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JURISPRUDENCE AT THE LEVEL OF LEGAL RULES
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Legal scholarship is remarkably wide-ranging topically, thematically, and methodologically. This is certainly true at Virginia, as evidenced by the profiles of forty-two members of our faculty who have previously graced the pages of this periodical. The same diversity of training, approach, and style are evident in the three scholars profiled in this issue. Each holds a graduate degree in addition to the J.D.—an MBA, a Ph.D. in philosophy, and twin master’s degrees in political theory and political sociology. One worked as a consultant at McKinsey; another served for eight years as a federal prosecutor; the third taught philosophy. These broad experiences and interests inform their scholarship. Each, in his or her own way, is engaged in applied work that uses theory in the service of real-world problems. Their work amply repays a close read.

**George Geis** focuses on the how and why of commercial and corporate transactions. His writings range over contract law, corporate law, and related fields. He is one of the nation’s leading scholars in the law and economics of outsourcing. George supplements contract theory, which law and economics scholars use to analyze transactions, with perspectives from marketing and organizational behavior reflecting his time as a management consultant. He is attuned to the manager’s viewpoint as well as the economist’s take on contracting. His proposal for incentive-compatible contracting within close corporations is particularly innovative and a worthy successor to the writings on close corporations of our former colleagues John Hetherington and Mike Dooley.

**Rachel Harmon’s** scholarship studies the regulation of policing. Like another former colleague, the late Bill Stuntz, Rachel examines carefully the downsides of our current system of using constitutional standards as the principal check on police behavior. Constitutional litigation identifies either a specific transaction or specific policy as potentially prob-
lematic and sets limits on the behavior or policy to avoid its problematic aspects. It necessarily fails to ask broader questions about what constitutes “good” or “bad” policing considered as a whole. Rachel’s project is to develop sound normative guidelines for police behavior, show how one could measure the extent to which a particular department conforms to those norms, and identify policies that will improve the quality of policing when it falls short.

**STEVE WALT** approaches issues in commercial law with a philosopher’s precision of thought and expression. The care and attention to detail with which he identifies the foundational claims of various schools of thought within commercial law scholarship often enables him to upset conventional understandings of particular commercial doctrines and shed new light on longstanding puzzles. His writings on jurisprudence are almost playful, if one may use that description for such philosophically weighty material. He argues persuasively that many legal propositions that we think of as proceeding from specific jurisprudential commitments are in fact unconnected to those commitments once we unpack both the jurisprudential and legal claims.

Paul G. Mahoney
*Dean*
George Geis joined the Virginia faculty in 2008, after teaching at the University of Alabama. He immediately became one of the most admired teachers at Virginia, and he has taken a leadership role in the institution. Geis has directed the school’s highly successful Law & Business Program, a curricular effort aimed at integrating business and legal analysis in the law school classroom, and became vice dean of the Law School in 2012.

Making his mark quickly comes naturally to Geis. He is just one decade into his academic career, but he already enjoys a reputation as an innovative scholar who brings the rigor and perspective of business analysis to contract and corporate law. Much of his work uses the methods of corporate decision-makers to evaluate the legal rules that govern economic organization, production, and exchange. Geis often reveals the hidden incentives or features of business law, and proposes new ways that latent incentives can be harnessed to shape legal doctrine or further cooperative private activity.

Geis never expected to be a law professor. After completing a joint J.D.-MBA degree, he joined the management consulting firm McKinsey & Company. During his five years there, Geis worked with dozens of companies around the world on business problems related to corporate strategy, mergers and acquisitions, corporate finance, and other CEO-level concerns. Geis eventually made his way to academia,
but his time in the boardroom continues to shape and influence his approach to legal scholarship.

“The decisions of corporate executives have some striking similarities to the challenges faced by lawmakers,” Geis says. “A company, for example, does not serve everyone the same way; rather, it segments customers into related groups and treats each segment differently. Lawmakers often ask a similar question: Should everyone be treated identically, or is there room to improve a legal system by offering more customized treatment?” To answer this question in business law, Geis uses the tools of corporate decision-making—such as customer segmentation, real option analysis, computer simulation, predictive modeling, and mechanism design.

Geis’s first few articles focused on contract law default rule theory. The famous case of Hadley v. Baxendale establishes a default rule that unforeseeable consequential damages are not recoverable unless the special facts leading to these damages are disclosed at the outset of the contract. Contract theorists have questioned the merits of this default rule, and some have argued for an approach that awards full damages for breach. The critics charged that the Hadley rule made sense only for markets where many buyers placed a relatively low value on performance, while just a handful of buyers held a much higher value. With this unique market structure, the high-value buyers could reveal their circumstances, and thereby receive customized seller treatment, with lower systemic transaction costs (as compared to a full-damages rule that forced many low-value buyers to step forward to negotiate lower service levels). But Hadley’s critics argued that it should not be the default rule for all markets. While market-specific rules would be best, critics pointed out that lawmakers were in no position to make fine-grained determinations about buyer preferences in different markets.

Geis saw this problem through the eyes of a marketing executive and realized that this exact question was faced by most companies: What range of prices are my customers willing to pay? In “Empirically Assessing Hadley v. Baxendale,” 32 Fl. State U. L. Rev. 897 (2005), Geis collected a series of detailed marketing studies that measured buyers’ willing-
ness to pay for various products, used this data to estimate buyer preferences about performance, and concluded, contrary to the Hadley critics, that a Hadley default rule often made more sense than a full-damages default.

Geis continued his analysis of contract law with “An Embedded Options Theory of Indefinite Contracts,” 90 Minn. L. Rev. 1664 (2006). This article asked what courts should do with an ambiguous contract. Judges often fill gaps in agreements via the process of contract interpretation. But Geis argued that courts should be more willing instead to strike down these agreements under the indefiniteness doctrine. To support this claim, he turned to real option theory. Business executives often incorporate real options—the right, but not the obligation, to expand or abandon an initial decision once new information emerges—into their planning efforts. Geis recognized that indefinite contracts are sometimes created because an imprecise term, combined with a judicial willingness to fill gaps when faced with those terms, can create an embedded option. Such options, however, may be difficult for the contractual counterparty to price. This is problematic, not only because parties are externalizing contracting costs onto the courts, but also because it can warp the efficient trade and investment goals of contract law. Geis then modeled the effect of these distortions, and that analysis supported his argument that courts should not hesitate to invoke the indefiniteness doctrine to strike down these types of bare-bones agreements.

Geis travels frequently to India to research and lecture on business-outsourcing transactions. In connection with this work, he has written a trio of articles that examine the decision to move economic production outside of a firm via contract. This work builds on legal scholarship exploring the theory of the firm, but it takes a fresh perspective. Most scholars ask why firms conduct economic activity internally—producing a given input within the borders of a corporation rather than sourcing the product via external market exchange. Geis takes the reverse tack, asking what might cause a firm to jettison an internal production activity by outsourcing. In “Business Outsourcing and the Agency Cost
Problem,” 82 Notre Dame L. Rev. 955 (2007), Geis concluded that the conventional explanation for outsourcing—that companies were adjusting their purchasing practices to take advantage of lower production costs—was only half the story. He showed how the transaction costs of outsourcing contracts (broadly defined to include agency distortions from using outsourcing vendors) were also dropping, and that this reduction in costs should accelerate a move toward greater economic production via contract.

Along the way, Geis also analyzed the common provisions in business outsourcing contracts and showed how these terms are used to mitigate the risk that an outsourcing partner would shirk or cut corners (in his terms, the “agency costs of outsourcing”). For example, most business outsourcing transactions are structured as a complicated array of overlapping contracts. A broad framework agreement will often be supplemented with dozens of detailed work orders. At one level, these complicated arrangements are puzzling because they are costly to formulate. But Geis showed that multiple, asynchronous contracts allowed outsourcing clients to stage their commitment, freeing them to reduce the scope of a project if hints of vendor opportunism arose. Other contracting strategies, such as allocating similar work to multiple vendors, negotiating explicit control or monitoring rights, and securing for-cause exit terms, can also be understood as mechanisms for aligning performance incentives.

Geis extended this work with “The Space Between Markets and Hierarchies,” 95 Va. L. Rev. 99 (2009) and “An Empirical Examination of Business Outsourcing Transactions,” 96 Va. L. Rev. 241 (2010). He recognized that the traditional distinction between internal firm production and external market contract, sometimes known as the “make-or-buy” decision, oversimplified the way that goods and services are actually produced. In “The Space Between Markets and Hierarchies,” Geis demonstrated how middle-path organizational arrangements—such as business alliances, joint ventures, franchise agreements, and outsourcing transactions—could serve as a sensible compromise between market
exchange and firm hierarchy. This type of organizational compromise can strike a balance among the typical factors that underlie the make-or-buy decision, including production costs, transaction costs, control terms, and optimal financing arrangements.

In “An Empirical Examination of Business Outsourcing Contracts,” Geis moved from the “why” question to the “how” question. He rolled up his sleeves to conduct a micro-analytic examination of outsourcing contracts to determine how parties were actually executing these transactions. Outsourcing relationships, Geis found, were extremely diverse, and he described the many different provisions for dividing financial gains, allocating control, and parsing operational risks.

Geis has also investigated the corporate governance tension between majority and minority shareholders. Much of corporate law addresses managerial agency costs—the risk that lazy or dishonest managers will use their control of a firm’s daily operations to take advantage of shareholders. But there is another tricky governance problem in corporate law: how to allocate the balance of power between controlling shareholders, who typically retain more than 50 percent of a firm’s stock, and the remaining minority shareholders who hold much smaller stakes. Lawmakers balance on a tightrope here because assigning too much power to minority shareholders can lead to a holdout problem, while granting untrammeled discretion to a majority shareholder can promote various abuses (such as underpriced freezeout mergers) that will harm overall shareholder interests. The law attempts to address these concerns through disclosure obligations, corporate fiduciary duties, and appraisal rights, but these efforts are often dismissed as inadequate.

In “Internal Poison Pills,” 84 N.Y.U. L. Rev. 1169 (2009), Geis offered a new idea for balancing the tension between majority and minority shareholders in the freezeout merger context. Borrowing conceptually from the antitakeover device created in the 1980s to counter hostile takeovers, he showed how a privately enacted solution—the internal poison pill—might finesse the twin internal governance ten-
sions of holdout and expropriation. The internal poison pill uses embedded option theory to construct an intermediate legal entitlement (as opposed to an extreme property or liability rule) for both majority and minority shareholders. A company could adopt a pill with nuanced redemption features (typically, a poison pill can be redeemed for a nominal amount at the sole discretion of the board). For instance, a minority shareholder seeking to exercise the pill after a freezeout announcement could be required to name a buyout or redemption price for the pill. There must be a mechanism to prevent the minority shareholder from naming an outrageous surrender price. (Geis suggests a money-where-your-mouth-is feature that would grant the firm a put option to sell shares to the claimant at the stated redemption price.) With that in place, the pill would allow minority shareholders to block an abusive freezeout merger, while also chilling minority holdout claims. In this article Geis also develops a precommitment theory to show why a firm might be willing to adopt an internal pill, though he recognizes that lawmakers may need to press for this type of governance compromise.

Geis continued his study of the governance tensions between shareholders in “An Appraisal Puzzle,” 105 Nw. U. L. Rev. 1635 (2011). As the title suggests, this piece focuses on appraisal rights, the statutory power granted to shareholders to dissent from a merger and receive a judicially determined fair price for their shares. Appraisal rights have been derided for years. But Geis identified a modern problem with these statutes, one linked to the internal plumbing of our financial markets. In order to assert an appraisal claim, shareholders must prove that they did not vote for the merger. Under current securities settlement practices, however, shares are not specifically identified; rather, a large clearinghouse organization holds the vast number of shares in undifferentiated bulk. This means that shareholders who purchase stock in a company after the record date (the day when the right to vote on a matter is severed from ownership) cannot establish, with any degree of certainty, whether “their” shares voted against the merger—and therefore whether they are entitled to appraisal rights.
Delaware courts recently weighed in, however, and held that after-purchased shares are now often eligible for appraisal. Geis argued that, as with much of corporate law, the governance effects of this Delaware ruling are difficult to predict. Amplifying appraisal rights in this way may have the positive effect of mitigating the majority shareholder freeze-out problem with a “back-end appraisal market,” analogous to the market for corporate control. Or appraisal rights could morph into a vehicle for minority shareholder strike suits, serving as a tax on freezeout transactions and ultimately preventing sensible deals from taking place. As he often has, Geis advocates a compromise, one that would retain the ability to maintain widespread appraisal claims while simultaneously undermining financial incentives for minority shareholders to overreach.

More recently, Geis has turned his attention back to contract law and to the obscure rules that govern third-party relationships. Few scholars study the law of third-party beneficiaries, and not everyone realizes that a person who lacks contractual privity may be able to sue for nonperformance. In “Broadcast Contracting,” 106 Nw. U. L. Rev. 1153 (2012), Geis shows how the rules of bilateral contract law are often turned on their head when the rights of outsiders come into play. For example, gift promises are not legally binding in bilateral agreements, but a promise to a third-party beneficiary can be vested, such that it becomes legally enforceable without consideration from the outsider. Geis also demonstrates how the law of third-party beneficiary contracting can be used to broadcast private economic commitments to many different beneficiaries or even to write “new laws” in areas as diverse as tort, employment, property, and corporate law. For example, an employer might contract to license a trademark from a counterparty in exchange for a promise that all of the employer’s workers and job applicants will receive heightened legal protection (such as anti-discrimination provisions that go further than current law) as third-party beneficiaries. This commitment has legal force because any outsider in the protected class is now empowered to sue the firm directly for breach. Drawing again on his experience in corporate strat-
egy, Geis shows how a party might derive incremental benefits, even beyond transaction cost savings, from an ability to commit broadly to future obligations or limits on behavior. He concludes that third-party beneficiary rights offer a “powerful, even foundational, tool that can be used to adjust legal relationships in diverse areas of activity.”

Geis remains intrigued by the possibility that the methods used by firms to take action in complex markets might also be useful for understanding and setting the very rules that govern this production activity. In his scholarship, Geis often advocates a compromise approach because he appreciates that the law must often strike a balance between two equally problematic outcomes. Though he recognizes the need to regulate, Geis also seeks incentive-molding rules that can corral parties toward optimal social ends, strictly by appealing to their self-interest. In pursuit of these goals, Geis takes up the tools of the marketer to understand markets, the tools of the strategist to explain organizational structure, and the tools of the corporate leader to reform corporate law.
In early 2002, I climbed on a plane—along with my pregnant wife and two-year old daughter—for a 30-hour flight from Los Angeles to India. Our destination was Hyderabad, in the south-central part of the country, where we would be living and working for the next two months. At the other end of the flight we got off, tired and anxious, into a very different part of the world. Cows really did cross the streets. Shabby tent cities littered abandoned lots—sometimes right in front of mansions. Motor scooters loaded with husband, wife, and kids darted between bicycles, three-wheeled taxis, pedestrians, and trucks. There were people everywhere, dressed in bright reds, greens, pinks, and oranges, and they scurried among small roadside shops and cafes that seemed to be open all the time. It was eleven-and-a-half hours later back in LA, but, if anything, all of our senses seemed sharpened.

I had accepted a teaching position at a prominent new business school, started in conjunction with several Western universities, and it was the perfect place to take the pulse of economic trends in India. Most of the students and faculty were excited about technology—software development, networking, and the telecommunications industry in particular. Y2K fears had put Indian software programmers to work, and IT budget pressures in the wake of the dot-com implosion kept them there. A handful of students were talking about outsourcing beyond call centers and software maintenance, but for the most part the focus seemed to be elsewhere—on things like finance, consumer marketing and, above all, technology.

Nearly four years later, I took the same flight (actually a shorter one this time since there was a direct route into Hyderabad) and returned for another teaching visit at the business school. It is hard to describe the economic transformation that had occurred while I was away. The people and
cows were still everywhere, but now they competed with Hondas and Hyundais more than with bicycles. Gigantic new shopping malls dominated the city center; several were multi-level stores specializing in just wedding apparel. Work crews demolished decrepit roadside shops to widen the streets, and many of the shanty-towns were replaced with sparkling new office buildings.

Most strikingly, the signs of business outsourcing were everywhere. Loud explosions interrupted the late afternoon, as Microsoft built a massive campus for thousands of workers. People argued over the effects of English accent training on Indian culture—the buzz of conversation was now peppered with a Manhattan staccato or Southern drawl from some call-center workers. I asked my class of a hundred students whether they had worked on an outsourcing transaction, and nearly seventy percent raised their hand. Everyone was looking for the next wave—was it legal services outsourcing, pharmaceutical R&D outsourcing, animation, or something else? You could almost feel the exuberance in the air. And it wasn’t just Hyderabad; even the Communist governments in West Bengal and Kerala were aggressively courting foreign investment. Business outsourcing had saturated the Indian economy.

And India is certainly not the only country—although perhaps it is the most prominent one—affected by business outsourcing. By 2008, an estimated 4.1 million jobs in the service sector will have moved from developed economies to places like China, India, Russia, Brazil, and the Philippines. According to the McKinsey Global Institute, this is just a tiny proportion of the jobs that could theoretically be outsourced—it estimates that nearly 160 million jobs in the service economy, about 11 percent of total employment, could be performed anywhere in the world. No one expects this many positions to move overseas, but analysts do project the size of the total offshoring market to grow rapidly.

Firms keep some of this relocated activity under their own control by building “captive” offshore facilities that become, in essence, foreign subsidiaries of the parent firm. But many of these projects are moving economic production
beyond a firm’s borders—as companies contract with third party vendors to do something that they have historically done themselves. In short, we are witnessing a significant realignment in the scope of the firm.

This Article addresses an obvious question: why has business outsourcing grown so far so fast? What is causing so many firms to move economic activity beyond their corporate and country borders?

The question is important for corporate law scholars because it raises foundational issues underlying the theory of the firm. Indeed, the decision to pool resources under centralized control presents the fundamental tension in corporate law literature. The issues date back at least seventy years—to the celebrated work of Ronald Coase and of Adolphe Berle and Gardiner Means. On the one hand, it’s nice to be big. Assembling property under the discretionary control of a small management team can certainly create economies of scale, save transaction costs, and lead to other benefits. But on the other hand, it is now well established that the separation of ownership and control can unleash a wide variety of bad manager behavior, such as shirking, lavish compensation, entrenchment, and excessive risk-taking—collectively referred to as agency costs.

This friction between size and sloth permeates the study of corporate law, especially in discussions of executive compensation and corporate capital structure. The extensive literature in these fields debates the magnitude of agency costs and wrestles with ideas for mitigating these problems—using things like executive stock options, management performance targets, leveraged buyouts, debt covenants, and shareholder access initiatives. But the tension has hardly been explored in business outsourcing—which is surprising because outsourcing has received such widespread public attention in recent years. This Article suggests that the business outsourcing phenomenon offers a valuable, but previously neglected, context for analyzing the fundamental tradeoffs that occur when ownership is parted from control. Essentially, it considers theories of the firm from an opposite perspective: why does activity move outside the firm, rather
than why activity is placed inside it.

So let me come back to my earlier question: why have we seen such a notable shift in the optimal balance between intra-firm activity and inter-firm contracts over the past decade? The conventional explanation for the outsourcing explosion runs something like this. Relatively high transaction costs have historically prevented firms from tapping into the global supply of labor. As these costs drop, however—through improvements in communication, digitization, standardization, and the like—it becomes economical for firms to embrace overseas production. In essence, falling interaction costs have unlocked a massive supply of labor, driving down the price of economic inputs, realigning business processes, and tempting (or forcing) managers to move production outside the firm. This explanation comports with intuition and empirical observation, and certainly there must be some truth to the story.

This Article argues, however, that there is a second important catalyst for the rise of business outsourcing—one rooted in the agency cost problem. For while business outsourcing can bring interesting opportunities, it also introduces some familiar anxieties. Just as a CEO may slack off, build a fancy office, or make risky bets with shareholder dollars, an outsourcing vendor may abuse its power to conduct the economic activity that impacts another firm. Essentially, a company outsourcing an activity faces the same dilemma where control is divorced from ownership. The outsourcing vendor controls the activity, while the outsourcing firm “owns” the result. These agency costs raise a significant impediment to business outsourcing and are a major reason why firms elect to keep economic activity within their borders.

The thesis of this Article is that business outsourcing has thrived in recent years not only because globalization has unlocked inexpensive production markets, but also because it is becoming easier for firms to monitor and prevent the agency costs of outsourcing. Over the past decade, firms have undertaken a variety of intriguing tactics for mitigating agency problems in the business outsourcing context.
Drawing upon a detailed analysis of outsourcing contracts, I will explore several strategies to minimize agency costs—including the use of staged contractual commitment, redundant agents, incentive-compatible compensation, exit rights, and other techniques. To be sure, the issues here can arise in any long-term or relational contract. But the recent explosion in business outsourcing offers a fresh perspective on the ways that private parties take strategic and contractual steps to minimize agency risks.

For example, it is certainly more expensive to manage several outsourcing vendors who perform the exact same activity. But these increased costs might reduce agency risk through benchmarking or other means—and the use of multiple vendors is becoming a popular outsourcing strategy. I argue that firms are increasingly willing to trade greater monitoring activity for reduced agency risk because it is becoming cheaper to do so. In essence, the same forces that are opening overseas markets are also making it more cost-effective to detect and prevent misbehavior by outsourcing partners. And I believe that this ability to reduce the agency costs of outsourcing is another important factor in the rapid movement of activity beyond firm borders.

INTERNAL POISON PILLS

Large corporations harbor dark corners, and these shadows shelter a daunting collection of governance concerns. There are at least three problems. First, lazy or dishonest managers might use their control of a firm’s daily operations to make poor decisions or steal that which rightfully belongs to shareholders. Second, greedy shareholders may leverage their influence over managers to siphon wealth from other investors, such as lenders or preferred shareholders. Third, a controlling majority shareholder, again working through compliant managers, may wrongfully extract value from minority owners. Corporate law tries, with varying degrees
of success, to arrest the guns of all actors in this Quentin Tarantino—style standoff.

The first two contests—between manager and shareholder, and between shareholder and lender—have already been carefully dissected in the academic literature. The agency problems are unsolved (and will likely remain impenetrable), but we now have a pretty good sense of the battlefield. It is only in this decade, however, that the third relationship—the civil war between majority and minority shareholders—has taken center stage. Several incongruous Delaware cases, the rise of private equity, and a flood of post-Sarbanes-Oxley freezeout mergers have underscored the need for lawmakers to confront the governance problems presented in this context.

The tension between majority and minority shareholders is especially interesting because lawmakers must walk a tightrope between two alternative hazards. On the one hand, granting the majority untrammeled discretion can promote abuses of power that will depress the ex ante value of a firm. Controlling shareholders enjoy many strategies for fleecing minority investors, but none are more potent than using a freezeout merger to take full ownership of the firm. It is easy to see how an overly permissive freezeout policy might lower a firm's market value: Potential investors will fear that a controlling shareholder might price the merger at a ridiculously low level. This fear will, in turn, depress the upfront price that minority investors would be willing to pay for the stock.

On the other hand, assigning too much power to minority shareholders can lead to a holdout problem, with recalcitrant dissenters demanding private payouts before blessing a merger. Even if minority owners do not maintain an express veto over the transaction, generous remedial statutes or very strict standards of review present a risk of costly strike suits.

Not all freezeout transactions amount to legally sanctioned theft. It is important to recognize that there are legitimate reasons to conduct these deals, and excessive minority blocking power (de jure or de facto) may destroy social wel-
fare by obstructing efficient mergers. The legal challenge, of course, is how to balance the dual extremes of minority holdout and majority expropriation.

Thus far, corporate law has dealt with the majority-minority governance problem, as it appears in the merger context, through a troika of regulatory policies. First, under federal securities law, firms undergoing a freezeout merger must disclose detailed financial information to all shareholders. Second, these deals are subject to judicial review (often in Delaware) to determine whether the firm (through its managers) or the controlling shareholders (directly) have breached a fiduciary obligation to the minority owners. And third, dissenting shareholders may have the right to file an appraisal claim, which theoretically ensures—again through a judicial proceeding—that minority owners receive fair value for their shares. In a perfect world, these protections should act in concert to get the balance right.

Unfortunately, this three-part framework has not been very satisfying. Disclosure seems like a reasonable idea, but it often does not have much practical effect and is subject to loopholes. Judicial review of freezeout mergers is messy, at least in Delaware, because inconsistent standards attach to identical economic transactions. Courts will either adopt a strict “entire fairness” standard or award defendants the protection of the deferential “business judgment rule”—depending on whether the deal is structured as a statutory merger or a tender offer. And the appraisal remedy has long been criticized as a weak cure due to its stringent (and outdated) procedural requirements and its protracted use of adversarial litigation to value shares.

So if the current legal framework is not working, how should we deal with the freezeout problem? Are there other sensible ways to divide the levers of power between majority and minority shareholders to help deter abusive deals and facilitate sensible ones? And can we encourage firms to make reasonable tradeoffs themselves, using private contractual arrangements instead of costly judicial resources?

In this Article, I propose and analyze a new type of economic instrument for balancing the tension between major-
ity and minority shareholders in the freezeout context. I call
it an “internal poison pill”—in obvious reference to the
antitakeover device that famously sets the balance of power
between target firms and third-party acquirers during an
outside merger contest. An internal poison pill is similar to
its cousin in that it seeks to craft economic disincentives to
the trampling of the rights of impacted shareholders (minor-
ity owners in this context) as a way of restoring balance to
merger deliberations. Indeed, as I will show, a traditional
“external” poison pill (with only slight modifications) might
be used to address this problem, although this is not the
approach that I ultimately recommend.

Instead, I argue that a more flexible, though weaker,
“internal” pill can offer a better compromise than the con-
ventional medicine.

The focus of my proposed modification is on the power of
redemption. The stock options in traditional pills are redeem-
able (for a nominal fee, perhaps a penny) at the sole discre-
tion of the issuing firm’s board of directors. This has the
obvious benefit of forcing external acquirers to negotiate
with the target board, instead of sidestepping this process
through a direct tender offer to current shareholders. But
centralizing the power of pill redemption in this manner also
has some serious drawbacks: It can, for example, shield
incumbent managers and directors from the discipline of
corporate control markets or stymie efficient deals. This is
especially true if poison pills are combined with staggered
board charter provisions to brew an even more toxic potion.
The thought of mounting a multiyear proxy contest to
replace a staggered board—and only then redeeming the
pill—is enough to scare off all but the most determined of
acquirers.

By contrast, an internal poison pill (as envisioned here)
would adopt a more nuanced redemption strategy. The main
trick is to use embedded options to qualify the pill’s de facto
veto power. For example, as part of the strike price to exercise
the pill’s discounted call option, minority shareholders could
be required to write the triggering controller an embedded
option setting a price under which the minority sharehold-
ers’ poison pill rights could be redeemed. Economic incentives (what I call a “catch”) should also be adopted to discourage the minority shareholders from demanding outrageous terms—such as requiring a redemption payment of $1,000,000 per share. If designed correctly, these (admittedly more complex) securities might be used to elicit and compare the subjective values that each party places on a transaction. If the freezeout is a rip-off (because the majority has set an artificially low price), then the internal pill would have bite, and the minority holders could receive additional discounted shares—or, more likely, the majority controller would not attempt the abusive freezeout in the first place. If, on the other hand, a minority shareholder is simply stonewalling a sensible deal, he will be unwilling to put his money where his mouth is (for fear of springing the catch), and the majority owner can economically redeem the pill.

More theoretically, using internal poison pills as a governance tool is a way to craft an intermediate legal entitlement that rests between the extreme options of granting dissenters veto power over the merger (a property right) or granting majority shareholders full discretion to execute the merger by paying dissenters a judicially determined fine (a liability right). This work thus shows how we might parse the legal entitlements established by Calabresi and Melamed’s famous “cathedral framework” much more finely in a corporate law context.

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RACHEL HARMON arrived at Virginia in 2006, following eight years of service with the U.S. Department of Justice. Her scholarship, which focuses on the relationship between the law and police governance, is deeply informed by her real-world experience as a federal prosecutor. Harmon is also known as a dynamo in the classroom, a thoughtful mentor to students, an admired leader of the faculty, and a public servant who remains deeply involved in the community.

Harmon’s scholarship stems from a very practical problem. As a federal civil rights prosecutor, Harmon won convictions against white supremacists who assaulted young African-American men in Los Angeles, a halfway house director who forced probationers to have sex with him in Memphis, and others who violently assaulted those who are less powerful. One type of case, however, proved to be the most challenging and most troubling: charges against police officers who abused their positions, often by using excessive force.

Harmon prosecuted a police chief in Mississippi who beat a Latino man in the head with a baton after arresting him for public drunkenness. She tried an officer in Texas who punched and seriously injured an elderly man at a convenience store. She pursued Tennessee police officers who conspired to rob drug dealers. But she found proving these cases difficult. The victims were unsympathetic, there were few independent eyewitnesses, and the defendant police officers were experts at testifying in court. Even when she was successful, Harmon discovered that convicting individual
police officers for misconduct hardly seemed to help prevent future violence. It removed some bad officers from the streets, it vindicated the rights of the victims, and it reminded the public that no one is above the law. But more misconduct followed, often in the same departments. Broken departments ignored complaints, inadequately trained and disciplined officers, or rewarded overly aggressive policing, and criminal prosecution failed to inspire reform. In some cases, the Justice Department could even be accused of doing more damage than good. A police chief could use a criminal conviction to claim that the problem of misconduct was solved without being forced to implement structural reforms that would effectively prevent future misconduct.

Harmon turned from practice to academia not to escape her frustration, but to do something about it. In her six years at Virginia, she has sought answers to the questions her criminal cases raised: Can criminal prosecutions be more effective? Are other legal remedies likely to work better to prevent misconduct? And ultimately, what can law do to promote policing at its best?

In her first article, “When is Police Violence Justified?”, 102 Nw. U. L. Rev. 1119 (2008), Harmon critiqued legal doctrine governing police uses of force and proposed refinements intended to help identify and prevent illegal police uses of force. Civil plaintiffs and federal prosecutors who challenge a police officer’s use of force during an arrest must establish that the violence violates the Fourth Amendment guarantee against unreasonable seizures. In 1985, in Tennessee v. Garner, the Supreme Court provided a relatively easy-to-apply legal test for one context in which police face the decision to use force: when deadly force is necessary to subdue a fleeing suspect. The Court permitted deadly force “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.” In subsequent cases, however, the Court addressed the force used by police officers more generally. Harmon argues that in doing so, the Court failed to provide precise rules for lower courts to use, or guidance on basic questions
about why police uses of force may be justified or when they are excessive. In *Graham v. Connor*, for example, the Supreme Court instructed courts to balance the police officer’s intrusion on the individual’s Fourth Amendment interests against the government interests at stake, carefully attending to facts and circumstances such as the severity of the crime at issue and whether the suspect poses an immediate threat to the safety of officers. However, the Court neglected to say when, why, or to what extent these circumstances were important. And more recently, in *Scott v. Harris*, the Court has eschewed providing even this limited guidance, instead announcing that “all that matters is whether [the officer’s] actions were reasonable.”

Harmon shows that *Garner*, *Graham*, and *Scott* provide vague, unprincipled, and sometimes misleading instruction to lower courts and juries about how to assess uses of force by the police. For example, in *Graham*, the Court suggests that the severity of a suspect’s crime is always relevant to whether force can be legally used against him. Harmon demonstrates that the severity of a suspect’s crime pertains to some decisions to use force because it can be used to predict the strength of the state’s interest in subduing the suspect or how dangerous he might be if he were to escape. But in other circumstances, she argues, the nature of the crime is entirely irrelevant. As she explains in the article, “an officer may use force to prevent an attacking suspect from injuring him, no matter what the crime—whether the suspect is being arrested for jaywalking or assassinating the President,” and conversely, “[w]hen a suspect is fully under control, the seriousness of the suspect’s alleged crime is no longer relevant to the use of force on the suspect,” since no force can be justified.

Harmon contends the Court has failed to answer the most basic questions about police uses of force, such as why a police officer may use force, when he can do so, and how much force he may use. As a result, courts and juries come to mistaken conclusions about the constitutionality of particular uses of force, leaving some unconstitutional acts by officers uncompensated and undeterred. Moreover, because judicial guidance is so limited, police officers cannot predict
how a court will assess the constitutionality of a particular type of force. This unpredictability reduces the specificity of officer training about what force is permissible. It also further undermines the deterrent effect of prosecutions and civil suits, because police officers can only be held liable for illegal uses of force when they should have clearly understood at the time that their conduct was unlawful.

Harmon addresses the problems of existing Fourth Amendment doctrine by first exploring why and when police violence is permissible, and then by turning to substantive criminal law defenses, such as self-defense, to provide more content to the Fourth Amendment legal standard. Self-defense addresses a social problem similar to that regulated by the Fourth Amendment: It distinguishes legitimate from illegitimate uses of force by individuals. Self-defense and other criminal law justification defenses have a well-established structure: Force is permissible only if it is a necessary and proportional response to an imminent threat to an interest weighty enough to justify the risk of harm the force entails. Harmon argues that, analogously, the Fourth Amendment should be understood to permit police uses of force only to serve the state’s interests in enabling lawful arrests, protecting public order, and protecting officers from harm. Even if one of these interests is at stake, the officer’s use of force should be a response to an imminent threat, reasonable in degree and in kind to protect the interest, and not substantially disproportionate to the interest it protects.

This answer to the weakness of Fourth Amendment doctrine seems straightforward, but it would provide much more guidance to officers, courts, juries, and the public than the Court’s limited advice that the force used by police officers must be “reasonable.”

While Harmon’s analysis offers new insight into the nature of police violence and shows a way toward more reasoned, predictable, and just results in civil and criminal cases, it is only the first step. As she recognized in practice, punishing officers’ criminal conduct and holding officers and departments civilly liable cannot solve the problem of police misconduct. Individual remedies are inevitably limited
in ways described by Harmon’s colleague Barbara Armacost in a 2004 article, “Organizational Culture and Police Misconduct”: They are “focused too much on notorious incidents and misbehaving individuals” and too little on “the organizational norms and policies” that drive misconduct in the first place.¹

Realizing that improving civil suits and criminal prosecutions is not enough to change police conduct around the nation, Harmon began to think about federal remedies that might better facilitate institutional change. That, in turn, became the subject of her next article, “Promoting Civil Rights Through Proactive Policing Reform,” 62 Stan. L. Rev. 1 (2009). In this article, Harmon considers how to best use a promising but so far unsatisfying federal legal remedy for police misconduct. Title 42 U.S.C. § 14141 authorizes the Justice Department to bring civil suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional police misconduct. The statute was originally hailed by scholars and activists as a crucial means of driving systemic reform in police departments. But over time, enthusiasm waned: Section 14141 has had a limited effect in the almost twenty years since it was passed, driving reform in just a handful of American police departments. Many have suggested that the Justice Department should simply investigate more departments and bring more cases under the statute. But Harmon points out that while such a strategy might change a few more departments, it cannot promote nationwide reform in pathological law enforcement agencies. Because § 14141 investigations and suits are extremely resource-intensive, the Justice Department is unlikely ever to have sufficient resources to pursue every—or even many—problematic police departments. Even if the Justice Department’s budget for investigating and suing police departments were doubled or tripled, the department’s § 14141 efforts would force reform in only a few more police departments, hardly the kind of widespread change many want.

To improve upon the expensive strategy of compelling structural changes in police departments one at a time, Harmon advocates enforcing § 14141 strategically to induce departments to adopt recommended measures to prevent misconduct before the Justice Department investigates or sues them. To spur reform, Harmon proposes a three-pronged regulatory and litigation approach. The first prong requires the Justice Department to collect nationwide data sufficient to estimate police misconduct by departments and adopt a “worst-first” policy that prioritizes suing the worst large departments. The Justice Department’s approach to § 14141 has been largely reactive, spreading the risk of such suits among a vast number of departments—large and small—and therefore drastically reducing the incentive felt by each department to reform. In contrast, Harmon’s approach concentrates fear of § 14141 among those departments most in need of reform—the largest of the “worst” departments. The second prong of the strategy is to create a “safe harbor” program in which departments that implement an array of reforms developed by the Justice Department are shielded from a § 14141 investigation or suit. Such a policy would make reforms more rewarding to police departments and encourage problematic departments to act proactively without an expensive investigation or suit. The third prong of Harmon’s strategy is to develop and disseminate information to police chiefs and departments about the causes of misconduct and cost-effective measures for preventing it. By providing technical assistance to those considering reform, the Justice Department can lower the costs of change, making it more attractive to police departments. Together, Harmon argues, these efforts would leverage the Justice Department’s inevitably limited § 14141 enforcement efforts to spur more reform in the nation’s worst police departments than a traditional enforcement strategy permits.

Harmon’s proposal for using existing legal tools to induce reform strikes a delicate balance informed by her experience at the Justice Department. Many academics invent solutions to social problems that are untethered from institutional realities. And many policymakers propose only incremental
and ineffectual reform, because they fail to transcend existing legal practices. Harmon brings practical experience to the academy, combining institutional knowledge with analytic rigor in order to articulate a vision that is both ambitious and—she believes—attainable.

Harmon recently expanded on her idea that police misconduct is a regulatory problem to be managed rather than an individual wrong to be remedied. This framework sets her work apart from traditional legal scholarship, which overwhelmingly considers policing through the lens of constitutional criminal procedure. In a new article, “The Problem of Policing,” 110 Mich. L. Rev. 761 (2012), Harmon outlines an agenda for future scholarship on the law governing the police. She contends that while the 1960s Warren Court improved policing by imposing concrete constitutional standards on the police, it also established a conventional paradigm in which the courts use the Constitution as the primary means of balancing law enforcement goals with protecting liberty. This paradigm is unavoidably flawed both because constitutional law alone cannot protect important individual interests or the distributional effects of law enforcement activities and because the judiciary cannot by itself adequately define or enforce limits on police conduct. Although others have noted some of the limits of constitutional law as a regulatory mechanism and the judiciary as a regulator, Harmon demonstrates that legal scholars nevertheless almost exclusively analyze aspects of policing subject to constitutional law using constitutional methodologies.

Because the conventional constitutional paradigm has dominated legal assessments of policing, Harmon argues, scholars have neglected essential preconditions for effective governance of the police. One of those conditions is a normative framework for evaluating policing policy. As Harmon points out, police officers may engage in an excessive number of stops and frisks, for example, substantially undermining a community’s quality of life but still technically complying with the constitutional rules governing these actions. If constitutional doctrine does not adequately protect the interests at stake, then regulators must measure a policy encouraging
stops and frisks by some other metric. To fill this gap, Harmon advocates policing that is harm-efficient—that is, policing should impose harms only when the law enforcement benefits of those harms outweigh their costs to individuals and communities. But for regulators to promote harm efficiency, they need access to information about the comparative costs and benefits of policing techniques. And that is a subject scholars have all but ignored.

Similarly, Harmon notes that governing the police effectively requires understanding what influences police behavior, so regulators can implement reforms that are likely to work. Scholars have neglected to explore the full range of laws that significantly influence police work in favor of almost exclusive focus on constitutional limits. Even now, Harmon argues, this neglect inhibits law governing the police. She uses the example of 18 U.S.C. § 1983 to illustrate her point. This long-standing federal statute permits individuals to sue police officers and departments for damages and other forms of relief. The Supreme Court has made clear that Congress intended § 1983 to deter misconduct as well as to compensate victims, and it tailors its interpretation of § 1983 to require constitutionally adequate screening, training, and discipline by police departments. But neither scholars nor courts seem to have noticed that other laws, including civil service law, collective bargaining law, and federal and state employment discrimination law, simultaneously discourage precisely the same reforms § 1983 encourages by making them much more costly for police departments to adopt. The result appears to be that § 1983 imposes significant costs on municipalities without preventing constitutional misconduct effectively.

In “The Problem of Policing,” Harmon tasks scholars with laying the groundwork for effective law governing policing. Harmon is now pursuing the agenda she outlined, starting with a thorough examination of law governing the police and the consequences of shared federal, state, and local responsibility for regulating the police. Harmon engages students in her efforts as well. She now teaches The Law of the Police, a course that analyzes the web of interacting laws.
that govern police and police departments. The Law of the Police explores a variety of legal doctrines, statutes, and administrative regulations to understand policing as the subject of regulation. Students explore the variety of conduct rules governing police behavior, drawing on sources as diverse as internal administrative orders and international conventions. Students then compare remedies for police misconduct, from the traditional to the informal and innovative. The course briefly considers some of the laws constraining how police officers are hired and managed, and it ends with several class sessions on the sundry laws that govern the production and dissemination of information about policing. These statutes—including state wiretap laws used to prosecute those who videotape police officers, state laws that command the police to record information in traffic stops, open records laws, and discovery rules—determine how much information citizens have about what the police do, and therefore constrain efforts to hold the police accountable. The Law of the Police course has been so successful at the University of Virginia that Harmon is developing a casebook to allow faculty at other institutions to teach similar courses.

The law plays an inevitable role in shaping police conduct. Harmon’s work highlights the true complexity of governing the police, a social institution that, in her words, has “always represented both hope and harm.” Through her scholarship and teaching, Harmon challenges the next generation of legal academics, students, and policymakers to move beyond traditional analysis of policing to improve police governance and the part law plays in it.
Police officers are granted immense authority by the state to impose harm. They walk into houses and take property. They stop and detain individuals on the street. They arrest. And they kill. They do all these things in order to reduce fear, promote civil order, and pursue criminal justice. The legal problem presented by policing is how to regulate police officers and departments to protect individual liberty and minimize the social costs the police impose while promoting these ends.

While courts and commentators have written extensively on the law governing the police, they have in recent decades mostly neglected the problem of regulating them. They have largely treated the legal problem of policing as limited to preventing the violation of constitutional rights and its solution as the judicial definition and enforcement of those rights. The problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure.

This conventional paradigm is necessarily inadequate to regulate the police. Despite doctrinal rhetoric to the contrary, constitutional law cannot alone balance individual and societal interests when they conflict. Instead, constitutional rights establish only deferential minimum standards for law enforcement, without addressing the aggregate or distributational costs and benefits of law enforcement or its effects on societal quality of life. Even within constitutional law, the judiciary alone cannot undertake the problem of policing. As the Supreme Court’s constitutional criminal procedure doctrine suggests, empirical and causal analysis is central to both defining and protecting constitutional rights, yet courts have limited institutional capacity to engage in that analysis. In short, the public policy problems presented by the use of police power necessarily extend beyond constitutional law and courts. Protecting rights and balancing competing indi-
individual and social interests require a broader set of regulatory tools and institutions.

Of course, legal scholars have often been critical of aspects of the conventional paradigm, especially of its reliance on courts to protect individuals and communities from abuses of police power. Despite those criticisms, the paradigm continues to influence scholarly efforts to understand the problem and regulate the police effectively. Even scholars who have criticized the traditional approach continue to view the problem of policing principally through the lens of constitutional law. They therefore limit their analysis to constitutional methodologies and the subject matter of constitutional law. And while some recent work highlights nonconstitutional rules governing police conduct or utilizes the methodologies of social science to understand police conduct, it usually does so in service of either conclusions about constitutional doctrines or nonlegal analysis. In short, contemporary scholarship remains firmly grounded in the conventional paradigm. Scholars have yet to consider the full range of nonconstitutional legal questions at the core of the problem of policing.

The ongoing influence of the conventional paradigm has obscured some of the conceptual preconditions for effectively regulating the police. First, the paradigm limits the regulation of the police to the problem of identifying and enforcing constitutional rights. Yet the problem of regulating the police extends beyond constitutional law to ensuring that the benefits of policing are worth the harms it imposes, including harms not prohibited by the Constitution. The law should promote policing that effectively controls crime, fear, and disorder without imposing unjustifiable and avoidable costs on individuals and communities. Addressing the problem of policing therefore requires determining what harms policing produces, what kinds of policing are too harmful, and what kinds are harm efficient. Legal scholars and social scientists have yet to embrace this inquiry.

Second, courts have difficulty assessing the incentives affecting police officers, a task central to determining how to encourage police officers to conform their conduct to law.
Scholars have studied many determinants and correlates of police conduct, but the conventional paradigm has encouraged the belief that constitutional criminal procedure is the primary legal influence on police officers and departments. In fact, nonconstitutional law plays a much greater role in influencing police officers than has previously been appreciated. While scholars have begun to consider nonconstitutional law governing the police, their efforts have been narrow. Scholars have not yet adequately considered the full web of federal, state, and local laws that govern the police outside of the context of criminal investigations. This neglect stymies existing efforts to regulate the police. Presently, for example, courts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior, yet civil service law, collective bargaining law, and federal and state employment discrimination law simultaneously discourage the same reforms.

Finally, courts lack the institutional capacity to undertake complex empirical analysis of policing or to constrain the police beyond identifying and enforcing constitutional rights. Because regulating the police requires such capacity, it is clear that courts cannot adequately regulate the police by themselves. Thus, regulating the police requires allocating responsibility among institutional actors to ensure a regime capable of intelligently choosing and efficiently promoting the best ends of policing. Yet the focus of scholarship remains on the courts, with little attention to the comparative roles, capacities, and incentives of nonjudicial institutions that can influence police conduct.

These neglected areas of inquiry—harm efficiency, the real law of the police, and comparative institutional analysis—suggest a new scholarly agenda that asks not how the Constitution regulates the police but how law and public policy can best regulate them. In this Article, I explore the development and limitations of the conventional paradigm and elaborate on this new agenda.
Much police misconduct is not accidental, incidental, or inevitable. Instead, it is systemic, arising out of departmental deficiencies that undermine officer adherence to legal rules. When a police department resists public feedback, provides inadequate training and policy guidance to officers, or disciplines laxly those who violate legal rules, it facilitates—even encourages—law breaking. Countering the systemic causes of police misconduct requires doing more than punishing individual officers. It requires structurally changing police departments that permit misconduct in order to create accountability for officers and supervisors and foster norms of professional integrity.

Federal law has long prohibited some kinds of police misconduct and has empowered governmental and private actors to enforce those prohibitions. Yet, unfortunately, the traditional federal legal means of regulating police officer conduct—federal criminal prosecutions, civil suits for damages under 42 U.S.C. § 1983, and the exclusionary rule—promote departmental reform only weakly. One alternative to these remedies, structural reform litigation, has been a primary legal tool for inducing public institutional change in other civil rights contexts—such as changing segregated schools or improving unconstitutional prison conditions. But litigation seeking equitable relief against police departments has frequently foundered on standing requirements and similar legal obstacles. As a result, structural reform litigation has played a marginal role in promoting reform in law enforcement agencies. In sum, traditional legal tools do not spur widespread change in pathological police departments.

In the mid-1990s, Congress passed 42 U.S.C. § 14141 in an effort to remove some of the barriers to structural reform of police departments. Section 14141 authorizes the Justice Department to bring suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional police misconduct. Initially, legal scholars
hailed § 14141 as a significant achievement in the battle against police misconduct because it expressly authorizes lawsuits that could force institutional changes on police departments. Since then, however, enthusiasm has waned. A consensus has emerged that, hampered by limited resources and inadequate political commitment, the Justice Department has brought too few cases.

The Obama Administration represents new hope for those interested in widespread policing reform. Political commitment to enforce § 14141 is likely to increase, and that commitment may produce a concomitant devotion of resources. Although this is exactly what prior scholarship implies is necessary to improve § 14141 enforcement, these changes alone are unlikely to make more than marginal improvements in the effectiveness of § 14141 at reducing police misconduct. Even with new interest, funding for § 14141 actions will unquestionably remain limited. If any significant number of the nation’s large police departments are structurally deficient, the Justice Department is unlikely—under the Obama Administration or any other—to have sufficient resources to investigate and sue every problematic police department. Instead, additional resources will allow only a few more suits each year. Thus, using § 14141 to achieve direct reform is inevitably a limited enterprise. To achieve more significant reform, the Obama Administration must improve as well as enlarge the government’s efforts to reduce systemic misconduct.

This Article proposes a new approach to § 14141 enforcement, one that overcomes the limits of direct reform by inducing departmental reform as well as compelling it. The Justice Department can induce reform in police departments that are engaged in substantial misconduct, even if it does not sue them, by making the proactive adoption of reforms a less costly alternative for these departments than risking suit. This strategy seeks to leverage whatever Justice Department litigation resources exist to motivate problematic departments to adopt recommended reforms without incurring the costs to the Justice Department of additional suits. Since the Justice Department can induce and monitor reform in more
departments than it could otherwise sue, incentivizing reform in this way—rather than solely by coercing it department-by-department through § 14141 litigation—is a more efficient means of attacking systemic police misconduct. Thus, this Article argues that the Justice Department can best use § 14141 to reduce police misconduct by implementing a regulatory and litigation strategy that maximizes the rate at which police departments proactively adopt cost effective reforms. Even if the Justice Department has resources sufficient to sue only a few departments each year, it can use those resources to create a § 14141 policy that provides sufficient incentives for many more departments to reform.

In order to induce police departments to reform prior to being sued under § 14141, the Justice Department must make the net expected cost of reform less than the net expected cost of misconduct for those departments. The Justice Department can change the calculus of police departments in three ways: (1) it can raise the expected cost of a § 14141 suit for a department by raising the probability that the department will be sued; (2) it can increase the benefits of proactive reform for a department; and (3) it can lower the costs of adopting proactive reform. To achieve these ends for departments that most need reform, the Justice Department should adopt a three-pronged § 14141 enforcement policy.

The first prong requires the Justice Department to adopt a “worst-first” policy that prioritizes suing the worst large departments. Such a policy raises the expected costs of a § 14141 suit for the worst departments in the nation by raising the probability of suit for those departments. This requires a radical change in how the Justice Department approaches enforcing § 14141. Instead of deciding which departments to target under § 14141 simply by reacting to complaints, the Justice Department itself must be proactive: it must identify the worst departments and pursue them. Doing so requires a vision of § 14141 that is more like regulation than traditional public civil rights enforcement. It also presupposes the creation of a new national database on police misconduct through which the Justice Department can identify the worst departments.
Collecting national data is no less essential for assessing and improving the efficacy of the Justice Department’s current § 14141 enforcement policy than it is for implementing the proposal advanced here. Any effective effort to reduce systemic police misconduct nationwide requires data sufficient to estimate where misconduct exists, how departments compare in their levels of misconduct, and what the effects are of different departmental reforms on misconduct over time. No such data currently exist. As a result, existing § 14141 enforcement is reactive and haphazard rather than proactive and systematic. Without the most basic empirical tools, the Justice Department cannot set priorities intelligently. Rather, it necessarily chooses its targets without regard to how the misconduct in those departments compares to that of similar departments, and it therefore uses its limited resources inefficiently. For this reason, whether or not the Justice Department adopts the proactive approach this Article recommends, Congress should grant the Justice Department authority to issue regulations requiring large police departments to collect and report essential data in a uniform manner. But once such data are collected, the Justice Department can do better than merely [...] improve existing enforcement choices; it can use the data to make § 14141 enforcement significantly more effective.

The second prong requires the Justice Department to announce a “safe harbor” policy. Such a policy would shield from investigation or suit any department that officially commits itself to adopting proactively a preset array of reforms and then makes substantial, verifiable progress toward their implementation. A police department that receives the safe harbor would avoid the litigation costs associated with a § 14141 suit. In addition, the set of reforms that a department would be required to adopt in order to receive the safe harbor, though still beneficial, would be less extensive and costly than the reforms imposed as a result of a suit. The safe harbor policy would therefore raise the net expected benefit of proactively adopting reforms.

The safe harbor mechanism is critical to this three-pronged proposal because it would ensure that departments
can move quickly off the worst list. However, the safe harbor mechanism cannot work to reduce misconduct unless a standardized set of reforms exists that is both effective and cost-effective for departments that should adopt them. Presently, such a set of reforms exists only for large departments. Thus, the three-pronged proactive approach to § 14141 advanced in this Article is intended to apply to and to incentivize only large police departments, that is, those with fifty or more sworn law enforcement officers.

To work, a safe harbor mechanism must also have an effective monitoring scheme. Otherwise, police departments may attempt to use superficial reform to secure a safe harbor at low cost. The case for a proactive reform policy, therefore, rests on a key claim: that the costs of suing a department are substantially higher than the costs of inducing and monitoring proactive genuine reform in that department. As discussed later in this Article, there is good reason to believe this is true.

The third prong requires using Justice Department resources to refine and disseminate information about institutional deficiencies that breed police misconduct, remedial measures that will reduce misconduct, and means for effectively implementing those measures. This technical assistance effort would make reform more cost-effective for police departments by lowering the information costs of adopting reform. Together, the worst-first, safe harbor, and technical assistance policies would raise the probability of suit while lowering the costs and increasing the benefits of reform for the worst of the nation’s police departments. Because it is more efficient at promoting reform, the § 14141 enforcement strategy advanced here would be superior to existing enforcement efforts, which have failed to maximize the expected costs of a § 14141 suit for police departments.

This proposal responds to existing deficiencies in § 14141 enforcement. Others have responded to such deficiencies by urging legislation to modify § 14141 to allow private citizens as well as the federal government to sue police departments. These critics assume that allowing private suits will result in more suits and that more suits will produce more effective
§ 14141 enforcement, regardless of the Justice Department’s efforts. While private suits might add resources, they would also likely promote less effective departmental changes than federal efforts and may interfere with the most efficient governmental enforcement of § 14141. In fact, this Article contends that the three-pronged § 14141 enforcement strategy advocated here is likely to be more effective and efficient and less likely to intrude in local affairs or inhibit innovation than adding private plaintiffs to § 14141 or replacing § 14141 with a regulatory scheme.

WHEN IS POLICE VIOLENCE JUSTIFIED?

The Supreme Court’s Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished. Although lower courts frequently rely on this doctrine in civil and criminal cases alleging excessive force by police officers, the Court’s standard is indeterminate and undertheorized, particularly as applied to nondeadly force. After nearly twenty years of silence on the issue, the Supreme Court finally turned again to the constitutionality of police acts of violence last year in Scott v. Harris. Yet, rather than improve its confused doctrine, the Court made matters worse. Far from providing a principled account of when police uses of force are justified, it left the law more incomplete and indeterminate than ever.

Criminal law already provides a well-established conceptual structure for deciding when, how, and why one person may justifiably use force against another. It does so in the context of justification defenses—such as self-defense, defense of others, and the public authority defense—each of which differentiates instances of legitimate force from impermissible exercises of violent will. Justification law provides a mechanism for balancing individual interests with our moral obligations to each other: It limits the interests we may
defend, measures our need to respond to attacks, balances the difficulty of responding quickly to threats with the costs of our errors, and incorporates deontic limits on our permissible responses to wrongdoing. Assessing the constitutionality of police uses of force requires balancing precisely the same kinds of considerations. As a result, the law of justification provides a natural and powerful framework for evaluating the force used by law enforcement officers.

In this Article, I argue that the concepts that structure justification defenses can and should be imported, subject to appropriate modifications, into the Fourth Amendment doctrine regulating police violence. Specifically, the law of justification defenses permits individuals to use force to serve particular well-defined interests, such as to protect themselves or others, under specific, carefully delineated conditions, i.e., when that force is necessary to protect against an imminent threat to one of those interests and is proportional to that threat. Analogously, I contend that the Fourth Amendment permits police uses of force only to serve directly the state’s distinct interests in (1) facilitating its institutions of criminal law, most commonly by enabling a lawful arrest; (2) protecting public order; and (3) protecting the officer from physical harm. Moreover, even if one of these interests is at stake, a use of force should be considered unreasonable—and therefore unconstitutional under the Fourth Amendment—unless it is a response to an imminent threat to one of these interests, the force reasonably appears necessary in both degree and kind to protect the interest, and the harm the force threatens is not substantially disproportionate to the interest it protects. In this way, the substructure of justification defenses can be used to analyze whether a police use of force is constitutional.

Of course, police officers and civilians are not similarly situated: Officers act with state authority, they are often not permitted to retreat, and they are trained and expected to use force. These differences affect how the concepts of imminence, necessity, and proportionality that comprise the justification standard should be applied to police uses of force, and these differences are not incidental. Instead, they reveal
the deep dual structure of policing. Police officers use force as an authorized form of state coercion, but they do so in tense and often emotionally charged interpersonal encounters. An officer using force to arrest a subject is neither entirely a neutral actor, detached and disinterested, charged with carrying out the will of the state, nor entirely an individual acting in the heat of the moment, vulnerable and in harm’s way, perhaps vengeful and afraid. Strangely but inevitably, he is both.

It is this combination of state authority and human agency that distinguishes police violence from other forms of state coercion and from other forms of justified force by individuals. Because police uses of force are both determined and imposed by persons who are under threat, these acts are unlike punishment, the paradigmatic form of state coercion, which is detached, impersonal, and institutionally enacted. Yet, because police officers are empowered and trained by the state, prepared for violence, and denied the choice of retreat, their uses of force are also unlike self-defense, the paradigmatic form of justified individual violence. Neither purely of the state nor of the individual, police violence has remained confusing and dangerously unclear to juries, judges, and the public precisely because of its dual character. Although the factual contexts in which police uses of force arise make incidents of force inevitably complex and difficult to assess, understanding the unique character of police violence clarifies its proper scope and limits.

Like jurists, scholars have overlooked the specific blend of state authority and individual agency inherent in police violence. Instead, disciplinary norms have led scholars either to explore justifications for state coercion entirely abstracted from policing or to focus exclusively on the cause and prevention of police misconduct without considering the normative grounds that justify and limit the state’s use of force through police officers. Thus, when contemporary political philosophers consider state coercion, they usually do so in the context of punishment. As a consequence, they consider state-applied force without recognizing the significance of the actors who implement that force or the special conditions of policing as a form of state coercion. Social scientists, by con-
trast, have acknowledged the actors, emphasizing the psychological, sociological, and organizational factors that influence police violence. Yet they have failed to recognize policing as a distinctive state enterprise arising out of the state’s responsibility to protect freedom by creating order. They have therefore neglected to offer accounts of why and when police uses of force are legitimate. Criminal procedure scholars have largely focused on a set of police activities—searches, seizures of property, interrogations, and techniques of community policing—other than the use of force. Even when legal scholars have addressed excessive police violence, they have considered the topic from an entirely pragmatic perspective, focusing, for example, on why existing avenues of criminal and civil litigation are inadequate tools for redressing and curbing police misconduct, or why existing case law on the constitutionality of excessive force is inadequate to address the problem of police interaction with the mentally ill. By contrast, this Article describes the limits of the state’s use of force by police officers and the officers’ role in carrying out state commands. Moreover, it demonstrates that that relationship can be captured doctrinally by the analogy to justification defenses: The state’s legitimate but limited authority is reflected in the interests that justify the use of force, and the intersubjective and situational nature of individual police uses of force is captured by applying concepts of imminence, necessity, and proportionality to uses of force that serve legitimate state interests.

In Part I of this Article, I describe the constitutional landscape governing police uses of force, including the Court’s recent foray into the substantive standard for the use of force in *Scott v. Harris*. I argue that the Supreme Court’s few opinions fail to answer basic questions of why, when, and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably. While the Court has declared some uses or degrees of force within bounds or beyond the pale, it has failed to provide a principled basis for determining when police uses of force are reasonable under the Fourth Amendment. This has
had the effect of stunting the development of the law in the lower federal courts: While the intuition of federal judges usually leads to results that seem reasonable and are consistent with the Court’s doctrine, the reasoning in these cases is ad hoc, often inconsistent, and sometimes ill-considered. Because the doctrine on police violence is underdeveloped, the outcomes of future cases are largely unpredictable, even by the Supreme Court’s own measure. This unpredictability turns out to be of enormous consequence to federal civil rights litigation. Under the doctrine of qualified immunity, officers are not civilly liable under federal civil rights law for using excessive force unless the unlawfulness of their conduct is apparent from prior case law. Since current Fourth Amendment doctrine is often too indeterminate to permit officers to determine the lawfulness of a particular use of force ex ante from past Supreme Court and lower federal opinions, qualified immunity plays an overly expansive role in determining the outcome of excessive force litigation. Thus, the indeterminate nature of the Court’s doctrine leads many unconstitutional uses of force to go uncompensated and undeterred.

Parts II and III provide an alternative to the Court’s failed doctrine that is analogous to the law of justification defenses. In order to establish a justification defense, there must be an interest weighty enough to justify the risk of harm created by the use of police force. [...] I argue that while the interests protected by justification defenses are helpful to consider, they are insufficiently tailored to policing as a form of state coercion to provide an account of the limits of police uses of force. More importantly, I argue that the traditional retributive and utilitarian justifications for punishment—the paradigmatic form of state coercion—also fail to provide an adequate justification for state force exercised through the police. Instead, I argue that only two state interests justify police uses of force: the implementation of the adjudicative processes of criminal law and the preservation of public order.

In addition to these primary interests, however, the state has a derivative interest in using force to protect police offi-
cers so that the officers may serve the state’s interests in effectuating the adjudicative process and maintaining public order. Thus, rather than protect its citizens’ freedom by demanding that officers contract away any legal right to defend themselves while acting in the line of duty, states should and do permit officers to use force to defend themselves as well as the state’s interests. The state’s derivative interest, however, is not without limits. Not only is the force used to protect officer safety subject to deontic constraints—which reflect the moral rights of officers and suspects alike—but the scope of the state’s interest in protecting officers depends on social conditions, including the societal costs of police uses of force. In considering the justifications for state violence in light of the social and institutional constraints, the analysis in Part II is methodologically sympathetic to recent criminal procedure and constitutional law scholarship that has considered the effect of contextual interests and incentives on the legal regulation of government officials. I conclude that the legitimate exercise of force by police officers must assist the institutions of criminal justice, preserve public order, or protect an officer. Any other use of force is simply illegitimate.

In Part III, I argue that the concepts of imminence, necessity, and proportionality that make up justification defenses in criminal law provide a coherent conceptual framework and a set of practical legal principles for assessing the constitutionality of police uses of force against citizens under the Fourth Amendment. While the law of justification defenses provides the starting point for such a standard, that law must be adjusted in crucial ways to accommodate both the state’s interests and the unique character of police power.

No legal standard can eliminate the difficulty of analyzing and making judgments about the complex interactions out of which excessive force claims arise. Nor can any legal framework make Fourth Amendment law fully determinate and predictable. Nevertheless, this Article supplies a more theoretically grounded and doctrinally rigorous framework for determining when police uses of force are justified, one that reflects the dual nature of policing and permits lower
federal courts to develop the law in a principled fashion over time. It also provides a reasoned basis for explaining and evaluating the intuitions underlying both federal court decisions and general public opinions about excessive police violence. Only by taking seriously the role of the state and the limitations of human actors can we come to a sound constitutional assessment of police uses of force—an assessment which promises more reasoned, predictable, consistent, and just results in civil and criminal cases.

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IN THE novel *Scoop*, one of Evelyn Waugh’s characters is in the habit of responding with “Up to a point” when he means “No, not at all.” In its ordinary, non-literary meaning, the phrase “up to a point” describes how Steven Walt’s scholarship reflects his training and interest in analytic philosophy. Before going to law school, Walt received a doctorate in philosophy and taught the subject. His purely philosophical publications, such as “Hegel on War: Another Look” and “Dispositions, Functional Explanation and Historical Materialism,” date from that time. But most of Walt’s scholarship since then concerns commercial and contract law, addressing legal questions on which philosophy has no bearing. Titles such as “The Current State of Debate Over the Incorporation Strategy in Contract Law,” or “Underestimation Bias and the Regulation of Secured Consumer Debt” do not promise discussion of matters of philosophical psychology or metaethics. However, Walt has published other articles that address the bearing of jurisprudential issues on particular legal doctrines, drawing again on analytical philosophy—up to a point. These works are in an area that could be described as applied jurisprudence.

Walt joined the Virginia faculty in 1993, after three years at the University of San Diego, and before that, two years at the Wharton School. Walt’s work exhibits a rare combination of traits: He is prolific, writing in a wide variety of areas, but his work is also exceptionally careful. In his years on the faculty, Walt’s colleagues have come to know him as a polymath, widely read and informed about intellectual develop-
ments in many different fields.

Walt’s legal scholarship addresses a diverse range of issues in commercial and contract law. He has written on domestic and international sales law, commercial paper, secured transactions, bankruptcy, and bank insolvency. Several of his pieces have also been in the field of contract theory. Walt is the co-author (with William D. Warren) of two popular casebooks: *Secured Transactions in Personal Property* (8th ed. 2010) and * Payments and Credits* (8th ed. 2010). He also has authored (with Clayton P. Gillette) a book on sales law, *Sales Law: Domestic and International* (revised ed. 2009). Walt is completing a casebook, *Commercial Sales Transactions* (forthcoming, 2013), on the same subject and a treatise (with Clayton P. Gillette) on the U.N. Convention on Contracts for the International Sale of Goods.

Walt’s work in jurisprudence centers on the relevance of philosophy to particular legal questions. He asks whether the resolution of these legal questions requires courts or scholars to take a position on philosophical issues. In law and life, beliefs about what are uncontroversially philosophical questions might have practical implications. For instance, the belief that the self exists simply as a set of different experiences might change one’s attitude about one’s own survival. Closer to the law, the interpretation of statutory or constitutional provisions containing ostensibly moral terms might depend on the existence of moral facts. The practice might require taking a metaethical position on the nature of moral judgments. Or criminal liability might depend on the causation of harm, which in turn requires a metaphysical account of causation. Whether and how philosophical issues are relevant to a legal question obviously depends on the particular legal issue or doctrine in question.

Walt’s work, however, often points out the ways in which jurisprudence is not relevant to the resolution of certain legal questions. In three papers, for different purposes, Walt considers the limit on the common lawmaking authority of federal courts declared in *Erie Railroad Co. v. Tompkins*. *Erie* prohibits federal courts from making federal common law unless such authority is delegated to them by constitutional
provision or congressional enactment. Commentators and some courts tend to think that the limitation relies on legal positivism—that is, the claim that law is explained by social facts such as the declarations of a legal authority. Positivism is a view about the nature of law. It figures into Justice Louis Brandeis’ opinion in *Erie*, which invokes positivism to support the Court’s holding that there is no general federal common law. Positivism is hard-nosed, modern, and seemingly correct, making it appear to be a part of *Erie’s* rationale. Contrary to this commonly held belief, Walt argues, positivism is not relevant to *Erie’s* holding. Positivism, in fact, has nothing to do with its limitation on judicial common lawmaking authority.

In two articles, “*Erie* and the Irrelevance of Legal Positivism” (with Jack Goldsmith), 84 Va. L. Rev. 673 (1998) and “Why Jurisprudence Doesn’t Matter for Customary International Law,” Wm. & Mary L. Rev. (2012), Walt shows why *Erie’s* holding does not rely on a jurisprudential claim about the nature of law. Legal positivism’s truth is neither sufficient nor necessary to the case’s result. Positivism is not by itself enough to justify *Erie’s* limitation on federal common lawmaking authority. This is because positivism is consistent with a variety of different constitutional roles for federal courts. For example, Article III’s grant of diversity jurisdiction might give federal courts the authority to independently determine state law, just as Article III’s grant of admiralty jurisdiction is understood to give federal courts the authority to make admiralty law. Nor does positivism, together with specific constitutional limitations, explain *Erie’s* holding. Constitutional limitations alone might justify the holding, Walt argues, but positivism is superfluous to the case’s rationale. The reason is because if positivism is true as a claim about the nature of law, it is a necessary truth. But constitutional limitation on federal judicial lawmaking does not rely on positivism’s necessary truth any more than it relies on any other necessary truth, such as “2 + 2 = 4” or “Bachelors are unmarried males.” If the justification for *Erie’s* result included the statement “2 + 2 = 4,” the statement, though true, would obviously be superfluous to the
justification. Positivism is superfluous to *Erie’s* rationale in exactly the same way.

Positivism is thus not sufficient to justify *Erie’s* limitation on judicial common lawmaking authority, but it is also not necessary to the holding. *Erie’s* limitation can hold even if positivism is false. For instance, suppose certain sorts of moral facts, not social facts, necessarily determine whether a norm is a legal norm. Although this is a stylized version of natural law, it is a coherent view about the nature of law. And on this view, positivism is false. Nonetheless, *Erie’s* limitation still could apply. A federal court would need constitutional or congressional authority to create norms, even when the norms created are consistent with morality. This possibility shows that *Erie’s* holding depends only on constitutional allocations of lawmaking authority, not jurisprudential views about the nature of law.

Walt has also explored the separate, historical question of whether a then-contemporary legal theorist endorsed positivism while disagreeing with *Erie’s* holding. It is one thing to demonstrate that positivism plays no role in *Erie’s* rationale. It is another to find working positivists at the time who rejected *Erie*. In “Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to *Erie*,” 2 *Wash. U. Juris. Rev.* 75 (2010), Walt documents Arthur Corbin’s long-held nonjurisprudential objections to *Erie*. While Corbin rejected the classical version of positivism, according to which law consists of authoritative commands, he advocated two claims in articles published before *Erie* was decided. One is the view that law consists of behavioral regularities of legislatures and courts. The other is that the behavior of private persons in some fashion defines morality, while legal relations are defined by the conduct of officials. Because private behavior defines morality, law and morality are separable. Both views are consistent with the standard (but still controversial) understanding of positivism’s core claims: that law is explained by social facts and that it need not have a moral content.

Corbin’s commitment to positivism, however, stood alongside nonjurisprudential objections to *Erie’s* holding. These objections appear in writings spanning several
decades. But the exact basis of Corbin’s opposition is unclear, says Walt. In different places Corbin gave different, brief reasons why the authority of federal courts to determine state law was not limited by the determinations of a state’s highest court. His complaints are an unsorted mixture of practical concerns, constitutional considerations, and certain basic entitlements of litigants. Corbin thought the alleged lack of vertical uniformity between federal and state courts on matters of state law was exaggerated. He took Article III’s jurisdictional grant to give federal courts law-making authority. And he seems to have believed that litigants possess the right to have a court decide their case by the best legal reasons available to it. Based on these considerations, Corbin concluded that federal courts have the authority to make independent judgments about state law. Initially his opposition focused on a quartet of cases decided by the Supreme Court in 1940, which together suggested that federal courts must follow the interpretation of state law given by even inferior state courts whose judgments have no precedential effect. Corbin was not mollified when the Court later made it clear that *Erie* requires a federal court to defer only to state supreme court determinations of state law; the clarification left unaffected his nonjurisprudential considerations favoring the authority of courts to make independent judgments about state law. Corbin therefore counts as a positivist whose opposition to *Erie* was based on nonjurisprudential grounds. For him, positivism’s truth is not a sufficient rationale for *Erie*’s holding.

“Why Jurisprudence Doesn’t Matter for Customary International Law” argues that the irrelevance of jurisprudence for judicial common lawmaking has implications for customary international law. The same considerations that limit the authority of federal courts to make common law also limit their authority to recognize customary international law. Because constitutional limitations or statutory enactments restrict a federal court’s authority to rely on federal common law, they also restrict the court’s authority to rely on customs among states. Walt argues that conceptions of law, including positivism, play no role in this position.
They are neither necessary nor sufficient to limit a court’s reliance on customary international law. In some sense, Walt explains, this is not surprising. After all, customary international law (where it exists) is, by definition, a type of custom—a regularity of behavior among states in which they comply with a norm from a sense of obligation. But customs by themselves have no legal effect. They have legal effect domestically only when recognized by a legal system through constitutional provision, statute, or decisional rule.

Finally, Walt extends what might be called his “irrelevance thesis” beyond conceptions about the nature of law. In “Why Jurisprudence Doesn’t Matter for Customary International Law,” he argues that views about the identity of legal systems say nothing about the relation of international law to domestic law. International legal theorists distinguish between two views about the character of international law. Monists maintain that the legal order consists of a single legal system of which domestic legal systems are a part, while dualists allow a plurality of distinct legal orders, including international law. At bottom they disagree over a requirement of legal validity. Monists maintain that legally valid rules cannot impose inconsistent demands on those subject to them, as is possible if international and domestic legal rules are parts of different legal systems. Dualists, for their part, allow the possibility of conflicting legal rules. Corresponding to this divide is a difference in views about the incorporation of international law into domestic law. Monists believe that international law is self-executing in domestic law because it is part of the same legal system; dualists hold that international law has no application domestically until incorporated into domestic law. Theorists’ difference in views about the incorporation of international law into domestic law appears to be tied to different conceptions of a legal order.

Walt, however, argues that this interpretation is a mistake. The dispute in fact is over the relation of international law rules to those of domestic law, and the priority of international law to domestic law is a question of priority among legal rules. This is because a legal order consisting of a single
legal system could give priority to domestic law over international law or, alternatively, it could give priority to international law over domestic law. The relation of rules of international law to those of domestic law thus does not turn on monism or dualism. The disagreement between monists and dualists instead is substantive, not conceptual, Walt shows. For this reason, conceptual considerations about the identity of legal systems cannot determine the relation between legal rules.

The three papers described reach the same conclusion: Specific legal questions are answered by substantive legal doctrine, not legal concepts or jurisprudential claims about them. The limits on a federal court’s power to make federal common law are constitutional limits, not those imposed by the nature of law. For his part, Corbin found that the Constitution in fact authorized federal courts to determine common law independently of the determinations of state courts. Moreover, Corbin’s jurisprudential commitments had nothing to do with this stance. Finally, whether customary international law has domestic effect turns on applicable constitutional or legislative enactments, not the existence of customary international law or its binding effect on nations. In Walt’s view, jurisprudence bears on the questions he discusses only “up to a point,” as Waugh’s character would put it.
Jurisprudential views are sometimes thought to affect case outcomes. Many commentators and some courts believe that *Erie Railroad Co. v. Tompkins* illustrates the point. *Erie* holds that federal courts generally must follow state decisional or statutory law except when inconsistent with constitutional law or federal statute. Legal positivism is a jurisprudential thesis about the nature of law. In its general form, the thesis asserts that law is explained in terms of social facts. Justice Brandeis's majority opinion in *Erie* recites a classical conception of legal positivism, according to which law consists only of the authoritative declarations of a jurisdiction's courts or legislature. It concludes that, subject to constitutional and federal statutory constraints, federal courts must apply state law as declared by state courts. Thus, the opinion itself suggests that this conclusion relies on a particular conception of law: legal positivism. It suggests that jurisprudence matters to *Erie*’s reasoning and outcome.

The suggested connection between legal positivism and *Erie*’s holding represents the “jurisprudential turn” in understanding *Erie*. Courts and commentators tend to read *Erie*’s result as depending on a commitment to a particular conception of the nature of law. With or without careful qualification, they frequently understand the case in this way. Consult a civil procedure casebook today and you are likely to find *Erie* described as endorsing a particular conception of the nature of law: legal positivism. [...] 

I think the jurisprudential turn in understanding *Erie* is a mistake. *Erie*’s result has nothing to do with jurisprudential positions about the nature of law. It does not rely in any way on legal positivism. *Erie*’s result instead turns only on constitutional matters, such as separation of powers or the constraints of federalism set by the U.S. Constitution. The
Federal Constitution, supplemented by state constitutional provisions, alone requires federal courts generally to follow state court determinations of state law. Correct jurisprudential positions about the nature of law have nothing to do with this requirement. Although Brandeis’s opinion recites a classical version of positivism, positivism is irrelevant to the court’s conclusion in the case. […]

This article presents an historical case against the jurisprudential turn in understanding *Erie*. It does so by focusing on Arthur Corbin’s opposition to *Erie* over a significant portion of his long academic life. Today Corbin is remembered primarily for his work in contract law, principally as the author of the multi-volume treatise *Corbin on Contracts* and the engineer of the *Restatement (First)* of Contract’s recognition of promissory estoppel as a basis of contract enforcement. Corbin’s writings on contract law sometimes still figure in the debate over their inclusion among the legal realist scholarship of the 1920s and 1930s. His work in federal courts scholarship is almost forgotten, perhaps because *Erie*’s result is accepted and its applications understood reasonably well. However, Corbin’s consistent and long-held opposition to *Erie* is articulated at points throughout his long working life, particularly between 1938 and 1964, when he stopped writing. It is anticipated in 1929, nine years before *Erie* was decided, in his criticism of Holmes’s dissent in *Black & White Taxi & T. Co. v. Brown & Yellow Taxi & T. Co.* In articles in 1938 and 1941, Corbin questioned *Erie*’s constitutional basis and found objectionable consequences in federal court deference to state court determinations of state law. *Corbin on Contracts* and Supplements to the treatise up to 1964 continued to question *Erie*’s result. Finally, in a 1953 book review, later approvingly cited in supplements to *Corbin on Contracts*, Corbin called for *Erie*’s overruling. In work outside of contract law between 1921 and 1964 Corbin endorsed views about the nature of law that fairly can be described as a version of legal positivism. Taken as a whole, Corbin’s work represents the position of a legal positivist at mid-century who opposed *Erie*’s result on constitutional and practical grounds. It provides historical evidence that *Erie*’s result does
Customary international law is puzzling in a way treaties are untroubling. Treaties are contracts, and the source of the obligations they impose on states, as well their content, presents no special legal problem. If there is a puzzle about how treaties can bind states, it is a general puzzle about how contracts can legally bind promisors. By comparison, the status of customary international law is controversial. Customary international law is created by the regular practice of states, and the extent of consensus required for a custom to exist is vague. Similarly, because customary international law does not have the canonical form of a treaty or statute, its content is uncertain. Even the extent to which states act merely in accordance with norms, rather than from a sense of obligation, is unknown and understudied.

May a state unilaterally withdraw from a treaty to which it is a party when the treaty doesn’t otherwise so provide? Are states obligated not to arbitrarily detain people or subject them to degrading treatment? May a successor state repudiate the odious debts of the preceding state? Because customary international law is created by the regular practice among states, not by the states’ lawmakers, its legal validity is not self-evident. Three questions therefore can be asked in connection with its legal status: (1) What are the norms of customary international law governing the conduct of states or their citizens?, (2) Are states legally bound by it?, and (3) Does customary international law apply domestically without incorporation by domestic law?

I will argue that there are other sorts of questions that do not need to be asked about customary international law: namely, jurisprudential questions. It is often thought that
judicial recognition of customary international law depends on jurisprudential assumptions about the nature of law, legal norms and legal validity. This is a mistake. The limits of judicial reliance on customary international law are constitutional or evidentiary, not jurisprudential. Jurisprudential views about law, which are analytic in character, have nothing to say about the questions just flagged. My argument is in three steps. The first step is a claim about *Erie Railroad v. Tompkins*. Although *Erie* fairly can be read to require domestic authorization for customary international law to have domestic legal effect, the case and its reasoning do not rely on commitments to a theory of law, including legal positivism. Second, reliance on positivism has an unwelcome consequence for the binding character of customary international law. The third step is that conceptions of law or legal validity can ground different views about the relation between international and domestic law. Positions on the priority of customary international law therefore are determined by views about that relation, not by views on the source of its authority. Taken together, these considerations suggest that jurisprudence is not needed to answer the questions courts and other legal authorities ask about customary international law’s content, the legal obligations it creates, and its domestic legal effect.

The paper is in three parts. Part I argues that legal positivism is irrelevant to *Erie Railroad Co. v. Tompkins*’ holding that federal jurisdiction does not give federal courts general lawmaking power. Positivism is neither sufficient nor necessary for *Erie’s* result and rationale. Instead, the holding rests on one or more uncertain constitutional bases. Part II describes a dilemma for those relying on legal positivism as a basis for *Erie’s* result: Dualists about international law must either conclude that customary international law does not bind governments or select a conception of positivism that preserves customary international law but is ad hoc. The domestic effect of customary international law concerns the relation of priority between domestic and international law in a legal system. Part III argues that the same conception of law can ground different views about that priority. It con-
cludes that positions on the customary international law are determined by substantive legal views about the proper relation between international and domestic law, not the source of authority of customary international law. A conclusion follows.

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