrial proceedings. Interestingly, the Supreme Court granted certiorari in City of Hays v. Vogt to potentially resolve the circuit split but ultimately dismissed certiorari as improvidently granted.

This Note delves into the history, intent, and Supreme Court precedent regarding the Fifth Amendment’s privilege against self-incrimination, analyzes the circuit split on the issue, and argues in favor of the narrow interpretation of the term “criminal case.” This Note argues that a “criminal case” within the meaning of the Fifth Amendment’s Self-Incrimination Clause should be limited to compelled statements used at trial. This approach comports with the history behind, purpose of, and Supreme Court precedent regarding the Self-Incrimination Clause and acknowledges that alternative procedural safeguards exist to prevent violation of the Clause.

* Michael Votel
I. INTRODUCTION

The Self-Incrimination Clause of the Fifth Amendment of the U.S. Constitution states that no person, “shall be compelled in any criminal case to be a witness against himself.” Despite its seemingly simple wording, lawyers and legal scholars alike have been unable to agree on the Self-Incrimination Clause’s exact meaning, scope, and rationale. The Self-Incrimination Clause has created many puzzles, but perhaps one of the most difficult is this: when exactly does a violation of the Clause occur? Specifically, when does a “criminal case” begin for purposes of the Self-Incrimination Clause?

In Chavez v. Martinez, Justice Thomas wrote in his plurality opinion that compelling a confession does not violate the Fifth Amendment right against self-incrimination unless that confession is used in a “criminal case.” However, Justice Thomas declined to define the precise moment when a “criminal case” begins. Chief Justice Rehnquist, Justice O’Connor, and Justice Scalia joined Justice Thomas’s plurality opinion which found that, “mere coercion does not violate the text of the Self-incrimination Clause absent use of the compelled statements in a criminal case against the witness.” Justice Souter and Justice Breyer, who both concurred in the judgment, also agreed that a “criminal case,” at the very least, requires the initiation of legal proceedings.

The lack of a clear definition of “criminal case” has caused a circuit split regarding the exact moment when a criminal case commences. The Third, Fourth, and Fifth Circuits have adopted a narrow definition of the term “criminal case” that requires the use of compelled statements at trial before a violation of the Self-Incrimination Clause occurs. Conversely, the Second, Seventh, Ninth, and Tenth Circuits have more broadly defined the term “criminal case” to include certain pretrial proceedings, such as bail hearings. At present, the Supreme Court has yet to resolve the circuit split.

This Note first fully dissects the Supreme Court’s decision in Chavez focusing on the reasoning behind Justice Thomas’s plurality opinion. This Note then discusses the post-Chavez circuit split, outlining the reasoning behind each
Finally, this Note will argue in favor of the position that a “criminal case,” in the Fifth Amendment context, should be limited to the use of compelled statements at trial. This Note will first show that a narrow definition of “criminal case” is consistent with the history behind, purpose of, and Supreme Court precedent regarding the Self-Incrimination Clause. This Note will also argue that there are already sufficient substantive and procedural safeguards in place to protect the right against self-incrimination, which make the broader view of the right unnecessary.

II. THE SUPREME COURT’S DECISION IN CHAVEZ

In 2003, the U.S. Supreme Court decided Chavez v. Martinez, thereby setting the stage for the circuit split that was to follow. In Chavez, two police officers were investigating suspected narcotics activity near a vacant lot when they heard Oliverio Martinez riding by on his bicycle. The officers ordered Martinez to stop, dismount, spread his legs, and place his hands behind his head. The officers then conducted a pat down frisk and discovered a knife in Martinez’s waistband. Exactly what happened next was disputed, but the officers claimed that Martinez took one of the officer’s gun and pointed it at them. Both the officers and Martinez agreed that the other officer then drew her gun and shot Martinez several times, causing severe injuries. Several minutes later, Ben Chavez, a patrol supervisor, arrived on the scene with paramedics and accompanied Martinez to the hospital. For about ten minutes total, over a forty-five minute period, Chavez questioned Martinez while he received treatment from medical personnel. During the interview, Martinez admitted that he took the gun from the officer’s holster and pointed it at the police. At no point during the interview was Martinez read his Miranda v. Arizona warnings. Martinez, however, was never charged with a crime and, therefore, his statements were never used against him in a criminal prosecution. Nevertheless, Martinez filed suit, in part, under 42 U.S.C § 1983 claiming that Chavez had violated his right to not be

13. See infra Part III.
14. See infra Part IV.
15. See infra Section IV.A.
16. See infra Section IV.B.
18. Id. at 763 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O’Connor and Scalia, JJ.).
19. Id.
20. Id. at 763-764.
21. Id. at 764.
22. Id.
24. Id.
25. Id.
27. Chavez, 538 U.S. at 764.
"compelled in any criminal case to be a witness against himself." Both the District Court and the Ninth Circuit held that Chavez was not entitled to qualified immunity because he violated Martinez's clearly established constitutional rights. The Supreme Court disagreed and held that Chavez did not violate Martinez's Fifth Amendment rights.

A. Justice Thomas's Plurality Opinion

Justice Thomas, writing for himself, Chief Justice Rehnquist, and Justices O'Connor and Scalia, announced the judgment of the Court regarding the Fifth Amendment issue and began his plurality opinion by analyzing the plain language of the Self-Incrimination Clause. The plurality squarely rejected Martinez's contention that the meaning of the term "criminal case" within the Self-Incrimination Clause should include the entire criminal investigatory process. The plurality instead stated that, "a 'criminal case' at the very least requires the initiation of legal proceedings." The plurality relied, in part, on the Black's Law Dictionary definition of "case," as "a general term for an action, cause, suit, or controversy at law...; a question contested before a court of justice." The plurality interpreted this definition to support its position that a criminal case does not commence until the initiation of legal proceedings because, unless the compelled statements are presented "before a court of justice," a "case" has yet to be initiated.

The plurality then relied heavily on previous Supreme Court precedent to establish its position. The plurality mainly relied on dicta in United States v. Verdugo-Urquidez to conclude that, "although conduct by law enforcement officials prior to trial may ultimately impair the right against self-incrimination, a constitutional violation occurs only at trial." Although this language is dicta, the language itself is steeped in precedent. The plurality also reinforced the idea that the failure by Chavez to read Martinez his Miranda rights did not create a Fifth Amendment violation because the violation of judicially created

28. Id. at 764-65. Martinez also made a Fourteenth Amendment Due Process claim but that is a separate question from his Fifth Amendment claim.
29. Id. at 765.
30. Id. at 766-67.
31. Id. at 763, 766-67.
32. Id. at 766.
33. Chavez, 538 U.S. at 766 (citing Blyew v. United States, 80 U.S. 581, 595 (1872)).
34. Id. (citing Case, BLACK'S LAW DICTIONARY (6th ed. 1990)).
38. See Verdugo-Urquidez, 494 U.S. at 264; see Withrow v. Williams, 507 U.S. 680, 692 (1993) (describing the Fifth Amendment as a trial right); see Kastigar v. United States, 406 U.S. 441, 453 (1972) (stating that use of compelled testimony at trial is not a violation of the Fifth Amendment if immunity is granted to the compelled witness).
prophylactic rules does not automatically create a constitutional violation.\textsuperscript{39} Ultimately, the plurality found that because Martinez’s statements were never admitted as testimony against him in a criminal case, he was never made to be a witness against himself in violation of the Fifth Amendment.\textsuperscript{40} Accordingly, the plurality found that compulsive questioning alone is not enough to violate the Self-Incrimination Clause of the Fifth Amendment.\textsuperscript{41} Although the plurality declined to define the precise moment when a “criminal case” begins, Justice Thomas’s reliance on dicta from Verdugo-Urquidez suggests that the right against self-incrimination is solely a trial right.\textsuperscript{42}

**B. Justice Souter’s Concurrence in the Judgment**

In a separate opinion concurring in the judgment, Justice Souter, joined by Justice Breyer, indicated that he agreed with Justice Thomas’s plurality that the Self-Incrimination Clause is not violated until a person’s statements are used against him in a “criminal case,” which requires, at the very least, the initiation of criminal proceedings.\textsuperscript{43} Therefore, a majority of the Court rejected the idea that mere compulsion can violate the Self-Incrimination Clause.\textsuperscript{44} Unlike Justice Thomas, Justice Souter suggested that the privilege against self-incrimination could be more than just a trial right if a plaintiff could make a “powerful showing” to warrant expansion of Fifth Amendment protection.\textsuperscript{45} However, a majority of the Court agreed that, at least in the typical case, the Self-Incrimination Clause cannot be violated until compelled statements are used in a legal proceeding.\textsuperscript{46}

The main reason that Justices Souter wrote separately and did not join Justice Thomas’s plurality is that he, along with Justice Breyer, believed that the issue of determining when a Self-Incrimination Clause violation occurs requires some amount of judicial discretion.\textsuperscript{47} While reiterating that the Self-Incrimination Clause’s core protection focuses on the courtroom use of a criminal defendant’s compelled, self-incriminating testimony, Justice Souter argued that the bright-
line rule suggested by Justice Thomas would be insufficient to deal with the extraordinary case. Essentially, while fundamentally agreeing with Justice Thomas that the right against self-incrimination is not violated until statements are used in a legal proceeding, Justice Souter simply preferred to forego the institution of a bright-line rule that might bar a future extraordinary case. Accordingly, save for Justice Souter’s caveat, the majority of the Court agreed that the main purpose of the Self-Incrimination Clause is to protect against courtroom use of compelled, self-incriminating statements.

III. THE POST-CHAVEZ SPLIT

After the Supreme Court’s inharmonious “decision” in Chavez v. Martinez, a circuit split emerged regarding when a “criminal case” actually commences. Three circuit courts, the Third, Fourth, and Fifth, have determined that the right against self-incrimination can be violated only at trial. These narrower holdings focus the use of compelled statements at trial and that without such use a Self-Incrimination Clause violation has yet to occur. Conversely, four circuit courts, the Second, Seventh, Ninth, and Tenth, have determined that the right against self-incrimination can be violated in certain pretrial proceedings, such as probable cause hearings, bail hearings, and suppression hearings. These broader holdings take advantage of the “grey area” left by Chavez and use their own precedent to justify their position. Both the narrower and broader holdings have relied, to some degree, on Justice Thomas’s plurality opinion in Chavez, but the latter have chosen to take Justice Thomas’s dicta less seriously.

A. The Narrow Definition of “Criminal Case”: The Self-Incrimination

48. See Chavez, 538 U.S. at 777-79.
49. See id.
50. See Mannheimer, supra note 46, at 1279.
52. Renda, 347 F.3d at 557-58; Burrell, 395 F.3d at 513-14; Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005). Many of the “undecided” circuits, such as the Sixth Circuit, have been leaning towards a narrow definition as well.; See Tinney v. Richland Cnty., 678 F. App’x 362, 365 (6th Cir. 2017); see also Dowell v. Lincoln Cnty., 927 F. Supp. 2d 741, 749 (E.D. Mo. 2013).
53. See Renda, 347 F.3d at 557-58; Burrell, 395 F.3d at 513-14; Murray, 405 F.3d at 285.
54. Higazy v. Templeton, 505 F.3d 161, 170 (2d Cir. 2007); Sornberger v. City of Knoxville, 434 F.3d 1006, 1026-27 (7th Cir. 2006); Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009); Vogt v. City of Hays, Kansas, 844 F.3d 1235, 1239 (10th Cir. 2017).
55. See Higazy, 505 F.3d at 170; Sornberger, 434 F.3d at 1026-27; Stoot, 582 F.3d at 925; Vogt, 844 F.3d at 1239.
56. See Renda, 347 F.3d at 557-58; Burrell, 395 F.3d at 513-14; Murray, 405 F.3d at 285; Higazy, 505 F.3d at 170; Sornberger, 434 F.3d at 1026-27; Stoot, 582 F.3d at 925; Vogt, 844 F.3d at 1239.
WHAT IS A "CRIMINAL CASE" 93

Clause as a Trial Right

The Third, Fourth, and Fifth Circuits have adopted Justice Thomas's narrow view of the term "criminal case" within the Self-Incrimination Clause. These circuits have held that compelled statements must be used at trial to trigger a violation of the right against self-incrimination. These circuits heavily relied on Chavez, Miranda, and their own precedent in making their holdings.

Much like Justice Thomas's view in Chavez, the narrower view of the Self-Incrimination Clause focuses on Miranda being a prophylactic rule and that failure to give Miranda warnings is not itself a violation of the Constitution. This is an important distinction because if Miranda is a constitutional rule, rather than a prophylactic one, it would follow that the Self-Incrimination Clause could be violated when police violate Miranda. Admittedly, Dickerson v. United States seemed to say that Miranda is a constitutional rule, and therefore not prophylactic. However, the Supreme Court has indicated that Miranda is still functionally a prophylactic rule even after Dickerson.

The categorization of Miranda as a prophylactic rule supports the narrower view of the Self-Incrimination Clause because "rules designed to safeguard constitutional rights do not expand the scope of the constitutional rights themselves." This coupled with Chavez further suggests that the Self-Incrimination Clause's core function is to protect against the use of compelled, self-incriminating statements at trial and not to deter police conduct. For example, outrageous police conduct may lead to a constitutional violation under the Fourteenth Amendment's Due Process Clause, but does not implicate the Self-Incrimination Clause. Therefore, according to the narrower view, the focus is on the actual use of the compelled statements and not the conduct of law enforcement officials.

The main thrust of the narrower view of the Self-Incrimination Clause is that the Clause "focuses on courtroom use of a criminal defendant's compelled, self-

57. See Renda, 347 F.3d at 557-58; Burrell, 395 F.3d at 513-14; Murray, 405 F.3d at 285.
58. See Renda, 347 F.3d at 557-58; Burrell, 395 F.3d at 513-14; Murray, 405 F.3d at 285.
59. See Renda, 347 F.3d at 557-58; Burrell, 395 F.3d at 513-14; Murray, 405 F.3d at 285.
60. See Renda, 347 F.3d at 558.
61. See Chavez, 538 U.S. at 790 (Kennedy, J., concurring in part and dissenting in part).
63. See United States v. Patane, 542 U.S. 630, 642-44 (2004). A more nuanced explanation of this argument is outside the scope of this Note. It is enough to say that there is a strong argument that Miranda, at least functionally, remains a prophylactic rule even after Dickerson.
64. See Chavez, 538 U.S. at 772-73 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).
65. Id.
66. See Geoffrey B. Fehling, Note, Verdugo, Where'd You Go?: Stoot V. City Of Everett And Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations, 18 GEO. MASON L. REV. 481, 505 (2011) (citing Chavez, 538 U.S. at 779 (Souter, J., joined by Breyer, J., concurring in the judgment)).
incriminating testimony.”68 The narrower view acknowledges that Chavez did not expressly outline the exact moment that use of a compelled statement becomes “courtroom use,” but recognizes that the core guarantee of the Self-Incrimination Clause is the exclusion of compelled statements from evidence.69 This core guarantee is violated only when a person’s conviction is “based, in whole or in part, on an involuntary confession, regardless of its truth or falsity.”70 The narrower view takes the position that, even though pre-trial conduct by law enforcement or other officials may ultimately impair the right against self-incrimination, a true violation of the right can only occur at trial.71

Another aspect of the narrower view is that it treats the right against self-incrimination as a pseudo-evidentiary rule, a view popularized by legal scholars Akhil Amar and Renee Lettow Lerner.72 This theory of the Self-Incrimination Clause states that confessions elicited by coercion are entitled to little evidentiary weight as they are unlikely to be reliable.73 While only the Fifth Circuit expressly relied on this idea, it is helpful in illustrating another reason why the right against self-incrimination is a trial right.74 While the Fourteenth Amendment’s Due Process Clause guards against coercion being used to elicit confessions, the Self-Incrimination Clause is concerned with defendants being convicted as a result of their unreliable, compelled confessions.75 That is to say, reliability of statements are at the heart of the Self-Incrimination Clause, and reliability is of unique importance in determining guilt or innocence.76 This view is squarely rejected by the broader view of the Self-Incrimination Clause.77

B. The Broad Definition of “Criminal Case”: The Self-Incrimination Clause

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68. Id.
69. See Renda v. King, 347 F.3d 550, 558-59 (3d Cir. 2003); See also Burrell, 395 F.3d at 513 (citing Chavez, 538 U.S. 777).
71. Id. (citing Chavez, 538 U.S. at 767 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).
72. See Murray, 405 F.3d at 285, 295-96. See Amar & Lettow, supra note 2, at 865; see supra Part IV.
73. See Murray, 405 F.3d at 285, 295-96. See Amar & Lettow, supra note 2, at 865-67.
74. See Murray, 405 F.3d at 285, 295-96. See Amar & Lettow, supra note 2, at 866.
75. See Murray, 405 F.3d at 296.
76. Id.
as a Pretrial Right

The Second, Seventh, Ninth, and Tenth Circuits have adopted a broader definition of the term "criminal case" as used in the Self-Incrimination Clause. These circuits have held that the right against self-incrimination can be violated in certain pretrial proceedings, such as probable cause hearings, bail hearings, and suppression hearings. The Ninth Circuit has even gone so far as to hold that the reliance on a compelled statements in filing formal charges against a person is a violation of the Self-Incrimination Clause. Interestingly, these circuits also relied on Chavez but reached very different holdings from the courts discussed above.

The broader view of the Self-Incrimination Clause takes advantage of the "gray area" left by Chavez and minimizes Justice Thomas’s dicta that the right against self-incrimination is a trial right. The broader view takes the position that Chavez does not directly bar the expansion of the right against self-incrimination to pretrial areas. The broader view reasons that, in spite of Justice Thomas’s dicta, the Supreme Court has been retreating from the idea that the right against self-incrimination is only a trial right. The broader view also relies on a literal interpretation of the word “use” used by both Justices Thomas and Souter in Chavez and holds that any “use” of a compelled confession in a “criminal case” triggers a violation of the Self-Incrimination Clause. The broader view, specifically the Tenth Circuit in Vogt v. City of Hays, also supported its position by looking to the plain language of the Self-Incrimination Clause, the history of the Clause, and several policy considerations.

The overarching idea behind the broader view is that the Self-Incrimination Clause is concerned with regulating law enforcement conduct. The broader view seeks to extend the right against self-incrimination to help protect against

78. See Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007); Sornberger v. City of Knoxville, 434 F.3d 1006 (7th Cir. 2006); Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009); Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017).

79. See Higazy v. Templeton, 505 F.3d 161; Sornberger v. City of Knoxville, 434 F.3d 1006; Stoot v. City of Everett, 582 F.3d 910; Vogt v. City of Hays, 844 F.3d 1235.

80. See Stoot v. City of Everett, 582 F.3d at 925.

81. See Higazy v. Templeton, 505 F.3d 161; Sornberger v. City of Knoxville, 434 F.3d 1006; Stoot v. City of Everett, 582 F.3d 910; Vogt v. City of Hays, 844 F.3d 1235.

82. See Stoot, 582 F.3d at 923.

83. See Vogt, 844 F.3d at 1239.

84. See id. (citing Mitchell v. United States, 526 U.S. 314, 320-21, 327 (1999)); See Chavez v. Martinez, 538 U.S. 760, 764-65 (2003). While dicta does not technically create controlling law, even the Tenth Circuit has admitted that "Supreme Court dicta is almost as influential as a Supreme Court holding." Vogt, 844 F.3d at 1239 (citing Indep. Inst. v. Williams, 812 F.3d 787, 798 n.13 (10th Cir. 2016)).

85. See Stoot, 582 F.3d at 925.

86. See Vogt, 844 F.3d at 1242-46.

coercive interrogation by making it easier for people to pursue constitutional claims against law enforcement and other officials. However, each circuit that has adopted the broader view has differed in which particular pretrial proceedings qualify as being part of the “criminal case.”

IV. WHY “CRIMINAL CASE” SHOULD BE NARROWLY DEFINED

The circuit split over the starting point of a “criminal case” under the Self-Incromination Clause has caused incredible inconsistency in the application of the right against self-incrimination across the United States. The implications of this inconsistency are vast because, at present, a person’s Fifth Amendment rights substantially different in different areas of the United States. This highlights the need for a cohesive rule that can be applied evenhandedly throughout the country.

Many believed that the Supreme Court would put an end to this issue in Vogt v. City of Hays, Kansas but the Court ultimately decided to dismiss certiorari as improvidently granted, citing Vogt’s “odd” procedural and factual background. At the very least, it seems that Vogt has aroused the Court’s interest in this issue and that, given the right case, the Court would happily bring an end to the confusion it created in Chavez.

For a variety of reasons, the narrow approach to the Self-Incromination Clause that confines the term “criminal case” to trial is the correct solution. First, a narrow definition of “criminal case” is consistent with the history behind, purpose of, and Supreme Court precedent regarding the Self-Incromination Clause. Additionally, there are already sufficient substantive and procedural safeguards in place to protect the right against self-incrimination, which make the broader view of the right unnecessary.

A. The History Behind, Purpose of, and Supreme Court Precedent Regarding the Self-Incromination Clause

In determining whether the narrower or broader view of the Self-Incromination Clause is more appropriate, it is important to consider the history

88. See id. at 136-38.
89. See Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007); Sornberger v. City of Knoxville, 434 F.3d 1006 (7th Cir. 2006); Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009); Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017).
90. See supra Part III.
91. See supra Part III.
92. See Fehling, supra note 66, at 506.
94. See Little, supra note 93.
95. See infra Section IV.A.
96. See infra Section IV.B.
behind, purpose of, and Supreme Court interpretation of the Clause. Doing so is helpful in determining how we should define the right against self-incrimination in the present. There are several methods when interpreting a constitutional provision, or, for that matter, any other statutory provision, each with its own advantages. Potentially the most helpful methods for constitutional and statutory interpretation here are the plain language approach and the purpose-oriented approach. It is often a fight over which method of interpretation will control in any given case but both methods can potentially make a powerful statement about the meaning of the constitutional or statutory provision. Finally, it is often very helpful to look to prior Supreme Court precedent and dicta to determine the proper meaning of a constitutional provision.

1. The Plain Language of the Self-Incrimination Clause

The Self-Incrimination Clause of the Fifth Amendment provides that, “no person...shall be compelled in any criminal case to be a witness against himself.” While containing seemingly simple language, the Self-Incrimination Clause is much more complex than meets the eye. Obviously, the first place to start is with the phrase “criminal case” itself, but it would be foolish to ignore the context that the phrase finds itself in. Clues that aid in pointing the way include the word “witness,” the fact that the Self-Incrimination Clause is within the Fifth Amendment and not the Sixth, and, unfortunately for the narrower view of the right, the absence of the word “trial.”

“Case,” according to the Supreme Court’s interpretation, means “a proceeding in court, a suit, or action” or, more recently, “a general term for an action, cause, suit, or controversy at law...; a question contested before a court of justice.” Unfortunately, this definition sheds little light on the exact moment when a “criminal case” begins because, although it is clear that some proceeding or action must take place before a “criminal case” begins, the remainder of the definition is closer to a list of synonyms. Because the definition does little to
help determine the precise moment when a “criminal case” begins, we must look to other areas of the Constitution to gain context. First, the word “case” is used in Article III of the Constitution to refer to what Article III courts have jurisdiction over. Second, the word “trial” is used in the Sixth Amendment, among other places, but was not used in the Self-Incrimination Clause. Third, the Self-Incrimination Clause is in the Fifth Amendment whereas other trial rights are in the Sixth Amendment. Finally, the Sixth Amendment uses the term “criminal prosecution,” which has been determined to be narrower than the term “criminal case” in the Fifth Amendment. Admittedly, all of these things, at least from a plain language standpoint, suggest that the right against self-incrimination is not just a trial right.

However, not everything falls in favor of the right against self-incrimination being all-reaching. The use of the term “witness” within the Self-Incrimination Clause suggests that a “criminal case” is, at the very least, limited to proceedings where testimony is admitted into evidence. A witness, in the natural sense, means someone whose testimony, or utterances, are introduced at trial. Generally, out-of-court statements introduced at pre-trial hearings, such as grand jury proceedings, are not thought to be made by “witnesses.” However, it is certainly arguable that a grand jury witness or the suspect in a similar pretrial questioning under oath could be a “witness” in a “criminal case.” Looking to other parts of the Constitution that use the word “witness,” the Confrontation Clause of the Sixth Amendment potentially sheds light on the definition of “witness” within the Self-Incrimination Clause.

The Confrontation Clause of the Sixth Amendment states that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” The Supreme Court has been rather clear that “the right to confrontation is basically a trial right” and does not extend to pretrial proceedings. One possible explanation for this is that pretrial proceedings do not fall within a “criminal prosecution.” However, an equally powerful explanation that the Confrontation Clause does not apply to pretrial proceedings

107. U.S. CONST. amend. IV.
109. See Mannheimer, supra note 43, at 1320-21 (citing Counselman v. Hitchcock, 142 U.S. 547 (1892)).
110. See Mannheimer, supra note 43, at 1320-23.
111. See Mannheimer, supra note 43, at 1320-21.
113. See Amar & Lettow, supra note 2, at 900.
114. See Amar & Lettow, supra note 2, at 902.
116. See Amar & Lettow, supra note 2, at 919.
117. U.S. CONST. amend. VI.
is that any out-of-court statement used in a pretrial proceeding is not made by a "witness."  Although the Supreme Court has not made a determinative ruling on this point, several state and federal courts have indicated that they hold this view. If the word "witness" in the Confrontation Clause means a witness at trial, it follows that the word "witness" would mean the same thing in the Self-Incrimination Clause. This would suggest that the right against self-incrimination is in the same category as the right to confrontation as a trial right.

There are somewhat strong plain language arguments that the right against self-incrimination is not just a trial right. However, much of the language in the Self-Incrimination Clause is ambiguous and does not completely bar a narrower interpretation. Additionally, there are at least a few plausible plain language arguments that the right against self-incrimination is limited to trial. Although, the plain language approach to the interpretation of the Self-Incrimination Clause seems to favor a broader interpretation, the analysis does not end there.

2. The Original Understanding and Fundamental Purpose of the Self-Incrimination Clause

Some of the greatest legal minds of recent history believed that the purpose-oriented approach to constitutional and statutory interpretation was just as important as the plain language approach. Because the plain language of the Self-Incrimination Clause is, on its own, inconclusive on the precise moment that a "criminal case" commences, it is helpful to look to the original understanding and fundamental purpose of the Clause. Like much of American law, the idea that one should have a privilege against self-incrimination began in English common law. It is commonly believed that privilege against self-incrimination arose in response to prosecutions based on religious belief or political expression. The unique nature of crimes based on personal belief or thoughts

120. Amar & Lettow, supra note 2, at 919 (citing White v. Illinois, 502 U.S. 346, 358 (1992) (Scalia, J., joined by Thomas, J., concurring)).
122. See Amar & Lettow, supra note 2, at 919.
124. Id.
125. See infra Section IV.A.2.
126. See Gregory, supra note 97, at 456-57 (explaining that Justices, such as Holmes, Cardozo, and Hand, held the view that judges should not always rely solely on plain language).
128. Id. at 411.
129. Id. at 411-12.
often made confessions the only real way to prosecute these crimes.\textsuperscript{131} Although the privilege against self-incrimination originated in crimes based on personal belief or thoughts, the privilege was not construed to be limited to those crimes.\textsuperscript{132} Although the privilege against self-incrimination was meant to extend to everyone, no matter the crime, the reality was much less progressive.\textsuperscript{133}

In the American colonies, as a matter of procedural design, the privilege against self-incrimination was purely a trial right.\textsuperscript{134} The privilege against self-incrimination did not extend to all questioning and covered only questioning under oath.\textsuperscript{135} The reason for this was that the privilege was, in part, designed to protect people from being forced to either tell the truth and incriminate themselves or lie under oath.\textsuperscript{136} At that time, the privilege was very much considered a trial right and quite often did not stop English and colonial governments from using a person’s self-incriminating statements at trial.\textsuperscript{137} There is a strong argument that this weak colonial privilege against self-incrimination is one of the reasons why the drafters chose to include the Self-Incrimination Clause in the Bill of Rights.\textsuperscript{138} Even after the birth of the United States and the eventual ratification of the Constitution, the Fifth Amendment rarely played a significant role in criminal procedure and the privilege against self-incrimination was still strictly limited to trials.\textsuperscript{139} This was likely due, in part, to the fact that defense lawyers would not become a common occurrence until much later on in American history.\textsuperscript{140} Without a lawyer to represent him, a criminal defendant would be forced to speak to defend himself, which limited the utility of the privilege.\textsuperscript{141} While the early history and understanding of the of the Self-Incrimination Clause cannot simply be applied one-for-one today, it at least suggests that the privilege against self-incrimination was originally designed to be quite narrow.

The history of the Self-Incrimination Clause also helps to reveal its fundamental purpose. Those with a broader view of the Clause would most likely say that the primary purpose of the privilege against self-incrimination is to prevent coercion and compulsion from law enforcement and other government officials.\textsuperscript{142} Conversely, there is an argument to be made that the fundamental purpose of the privilege is not only to protect individuals from the “cruel trilemma” of self-accusation, perjury, or contempt, but also to prevent unreliable

\begin{footnotes}
\item[131.] Id. at 415.
\item[132.] Id. at 416.
\item[133.] Id.
\item[134.] Stuntz, supra note 128, at 416.
\item[135.] Stuntz, supra note 128, at 416-17.
\item[136.] Stuntz, supra note 128, at 412-13 (explaining that people typically took oaths and swearing much more seriously a few centuries ago).
\item[137.] Stuntz, supra note 128, at 416-17.
\item[138.] Stuntz, supra note 128, at 419-20.
\item[139.] Stuntz, supra note 128, at 419.
\item[140.] Stuntz, supra note 128, at 419-20.
\item[141.] Stuntz, supra note 128, at 419-20.
\item[142.] See Dripps, supra note 124, at 1629.
\end{footnotes}
testimony from being admitted into evidence.\textsuperscript{143} Over the past few decades, courts, including the Supreme Court, have increasingly emphasized this idea.\textsuperscript{144}

If the fundamental purpose of the Self-Incrimination Clause is indeed to act as a pseudo-rule of evidence, then the scope of the right would be understandably narrow.\textsuperscript{145} This is because the need for reliability is at its apex when determining guilt or innocence, as opposed to determining merely what bail to set or even whether there is probable cause to proceed with a prosecution.\textsuperscript{146} This is because pretrial proceedings have much more limited functions than the guilt-finding function of a trial.\textsuperscript{147} Additionally, no pretrial proceeding requires the elevated beyond-a-reasonable-doubt burden of proof that trials do, which indicates that the need for reliable statements is lowered significantly in pretrial settings.\textsuperscript{148} While the history and original understanding of the Self-Incrimination Clause does not fully solve the dispute between the narrower and broader view of the Clause, it does strongly suggest that the right against self-incrimination is a trial right.\textsuperscript{149}

3. Prior Supreme Court Self-Incrimination Clause Jurisprudence

The plain language, original understanding, and fundamental purpose help to suggest an answer to when a “criminal case” commences under the Self-Incrimination Clause, but none of these provide a definitive answer to how the Self-Incrimination Clause works in the modern world. Therefore, it is helpful to turn to prior Supreme Court precedent and dicta to explain how the Court has handled the right against self-incrimination. First, much confusion can be cleared by a look into the Supreme Court’s relatively recent precedent in \textit{Verdugo-Urquidez}.\textsuperscript{150} In \textit{Verdugo-Urquidez}, the Supreme Court, citing even earlier precedent, stated that the privilege against self-incrimination is a fundamental trial right and that although the right can be impaired prior to trial, a constitutional violation occurs only at trial.\textsuperscript{151}

The Court contrasted the Fifth Amendment and the Fourth Amendment, stating that the Fourth Amendment protects against unreasonable search and seizures regardless of whether the evidence is sought to be used at trial.\textsuperscript{152} Conversely, the Court stated that a Fifth Amendment violation is not “fully

\begin{enumerate}
\item \textsuperscript{143} Amar \& Lettow, \textit{supra} note 2, at 890, 894-95.
\item \textsuperscript{144} Amar \& Lettow, \textit{supra} note 2, at 895.
\item \textsuperscript{145} Amar \& Lettow, \textit{supra} note 2, at 895.
\item \textsuperscript{146} Amar \& Lettow, \textit{supra} note 2, at 924.
\item \textsuperscript{147} \textit{See} Barber v. Page, 390 U.S. 719, 725 (1968).
\item \textsuperscript{148} Amar \& Lettow, \textit{supra} note 2, at 924.
\item \textsuperscript{149} \textit{See} United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990).
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} (citing Kastigar v. United States, 406 U.S. 441, 453 (1972)).
\item \textsuperscript{152} \textit{Id.} (citing United States v. Calandra, 414 U.S. 338, 354 (1974); United States v. Leon, 468 U.S. 897, 906 (1984)).
\end{enumerate}
accomplished" unless the compelled statement is used at trial. In making this distinction, the Court was pointing out that, while the Fourth Amendment can be violated regardless of whether the evidence is used at a trial, the Self-Incrimination Clause can only be violated if the coerced confession is used at trial. Therefore, according to dicta in Verdugo-Urquidez, the definition of "criminal case" under the Fifth Amendment is limited to the actual trial.

The Supreme Court's decision in Withrow v. Williams also leads to a narrow interpretation of the term "criminal case." The Court in Withrow described the Fifth Amendment privilege against self-incrimination as a "trial right." Additionally, the Court described the right as one that cannot be "necessarily divorced from the correct ascertainment of guilt," which suggests that the right is much more closely tied to the trial than to any other proceeding. The Court also went on to say that the violation of judicially created prophylactic rules does not, by itself, create a constitutional violation.

Judicially created prophylactic rules, such as the requirement of police to give Miranda warnings before conducting custodial interrogations, are designed to safeguard the core constitutional rights protected by the Constitution. However, these prophylactic rules do not expand the scope of the Constitution itself, but instead "provide practical reinforcement for the right." Specifically, the Miranda warnings were created with the purpose to guard against the use of compelled statements at trial. This is evidenced by the fact that a violation of Miranda does not, by itself, create a Fifth Amendment violation. Indeed, in Chavez, the Court was unanimous on this point. Additionally, although conduct prior to trial can implicate an impairment of the privilege against self-incrimination, a true Fifth Amendment claim encompasses the "extraction and use of compelled testimony" at trial.

Another reason why the right against self-incrimination is best described as a trial right is that use-immunity completely trumps the privilege. In Kastigar v. United States, the Supreme Court held that compelled testimony is legitimate if the person being compelled to testify is granted immunity from the use of that

153. Id.
154. Id.
157. Id.
158. Id.
159. Id.
161. Id. (quoting Oregon v. Elstad, 470 U.S. 298, 306 (1985)).
163. See Chavez, 538 U.S. at 766-70.
165. See Withrow, 507 U.S. at 705 (O'Connor, J., concurring in part and dissenting in part).
166. Amar & Lettow, supra note 2, at 890-91.
testimony in a criminal trial against him. The Court decided this way because it found that the immunity granted by the federal immunity statute was on par with the protections afforded by the Self-Incrimination Clause. Specifically, the immunity granted by the federal immunity statute, like the Self-Incrimination Clause, protects witnesses from being convicted at trial based on their compelled, self-incriminating statements. According, Kastigar can be read to parallel the scope of the right against self-incrimination with the immunity requirements given to witnesses who are compelled to self-incriminate, which strongly suggests that the right against self-incrimination is rooted in the use of evidence at trial. Additionally, the majority in Kastigar, in rejecting the need for transactional immunity, expressly stated that the grant of immunity to a witness does not bar the prosecution of that witness. The Court even seemed to imply that the government would not be barred from using a witness’s compelled statement to indict that witness.

The Supreme Court’s treatment of the Self-Incrimination Clause strongly suggests that the privilege against self-incrimination is strictly a trial right. A close reading of Chavez strongly indicates that Chavez was meant to leave Verdugo and Withrow intact, meaning that the language of both cases is very much alive. Ultimately, the history and Supreme Court precedent behind the Fifth Amendment’s privilege against self-incrimination support the conclusion that the term “criminal case” should be narrowly defined.

B. The Substantive and Procedural Alternatives

Not only does the history behind, fundamental purpose of, and Supreme Court precedent and dicta support the narrower view of the Self-Incrimination Clause, but the expansion of the privilege against self-incrimination to pretrial proceedings is simply unnecessary because substantive and procedural safeguards already exist to protect the purpose of the privilege. In essence, the ultimate purpose of the Self-Incrimination Clause is to prevent compelled testimony from being used at trial to convict a defendant of a crime. There are already many procedural vehicles, such as suppression hearings, that help to

168. Id. at 461.
169. Id.
170. Id. See also Amar & Lettow, supra note 2, at 878-79, 890.
171. See Kastigar, 406 U.S. at 461-62.
172. See id.
175. Id.
achieve this purpose. For example, when a compelled statement is suppressed in a suppression hearing that statement is not being “used” in a “criminal case” but is instead being prevented from use in a “criminal case.” In other words, the suppression of the compelled statement prevents the Self-Incrimination Clause from being violated at all. While there may be a fear that compelled statements may be used for the purposes of the suppression hearing itself, Kastigar states that the privilege against self-incrimination extends to the derivative use of compelled statements. This means that the government would be barred from using evidence derived from the use of a compelled statement in a criminal trial.

In many respects, the broader view of the Self-Incrimination Clause is motivated by a desire for the Clause to discourage the use of coercive police tactics. However, the proper vehicle for achieving this goal is for plaintiffs to bring an action under the Fourteenth Amendment Due Process Clause, not the Self-Incrimination Clause. This is because the Fourteenth Amendment Due Process Clause protects individuals from coercive police tactics. Ultimately, because there are other substantive and procedural safeguards already in place to prevent and discourage the compelling of statements, thereby helping to prevent violations of the Self-Incrimination Clause from ever occurring, the broader view of the Clause is both wrong and unnecessary.

V. CONCLUSION

Even fifteen years after the Supreme Court’s decision in Chavez, the circuit split regarding the starting point of a “criminal case” under the Fifth Amendment continues to expand. While the most recent member of the circuit split, the Tenth Circuit, has chosen to adopt a broad definition of the term “criminal case,” the correct answer, according to history, precedent, and policy, is a narrow definition. At the moment however, conflicting precedent amongst the circuits and the Supreme Court has, admittedly, created a gray area that has technically allowed for a more broadly defined interpretation of “criminal case.” The

178. Chavez, 538 U.S. at 770-71 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O’Connor and Scalia, JJ.).
179. See id. at 777-79 (Souter, J., joined by Breyer, J., concurring in the judgment).
180. See id.
181. Amar & Lettow, supra note 2, at 858.
182. Amar & Lettow, supra note 2, at 858.
183. See Chavez, 538 U.S. at 766-67 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O’Connor and Scalia, JJ.).
184. See id.
185. Id. at 773-74.
186. See id. at 777-79 (Souter, J., joined by Breyer, J., concurring in the judgment).
187. See supra Part III.
188. See supra Parts III, IV.
189. See supra Part IV.
Supreme Court has, for one reason or another, decided to remain silent on the issue and has allowed the circuit split to continue.\textsuperscript{190} However, it is only a matter of time before a case comes along that will allow the Supreme Court to finally put this issue to rest. When that time comes, hopefully the Supreme Court will decide not to once again plead the Fifth.

\textsuperscript{190} See supra Parts III, IV.