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The Puzzle of the Constitutional Home

GERALD S. DICKINSON*

The home enjoys a special place in American constitutional law. A doctrinal thread runs across the first five amendments that demarcates the home as a realm in which rights enjoy elevated protection. That thread covers rights involving smut, guns, soldiers, searches, and self-incrimination, but inexplicably does not extend to takings. This stark dichotomy between the solicitude of the home for most rights and the opposite for takings produces a deep puzzle.

This Article contends that the answer to this fundamental puzzle is that the Court’s takings doctrine, unlike the home-centric doctrines in the Bill of Rights, is infected with post-Lochner v. New York judicial deference to economic regulation. This has influenced the Court’s aversion to a special protections doctrine to homes under the Takings Clause. This Article argues that, as a matter of constitutional coherence theory, which prizes doctrinal symmetry and harmony, the Court should, in limited circumstances, extend the home-centric thread to protect homes in takings that expropriate title to or impact the economic value of homes.

This Article also grapples with several broader methodological, doctrinal, and theoretical implications. First, the Court consistently applies atextual methods of interpretation of the home. Second, this atextual interpretive pattern of influence supports this Article’s proposition that the home-centric doctrinal thread should extend to takings. Finally, a congruent home-centric Bill of Rights that extends to takings aligns neatly with constitutional coherence theory.

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I. INTRODUCTION

The home occupies a special place within the Constitution. Americans’ admiration “for the sanctity of the home” is linked to the individual, the family, and the fabric of society. The home is the “moral nexus between liberty, privacy, and freedom of association” and property. This sentiment is the basis of the Supreme Court’s distinctive protections to the home. The Court has had to grapple with the intersection of the meaning of the “home” and the nature of individual rights across a range of constitutional provisions. This engagement has produced a stark dichotomy and a deep puzzle. In most contexts, the Court finds reason to grant special solicitude to a zone of constitutional protection emanating from the distinctive nature of the home. The Court has, in other words, extended itself to textually adhere or doctrinally shape its jurisprudence to protect the home, as opposed to other places and spaces. That solicitude is entirely absent when it comes to the Takings Clause.

To appreciate this dichotomy, take for example the Court’s relatively recent cases where the home was at the center of the Court’s review. In Kelo v. City of New London, Justice Stevens upheld the seizure of homes for economic development purposes as justifiable under the Fifth Amendment Takings Clause. Yet, in District of Columbia v. Heller, the late Justice Antonin Scalia

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1 See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 978, 996–1002 (1982).
2 Id. at 1013.
3 Id. at 991.
elevated the right to bear arms in the “hearth and home” above all other interests under the Second Amendment. This is odd. The Second Amendment does not textually say that the right to bear arms enjoys greater protection in the home. Likewise, the Fifth Amendment does not textually preclude or grant special compensation formulas or heightened scrutiny when homes are subject to physical or regulatory takings. To make his atextual leap in the Second Amendment, Justice Scalia, who purported to ascribe to “public meaning” originalism, leaned on the Fourth Amendment’s explicit homebound protections arising from Payton v. New York. There, the Court explained that “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” Justice Scalia then extended such protections in Kyllo v. United States. However, in Kelo v. City of New London, Justice Stevens—to the dismay of Justice Thomas in his dissent—was uninterested in equating the Fourth Amendment’s search and seizure protections in the home with the idea that such protections similarly extend to physically taking homes. Yet, the home-centric doctrinal acrobatics employed by Justice Scalia have also been exercised in other areas of constitutional interpretation throughout the Bill of Rights.

For example, the Court had no trouble lifting the sanctity of the home in Stanley v. Georgia, extolling that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” The Court later expanded its focus from freedom of mind and thought in the home to protections to “privacy and freedom of association in the home.” Notice again that nothing in the First Amendment remotely offers special protections to or within homes. There are, however, examples of textual clarity, if not, purity, of the home in the Bill of Rights. Indeed, the Court in Youngstown Sheet & Tube...
Co. v. Sawyer gave credence to the Third Amendment’s textual prohibition of quartering soldiers in a home during peacetime, noting that “even in war time, [the Third Amendment requires that] seizure of needed military housing must be authorized by Congress.”\(^{15}\) And in Boyd v. United States, the Court explained that its Fourth Amendment search and seizure and Fifth Amendment criminal procedure protections almost run directly into each other, thus giving the home a special place of protection from self-incrimination.\(^{16}\) Takings Clause jurisprudence, however, is devoid of special protections to homes and is equally wanting of any special protections in the home.

The Takings Clause, generally, protects homes from takings that do not satisfy the public use requirement or that fail to pay just compensation.\(^{17}\) There is nothing special about those well-established limitations; they apply equally to most forms of private property. It is not as if Justice Stevens in, say, Kelo was doctrinally or textually handicapped from doing in takings what Justice Scalia did with guns in Heller or Justice Marshall did with smut in Stanley—that is, formulate a methodological and theoretical interpretation of the home to conclude that a special zone of protection existed. Yet, the Court has simply refused to do so in takings. Why is this?

Justice Thomas’s dissent in Kelo offers perhaps the ultimate clue to solving this mystery. His dissent employs an intradoctrinal maneuver by juxtaposing the Fourth Amendment and the Takings Clause. There, he was alarmed at the majority’s refusal to protect the home, noting that the Court has “elsewhere [in the Fourth Amendment] recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,’” and that “[t]hough citizens are safe from the government in their homes, the homes themselves are not.”\(^{18}\) Importantly, he then stated, “the [majority] tells us that we are not to ‘second-guess the [legislative’s] considered judgments’ but the real issue is ‘whether the government may take the infinitely more intrusive step [than unlawfully searching a home] of tearing down the petitioners’ homes.’”\(^{19}\) As a result, Justice Thomas argued, something has “gone seriously awry with this Court’s interpretation of the Constitution.”\(^{20}\) He continued, “[w]e would not defer to a legislature’s determination of the various circumstances that establish, for example, when a search of a home would be reasonable,” because we have recognized the “overriding respect for the sanctity of the home.”\(^ {21}\) Indeed, the uprooting of persons from their homes is, to Justice Thomas, a “justification for intrusive judicial review” as set forth

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15 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).
17 U.S. CONST. amend. V.
19 Id.
20 Id.
21 Id. (emphasis added).
in *United States v. Carolene Products*. 22 Several major methodological and theoretical implications about the “constitutional home” emerge in those few lines buried in Justice Thomas’s dissent.

First, Justice Thomas’s dissent implicitly answers why there exists asymmetry of the home in the Bill of Rights. The Takings Clause is infected with post-*Lochner v. New York* deference to economic legislation; the other homebound amendments are not. The Court’s home-centric jurisprudence involving smut, guns, soldiers, searches, and self-incrimination—as opposed to takings—simply has nothing to do with economic legislation, and thus are immune to the Court’s post-*Lochner* deferential treatment to social and economic regulations. They are, in other words, primarily fundamental rights issues that have shaped a doctrine amenable to protections of homes where liberty and privacy concerns are most pronounced. While the Court’s development of an exactions doctrine provides heightened standards of review in disputes over land use permitting, the level of scrutiny and the rulings, in and of themselves, have not risen to the level of *Lochner*-era dismay for social and economic legislation. 23

Second, Justice Thomas’s dissent implicitly alludes to a longing for adherence to coherence theory in constitutional interpretation. His argument is that if the Fourth Amendment provides protections to homes (albeit within the zone of privacy), then it would seem that, as a matter of consistency and symmetry, the Court should likewise extend similar special protections to homes threatened by condemnation for purposes of economic development under the Fifth Amendment. Taken to its logical conclusion, if smut, guns, soldiers, searches, and self-incrimination all enjoy some form of protection or liability regarding the home, then takings should neatly provide a similar result as a matter of uniformity. This Article proceeds in four Parts.

Part II revisits the Court’s jurisprudence protecting the “home” across the first five amendments. The exercise reveals an imbalance and lack of complete coherence in constitutional interpretation: the Court has carved out home-centric doctrines involving smut, guns, soldiers, searches, and self-incrimination, yet the Court offers no equivalent express interest in or direct protection to the home in its takings jurisprudence. 24 There is a tendency among property scholars to reorient the homebound amendments in the Bill of Rights. Margaret Radin has analyzed her theory of “personhood” through the lens of the Court’s decisions giving privacy and liberty protections to the home under its First and Fourth Amendment jurisprudence. See Radin, *supra* note 1, at 911–1002. In doing so, she identified the

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22 Id. at 521.
24 See infra Part III. I recognize that home-centric protections extend beyond the Bill of Rights, as the Court has found a right to consensual sodomy in the home. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). However, this Article focuses on the peculiar schism in the first five amendments where home protections are absent from the Takings Clause and the Court’s takings jurisprudence.
25 Property scholars have not engaged in textual and doctrinal interpretive methodologies to reorient the homebound amendments in the Bill of Rights. Margaret Radin has analyzed her theory of “personhood” through the lens of the Court’s decisions giving privacy and liberty protections to the home under its First and Fourth Amendment jurisprudence. See Radin, *supra* note 1, at 911–1002. In doing so, she identified the
constitutional law scholars to make light of this stark dichotomy. Some go as far as to ignore the schism by reiterating that the Takings Clause offers protections to homes, yet do not acknowledge that the Court’s takings doctrine fails to provide special protections to homes, as opposed to other doctrines in the Bill of Rights. This Part revisits this underexplored lacuna within the

“anomalous” nature of the Court’s takings jurisprudence lacking any similar protection to the “home,” contemplating a special class of property protections to a family home against government takings. Id. at 1006. But Radin neither expressly connects all five amendments utilizing interpretive methodologies nor explains why there exists this abrupt departure of protections to the “home” under the Takings Clause. It is worth noting that the Court’s announcement that the Second Amendment also entails a liberty protection to bear arms in the “home and hearth” arrived in 2008, nearly twenty-five years after Radin’s groundbreaking article. See District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (holding that the Second Amendment protects individuals’ rights to carry guns in the home). Benjamin Barros, likewise, has covered the Court’s First and Fourth Amendment jurisprudence in a non-interpretive manner proselytizing the “home,” yet when arriving at the Takings Clause, Barros merely ponders that the Court’s failure in its Kelo v. City of New London decision to “address the unique nature of the home is striking” in light of the “litany of areas in which homes are given special legal treatment.” D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255, 297 (2006). Barros, like others, fails to provide any explanation for this “striking” fact or embark on the question of why the Court’s takings jurisprudence lacks home-centric protections. See id.

Few scholars have recognized this constitutional puzzle, and only a handful have explored the fundamental question of why this schism exists across the first five amendments. See Akhil Reed Amar, America’s Lived Constitution, 120 YALE L.J. 1734, 1776 (2011) [hereinafter Amar, America’s Lived Constitution]. Amar identifies the Takings Clause as protecting private property, including homes, broadly, and that judges might be “vigilant” in protecting the home by special just compensation calculations. Id. But Amar’s treatment of the home under each of the amendments is cursory, and he, like others, misses an opportunity to resolve the puzzle by asking the bigger question of why the Court’s takings jurisprudence departs from its other homebound amendments. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 267 (1998). While Amar has noted that protections to the home under the Constitution were largely a result of the post-Reconstruction era where the Third Amendment bridged together a “home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain,” he merely explains that the prevailing dichotomy between “privacy” and “property” may have something to do with distinctions in protections to homes. Id.

Constitutional law scholars have only partially pieced together the amendment puzzle presented in this Article, and none are fixated on the Court’s home-centric void under its takings jurisprudence or attempted to offer explanations for the departure. Darrell Miller has drawn parallels and contradictions between the Second and Fourth Amendments to argue that the right to bear arms in the “home” and in public should be tempered by the First Amendment’s lack of protections to “smut” in public. See Darrell A.H. Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 COLUM. L. REV. 1278, 1278 (2009) (arguing for courts to “[t]reat the Second Amendment right to keep and bear arms for self-defense the same as the right to own and view adult obscenity [in the home] under the First Amendment,” and making tacit reference to homebound conceptions across the first five amendments). But Miller declines to extend his proposal, let alone analyze the other “homebound” amendments, especially the Takings Clause, in his piece. Stephanie Stern similarly argues for less emphasis on the “home” under Fourth Amendment search and
“penumbra of home-related rights” to better appreciate the nature of this constitutional puzzle.  

Part III answers the question of why the Court’s takings jurisprudence is devoid of home protections by arguing that the Court’s first five home-centric doctrines in the Bill of Rights are immune to and shielded from the Court’s embrace of post-Lochner era judicial deference to economic regulation. However, the Court’s takings jurisprudence, unlike its homebound counterparts, is focused on advancing a body of law that primarily falls in line with preserving the post-Lochner judicial repudiation of substantive due process review of economic legislation.

Part IV seeks to ground this Article’s call for home-centric harmony across the Bill of Rights in coherence theory. If the Court’s goal is to read the document with an eye towards consistency and accord, then it has arguably failed in the context of a person’s property and privacy rights in the home given the inexplicable absence of special home protections in the Takings Clause. Otherwise, the most logical alternative interpretation would be for the Court to employ a strictly textualist method of interpretation to achieve coherence by extending special protections to the home in the Bill of Rights only where the text commands in the Third and Fourth Amendments. But, of course, such an alternative is a far more radical departure from longstanding home-centric seizure jurisprudence, but like Miller, never gets around to tying the Court’s other amendment jurisprudence on the home together to offer a coherent understanding of what makes protecting homes from takings different from protecting smut, guns, or soldiers. See Stephanie M. Stern, The Inviolate Home: Housing Exceptionalism in the Fourth Amendment, 95 CORNELL L. REV. 905, 905 (2010) (arguing to replace emphasis on the physical home under Fourth Amendment search and seizure jurisprudence with narrower residential privacy interests). While John Fee notes that “[f]ederal constitutional law recognizes the unique status of the home in several ways” under the First, Third and Fourth Amendments, John Fee, Eminent Domain and the Sanctity of Home, 81 NOTRE DAME L. REV. 783, 786 (2006). He leaves gaps in homebound interpretations in the Second Amendment and Fifth Amendment self-incrimination clause and concludes that legislative action is required (as opposed to Supreme Court doctrine) to absolutely bar taking homes. Id. at 788–89; see also Arianna Kennedy Kelly, The Costs of the Fourth Amendment: Home Searches and Takings Law, 28 MISS. C. L. REV. 1, 4, 18–28 (2009) (arguing that “home searches” under the Fourth Amendment “should be viewed as takings” under the Fifth Amendment). Thomas Sprankling covers the Third and Fifth, but does not offer an assessment of the home across the first four amendments in relation to the Takings Clause and does not, as this Article does, explore why the Court’s takings jurisprudence neglects to offer greater protections to homes. See Thomas G. Sprankling, Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses, 112 COLUM. L. REV. 112, 112 (2012) (arguing that the Fifth Amendment Takings Clause should be read to protect homes from takings in light of the Third Amendment’s protection to the home); see also Michael A. Cottone, The Textualist Third Amendment, 82 TENN. L. REV. 537, 540–41, 541–54 (2015) (engaging in contextual and intratextual approaches to the Third Amendment).

29 See Fee, supra note 27, at 788–89. Fee mentions that “in contrast to other areas of the law, eminent domain law” is highly deferential. Id.
30 See infra Part IV.
jurisprudence. Instead, the Court seems content to employ a purposivist and largely precedent-based methodological approach to home limitations in a variety of contexts to achieve coherence. This history of atextualism’s predominance in the home raises the specter that, instead of traditional explanations, such as the privacy versus property dichotomy, constitutional coherence theory is the underlying influence for the Court’s constitutional interpretation. Thus, such a theory should influence the home-centric doctrinal thread to extend to takings. As Richard Fallon explains: [I]f the conclusions fail to cohere into a uniform prescription for how the case or issue ought to be resolved, then any or all of the individual conclusions may be reexamined, and the results adjusted . . . in an effort to achieve a uniform outcome.31 What Fallon and other adherents of coherence theory mean is that the Court, in striving for consistency, ought to adjust the traditional interpretive tools of structure, text, doctrine, and history in a manner that achieves a uniform, coherent outcome.

Thus, where incoherence and inconsistency exist, the Court should adjust some of the tools, such as textualism and doctrinalism, to arrive at the most coherent conclusion. As a result, if faced with a takings challenge where plaintiffs are homeowners who request the Court seek harmony with the rest of its home-centric Bill of Rights doctrines to specially protect the home, the Court should engage, for example, in some formulation of atextualism and intradoctrinalism, to achieve a coherent, uniform outcome. The Court’s prevailing takings doctrine fails to conclude that homes deserve greater protections above all other property interests. Thus, it should, in limited circumstances, find for special compensation formulas, per se and categorical tests, or basic heightened standards of review where homes are subject to taking. What we are concerned with, then, as readers and interpreters of the Constitution as law, is the ability to read into the document “consistency rather than inconsistency.”32 Indeed, the dual methodologies of textualism and doctrinalism fit like a glove into coherence theory, because both methods espouse a “certain undeniable aesthetic attraction, appealing to ideals of symmetry and harmony.”33

33 Id. at 799. Note that textualism is often referred to as “structural” or “historical” interpretations of the canon. Scholars continue to debate the semantics. For example, Phil Bobbitt set forth six modalities (or methods) of interpretation, which include historical, textual, doctrinal, prudential, structural, and ethical. See PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–119 (1982). Akhil Amar argues that “structural” and “historical” interpretations are “documentarian” as they seek to pull meaning from the document itself. See Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26, 30 (2000). He also refers to the method of interpreting the Constitution to identify pattern recognition by juxtaposing adjoining and nonadjoining amendments, clauses, and provisions within and across the document as “intratextualism.” See generally id. For purposes of this Article, specifically Part II, I am implicitly engaging in both textual and doctrinal methods of interpretation across the first five amendments, with a special
However, it is the atextual or doctrinal interpretive pattern of influence grounded in coherence theory that supports this Article’s proposition that the doctrinal thread should extend to takings to achieve coherence by altering its prevailing takings doctrine to impose special protections on homes, if not homeowners. A home-centric Takings Clause would, indeed, bring a variety of constitutional phenomena involving the home into a coherent conception of constitutional interpretation across the Bill of Rights. Few, if any, scholars have engaged these methodological tools and theoretical explanations in the context of the “constitutional home.”

II. THE SUPREME COURT’S HOMEBOUND DOCTRINES REVISITED

William Blackstone has raised the home as a paramount legal concept under American law. He noted that “every man’s house is looked upon by the law to be his castle.”34 Such sentiments have led to the castle doctrine under Supreme Court precedent; that is, a person’s home is his castle, and the common law traditionally protected the house as a “castle of defence and asylum.”35 Notable constitutional law scholars, such as John Fee and Akhil Amar, have noted houses as being “singled out above and beyond all buildings” and “a special place for privacy.”36 As a result, both federal constitutional law and statutory law “recognize the home as a special place worth preserving.”37 In fact, it was the Republican Party that influenced legislation during Reconstruction to promote homeownership.38 But, the home is not just a special place.

The locus offers something “uniquely personal,” thus “making it different and in a sense of higher value than other forms of real property.”39 As Jeanie Suk has explained, the “[h]ome has been central to the articulation of constitutional rights, including the right against unreasonable search and seizure, the right to due process, the right of privacy, and (recently) the right to bear arms,” which “lies at the center of the legal edifice that helps to construct human experience.”40 Likewise, the home is “treated more favorably”41 than other types of property, largely because the home is “inextricably part of” our

34 3 WILLIAM BLACKSTONE, COMMENTARIES *288.
36 Amar, America’s Lived Constitution, supra note 26, at 1772.
37 Fee, supra note 27, at 786–87.
39 Fee, supra note 27, at 793.
40 JEANIE SUK, AT HOME IN THE LAW 3, 133 (2009).
41 See Barros, supra note 25, at 255.
society. Indeed, “with very few exceptions—notably that of the home—the Framers’ conception of liberty related primarily to persons rather than places.”

But, in some circumstances, the “right to possess a home is given more protection than the right to possess other types of property,” such as “[h]omestead exemptions, rights of redemption in foreclosure, just-cause eviction statutes, and residential rent control.” Some argue that the Framers “envisioned a private, parochial, and rather sedentary people” and that the home was “singled out for special constitutional treatment” because it was deemed a “consecrated constitutional location” immune from intrusion. Even under the Fourteenth Amendment, the Court has described the home as a “sanctuary.” In Lawrence v. Texas, the Court found a protected liberty and dignity interest to engage in private consensual sexual activity between consenting adults, especially in the home.

Indeed, jurists join legal scholars in exalting over the home. A few state supreme courts have concluded that the First, Third, Fourth, and Fifth Amendment’s self-incrimination protections created a “zone of privacy” regarding security to and in the home. The Ninth Circuit recognized in United States v. Craighead that the “home occupies a special place in the pantheon of constitutional rights,” including privacy and self-defense-related protections to the “home” under the First, Second, Third, and Fourth Amendments, adding that the Fifth Amendment’s protections to custodial interrogations extended to a suspect’s own home. Indeed, the Supreme Court itself has constructed a Constitution that “manifests a special concern with the protection of the home”—except, of course, within its takings jurisprudence. This is a striking,

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42 Radin, supra note 1, at 1013.
44 See Barros, supra note 25, at 276.
45 Zick, supra note 43, at 539.
46 Id.
47 Lindsey v. Normet, 405 U.S. 56, 82 (1972) (Douglas, J., dissenting in part) (recognizing that tenants have a “fundamental interest” in their housing).
49 See, e.g., Ravin v. State, 537 P.2d 494, 498–502 (1975). This was stated before the Court’s 2008 ruling in Heller, which lifted the “hearth and home” as a special place to bear arms, District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
50 In United States v. Craighead, 539 F.3d 1073, 1077 (2008), the court stated:

Under the First Amendment, the “State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.” The Second Amendment prohibits a federal “ban on handgun possession in the home.” The Third Amendment forbids quartering soldiers “in any house” in time of peace “without the consent of the Owner.” The Fourth Amendment protects us against unreasonable searches and seizures in our “persons, houses, papers, and effects.”

Id. (internal citations omitted).
51 Id.
52 See Michael C. Dorf, Does Heller Protect a Right to Carry Guns Outside the Home?, 59 SYRACUSE L. REV. 225, 232 (2008); see also Miller, supra note 27, at 1305 (arguing that
yet strange, dichotomy that I will explore in just a moment. But first, let us explore the Court’s home-centric doctrines involving smut.

A. Smut

We begin by exploring the Court’s handling of cases involving protections to the home under its First Amendment jurisprudence with an eye towards doctrinal interpretations, because the text of the First Amendment does not expressly mention the home. The First Amendment, instead, recognizes the state’s interest in regulating and protecting against obscenity, but at the same time protects the right of a person to receive information and ideas, despite the questionable social value or worth of the material. This includes prohibiting, to some extent, the state from regulating a person’s private thoughts. But what about a person engaging (or indulging) in his desire to read and think about such material in his home?

The Supreme Court in Stanley v. Georgia held that the First Amendment protects a person’s right to possess obscene material in the privacy of his home, even though the Court conceded that the state had the power to regulate obscenity in the public sphere. In Stanley, police executed a search warrant to enter Robert Eli Stanley’s home, where they found adult film. Stanley was later arrested after the police determined the film was in violation of a Georgia statute.

Justice Marshall’s majority opinion offers clues into the Court’s constitutional take on the “home.” There, he reiterated the Court’s position that a person has a “right to satisfy his intellectual and emotional needs in the privacy of his own home” and that state regulation cannot “reach into the privacy of one’s own home.” Perhaps most worthy of attention is this: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”

The Court’s ruling in Stanley steadfastly adhered to the “home” as a castle under the First Amendment, reiterating the heightened protection that the Constitution gives to such activity in the home. The Court followed up its Stanley decision in United States v. Williams, where it dealt with Secret Service agents who “obtained a search warrant for William’s home” and found hard
drives that contained “images of real children engaged in sexually explicit conduct.” 61 The Court affirmed Stanley, but explained that lewd material and obscenity of underage children were not protected under the First Amendment. 62 Its decision in Osborne v. Ohio likewise found the Stanley ruling “firmly grounded in the First Amendment.” 63

However, it is important to note here that while one may view and enjoy such material in the home, a person is not protected, as the Court has stated in United States v. Orito, from distributing such material, even if from within the home. 64 The Supreme Court then, in Paris Adult Theatre I v. Slaton, refused to extend the protections of lewd material for noncommercial purposes, or in other words refused to interpret a “theater” as an equivalent to a home. 65 Further, the Court has extended free speech protections to residential areas, paying heed to the home as a safe space for speech that cannot be infringed upon. 66 However, the right to privacy must yield if particular activities in the home interfere with the public welfare. 67 I will return to this particular limitation in Part III.

Let us now turn to the Second Amendment, where protections to the “home” were most recently etched into the Court’s jurisprudence.

B. Guns

In District of Columbia v. Heller, the Court held that a total ban on handguns in the “home” was tantamount to a complete ban on an entire class of arms, and that the state must permit a person to register and issue a license for the person to carry a gun in his home. 68 The D.C. ordinance specifically required that a “lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.” 69 In striking down the ordinance, the Court showed its concern regarding any prohibition of firearms that extended to the home, because the “need for defense of self, family, and property is most acute” in the home and that handguns are regularly used to protect one’s home. 70 The Court’s focus on the home was not by accident. Senator Samuel Pomeroy, during the debates over the Fourteenth Amendment, stated that “Every man . . . should have the right to bear arms for the defense of himself and family

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62 Id. at 288–89.
69 Id. at 628.
70 Id.
and his homestead.”71 Justice Scalia’s opinion ventured to the Revolutionary Era to unpack the significance of arms in the home, noting that “[i]n the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.”72

But, Justice Scalia’s opinion also offered an extensive explanation for why the locus of the firearm—the home—as opposed to other spaces or places not readily perceived as private is essential to Second Amendment protections. There, he stated that citizens prefer handgun possession in the home as a form of defense because such guns are “easier to store” and are “accessible” in the event of an emergency, such as when an intruder enters the home to try to wrestle away the gun.73 Justice Scalia, concerned with intruders like burglars, saw great value in being able to “lift and aim” a handgun in the home while dialing the police with the other free hand versus a long gun that required pointing the gun at the attacker.74 Besides the multitasking function that a small handgun apparently gives to gun owners when attacked in the home, Justice Scalia may be telling us more about the “home” than is apparent from a surface reading of Heller. He then departs from textualism and instead creatively inserts his own version of what the Constitution means by stating that “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”75

But, as Justice Stevens explained the Framers’ intent, the idea that militiamen could “keep” firearms really meant that they could “store” such arms in their homes to be used in service when called upon, and that “[d]ifferent language surely would have been used to protect nonmilitary use and possession” of arms in the home had that been the intent of the Framers.76 As Justice Stevens argued, this simply did not include bearing the arms to protect the hearth and home. And, as Justice Breyer questioned, “[w]hat is [the] basis for finding [hearth and home] to be the core of the Second Amendment right?”77 Is it really the case, largely supported by limited sources, such as a state court decision, that the Second Amendment protects, primarily, persons bearing an arm beside his or her bedside?78

73 Id. at 629.
74 Id.
75 Id. at 635.
76 Id. at 650–51 (Stevens, J., dissenting).
77 Id. at 720 (Breyer, J., dissenting) (alterations added).
78 Heller, 554 U.S. at 720 (Breyer, J., dissenting).

C. Soldiers

The Third Amendment states that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner.”79 There was very little debate over the inclusion of an anti-quartering clause in the Constitution.80 Most states strongly supported such a provision.81 While the Court has not directly reviewed a challenge grounded in the Third Amendment, its case law has offered useful summaries of the oft-neglected provision. The Amendment has been interpreted as a “property-based privacy interest” that protects “a fundamental right to privacy.”82 It has not been limited to mere fee simple ownership, but rather to any “lawful occupation or possession with a legal right to exclude others.”83

In Griswold v. Connecticut, the Court clarified property-based privacy protections under the Constitution.84 The Court reasoned that privacy, in and of itself, is based largely on a desire to be secure in their homes, such as having privacy in a marital relationship.85 Thus, “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy.”86 As a result of the Third Amendment and other constitutional provisions extending special protections to the home, the Court found a general penumbra of privacy in the home.87 Some have interpreted the amendment to solely embody a “fundamental value” of the “sanctity of the home” and that textually stretching the provision to include nonresidential and non-fee simple ownership or occupation is inappropriate.88 A literal, textual reading of the amendment only plausibly protects “fee simple owners of houses.”89 Likewise, the Court in Youngstown Sheet & Tube Co. v. Sawyer gave credence to the Third Amendment’s prohibition of quartering soldiers in a home during peace time, noting that the “Third Amendment [mandates] . . . in war time [any] seizure of needed military housing . . . be authorized by Congress.”90

79 U.S. CONST. amend. III.
80 Sprankling, supra note 27, at 128.
81 See id.
82 Engblom v. Carey, 677 F.2d 957, 962 (2nd Cir. 1982).
83 Id. (citing Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978)).
85 See id. at 485–86 (discussing the expansive nature of privacy interests as they relate to marital relations).
86 Rakas, 439 U.S. at 143–44 n.12.
87 See Griswold, 381 U.S. at 484 (stating that the Fourth and Fifth Amendment protections against government invasions of privacy extend to the “sanctity of a man’s home and the privacies of life”).
88 Engblom, 677 F.2d at 967–68 (Kaufman, J., concurring in part and dissenting in part) (arguing that, while “the home is a privileged place,” this protection does not encompass the occupational residences of correctional officers in the scope of their employment).
89 Id. at 968.
90 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).
D. Searches

The Court’s ruling in Payton v. New York is its longstanding pinnacle case drawing a fine line between searches and seizures in public spaces and those conducted in a person’s home. There, Justice Stevens’ opinion commingled search and seizure with the concept of the home, finding that while warrantless arrests in public may be constitutional, such arrests in the home are unconstitutional. The Court explained, “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." The Court went so far as to say that the purpose of the Fourth Amendment, in and of itself, was to “guard against arbitrary governmental invasions of the home,” and that there existed a distinction between searches and seizures in the office as opposed to the home. However, it is important to note here that the dissent in Payton sought to rein in the home-centric emphasis of the majority’s opinion, noting that the “Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere.” Still, the Court’s homebound approach to the Fourth Amendment influenced subsequent decisions.

In Wilson v. Layne, Chief Justice Rehnquist wrote that a “media ride-along” of reporters into a person’s home while police conducted a search with a warrant violated the Fourth Amendment. There, a group of homeowners, suing federal law enforcement officials under federal law, sought to protect the homebound precedent of the Court’s jurisprudence and extend such protections to not only warrantless searches in the home, but to third-party media and reporters who happen to enter the home during a lawful search. Indeed, this “ride-along intrusion” into a home runs afoul of the Court’s conception of the sanctity of the home. Further, at the core of the Fourth Amendment is what the Court believes to be the “right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” The Fourth Amendment provides for,

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91 Payton v. New York, 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.”).
92 Id.
93 Id. at 585 (citation omitted).
94 Id. at 582 n.17.
95 Id. at 586 n.25.
96 Id. at 615 (White, J., dissenting).
98 See id. at 608 (highlighting petitioners who “contended that the officers’ actions in bringing members of the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights”).
99 Id. at 613 (“Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home.”).
“The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures . . .”\textsuperscript{101}

However, the Supreme Court has also made clear that the protection is about “people,” not “places.”\textsuperscript{102} Even so, the Court has also acknowledged that the Fourth Amendment’s protections depend upon the locus, or where the individual is located at the time of the search, and whether he personally has an expectation of privacy in the place searched.\textsuperscript{103}

The Court made an explicit distinction between protections in the home in \textit{Rakas v. Illinois}. There, the Court stated that there is a fine line regarding reasonable expectations of privacy in the home, which is often dependent upon whether the source of the reasonable expectation is “outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”\textsuperscript{104} Justice Rehnquist, in his majority opinion in \textit{Minnesota v. Carter}, further acknowledged that the “text of the Amendment” meant only that persons “in ‘their’ houses” were protected.\textsuperscript{105} Yet, amidst the Court’s precedential broadening of the concept of the home as a protection, it also provided protections in “some circumstances” to a person housed in the home in another,\textsuperscript{106} such as an overnight guest, because it is “social custom” that should, likewise, be recognized as a daily expectation of privacy.\textsuperscript{107} Justice Stevens has noted that invasion of the home for search purposes without a warrant is “presumptively unreasonable.”\textsuperscript{108} This, the Court has noted, is a “firm line at the entrance to the house” that must not be crossed by police without a warrant.\textsuperscript{109} Justice White, animated by the threat of unchecked law enforcement invasions, explained that the home’s expectation of privacy “is plainly one that society is prepared to recognize as justifiable.”\textsuperscript{110}

Justice Scalia, the architect of the Second Amendment’s protections to the “hearth and home,” explained in \textit{Kyllo v. United States} that “in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists” to withdraw that protection with new technology “not in general public use” that would erode

\textsuperscript{101} U.S. CONST. amend. IV.
\textsuperscript{102} Katz v. United States, 389 U.S. 347, 351 (1967).
\textsuperscript{103} Id. (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); see also Minnesota v. Carter, 525 U.S. 83, 83 (1998).
\textsuperscript{105} Carter, 525 U.S. at 89.
\textsuperscript{106} Id.
\textsuperscript{107} Minnesota v. Olson, 495 U.S. 91, 98 (1990).
that privacy.\textsuperscript{111} Justice Stevens explained that scanning technology that does not physically penetrate the interior of the home is not the same as the physical penetration of the home that many would agree is an example of the chief evil against the Fourth Amendment.\textsuperscript{112}

It seems that the Court’s Fourth Amendment jurisprudence on the “home” does not turn on expectations of privacy as the Court has previously stated, but rather on whether the property utilized for privacy is commercial or residential. The Fourth Amendment arguably treats commercial property differently by providing lesser protections to individuals than those owning or occupying a home.\textsuperscript{113} Indeed, searches and seizures regarding “purely commercial” transactions in the home of another, without any prior connection to the homeowner-householder, will not violate the Fourth Amendment.\textsuperscript{114} However, at the core of the protections is the “psychological primacy of privacy in the home” and the “political and historical role” that the home plays as a “haven” from government overreach.\textsuperscript{115} Some argue that the Fourth Amendment was meant to protect property.\textsuperscript{116} But the Court quickly disposed of property theories, explaining in \textit{Warden v. Hayden} that “[w]e have recognized that the principal object of the [amendment] is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”\textsuperscript{117}

And finally, in \textit{Katz v. United States}, the Court solidified its position that the Fourth Amendment “protects people, not places.”\textsuperscript{118} Yet, the Court has downplayed other forms of property in comparison to the “home” when determining levels of protection.\textsuperscript{119} Justice Burger has explained expectations of privacy in a person’s automobile are less than a person’s home.\textsuperscript{120} A year later, Justice Burger noted that “open areas” are not analogous to the “curtilage” for purposes of aerial surveillance, and that residences have heightened expectations of privacy.\textsuperscript{121} Such distinctions, some argue, “illustrate[] how home-search cases provide additional justification for limiting protection

\begin{thebibliography}{99}
\bibitem{Kyllo} Kyllo v. United States, 533 U.S. 27, 34 (2001) (emphasis omitted); \textit{see also} United States v. Dunn, 480 U.S. 294, 307 (1987) (citing Boyd v. United States, 116 U.S. 616, 630 (1886)) (“[C]urtialge is ‘the area to which extends the intimate activity associated with the “sanctity of a man’s house and the privacies of life.”’”).
\bibitem{Stevens} \textit{Kyllo}, 533 U.S. at 44 (Stevens, J., dissenting).
\bibitem{Stern} \textit{Stern}, \textit{supra} note 27, at 913.
\bibitem{Radin} \textit{See} \textit{Radin}, \textit{supra} note 1, at 998.
\bibitem{Katz} \textit{Katz v. United States}, 389 U.S. 347, 351 (1967).
\bibitem{Stern2} \textit{See} \textit{Stern}, \textit{supra} note 27, at 922.
\bibitem{Dow} \textit{Dow Chem. Co. v. United States}, 476 U.S. 227, 239 (1986) (holding that open areas in an industrial plant spread over a large geographic area are not akin to the “curtilage” of a dwelling).
\end{thebibliography}
outside of the home.” Some have raised concerns that elevating the home as subject to greater protections does not fit the empirical evidence, as “there are many, many more street encounters than searches of private homes.”

E. Self-Incrimination

The Court’s ruling in Boyd v. United States expressly commingled the Fourth and Fifth Amendment protections to unlawful searches and self-incrimination in the home, with the text and accompanying doctrine from both amendments running “almost into each other.” There, the Court held that the doctrines:

[A]pply to all invasions . . . of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense . . . it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .

Indeed, the Court there explained that “[b]reaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony, or of his private papers to be used as evidence to convict him of a crime, or to forfeit his goods” is in violation of the Fourth and Fifth Amendments. The Court there laid out the case that the “compulsory production” of evidence against an accused is the same as compelling a person to be a witness against himself is prosecution, which is prohibited under the Fifth Amendment.

III. THE PUZZLE OF THE HOME-LESS TAKINGS CLAUSE

The Takings Clause permits takings of “private property” so long as the government pays and the taking is for a public use. But the Court’s takings doctrine is devoid, unlike its homebound counterparts, of any special interest in or unique protection to the home. Why is this? Constitutional and property scholars would readily point to the privacy versus property dichotomy apparent

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122 See Stern, supra note 27, at 922.
125 Id.
126 Id.
127 Id. (stating that “compulsory extortion of a man’s own testimony” or using “his private papers . . . to convict him”).
128 U.S. CONST. amend. V.
129 See Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2426 (2015) (stating that the government may take an individual’s home in line with the Fifth Amendment if it pays just compensation).
on its face when exploring this question.\textsuperscript{130} In the context of property rights, the home is fungible and can be traded on the market for value, whereas the home protections elsewhere in the Bill of Rights cannot be traded on the market. The alienability of the home in the property context does not extend to the inalienability of the right to privacy. For example, a person cannot trade his or her privacy protection to viewing and enjoying smut in his or her home to the next-door neighbor for market value. Nor can a person sell his or her right to bear arms in the home to the government or trader on the market. In other words, the longstanding explanation to the puzzle presented in this Article is that most of the home protections in the Bill of Rights emanate from a zone of privacy rather than private property. And, of course, those are not the same. But this dichotomy, in and of itself, does not explain the atextual aberration of not extending special protections to the home in takings. The home-less Takings Clause is asymmetric with the rest of the Bill of Rights, and the prevailing explanation of privacy-based rights in the home versus property-based protections of the home is not the end of the story.

For decades, the Court did not expressly provide for special protections to bearing arms in the home. It was not until \textit{Heller}, and a particular Justice to write the opinion, that the Court arrived at a homebound doctrine in the Second Amendment.\textsuperscript{131} Likewise, a person cannot sell certain forms of smut from the home, such as child pornography, yet the Court offers special protection to viewing and enjoying permissible smut in the home.\textsuperscript{132} This property-based limitation on sale, but privacy-based exception on possession is evidence of the Court’s fast and loose play with privacy and property dimensions in the Bill of Rights. Indeed, the Court tends to interpret amendments and revisit its precedent in a variety of ways that satisfy its desire to find home-centric protections. Likewise, while takings law is redistributive in nature, it does not preclude a “special” right to the home carved out of the Bill of Rights.

This Part contends that the answer to this textual and doctrinal riddle is that the Court’s home-centric doctrines involving smut, guns, soldiers, searches, and self-incrimination are immune to and shielded from the Court’s embrace of post-\textit{Lochner} era judicial deference to economic regulation.\textsuperscript{133} However, the Court’s takings jurisprudence, unlike its homebound counterparts, is focused on advancing a body of law that primarily falls in line with preserving the post-\textit{Lochner} judicial repudiation of substantivist due process review of economic

\textsuperscript{130} See Fee, \textit{supra} note 27, at 788 (“In contrast to other areas of law, eminent domain law regards the home as no different than any other kind of property . . . ”).


\textsuperscript{133} See McUsic, \textit{supra} note 23, at 647, 653; \textit{see also} Fee, \textit{supra} note 28, at 793 (discussing place of “home” in eminent domain law in economic terms). Both McUsic and Fee note the deferential treatment that takings enjoys under current Court doctrine, but neither tie the deferential standard back to post-\textit{Lochner} era deference broadly and how the other amendments are immune from such deference, instead benefitting from strict scrutiny.
legislation. This has hindered, but not fully foreclosed, the possibility of special protections to homes in the takings context.

The text and history of the Takings Clause does not get scholars or jurists very far when determining whether there exists, or should exist, a special protection to the home. James Madison inserted the text into the draft Constitution, and it is unclear to this day what exactly he intended when writing those few words. The historical record is also minimal, showing little evidence of what other Framers intended with the clause. There was virtually no debate about the clause at the time of ratification. Some have argued that the purpose of the Takings Clause was to minimize the possibility of military seizures of personal and real property during wartime. Indeed, much of the Court’s takings jurisprudence has been carved out of thin air with little adherence to the original intent, especially the Court’s regulatory takings and exactions doctrine. Doctrinalism, on the other hand, offers a useful approach to understanding the Court’s aversion to the home in light of the lack of history and text to glean from.

It would seem that even if the Fifth Amendment textually lacks the word “home” or “house,” unlike the Third and Fourth Amendments, protections to the house could still be read into the Court’s takings doctrine. Why not? This is exactly what the Court did in its First and Second Amendment jurisprudence, as well as its self-incrimination clause in the Fifth. Justice Scalia, specifically, offered the latest rendition of conservative doctrinalism to carve out the “hearth and home” protection in gun rights. Likewise, he did the same in Kyllo, raising issue with searches and seizures that threatened the home, as opposed to other places ordinarily understood to be domains of privacy. But something is afoot beyond mere sloppy textualism and doctrinalism or, for that matter, the prevailing privacy versus property dichotomy for why the Court’s takings jurisprudence is “home-less.” The inexplicable absence of home protections in takings can also be explained by the Court’s post-Lochner deferential treatment of social and economic legislation.

134 William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738, 1794 (2013) (“When [Madison] put forth his draft of what became the Fifth Amendment, the Takings Clause was there, tacked on to the end of some criminal procedure rights and the Due Process Clause. Madison did not specifically discuss the Takings Clause at all. A committee later made minor changes to the Clause’s wording (also without recorded explanation). That version passed the House and Senate, and still there was almost no recorded discussion about the Clause’s purpose.” (citation omitted)).

135 See, e.g., Sprankling, supra note 27, at 131 (positing that “Framers intended the lesser-known Takings Clause would provide greater protection to the home than to other types of property”).

136 Id. at 132.

137 Id. at 115–16.


A. Takings in the Lochner Era

Indeed, revisiting *Lochner* begins to piece together this previously incomplete constitutional puzzle, as it identifies the Court’s deference to “class legislation” as the crux of the home-centric schism in the Takings Clause and the rest of the Bill of Rights. The infamous *Lochner* Court derived the doctrine of “substantive economic due process” from the Fifth and Fourteenth Amendments. The Court was unabashedly hostile to “class legislation” that advanced social policies and sought to limit government power to regulate economic relationships through a conservative yet judicially active approach. The Court carved out its doctrine targeting economic legislation, which pursued social change, by narrowing its inquiry to whether the government action in dispute was within the police power of the state. The economic legislation and regulations attacked by the Court, including some federal courts, included regulatory pricing, restriction on businesses, graduated taxes, and labor legislation. One of the primary explanations for the Court’s lurch towards anti-class legislation was that the Court despised unequal legislation. By doing so, the Court found a way to review the substantive nature of government economic regulation and legislation by asking whether the government exercised its police powers. As a result, the Court severely limited the scope of the state police powers.

The Fifth and Fourteenth Amendment’s Due Process Clause was the origin of the Court’s *Lochner*-era treatment of private property rights. The Industrial Revolution brought significant social and economic transformations in American society. Such change also gave rise to social problems, such as poverty and inequality. Congress and state legislatures stepped in to mitigate these harms. However, the Court would hand down rulings that struck such legislation as an interference with property and liberty. There, the Court found redress and protections against deprivation of property without due process. For the Court, the Constitution protected property from government interference. To rein in government overreach in the realm of private property rights, the Court gave special meaning and interpretation to due process, takings, and property. The late 1800s Court cases were testing grounds for the

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140 *Lochner* v. New York, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”).
141 See id. at 64 (showing hostility to a statute that sought to limit hours worked as it unduly restricted the “freedom of master and employee to contract with each other”).
142 Id. at 57.
143 See *McUsic*, supra note 23, at 609.
145 See *McUsic*, supra note 23, at 610.
146 See *Lochner*, 198 U.S. at 61; see *McUsic*, supra note 23, at 611.
147 See *McUsic*, supra note 23, at 612.
Lochner Court to scrutinize legislation that affected property rights. For example, the Court departed from its longstanding interpretation of eminent domain and public use as dealing strictly with physical seizures of title when it gave credence to takings that rendered property unusable. In \textit{Pumpelly v. Green Bay Co.}, the Court found flooding of private property as a result of government action to constitute a taking of private property. The Court then turned to economic legislation that affected private property rights.

In \textit{Chicago, Burlington & Quincy Railroad Co. v. Chicago} and \textit{Fallbrook Irrigation District v. Bradley}, the Court accelerated the theory that it could determine whether a deprivation of property could be considered a taking of property in violation of the Fourteenth Amendment, all in an attempt to forge a bloc of doctrine to preclude class legislation in the areas of private property rights. Then, the Court’s jurisprudence morphed into a combination of criteria to determine if the state deprived a property owner of due process protected rights and whether the action was a taking of private property. This allowed the Court to shift its focus on core property interests such as title, possession, and exclusion to property interests such as economic value. In other words, “the notion of property” became an abstract category of economic interests.

In \textit{Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota}, the Court equated “expected earning power” with traditional definitions of property. Or, for example, the Court in \textit{Pollock v. Farmers’ Loan & Trust Co.} stated that taxes were the equivalent of property, and that legislation prohibiting direct taxation on real property or income was unconstitutional. The concept of property became malleable beyond the core possession and title definitions, which gave the Court flexibility to attack regulations on property rights, particularly those that were redistributive in nature.

\begin{itemize}
\item \textsuperscript{148} See id. at 612–13.
\item \textsuperscript{149} \textit{Pumpelly v. Green Bay Co.}, 80 U.S. 166, 179 (1872).
\item \textsuperscript{150} See McUsic, supra note 23, at 611 (highlighting the Lochner Court’s use of doctrinal tools to invalidate legislation based on their “personal belief in laissez-faire economics”).
\item \textsuperscript{151} See Chi., Burlington & Quincy R.R. Co. v. Chicago, 134 U.S. 226, 235–41 (1897) (discussing case precedent on issue of government takings of private property for public use); see also \textit{Fallbrook Irrigation Dist. v. Bradley}, 164 U.S. 112, 113 (1896).
\item \textsuperscript{152} See McUsic, supra note 23, at 614.
\item \textsuperscript{153} See id. at 614. n.35.
\item \textsuperscript{154} See id.
\item \textsuperscript{155} Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456 (1890) (“Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation . . . .”); see also McUsic, supra note 23, at 614–17 (discussing the Court’s evolution to understand property as “economic value itself”).
\item \textsuperscript{156} \textit{Pollock v. Farmers’ Loan & Tr. Co.}, 158 U.S. 601, 601 (1895); see also McUsic, supra note 23, at 615.
\item \textsuperscript{157} McUsic, supra note 23, at 614–17 (discussing case precedent on the Court’s treatment of expanding conceptions of property rights).
\end{itemize}
As Molly McUsic explained, economic rights became property in the eyes of the Court, and therefore, during the *Lochner* era, legislation and regulation that affected property could be subject to substantive due process inquiries.\(^{158}\) Rate regulation, specifically, was subject to due process inquiries under the Fourteenth Amendment.\(^{159}\) In *Munn v. Illinois*, for example, the Court found that such rate regulations on railroads were the equivalent of the state forcing an owner to run a “business with less return than he would receive without the regulation,”\(^{160}\) thus viewing such economic regulations as amounting to takings of property for public use without just compensation.\(^{161}\) In other words, where the regulation significantly reduced rates, the Court would find a taking for public use without just compensation because the state “cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking.”\(^{162}\)

The consistent rulings on economic regulations as equivalent to seizing private property gained considerable support in subsequent cases in the early 1900s.\(^{163}\) In *Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, the Court found that requiring a railroad company to make a track connection was “not a mere administrative regulation,” but was a taking of property since the company had to “expend money” and was prohibited from certain “uses” of the land.\(^{164}\) By the 1920s, the Court had concluded that regulations “could take property by limiting its use or value, and such a taking would contravene” due process.\(^{165}\) For example, in *Pennsylvania Coal Co. v. Mahon*, Justice Holmes explained that legislation affecting the coal mining rights of companies was not a valid exercise of the police power, but was instead a taking.\(^{166}\) Because coal mining is valuable and a regulation making it “commercially impracticable to mine certain coal” is the same as destroying it, the regulation is thus an unconstitutional taking.\(^{167}\) In *Block v. Hirsh*, the Court upheld a rent control statute.\(^{168}\) However, in doing so, the Court reiterated its *Lochner*-esque doctrine that the police power may be scrutinized if it goes too far as to become nothing

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\(^{158}\) *Id.* at 615–16.

\(^{159}\) *Id.* at 616.

\(^{160}\) *Id.* at 616, 616 n.49.


\(^{163}\) McUsic, *supra* note 23, at 617.


\(^{165}\) McUsic, *supra* note 23, at 617.


\(^{167}\) *Id.*

more than a regulation equivalent to a taking. Thus, regulations on rents “might amount to a taking without due process of law.”

Indeed, the Court “routinely” found economic regulations and legislation where property was affected to equate to takings because it limited its use or economic value. The market value became as constitutionally protected as traditional sources of “property.” Thus, any reduction in market value, the Court supposed, was a deprivation of property by taking. This tied “economic” legislation, and arguably “social” legislation, to the Court’s doctrinal rubrics under the Fourteenth Amendment’s Due Process Clause and increasingly the Takings Clause. The result was that the Court’s jurisprudence viewed any and all substantive property-based economic measures as “subject to judicial supervision, and all could have been invalidated under the Court’s doctrine.” The Lochner Court’s expansive view of property meant that “[i]f economic value is property, then any change in the common-law rules could be an unconstitutional infringement on property.”

Amidst the Lochner era’s revolt against legislation affecting liberty and property, the Court never once raised the prospect that legislation that affected specific property interests, such as homes, deserved greater scrutiny. Instead, a diverse range of property, from land to market value, was given broad protections under the Court’s substantive due process inquiries from regulations. The dawn of the Court’s regulatory takings doctrine saw an opportunity to limit takings that infringed too significantly on classes of homeowners. Yet, in Pennsylvania Coal Co., the Court failed to lift the “home” to the pantheon heights it receives in its sister amendments.

There, Mr. and Mrs. Mahon sued to prevent a coal company from mining under their house, which would remove the supports and cause subsidence of the surface. At the time, an anti-subsidence statute prohibited mining under residential dwellings to prevent destruction of residences for the public good. However, the house in dispute had a deed that reserved an estate interest in the subsurface for the coal company, giving it the right to mine under the surface. The Court struck down the statute as going too far by diminishing the coal

169 Id. at 146.
170 Id. at 156.
171 McUsic, supra note 23, at 617.
172 Id. at 618.
173 Id.
174 Id. at 624. The Lochner Court employed a two-part inquiry. Lochner v. New York, 198 U.S. 45, 57–58 (1905). First was whether the regulation properly furthered the health, safety, and welfare of the citizenry. Id. at 57. Second was whether the regulation or legislation actually fixed the harm caused by the plaintiff. Id.
175 McUsic, supra note 23, at 624.
176 Id. at 608.
178 Id. at 393–94 n.1.
179 Id. at 394–95.
company’s property rights in the estate.\textsuperscript{180} As noted, the ruling was once part of the Court’s long line of takings cases that scrutinized economic legislation.

The Court paid little attention to or special care for the “single private house” in dispute, instead carving out a new takings doctrine that, as applied to the case at hand, arguably under-protected the house.\textsuperscript{181} Justice Holmes’s lack of conviction for the “single private house” is instructive. He minimizes the seriousness of the house by noting that “[t]his is the case of a single private house.”\textsuperscript{182} There is “[n]o doubt there is a public interest even in this,” but “[s]ome existing rights may be modified even in such a case.”\textsuperscript{183} Notably, the Court stated that where exercises of police power are in dispute, the “greatest weight is given to the judgment of the legislature.”\textsuperscript{184} Ultimately, the Court departed from its longstanding separation of takings and exercises of police power by introducing the concept that if regulations “go too far,” they will be deemed “regulatory takings” in violation of the Takings Clause.\textsuperscript{185}

Notwithstanding the Court’s lack of interest in homebound protections, the Court’s heavy-handed approach to constraining state exercises of police power that impinged on liberty and property slowly receded. In the post-\textit{Lochner} era, largely as a result of the Court’s command in \textit{Carolene Products}, the Court instead embraced deference to economic legislation affecting property interests in takings that starkly contrasted with the \textit{Lochner} Court. But at the same time, the Court embarked on a crusade of strict scrutiny in cases where fundamental rights were central to a dispute, thus giving the Court a useful tool to address special protections to homes in non-economic legislation cases in which fundamental rights converged with longstanding principles of sanctity of the home.

\textbf{B. Deference Post-\textit{Lochner}}

The period after 1937 is when the Court, thanks to its ruling in \textit{Carolene Products}, abandoned its economic substantive due process doctrine for a more relaxed, deferential standard to government economic activity.\textsuperscript{186} Justice Stone’s famed footnote four set forth distinctions that would inevitably remove property rights protections from substantive due process review, but leave fundamental rights in the domain of strict scrutiny.\textsuperscript{187} The Court carved out an exception to its departure from close scrutiny of economic and social legislation.

\textsuperscript{180} \textit{Id.} at 395.
\textsuperscript{181} \textit{Id.} at 413.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Pa. Coal Co.}, 260 U.S. at 413.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 393.
\textsuperscript{186} See \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 152 (1938) (holding that legislative judgments for regulatory purposes are presumed legitimate absent a showing otherwise).
\textsuperscript{187} \textit{Id.} at 152 n.4.
by remaining tethered to the doctrine where fundamental rights were at stake, including freedom of religion, right to privacy, right to self-defense, and freedom of press, speech, and association.\textsuperscript{188}

The new test, it was determined, was one that set forth whether “in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”\textsuperscript{189} In other words, strict scrutiny would be applied to alleged violations of fundamental rights, but rational basis review, and subsequently deference, would be applied to economic regulations. At the same time, economic and property rights would no longer enjoy the same \textit{Lochner}-era searching judicial inquiry of government regulation.\textsuperscript{190} Justice Stone explained that rational basis review—the oft-recited standard as to whether a regulation bears a reasonable relationship to a legitimate governmental interest—would be applied to regulations and statutes that entailed life, liberty, and property, but that fundamental rights still enjoyed substantive due process review.\textsuperscript{191} Scholars have questioned the Court’s \textit{Carolene Products} elevation of fundamental rights as worthy of strict scrutiny, yet relegation of economic and property rights as merely rational basis.\textsuperscript{192}

Unlike the first four Amendments, the Takings Clause is limited in protecting private property by the Due Process Clause’s requirement of rational basis review of legislative action in economic and social kind.\textsuperscript{193} Unenumerated rights, such as privacy or the right to marry, have gone from focusing on property rights to focusing on privacy thanks to landmark cases such as \textit{Griswold} and \textit{Katz}.\textsuperscript{194} Indeed, before \textit{Katz}, the Court’s Fourth Amendment jurisprudence focused on property concepts, like trespass.\textsuperscript{195} But \textit{Katz} moved the Court in the direction of privacy protections, especially regarding the home.\textsuperscript{196}

As a result, the Court’s takings jurisprudence has almost exclusively allowed for deferential treatment to takings because such takings usually advance an economic-oriented agenda. As the Court long ago explained in \textit{Carolene Products}, “regulatory legislation affecting ordinary” economic activity deserves a presumption of rational basis.\textsuperscript{197} Such adherence to deference seeped into the Court’s takings jurisprudence even though the core of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id.} at 152.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{193} See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) (highlighting that regulation of private property turns on whether it is “\textit{effective in achieving some legitimate public purpose}”).
\item \textsuperscript{194} Amar, \textit{America’s Lived Constitution}, supra note 26, at 1771.
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).
\end{enumerate}
\end{footnotesize}
the Takings Clause is to protect property owners from excessive government regulation.\textsuperscript{198}

In \textit{Penn Central Transportation Co. v. City of New York}, Justice Brennan stated that the Court would adhere to deferential standards and continue to treat government land use regulations as nothing more than exercises of police powers that deserve the greatest weight of deference, even though the majority carved out an ad hoc balancing test that could conceivably be wielded to constitutionally rein in local legislation and regulation.\textsuperscript{199} In \textit{Berman v. Parker}, Justice Douglas surrendered the Court’s substantive due process appetite, instead choosing the Court’s longstanding preference to defer to “social legislation” for the public good.\textsuperscript{200} Instead, the Court reiterated that the legislature, not the judiciary, may exercise its powers over its affairs, commingling the legislature’s broad police powers with “public purpose.”\textsuperscript{201} Specifically, Justice Douglas noted “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,” and “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”\textsuperscript{202} Indeed, for matters involving the physical seizure of private property, the role of the Court, Justice Douglas explained, is “extremely narrow.”\textsuperscript{203}

This is not to say that the Court immediately abandoned some of the doctrinal tools left by the \textit{Lochner} Court; it simply did not hand down rulings that were averse to economic regulation of property, notwithstanding having the doctrinal tests at its disposal to do so. For example, the Court’s balancing ad hoc test in \textit{Penn Central} could, if the Court decided, be used to strike down a regulation that interfered with investment-backed expectations, or in other words, regulations that impacted economic interests in the name of class legislation.\textsuperscript{204} The Court’s per se takings tests formulated in \textit{Lucas v. South Carolina Coastal Council} and \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, likewise, give the Court some teeth to chew away at regulations it finds overly burdensome or redistributive in nature while nonetheless essentially giving governments free rein to regulate property so long as it does not deprive all economically viable use or permanently invade private property.\textsuperscript{205} As scholars have noted, this essentially means that the Court defers to and validates the government regulations, even if it leaves less than ninety-five percent of the property available for use.\textsuperscript{206} In other words, while the Court has crafted tests that, if it chose, could strike down or scale back regulations of property that seek

\begin{footnotesize}
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} \textit{Penn Cent. Transp. Co.}, 438 U.S. at 124.
\textsuperscript{205} See \textit{infra} Part III.C.
\textsuperscript{206} Id.
\end{footnotesize}
to redistribute based on price or market value, it rarely hands down rulings that actually go that far.

Some argue that the Court’s means-end exactions doctrine under the Takings Clause is a return to *Lochner*-style decision-making.\(^{207}\) Glenn Lunney, for example, explains that the Court’s exactions doctrine “is either to ignore [precedent] or to use name-calling—Lochnerism!”\(^{208}\) But, as noted above, even if today’s Court still has at its disposal the doctrinal tools used by the *Lochner* Court to wield against contemporary “liberal economic policy,” the Court simply has refused to go that far.\(^{209}\) Recall the Court’s exactions doctrine for example.

There, in both *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the majority carved out a heightened standard of review to government actions, usually planning commissions, to withhold a building permit on condition that the landowner concede to the government’s demand.\(^{210}\) This is a means-end test that looks at the reasons for the condition and the goal that the government is seeking to achieve. Thus, as a result, the government, under its exactions doctrine, has the burden to show there is an essential nexus and rough proportionality between the public harm caused by the landowner’s development and the condition to mitigate that harm. The Court, shortly after its *Nollan* decision, explained that regulating property is unconstitutional unless “there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.”\(^{211}\)

In the dissents in both *Nollan* and *Dolan*, Justice Brennan and Justice Stevens raised concerns that the direction of the Court’s exactions doctrine inappropriately brought *Lochner* into contemporary takings doctrine. For example, in *Dolan*, Justice Stevens leveled a *Lochner* charge against the majority, arguing that the Court had reasserted the reasoning of *Lochner* by advancing a means-end test requiring heightened scrutiny of environmental and land use determinations by local governments in a similar vein as the *Lochner* Court did in refusing to presume a connection between the hours regulation on working in bakeries and the state interest in protecting the public health and safety.\(^{212}\) Justice Brennan, likewise, in *Nollan* argued that the Court had

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\(^{208}\) Lunney, *supra* note 207, at 1896.

\(^{209}\) See McUsic, *supra* note 23, at 624.


\(^{211}\) Pennell v. City of San Jose, 485 U.S. 1, 20 (1988); see also McUsic, *supra* note 23, at 639.

\(^{212}\) Dolan, 512 U.S. at 406–09 (Stevens, J., dissenting).
implemented a *Lochner* standard that was “discredited for the better part of [a] century.” Of course, the majority opinion in those cases pushed back, arguing that the Court had not resuscitated *Lochner*. Other scholars such as Richard Levy, on the other hand, argue that the *Lochner*-era Court strategy would be a welcome addition to today’s takings doctrine, as the “problems plaguing the Court in this area can and should be resolved by emerging from *Lochner*’s shadow and integrating economic interests into a broader jurisprudence of constitutional rights.”

However, the Court’s exactions doctrine does not quite embrace *Lochner* like some have feared. The difference is that the Court during the *Lochner* era protected not only core property rights, such as rights of possession, acquisition, exclusion, and disposition, but also economic and market values of property. Today’s Court, on the other hand, protects primarily core property rights, such as the right to exclude, acquire, dispose, or develop land, rather than protecting from regulations on prices, profits, or market value. The Court, it seems, “leaves far more of the nation’s property constitutionally unprotected from legislation than the *Lochner* Court did.” While the methodology the Court employs is reminiscent of *Lochner*—that is, a means-end heightened scrutiny—today’s Court rulings do not extend to protecting income generated from property or striking down regulations that redistribute on that basis like the *Lochner* Court did. Moreover, with regards to *Penn Central*, as Barton Thompson explains, “[l]acking an underlying rationale for invoking the takings protections and haunted by the specter of *Lochner*, however, this tripartite approach has provided virtually no significant restrictions on property regulations.”

One might say that the main difference is not the type of legislation between today’s Court and yesterday’s *Lochner* Court, but the “proportion” of redistributive legislation and regulations at risk. Thus, attacks on economic legislation affecting property by the Court today have not been on major economic legislation by the federal or state governments, but primarily focused on environmental and local land use regulations protecting core property interests that give rise to the Court’s means-end tests dating from *Nollan* and *Dolan*, and most recently from *Koontz v. St. John’s River Management*.

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213 *Nollan*, 483 U.S. at 842 (Brennan, J., dissenting).
214 See *Dolan*, 512 U.S. at 384 n.5; *Nollan*, 483 U.S. at 834 n.3.
216 McUsic, supra note 23, at 608.
217 Id.
218 Id.
219 Id.
220 Id.
222 McUsic, supra note 23, at 609.
District. It has consistently approved economic regulations affecting property, even though the Court, as noted above, still has Lochner-esque doctrinal tools in its toolbox to strike down such legislation. Even post-Nollan and Dolan, the Court has consistently veered down the road of deference whenever it can, and clarified some of the heightened standard of review language employed in Nollan and Dolan that some argue is a return to substantive due process.

In Lingle v. Chevron U.S.A. Inc., for example, Justice O’Connor closed the door on the substantive due process inquiries bleeding into takings doctrine, finding it inappropriate for the Court to employ a formula that asks whether a regulation of private property “substantially advances” legitimate state interests. There, the majority declined to commingle substantive due process inquiries of regulations where the crux of the dispute was whether the regulation was a taking. Justice O’Connor was compelled to eviscerate due process from takings as a way to clean up some messy and “regrettably imprecise” dicta left over from Penn Central, where the Court left the door open to the possibility that a use restriction on real property could potentially constitute a taking if the regulation was not reasonably enacted to pursue a public purpose.

Then, Justice O’Connor reverted to the Court’s preferred deferential approach, explaining that prior to engaging in inquiries of the underlying validity of a regulation, the Court “presupposes that the government has acted in pursuit of a valid public purpose.” The concern for the majority in Lingle was that, if it permitted “substantially advances” inquiries into takings doctrine, then the efficacy of “virtually any regulation of private property,” including state and federal regulations, could conceivably be scrutinized, thus empowering courts to substitute their “predictive judgments for those of elected legislatures.” Indeed, the Court’s prior rule, that regulations must substantially advance a legitimate state interest to survive a takings challenge, was rejected in place of its longstanding preference for deference to legislatures. The same year Lingle was handed down, the Court confirmed its willingness to continue its longstanding deference to social and economic legislation in Kelo.

There, Justice Stevens deferred to a local government’s “economic development” policy, explaining, “[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to

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224 See Koontz, 570 U.S. at 625 (Kagan, J., dissenting).
226 See id.
228 Lingle, 544 U.S. at 543.
229 Id. at 544.
230 Id. at 548.
legislative judgments in this field.\textsuperscript{232} Justice Stevens invoked a “strong theme of federalism” in his opinion, noting that such a history is part of the Court’s longstanding “great respect”\textsuperscript{233} owed to state legislatures in discerning local public needs in eminent domain determinations.\textsuperscript{233} He reiterated that while it was not the Court’s responsibility to question the legislature’s judgment, “nothing” in the opinion “precludes [state legislatures] from placing further restrictions” on takings where the government seeks to redistribute private property in order to achieve economic development for the broader public.\textsuperscript{234}

As a result, this deferential treatment in takings doctrine post-\textit{Lochner} has caused the Court to overlook and refuse to apply a heightened standard that gives greater protections to homes and homeowners than other forms of property. The Court’s refusal to permit special protections to homes is all the more curious in light of the many home-centric takings disputes it has reviewed post-\textit{Lochner} and the Court’s simultaneous embrace of homebound doctrines under the other Bill of Rights doctrines post-\textit{Lochner}.

\textbf{C. The Home-Less Takings Doctrine}

As a baseline, without plaintiffs who embody the principle of the sanctity of the home, the Court has had no reason to extend its takings doctrine to specially protect homes or homeowners. The plaintiff in \textit{Penn Central} was the Penn Central Transportation Company, which owned Grand Central Terminal.\textsuperscript{235} Anthony Palazzolo, landowner of beachfront property, was denied a permit to develop wetlands into a private beach club.\textsuperscript{236} David Lucas was the owner of two vacant oceanfront lots.\textsuperscript{237} Chevron was the plaintiff in \textit{Lingle}.\textsuperscript{238} The plaintiffs in \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency} were hundreds of owners of undeveloped land.\textsuperscript{239} Ms. Dolan was the owner of a store who sought to expand the premise and pave a parking lot.\textsuperscript{240} Coy Koontz’s 14.9-acre swath of undeveloped land was slated for development.\textsuperscript{241} \textit{Berman} concerned the physical seizure of a department

\begin{thebibliography}{99}

\bibitem{232} Id. at 480.
\bibitem{233} Id. at 482.
\bibitem{234} Id. at 489.
\bibitem{237} \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003, 1008 (1992). Notably, however, David Lucas sought to build a single-family home on the beachfront property. \textit{Id.} at 1007. While the Court deemed the restriction a taking, it did not give special credence to the fact that regulation prevented all economically viable use of his ability to build a home, but instead that Lucas and his property interest in his land—regardless of what it would be used for later—had been severely restricted. \textit{See id.} at 1030–32.
\bibitem{240} \textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994).
\end{thebibliography}
store. Notwithstanding the Court’s aversion to imposing home-centric protections in cases lacking homeowner-plaintiffs, the Court has missed many opportunities to bring the Takings Clause into uniformity with the First, Second, Third, and Fourth Amendments in cases that dealt with a homeowner or a property interest in either building, selling a home, or the seizing of a home.

In Loretto v. Teleprompter Manhattan CATV Corp., the Court was faced with a relatively sympathetic landowner in Jean Loretto, owner of a multifamily residential apartment building in Manhattan. There, the Court missed an opportunity to set forth distinctions in physical invasions of property interests akin to homes where people live, where elements of personhood thrive, and where privacy is sacred. Of course, the invader was not a law enforcement officer or a soldier, but a physical cable imposed by a cable company, permitted to do so by statute. The Court had ample opportunity to give special scrutiny to regulations that physically invade or occupy home-like structures. The cable company, in fact, argued that it was permitted to physically occupy the residence, i.e. install cable boxes, because the property relationship at issue was residential rental buildings, and that tenants were granted a property right for cables to be placed on the rooftops. Indeed, for the majority, such distinctions were irrelevant. They questioned “why a physical occupation of one type of property but not another type is any less a physical occupation.” The physical occupation of “plates, boxes, wires, bolts, and screws” that occupied “space immediately above and upon the roof” of apartments did not arouse the Court’s sympathy towards personhood and houses in a way to announce that such physical occupations were, for example, “the chief evil against takings.”

One could imagine the Court uttering the sanctity of the home in a revisionist version of the Loretto opinion. It did not happen. Two years later, the Court had yet another chance to set forth a home-centric doctrine. It failed.

In Hawaii Housing Authority v. Midkiff, the Court was faced with takings that were for the purpose of breaking up a land oligopoly where the transfer resulted in rental homes being taken from landlords. There, the Court deferred to social legislation, explaining that Hawaii was merely attempting to “reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs” and that land systems aimed at “forc[ing] . . . individual

243 See Radin, supra note 1, at 989.
245 Id. at 419, 438–39.
246 Id. at 438–39.
247 Id. at 439.
248 Id. at 420, 438.
249 Payton v. New York, 445 U.S. 573, 585 (1980). It was only four years earlier that the Court uttered the now famous homebound words that “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” Id. (citation omitted).
homeowners” to lease rather than buy was a regulation that was a “classic exercise of a State’s police powers.”

Justice O’Connor, pulling longstanding deferential language from the Court’s line of precedent, explained that “[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power” to reduce the perceived social and economic evils of land oligopoly that forces thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Again, the Court missed an opportunity to perhaps provide stricter requirements for takings that impeded property interests related to homeowners.

In Nollan, Mr. and Mrs. Nollan had their building permit to replace their already existing bungalow with a larger house denied by the planning commission. Justice Scalia, the architect of home-like sensibilities in Heller and Kyllo, was not persuaded by the rosy, American dream-like profile of the Nollans’ small bungalow, which they enjoyed in the summers and even rented out to vacationers. The Nollans proposed to build a large house, but their permit was denied as a result of their refusal to allow a public easement across their property in exchange for the permit. Justice Scalia’s quirky exactions doctrine remained neutral, neither paying attention to nor making a distinction between a bungalow or other property in a similar dispute. If anything, the majority adhered to longstanding notions of the proverbial bundle of sticks, noting that the right to exclude is one of the most essential of the sticks.

Several years later, in 1992, the Court reviewed David Lucas’s challenge of legislation that barred him from building single-family homes on two residential lots he purchased. He argued the restriction on building permanent habitable structures deprived him of all economically viable use of his property. It is peculiar that the majority, especially the mostly conservative bloc of the Court, did not utilize the home-centric nature of the dispute to give greater protections to landowners seeking to utilize land to build and invest in homes. For one, the South Carolina legislation not only prohibited new buildings, but also restricted the “rebuilding of houses” that were previously destroyed by natural causes. This is especially surprising given the trial court’s finding that the appraisal of the land concluded that its best and highest use would be “luxury single family detached dwellings.” Still, the Court found no reason to narrow the scope of

251 Id. at 241–42.
252 Id. at 244.
254 Id. at 827, 841–42.
255 Id. at 825.
256 See id. at 831–42.
257 Id. at 831.
259 Id.
260 Id. at 1064 (Stevens, J., dissenting).
261 Id. at 1044 (Blackmun, J., dissenting).
its per se test to offer greater protections to landowners of lots who seek to build single-family homes. The Court could have carved out an alternative categorical test that prohibited legislation that rendered land slated for the development of single-family homes a taking if the regulation deprived the landowner of, say, more than seventy percent economically viable use of the lots, but all economically viable use where the prospective use in dispute was commercial or industrial.

Most recently, in *Murr v. Wisconsin*, the plaintiffs were landowners of two lots, one of which had an old family-owned cabin situated on it. The Murr children sought to remove the cabin to a different area in order to develop the lot in dispute into a new residence. But state law prohibited the development of the particular lot, thus giving rise to a takings claim. This time, the now retired Justice Kennedy was inattentive to the personhood narrative of the plaintiff. He ruled in favor of the government’s exercise of its powers to regulate the lots. In doing so, he never mentioned the arguably unique nature of the family cabin as perhaps overregulated.

A clue for understanding the mystery behind the Court’s aversion to home-centric protections in takings can be found in *Pennsylvania Coal Co*. There, the Court paid little attention to Mr. and Mrs. Mahon’s “single private house.” Instead of offering a special limitation on regulations that under protect the subsurface subsidence that potentially harms the physical structure and economic value of homes, the Court carved out a new “regulatory” takings doctrine agnostic to any distinctions in the property interest affected. The Court was instead more interested in striking down legislation that affected the economic value and property interests of a company. But the Court did reiterate that where exercises of police power are in dispute, the “greatest weight is given to the judgment of the legislature.” That deference would be the standard unless, of course, the regulation goes too far.

Likewise, take Justice Brennan’s opinion in *Penn Central* for another sign. There, the Court added a new multifactor ad hoc test to the Court’s takings jurisprudence. The test allows the Court to strike down regulations it finds too offensive to the investment and economic-backed expectations of landowners. While such doctrinal tools to attack government land use regulations are now available as a result of *Penn Central*, the Court has, for the

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263 Id. at 1941.
264 Id.
265 Id. at 1950.
266 See id. at 1940–50.
268 See id. at 415.
269 Id. at 413.
270 Id.
271 Id. at 415.
most part, declined to bludgeon most local government regulations as takings, and has never shaped its ad hoc test to specially protect the homestead. Instead, it adheres to deferential standards that treat such regulations as nothing more than exercises of police powers that deserve the greatest weight of deference.273

And recall Justice Douglas's deference to "social legislation" in Berman for an additional hint.274 There, the Court was focused on respecting urban renewal as a justifiable public good, making no distinction as to the property taken, whether residential homes or commercial businesses.275 Justice Douglas explained that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" and "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."276

Similarly, Justice Stevens deferred to a local government's "economic development" policy in Kelo, explaining, "[w]ithout exception, [that] our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."277 There, the Court seemed disinterested in providing homes the same level of protection from government expropriation as the home (and its private occupants) receives from warrantless searches or the forced quartering of soldiers in peacetime. Kelo, arguably the Court's most contentious home-centric dispute, was a missed opportunity to bring harmony with the other homebound amendments. The case was the quintessential American dream narrative. There, Ms. Kelo's little pink house was threatened by eminent domain to make way for a major economic development project that never came to fruition.278 Justice Stevens's opinion never mentions the home as worthy of additional protections, and certainly does not cite to prior rulings under cousin amendments that provided greater protections to the home.279 However, in his Kelo dissent, Justice Clarence Thomas, troubled by majority's lack of concern for protecting plaintiffs' homes, explains the oddity of protecting homes in other constitutional contexts but refusing to do so under the Takings Clause.280

There, Justice Thomas stated that the Court has long recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."281 He then juxtaposes the Fourth Amendment's search and seizure doctrine with the Fifth Amendment's taking doctrine, arguing that it is difficult to square how "citizens are safe from [police searches] in their homes, [but] the homes themselves are not" protected from

273 See id. at 138.
275 See id.
276 Id.
278 See id. at 473–75.
279 See id. at 472–90.
280 Id. at 505–17 (Thomas, J., dissenting).
281 Id. at 518.
government seizures. The Court, he said, has “elsewhere recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,’” but that the majority’s ruling leaves homes themselves unprotected from taking. Perhaps most prescient is this excerpt from Thomas’s dissent: “[t]he [majority] tells us that we are not to ‘second-guess the [legislative] judgments,’” but the real issue is “whether the government may take the infinitely more intrusive step of tearing down . . . homes,” and as a result something has “gone seriously awry with this Court’s interpretation of the Constitution.” He continued: “We would not defer to a legislature’s determination of the various circumstances that establish, for example, when a search of a home would be reasonable,” because we have recognized the “overriding . . . sanctity of the home.” Thomas’s passage in his dissent hints at, but does not explicitly answer, the real dilemma in the Court’s void in home protections in takings as opposed to other homebound doctrines in the Bill of Rights.

D. Explanations

Justice Thomas’s dissent is perhaps a useful segue into discussing the lack of deference afforded to governmental action against fundamental rights. Indeed, as he noted, the Court does not ordinarily defer to the government’s determination when it decides to search and seize a home without a warrant. The Constitution fundamentally protects such searches under the Fourth Amendment. As for fundamental rights, the Court is skeptical of deferential treatment to government determinations. Indeed, the Court does not, as Justice Thomas explained, defer to the law enforcement officials’ judgments regarding when and if to enter a home or search and seize property without a warrant. It is telling that after the Court’s Carolene Products ruling effectively ousted Lochner-era judicial scrutiny to economic legislation from the Court’s Bill of Rights jurisprudence, the Court consistently and systematically carved out homebound protections in the entire first half of the Bill of Rights, while at the same time choosing deference over home-centric doctrines in its takings jurisprudence. Indeed, while the Court made short shrift of governments that seized homes for economic development or governments that denied building permits for single family home developments, it regularly found physical entries into the home to be a chief evil or the right to bear arms in the hearth and home as more worthy of protection above all other interests.

The District of Columbia ordinance in Heller restricting gun possession in the home, even if for the health, safety, and general welfare of the public, did

282 Id.
283 Kelo, 545 U.S. at 518 (Thomas, J., dissenting).
284 Id.
285 Id. (emphasis added).
286 See id. at 517–18.
287 Id. at 518.
not receive the kind of deferential treatment an ordinance regulating land use would receive. The right to bear arms, the Court emphasized, is a fundamental right of the individual, not the collective.²⁸⁸

The statute at issue in Stanley prohibiting lewd material in the home was purportedly enacted to regulate possession of material “thought to be detrimental to the welfare” of the citizens.²⁸⁹ But that argument is weakened when viewed in light of the constitutional limitations on regulations or governmental action that intrudes into one’s privacy. The Court long ago upheld restrictions on the commercial sale of certain obscene material as defensible in limited contexts for the public welfare. Thus, privacy and speech rights in Stanley were violated when viewed as fundamental rights issues by the Court requiring closer scrutiny.²⁹⁰ This closer scrutiny permitted the Court to glean at the place and space of the violations, and to determine that where such legislative offenses occur, the Court will offer additional protections to ensure fundamental rights are not violated.

Likewise, the statute in Payton permitting warrantless arrests and invasions in the privacy of the home when emergency or dangerous circumstances are afoot was not the kind of economic legislation that the Court would ordinarily find for deference.²⁹¹ Instead, the Court employed protections to fundamental rights, as opposed to deference to allowing warrantless arrests to occur.²⁹²

Once placed in this historical context against the backdrop of the post-Lochner era, the fundamental puzzle—why the Court offers homebound protections in its obscenity, gun rights, quartering soldiers, search and seizure, and self-incrimination doctrines, but neglects an equivalent doctrine under the Takings Clause—becomes clearer. But how can the Court move its takings jurisprudence in line with the rest of its homebound sister amendments? Rather, is homebound concordance and uniformity across the Bill of Rights, where applicable, necessary, or desirable?

IV. TOWARDS A THEORY OF COHERENCE OF THE CONSTITUTIONAL HOME

There are several broader theoretical implications, if not questions, that remain. If textualists are adamant about consistent readings of text, then one might suspect that the Court should only recognize special protections in the home where the text commands in the Third and Fourth Amendments. Such a result would preclude special protections in or to the home involving smut, guns, self-incrimination, and takings. Likewise, one might argue that the home-less Takings Clause is not defective, but rather that the Court’s other various atextual home-centric doctrines are wrong. The concern here is that the “purposivist [and] precedent-based interpretive” methods have gone far beyond the text and

²⁹⁰ Id. at 565.
²⁹² Id.
history to resuscitate and maintain the principle of the sanctity of the home in American constitutional law. Therefore, it might be said, just leave the homeless takings doctrine in place. Yet, it is difficult to escape the predominantly “atextual nature of the Court’s opinions” involving the home in the other amendments, and this suggests that the Court’s lack of homebound limitations in its takings jurisprudence is evidence that it has failed to engage in the same atextual home-centric method of interpretation as its other home-centric doctrines in the Bill of Rights. In other words, the Court has created asymmetry where all doctrinal signs point towards a Bill of Rights of home-centric symmetry. This instance of incoherence in takings doctrine, then, is peculiar.

Constitutional congruence of home protections offers a comprehensive vision of the sanctity of the home in the Bill of Rights that embraces consistency and predictability. This constitutional congruence, in other words, offers a pragmatic mode of interpretation that harmonizes the home consistently in between and across all five amendments, including the Takings Clause. The addition of homebound protections in takings would further allow scholars and jurists to contemplate the home not solely through the lens of an “individual line of constitutional text” as if bound to, say, the Third or Fourth Amendment. Rather, pursuing home protections in the Takings Clause harmonizes home-centric doctrines in the Bill of Rights as a whole. This is achieved by doing two things at once: inferring the “home’s constitutional primacy from the structure and context of the document itself,” and subsequently drawing parallels to the sanctity of the home by leaning on precedent and doctrine from other doctrines within the Bill of Rights. But what is the theoretical basis for the claim that home-centric doctrines across the Bill of Rights should be interpreted congruently and coherently to include special protections in the Takings Clause?

A. Coherence Theory

Our constitutional culture generally aspires to a theory of coherence. Richard Fallon argues that even though the multiple modes of constitutional interpretation—text, structure, history, doctrine—are distinct, they are interconnected in ways that allow interpreters to find “constructivist coherence”—a form of reflective equilibrium that is influenced by reciprocal modes of assessment and reassessment. This theory calls for scholars and jurists to “assess and reassess the arguments in” text, history, precedent, and

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293 See Jonathan F. Mitchell, Textualism and the Fourteenth Amendment, 69 STAN. L. REV. 1237, 1241 (2017) (citing Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 709 (1975)).
294 Id.
295 Miller, supra note 27, at 1305.
296 See Dorf, supra note 52, at 232.
297 Miller, supra note 27, at 1304.
298 Fallon, supra note 31, at 1189.
structure to “understand each of the relevant factors as prescribing the same result.”299 Doing so, according to Fallon, results in “coherence.”300 This is because the modes of interpretation are “substantially interrelated and interdependent” and that this reciprocal influence helps achieve constructivist coherence “most of the time.”301 Constitutional interpretation “prescribe[s]” to embody various interpretations that lead to the “same result.”302 Fallon explains:

[I]f the conclusions fail to cohere into a uniform prescription for how the case or issue ought to resolved, then any or all of the individual conclusions may be reexamined, and the results adjusted insofar as plausible within the prevailing conventions of constitutional analysis, in an effort to achieve a uniform outcome.303

This is a familiar line of logic that has roots in John Rawls’s teaching of “reflective equilibrium” that advocates for an intellectual process of adjusting and correcting concepts to achieve a coherent theory.304 Likewise, in the constitutional interpretive context, “our constitutional practice” arguably implicitly prescribes the attainment of coherence.305 To achieve this coherence and ultimately, for example, home-centric congruence in the Bill of Rights, interpreters rely upon “patterns of influence and adjustment” to make coherence attainable.306 Indeed, under this theory, the claim for constitutional congruence of home-centric doctrines across the Bill of Rights is substantially supported by the fact that interpreters must utilize, among other methods, textualism and doctrinalism to fully appreciate the desire for a coherent homebound Bill of Rights.

In each separate amendment in the first half of the Bill of Rights, the Court has utilized a variety of interpretive tools to find a zone of protections in or to the home. While smut is given an atextual and largely doctrinal protective treatment inside the home, derived largely from the textual home-centric protections of the Fourth Amendment, both interpretive tools were used to achieve symmetry in home protections.307 Likewise, the Second Amendment’s atextual and historical treatment by Justice Scalia in *Heller* relied upon the atextual First Amendment and the textual Fourth Amendment to find consistent application of a homebound protection to the right to bear arms the “hearth and

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299 *Id.* at 1193.
300 *Id.*
301 *Id.*
302 *Id.* at 1240.
303 *Id.* (emphasis added).
306 *Id.* at 1241.
307 See Miller, *supra* note 27, at 1305.
The interconnectedness that Fallon speaks to plays out in the Court’s prominent *Kelo* decision, as mentioned in Part III. \(^{309}\)

The *Kelo* ruling was arguably a commensurability problem. That problem raises the question of what category of interpretation should be used when invoking a particular interpretive tool results in different outcomes. Inevitably, Fallon concludes that “blurring occurs in some cases between” some of the categories of constitutional interpretation. \(^{310}\) Rereading Thomas’s dissent with an eye towards coherence theory seems to suggest that Justice Thomas was seeking to extend the home-centric doctrinal thread from searches to takings—two amendments adjoined at the hip, but distinct in approaches to home protections.

There, Justice Thomas was concerned with the specter of incoherence, noting that the Court has “elsewhere [in the Fourth Amendment] recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.’” \(^{311}\) Indeed, textually he finds the “house” substantially protected in the Fourth Amendment, but unprotected in the Takings Clause. \(^{312}\) He wants it both ways. His concern was that since the Court specially protects persons from warrantless searches and seizures in the home, why should the government be capable of tearing down homes without special limitations? By not reading the Fourth Amendment protections of the home congruently with the Fifth Amendments protections to private property, Justice Thomas concluded that the Court’s interpretation of the Constitution had “gone seriously awry.” \(^{313}\) Here, textualism and doctrinalism seem to converge and be interrelated (or blurred) in those few lines of Justice Thomas’s dissent. This “reciprocal influence” between interpretive methods seemed to color Justice Thomas’s implicit plea for coherence. In other words, it would seem that bringing closure to the homebound schism in the Bill of Rights, as this Article calls for, is simply part of the evolution of coherence theory.

Likewise, in the late 1800s, the Court in *Boyd* expressly commingled the Fourth and Fifth Amendment protections to unlawful searches and self-incrimination in the home, with the text and accompanying doctrine from both amendments running “almost into each other.” \(^{314}\) This was arguably yet another attempt at achieving *some* coherence, and aligns with the Third Amendment’s mandate to prohibit quartering of soldiers during peacetime. \(^{315}\) The Court’s *Stanley* ruling was arguably yet another attempt to thread an additional amendment to homebound coherence, as the Court explained that “[i]f the First

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\(^{309}\) *See supra* Part III.C.

\(^{310}\) Fallon, *supra* note 31, at 1239.


\(^{312}\) *Id.*

\(^{313}\) *Id.*

\(^{314}\) *Boyd v. United States*, 116 U.S. 616, 630 (1886).

\(^{315}\) *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).
Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” 316 And again in Payton, the Court sought to achieve an advanced thread of coherence by finding that “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” 317 Finally, Justice Scalia leaned on the Fourth Amendment’s explicit homebound protections arising in Payton to declare, in Heller, that there existed an elevated right to bear arms in the “hearth and home” above all other interests under the Second Amendment. 318 Again, underlying these home-centric doctrinal moves is an implicit attempt at coherence theory in constitutional law. Fallon’s “constructive” variation of coherence theory is useful in understanding the process of utilizing each interpretive method to find the same result where possible. Indeed, doing so raises, yet again, the prevailing question in this Article. Why not apply coherence theory to the Takings Clause as a theoretical ground to extend the home-centric doctrinal threat to takings?

B. Consilience

This Article’s conception of the home-centric Bill of Rights begins to look and sound like Jules Coleman’s definition of consilience theory—that is, “other things equal, it is good when a theory can bring a diversity of phenomena under a single explanatory scheme.” 319 Take Newton’s theory of gravitation, and all its conceptions of orbiting planets around the sun. Prior to Newton’s theories, these conceptions were, in the language of constitutional scholars, “individual line[s] of constitutional text” under each Amendment in the Bill of Rights viewed and understood separately from each other. 320 Instead, consilience would ask interpreters to view certain aspects of the Bill of Rights, such as home protections, “as a whole.” 321

Jules Coleman explains this phenomenon through the lens of tort and criminal law. The two, he argues, are interconnected. 322 In fact, the two might be “unified” under a theory of consilience that shows “why we need these distinct bodies of law, each with its distinct and ineliminable principles.” 323 Likewise, the Bill of Rights, while offering constitutional rights and protections, also espouses generally distinct bodies of constitutional law. Yet, to view these

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319 JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 41 (2001). I do not claim that Fallon’s constructivist theory and Coleman’s consilience theory are the same, but instead that the two theories tend to strive for consistency and coherence in some fashion using constitutional interpretation.
320 Miller, supra note 27, at 1305.
321 See Dorf, supra note 52, at 232.
322 See COLEMAN, supra note 319, at 42.
323 Id.
bodies of law as interrelated and interconnected is to “explain how the modes of practical reasoning and substantive principle realized in each part of the law express fundamentally or unavoidably (perhaps even necessarily) unique features of that part.” Indeed, applying substantive principles in home-centric doctrines involving smut, guns, soldiers, searches, and self-incrimination gives scholars and jurists a sense of equilibrium that arguably justifies an extension to takings. As Coleman explains in consilience theory:

The basic point is simply that a good explanation can show how various parts of the whole differ from one another in some systematic or principled way, and how their doing so contributes to the coherence of the whole. In the limiting case, such an explanation might demonstrate that different parts of the whole are necessarily distinct, and that the principles or concepts involved in each are unique. Indeed, the “norm of consilience tells us only that a theory that explains” Second Amendment law “in terms of a given set of principles is better to the extent that those principles can also explain other practices” such as Takings Clause law. Thus, “the theory contributes to a more comprehensive understanding of the whole.”

C. Harmony

Several questions emerge after answering why the Court’s Bill of Rights jurisprudence fails to provide equivalent protections to homes in takings and why the Court, as a matter of coherence theory, should actively carve out a takings doctrine that specially protects homes. The logical next step is to ask how should the Court construct a homebound pronouncement that brings the Court’s takings jurisprudence into harmony with its counterparts. This is no easy task, because while a “man’s home may be his castle . . . that does not keep the Government from taking it” under the prevailing takings doctrine. A “general limitation [on taking homes] has not developed.” Indeed, it seems “anomalous” that “some explicit protection to family homes from government taking[s]” has not developed. While the Takings Clause “prohibits the taking of any home (or other private property) without just compensation,” it does not, in any real sense, offer special protections to homes.

As some scholars have noted, “one might expect to find an implied limitation on the eminent domain power” that protects a “special class of

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324 Id. at 42–43.
325 Id. at 53 n.4.
326 Id. at 43.
327 Id.
329 Radin, supra note 1, at 1006.
330 Id.
331 Zick, supra note 43, at 539.
property like a family home” from a taking “unless the government shows a “compelling state interest” and that [the] taking . . . is the “least intrusive alternative.” This is, in other words, an argument for strict scrutiny where homes are at stake. In the Court’s *Kelo* decision, Justice Kennedy along with the three dissenting Justices, raised the prospect of the Court imposing heightened scrutiny to takings by peering into the motives behind government takings for economic development purposes.

As Justice Kennedy noted, the majority opinion does not “foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings.” Thus, it is plausible that the Takings Clause could be brought in line with its cousin home-centric provisions by relying upon a more stringent standard of review or simply heightened review where homes are threatened by condemnation. Admittedly, “[e]ven if the Court began applying heightened scrutiny” as Justice Kennedy suggested, “it is far from certain that homes would receive any special protection.” Some scholars have questioned *Kelo* critics, noting that many “have not clearly articulated a textually grounded constitutional rationale that justifies specifically protecting homes from condemnation.”

There are, nonetheless, several tweaks that could be made to the Court’s prevailing takings doctrine, including all three veins—eminent domain, regulatory, and exactions—to carve out protections to homes under the Takings Clause, thereby bringing congruence across the first half of the Bill of Rights. A special limitation to taking homes may offer broad special safety to the historical targeting of homes by local governments. The root of this Article’s extension of special protections to homes in the takings context lies in what Barton Thompson coins as the “consequential fit” in takings; that is, the Court’s scrutiny of the “relationship between the actions or status of a property owner and the burden imposed on the property owner by the challenged regulation.”

Indeed, Thompson is referring to the Court’s exactions doctrine born from *Nollan* and *Dolan*, which offers the Court the doctrinal teeth to “sink . . . into the meaty and meaningful question of whether particular property owners, rather than society more broadly, should bear the cost of public goods and services.” The concern, as discussed above, is that such doctrinal teeth invites “allusions” to *Lochner*. Yet, this concern is overstated, since the Court does not invalidate government exercises of police power where the effect is price controls on

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332 Radin, *supra* note 1, at 1005–06.
334 Id.
335 Sprankling, *supra* note 27, at 120.
336 Id.
337 See *Fee, supra* note 27, at 795–96.
338 Thompson, *supra* note 221, at 1262.
339 Id.
340 Id.
property. Rather, the Court has remained steadfast with its approach to actions that impact land development or environmental regulations. Thus, one way to conceptualize a home-centric Takings Clause in harmony with the rest of the Bill of Rights is to find a happy-medium doctrine amidst the dizzying array of available takings doctrines to limit regulations that affect homes or require greater than fair market value in compensation for the taking.

1. Means-End Public Use Inquiry

One such alteration to takings doctrine would be for the Court, in limited circumstances, to embrace *Lochner*-like searching scrutiny by applying its exactions tests as a special doctrine solely for takings that expropriate title or affect the economic value of core property interests, such as homes. The exactions heightened scrutiny test would be applied only where the economic value of a core property interest, such as homeownership, is diminished, destroyed, or expropriated by the governmental action. In other words, where homes are subject to a taking, the Court’s exactions heightened scrutiny tests would “carry over to other portions of the takings clause,” including eminent domain and regulatory taking to create a special homebound limitation under the Takings Clause. This would give rise to the Court adopting and applying a special means-end test as a homebound limitation doctrine.

Indeed, adopting a special limitation for taking homes requires the Court to abandon, in limited circumstances, its post-*Lochner* deferential standard of review and, instead, requires the government to connect the means for which it achieves the end when taking homes. Richard Epstein and Nicole Garnett have raised the prospect of exactions doctrine seeping into public use doctrine. This would fit with the narrative that the Court, as a matter of concordance and coherence with its other homebound amendments, desert post-*Lochner* deference by abandoning rational basis and instead mandating governments show a rational connection between the means of condemning homes and the public use end. Such a test would require a showing that the taking of homes is “reasonably necessary” to advance the public purpose proposed, such as economic development.

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344 Epstein, supra note 342, at 491–92.
345 Garnett, supra note 343, at 938.
346 Id. at 939.
As with most exactions inquiries, this is a difficult heightened standard for governments to meet. It requires extensive studies and data, including factual evidence, to show direct and rational connections between the condemnation of homes and the ultimate public purpose. Drawing upon public use challenges by homeowners might offer a more “narrowly focused and judicially manageable inquiry” in takings involving houses.\(^3^{47}\) If the Court had given the Nollan’s bungalow searching judicial protection, then perhaps the cross-pollination argument of exaction jurisprudence into public use to provide a homebound limitation would be strengthened. Even under the Court’s regulatory takings doctrine, it would seem that “courts would protect one’s home to a far greater extent than one’s commercial plans, even if the result, in purely monetary terms, seems irrational.”\(^3^{48}\) Some scholars have raised the broader normative point that where property interests in dispute are “personal” or give rise to “personhood,” there should be available a “prima facie case that [such a] right should be protected to some extent against invasion by government.”\(^3^{49}\) Indeed, the Court’s exactions doctrine is perhaps the most potent area of takings that could give rise to special homestead protections.

For example, the Court’s longstanding deferential treatment to its public use inquiry from Berman to Kelo would require governments to connect the “means by which it acquires land to the particular purpose” when condemning homes.\(^3^{50}\) Indeed, the Supreme Court would “put the government to its proof—requiring a demonstrated connection between” the taking of homes and the specific purpose used to justify the taking.\(^3^{51}\)

2. Penn Central Ad Hoc Test

Under a normative homebound takings doctrine, the Court’s Penn Central ad hoc balancing test would place the burden on the government, rather than the challenger, to show the regulation did not affect the investment-backed expectations of the homeowner. Indeed, had Penn Central been a homeowner, then the “character” of the governmental action would be given searching scrutiny by the Court. Perhaps more important would be the investment-backed expectations of the home. Homeowners, unlike developers, do not necessarily view their immovable structure as a strong fungible asset, because most Americans are single-family homeowners and rarely own more than one home.\(^3^{52}\) Thus, the investment-backed expectation would arguably exceed that
of the typical developer-landowner. Regulations that impede on the economic value of the home in even the slightest of cases should be construed as enjoying special protection from the regulation in dispute, whether invalidation or compensation formulas that offers more than fair market value.

One could conceive of a doctrine that limits the taking of homes by requiring greater compensation, particularly in tests such as *Penn Central.* Indeed, a “homeowner’s emotional attachment to her home merits special respect, either in the compensation formula or in some other appropriate way.” Given the Court’s focus on homes elsewhere in the Bill of Rights, it makes sense, then, for vigilance in protecting private dwellings. Not giving special preference for or protections to investors whose property is taken might make sense, but as for those homeowners “displaced from [their] homesteads], the matter seems different” because houses “are not merely fungible investments,” but rather they entail personhood—elements that cannot be quantified.

This would require a very different calculation of just compensation when considering seizing homes where personal history, loved ones, and people’s lives are intertwined in the fabric of the property. In other words, government would be required to engage in a “very different kind of calculus” when seeking to condemn a home by giving a “bonus above fair market value in setting the rate of just compensation.” While investors could potentially abuse this “bonus,” it is still an arguably necessary recalculation of the traditional just compensation rate because homeowners assets are not fungible, but instead involve elements of personhood unlikely to be considered in a typical fair market valuation. A typical homeowner values his property very differently than the market, and thus the market value does not “compensate landowners completely.”

In other words, the government simply cannot capture person’s interests in memories, community, friends, family, stability, and comfort into fair market value, because these “elements are far more valuable than the marketable elements of property.” These considerations are sharply different than considerations of a business owner’s fair market value when facing condemnation, and these differences impact appraisals. One could imagine

**Footnotes**

354 See id.
355 See id. at 1776.
356 *Id.*; see Radin, *supra* note 1, at 1006.
358 *Id.*
359 See id.
360 See Fee, *supra* note 27, at 790.
362 See Fee, *supra* note 27, at 791.
363 *See, e.g., id.* at 793.

the government being required to pay an additional “bonus” or fee when condemning homes to mitigate any hint of unfairness or inefficiency in *Penn Central* challenges that show some governmental interference with investment-backed expectations.  

3. Less than All Economically Viable Use

The Court’s *Lucas* test, likewise, would be strengthened by either invalidating a regulation altogether or requiring above-market compensation when the regulation has reduced the market value of the home by twenty-five percent (or some other decisional percentage), instead of the constitutional baseline of “all economically viable use” of the home. In other words, homes would enjoy a test that would invalidate a regulation or require above market compensation where the regulation deprived the homeowner of less than all economically viable use of the property, while all other forms of private property would be subject to the traditional test of all economically viable use. The *Lucas* case, in and of itself, presented a missed opportunity to embark on this kind of test, but Justice Blackmun’s dissent offers a homebound roadmap.

David Lucas was seeking a permit to build single-family homes on his undeveloped land. Justice Blackmun’s dissent engages with the trial court record, noting that the appraised value of Lucas’s undeveloped land was determined “based on the fact that the ‘highest and best use’” was “luxury” single-family detached homes. This suggested the value was determined only based on its best use, and anything less than the best use rendered the undeveloped land valueless. Further, Justice Blackmun chastised the majority for disposing of a doctrine that looks at each case and its particular circumstances to determine whether a regulation renders the need for just compensation to a property owner. Of course, a less than all economically viable use test may threaten such a home-centric claim because local

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365 There are states that have enacted greater protections to property interests affected by regulatory takings, some of which are specifically carved out for residential property or homeowners. *See* TEX. GOV’T CODE ANN. § 2007.002(B)(ii) (West 2017) (legislation permitting property owners to attack governmental action that causes “a reduction of at least 25 percent in the market value of the affected private real property”); *see also* ARIZ. REV. STAT. ANN. § 12-1134(A)–(B)(1) (2018) (legislation noting that property owners are entitled to just compensation when regulation “reduces the fair market value of the property”); OR. REV. STAT. ANN. § 195.305(1) (West 2018) (legislation providing that “[i]f a public entity enacts one or more land use regulations that restrict the residential use of private real property . . . and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation”).
367 *Id.* at 1044 (Blackmun, J., dissenting).
368 *Id.*
369 *Id.* at 1047.
governments could, conceivably, simply argue that the regulation is nothing more than exercise of their police power untethered to a takings claim.

Notably, Justice Stevens’s dissent raises the prospect that Lucas may not have even met a “temporary takings” claim entitled to just compensation because it is unclear when Lucas planned to build and to what extent the statute “temporarily” frustrated his building plans. Justice Stevens notes that under the majority’s per se rule, Lucas would lose nearly all his land value if—say 95%—were deprived, whereas a similarly situated landowner would be entitled to just compensation if 100% were deprived. It would seem that where homes are in dispute, the opposite would be true. The home would be elevated above all other property interests. A regulation that diminishes 100% or less of value of the home would require just compensation for the homeowner, whereas commercial or industrial property would be subject to the traditional per se test of all economically viable use.

4. Temporary Physical Invasion

Likewise, the Court’s Loretto test would also be stricter where the challenger is a homeowner. For example, it would be enough for the homeowner to mount a challenge under a home-centric regulatory takings challenge when the “character of the governmental action” is a temporary, rather than permanent, physical occupation or invasion of the home, regardless of the public purpose or benefit of the regulation. Broadening the scope of the Loretto test is important for purposes of conceptualizing a harmonious and congruent home-centric Bill of Rights—it offers seamless thematic and doctrinal associations across adjoining and non-adjoining Bill of Rights doctrines that protect the home. Historically, the Court has only entertained permanent physical occupations as subject to the Takings Clause. However, the Court’s lackluster reasoning in Loretto (why permanent occupation rather than temporary invasion?) left the door open for the Court to entertain challenges where the governmental action temporarily invades or occupies the home.

5. Class of One Homeowner Protections

Recall Carolene Products. Footnote four suggested that discrete and insular groups may enjoy a “more searching judicial inquiry” or “exacting judicial scrutiny” than economic regulations and social legislation. This approach would offer strict scrutiny to fundamental rights, but leave economic and social

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370 Id. at 1061–62 (Stevens, J., dissenting).
371 See id. at 1064.
373 See supra Part III.
374 See Loretto, 458 U.S. at 426.
To effectively bring the home into the ambit of the homebound pronouncements made regarding smut, guns, soldiers, searches, and self-incrimination, the Court would need to remove itself from the ghost of post-Lochner era deference. One way to do this is to entertain the Equal Protection Clause as a vehicle to allow the Court to engage in searching inquiries of a discrete and insular group, such as homeowners. Justice Thomas, in his Kelo dissent, likewise noted that “intrusive judicial review” was necessary to protect “discrete and insular minorities” from takings. One might argue that this implied that minority homeowners, specifically, were threatened by a deferential takings standard, since they are traditionally a politically underrepresented group. Thus, governments will be incentivized to target minority homeowners because such takings would be the path of least resistance. Some scholars have called for eminent domain that seizes homes from low-income people as impermissible due to inadequate representation of minority groups in the political process. This would arguably mitigate the number of poor people forced to lose their homes “simply because they are poor.”

The Court’s ruling in Village of Willowbrook v. Olech perhaps provides a strong doctrinal candidate for a homebound limitation in takings, or at the very least, a cross-pollinated example of finding greater protections from within constitutional standards. There, the Court held that homeowners were permitted to sue under Equal Protection as a “class of one” in the context of zoning. However, some argued that such an argument could be used in the eminent domain context. If a group of homeowners, as opposed to other landowners, were singled out for condemnation, then it is possible that a homeowner could “bring suit to challenge the arbitrariness of the decision to take the property” in violation of Equal Protection. This argument is predicated on Equal Protection and enforced by Section 1983 causes of action that allege government agencies and officers intentionally treated homeowners differently than other similarly situated landowners. Such an argument is pronounced when race is considered.

376 See id. at 152.
379 Id. at 6.
381 Olech, 528 U.S. at 564.
382 Blackman, supra note 377, at 700.
383 Id. at 727.
384 Id. at 730.
For example, “if all homeowners in a group targeted for eminent domain were black,” and similarly situated landowners not threatened by condemnation were white, then a discrete and insular minority group would essentially be treated differently in violation of Equal Protection. The essence of the “class of one” theory is that it does not ask whether eminent domain is “necessary to achieve a certain public purpose, but rather scrutinizes the decision to take the particular plot of property.” However, it is important to note here that such a homebound protection exists outside the Takings Clause, since a “class of one” theory has only been applied under Equal Protection challenges. Indeed, the Takings Clause protects property rights and does not search for or find discrimination. The Takings Clause in and of itself, therefore, is unlikely to be the venue for remedying discrimination against minority homeowners. Nonetheless, given the nature of the doctrinalism used by the Court in its home-centric doctrines involving smut or soldiers, the “class of one” theory may offer a legitimate homebound limitation in takings under Equal Protection.

V. CONCLUSION

This Article explored the fundamental puzzle of the Bill of Rights’ distinctive textual and doctrinal protections to the home. Indeed, the Court’s jurisprudence involving smut, guns, soldiers, searches, and self-incrimination extends protections to the home, but inexplicably does not in takings. The reason, it seems, is that the former doctrines have proven immune to post-Lochner era judicial deference to economic regulation, largely as a result of the Court acknowledging those protections as fundamental, whether enumerated or unenumerated, particularly privacy protections. Yet, the Court can bring harmony to the homebound Bill of Rights by, among other proposals, adjusting several of its public use and regulatory takings tests.

The importance of connecting all the homebound dots and then reorienting all the pieces of the puzzle cannot be overstated. The Court’s home-centric doctrines are mostly atextual. Doctrinalism has pushed the Court’s Justices, whether liberal or conservative, to adhere to a purposivist or precedent-based interpretive methodology where homes are central to a dispute, even if the home is not textually explicit in a particular Amendment. What we find by applying an interpretive methodology of doctrinalism to the Takings Clause is clarity, coherence, and consistency in protections to the home. This extension of the home-centric doctrinal thread to the Takings Clause offers scholars and jurists a theoretical justification for homebound coherence across the Bill of Rights.

385 Id. (emphasis omitted).
386 Id. at 734 (emphasis omitted).
387 See id. at 713.
Police Shootings: Is Accountability the Enemy of Prevention?

BARBARA E. ARMACOST

Police officers shoot an unarmed man or woman. The victim’s family and community cry out for someone to be held accountable. In minority communities, where a disproportionate number of officer-involved shootings occur, residents suspect that racial animus and stereotypical assumptions about “dangerous black men” played a part. Citizens seek accountability by filing lawsuits and demanding criminal prosecutions. They are usually disappointed: the majority of police-involved shootings are deemed “justified” by police investigators and courts, and no criminal charges are brought. If so, this is the end of the inquiry under current legal standards and there is no accountability. There is also no legal reason to ask why the shooting occurred and how it could have been prevented. This Article argues that the current accountability paradigm is hindering genuine progress in decreasing the number of police-involved shootings, including those motivated by racism. We need to look beyond the limited time frame embraced by the current legal standard and view police-involved shootings as organizational accidents. Borrowing lessons learned from the aviation and healthcare fields, this Article urges a prevention-first approach that applies systemic analysis to what are systems problems. In these sectors, investigations of tragic accidents employ Sentinel Event Review, a systems-oriented strategy that looks back to discover all the factors that contributed to the event and looks forward to identify systemic reforms that could mitigate the chance of recurrence. The goal is to create systemic barriers that make it more difficult for sharp-end actors to err or misbehave. I am not arguing that individual police officers should escape responsibility for their actions. But our current relentless focus on accountability—while an understandable human reaction—has become the enemy of prevention in the very communities that need it most.

* Professor of Law, University of Virginia School of Law. For helpful suggestions on early drafts, I thank participants of the 2018 Criminal Justice Roundtable at the University of Richmond Law School, and participants at a faculty workshop at the University of Virginia School of Law. I also thank students in my 2018 Advanced Issues in Criminal Justice seminar, my colleague and co-teacher, Anne Coughlin, and my colleague Rachel Harmon for crucial insights. I thank the stellar research librarians at UVA Law School and my editor, colleague, and friend Dr. Amy L. Sherman for her invaluable editorial contributions. Any remaining errors are mine.
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I. INTRODUCTION

Societal outrage over the death of civilians at the hands of police may be near an all-time high. The relentless litany of tragic deaths—Stephon Clark,1

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Eric Logan, Justine Ruszczyk Damond, Laquan McDonald, Eric Garner, Freddie Gray, Sandra Bland, Philando Castile, Tamir Rice, Alton Sterling, Michael Brown, Trayvon Martin, and others named and unnamed—has provoked street protests and recurring calls for prosecutorial intervention. Families, neighbors, and communities want police officers to explain why they found it necessary to use deadly force. Society looks to prosecutions and civil damages actions to provide accountability by unearthing the truth about the circumstances of the shooting, imposing sanctions for wrongdoing, and deterring any misconduct that may have led to the incident. People are dead and we thirst for justice. “Officers must be held accountable,” we cry. “This must never be allowed to happen again.”

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And yet it does happen again. Multiple factors contribute to this, perhaps predominant among them, ongoing structural racism. 13 Unarmed African-American individuals are 3.5 times more likely to be shot by police than unarmed white persons. 14 Efforts to hold individual officers directly accountable for their racially motivated actions, though, may be the enemy of prevention. Without in any way minimizing the reality of racism, we need to address police shootings from a different angle. This Article argues that the current accountability paradigm—targeting the officer who pulled the trigger—is actually hindering genuine progress in decreasing the numbers of these tragedies, including those motivated by racism.

We need to understand police shootings (and other acts of excessive force that result in the death of unarmed civilians) as tragic organizational accidents. We need a shift towards a prevention-first approach that applies systemic analysis to what are systems problems.

The current accountability paradigm is fundamentally flawed for three related reasons. First, the idea that successful prosecutions and lawsuits after a police-involved shooting will prevent future tragedies relies on several related, but fundamentally flawed assumptions: 15 it assumes that police shootings result solely (or primarily) from individual misconduct by the person who pulled the trigger, that police reform should focus on changing the behavior of these officers, and that lawsuits against individual officers will result in the kinds of changes that will reduce the incidence of police violence. 16

In fact, the killing of unarmed civilians by police results from multiple causes, both human and systemic, that set the stage for the tragic moment when the shot was fired. Our current focus on only the immediate causer—and the narrow time frame that defines his actions—ignores this broader set of causal factors. This is not to say that the shooter is not blameworthy. But the single-

15 Many scholars, including myself, have argued that—even apart from the systemic arguments I am making in this Article—criminal prosecutions and civil damages actions are largely ineffective in regulating police misconduct. See, e.g., Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 GEO. WASH. L. REV. 453, 464–77 (2004); Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 COLUM. L. REV. 247, 285–86 (1988) (arguing the deterrent effect of civil damage payments by municipalities on the conduct of individual officers remains highly questionable); Samuel Walker, The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context, 22 ST. LOUIS U. PUB. L. REV. 3, 18–19 (2003). These arguments have been thoroughly and exhaustively explored and are widely accepted by scholars. I do not rehash them here.
minded focus on the officer who discharged his weapon leaves the officer’s colleagues embedded in the same organization that led to his mistakes. It misses the opportunity to address the systemic and organizational features that make it possible (or probable) that individual officers will continue to make mistakes or misbehave.

The second reason the accountability paradigm is flawed is that its tools—civil and criminal actions and internal police department investigations—ask the narrow question of whether the shooting was “justified” or “reasonable” at the precise moment the shot was taken.17 When a shooting is deemed justified, all other examination of the tragedy ceases. This adds to the tragedy, since further examination could illuminate its root causes and point us to systemic reforms that could reduce the incidence of future officer-involved shootings.

It is easy to miss the perverse implications of this analysis. The very word “justified” implicitly assumes that this shooting, and shootings like it, are unavoidable or even desirable. By applying a case-by-case inquiry, however, the analysis never squarely asks the question whether these kinds of shootings—shootings under these or similar circumstances—are reasonable or societally justified. In addition, the terms “reasonable” and “justified” deeply fail to express adequately the human values at stake: every loss of human life is regrettable and every police shooting a tragedy, even if—at the moment the shot was taken—the police officer reasonably believed it was necessary.

Third, the current accountability paradigm is inadequate because it applies a single-dimension analysis to an entity—a police department—which organizational management experts would define as a “complex” and “tightly coupled” organization.18 Such organizations by their nature are highly susceptible to systems failure.19 Yet present investigations do not apply systems-oriented analysis and review. This in turn prevents us from identifying the correspondingly wider range of potential preventative measures that could (or must) be taken to prevent similar tragic shootings in the future.

Many other actors may have contributed to the circumstances or increased the risks that led to the fatal moment; for example, the dispatcher who sent the officer to the scene, the supervisors who wrote the use-of-force policies, the managers who trained on those policies, the magistrate who signed an arrest warrant, or the legislature that set the terms of the officer’s arrest authority. Non-human factors, such as overtime or moon-lighting policies that promote overwork, unenforced discipline rules, patterns of repeated risk-taking behavior, pressure to effectuate quotas of arrests or stops, stop-and-frisk policies, laws that define crimes and regulate police powers, and cultural patterns that promote over-aggressive policing, may also have contributed to the officer’s actions.

18 See infra Part II.B for a discussion of police departments as complex systems.
If the goal is not only punishment and accountability for individual actions, but also prevention of future similar harm-causing incidents, then it is essential that these other causes be part of the analysis. We must move beyond the current strategy of looking backward to identify errors to a forward-looking approach that employs the kind of systems-oriented review that is currently not available as part of the adversarial process of criminal prosecution and civil litigation.  

Sadly, accountability review fails even if it succeeds in holding the shooter responsible. Consider the recent prosecution of Officer Van Dyke, who was convicted of second-degree murder and sixteen counts of aggravated battery in the shooting death of Laquan McDonald. The prosecutor called the verdict “a satisfying victory” and McDonald’s family called it “justice.” The African-American community filled the streets to celebrate the first guilty verdict in fifty years in connection with a Chicago police-involved shooting. Officer Van Dyke will spend at least ten years in prison. But police leaders say the sixteen shots that killed Laquan McDonald were “absolutely justified,” that politicians “have used this case . . . to really kick around the Chicago Police Department.” Van Dyke’s attorney, Daniel Herbert, warned that the verdict will make police officers into “security guards” who will be unwilling to “get out of the car to confront somebody.” The community is overjoyed with the verdict while the Fraternal Order of Police calls it a “sham” trial, and Herbert echoed it as a “sad day for law enforcement.” Will anything change as the parties talk past each other? No one seems to be asking why this happened.

To outsiders, there may seem to be a variety of responses giving voice to community outrage. But as I will argue, none of these as currently structured—internal investigations, civilian reviews, mayoral task forces—are sufficiently reliable, thorough, independent, or systemic. Moreover, because all focus on

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20 The Supreme Court has foreclosed forward-looking, equitable remedies that have been useful in other contexts, including school desegregation and prison reform. See City of L.A. v. Lyons, 461 U.S. 95, 112 (1982). Entity lawsuits, which are designed to hold the entity liable for the immediate causer’s actions, do not produce the kind of systems-oriented review I am advocating for here. Pattern or practice lawsuits against municipalities and 42 U.S.C. § 14141 lawsuits are also limited in addressing systemic issues involving additional actors and latent causes.

21 Swanson, supra note 4.

22 Id.

23 Id.

24 See id.


27 Blumberg, supra note 25; Swanson, supra note 4.
accountability, the queries that could raise reforms advancing prevention are absent.28

Given racial realities, it is tempting to say, “We know why this happened: a white police officer, motivated by racial animus and stereotypical assumptions about dangerous black men, shot a black man—again.” Even when this account is partially true, individual racism is not a sufficient causal story if the goal is to prevent the next shooting. We need to be asking a whole series of deeper “why” questions that go behind the racial explanation to uncover the systemic factors that enabled the officer’s actions, including factors that facilitated the officer’s race-motivated actions.

In short, what is needed instead is a paradigm focused primarily on prevention. For it, we can borrow from lessons learned in the aviation and healthcare fields. In these sectors, investigations of tragic accidents employ Sentinel Event Review (SER), a systems-oriented approach utilizing analytic tools, like root cause analysis, to both look back to understand all the factors contributing to the event and look forward towards the kinds of systemic

reforms that could mitigate the chances of recurrence. In aviation, SER is credited with dramatically increasing safety: there has been no major airline accident involving an American commercial airplane since 2009. In the healthcare field, systems-oriented review has led to a drastic reduction of certain kinds of accidents and errors because of its focus on systems solutions rather than on reducing human error.

In Part II, drawing on the seminal work of Charles Perrow, I argue that we must see police shootings not only as human-caused actions but as “systems accidents,” meaning that they involve unanticipated interaction of multiple failures in a complex system. I show how police departments are the kinds of complex, “tightly bound” organizations that Perrow shows are especially susceptible to system failures.

Perrow advanced our understanding of the kinds of organizations most susceptible to system failure but did not offer strategies for how to implement post-failure investigations in ways that could prevent future tragedies. This work was pioneered by James Reason. He applied an early version of root cause analysis (RCA), which has helped investigators understand the latent conditions underlying such system failures. I discuss Reason’s work in Part III, exploring its application to aviation accidents and medical mistakes. This Part ends with a discussion of early applications of root cause analysis (systems review) to wrongful convictions and other criminal justice errors.

In Part IV, in an effort to make the concept of RCA more three-dimensional, I apply this analytical tool to the tragic shooting of twelve-year-old Tamir Rice

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32 See generally PERROW, supra note 19.
33 James Reason was a Professor of Psychology at the University of Manchester starting in 1977, where he continues as Professor Emeritus. Reason has published multiple important articles and books on human error and organizational processes, including most importantly, HUMAN ERROR (1990) [hereinafter REASON, HUMAN ERROR], MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS (1997) [hereinafter REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS], and ORGANIZATIONAL ACCIDENTS REVISITED (2016). For a general description of Reason’s work, see James T. Reason, SAFETYLEADERS, http://safetyleaders.org/superpanel/superpanel_james_reason.html [https://perma.cc/35FM-JLCX] [hereinafter Reason, SAFETYLEADERS].
by an officer of the Cleveland Division of Police in November 2014.\footnote{See Heisig, supra note 9.} Here I demonstrate how the insights from this kind of structured analysis can lead to systems solutions. Full success, though, rests on applying RCA not only to individual incidents but also to large-scale data records that can help us find patterns of mistakes across multiple, similar incidents.

In Part V, I supply an overview of the promise of systems-oriented review in policing, including the use of data-informed analysis to look for repeated causal patterns in police shootings.

Finally, Part VI briefly concludes.

II. POLICE VIOLENCE AS AN ORGANIZATIONAL PROBLEM

Police-involved shootings almost always give rise to investigations or litigation targeting the individual officer who fired the shots. This seems like an obvious result. It was, after all, this officer who decided to approach or confront the suspect. It was he who determined that deadly force was necessary. He is the one who raised his gun and pulled the trigger. This way of thinking reflects the way we generally think about issues of causation: we tend to look at the most proximate causer.

Lawsuits and prosecutions against the person who did the shooting also express a legitimate demand that justice be done. Police officers’ power to take a human life is an awesome and terrible power. When that power is applied against an unarmed person or against someone who arguably posed no risk to police, there is understandable grief, sorrow, and moral outrage. Beyond the tragedy of a lost life, the suspect’s family and community may believe that police acted carelessly or even maliciously. In many communities there is a history of police violence or illegality by police officers, particularly against racial or cultural minorities.\footnote{See, e.g., U.S. Dep’t of Justice, Civil Rights Div., Investigation of the Baltimore City Police Department 16 (2016), https://assets.documentcloud.org/documents/3009376/BPD-Findings-Report-FINAL.pdf [https://perma.cc/2NXZ-F3TT] (outlining, among other incidents, a history of racially motivated civil rights violations by the Baltimore Police).} There is suspicion that police, investigators, and governmental officials will not tell the truth about what really happened. Communities rely on legal actions to get the real story out, to make sure that someone is held accountable, to make sure that justice is done for the victim and his family, to get bad or dangerous cops off the streets—all in hopes that lawsuits will keep police from taking other innocent lives in the future.\footnote{See generally Sidney Dekker, Just Culture 90–91 (2d ed. 2012) (describing the role of lawsuits).}

Enforcing individual culpability reflects Western culture’s deep commitment to the idea that human beings have agency and act voluntarily. Our entire criminal justice system is premised on the belief that human beings can justifiably be held accountable for their bad behavior. Even though we know...
that criminal conduct is not entirely “voluntary” in a deeper sense—poverty, past abuse, mental illness and other factors contribute to the likelihood of criminal conduct—criminal sanctions fall on the voluntary acts of the final human actor, the last “cause” in the chain.37 This way of thinking also reflects a deep human need to find someone to blame for harmful or tragic circumstances. The need to identify causes is fundamental to human nature; not being able to find a cause is deeply disturbing because it signals a loss of control:38

Without a cause, there is nothing to fix. And, with nothing to fix, things could go terribly, randomly wrong again—with us on the receiving end this time. Having a criminal justice system deliver us stories that clearly carve out the disordered from order, that excise evil from good, deviant from normal, is about creating some of the order that was lost in the disruption of the bad event.39

Ironically, the sense of order we get from blaming individual bad performance—the belief that blaming will bring change—is an illusion when it comes to harms involving complex organizations. Several decades of research on “organizational accidents” demonstrates that so-called “active causes” by “sharp end” actors—pilots, airline mechanics, surgeons, equipment operators—are only a small part of the causal story.40 Sharp end actors inherit situations and circumstances with latent failures and errors inherent in them.41 It is the combination of active errors and latent weaknesses that predominantly explains harmful results in complex systems.42 Sadly, addressing only active causes, through lawsuits and prosecutions against individual actors, does not ultimately result in a reduction in harmful accidents. If, as I argue below, policing involves a complex system within the meaning of the organizational accident literature, the current reliance on lawsuits and prosecutions in police-involved shootings is at best inadequate, and at worst counterproductive.


38 DEKKER, supra note 36, at 151 (citing FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS: OR HOW TO PHILOSOPHIZE WITH A HAMMER (1889)).

39 Id. at 152.


41 Id. at 83.

42 Id. at 84.
A. Complexity and Organizational Accidents

In 1979, reactor No. 2 of the Three Mile Island Nuclear Generating Station near Harrisburg, Pennsylvania partially melted down, causing the most serious radiation leak in the history of the U.S. commercial power plant industry. The accident resulted in multiple investigations, commissions, books, articles, and lawsuits all seeking to understand what went wrong. The accident and the desire to identify its causes inspired Charles Perrow’s seminal book with the counterintuitive title “Normal Accidents.” Perrow argued that where high-risk technologies are involved, some accidents are “inevitable,” no matter how effective are conventional safety devices. This has to do with the way failures in the system can interact and the way systems are tied together. Importantly, he argues, this “interactive complexity” is a characteristic of the system, not the operator.

The key to safety in complex systems is to focus on the “properties of systems themselves, rather than on the errors that owners, designers, and operators make in running them.” Perrow faulted conventional accident explanations for focusing solely on such causes as “operator error; faulty design or equipment; lack of attention to safety features; lack of operating experience; inadequately trained persons; failure to use advanced technology; [or] systems that are too big, underfinanced, or poorly run.” He argued that this myopic attention to individual failures or weaknesses misses important insights about the way risks interact and the way complex, nonlinear systems function. As I explain more fully below, systems that are “complex” and “tightly coupled” rather than “linear” and “loosely coupled” are the most susceptible to systems accidents of the sort that occurred at Three Mile Island.

Additional catastrophes in the 1980s involving complex, technological operations brought increased attention to Perrow’s work on systems accidents, including a focus on human failures in such systems. Whereas fifty years ago

43 Perrow, supra note 19, at 15.
44 Id. at 16.
45 See generally id.
46 Id. at 3.
47 Id. at 4.
48 Id.
49 Perrow, supra note 19, at 63.
50 Id.
51 Id.
52 Incidents included the Bhopal methyl isocyanate tragedy of 1984, the Challenger and Chernobyl disasters of 1986, the capsise of the Herald of the Free Enterprise, the King’s Cross tube station fire in 1987, and the Piper Alpha oil platform explosion in 1988. Detailed analyses of these and other catastrophic accidents led to an increasing awareness that “latent errors” as opposed to active human errors “pose the greatest threat to the safety of a complex system.” See Reason, Human Error, supra note 33, at 173.
53 Theoretical and methodological developments in cognitive psychology also spurred interest in the study of human error. See id. at 50.
investigations of a major tragedy, such as a plane crash, would have ended by identifying the “proximal cause” at the “sharp end” of the causal chain, i.e., pilot error, today neither investigations nor organizational leaders would end there. Today it is understood that rather than being the “main instigators” of a harmful incident, operators (even those contributing their own mistakes) inherit system defects resulting from preexisting conditions such as poor design, faulty installation or maintenance, inadequate supervision, or bad management decisions.\textsuperscript{54} Thus even culpable operators add “the final garnish to a lethal brew whose ingredients have already been long in the cooking.”\textsuperscript{55} Moreover, the category of “human factors” encompasses much more than those associated with the “front-line operation of a system.”\textsuperscript{56} Increasingly, experts agree that attempts to discover and neutralize system defects may have a greater beneficial effect upon system safety than will localized efforts to minimize active errors.\textsuperscript{57}

The implications of this organizational literature for safety in policing are profound. The point is not that safety cannot be improved at the operator level, but that improving safety at that level will never solve the problem if latent defects and failures plague the entire system. While individual prosecutions and lawsuits are important for accomplishing other goals, they may be the wrong avenue for achieving what we all want the most: fewer police shootings.

B. Policing as a Complex System

According to Perrow, the kind of system that is most likely to have a systems accident is one that is complex (as opposed to linear) and tightly (as opposed to loosely) coupled.\textsuperscript{58} The first variable captures the relative interactiveness of the system: do its parts interact in a simple, linear fashion or do the parts serve multiple functions, interacting in a more complex way?\textsuperscript{59} Linear interactions overwhelmingly predominate in all systems; even the most complex systems comprise mostly linear, planned, visible interactions.\textsuperscript{60} Conversely, while all organizations have many parts that interact with each other, the key determinant of a complex system is whether these interactions are expected and obvious, or unexpected and hidden.\textsuperscript{61}

The consummate example of a linear system is manufacturing, specifically ordinary assembly-line production.\textsuperscript{62} The equipment in the production line is

\begin{itemize}
\item \textsuperscript{54} Id. at 173.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id. at 174.
\item \textsuperscript{57} Id. at 173.
\item \textsuperscript{58} See PERROW, supra note 19, at 4.
\item \textsuperscript{59} Id. at 78.
\item \textsuperscript{60} Id. at 75.
\item \textsuperscript{61} Id. Even the most linear systems will have at least one source of complex interactions: the environment in which the system operates. Id.
\item \textsuperscript{62} See id. at 86–87.
\end{itemize}
spread out and the steps are discrete and sequential.63 A failed component can easily be segregated.64 There are few unintended or unknown feedback loops in the process.65 Sources of information about the functioning of the system tend to be direct and straightforward.66 Personnel on a simple production line are usually generalists who can rotate, bid on various jobs, or fill in for other people.67 Another example of a linear system is a trade school, where classes are taken in sequence.68

By contrast, complex systems tend to have unexpected connections and interactions that were not intended or built into the system, and that operators could not fully anticipate or guard against.69 A nuclear power plant is a good example of a complex system.70 Unlike assembly line manufacturing, equipment in a complex system is tightly spaced and not linear.71 Components are not in a production sequence and they often have multiple modes of connection with other components.72 There are unfamiliar, sometimes “unintended feedback loops.”73 Information sources about how the system is functioning are often “indirect and inferential.”74 Operators and other personnel tend to be specialists, and there is very little substitutability among jobs.75

Another, somewhat different example of a complex system, and one more like a police department, is a university. Universities have multiple functions: classroom teaching, vocational training, research, public service, etc. These interact in unexpected, synergistic, creative, or disruptive ways. Consider, for example, what might happen if university administrators deny tenure to a popular teacher allegedly because her research did not measure up. The tenure denial might spark protests by students who highly value her classroom teaching. It might also engender insecurity among other untenured faculty, who worry that their research will be found wanting. In addition, imagine the teacher runs a public service program that is well-known and valued in the community. The mayor and other community leaders are up in arms that the program might be terminated. The local paper covers the story and some private donors threaten to withdraw their financial support for the university if the case is not

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63 See id.
64 See PERROW, supra note 19, at 86–87.
65 See id.
66 See id.
67 Id.
68 Id. at 93–94.
69 See id. at 78.
70 For a detailed description of the complex, nonlinear way in which the accident at Three Mile Island occurred, see PERROW, supra note 19, at 15–31.
71 See id. at 83.
72 Id. at 82–83.
73 Id. at 82.
74 Id. at 83.
75 Id. at 87.
reconsidered. The failure to tenure one teacher has produced a whole set of unexpected results and problems for university administrators.\textsuperscript{76}

Despite being complex, however, a university is “loosely” rather than “tightly” coupled. This is the second determining variable for the likelihood of systems accidents. “Tight coupling” is a mechanical term used by engineers, which means that there is no “slack or buffer or give between two items.”\textsuperscript{77} In other words, whatever happens in one automatically and directly affects what happens in the other.\textsuperscript{78}

Tightly coupled systems have certain characteristics that make them more susceptible to systems accidents.\textsuperscript{79} Because complex systems do not tolerate delay and must proceed in particular and invariant sequences, they are unable to handle failures and errors without serious consequences.\textsuperscript{80} Tightly coupled systems have very little flexibility.\textsuperscript{81} Their overall design permits only one way to reach the production goal. “Quantities must be precise; resources cannot be substituted for one another; wasted supplies may overload the process; failed equipment entails a shutdown because the temporary substitution of other equipment is not possible.”\textsuperscript{82} One of the most important differences between tightly and loosely coupled systems is the inability of the former to recover from failures.\textsuperscript{83} In loosely coupled systems there is a better chance that spur-of-the-moment fixes and substitutions can be found even if not planned ahead of time.\textsuperscript{84} By contrast, in complex systems buffers, redundancies and substitutions cannot be improvised but must be created in advance.\textsuperscript{85}

Returning to the university example, Perrow argues that while universities are complex, they are loosely rather than tightly coupled.\textsuperscript{86} In the case of the fired teacher, he says, there is ample slack (and time) to limit the impact of the negative tenure decision.\textsuperscript{87} For example, administrators can meet with students to hear their complaints and explain the reasons for the tenure decision. Students can be invited into the process of interviewing a new scholar for the department. Faculty can be given clear guidelines about future research requirements. Community members can be reassured that someone will take over the running of the public service program. Funders can be educated about the careful process

\textsuperscript{76} This example is drawn, with some adaptations, from \textsc{Perrow, supra} note 19, at 98–99.
\textsuperscript{77} \textit{Id.} at 90.
\textsuperscript{78} Sociologists and psychologists adopted the term in the mid-1970s to describe whether a particular remedial program was tightly (or only loosely) correlated with intended changes in the behavior of students. \textit{See id.}
\textsuperscript{79} \textit{See id.} at 94.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{See id.}
\textsuperscript{82} \textsc{Perrow, supra} note 19, at 94.
\textsuperscript{83} \textit{See id.} at 95.
\textsuperscript{84} \textit{See id.}
\textsuperscript{85} \textit{Id.} at 94–95.
\textsuperscript{86} \textit{Id.} at 98.
\textsuperscript{87} \textit{See id.} at 99.
followed in the tenure decision. These actions have the potential to prevent harmful fallout from a controversial tenure decision.

Applying these insights to law enforcement, it seems clear that policing is more like a university than it is like a linear manufacturing line. The policing context has a high level of interactive complexity. Police organizations have many goals and tasks; for example, investigating crimes, preventing crimes, promoting public safety, enforcing traffic laws, responding to citizen reports and complaints, conducting public welfare checks, leading educational programs in schools and other institutions, and taking mentally ill people into protective custody. In addition, policing priorities may be affected by city officials seeking to use law enforcement to raise money through increased ticket writing or by penalties or promotion metrics that reward aggressive policing.

These goals, actions and priorities intersect in complicated ways. Moreover, complexity arises whenever police officers face circumstances, citizen responses, or reactions by fellow officers that are unexpected or unanticipated. When a police officer stops a driver with a broken tail light, or knocks on a door to execute a search warrant, or answers a public welfare call, the officer cannot be certain of the circumstances that await him. A welfare check can lead to an investigation or arrest for illegal activity. An automobile stop for a minor offense can result in threatened or perceived force by a suspect, a fatal shooting, and riots in the surrounding community. Police responding to a call regarding a mentally ill person face unique uncertainties requiring unique skills. Multiple officers responding to an emergency may have difficulty communicating their intentions, coordinating their actions, or anticipating their interactions. That police have multiple, intersecting and sometimes conflicting goals and function in an uncertain, rapidly changing environment means that failures and mistakes take uncertain paths that are difficult to anticipate and often impossible to manage or control.

While policing is like a university in its complexity, it is unlike a university in that policing is a much more tightly coupled system, meaning that there is very little slack for correcting mistakes before they result in harm. Recall our

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88 On the other hand, consider the series of events that followed the forced resignation of a popular university president by a subgroup of the board of visitors of that institution. See Richard Pérez-Peña, Ousted Head of University Is Reinstated in Virginia, N.Y. TIMES (June 26, 2012), https://www.nytimes.com/2012/06/27/education/university-of-virginia-reinstates-ousted-president.html [https://perma.cc/RTS9-2MU5]. The resignation resulted in student and faculty protests and marches, a statement by the faculty senate decrying the actions and demanding the president’s reinstatement, a meeting of the full board of visitors, reactions by the state legislature that partially funds the school, weigh-in by the governor, eventual reinstatement of the president, and investigation of the governance of the university by the higher education accrediting body. Id. No one could have predicted this series of events! In certain circumstances, it seems, even relatively loosely coupled systems can sometimes suffer systems accidents. (I do not mean to suggest that the reinstatement of the University of Virginia’s president was itself a mistake.)

example of the teacher not granted tenure. While tight coupling occurs on a continuum, as a general matter, university administrators can anticipate fallout from a potentially unpopular decision, and they have time and opportunity to intervene against harmful consequences. By contrast, circumstances in the policing context tend to be fast-moving, uncertain, and unpredictable, making it very difficult to intervene once potentially hazardous events have been set in motion. Officers have little time to think and limited options to act in the heat of the moment. Whatever constructive actions police are able to take in such circumstances will depend upon reflex actions, training, and discipline rather than reasoned intervention to address the particular system breakdown at hand. These distinctions become vitally important when designing preventative measures to address harm-causing incidents in policing.90

Police face at least two “production pressures” that contribute to the tight coupling that characterizes law enforcement.91 The first is the pressure to “move on”; to finish each policing task quickly and proceed to the next. Police officers experience a constant pressure to triage their time, always wondering whether they should be answering another call or helping out their colleagues at another location, and worrying that they will be judged by their peers for taking too much time with any particular task. According to police scholar Lawrence Sherman, this results in a “dominant occupational culture” best described as “urgency,” the perceived need to finish each task quickly and resume “readiness to provide immediate assistance elsewhere to those who need it most.”92 The second production pressure is the necessity to “contain risk.”93 This pressure is created by the tight coupling between the behavior of non-compliant citizens and the potential risks such behavior poses to the officer and others.94 Both production pressures create incentives to move in quickly and to move in close.95 In turn, both of these actions increase the tightness of coupling in the social system by escalating the situation and reducing the possibilities for preventing harm.96

C. Accident Prevention in Complex Systems

That policing is a relatively complex and tightly coupled system means that it is especially susceptible to organizational or systems accidents.97 A systems

90 See infra Part II.C.
91 Sherman, supra note 89, at 436. By production pressure, I mean the pressure to complete the job of producing the product at issue. In policing the “product” is public safety—or more narrowly, responding to all challenges to public safety—rather than widgets.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
97 See Sherman, supra note 89, at 434.
accident “involve[s] the unanticipated interaction of multiple failures” in a complex system.98 While such an accident may have one active proximal cause—such as a pilot or air traffic controller whose error resulted in a plane crash—it has many other, latent causes that interacted in complex and unanticipated ways with the errors of the operator.99 In this way of thinking, the erring operator is usually best thought of not as an instigator of the accident but as an inheritor of preexisting system defects, such as faulty design, installation, maintenance, and management.100

Some latent defects are traceable to human error, but others are more difficult to attribute.101 Latent defects contribute to the potential of accidents by increasing the likelihood of active failures, for example, by increasing the potential for errors or violations, or by aggravating the consequences of unsafe acts.102 Importantly, these system defects were in place before the accident sequence began.103 They are weak spots whose accident-causing potential is generally kept in check.104 But these preexisting weaknesses can combine with external circumstances to bring about a catastrophic incident.105

The organizational accident literature leads to some important insights that should frame our thinking about solutions to accidents in complex systems, including policing. First, the tendency to identify as the sole or primary causer of an accident the proximal, active causer—usually a front-line operator—is woefully inadequate if the purpose is to prevent future accidents.106 Ironically, to the extent an accident resulted from the confluence of multiple factors that are unlikely to recur, a single-minded effort to prevent repetition of the same specific, active errors will do little to improve the safety of the system as a whole.107 Second, while it seems intuitive that it is easier to change human

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98 PERROW, supra note 19, at 70.
99 REASON, HUMAN ERROR, supra note 33, at 173.
100 Id. at 173–74.
101 See id. at 173.
102 REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS, supra note 33, at 11.
103 Id. at 12.
104 See id. at 11.
105 See id. at 9. James Reason dubbed this the “Swiss cheese” theory of accident. Id. Imagine that you have a package of ten slices of Swiss cheese in an even stack. Although each of the pieces of cheese has multiple holes in it, you cannot put your eye to any one of the holes in the first slice and see through to the other side. The holes in each slice are in different places. Now imagine that each slice is a subpart or component of a complex system that would need to fail for an accident to occur. The holes are weak spots that predispose that particular component to fail in some way. The only way that the accident will occur is if all the holes are lined up so that all of the potential failures occur at the same time. In other words, the accident likely resulted from the unique confluence of multiple necessary, but singly insufficient factors. See id.
106 See REASON, HUMAN ERROR, supra note 33, at 216.
107 Id. at 174.
beings than systems, scientific research suggests the opposite. While human error can be reduced to some extent by retraining, discipline, etc., it is inevitable that even the best-trained and most well-intentioned human beings will continue to make mistakes from time to time. Many sources of human error result from psychological factors such as inattention, mismanagement, forgetfulness, preoccupation, and anxiety, which are hard to control or eliminate. While we cannot completely eliminate human error, we can change the circumstances in which fallible human beings work, particularly the circumstances that increase the likelihood of operator error or aggravate the consequences of unsafe acts.

III. PREVENTING ORGANIZATIONAL ACCIDENTS

As noted in Part II, accident investigations in the past tended to focus almost entirely on human operator errors and equipment failures. A series of catastrophic accidents, however, led investigators to recognize that many of the underlying causes of these incidents were latent within the system long before the active errors occurred. This led to the growing realization that “attempts to discover and neutralise these latent failures [could] have a greater beneficial effect upon system safety than...localised efforts to minimise active errors.” In particular, investigators realized that attempting to weed out or remove so-called “accident prone” human actors or “bad apples” was not the most effective strategy for preventing accidents.

James Reason is one of the pioneers of this theory of human error and organizational processes. His error classification and models of systems breakdown laid the groundwork for putting these ideas into practice across multiple domains, including commercial aviation, nuclear power generation, process plants, railways, marine operations, financial services, and healthcare organizations. His insights provided the scholarly architecture for the

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108 REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS, supra note 33, at 129.
109 Id. at 129.
110 Id.
111 Id.
112 REASON, HUMAN ERROR, supra note 33, at 173. For a brief history of modern research on accidents and causation from the early 20th century into the 21st, demonstrating the move from single causes to multiple causes and from human causes to systems causes and nonblaming review, see generally THOMAS G.C. GRIFFIN ET AL., HUMAN FACTORS MODELS FOR AVIATION ACCIDENT ANALYSIS AND PREVENTION 26–56 (2015).
114 See generally Armacost, supra note 15 (criticizing the “bad apple” explanation for police misconduct); REASON, HUMAN ERROR, supra note 33 (examining human errors and the field of human error study); REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS, supra note 33 (discussing organizational accidents and how to manage the risks associated with them); REASON, ORGANIZATIONAL ACCIDENTS REVISITED, supra note 33
development of systemic accident reviews known as “sentinel event review” (SER) and “root cause analysis” (RCA).

A “sentinel event” is a “significant negative outcome that: [s]ignals underlying weaknesses in the system or process[,] [i]s likely the result of compound errors[,] and [m]ay provide, if properly analyzed and addressed, important keys to strengthening the system and preventing future adverse events or outcomes.” Sentinel event review often employs the tool of “root cause analysis” to identify what, how and why something happened, with the goal of preventing its recurrence.

RCA is designed to investigate and categorize the “root causes of events with safety, health, environmental, quality, reliability and production impacts.” The goal of RCA is to determine not only what and how an event happened, but also why it happened. Only by knowing the “why” can investigators identify “workable corrective measures that prevent future events of the type observed.” Identifying root causes requires the analyst to go behind the visible problem—usually the last causer—to identify first-level and second-level and third-level causes, i.e., causes that came before the most proximal, human causer. The overall goal of SER is to investigate significant, unexpected harm-causing events and to use the knowledge gained from the review to create barriers against future harm-causing errors.

(expanding upon developments in the field of organizational accidents). For a general description of Reason’s work, see Reason, SAFETYLEADERS, supra note 33.

As will be explained in more detail below, “root cause analysis,” which applies a linear investigative strategy in pursuit of just one cause, has been criticized as ineffective as a systems analysis tool. To the extent that RCA is applied in this narrow way, I agree with these criticisms; however, it can and often is employed much more broadly as one tool toward pursuit of systemic causes. In this Article, I assume the broader use of RCA. Risk management scholars and practitioners have created numerous frameworks for systems-oriented accident review, but most seem to trace their origins to some version of Reason’s framework.

See James J. Rooney & Lee N. Vanden Heuvel, Root Cause Analysis for Beginners, 37 QUALITY BASICS 45, 45 (2004). American Society for Quality (ASQ) is a global, professional association that promotes the use of techniques to improve organizational quality. About ASQ, AM. SOC’Y FOR QUALITY (Sept. 4, 2019), https://asq.org/about-asq [https://perma.cc/4CMZ-4ZN3]. It has over 80,000 members in 150 countries. Id. ASQ provides its members with certification, training, publications, conferences, and other services. Id.

Rooney & Vanden Heuvel, supra note 117, at 45.

Id. Note that a root cause is one over which management has control and for which there is a workable solution. Id. at 46.

See generally id.

Traditional RCA was sometimes understood to involve a purely linear investigative strategy designed to find a single root cause that was local enough to be mitigated by the investigating institution or organization. These assumptions about the nature of RCA have led to vigorous criticism by organizational management scholars and practitioners. As applied by systems-oriented risk managers, RCA must not be so limited. It is understood and expected that investigation of an accident involving a complex system will reveal multiple, nonlinear chains that lead to multiple “root causes.” In addition, while incident-specific RCA continues to define a root cause as one over which management has control—to ensure that the resulting action plan can actually be implemented—organizational management scholars embrace a broader causal analysis. Systems-oriented review is designed to identify not only incident-specific and institution-specific causes, but also systems-wide causes that may involve broader patterns that transcend organizational and institutional boundaries.

A. Lessons from Aviation

This kind of systems-oriented review has been adopted and perfected in various industries, including in commercial aviation, nuclear energy, and medicine. Commercial aviation, which has enjoyed a dramatic increase in safety over the past few decades, is the poster child for the success of proactive, forward-looking, systems-oriented review of harm-causing incidents. Airline safety has improved in every decade since the 1950s. In 1959 an individual would have faced a chance of being in a fatal accident in one out of every 25,000 departures. Today the odds of dying in an airline crash in the U.S. or European Union are calculated to be only 1 in 29 million. Even though the number of worldwide flight hours has doubled over the past 20 years—from approximately 25 million in 1993 to 54 million in 2013—in the same period the

\[123\] See Rooney & Vanden Heuvel, supra note 117, at 48.


\[125\] As root cause analysis has long been associated with the kind of systems review advocated by organizational management scholar James Reason and investigators who follow his insights, it was never intended to describe a linear, single root cause strategy. While the term continues to be used, some scholars and practitioners have urged the alternative term “systems analysis” to avoid misunderstanding. In this Article, I use the term “root cause analysis” in this broader sense, to connote a structured, systems-oriented approach.

\[126\] ALLIANZ, GLOBAL AVIATION SAFETY STUDY 4 (2014).

\[127\] Id.

\[128\] Id.

\[129\] Id.
number of airlight-caused fatalities fell from approximately 450 to 250 per year.\textsuperscript{130}

This enormous increase in airline safety has resulted from a combination of factors, including dramatic improvements in aircraft engines and design as well as the advent of electronics, most notably the introduction of digital instruments.\textsuperscript{131} Higher standards of training for flight crews, improved air traffic technology, and better collision avoidance systems have also had an impact.\textsuperscript{132}

One of the most important factors generating the dramatic improvement in airline safety is that commercial aviation has a sophisticated program of systematic investigations of airline accidents, which is viewed as a model for other industries.\textsuperscript{133} Investigations come from two sources: under National Transportation Safety Board (NTSB) regulations, all “accidents” and certain “incidents” must be reported to the NTSB,\textsuperscript{134} which was established in 1967 to conduct independent investigations of all civil aviation accidents in the United States.\textsuperscript{135} The NTSB immediately sends a “go team” of investigators and specialists to the accident site to collect and analyze information.\textsuperscript{136} The team ultimately drafts a report for the Board, including safety recommendations based on the findings of the investigation.\textsuperscript{137} The issuance of safety recommendations is the most important part of the NTSB’s mandate, and may address deficiencies discovered during the investigation, even if they did not contribute to the accident.\textsuperscript{138} The Board is required to address safety issues immediately, often issuing safety recommendations before the investigation is complete.\textsuperscript{139} The final report, which contains details about the accident, analysis of the factual

\textsuperscript{130} Narinder Kapur et al., Aviation and Healthcare: A Comparative Review with Implications for Patient Safety, 7 J. ROYAL SOC’Y MED. OPEN 1, 1 (2015).


\textsuperscript{132} Id.

\textsuperscript{133} Id.

\textsuperscript{134} 49 C.F.R. § 830.5 (2018).


\textsuperscript{136} Id. The NTSB “go team” consists of from three to four to as many as twelve or more specialists from the Board’s headquarters in Washington, D.C. who serve on a rotating basis. Id. Each of the “go team” investigators has a working group composed of experts in eight different areas of expertise—operations, structures, powerplants, systems, air traffic control, weather, human performance, and survival factors—and includes representatives from various stakeholder groups, including the Federal Aviation Administration (FAA), the pilots and flight attendant’s unions, airframe and engine manufacturers, etc. Id. The team begins its investigation at the crash site (remaining for days or even weeks), continues its analysis at NTSB headquarters in Washington, D.C., and drafts a report that goes to the NTSB with safety recommendations. Id.

\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} Id.
record, conclusions and the probable cause of the accident, and the related safety
guidance, is posted on the NTSB website.140

Since its creation, the NTSB has investigated more than 140,500 aviation
accidents and issued thousands of safety recommendations, more than 73
percent of which have been adopted in whole or in part by the entities to which
they were directed.141 Although most NTSB reports focus on one accident, the
NTSB also publishes reports that address deficiencies that are common to a set
of similar accidents.142 As I explain in more detail below, this kind of pattern-
oriented analysis is essential to successful risk management.

While investigation of airline accidents is crucial and can lead to forward-
looking safety recommendations, this learning comes only in the face of
catastrophe. In addition, absent centralization and communication of findings,
one-by-one accident investigation can obscure patterns of errors leading to
repeated, similar accidents.143 This lesson was brought home to the airline
industry in December 1974, when the flight crew of TWA Flight 514, inbound
to Dulles Airport in a cloudy sky, misunderstood the clearance from traffic
control and crashed into the Virginia mountains, killing everyone on the
plane.144 Upon investigation, it was discovered that six weeks earlier, a United
Airlines flight crew had experienced the same clearance misunderstanding and
had only narrowly missed a similar crash during a nighttime approach.145 A
warning notice had gone out to all United Airlines pilots, but there was no
mechanism for communicating this information more widely.146 The creation of
the Aviation Safety Reporting System (ASRS) was the first step in establishing
a national incident-reporting system, which proved crucial to continued
advances in airline safety.147

ASRS was designed by the FAA to analyze voluntarily submitted incident
reports from pilots, air traffic controllers, dispatchers, cabin crew maintenance

140 Id.; see also Accident Reports, NAT’L TRANSP. SAFETY BOARD, https://www.ntsb.
gov/investigations/AccidentReports/Pages/AccidentReports.aspx [https://perma.cc/
7JJU-L25M] (containing a dynamic list of accident reports, updated daily).
141 NAT’L TRANSP. SAFETY BD., ANNUAL REPORT TO CONGRESS 2014 3 (Dec. 2015),
c.c/6XVW-PXPE]. Despite its contributions, the NTSB has been the subject of various
criticisms over the years. See, e.g., CYNTIHA C. LEBOW ET AL., RAND INST. FOR CIVIL
JUSTICE, SAFETY IN THE SKIES: PERSONNEL AND PARTIES IN NTSB AVIATION ACCIDENT
INVESTIGATIONS 23 (2000), https://www.rand.org/content/dam/rand/pubs/monograph
_reports/2005/MR1122.pdf [https://perma.cc/7KAF-XR28].
142 Id.
143 In addition, as aviation safety has continued to improve, there are fewer serious
accidents to provide opportunities for continuous and significant improvements, making
reporting of near misses and other incidents crucial.
144 This incident is described in STEPHEN K. CUSICK ET AL., COMMERCIAL AVIATION
145 Id.
146 Id.
147 Id.
crew, maintenance technicians and others. These reports identify hazardous or dangerous conditions recognized by ground-level practitioners and experts as posing risks to safety. In order to encourage voluntary reporting, reports sent to ASRS are held in strict confidence and may not be used by the FAA in enforcement actions against reporters.

From its inception in 1975, ASRS reporting has been robust, with an average intake of over 8000 reports every month, and over 1.5 million reports in its forty-three-year history. Each incident report is read and analyzed by at least two of ASRS’s corps of aviation safety experts, composed of experienced pilots, air traffic controllers, and mechanics. Their first priority is to flag any aviation hazards identified, and send an alerting message to the appropriate FAA office or aviation authority. The analysts then classify each report and uncover the causes underlying the reported incident. The original report and the expert’s observations are incorporated into the ASRS database.

ASRS has also conducted over sixty research studies that seek to effect incremental improvement in aviation safety on a system-wide level. ASRS incident reports are viewed as one of the world’s largest sources of information on aviation safety and human factors.

The history of safety investigations in commercial aviation illustrates two moves that have become central features of risk management in industries as diverse as health care, nuclear power and banking. The first is the move from the reactive strategy that investigates only full-fledged accidents—the “fly-
The "crash-fix-fly" approach to investigating close calls and near miss incidents as well. Historically, only the costliest and most harm-causing events were subjected to detailed investigation to determine causes and contributory factors. In current risk management practice, the whole range of procedural errors, human mistakes, and systems defects are routinely analyzed and investigated. "Incidents, or 'near misses,'" can include instances in which only "partial penetration of defences" occurred or where "all the available safeguards were defeated but no actual losses were sustained." The proactive approach includes actively looking for potential safety problems by analyzing trends, investigating hazards, and using other methods of scientific inquiry.

There are two potential benefits to looking at near misses, dangerous mistakes and closes calls as well as accidents: First, it provides insight into why some sequences of events result in accidents while other sequences do not. Second, this kind of investigation can uncover circumstances that pose dormant or hidden risks before those risks result in an accident.

The second important move in aviation safety management that has served as a model for other disciplines is the move from looking at accidents or incidents one by one, to looking for recurring patterns or risk factors. Aviation investigators constantly work to find "connections and interrelations between individual events" that suggest there is some "common, underlying risk."

The TWA incident described above

158 ALAN J. STOLZER ET AL., SAFETY MANAGEMENT SYSTEMS IN AVIATION 13 (2008). Stolzer, Halford, and Goglia describe three levels of safety risk management: Reactive safety management involves forensic analysis of harm-causing accidents or incidents in order to determine causative or contributory factors that led to the events. Id. at 215. Proactive safety management uses "trend analysis, hazard analysis, and other methods of scientific inquiry" to look for potential safety problems before they result in an accident. Id. The Aviation Safety Reporting System (ASRS), which promotes active reporting of potential safety hazards, is an example of a proactive program. Id. at 53. It is by far the most successful voluntary reporting system, and is widely accepted by virtually all stakeholders in the airline industry, including flight crews, dispatchers, maintenance technicians, and flight attendants. Id. For examples of other proactive airline safety programs, see id. at 51–53. The third level of safety management goes even farther, for example, using models such as probabilistic risk assessment and data mining to determine where and when the system is likely to fail. Id. at 217. See generally CUSICK ET AL., supra note 144, at 205–64 (describing reactive versus proactive safety management).

159 MACRAE, supra note 157, at 1.
160 Id.
161 Id.
162 GRIFFIN ET AL., supra note 112, at 46.
163 STOLZER ET AL., supra note 158, at 215.
165 Id.
166 MACRAE, supra note 157, at 150.
167 Id.
is one example of this strategy, which linked the TWA crash to an almost identical near miss that had occurred just six weeks prior.\textsuperscript{168} In addition, proactive investigations of similar incidents or near misses can lead to discovery of dangerous conditions, safety hazards or jeopardous human conduct before a catastrophic accident occurs.\textsuperscript{169}

B. Sentinel Event Review in Medicine

Systems-oriented, root cause analysis has also been applied with good results in medicine, although its use in this context is still evolving. Modern risk management in medicine looks to aviation as its precursor, but prior to applying the aviation model the medical profession employed an earlier version of multidisciplinary accident review.\textsuperscript{170} Hospitals have a long tradition of conducting “morbidity and mortality conferences” to review negative patient outcomes and medical errors to better understand how they occurred and how they could have been prevented.\textsuperscript{171} In early versions, however, these reviews were limited by their backward-looking, “blaming” approach.\textsuperscript{172} More recently safety management experts have looked to commercial aviation as a model for more forward-looking, systems-oriented review.\textsuperscript{173}

Salient parallels between aviation and medicine make the commercial airline model a good one.\textsuperscript{174} Physicians, like pilots, are highly educated for work in “high-risk environments,” they are often forced to make decisions under pressure, and they are “constantly reminded that their mistakes may cost human life.”\textsuperscript{175} Both function in complex settings where teams of experts interact with technology, and in both settings, threats to safety can come from a wide range of environmental sources.\textsuperscript{176} Also, in medicine as in aviation, safety is critical but financial concerns can affect the commitment of safety resources.\textsuperscript{177} Scholars have also identified particular risk-management strategies used in aviation that are deemed transferable to the medical context, for example, aviation teamwork is suitable for adaptation to hospital operation rooms and

\textsuperscript{168} CUSICK ET AL., supra note 144, at 252.
\textsuperscript{169} See, e.g., id. at 490.
\textsuperscript{170} See, e.g., Kapur et al., supra note 130, at 1, 6.
\textsuperscript{171} See POPE & DELANY-BRUMSEY, supra note 122, at 2.
\textsuperscript{173} See, e.g., Kapur et al., supra note 130, at 1.
\textsuperscript{174} For a detailed chart comparing aviation to medicine, see id. at 2. Some authors have expressed reservations about the analogies between aviation and medicine. See id. at nn.5–9 (listing references).
\textsuperscript{177} Id.
emergency departments, and the aviation safety reporting has served as a model for voluntary reporting of medical incidents. In addition, the use of checklists and redundancies, which have transformed aviation safety, have been employed to good effect in addressing particular recurrent errors in medicine.

An important event that led medicine out of old-school blaming review toward more forward-looking review was the 1999 U.S. Institute of Medicine (IOM) consensus report *To Err is Human: Building a Safer Health System*. It reported the alarming statistic that 44,000 people died every year from preventable errors. The key insight of the report was that the majority of medical errors result not from mistakes by individuals but from “faulty systems, processes, and conditions that lead people to make mistakes or fail to prevent them;” in other words, from “bad systems rather than bad people.” This was a transformative concept for medical review of errors. It led the IOM to conclude that mistakes can best be prevented by designing the medical system to “make it harder for people to do something wrong and easier for them to do it right.” The IOM reasoned that “when an error occurs, blaming an individual does little to make the system safer and prevent someone else from committing the same error.” Its recommendations were designed to adopt a more “institutionalized approach that identifies root causes and underlying system failures,” with the goal of reducing medical errors by a minimum of 50% over the succeeding 5 years.

The Joint Commission, the oldest and largest standard-setting and accrediting body for healthcare organizations in the world, has since institutionalized a strategy for identifying and analyzing harm-causing medical

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178 *Id.* at 782, 784.
180 See generally IOM REPORT, *supra* note 179.
181 *Id.* at 1. For a summary version of the full report by its authors, see *id.* at 1–5. The report defines medical error as “the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim.” *Id.* at 4. The report lists as common errors: “adverse drug events and improper transfusions, misdiagnosis, under and over treatment, surgical injuries and wrong-site surgeries, suicides, restraint-related injuries or deaths, falls, burns, pressure ulcers, and mistaken patient identities.” NIKI CARVER & JOHN E. HIPSKIND, MEDICAL ERROR 1 (2019).
184 *Id.*
errors and formulating action plans to prevent such harms from recurring. Since 1996, the Commission has had in place a Sentinel Event Policy, which requires accredited organizations to conduct a systemic review of all sentinel events to determine causal and contributing causes and to formulate an action plan to promote greater safety going forward. A sentinel event is defined as a patient safety event (not primarily related to the natural course of the patient’s illness or underlying condition) that reaches a patient and results in death, permanent harm, or severe temporary harm. Such events are deemed “sentinel” because they signal that immediate investigation and response is needed. The goal of sentinel event review, using a revised version of root cause analysis called Root Cause Analysis and Action (RCA²), is to identify and implement “sustainable systems-based improvements” that improve patient safety. As virtually all U.S. hospitals and medical organizations are accredited by the Joint Commission, sentinel event review using RCA² has become the standard of safety for medical providers in this country. RCA² seeks to improve traditional root cause analysis in two ways, first by emphasizing that investigation and analysis must be followed by a concrete action plan, and second by prescribing that analysis and implementation must focus on systems-oriented change. Specifically, RCA² is designed to identify and mitigate “system vulnerabilities” rather than individual errors, on the theory that individual performance is a “symptom” of broader, systems-based problems. Human error simpliciter is never an acceptable root cause because disciplining or retraining a human causer may reduce the risk that the errant actor will repeat his mistake, but it will not reduce the probability that the event

190 See Sentinel Event Policy and Procedures, JOINT COMMISSION, https://www.jointcommission.org/sentinel_event_policy_and_procedures/ [https://perma.cc/ER2R-MF3M]. Accredited organizations are “strongly encouraged” but not required to report sentinel events to the Joint Commission, which enables “lessons learned” from the event to be added to the Joint Commission’s Sentinel Event databases. Id. This contributes to widespread knowledge about harm-causing events and to enhanced opportunities for risk reduction. Id.

191 Id.

192 Id.

193 Id.

194 NAT’L PATIENT SAFETY FOUND., RCA² IMPROVING ROOT CAUSE ANALYSES AND ACTIONS TO PREVENT HARM i, vii (June 2015), https://www.ashp.org/-/media/assets/policy-guidelines/docs/endorsed-documents/endorsed-documents-improving-root-cause-analyses-actions-prevent-harm.ashx [https://perma.cc/67R4-PES6]. The overall goal of robust investigations of harm-causing events is a “culture of safety.” U.S. DEP’T OF JUSTICE, supra note 172, at 4. The Agency for Healthcare Quality and Research at the Department of Health and Human Services has formulated indicators that measure the culture of safety at health institutions, such as whether staff members feel free to speak up if they see others making an error. Id. The goal is to “shine a spotlight on errors and create a culture where people are comfortable sharing information on mistakes.” Id.

195 See NAT’L PATIENT SAFETY FOUND., supra note 194, at vi (listing organizations that endorse the use of RCA).

196 Id. at 1–3.

197 Id. at vii.
will recur with other operators in similar circumstances. Thus the strongest, most effective actions are systems-wide interventions that reduce the inevitable risk that well-trained and well-intentioned human operators will make mistakes. Strong, systems-oriented actions include architectural/physical plant changes, engineering control, simplification of processes, and standardization of equipment. The weakest actions are those directed at directly changing human behavior, such as double checks, warnings, new procedures and re-training.

Sentinel event, systems-oriented review in medicine has not yet reached the high level of success it has reached in aviation. The reasons for some of its failures in medicine hold important lessons for systems-oriented review in the criminal justice context. One determinative difference between aviation and medicine has to do with the organizational culture of the two contexts with regard to safety: over the past twenty years, aviation has developed a “non-blaming” culture in which incident reporting has become more routine and less threatening. In addition, aviation is less hierarchical than medicine, which makes joint-responsibility for safety less threatening and more likely. Commitment to safety permeates all levels of the business of airlines, whereas safety in medicine continues to be regarded as a specialized priority for some but not the obligation of all. Finally, organizational culture in some medical institutions continues to be a culture of “low expectations,” in which medical personnel fail to correct discrepancies, mistakes and inconsistencies. If medical personnel come to expect that they will receive faulty or incomplete information, it may lead them to conclude that “red flags” are not unusual or worrisome. They may come to regard them as only repetitions of the poor communication to which they have become accustomed.

C. The Importance of Multi-Incident Review

Sentinel event review of particular, harm-causing events has been an essential feature of systems review in commercial aviation and in medicine. As

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198 Id. at 18. Retraining that is focused on the harm-causing event is also inadequate because there is always turnover and a high-profile event is eventually forgotten. Id.

199 Id. at 17 (laying out an “action hierarchy” from stronger actions to weaker actions that was developed by the U.S. Department of Veterans Affairs National Center for Patient Safety, which has been “used for decades in many other industries to improve worker safety”); id. at 16 (internal citation omitted).

200 Id. at 17.

201 Kapur et al., supra note 130, at 2.

202 Id. at 5.

203 Id. at 2.


205 Id.

206 Id.
described above, the NTSB requires the investigation of all airline accidents and near misses and the Joint Commission requires that hospitals review all “sentinel events.”

The dramatic success of systems-oriented analysis in these contexts, however, lies in accident investigation that goes beyond single incident review. Commercial aviation and medical investigators have increasingly used the information gleaned from individual reviews to identify patterns of repeated, similar errors that were found to have caused repeated, similar accidents. In turn, pattern identification has led the way for systems-oriented interventions that have had enormous success in changing the circumstances that lead to predictable, repeated human errors in these contexts.

Single incident analysis is essential for identifying the lines of causation that uncover the root causes of a particular accident. Employed alone, however, single incident analysis has limited value. Focusing solely on individual events may frustrate an institution’s ability to appreciate its vulnerability to reoccurring harmful errors, some of which may result from easy-to-identify systems causes. Failing to see these easy fixes is to miss the lowest hanging fruit. By contrast, identifying patterns of errors and sharing information among similarly situated institutions or agencies promotes the most efficient and effective investigation of harm-causing events. In addition, prioritizing the investigation of reoccurring errors avoids the risk of investing inordinate resources to prevent a rare event, which may be unlikely to reoccur. In short, investigating and addressing reoccurring errors—by looking at both harmful events and near misses—has huge payoffs for accident reduction.

D. Sentinel Event Review in Criminal Justice

In 2004, twenty-one-year-old Michael Bell was shot in the head by officers of the Kenosha (Wisconsin) Police Department. Michael had driven home from an evening out and pulled up to the curb at his home when police pulled up behind him. There is no dispute that Michael was unarmed, but the events that led to the shooting were outside the range of the officers’ dashcam and

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207 See How Aviation Safety Has Improved, supra note 131; Sentinel Event Policy and Procedures, supra note 190.

208 See, e.g., Kapur et al., supra note 130, at 7.

209 Id.


211 Id. Police claimed that because Michael “failed to make a complete stop,” they followed him to his house and parked behind him. Id. Toxicology screens later demonstrated that Michael had been drinking that night. Id. Michael had tangled with one of the three officers sometime before, and was scheduled to appear in court the next day in connection with charges from that incident. Appendix to the Affidavit of Russell Beckman Regarding the Circumstances Surrounding the Possession of the Handgun of Officer Eric Strausbaugh During the Encounter with Michael E. Bell at 38 [on file with Ohio State Law Journal].
details were disputed. What is now clear, however, is that while three officers were trying to subdue Michael against a police vehicle, one yelled, “He’s got my gun,” and moments later a fellow officer shot Michael point blank in the head.

After the incident, Michael’s father, Michael Bell, Sr., who is a retired lieutenant colonel in the U.S. Air Force and familiar with NTSB investigations of airline accidents, assumed that there would be a similar, detailed, independent investigation of his son’s death. Instead, the Kenosha police department internal affairs unit spent only 48 hours investigating the incident before concluding that the shooting was justified. The investigation was apparently conducted without interviewing witnesses or waiting for the forensic evidence to come back from the crime lab.

When the forensic reports came back, and Michael’s fingerprints and DNA were not found on the officer’s gun, Mr. Bell, Sr. hired his own investigators, including a retired police detective from the Kenosha Police Department. In the course of this investigation, the detective discovered evidence suggesting that the officer’s holstered handgun may have gotten caught in the driver’s side mirror—found to be broken at the base—which caused the tugging the officer interpreted as an effort to disarm him.

In comparing the vigorous investigations of airline accidents to the less independent and comparatively anemic investigations of many police shootings by their departments, Mr. Bell, Sr. was raising an important question: Does aviation have something to teach the criminal justice system about how to investigate harm-causing accidents with an eye toward preventing such events in the future? Significantly, Mr. Bell, Sr. did not blame the officer who fired the shot, concluding that he made an “honest mistake” in thinking that Michael had


213 Id.

214 Kennedy, supra note 210.

215 In Wisconsin, a Decade-Old Police Shooting Leads to New Law, supra note 212.

216 Id.

217 Id. For a record of this investigation, see generally Evidence & Investigation, PLEA FOR CHANGE, https://michaelbell.info/Evidence.html [https://perma.cc/57TC-7ABD] (describing the evidence and investigation of the Michael E. Bell shooting).

218 See Affidavit of Russell Beckman Regarding the Circumstances Surrounding the Possession of the Handgun of Officer Erich Strausbaugh during the Encounter with Michael E. Bell at 2, https://docs.google.com/file/d/0B6SnSBw-2160ME9ibHjeSWdBN1k/edit [https://perma.cc/R5SZ-Y2DX]. In 2010, the City of Kenosha agreed to pay $1.75 million dollars to settle a wrongful-death lawsuit by Michael’s family. Kennedy, supra note 210. The family used the settlement money to fund a grassroots campaign to pass legislation to mandate that police incidents involving civilian deaths be investigated by outside, independent investigators. In Wisconsin, A Decade-Old Police Shooting Leads to New Law, supra note 212. The statute is admirable for requiring an independent investigation, but, unfortunately, it does not mandate the systems-oriented review that Mr. Bell, Sr. envisioned from his aviation experience. See Wis. STAT. § 175.47 (2014); Kennedy, supra note 210.
ahold of the officer’s gun. What Mr. Bell objected to was the fact that the department failed to conduct a thorough investigation that took seriously all available evidence. Instead it stopped with the conclusion that the shot was “justified.” A rigorous, systems-oriented sentinel event review of these circumstances would have gone behind the officer’s mistake to determine why that mistake occurred. If the gun got caught on the side mirror, did that suggest an equipment design failure? Did it implicate an addressable vulnerability in the way the officer positioned himself so that his gun holster got caught? Was the initial stop justified? Could de-escalation techniques been used to diffuse the situation? Could Michael have been ticketed rather than arrested, in order to avoid the escalation that occurred? These kinds of questions could uncover systems vulnerabilities that could be addressed to make a similar shooting less likely to occur in the future. In other words, that the shooting may have been reasonable (lawful) at the moment the shot was fired does not preclude a finding that there were ways it could have been prevented. The list of questions I have outlined suggest there may have been systems vulnerabilities that contributed to the shooting. This is the great benefit of independent, nonblaming, systems-oriented review.

Criminal justice scholars have begun to recognize the promise of systems-oriented review. Initial interest was spurred by the U.S. Justice Department’s landmark 1998 study of the first twenty-eight wrongful convictions exposed by DNA testing and the growing number of such cases that were catalogued by the first Innocence Project.

More recently, the National Institute of Justice has launched the Sentinel Events Initiative (SEI) to explore whether the same forward looking, all-stakeholders, multi-disciplinary, nonblaming review employed in medicine, aviation and other contexts could be used to address sentinel events in the criminal justice system. NIJ defines a sentinel event as an “unexpected negative outcome” that signals a possible weakness in the system and is likely caused by “compound errors.” Such an event may provide, “if properly

219 Kennedy, supra note 210.
220 Id.
221 Id.
222 I take no position on the question of whether the shooting was lawful at the moment it occurred.
223 See, e.g., Hollway et al., supra note 28, at 884.
225 For a discussion of this history, see generally James M. Doyle, Learning from Error in American Criminal Justice, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010).
226 The National Institute of Justice is part of the Office of Justice Programs at the Department of Justice.
228 Id. at 1.
analyzed and addressed—important keys to strengthening the [criminal justice system] and preventing future adverse events or outcomes." The purpose of the NIJ Sentinel Events Initiative is to "develop a template for how state and local stakeholders could learn from criminal justice errors" and to "provide a platform where stakeholders can disseminate information, accessing each other’s experiences and allowing access by other jurisdictions, including researchers, to knowledge gained from a sentinel review."

In 2013, after two years of preliminary research by NIJ fellow James Doyle, the NIJ convened a roundtable of criminal justice experts to consider the applicability of sentinel event review for such negative outcomes as wrongful convictions, erroneous release of dangerous inmates, and cold cases that remain unsolved for too long. Doyle urged his colleagues to consider making multidisciplinary, nonblaming review of errors a regular part of criminal justice practice; to make the errors themselves the mechanism for learning and change. The 2013 roundtable participants concurred with Doyle’s assessment and urged the NIJ to begin the process of testing the viability of sentinel event review in the criminal justice context.

In 2014, NIJ invited jurisdictions around the country to volunteer to review a sentinel event that had occurred in their area of authority. Through a competitive process, three sites were selected: Milwaukee, Philadelphia, and Baltimore. Teams in each of these sites designated and conducted a review of a “justice error”—a sentinel event—that had occurred in their jurisdiction. All three sites successfully completed their reviews, providing the first empirical evidence of the feasibility of adopting SER in the criminal justice context.

While retaining promised anonymity about the details of the sentinel event each

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229 Id.


231 James M. Doyle was a former defense attorney from Boston.

232 See U.S. DEP’T OF JUSTICE, supra note 172, at 1, 5, 24. Doyle reflected that the recent wave of DNA exonerations had focused attention on system-wide errors in criminal justice and undermined public confidence in the American public justice system. Id. at 2. He noted that some progress had been made in addressing these issues, but that efforts to that point had created best practices for individual actors, while ignoring the complex interactions and system features that together lead to adverse events. See id. at 2–3. He deemed this “linear” approach inadequate to address errors in complex systems, including the criminal justice system. Id. at 2.

233 See id. at 3.

234 Doyle, supra note 227, at 1.


236 Id.

237 Id.

238 Id. at 3.
site chose to review, the NIJ published a detailed report of “lessons learned” across the three SERs.\textsuperscript{239}

More recently, police scholars John Hollway, Calvin Lee, and Sean Smoot have urged the application of root cause analysis, as it has been applied in aviation, medicine, and other industries, to police shootings.\textsuperscript{240} They argue, as I do here, that our existing systems for evaluation of past officer-involved shootings by administrative investigations, civilian oversight, and civil and criminal investigation are inadequate for learning how to prevent similar shootings in the future.\textsuperscript{241} They agree that unlike these existing strategies, which are backward-looking and individual-focused, root cause analysis could uncover nonhuman, systemic causes and corresponding systemic remedies that would be more effective in preventing officer-involved shootings.\textsuperscript{242}

What is missing to this point is a more robust description of what root cause analysis might look like in the context of police-involved shootings, and precisely what kinds of systemic causes—and systemic solutions—root cause analysis might uncover.\textsuperscript{243} In what follows, I begin to fill that gap.

\textsuperscript{239} Id. at 2. The report covered the following topics: Where does a jurisdiction start when thinking about performing a sentinel event review? Id. at 3. What kind of event should be reviewed, including some of the benefits and challenges of selecting an older event? Id. at 3–4. Who should be on the sentinel event team—and who should lead or facilitate the review process? Id. at 5–6. How can the important “non-blaming” component of sentinel event review be achieved? Id. at 11. In 2014 and 2015, the NIJ made four research grants as part of its effort to bring sentinel event reviews into the criminal justice system. Nancy Ritter, \textit{Testing a Concept and Beyond: Can the Criminal Justice System Adopt a Nonblaming Practice?}, 276 NIJ J. 38, 39–40 (2015). Grants were awarded to Texas State University to study wrongful convictions; the Vera Institute to implement and evaluate a protocol for reviewing cases of self-harm in New York City jail; Michigan State University to study the use of sentinel event review in aviation and medicine; and the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania to work with the Philadelphia Police Department, District Attorney’s Office, Defender Association, and Court of Common Pleas to evaluate the effectiveness of multidisciplinary sentinel event teams. Id. This project will create a database of errors and near misses similar to the Aviation Safety and Reporting System to provide a mechanism for prioritizing negative outcomes that are suitable for sentinel event review. Id. The goal is to develop rules and standards for the creation and maintaining of multi-stakeholder teams that will embrace a culture of learning from error. Id.

\textsuperscript{240} See Hollway et al., supra note 28, at 891–98.

\textsuperscript{241} See id. at 891–92.

\textsuperscript{242} See id. at 898–99.

\textsuperscript{243} A notable exception is Schwartz, who suggests some possible systemic solutions. See Joanna C. Schwartz, \textit{System Failures in Policing}, 51 SUFFOLK U. L. REV. 535, 561–62 (2018). Her discussion, however, is quite general and does not combine individual incident root cause analysis with the kind of pattern analysis that has been so successful in aviation and medicine.
IV. SYSTEMS-ORIENTED REVIEW OF POLICE SHOOTINGS

Current methods of investigating police-involved shootings differ from the forward-looking, systems-oriented investigations of accidents that occur in aviation and medicine in three critical ways. First, unlike investigations by the NTSB and the Joint Commission, almost none of the traditional police investigatory mechanisms are fully independent from the employing police organization. Second, police reviews are designed solely to determine whether the proximal, human actor—the officer who pulled the trigger—was legally culpable, i.e., whether he acted reasonably at the moment of the shot. Once it is determined that the officer’s conduct was legally justified, the investigation is over. There is no interrogation of the broader circumstances surrounding the shooting, no search for systems vulnerabilities, and no analysis of how the shooting could have been prevented. (I examine this difference in more detail below.) Third, existing structures for police review have no mechanism for sharing analyses of individual police shootings to discover recurring errors or recurring systems breakdowns that could help identify forward-looking solutions.

In the following pages, I illustrate what systems-oriented review might look like in the policing context by examining as a case study the 2014 shooting by a police officer of twelve-year-old Tamir Rice. First, though, I address the question of what the goal of systems-oriented review is—because that is more complicated in the police context than in aviation and medicine since lethal force is sometimes necessary to protect police and public safety.

A. What Is the Goal of Systems-Oriented Review of Police Shootings?

Effective systems-oriented review requires clearly defined goals. In aviation and medicine, the task of setting goals is relatively easy. In aviation the aim is to prevent airline crashes. In medicine the objective is to prevent harm or injury to patients that is not related to the natural course of the patient’s illness. While finding the right level of safety in these contexts includes financial

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244 See id. at 558.
245 See Chuck Wexler, Why We Need to Challenge Conventional Thinking on Police Use of Force, in POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 6 (2016).
246 I will contrast the extant accountability reviews with what I call a “modified” systems-oriented review. I use the term “modified” because I am not a trained expert in RCA and my analysis is limited to the information contained in the existing record. Full-blown sentinel event review leading to systems-oriented review would require additional data gathering, participation by individuals involved in the event being reviewed, and third-party experts from the context in which the events occurred.
considerations, there is little else to “balance” against airline safety and patient safety.\footnote{247} Setting a goal for systems-oriented review of police shootings is more complicated because there are important values (aside from cost) on the other side of the balance. Decreasing police-involved shootings of citizens might increase the risk that police officers or third parties could be shot or injured. Putting more pressure on police not to use their firearms might increase the incidence of crime or threaten public safety. In addition, the balancing is even more fraught because the costs and benefits on the two sides of the balance are not evenly distributed across demographic and socially defined communities: for example, police-involved shootings fall disproportionately on inner city, African-American communities, while many of the benefits of aggressive police intervention may inure to richer, whiter communities.\footnote{248} That the goal is more complicated, however, does not preclude systems-oriented review of police shootings. It simply means that prevention measures must take account of conflicting values and distributional effects. The question for a systems-oriented investigator is whether a particular shooting (or pattern of shootings) could have been prevented without compromising police and public safety across all communities.\footnote{249}

Reviews that apply current legal standards never ask this question. Legality of lethal force depends upon whether the officer \textit{reasonably believed} the force he or she applied was necessary under the specific circumstances at the moment the shot was fired. This inquiry is ultimately about accountability, not prevention: it tells us whether the officer was culpable for pulling the trigger given what he reasonably perceived at the time. That a particular killing was “justified” in this legal sense, however, tells us nothing about “what kinds of attacks really \textit{require} lethal counterforce or how often police use of deadly force—whether fatal or not—saves the lives of police or crime victims.”\footnote{250} Moreover, to call police-involved shootings “justifiable killings”\footnote{251} is to implicitly deny the social costs to victims, families, and the broader community.

\footnote{247} I say “little else” because it is possible that some efforts to create fewer accidents or incidents in aviation and medicine could have other, less easily monetized costs. For example, institution of a checklist before a surgery could increase the length of that procedure, which could lead to fewer surgeries and longer wait times for patients to get necessary treatments. Some human costs like these are not wholly monetizable. But, in general, the primary value on the other side of the equation is financial cost.\footnote{248} See generally William J. Stuntz, \textit{The Collapse of American Criminal Justice} (2011) (discussing the distributional effects of criminal justice actions).\footnote{249} Franklin E. Zimring, \textit{When Police Kill} 91 (2017).\footnote{250} Id. at 124 (emphasis added).\footnote{251} The FBI’s Supplementary Homicide Reports (SHR) designates officer-involved, fatal shootings as “justifiable killings by police officers of felons.” Id. at 122. The SHR is part of the Uniform Crime Reporting (UCR) Program administered by the FBI. \textit{Bureau of Justice Statistics, Dep’t of Justice, Nation’s Two Measures of Homicide} 1 (2014), https://www.bjs.gov/content/pub/pdf/ntmh.pdf [https://perma.cc/9264-R5UF]. “The UCR provides aggregate annual counts of the number of homicides occurring in the United States. However, the SHR provides detailed information about police-involved shootings. These two reports thus provide complementary information.” Id. at 1.}
of legally justified shootings, especially those that were factually unnecessary because neither the officer nor the public was ultimately at risk. \(^{252}\) While some officer-involved shootings might be unavoidable, every police shooting that takes a human life is regrettable and tragic. \(^{253}\) This point gets obscured by an investigative regime that ends by calling a shooting “justified.” Whether or not justified, every officer-involved shooting is undesirable and worthy of review to understand how and why it occurred and how it can be prevented in the future.

That the legal standard governing review of police shootings is focused on placing (or eliminating) blame rather than on decreasing unnecessary shootings underlines the need for additional, systems-oriented investigations. In the next section I illustrate the difference between accountability review and systems-oriented review by contrasting the extant reviews of the Tamir Rice shooting with a more systems-oriented inquiry.


On November 22, 2014, Tamir Rice was shot in a city park by Officer Timothy Loehmann from the Cleveland (Ohio) Division of Police. \(^{254}\) Loehmann and his partner, Officer Garmback, entered the park in their vehicle in response to a police dispatch call reporting a black male who allegedly kept “pulling a gun out of his pants and pointing it at people.” \(^{255}\) The officers drove across the

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\(^{252}\) The social cost to victims and their communities is obvious. What might be less obvious is that there are also grave personal and professional costs for an officer who is involved in a lethal police-involved shooting. See generally DAVID KLINGER, INTO THE KILL ZONE 7, 203–71 (2004) (describing the dramatic, negative effects that police-involved shootings can have on the officer who pulled the trigger, effects that have been called “post-shooting trauma”—a form of traumatic stress syndrome—in law enforcement circles).

\(^{253}\) See Hollway et al., supra note 28, at 887–88 (“[O]ur system of criminal justice defines any [officer-involved shooting]—even one in which all protocols were followed by the officer—as an undesirable outcome, and one worthy of review to understand how and why it occurred with the goal being its prevention in the future.”).


ground close to the suspect and braked on the snow-covered grass.256 The vehicle then slid over forty feet to a point adjacent to where Tamir was standing.257 Officer Loehmann disembarked and fired his weapon within two seconds after the vehicle came to a stop.258 Tamir Rice was transported to a nearby hospital, but died several hours later from his injuries.259

It turned out that Tamir was only 12 and that the gun was an “airsoft” gun,260 which shoots small plastic pellets and is not designed to kill or wound.261 Officer Loehmann later reported that Tamir looked like he was reaching for a gun in his waistband.262

In the aftermath of the shooting, the Cleveland Division of Police and the Cuyahoga County Prosecutor’s Office launched investigations into the shooting.263 Tamir Rice’s family and community called for criminal prosecutions of the officers and filed a wrongful death suit against the officers, the police department and the City of Cleveland, alleging claims under the Fourth Amendment, the Due Process Clause, and state tort law.264 The lawsuit and demands for prosecution reflect the strong causal intuitions and moral commitments that underlie calls for accountability review: the officers drove their police car into the park and shot and killed a young boy holding a pellet gun. Surely someone must be held accountable for Tamir’s tragic death.

256 Id. at 4.
257 Id.
258 Id.
259 Id. at 5.
261 Kilpatrick, supra note 260.
264 See generally First Amended Complaint, Winston v. Loehmann, No. 1:14-CV-02670 (N.D. Ohio Jan. 30, 2015) (detailing the various claims brought by the administrator of the estate of Tamir Rice).
There were three layers of accountability review of the shooting. The first was an administrative review by the Internal Affairs Unit (IAU) of the Cleveland Police Department to determine whether police employees—the two officers and the police dispatcher—had violated any police rules or policies. The second, an administrative inquiry by the Critical Incident Review Committee (CIRC), was tasked to investigate the officers’ actions and make recommendations to police management for changes to training, rules, policies, or equipment in light of the reviewed incident. The third review was conducted by the Cuyahoga County Prosecutor’s Office (CCPO) to determine whether there was a basis to bring criminal charges against the two officers involved in the shooting.

All three investigations concluded that Officer Loehmann had acted lawfully because he reasonably believed, based on the facts and circumstances known to him at the time, that Tamir Rice was reaching into his waistband to pull out a real gun. The only sanctions that were brought against either officer were administrative sanctions: Officer Garmback was suspended for ten work days and ordered to attend remedial tactical training for failing to stop his police vehicle more quickly and declining to coordinate his approach with other police vehicles. Officer Loehmann was fired for failing to disclose a negative employment history on his application, but not for shooting Tamir Rice.

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265 See INTERNAL AFFAIRS UNIT, INVESTIGATIVE REPORT FROM TIMOTHY A. STACHO, SERGEANT, CLEVELAND DIVISION OF POLICE, TO MONROE B. GOINS, LIEUTENANT, CLEVELAND DIVISION OF POLICE 3 (Feb. 2015), https://www.dropbox.com/sh/z5g1kd9qjggdw4/AABPS1s8y5g_pptRyUYI0g1oa?dl=0&preview=IA+Report.pdf [https://perma.cc/YA56-8Z28] [hereinafter IAU REPORT].

266 CRITICAL INCIDENT REVIEW COMM., TAMIR RICE INCIDENT 1 (Apr. 2017), https://www.dropbox.com/sh/z5g1kd9qjggdw4/AABPS1s8y5g_pptRyUYI0g1oa?dl=0&preview=CIRC+Report.pdf [https://perma.cc/VT5B-DUMK] [hereinafter CIRC REPORT]. The CIRC was empaneled by Police Chief Calvin Williams in February 2016. Id. The Committee was chaired by the Deputy Chief of Field Operations, Cleveland Police Department, and consisted of eight members, five from the Cleveland Police Department and three administrators of the City of Cleveland. Id. It met from February 22, 2016 through October 6, 2016 and issued a report and an addendum. Id. at 3.

267 CCPO REPORT, supra note 255, at 1.

268 See id. at 70; CIRC REPORT, supra note 266, at 17; IAU REPORT, supra note 265, at 9.

269 See Letter from Michael McGrath, Dir., Cleveland Dep’t of Pub. Safety, to Patrol Officer Frank Garmback III, Cleveland Div. of Police 2–4 (May 30, 2017) [hereinafter McGrath Letter]. The CIRC investigation made a general recommendation that police receive more training in “off roadway driving [as well as] unconventional places.” CIRC REPORT, supra note 266, at 21.

city ultimately settled the wrongful death lawsuit with the plaintiffs for $6 million.271

1. The Inadequacy of Accountability Review

The legal question being interrogated by the three investigations was whether the shooting of Tamir Rice was a justified use of deadly force.272 Each of the three applied the Fourth Amendment standard to conclude that Officer Loehmann had acted lawfully.273 Under *Graham v. Connor*,274 police use of force is lawful if the officer’s actions were “objectively reasonable” in light of the facts and circumstances as the officer knew or reasonably perceived them to be when he took the shot.275 The reasonableness analysis requires “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”276 The *Graham* Court cautioned that legality of force must not be judged with the “20/20 vision of hindsight,” but must take into account that police officers are required to make “split-second judgments” under “tense, uncertain, and rapidly evolving” circumstances.277

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272 See CCPO REPORT, supra note 255, at 1; CIRC REPORT, supra note 266, at 1; IAU REPORT, supra note 265, at 3.

273 See CCPO REPORT, supra note 255, at 35; CIRC REPORT, supra note 266, at 17; IAU REPORT, supra note 265, at 5.


275 Although there is a circuit split on this question, compare Young v. City of Providence, 404 F.3d 4, 22 (1st Cir. 2005) (providing that the conduct of officials leading up to the use of force should be considered), with Livermore v. Lubelan, 476 F.3d 397, 407 (6th Cir. 2007) (providing that everything leading up to the use of force should be disregarded), the Supreme Court has signaled that the timeframe for determining the propriety of allegedly excessive force is extremely narrow. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989). With very limited exceptions, the broader context that led up to the need for force is not relevant to the *Graham* inquiry.

276 *Graham*, 490 U.S. at 396.

277 Id. at 396–97. Although the Supreme Court has opined in *Scott v. Harris*, 550 U.S. 372, 383 (2007), that the *Graham* standard applies to both deadly and non-deadly force, many jurisdictions, including Cleveland, continue to apply the more specialized rules of *Tennessee v. Garner* to deadly force cases. *See CCPO REPORT, supra note 255, at 35. As the CCPO framed it: “Law enforcement officers can only use deadly force in making an arrest where the police have probable cause to believe that the suspect poses a threat of death or serious bodily harm to the police or to public,” for example, “if the suspect threatens the officer with a weapon.” Id. (quoting Tennessee v. Garner, 471 U.S. 1, 11–12 (1985)).
Applying the Graham standard to the shooting of Tamir Rice, all three reports concluded that Office Loehmann acted reasonably when he pulled the trigger.278 For example, according to the IAU investigator:

As [the officers] arrived on scene, Officer Loehmann saw a male, who fit the given description, stand up from a picnic table and place a gun in his pants . . . . The male walked toward the path of the [patrol] car and, as the [patrol] car came to a stop in front of him, raised his shirt with one hand and began drawing the gun from his pants with the other. Officer Loehmann exited the vehicle and, fearing for his and Officer Garmback’s lives, shot the male two times in the abdomen and immediately sought cover behind the [patrol] car.279

The investigator concluded that “the use of deadly force by Officer Loehmann was reasonable and within the guidelines set forth in GPO 2.1.01 [Use of Force],” which mirrors the Graham standard.280

The CIRC investigator281 and the Cuyahoga County Prosecutor’s Office also agreed that Officer Loehmann had acted lawfully under Graham.282 The CCPO report began with the troubling and revealing concession that Officer Garmback’s “approach—skidding to a halt directly in front of where Tamir was standing—had left [Officer Loehmann] dangerously exposed to what [Loehmann] believed was a suspect drawing a gun.”283 But this observation was irrelevant to its analysis of the legality of the shooting:

[T]he two responding officers [were led] to believe a real man with a real gun was threatening innocent people’s lives at a recreation center . . . . The officers, who had no idea that the gun was fake or that Tamir was only [twelve], thought he was going to pull the gun out at them.284

278 See CCPO REPORT, supra note 255, at 70; CIRC REPORT, supra note 266, at 17; IAU REPORT, supra note 265, at 9.
279 IAU REPORT, supra note 265, at 8–9.
280 See id. at 9 (quoting CLEVELAND DIVISION OF POLICE, GENERAL POLICE ORDERS ch. 2, § 2.1.01 (2014)).
281 For example, the CIRC Report reported:

The CIRC examined the tactics used by PPO Loehmann and P.O. Garmback and determined they were reasonable and were based on their response to [Tamir’s] actions of standing up and retrieving the gun from the picnic table, placing then [sic] gun in his waistband then initially turning away from officers, and then finally turning back towards the officers and taking the gun out of his waistband.”

CIRC REPORT, supra note 266, at 17. The CIRC concluded that according to its “review of Officer Loehmann’s actions [involving the shooting of Tamir Rice] there are no apparent rule or policy violations.” Id. at 20.
282 CCPO REPORT, supra note 255, at 66, 70.
283 Id. at 66 (emphasis added).
284 Id. at 69.
[The evidence does not show that Loehmann’s] decision to shoot was unreasonable, or that it was feasible to give more commands than he did. Loehmann was facing a suspect pulling an object from his waist. The law does not require an officer to wait until being fired upon to confirm whether the gun is real or to give the suspect additional time to open fire to draw and fire [sic] upon the officer.\textsuperscript{285}

The legal analysis applied in each of these reviews demonstrates four crucial limitations that make accountability review of the shooting inadequate for the purpose of preventing the next shooting. \textit{First}, the reviews focused almost entirely on the actions of Officer Loehmann, the \textit{proximal human causer} who pulled the trigger. Investigation of other officials was for the limited purpose of ascertaining whether they had violated police rules, not to interrogate whether their errors were causally linked to the mistaken shooting.\textsuperscript{286} In addition, none of the investigations considered whether broader systems failures contributed to the errors, misjudgments, or misunderstandings made by police officials.

\textit{Second}, the applicable legal standard limited the analysis to the narrow question of whether Officer Loehmann reasonably believed that his life was in imminent danger \textit{at the moment he discharged his weapon}.\textsuperscript{287} As a result of this narrow timeframe, the lawfulness inquiry did not consider whether the officers’ approach—coming within four to seven feet of an allegedly armed suspect—unreasonably increased the risk that lethal force would be \textit{required}. For example, it did not invite investigators to consider whether the officer failed to use de-escalation techniques or provoked the confrontation in some way. Nothing that occurred before the shooting mattered to the investigation.

\textit{Third}, the ultimate question to be answered was whether Officer Loehmann was \textit{culpable} for what he did. The purpose of the exercise was to assign blame, i.e., to determine whether the officer should be punished, reprimanded, or fined for what happened. Once each of the reviews had determined that the shooting by Officer Loehmann was lawful, the investigation was over and no additional causal inquiry was required or indeed permitted.

\textit{Fourth}, the investigations were almost entirely \textit{backward-looking}. The goal was to determine what policies, rules, or laws were broken and to hand down sanctions for past behavior.\textsuperscript{288} By contrast, prevention requires investigators to ask not “what happened and \textit{who is to blame}?” but, rather, “\textit{why} did this happen

\textsuperscript{285} \textit{Id.} at 66.
\textsuperscript{286} \textit{See, e.g.,} CIRC REPORT, supra note 266, at 20.
\textsuperscript{287} The Supreme Court has signaled that the timeframe for determining the propriety of allegedly excessive force is relatively limited. \textit{See} Graham \textit{v. Connor}, 490 U.S. 386, 396–97 (1989). Courts of appeals are divided on the question of how narrowly the timeframe should be defined, with some courts permitting a more liberal analysis. \textit{See supra} note 275 and accompanying citations.
\textsuperscript{288} Only the CIRC analysis had anything to say about forward-looking policies, and its recommendations were vanishingly thin (one page out of twenty-one) and embarrassingly superficial. \textit{See} CIRC REPORT, supra note 266, at 21.
and how can we make sure it doesn’t happen again?” At the end of the day, “accountability review” of the sort described above is not well adapted to asking the “why” question.

Accountability questions are very important, and administrative reviews and lawsuits that ask them play an important role. These legal actions uncover important information, vindicate important society goals, and—at least sometimes—identify and punish culpable actors. But to focus exclusively on individual blame by the last actor for actions in the past is to miss something vital. This kind of analysis will almost never prevent the shooting of another Tamir Rice tomorrow, or next week, or next year: once the shooting is “justified” the investigator’s job is done. In the complex, tightly coupled world of policing, with its susceptibility to systems accidents, we need a systems-oriented approach that goes beyond the search for accountability.

2. Applying Systems-Oriented Review

My goal in this part is to apply a more systems-oriented, forward-looking analysis to the events that led to the shooting of Tamir Rice. I do not purport to be doing actual “sentinel event review (SER)” as it is practiced in aviation and medicine. Formal SER would require additional data gathering, participation by individuals involved in the event being reviewed, and third-party experts, such as police and forensic specialists. By contrast, I am limited to the information that was gathered in the accountability investigations, and I can only gesture at possible systemic causes and preventative solutions. To the extent possible, however, I use the materials, analysis, and conclusions contained in the investigative record of the Tamir Rice shooting to highlight some of the additional questions that systemic, sentinel event review would be trying to ask (and answer).

Recall that SER is designed to investigate a harmful outcome—here a police shooting—that may signal underlying weaknesses in a system or process. If properly analyzed and addressed, a sentinel event can provide important insights for preventing future, similar adverse outcomes. SER generally employs root

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289 See Hollway et al., supra note 28, at 904 (describing the difference between “accountability review” and “root cause analysis”).
290 Id. at 890.
291 This Part relies on the reviews by IAU, CIRC, and CCPO and their supporting documents, including witness statements, reports by independent police expert, an Ohio Highway Patrol Accident Reconstruction Report, and an enhanced video of the moments before, during and after the shooting. The enhanced video was solicited by the Cuyahoga Prosecutor’s Office from Grant Fredericks, an accredited video analyst with Forensic Video Solutions in Spokane Washington. See GRANT FREDERICKS, FORENSIC VIDEO SOLUTIONS, https://assets.documentcloud.org/documents/2623185/2015-11-28-tr-video-ehancement-forensic-video.pdf [https://perma.cc/M22J-RYLV].
292 See supra Part III.
293 U.S. DEP’T OF JUSTICE, supra note 172, at 1.
cause analysis as a problem-solving tool to determine not only what and how the harm-causing event occurred, but also why it happened.\textsuperscript{294}

One effective method to begin the process of identifying root causes is the “Five Whys” analysis. It involves identifying a problem and then asking a series of “whys” to try to get to successive underlying causes.\textsuperscript{295} The idea is that it takes at least five “Why?” questions—but sometimes more—to uncover a “root” or systems-oriented cause.\textsuperscript{296}

To take a very simple example, suppose the problem is that your car won’t start. Here is how the “Five Whys” analysis might play out:

\begin{quote}
\textbf{PROBLEM:} The vehicle won’t start.
Why? Because the battery is dead.
Why? Because the alternator is not working.
Why? Because the alternator belt is broken.
Why? Because the alternator belt was worn past its useful lifespan and not replaced.
Why? Because the vehicle was not regularly maintained.
\textbf{SOLUTION:} Schedule regular maintenance checks.
\end{quote}

The immediate cause of the problem was a dead battery. If the owner gets a new battery, it will fix that problem and the car will run. Of course, the battery will quickly run down if she doesn’t also get the alternator working. But, even if she gets both a new battery and a new alternator belt, the problem will eventually reoccur unless the car has routine maintenance checks. The only way to keep the same series of events from happening again is to attend to the root problem, the cause, that lies at the beginning of a whole chain of causes.

Sentinel event review of individual harm-causing events is a first step toward identifying systems-oriented solutions.\textsuperscript{298} It may be that nonhuman causes such as organizational factors (management, policies, organizational pressures, or occupational culture) and/or workplace factors (supervision, training, or working conditions) have created a flammable brew just waiting to be ignited by human error.\textsuperscript{299} Solutions, then, should aim not to change people directly, but to change the conditions that lead them to make mistakes by adopting barriers and safeguards that constrain human conduct.\textsuperscript{300}

Sentinel event review of the Tamir Rice shooting begins by identifying the harmful event or problem to be investigated: the shooting of an unarmed twelve-year-old boy.

\textsuperscript{294} See Hollway et al., supra note 28, at 906.
\textsuperscript{295} Id. at 904.
\textsuperscript{296} Id. at 905.
\textsuperscript{297} This example appears in id. at 904.
\textsuperscript{298} Id. at 905. Tools like the “Five Whys” analysis press investigators to work backward in the causal chain behind the human causers identified by accountability review.
\textsuperscript{299} REASON, HUMAN ERROR, supra note 33, at 173. Systemic factors can act as “error traps” that predispose to repeated, similar mistakes.
\textsuperscript{300} Hollway et al., supra note 28, at 905.
PROBLEM: Police Officer Loehmann exited his patrol car in a city park and shot an unarmed boy.

The first “why” question asks why the officer would have fired his gun at an unarmed person. It is the only question that was addressed by each of the three investigations of the Tamir Rice shooting. The answer they gave went something like this:

Why? Because when Officer Loehmann fired the shot he was standing four to seven feet from an individual who fit a police dispatcher’s description of a male in the park who had been “pointing a gun at people.” The officer fired because he thought the male was reaching toward his waistband to pull out a gun.

This answer essentially ended the legal inquiry because it supported a finding that the officer acted reasonably, even if mistakenly: Officer Loehmann reasonably believed that the male he faced when he alighted from the vehicle was the same person who had been threatening people with a gun and he reasonably believed the person was reaching into his waistband for that gun. Based on these facts, all three reviews concluded that the shooting was lawful. The investigations ended there.

Given the narrowness of this analysis, the question of prevention never came up. Indeed, the lawfulness judgment comes with an implicit assumption that the shooting need not—or could not—have been prevented: if the shooting was reasonably necessary to protect the officers’ safety, then it was—by definition—unavoidable. But this assumption is unfounded. That a shooting is justified addresses the momentary culpability of the officer at the moment he pulled the trigger. It tells us nothing about whether this is the kind of circumstance that requires lethal counterforce in order to save the lives of police or third parties or to prevent crime. Specifically, the legality of the shooting does not tell us whether this shooting—and others like it—could be prevented without compromising police or public safety. For that we need an investigation that employs a broader timeframe and goes beyond the first why question to interrogate deeper, systems-oriented causes.

James Reason’s typology of errors for assessing organizational accidents is helpful for expanding the causal horizon beyond the first “why” question addressed by accountability review. Reason makes a distinction between

301 See CCPO REPORT, supra note 255, at 1; CIRC REPORT, supra note 266, at 17; IAU Report, supra note 265, at 3.
302 See CCPO REPORT, supra note 255, at 69.
303 See supra note 278 and accompanying text.
304 Reason’s work is widely cited by virtually all institutions that routinely conduct root cause analysis. See, e.g., NAT’L INST. OF JUSTICE, supra note 230, at 6 (citing REASON, supra note 33). His most cited books were published in the 1990s, but his work goes back to the early 1970s. See JAMES REASON, HUMAN ERROR (1990); JAMES REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS (1997).
“active failures” and “latent conditions,” both of which contribute to organizational accidents.\footnote{REASON, HUMAN ERROR, supra note 33, at 173.}

Active failures are unsafe acts on the part of those who are in direct contact with the system, including, but not limited to, the proximal causer.\footnote{Id.} They can result from: inattention or forgetfulness (“skill-based slips or lapses”); failing to apply good rules and policies or applying bad rules and policies (“rule-based mistakes”); or misapplication of rules or policies to new or novel situations (“knowledge-based mistakes”).\footnote{JAMES REASON, ORGANIZATIONAL ACCIDENTS REVISITED 14–16 (2016) [hereinafter REASON, ORGANIZATIONAL ACCIDENTS REVISITED].} Active failures can also involve violations (as opposed to merely errors). Violations arise from motivational factors and may result from intentionally cutting corners, thrill seeking, habitual rule breaking, or willful violations not condoned by management.\footnote{Id. at 14.}

Reason’s discussion of latent, harm-causing conditions is especially enlightening in the policing context, given accountability review’s failure to look beyond immediate, human causes. Unlike active failures and violations, latent conditions may (but need not) involve mistakes by human actors.\footnote{Id. at 2–3.} Rather, they are preexisting, causal factors (culpable or not) that are necessary to the harmful event, like oxygen is a necessary condition for fire.\footnote{Id. at 3.} Organizational accidents in complex systems “arise from the insidious accumulation of delayed-action failures lying mainly in the managerial and organizational spheres.”\footnote{Id. at 9.} “Such latent conditions (or latent failures) are like resident pathogens within the system.”\footnote{REASON, ORGANIZATIONAL ACCIDENTS REVISITED, supra note 307, at 9.} “Organizational accidents can result when these latent conditions combine with active failures (errors or violations at the ‘sharp end’) . . . to breach or bypass the system defenses.”\footnote{Id. at 10.}

In Reason’s parlance, an organizational accident involves much more than the conduct, culpable or not, of the proximate causer.\footnote{Id. Workplace conditions might include high workloads, time pressure, lack of skill and experience, and inadequate equipment. Id.} The “accident sequence” begins with the organization, where management decisions, organizational processes, and corporate culture create conditions in the workplace that promote errors and violations.\footnote{Id. at 10.} These conditions then combine with human propensities for errors and violations which can result in risk-creating acts.\footnote{Id.} In order for an accident to occur, the organizational and
workplace conditions must combine with human errors or violations and penetrate the system’s ordinary defenses.\textsuperscript{317}

Reason’s typology of accident review highlights the grave limitations of the accountability analysis applied in the Tamir Rice investigations. Stopping with the conclusion that Officer Loehmann acted reasonably at the moment of the shooting leaves multiple potential causes unexplored. By contrast, a systems analysis requires investigators to reach back in time before the moment of the shooting by asking a descending series of questions. Applying a “Five Whys (or more)” framework, one line of analysis could look like this:\textsuperscript{318}

**PROBLEM:** Police Officer Loehmann exited his patrol car and shot an unarmed boy in a city park.

Why? (1) Because when Officer Loehmann fired the shot he was standing four to seven feet from an individual who fit a police dispatcher’s description of a male in the park who had been “pointing a gun at people.”\textsuperscript{319} The officer fired because he thought the male was reaching toward his waistband to pull out a gun.\textsuperscript{320}

Why? (2) Because Officer Garback drove the police vehicle right up to the suspect instead of stopping farther back and seeking cover.\textsuperscript{321}

Why? (3) Because Officer Garback wanted to stop the vehicle close enough so the officers could pursue the suspect on foot.\textsuperscript{322} The grass was wet and snowy, causing the vehicle to slide even closer than he intended.\textsuperscript{323}

Why? (4) Because the officers (mistakenly) thought there was an “active shooter” in the park, which may have influenced their decision to come in quickly and not wait for backup.\textsuperscript{324}

Why? (5) Because the officers were responding to a dispatcher’s inaccurate report that there was an adult male in the park who was threatening people with a gun.\textsuperscript{325}

Why? (6) Because the dispatcher failed to tell police that the 911-caller had actually said that the gun was “probably fake” and that the alleged shooter was “probably a juvenile.”\textsuperscript{326}

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317 In the language of Reason’s famous “Swiss Cheese” model of accident causation, the accident only occurs if the holes in the cheese are lined up so that the hazard finds its way through all the potential layers—organizational, workplace and individual—that would otherwise arrest its progress. \textit{Id.} at 2.

318 Recall again that the idea behind “Five Whys” is that it takes at least five why questions to get to a root cause. As will become clear, this line of analysis is only one series of questions that would be posed as part of a multi-linear, systems review.

319 CCPO REPORT, supra note 255, at 3.

320 \textit{Id.} at 6.

321 \textit{Id.} at 49.

322 \textit{Id.} at 7.

323 \textit{Id.} at 49.

324 \textit{Id.} at 47.

325 CCPO REPORT, supra note 255, at 69.

326 \textit{Id.} at 3.
a. *The Approach*

The questions numbered (2) through (4) above, interrogate the question why Officer Loehmann came to be standing so close to an active shooter. Why would Officer Loehmann have disembarked from the passenger seat of the patrol car within four to seven feet of an individual who was reportedly threatening people with a gun? The instant investigations considered these questions, but only in connection with possible violations of discrete police rules or policies.327 By contrast, sentinel review seeks to determine why the officers used the close approach and whether their decision was a causal factor in the mistaken shooting.

The investigators concluded that the police officers entered the park in response to a “Code-1,” which was the highest priority call.328 They drove their vehicle past a dead-end street and over wet, snowy grass, allegedly to get good access to the location of the alleged shooter.329 According to a forensic analysis by the Ohio State Highway Patrol, which was accepted by the CCPO, the police vehicle was traveling at about 19 mph when the officer braked to a stop.330 The police car came to rest only four to seven feet from where pre-teen Tamir Rice was then standing.331

In defense of their close approach, the officers claimed that they purposely drove right up to the suspect because they had seen him pick up an object, place it in his waistband, and begin walking toward a nearby recreation building.332 Officer Garmback stated that his approach was intended to keep the suspect from entering the recreation building where he might pose a danger to people.333

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327 CIRC REPORT, supra note 266, at 20.
328 A Code-1 designation indicated that the incident posed a significant public risk. CCPO REPORT, supra note 255, at 41.
329 Id. at 7.
330 Officer Garmback said in his written statement that he was traveling at 10–12 mph, id., but the Ohio State Highway Patrol Report put the speed at 19 mph. Id. at 30. The latter speed was accepted by the CCPO REPORT. Id.
331 CRAWFORD, supra note 254, at 1. The investigations and witness statements, including statements by the officers themselves, assert that people on the scene before and after the shooting thought 12-year-old Tamir was much older, perhaps as old as 18 or 19. See, e.g., CCPO REPORT, supra note 255, at 6. That he was mistaken for an adult rather than a child is consistent with social science studies identifying structural racism in age estimations of black male children. See Phillip Atiha Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 532 (2014) (explaining that minority children are consistently estimated to be older than they actually are, while Caucasian children are not).
332 CCPO REPORT, supra note 255, at 6. The officers invoked the Fifth Amendment and gave only written statements to the Internal Affairs Committee and to the CCPO. Id. at 5–6. It appears that they were interviewed by the CIRC investigator. See CIRC REPORT, supra note 266, at 14.
On this explanation, the officers intentionally chose their close approach to allow them to disembark and pursue the suspect on foot. It bears emphasis that not one of the police experts or investigators involved in the official review of these events accepted this defense of the officers’ approach. All agreed that no reasonable officer would have tried to engage an active shooter from such close range, but, rather, would have stopped their vehicle, taken cover and called for backup. For example, the Internal Affairs Unit concluded that Officer Garmback “did not employ proper tactics when he operated the [patrol] car up to what was reported to be an armed suspect, thereby violating [police policy].” The investigator concluded that Garmback had recklessly approached a suspect who was allegedly threatening to shoot people “without [waiting for] backup” even though another squad car had primary responsibility for the area. This action “placed himself and his partner in a position where either or both of them could have been injured by the suspect.” The officer’s tactically flawed approach called for administrative sanctions against him.

Police expert Jeffrey Noble, who reviewed the video of the circumstances surrounding the shooting for the Cuyahoga County Prosecutor’s Office, also strongly disputed the officers’ defense of their close approach:

Reasonable police officers responding to a man with a gun call would have stopped their vehicle prior to entering the park to visually survey the area to

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333 CCPO REPORT, supra note 255, at 7 (“As we moved in to the park, I saw the male in the gazebo. He matched the description given over the radio . . . . I believed at first the male was going to run. I think I told my partner, ‘watch him he’s going to run.’ However, he stopped and turned towards our cruiser . . . . Part of my intentions was [sic] to keep him away from entering the Recreation Center Building.”).

334 See CIRC REPORT, supra note 266, at 14–15 (“[Garmback] states he thought the suspect might run and slammed on the brakes in order to stop the car and ‘bail out.’ He stated he did this so that they could run after the subject. P.O. Garmback indicated he believed the subject might shoot at them because he did not run away as other subjects usually have in the past.”).

335 See, e.g., IAU REPORT, supra note 265, at 5. Commander Brian Hefferman who, in reviewing the IAU’s recommendations, acknowledged Garmback’s alleged rationale (that he was worried the suspect would flee), but concluded that Garmback should have adopted a “safer approach” when working as a Field Training Officer with a rookie probationary partner. Id.

336 Id. at 6.

337 McGrath Letter, supra note 269, at 3. The letter advises Garmback of the results of the administrative pre-disciplinary hearing held on March 13, 2017, in which Garmback was charged with a series of rule violations. Id. at 1.

338 IAU REPORT, supra note 265, at 6.

339 As his reprimand letter framed it, Garmback approached a suspect who was allegedly threatening to shoot people “without [waiting for] backup” even though another squad car had primary responsibility for the area. McGrath Letter, supra note 269, at 3. He was sentenced to a ten-workday suspension for employing improper tactics in approaching an active shooter, failing to wait for backup, and failing to coordinate his actions with the police team that had primary responsibility for that area. Id. at 2–4.
avoid driving upon a subject who may be armed. This serves not only to protect the officers, but also serves to protect others who may be in the area and it provides both time and distance for the officers to evaluate the situation and develop a plan. It also allows time for other officers to arrive to provide assistance.

... The officers’ grossly reckless tactics placed Officer Loehmann in a position where he was within a few feet of Tamir... [This was] counter to virtually all police training that counsels officers to develop a plan prior to confronting a subject, to take their time and proceed cautiously and slowly in attempting to resolve a situation, to remain calm, to remain at a safe distance from a subject, to wait for backup when possible, and to employ tactics focused on de-escalation.\footnote{JEFFREY J. NOBLE, PRELIMINARY EXPERT REPORT OF JEFFREY J. NOBLE 8–9 (Nov. 2015), https://www.chandralaw.com/files/blog/Jeff-Noble-Preliminary-Report.pdf [https://perma.cc/K2T6-ELFM] (emphasis added); see also ROGER CLARK, EXPERT REPORT ON THE SHOOTING DEATH OF TAMIR RICE 10, https://www.ecbalaw.com/wp-content/uploads/2015/11/00234247.pdf [https://perma.cc/U8BC-S5B5] (“Officers are trained to approach similar situations carefully, to assess it, and try to de-escalate it. Here, Officers Loehmann and Garmback did the opposite. Officer Garmback jumped the curb, drove through the park at a reckless speed, stopped right beside Tamir, and Officer Loehmann jumped out shooting... [T]hey had plenty of time to stop their car sooner and assess the situation from a position of cover and safety.”).}

Noble described the alternatives in some detail:

[Police officers are trained how to evaluate and manage potentially violent field situations and how to apply tactics to minimize the danger of risk to themselves and others... Reasonable officers understand the value of cover and concealment, contact and cover strategies, and calm and effective negotiation skills. They are well-versed in containing scenes, setting perimeters, isolating suspects, and evacuating those in harm’s way. Modern police officers are also provided a wide range of tools (including less lethal options like pepper spray, Tasers, and impact projectiles) to minimize the necessity of using serious or deadly force.\footnote{NOBLE, supra note 340, at 7.}

As an alternative defense for his close approach, Garmback claimed that he meant to stop further from the suspect, but the brakes locked and the vehicle slid closer than he had intended.\footnote{CCPO REPORT, supra note 255, at 7 (“The cruiser did slide as I applied my brakes. I am not sure how far. The car did not stop where I intended.”) On the day the shooting occurred, the ground was wet with snow and covered with wet leaves. \textit{Id.} at 4.} It is undisputed that the squad car slid somewhere between 40 and 75 feet after the officer applied the brakes.\footnote{See \textit{id.} at 30 (stating that, based on the speed of the vehicle, the frictional value of the surface at the time, and video evidence, Ohio State Highway Patrol Sergeant John Thorne determined that the vehicle slid to a stop at a minimum of 40.3 feet in 3.5 seconds, or a maximum of 73.3 feet in 4.5 seconds).} This second
explanation for Garmback’s close approach, however, begs two important questions: First, was the officer driving at a safe rate of speed when he applied the brakes, given the need for caution in confronting a possible active shooter? Second, was his intended stopping point far enough back to afford safety and cover in a dangerous situation, given that the grass was wet and snowy? If the answer to either of these questions is “no,” then we are back to saying that Garmback violated best police practices by coming in too close to an active shooter.344

Although police experts universally condemned the officer’s close approach as violating police best practices—and the IAU recommended discipline of Officer Garmback for these actions345—none considered whether the close approach was a causal factor in the shooting. The CCPO report stated that Officer Garmback’s “approach—skidding to a halt directly in front of where Tamir was standing—had left [Officer Loehmann] dangerously exposed to what he believed was a suspect drawing a gun.”346 The IAU investigation concurred that Garmback violated “cover and concealment training” and “high risk traffic stop training” when he drove his police car “up to what was reported to be an armed suspect” thereby “plac[ing] himself and his partner in a position where either or both of them could have been injured by the suspect.”347 But when considering the lawfulness (reasonableness) of the shooting itself, both investigations treated Officer Loehmann’s dangerous location as a “given” and

344 The answers to these questions depend on factual reconstructions of the accident and conclusions based on these reconstructions, upon which investigators and police experts disagreed. Compare NOBLE, supra note 340, at 5 (finding that the officers engaged in reckless tactical decision making that created the danger and the deadly force was excessive, unreasonable, and inconsistent with generally accepted police practices), with CIRC REPORT, supra note 266, at 17 (finding that the tactics used by the officers were reasonable). For example, there is a factual dispute among investigators and experts as to when exactly Officer Garmback applied the brakes in an attempt to stop the vehicle: when the officers saw Tamir sitting still in the gazebo with no gun visible or when Tamir allegedly picked up an object, put it in his waistband, and began walking out of the gazebo and toward the vehicle. This distinction matters for Garmback’s claim that he drove close because he thought the suspect would enter the recreation center and harm people inside. The CIRC investigator concluded that Garmback braked when he saw Tamir with a gun, that the vehicle was traveling about 19 mph when Garmback braked, that the officer was in control of the vehicle, and that he could not have anticipated his vehicle would slide on the wet grass. CIRC REPORT, supra note 266, at 15–17 (stating that “it was possible to clearly see a person picking up a weapon from the picnic table located in the gazebo”).

345 See IAU REPORT, supra note 265, at 6 (concluding that “Office Frank Garmback did not employ proper tactics when he operated the zone car up to what was reported to be an armed suspect, thereby violating General Police Order 2.1.01 [Use of Force]” and recommending that he be “disciplined”).

346 CCPO REPORT, supra note 255, at 66 (emphasis added). CCPO investigators did not fault Garmback only because they concluded that he had intended to stop “much earlier than he did.” Id. at 49; see also CIRC REPORT, supra note 266, at 15–16 (concluding that Garmback intended to stop the vehicle sooner, but it slid on the wet grass).

347 IAU REPORT, supra note 265, at 6 (emphasis added).
neither considered whether the bad positioning contributed to the shooting.\textsuperscript{348} That Garmback’s action may have increased the risk that deadly force would be necessary was deemed irrelevant.\textsuperscript{349}

Police expert Kimberly Crawford made this explicit in her analysis, concluding that whether or not “the officers enhanced [the] risk by entering the park and stopping their vehicle so close to a potentially armed suspect” was not germane to the lawfulness analysis: “Whether the officers’ actions were courageous or foolhardy [in driving within a few feet of the suspect] is not relevant to a constitutional review of the subsequent use of force.”\textsuperscript{350} Legal consultant S. Lamar Sims’s analysis was similar, concluding that:

[Officer Garmback] approached and stopped in such fashion that Officer Loehmann was in a position of great peril—he was within feet of a gunman who had stood up, was approaching the police car and reaching toward his waistband. The officers did not create the violent situation—they were responding to a situation fraught with the potential for violence to citizens . . . . To suggest that Officer Garmback should have stopped the car at another location is to engage in exactly the kind of “Monday morning quarterbacking” the case law exhorts us to avoid.\textsuperscript{351}

The admonition to avoid “Monday morning quarterbacking” is an ironic one under these circumstances. While fans could be faulted for second guessing coaching decisions after a sports event, teams and their coaches spend hours doing precisely that kind of review to figure out what went wrong. My point here is not to fault the instant investigations for focusing their constitutional analysis on the moment of the shooting, as required by the current constitutional standard. It is to make clear that accountability review, which under current doctrine stops at “why” question (1), has foreclosed an entire line of inquiry that is crucial for preventing the next police shooting, namely, “Did the officers’ ‘reckless approach’ which left them ‘dangerously exposed’ and put them in ‘great peril’ significantly (and unreasonably) increase the risk that deadly force would be needed to protect them?” In prevention (or systemic) terms, could a different approach—for example, waiting for backup before engaging the

\textsuperscript{348} See id. at 9; CIRC REPORT, supra note 266, at 17; see also CCPO REPORT, supra note 255, at 37–41.

\textsuperscript{349} See IAU REPORT, supra note 265, at 9; CIRC REPORT, supra note 266, at 17; see also CCPO REPORT, supra note 255, at 37–41 (arguing that “the tactics used by the police officers prior to the use of deadly force cannot be the basis for finding the use of deadly force itself unreasonable”).

\textsuperscript{350} CRAWFORD, supra note 254, at 6.

\textsuperscript{351} Sims, supra note 260, at 12–14 (referring to City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1777 (2015)) (emphasis added). Sims’s reference to “Monday morning quartering” reflects the Supreme Court’s warning not to judge the reasonableness of excessive force with the benefit of 20-20 hindsight. See Graham v. Connor, 490 U.S. 386, 387 (1989); Sheehan, 135 S. Ct. at 1777.
shooter or employing de-escalation techniques—have prevented the shooting without compromising police and public safety.\textsuperscript{352}

On the first point, recall that the officers argued they drove in quickly and close to engage Tamir Rice on foot and block him from entering the recreation center.\textsuperscript{353} This claim implicitly invoked the CPD’s “active shooter” policy, which permits officers to move in rapidly without backup to engage a person who is actively threatening others with a firearm.\textsuperscript{354}

Like virtually all police agencies, Cleveland adopted its active shooter policy in the wake of the Columbine school shooting.\textsuperscript{355} Before Columbine, the universal best practice was for patrol officers to “contain” and “control” a dangerous situation or person and call in a specialized SWAT team to engage with the shooter.\textsuperscript{356} In the Columbine incident, police from various Denver-area agencies responded and secured the perimeter of the school but did not enter to stop the shooter.\textsuperscript{357} Although police were doing exactly what they were trained to do, this strategy was deemed inadequate for circumstances requiring immediate action to halt a shooter.\textsuperscript{358} The active shooter policies adopted post-Columbine give patrol officers the authority to approach at close range without backup in order to stop an individual who is actively engaged in killing people or attempting to kill people in a populated area.\textsuperscript{359}

The Cleveland Police Department’s policy defines an active shooter as an individual whose “activity and use of a firearm (or any other deadly instrument, device, machine, dangerous ordnance, or deadly hazard) is causing or attempting to cause immediate death and/or serious physical harm in a well populated area (target rich environment), such as a school, church, business, or any other public place.”\textsuperscript{360} When these circumstances occur, Cleveland police

\textsuperscript{352} See infra notes 365–71 and accompanying text.
\textsuperscript{353} See CCPO REPORT, supra note 255, at 47.
\textsuperscript{354} See id. at 46–47.
\textsuperscript{355} Id. at 46.
\textsuperscript{356} Id. Law enforcement agencies call this the 4Cs: Contain, Control, Communicate and Call SWAT. See Amaury Murgado, Movement to Contact, POLICE MAG. (Nov. 14, 2013), http://www.policemag.com/channel/careers-training/articles/2013/11/movement-to-contact.aspx [https://perma.cc/99KL-54NS].
\textsuperscript{357} POLICE EXEC. RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: THE POLICE RESPONSE TO ACTIVE SHOOTER INCIDENTS 1 (2014).
\textsuperscript{358} See id. at 2 (“Contain and negotiate’ may be appropriate for hostage incidents or situations where a person is barricaded in a room and unable to harm victims. But it is not appropriate for active shooter incidents.”).
\textsuperscript{359} CCPO REPORT, supra note 255, at 46–47.
\textsuperscript{360} See id. at 46 (quoting Cleveland Police Department Active Shooter Policy). The CPD definition is somewhat broader than the definition that has been adopted across multiple law enforcement agencies, including the FBI and the Department of Homeland Security, which defines an active shooter as “an individual actively engaged in killing or attempting to kill people in a populated area,” such as a school, workplace, house of worship, transportation center, or other public gathering site. Active Shooter Resources, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about/partnerships/office-of-partner-engagement/active-shooter-resources [https://perma.cc/3M69-CMCN].
“have the authority to and shall attempt to make immediate contact with and stop the active shooter.” The prosecutor who investigated the Tamir Rice shooting concluded that the officers’ actions fit within this policy because they faced a “potential active shooter” who was “attempting to cause death and/or serious physical harm” at the nearby recreation center, which was 200 feet away.

Let’s just pause here. Upon arrival at the park, the officers did not see terrified people running away or wounded bodies on the ground. They did not hear gunshots or screaming. The park was virtually empty except for the lone figure of Tamir Rice sitting or standing with no visible firearm. Nothing they witnessed would have confirmed their interpretation of the dispatcher’s message: that they were facing an active shooter.

Thus, the prosecutor’s reading of the CPD was certainly a very broad one. By it, the policy would apply not only to actual shooters but also to potential shooters (which could be anyone with a gun!). Under the prosecutor’s reading, the officers were justified in the belief that Tamir Rice was “causing or attempting to cause immediate death and/or serious physical harm” at the moment they entered the park without backup, even though they had no confirmation that shots had been fired, that anyone actually had a gun, or that anyone had been hurt or was in danger.

By contrast, police expert Jeffrey Noble concluded that the active shooter policy had not been triggered, observing that “there were no claims that a single shot had been fired [or that] anyone was injured in any way, and the officers could see as they arrived that there was no one else in the area.” Invoking the active shooter policy under these circumstances was broadly inconsistent with the purpose of such policies; namely, to authorize police action when the suspect is actively shooting people and “even a one-minute delay in responding may result in multiple additional fatalities.”

It bears emphasis that after all the facts and expert testimony had been considered, the Cleveland Police Department agreed that Tamir Rice was not an active shooter within the meaning of the Department’s policy: it concluded that

361 CCPO REPORT, supra note 255, at 47.
362 Id. Around the time of the incident the recreation center’s security video system recorded a few people near the entrance to the recreation center. Id. at 48. In addition, the prosecutor reasoned that “as an experienced First District officer, Garmback would have known that during business hours, the Recreation Center would be crowded with children and adults.” Id. at 49.
363 Id. at 47 (emphasis added).
Garmback’s claim that he “had to take these actions because it was an active shooter situation [was] not supported by the facts.”

That Officers Garmback and Loehmann apparently believed they were following CPD’s active shooter policy under these circumstances raises broader, systemic questions. For example, did the active shooter policy encourage the officers to make a precipitous approach that increased the likelihood that deadly force would be required without improving officer safety or public safety? Police expert Jeffrey Noble answers in the affirmative. He concludes that “Officer Loehmann’s inaccurate assessment of the situation may [have been] a factor in his unreasonable use of deadly force.”

Or, to ask the question more broadly, are active shooter policies generally being applied in the appropriate circumstances? Do they conflict with de-escalation goals? Has the more precipitous approach that is permitted by these policies increased the incidence of police-involved shootings in some circumstances where such shootings might have been avoided? Virtually no attention has been paid to this important, systemic question by police scholars.

Relatedly, the invocation of the active shooter policy against a potential shooter foreclosed the skillful use of de-escalation techniques that might have diffused the threat without endangering the lives of the officers. In the language of Perrow’s theory of systems accidents, de-escalation creates slack in the social system by loosening the otherwise tight coupling that often characterizes fast-moving, uncertain police/citizen interactions. It gives police more time and creates more space for diffusing the situation without triggering a rapid sequence of circumstances that is hard to arrest or constrain.

While most large police agencies have adopted de-escalation policies, either voluntarily or under Department of Justice consent decrees, the meaning and

366 McGrath Letter, supra note 269, at 4.
367 NOBLE, supra note 364, at 5.
368 Id.
369 For a discussion of active shooter events and policies, see generally J. PETE BLAIR ET AL., ACTIVE SHOOTER: EVENTS AND RESPONSE (2013).
370 None of the investigations discussed whether de-escalation policies could have been used. See generally CCPO REPORT, supra note 255; IAU REPORT, supra note 265; CIRC REPORT, supra note 266 (all failing to discuss de-escalation techniques that could have been utilized). I am not aware of whether the CCPD had such a policy in place at the time of the Tamir Rice shooting and, if so, whether the officers had attended de-escalation training.
371 See PERROW, supra note 19, at 90; see also Sherman, supra note 89, at 436–37 (describing the dangers of tight coupling in the policing context).
373 Id.
application of de-escalation techniques continues to be debated by police leaders.\footnote{In 2016, the Police Executive Research Forum, a prominent, policing think tank, published its Guiding Principles on Use of Force, which urged police agencies to “adopt de-escalation as formal agency policy.” See POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 40 (Mar. 2016). There was immediate pushback from the International Association of Chiefs of Police (IACP), a large professional association for law enforcement worldwide. See Tom Jackman, National Police Groups Add ’De-Escalation’ to New Model Policy on Use of Force, WASH. POST (Jan. 17, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/01/17/national-police-groups-add-de-escalation-to-new-model-policy-on-use-of-force/?noredirect=on [https://perma.cc/T5VX-UYN]. In 2017, however, a group of eleven national police organizations, including IACP, adopted a model policy that incorporated the concept of de-escalation. See NATIONAL CONSSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 2–3 (Oct. 2017), https://www.theiacp.org/sites/default/files/all/no/National_Consensus_Policy_On_Use_Of_Force.pdf [https://perma.cc/6NNH-N77P]. Several large police groups, including two national sheriffs’ associations and the Major Cities Chiefs Association, and PERF, declined to sign on to this document because it included other policies, for example, the use of warning shots, with which they disagreed. Jackman, supra note 375. Most states (thirty-four total) do not mandate de-escalation training, leaving the decision whether to train up to local chiefs and sheriffs. Many departments do not provide such training, citing reasons such as cost, lack of staff, and belief that the training is unnecessary or is a rebuke to traditional policing. Curtis Gilbert, Not Trained to Kill, AM. PUB. MEDIA REP. (May 5, 2017), https://www.apmreports.org/story/2017/05/05/police-de-escalation-training [https://perma.cc/45RQ-MHA3].} Police departments that have instituted de-escalation training have reported drops in use-of-force incidents,\footnote{See, e.g., POLICE EXEC. RESEARCH FORUM, supra note 375, at 15; see also Zaid Jilani, Police Officers Should Be Trained in De-Escalation. It Works, INTERCEPT (Nov. 9, 2017), https://theintercept.com/2017/11/09/baltimore-police-deescalation-video/ [https://perma.cc/3Q8W-TDFA].} but there is a need for systematic empirical studies to document the benefits (and costs) of such training. More robust use of de-escalation strategies may be a systems-oriented strategy that would reduce the risk of police-involved shooting in some contexts.

To summarize: unlike accountability review, sentinel event review gets us to questions (2)–(4), forcing us to ask what features of police rules, policies, management and culture might have contributed to the officers’ decision to approach an active shooter, driving at 19 mph over wet and snowy grass, without backup and without adequate cover. In addition, the line of analysis I have constructed from the instant reports is only the beginning of a systems-oriented analysis. The potential causes that I have identified—along with other possible causes—could, in turn, implicate defects in supervision, management, training, or organizational culture. The goal of systems review is to identify actionable steps that will address not only the proximate cause, but second and third order causes—both human (active) and organizational (latent)—that combined with the proximate human cause to result in a catastrophic event. Recommendations emphasize verbal de-escalation techniques as part of an agreement to resolve the DOJ’s investigation of the BPD pursuant to 42 U.S.C. § 14141).
are designed not only, or primarily, to change the behavior of human causers, but to make it harder for them to make mistakes.

b. The Dispatcher’s Call

Returning to our list of “why” questions, we are ready to tackle (5)–(6), which interrogate the response to “why” question (4); namely, why did the officers mistakenly think they were facing an active shooter?

Why (5)? Because the officers were responding to a dispatcher’s inaccurate report that there was an adult male in the park who was threatening people with a gun.

Why (6)? Because the dispatcher failed to tell police that the 911-caller had actually said that the gun was “probably fake and the alleged shooter was “probably a juvenile.”

To get at these questions, I need to fill in the beginning of the story of what happened on November 22, 2014, the day that Tamir Rice was shot. At approximately 3:24 pm, a Cleveland Police dispatcher received a 911 call in which the caller’s initial words were, “I’m sitting here in the park . . . by the West Boulevard Rapid Transit Station. There’s a guy with a pistol. It’s probably fake, but he’s like pointing it at everybody.” Two more times in the course of a very short conversation, the caller expressed uncertainty about whether the gun was real, saying “It’s probably fake” and “I don’t know if it’s real or not.” The caller also said the guy was “probably a juvenile.”

Despite the fact that the caller expressed multiple qualifications, the call-taker did not convey these qualifications to the police dispatcher who told police: “Hey we have a Code-1 at Cudell. Everybody is tied up on priorities. Supposed to be a guy sitting on the swings pointing a gun at people.” And again,

Alright, it’s at Cudell Rec Center; 19, 10 West Boulevard; 1, 9, 1, 0 West Boulevard. [911 caller] calling. He said in the park by the Youth Center, there’s a black male sitting on the swing. He’s wearing a camouflage hat, a gray jacket with black sleeves. He keeps pulling a gun out of his pants and pointing it at people.

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377 CCPO REPORT, supra note 255, at 2.
378 Id.
379 Id. at 3.
380 Id. For text of the entire 911 call, see id. at 2–3.
381 A Code-1 is the highest priority call and it “designated the incident as [posing] a significant public risk.” Id. at 3, 41.
382 Id. at 3.
383 CCPO REPORT, supra note 255, at 4.
As a result of this message, Officers Loehmann and Garmback volunteered to respond to what was deemed the highest priority police call. They later testified that they believed they were responding to an “active shooter” situation, which under police protocols might have given them justification to approach the suspect without waiting for backup. Their expectation that the person they were about to encounter was an adult threatening people with a real gun shaped their expectations and tactical decisions as they drove into the park and confronted the suspect. When Officer Loehmann disembarked with his gun drawn and saw the suspect reach toward his waistband, he believed the suspect was now threatening him with a real gun. He did not know that the suspect was a child and the gun he was allegedly reaching for was a nonlethal “airsoft” gun.

The call-taker’s errors were prior workplace mistakes, holes in an earlier layer of Swiss cheese, weaknesses in the layers of protection that might have reduced the risk of (or prevented) the accident. The IAU investigation concluded that the call-taker had “failed to include [certain pertinent] information in the incident or to update the incident with the applicable [information],” in violation of Bureau of Communications and Property Control, Communications Control Section, Policy and Procedure Number 2012-04(VII).

According to police experts, procedures requiring additional questioning and updating reflect the necessity for call-takers to be sufficiently skeptical of the accuracy and veracity of the 911 caller. While information given from a citizen-informant who gives his or her name and phone number is considered the most accurate form of informant information, dispatchers are also trained to be skeptical: many 911 calls are outright false and/or contain incorrect or inaccurate information.

The uncertainty conveyed in the call in this case

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384 Id. at 3.
385 Id. at 6, 45. It is not clear that even based on the erroneous dispatch the situation qualified as an “active shooting” as the suspect had not shot anyone or actively threatened to shoot. See supra notes 362–65 and accompanying text.
386 CCPO REPORT, supra note 255, at 6–7.
387 Id. at 6.
388 Id. at 2.
389 IAU REPORT, supra note 265, at 9–10. This policy requires the call-taker to “obtain the basic information and immediately send the information to the dispatcher” informing the caller that the call-taker “must ask a few more questions, advising [the caller] that this will not delay the information being sent to the dispatcher or the responding zone car.” Id. at 9. The call-taker is to “gather pertinent information on the critical call and update the incident as needed.” Id. at 9–10.
390 CCPO REPORT, supra note 255, at 42 (citing LEWIS R. KATZ, OHIO ARREST, SEARCH AND SEIZURE 93 § 2:22 (2015 ed.) (concluding that the officers had probable cause that the suspect had violated Ohio’s felonious assault statute by taking a gun out and pointing it at people)).
391 See, e.g., CLARK, supra note 340, at 9. Officer Clark, who was retained by the Rice family in their § 1983 suit against the City of Cleveland, see CCPO REPORT, supra note 255, at 31, had 40 years of experience in law enforcement. CLARK, supra note 340, at 2, 9. As a former supervisor in the Los Angeles County Sheriff’s Department communications center,
would have required, at a minimum, a means for the informant to make contact with the dispatched units to vet the information the dispatcher had received. This was especially important given that Tamir was dressed in fairly ordinary clothing, which would have made it more difficult to identify him quickly and increased the risk of misidentification. The dispatcher should have instructed the informant to move to a safe place and remain on the line to provide accurate information or point out the target to police officers.

The call-taker also failed to convey to the dispatcher and thus to police officers converging on the scene the specific uncertainties the 911 caller had expressed when calling in the alleged threat, namely that the person he had observed might be a kid (“juvenile”) playing around with a toy (“fake”) gun. According to Assistant County Prosecutor Matthew Meyer who reviewed the entire episode for the Cuyahoga County Prosecutor’s Office, if the officers had received this “critical information,” they “would not have considered this incident to have been so serious and almost certainly would have used different tactics.” The information the officers received from the dispatcher “led the two responding officers to believe that a [grown] man with a real gun was threatening innocent people’s lives at a recreation center.” Their mistaken beliefs distorted their assessment of the risks posed, shaped their tactical choices, and negatively impacted their response to Tamir’s actions. When Tamir “unexpectedly moved in their direction and began pulling the gun from his waistband, the officers had no idea that it was fake or that Tamir was only twelve.”

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he was well acquainted with the danger of “false alarms” and the safeguards necessary to ensure that reliable information is obtained and dispatched with precision to field units. Id. at 9. In his view, the dispatcher’s report was “grossly incomplete.” Id. at 9. See CCPO REPORT, supra note 255, at 3. The caller said the black male had on “a gray coat with black sleeves,” “gray pants,” and a “camouflage hat.” Id. See CLARK, supra note 340, at 8. See CCPO REPORT, supra note 255, at 69. See News 5 Cleveland, Full Press Conference: Grand Jury Declines to Indict Officer who Shot 12-year-old Tamir Rice in Clev, YouTube (Dec. 28, 2015), https://www.youtube.com/watch?v=N7GZFbEm2eo [https://perma.cc/4XZZ-UGSK] (reporting by Assistant County Prosecutor Matthew Meyer with quoted material at 39:00–39:23). The IAU investigator recommended that the call-taker be disciplined for her failure to “include the information [that the suspect might be a juvenile and the gun might be fake] in the incident or to update the incident with the applicable [information].” IAU REPORT, supra note 265, at 10. This failure violated police policy concerning how incidents are to be reported and updated. See id. The CIRC also concluded that the call-taker “may have violated” police policy. See CIRC REPORT, supra note 266, at 19. In discussing the effect of the erroneous dispatch message, CIRC investigators noted: “From [the officers’] perspective they were preparing to respond to the call for a male with a gun pointing it at people.” Id. at 17.

Neither the IAU investigation nor the CIRC investigation (nor most of the police experts who reviewed the case) adequately discussed the *possible causal link* between the erroneous dispatch information the officers received and their use of deadly force in the park.\(^{399}\) This is a crucial omission if the goal is to avoid the next tragic shooting. It again points out the limitations of accountability review.

Two police experts did consider a possible link—concluding there was none—but for conflicting reasons. Police expert Ken Katsaris concluded that the omitted information was “irrelevant to the deadly force decision” because at the *precise point* when Tamir Rice appeared to be reaching for his waistband “the only objectively reasonable decision to be made by Loehmann was to utilize deadly force and deploy his firearm.”\(^{400}\) Police expert Roger Clark agreed that the dispatch was irrelevant but for a different reason. He reasoned that even based upon what Officer Loehmann *did* know “it was unreasonable for him (Loehmann) to jump out with his gun drawn and immediately open fire within 1.7 seconds at a person he could not be sure was the subject of the dispatch.”\(^{401}\) Crucially, both experts applied a very narrow timeframe—the exact moment of the shooting—in finding the erroneous dispatch causally irrelevant.

One last piece of the puzzle is that the erroneous dispatch was the first step in the causal chain that led Officers Garmback and Loehmann to apply the department’s “active shooter” policy.\(^{402}\) As noted earlier, this was a crucial judgment: the police officers believed it permitted, indeed compelled them to act more aggressively, more quickly, and without waiting for backup. Approaching an armed and dangerous individual at close range without backup would obviously have increased the risk that the officers would find it necessary

\(^{399}\) The IAU REPORT recommended punishment for the call-taker’s failure accurately to convey all relevant information to the officers, but did not connect it to the shooting. IAU REPORT, *supra* note 265, at 10. The CIRC Report noted in passing that the erroneous transmission led the officers to believe “they were preparing to respond to the call for a male with a gun pointing it at people,” but did not pursue this connection further. CIRC REPORT, *supra* note 266, at 17 (recommending follow-up training for dispatchers involved, including training on following correct procedures for documenting incoming information, but not how to handle unclear reporting from a 911 caller). The CCPO Report came the closest to connecting the erroneous dispatch with the shooting, noting that the reasonableness of the officers’ actions must be judged based on their “tragically mistaken [view] about the key facts of the case.” CCPO REPORT, *supra* note 255, at 69. The conclusion that the officers had acted lawfully, however, marked the end of the legal inquiry with no further need to interrogate the causal connections for purpose of prevention. See *id.* at 69–70.  


\(^{402}\) Police expert Jeffrey Noble disagreed that the circumstances triggered the CPD’s active shooter police. See *supra* notes 362–65 and accompanying text.
to use deadly force against the suspect. It should be clear that a contain-and-wait-for-backup strategy might have produced a different result than a strategy designed to neutralize a potentially dangerous gunman: if the officers had received the correct information about the suspect, sought backup to secure the recreation center, taken more time to consider their approach, and kept in touch with the dispatcher, the situation might have resolved without a shooting. If so, the dispatcher’s error that led to the designation “active shooter” may have played a decisive role in the shooting of Tamir Rice.

In a true systems review, my linear analysis of questions (5)–(6) would have been supplemented by an exploration of additional possible causes for the dispatcher’s actions: was there a policy in place that led the dispatcher to decline to pass on information she was unsure of? Was the dispatcher operating without clear guidance on how to handle transmission of disputed or unclear information? Was there a policy in place, but the dispatcher was inadequately trained on that policy? Did the dispatcher fail to disclose out of fear that if she cast doubt on whether the gun was real, police might place themselves in danger? Was the dispatcher distracted, inattentive or careless as a result of personal circumstances (e.g., fatigue) or workplace conditions (e.g., low morale)? Any of these causes could, in turn, lead to additional “why” questions and ultimately to additional human or systems causes that could be addressed by remedial recommendations.

V. THE PROMISE OF SENTINEL EVENT/SYSTEMS REVIEW IN POLICING

The purpose of my discussion in the prior section was to identify and answer some of the “why” questions that sentinel event review might tackle. While my analysis relied on the information contained in the instant investigations, it differed from the administrative and legal investigations of the Tamir Rice shooting in at least three important ways: First, my analysis expanded the causal timeframe. It went behind the proximal human causer to ferret out second and third level causes outside the narrow time frame of the immediate causer’s actions. In addition, rather than asking whether each human causer was blameworthy for violating a law or policy applicable to their specific area of

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403 As noted earlier, where activity poses a serious risk to public safety, most police departments have shifted from a “contain-and-wait-for-backup strategy” towards a policy that authorizes the first police responders to “quickly engage and attempt to neutralize active shooters.” CCPO REPORT, supra note 255, at 46 (citing Anderson Cooper, Responding to an Active Shooter, 60 MINUTES (Nov. 22, 2015), https://www.cbsnews.com/news/responding-to-an-active-shooter-60-minutes-anderson-cooper/ [https://perma.cc/J3BW-SB62]). The CPD defined an active shooter as one whose “activity and use of a firearm (or any other deadly instrument, device, machine, dangerous ordnance [sic], or deadly hazard) is causing or attempting to cause immediate death and/or serious bodily harm in a well populated area (target rich environment), such as a school, church, business, or any other public place.” Id.
responsibility. I asked how their conduct ultimately contributed to the end result: the tragic shooting of an unarmed boy.

Second, the analysis went behind individual human errors to ask what kinds of latent systemic causes might lie behind them, including error-producing conditions in the workplace—such as low morale, fatigue, poor police training, or inadequate equipment—and organizational factors—such as management decisions, organizational processes, and corporate culture.\footnote{404}{This is why broadening the timeframe in Fourth Amendment analysis would be helpful, but not sufficient. As noted above, some circuits have permitted claimants to include, in their excessive force claim, circumstances that preceded the actual moment of the shooting. See supra note 275 and accompanying text. This could permit a court to consider whether reckless or unreasonable tactical decisions prior to the shooting unreasonably increased the risk that deadly force would be necessary. For example, in an excessive force claim against Officer Loehmann, it might have permitted a court to consider Loehmann’s role in the decision to drive the patrol car so close to Tamir that it put the officers in danger. For obvious reasons, however, even the broader timeframe would not yield the same benefits as root cause analysis, which not only broadens the timeframe, but includes consideration of second and third level causes not directly related to Officer Loehmann’s actions.}

Finally, the ultimate purpose of my inquiry was not primarily to identify errors made by individual actors in order to sanction them. Its purpose, rather, was to identify systems-oriented barriers and defenses that could reduce the risk of the kinds of human errors that may have occurred.

Detailed investigation of particular, harm-causing events of this sort has been an essential feature of systems review in commercial aviation and medicine.\footnote{405}{See supra Parts III.A–B.} Recall, however, that the dramatic advances in safety in these contexts depends upon additional analysis that goes beyond single incident review. Risk management experts have learned to use the insights gleaned from particular, sentinel event reviews to uncover patterns of repeated, similar errors that were found to have caused repeated, similar accidents.\footnote{406}{See supra Part III.C.} This pattern evidence has then been employed by risk managers to formulate systems-oriented solutions to address the repeated errors.\footnote{407}{See, e.g., Kapur et al., supra note 130, at 7.} It is this pattern-identifying analysis that is responsible for the dramatic advances in safety in commercial aviation and medicine.\footnote{408}{See id.}

In Part A, below, I next identify some features of the Tamir Rice shooting that have recurred in other police shootings, and thus may call for systems-oriented solutions. I can only gesture in this direction, however. It would ultimately fall to policing experts to identify errors and corresponding points of systems vulnerability, and then formulate and implement solutions designed to address these failures. Then, in Part B, I broaden the discussion beyond the Tamir Rice shooting. I discuss systems-oriented solutions suggested by data-informed analysis of demographic and circumstantial features of police shootings writ large.
A. Beyond the Single Incident

Comparing the Tamir Rice case with other incidents of police-involved shootings suggests some repeated circumstances that may increase the risk of police shootings. I have already discussed two such circumstances: namely, circumstances involving active shooters and circumstances that might call for de-escalation strategies. Comparing police responses in multiple contexts involving the invocation of active shooter policies could lead to systemic lessons for safer, more effective use of police force. Similarly, comparing the use of de-escalation strategies in multiple contexts could enhance police learning about best practices in diffusing potentially dangerous confrontations.

A third systemic factor that contributed to the shooting of Tamir Rice was a breakdown in communication at several points. The first was the transfer of erroneous information between the dispatcher and the police officers, which led them to think they were facing an adult, active shooter with an actual gun.409

The second communication breakdown was Officer Garback’s failure to coordinate his approach with another police vehicle that was in the area and was formally assigned to the jurisdiction in which the park was located.410 Garback failed to report his arrival time to the dispatcher and neglected to make radio contact at any time prior to the shooting.411 As Garback’s disciplinary letter framed it:

No one knew where you were or what you were doing, and you did not know where anyone else was or what they were doing, until after the shooting occurred. . . . You never requested instructions from the primary car or otherwise coordinated your efforts with the primary car. You never gave the primary car the opportunity to decide on the best strategy.412

Had Garback communicated his location, the other officers—who arrived at the park only a few minutes later—could have provided backup, which might have changed the chosen approach and created space for de-escalation strategies.

Significantly, communication breakdown among team members is one of the most significant systemic causes of accidents that has been identified by risk management experts in commercial aviation and medicine.413 Airlines have

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409 CCPO REPORT, supra note 255, at 69.
410 McGrath Letter, supra note 269, at 2.
411 Id.
412 Id. at 3.
413 See, e.g., Helmreich, supra note 176, at 781 (arguing that pilots and doctors have “common interpersonal problem areas and similarities in professional culture” including the breakdown of communication); MACR A E, supra note 157, at 96 (concluding that “[c]ommunication problems are regularly found to be key contributors to adverse events and accidents”); A.J. Starmer et al., Changes in Medical Errors After Implementation of a Handoff Program, 371 NEW ENG. J. MED. 1803, 1803 (2014) (identifying “miscommunications” as a “leading cause of serious medical errors”).
sought to address the risks of miscommunication in the cockpit or between pilots and other airline personnel by requiring airline employees to undergo Crew Resource Management (CRM) training.\textsuperscript{414} CRM training can be traced back to National Aeronautics and Space Administration research, which identified human error resulting from failures of interpersonal communications, decision making and leadership as a major cause of air crashes.\textsuperscript{415} CRM is a set of instructional strategies aimed at reducing human error and increasing the effectiveness of flight crews by improving teamwork in the cockpit.\textsuperscript{416} While it is difficult to establish a clear causal link between CRM training and airline crashes, studies demonstrate a positive effect on attitudes, knowledge, and safety-enhancing behavior.\textsuperscript{417}

Medical experts have sought to replicate the CRM program in the medical context, particularly among personnel in the operating room.\textsuperscript{418} Hospitals have also sought to improve communication by standardizing what is communicated when patients are “handed off” from one medical person to another, with dramatic reduction of medical errors.\textsuperscript{419}

Police officers, like commercial aviation personnel and medical personnel, work in teams, which include other officers, administrative personnel, dispatchers, etc. Miscommunication and misunderstanding among members of the policing team and uncertainty about who is in charge have contributed to many tragic scenarios in the policing context.\textsuperscript{420}


\textsuperscript{415} Id.


\textsuperscript{418} See, e.g., Kapur et al., supra note 130, at 5 (arguing that communication failures may be more likely to occur in healthcare than in aviation cockpit settings and suggesting that some healthcare settings may benefit from implementation of aviation procedures); Leonie Seager et al., Applying Aviation Factors to Oral and Maxillofacial Surgery—The Human Element, 51 BRITISH J. ORAL MAXILLOFACIAL SURGERY 8, 8 (2013) (identifying features of crew resource management training that could readily be applied to healthcare settings).

\textsuperscript{419} See generally Starmer et al., supra note 413 (describing multicenter study assessing programs designed to improve handoff of information about patient care).

Finally, the Tamir Rice shooting raises the broader question of mistakes caused by realistic-looking, nonlethal guns. In 2016, the Washington Post did an analysis of police shootings involving “ultra-real-looking pellet guns, toy weapons and non-functioning replicas.”\(^{421}\) According to the Washington Post’s database of fatal police shootings, over the two years prior to the article’s publication, police had shot and killed eighty-six people in such encounters.\(^{422}\) Half of these shootings occurred at night.\(^{423}\) Police report that in sixty cases the suspect pointed the gun at them, and in virtually all of the cases the suspect failed to comply with their instructions.\(^{424}\) Significantly, in a large percentage of these cases—thirty-eight out of eighty-six—the suspect had a history of mental illness.\(^{425}\) Ten of the shootings began as robberies\(^{426}\) and fourteen resulted from calls of domestic disturbances.\(^{427}\) Over the years, however, a significant number of police shootings involving imitation firearms have involved individuals who were not committing crimes, some of whom were young children.\(^{428}\)

In 1988, Congress passed legislation that required a bright orange barrel on some imitation firearms, including water guns, many replicas and Airsoft guns that fire nonmetallic projectile, but it exempted BB guns, pellet guns, and replicas of antique firearms.\(^{429}\) Subsequent studies mandated by federal law to study whether the mandated orange barrels would prevent shootings found that the markings did not help police distinguish between toy guns and real guns.\(^{430}\)


\(^{422}\) Id.

\(^{423}\) Id.

\(^{424}\) Id.

\(^{425}\) Id.

\(^{426}\) Id. According to a 1990 study of shootings involving toy or immigration firearms, a nontrivial number involved suspects who were using them to commit crimes such as robbery and assault. See POLICE EXEC. RESEARCH FORUM, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, TOY GUNS: INVOLVEMENT IN CRIME AND ENCOUNTERS WITH POLICE viii (June 1990) [hereinafter TOY GUNS]. This study found that fifteen percent of all robberies are perpetrated with fake firearms. Id.

\(^{427}\) Sullivan et al., supra note 421.

\(^{428}\) See id. For example, five-year-old Patrick Andrew Mason was shot by a police officer who came to do a welfare check and mistook a child with a red gun for a burglar. Id.

\(^{429}\) Id.

\(^{430}\) See TOY GUNS, supra note 426, at viii–ix; KENNETH CARLSON & PETER FINN, ABT ASSOCIATES INC., TEST OF THE VISIBILITY OF TOY AND REPLICA HANDGUN MARKINGS x
Police confirm that it is “virtually impossible” to train officers to distinguish between actual guns and imitations from a distance.431 They are trained to treat anything that looks like a gun as a potential lethal threat, regardless of what the suspect may try to claim.432

The risk created by imitation firearms cries out for a systemic, legislative solution. One possibility would be to mandate that the entire surface of all toy guns and BB guns be painted a bright color, as California state law requires.433 Of course, it remains to be seen whether police officers are able to distinguish the bright colors at a distance or at night. Eleven states, the District of Columbia and Puerto Rico have banned imitation firearms or imposed restrictions on their use.434 The cities of Washington, D.C., Baltimore, Maryland, and Boston, Massachusetts have outlawed imitation firearms in public.435 The risk posed by the ubiquity of imitation firearms, some made by manufacturers who advertise their imitation guns as “carbon copies” of their most popular lethal firearms, cannot be addressed at the level of the individual police agency.436 It requires a systemic, legislative solution.

A final, intractable, systemic issue raised by the shooting of Tamir Rice is the fact that the twelve-year-old was assumed by most everyone on the scene to have been an adult.437 This mistake traces back to the initial 911 caller who was


431 Sullivan et al., supra note 421.

432 See TOY GUNS, supra note 426, at ix. During site visits by PERF investigators conducting the study referenced in note 426, police officers described a “Shoot/Don’t Shoot” training video in which the suspect appears with a gun and says something like “Don’t shoot, it’s a toy.” When the officer stands down, the suspect shoots the officer. This training illustrates why police are taught to assume that any object that looks like a firearm is a real weapon. Id.

433 Sullivan et al., supra note 421. In 2015, Sen. Barbara Boxer (D. Cal.) introduced a bill that would have mandated the California solution as a matter of federal law, but the bill stalled in committee. Id.

434 See Kevin Frazzini, Fracas over Fakes, 42 ST. LEGISLATURES 8, 8 (2016).


437 CCPO REPORT, supra note 255, at 3. Both Officers Loehmann and Garmback thought twelve-year-old Tamir was over eighteen years old. Id. at 6–7. Detective Lentz, who arrived on the scene immediately after Tamir was shot, thought the boy was seventeen or eighteen. Id. at 8. Patrol Officer Ken Zverina and Patrol Officer Ricardo Roman, who were in the area and arrived on the scene six minutes after the shooting described Tamir as “18–20 years old” and “early twenties” respectively. Id. at 10–11. Two other officers who responded to the report of shots fired, Louis Kitko and Chuck Judd, stated that Tamir looked to be somewhere between eighteen and twenty years old. Id. at 11–12.
unsure whether Tamir was a “juvenile.” The systemic nature of the error is reflected in social science studies showing that black boys are routinely misperceived as older than they actually are, including by police. For example, in one study black thirteen-year-old boys were routinely mischaracterized as adults by police officer participants from a large urban police department. The average age error for thirteen-year-old black boys was 4.59 years. The overestimation of age was correlated with police assumptions that the black, juvenile suspects were more culpable than white boys of the same age. Significantly, it was also correlated with a higher level of use of force by police against black male children, controlling for how much the suspects resisted arrest or were located in high-crime areas.

Devising systemic solutions for racial disparities of this sort is a huge challenge. Some police departments have initiated programs to address implicit racial bias through educational training, with mixed success for lasting change. Police departments in many cities have also sought to create more racially mixed departments to better reflect the demographics of their communities. Community oriented policing—where officers walk the neighborhood on foot or otherwise become involved with neighborhood youth—means that police are more likely to know or recognize the juveniles in the areas they patrol. This strategy could mitigate the kind of mistakes that contributed to Tamir’s death. At the end of the day, though, structural racism is one of our nation’s biggest challenges in contexts that go well beyond policing. A more detailed account is beyond the scope of this Article.

438 Id. at 3.
439 Goff et al., supra note 331, at 530–35.
440 See id. at 535.
441 See id. at 534–35. The study focused on black boys rather black than girls on the ground that black boys were more likely to become involved in criminal activity. Id. at 528.
442 See id. at 534.
443 See id. at 535. Significantly, these racial disparities were predicted by measures of dehumanization but not by traditional measures of explicit or implicit bias. Id. Dehumanization is “the denial of full humanness to others,” meaning that social protections from violence can be removed. Id. at 527 (quoting Nick Haslam, Dehumanization: An Integrative View, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 252 (2006)). The general association between a group and “animals” is one form of dehumanization. Id. at 528. For example, the association of African-Americans with great apes. Id.
444 For an optimistic assessment by a former police officer turned lawyer that “sophisticated training could lead to more accurate threat identifications, correcting for racial bias that officers may not even be aware of,” see Seth Stoughton, How Police Training Contributes to Avoidable Deaths, ATLANTIC (Dec. 12, 2014), https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/ [https://perma.cc/HQW5-U7U9].
B. Data-Informed Analysis: Looking for Patterns in Police Shootings

The identification of system vulnerabilities in the circumstances leading up to the shooting of Tamir Rice and the effort to identify similar vulnerabilities in other police shootings illustrates the way a single incident can be mined for potential pan-incident vulnerabilities and corresponding pan-incident solutions. But analyzing specific incidents is only one strategy for this.

A second strategy is to analyze the wide range of accessible statistical data that is currently available on police shootings for patterns that suggest potential systemic changes. This kind of research and analysis, focusing specifically on systems-oriented interventions, are still in their infancy. One of the most thorough recent studies along these lines is Franklin Zimring’s 2017 book, *When Police Kill*, made possible by newly accessible statistical data from two websites, both launched in 2015 to keep detailed data on police shootings.446

For many years the FBI and the Centers for Disease Prevention were the only available sources of data on the incidence and circumstances of police-involved fatal shootings. Government officials have admitted that these data, which depend on voluntary reporting,447 were and are woefully inadequate and incomplete.448 In 2015, the Washington Post and the Guardian (a British daily newspaper) each launched databases designed to keep better records of police-involved shootings.449

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446 *See ZIMRING, supra* note 249, at 43.
The Washington Post began compiling a database of every fatal shooting in the United States by a police officer in the line of duty.\textsuperscript{450} The Post tracks more than a dozen details about each killing, including the race of the victim, the circumstances of the shooting, and whether the person was armed or experiencing a mental health crisis.\textsuperscript{451} It obtains the information for the database from local news reports, law enforcement websites, social media, and by monitoring independent databases such as Killed by Police and Fatal Encounters.\textsuperscript{452}

The Guardian’s website—“The Counted”—is an interactive database that uses a “verified crowdsourcing model to record fatal encounters through sixteen data points.”\textsuperscript{453} The Guardian has also published a series of long form investigations into recurring police use of force issues identified by analysis of the data.\textsuperscript{454}

Police scholars urging systems-oriented review in policing have begun to rely on these databases to identify trends and patterns associated with increased


\textsuperscript{450} Tate et al., supra note 449.

\textsuperscript{451} Id.

\textsuperscript{452} Id. In 2016, the Post began gathering additional information by filing open records requests with police departments. “More than a dozen additional details are being collected about officers in each shooting,” and the “[o]fficers’ names are being included in the database after The Post contacts the departments to request comment.” Id.

\textsuperscript{453} Laughland & Lartey, supra note 449; see also The Counted: About the Project, Guardian, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted [https://perma.cc/84LY-3MJV] (“The Counted is a project by The Guardian—and you—working to count the number of people killed by police and other law enforcement agencies in the United States throughout 2015 and 2016, to monitor their demographics and to tell the stories of how they died.”).

risk of police shootings.\textsuperscript{455} Perhaps the most comprehensive is Franklin Zimring’s book-length analysis of police-shooting data.\textsuperscript{456} One of the most important goals of Zimring’s analysis is to find systems-oriented strategies that reduce police shootings of civilians—even legally justified ones—\textit{without compromising police safety}.\textsuperscript{457} So, for example, his recommendations for empirical research call for studies that encompass both investigations on the character and causes of police use of fatal force and research on minimizing threats to police from life-threatening incidents while on duty: “Testing the current assumptions about what threatens police and searching for tactics and limitations on police force that can reduce civilian death rates at no cost to police safety are the central tasks of policy research on police use of deadly force.”\textsuperscript{458}

For Zimring, the most important strategy for decreasing the use of deadly force by armed police officers is clear restrictions on the \textit{circumstances} in which and the \textit{extent} to which police are permitted to use force.\textsuperscript{459} In getting at what such restrictions should look like, a key question is what kinds of police/citizen interactions result in the highest incidence of police shootings. One systemic strategy would be to reduce, when possible, the kinds of police/citizen interactions that increase this risk.\textsuperscript{460}

Zimring used 2015 data from the \textit{Guardian} website to answer the police/citizen interaction question posed above.\textsuperscript{461} His analysis revealed that while most of the categories of citizen activity resulting in police-involved shootings involved relatively serious, criminal activities (criminal investigation, crime in progress, arrest in progress, serving warrants, armed and dangerous, shots fired), fully nine percent of shootings—approximately 100 deaths per


\textsuperscript{456} See generally ZIMRING, supra note 249.

\textsuperscript{457} See id. at 162.

\textsuperscript{458} Id.

\textsuperscript{459} Id. at 227, 231.


\textsuperscript{461} ZIMRING, supra note 249, at 43.
year—occurred after a traffic stop.\textsuperscript{462} This was despite the fact that individuals who are shot during a traffic stop are disproportionately unlikely to be armed.\textsuperscript{463}

While police officers are relatively unlikely to be injured or killed during routine traffic stops, the “dominant narrative” in policing is that traffic stops are fraught with hidden, unpredictable danger.\textsuperscript{464} Jordan Blair Woods describes how police academies “show officer trainees videos of the most extreme cases of violence against officers during routine traffic stops in order to stress that mundane police work can quickly turn into a deadly situation if they become complacent on the scene or hesitate to use force.”\textsuperscript{465} According to police magazines and websites, traffic stops figure prominently in law enforcement training videos because “the traffic stop remains one of the most dangerous aspects of police work.”\textsuperscript{466} Given their training, it is not surprising that traffic stops create stress and anxiety and police approach them ready for action. Joanna Schwartz frames it this way: “As an officer is walking up to the car window, he is likely to be primed for the possibility that the person he has stopped is armed and dangerous, and that he may need to make a split-second decision about whether to use force.”\textsuperscript{467} This creates precisely the kind of “cognitive strain that heightens implicit biases and makes error more likely.”\textsuperscript{468}

Given these realities, Zimring’s observation is important: while many of the risk-creating police/citizen interactions he identified are impossible to avoid because they involve serious criminal activity, it \textit{would} be possible to reduce the incidence of traffic stops. For example, police could use cameras more widely, i.e. to identify and ticket not only speeders and red-light violators, but also individuals with minor violations such as broken taillights. One creative solution for minor traffic offenses is for police to pull up behind an automobile, photograph the license plate and log a ticket to that license plate by computer.\textsuperscript{469}

The key point here is that it makes sense to reduce the incidence of routine traffic

\textsuperscript{462} Id. at 52–53.


\textsuperscript{465} Id. at 638 (internal footnotes omitted).


\textsuperscript{467} Schwartz, supra note 243, at 547.

\textsuperscript{468} \textit{Id.} at 548.

\textsuperscript{469} See Friedersdorf, supra note 460.
stops if they greatly increase the risk of police-involved shootings and pose risks to officer safety, without significantly enhancing road safety.\footnote{470} It is worth noting that quite a number of the most notorious police-involved shootings that have occurred over the past fifteen years involved traffic stops for relatively trivial violations that ultimately escalated out of control, resulting in the deaths of Samuel DuBose,\footnote{471} Sandra Bland,\footnote{472} Walter Scott,\footnote{473} Philando Castile,\footnote{474} Michael Bell,\footnote{475} and others.\footnote{476} Reducing the incidence of traffic stops is a systems-oriented strategy that could save the lives of approximately one hundred civilians\footnote{477} and ten police officers per year.\footnote{478}

\footnote{470}Unfortunately, police departments might resist any effort to reduce traffic stops because officers routinely use such stops—and accompanying searches incident to arrest, automobile searches, or inventory searches—to investigate non-traffic related crimes. \textit{See, e.g.}, Devallis Rutledge, \textit{Investigative Traffic Stops}, POLICE MAG. (Sept. 1, 2005), https://www.policemag.com/339426/investigative-traffic-stops [https://perma.cc/N4JF-Q84P]. Recent Supreme Court cases have curtailed their power to do so, but not entirely eliminated it. \textit{See generally} Barbara E. Armacost, Arizona v. Gant: Does It Matter?, 2009 SUP. CT. REV. 275, 276 (arguing that Arizona v. Gant curtailed, but did not eliminate, traffic stops). In addition, police agencies would have to give up the notorious “Ferguson strategy” of using traffic stops to load citizens with tickets and fines in order to raise money for the city. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Q84Z-AGZ6]; \textit{see also} Beth A. Colgan, The Excessive Fines Clause: Challenging the Modern Debtors’ Prison, 65 UCLA L. REV. 2, 22 (2018) (discussing the revenue generated from economic sanctions and Ferguson County’s use of fines and fees as a major component of their municipal budget). That fewer traffic stops would curtail these two strategies would be an important win in my view.


\footnote{472}Laughland, \textit{supra} note 7.


\footnote{474}Nelson, \textit{supra} note 8.

\footnote{475}Kennedy, \textit{supra} note 210.

\footnote{476}\textit{See supra} notes 462–63 and accompanying text.

\footnote{477}In the first six months of 2015, approximately 500 police officers were killed during policing activities, and nine percent of these deaths occurred during traffic stops, for a total of approximately 100 per year. \textit{See} ZIMRING, \textit{supra} note 249, at 51–53. For this data, Zimring relies on media reports linked to the \textit{Guardian}’s descriptions of police killings reviewed and coded by researcher Colin Christensen. \textit{See id.} app. at 259–85; \textit{see also} \textit{The Counted}, \textit{supra} note 454 (discussing findings on the use of deadly force by police).

\footnote{478}Between 2005 and 2014, 18.4% of the 505 felonious deaths of police officers resulted from traffic pursuits or stops, an average of nine per year. Michelle Ye Hee Lee, \textit{Are Most Job-Related Deaths of Police Caused by Traffic Accidents?}, WASH. POST (July 12, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/07/12/are-most-job-related-deaths-of-police-caused-by-traffic-incidents/?utm_term=.766ad0a9c857 [on
A second important observation about the circumstances of deadly force is that the kind of threat that provoked deadly force was very different when the officer was alone.\(^ {479}\) Single officers were more likely to use deadly force against the same threat than multiple officers.\(^ {480}\) In addition, single officers who kill were at least nine times as likely to kill an assailant who had no weapon than officers in pairs or more.\(^ {481}\) Zimring’s explanation is that “[a]s a matter of strategy as well as psychology, police officers who confront what they regard as danger are much more vulnerable when operating without the assistance and counsel of another officer.”\(^ {482}\) This vulnerability might lead officers to take more precipitous and aggressive actions, as it causes stress that can increase the incidence of miscalculations, misjudgments, and errors.

An obvious systems-oriented strategy is to make sure, as much as possible, that police officers act in pairs rather than alone. In addition, “a good tactical response to potential danger when it is operationally possible is to call for more police.”\(^ {483}\) Zimring recommends a clear rule: “When police are in constant communication with dispatchers and their departments, a rule that prohibits shootings in favor of calling for assistance makes sense unless the absence of gunfire produces a true emergency where the officer or an innocent citizen will be in mortal danger.”\(^ {484}\) This recommendation could call into question the broad scope and specific terms of active shooter policies.\(^ {485}\)

A third observation that bears notice is that in approximately thirty-three percent of the police shootings—over 150 deaths per year—the person who was killed by gunfire had or was threatening to use only a knife, club, or other weapon that may have had little or no potential to kill the police officer.\(^ {486}\) Virtually all of the attacks that kill police officers—97.5%—are with firearms.\(^ {487}\) FBI data shows that less than one percent of police deaths result

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\(^ {479}\) Zimring, supra note 249, at 59–61.
\(^ {480}\) Id. at 60–61.
\(^ {481}\) Id. at 61.
\(^ {482}\) Id. at 60.
\(^ {483}\) Id.
\(^ {484}\) Id. at 229.
\(^ {485}\) See supra note 356–61 and accompanying text.
\(^ {486}\) See Zimring, supra note 249, at 57. This is an empirical claim, which Zimring supports with statistical evidence from websites and studies that track on-duty police officer fatalities from various causes. Id. For example, only two police officers were killed with knives or other cutting instruments in the United States between 2008–2013. Id. at 97. Significantly these deaths resulted at close range by assailants who had hidden knives. Id.
\(^ {487}\) Id. at 96.
from knife wounds.\textsuperscript{488} In addition, British and German case studies show that protocols that use other than deadly force against knives and blunt instruments did not increase the risk to the lives of police in those countries.\textsuperscript{489} Zimring argues that the so-called “21-foot rule”—which advises deadly force against a knife-wielding attacker who comes within twenty-one feet—lacks empirical support.\textsuperscript{490} In light of existing data, Zimring proposes a blanket rule prohibiting deadly force in response to knives and blunt instruments with very few exceptions.\textsuperscript{491}

A fourth observation about the circumstances of deadly force is that about ten percent of all fatal shootings by police officers in the United States—or about 100 per year—take place where the potential assailant had no weapon at all.\textsuperscript{492} The question in these cases is whether police safety would be compromised by holding their fire in cases in which no weapon is observed. In its \textit{Guiding Principles On Use of Deadly Force}, the Police Executive Research Forum concluded, based on international police studies, that non-shooting responses to no-weapon situations do not threaten police lives and safety: “Unless there is credible and specific intelligence that a suspect is armed with a deadly weapon, a ‘shoot first’ policy seems premature and should be prohibited.”\textsuperscript{493}

A fifth observation concerns the extent to which a deadly attack was ongoing and the total amount of deadly force used. A major factor contributing to civilian fatalities is the total number of gunshot wounds inflicted by police.\textsuperscript{494} As neither official governmental reports nor the \textit{Guardian} or \textit{Washington Post} websites have kept comprehensive data on this issue, Zimring looked to a study of fatal and nonfatal shootings by the Chicago Police Department from 2007–2013.\textsuperscript{495} He found that the death rate for multiple-wound shootings (fifty-one percent) was more than twice the death rate for single-wound shootings (twenty-one percent), and that three-quarters of the civilian fatalities involved more than

\textsuperscript{488} Id. at 95, 229. In order to have complete information about the risk to police officers, however, we need additional data on the incidence and seriousness of nonfatal knife attacks, and the types of weapons and types of attacks that produce serious injuries. Id. at 163–64.

\textsuperscript{489} See id. at 80, 83–84, 90.

\textsuperscript{490} Id. at 100–01. The “21-foot rule” was apparently formulated by Lt. John Tueller, a firearms instructor with the Salt Lake City Police Department, who was said to have written that “it [is] entirely possible for a suspect armed with an edged weapon to fatally engage an officer armed with a handgun within a distance of 21 feet.” Id. at 100. The rule, which encourages officers to start shooting when knife-wielding adversaries are within twenty-one feet, has spread throughout the law enforcement community. Id.

\textsuperscript{491} Id. at 229.

\textsuperscript{492} ZIMRING, supra note 249, at 57. (This excludes situations where police saw something that turned out not to be a gun or weapon). Id.

\textsuperscript{493} Id. at 228 (citing Wexler, supra note 245, at 5–8).

\textsuperscript{494} Id. at 64.

\textsuperscript{495} Id. at 65.
The study demonstrates that police infliction of multiple wounds is a major risk in civilian deaths. According to Zimring, however, few if any departments have done research on the question of whether multiple shots are necessary to make police safer or made serious efforts to control multiple-shot continuations of shootings that were initially justified.

In light of the paucity of data to elucidate the possible effects of restrictions on continued shots, Zimring recommends restrictions in only three limited scenarios. But he calls the lack of reliable and detailed information on this and other issues concerning how weapons have been used in confrontation between civilians and police officers a “mind-boggling feature of the status quo in American police killings.” This absence of information “risks the lives not only of the victims of police shootings but also of police.”

In addition to Zimring, other police scholars have identified additional specific patterns in police shootings that call out for systems-oriented considerations. For example, Lawrence Sherman, who analyzed data from the Washington Post’s website, “Fatal Force,” in 2015, noticed that a majority of the shootings (fifty-one percent) in his seven-month sample occurred in communities of fewer than 50,000 people, and almost seventy percent occurred outside of major cities of 250,000 or more. In addition, the rate of police-involved shootings per one-hundred homicides was six times greater in the smallest of communities, those with less than 10,000 people, as compared to the largest cities. Sherman argues that studies identifying different rates of shootings in different geographical and social contexts foregrounds “organizational and environmental differences in the potential causal mechanisms or their policy applications for reducing shootings.”

Joanna Schwartz has pointed to evidence suggesting that police overtime and “moonlighting” likely contribute to violence and error resulting from officer

496 See id. at 67–69. More than seventy-four percent of individuals who are wounded five or more times by police shootings die of their wounds. Id. at 69.
497 ZIMRING, supra note 249, at 231.
498 Zimring describes three settings where he believes available data justifies restrictions on continued shots: first, when an adversary may have a gun but has already been wounded by police fire; second, where the adversary has not fired shots and is now on the ground; and third, where the adversary is fleeing from a confrontation with police. In the first two scenarios, Zimring doubts there is a realistic danger that a non-shooting suspect will begin shooting if the officers stop their shots. In the third category, Zimring posits that the firing may be “motivated by apprehending the suspect or avoiding the frustration of defeat by escape” rather than reasonable risk of police being shot. Id. at 231–32.
499 Id. at 232.
500 Id.
501 Sherman, supra note 89, at 429 (citing Lawrence W. Sherman, Small is Dangerous: Community Size and Police Shooting Deaths, Presented at The American Society of Criminology 71st Annual Meeting (Nov. 18, 2015)).
502 Id. at 429–30.
503 Id. at 430.
fatigue.504 She cites studies demonstrating “that fatigued officers ‘were significantly more likely to associate African-Americans with weapons,’ received more complaints, were more likely to be involved in use of force incidents, and were more likely to commit ethics violations.”505 A systems-oriented fix for this problem would be to limit the amount of time officers could work overtime, and limit their freedom to take on additional work.

Schwartz has also identified contexts in which police agencies might adopt the use of “checklists,” a systems-oriented strategy that has been used with great success in commercial aviation and medicine.506 Checklists can be effective for educating or reminding actors of important steps that promote safety. Perhaps counterintuitively, carefully formulated checklists can improve safety even in recurring emergency or stressful circumstances by focusing the actor’s attention and laying out a logical sequence of considerations and actions where time is of the essence.507 In the policing context, checklists are being used in an attempt to reduce the disproportionately high incidence of shootings that occur during police interaction with individuals who have a history of mental illness.508 Two police agencies have begun field-testing a checklist (“screening form”) for identifying people with severe mental illness who may pose a danger to themselves or others.509 An important goal of the program is to collect data that can be analyzed and used to “establish a connection between a particular


506 Id. at 550–51.

507 See generally GAWANDE, supra note 31 (discussing the use and effectiveness of checklists in complicated, complex, and emergency situations in medical, aviation, and other high-risk scenarios).


combination of observable characteristics and a high risk of potentially dangerous behavior.” 510 The final step would be to incorporate these insights into police training to enhance the safety of police officers as well as mentally ill individuals.

C. Challenges to Systems-Oriented Review: What Will It Take?

In thinking about the application of sentinel event/systems-oriented review in the policing context it is useful to consider four circumstances that have been essential to the success of such review in aviation and medicine.

First, in both contexts sentinel event review of certain kinds of incidents is mandatory, required by the NTSB in aviation and strongly encouraged by the Joint Commission in medicine. 511 Second, in both contexts sentinel event review investigations enjoy some degree of protection from discovery in civil (and criminal) cases. 512 Third, both contexts have organizations that can receive information from individual investigations, aggregate that information with investigative information from other similar events, and identify common causes. 513 Fourth, both contexts have an official, institutional mechanism for conveying the results of sentinel event investigations of single events, or the safety recommendations they identify, back to their members, which promotes best practices across institutions. 514

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510 Id.; see also Mason et al., supra note 508 (recommending that law enforcement agencies adopt a checklist similar to the brief-jail-mental-health-screening (BJMHS) checklist that many local jails have adopted to screen arriving inmates along with Crisis Intervention Team (CIT) training).


513 See Joint Comm’n, supra note 511, at 12; Wells & Rodrigues, supra note 512, at 52–68 (describing the role of the National Transportation and Safety Board in investigating airline accidents, creating accident reports, making safety recommendations, and publicizing reports and safety information); Program Briefing, Aviation Safety Reporting Sys., https://asrs.arc.nasa.gov/overview/summary.html [https://perma.cc/FKT7-GMBQ] (describing role of ASRS in “collect[ing], analyz[ing] and respond[ing] to voluntarily submitted aviation safety incident reports in order to lessen the likelihood of aviation accidents”).

514 See Joint Comm’n, supra note 511, at 14; Wells & Rodrigues, supra note 512, at 87 (explaining that the Aviation Safety Reporting System analyzes data and publicizes reports of its findings); Program Outputs, Aviation Safety Reporting Sys., https://asrs.arc.nasa.gov/overview/outputs.html [https://perma.cc/2NT6-M75V] (ASRS
These features pose notable—but not insurmountable—challenges for the potential success of systems-oriented review and prevention in policing. Unlike aviation and medicine, policing is highly decentralized. Police agencies lack an authoritative, institutional mechanism for mandating investigations and for prescribing the kind of review designed to uncover systems-oriented solutions. Instead, police departments have their own localized mechanisms such as internal affairs review and civilian oversight board review for reviewing incidents that occur in their own jurisdiction. Unlike airlines and hospitals, police departments are not required to collect the kind of data necessary for identifying patterns and systems vulnerabilities. Without such data, police agencies cannot make evidence-based decisions designed to reduce the risks of harm-causing conduct by police.

In addition, policing has no widely accepted, centralized mechanism for collecting, receiving, and analyzing crucial information derived from sentinel event/systems-oriented reviews. This lack of centralization severely limits the

promotes safety through: alerting messages relaying safety information to individuals in a position of authority; distributing a monthly newsletter to pilots, air traffic controllers, and others; publishing ASRS Directive containing ASRS reports to operational managers, safety officers, training organizations, and publications departments; taking database search requests on safety issues; assists in aviation safety rulemaking; and conducts and publishes research studies on specific issues and problems in aviation safety).

See Hollway et al., supra note 28, at 892–95 (describing mechanisms for review by a department’s homicide investigators, internal affairs department or civilian review board).

The U.S. Department of Justice has created a certain level of centralization by mandating specific police reforms pursuant to consent decrees with some troubled police agencies under 42 U.S.C. § 14141. See Rachel Harmon, Promoting Civil Rights through Proactive Policing Reform, 62 STAN. L. REV. 1, 3 (2009); see also 32 U.S.C. § 12601 (2017) (formerly cited as 42 U.S.C. § 14141). Many of these reforms have been mandated in multiple departments and some have become accepted as best practices. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 3 (Jan. 2017). But this mechanism is seriously limited by resource constraints on the DOJ’s ability to bring suit. See Harmon, supra note 515, at 3. Professor Harmon has recommended ways that DOJ could use § 14141 proactively to induce police reform. See id. at 22.

See Schwartz, supra note 243, at 558.

See id. at 559.

See id. at 558. The Police Executive Research Forum (PERF), an independent research organization, conducts important research resulting in widely-read recommendations on best practices. See POLICE EXEC. RESEARCH FORUM, supra note 375, at 121. These recommendations are often debated and sometimes rejected, but many of PERF’s recommendations end up influencing policies adopted by police agencies around the country. See generally id. at 33–73 (“The policies, training, tactics, and recommendations for equipment and information exchange that are detailed in this chapter amount to significant changes in a police agency’s operations and culture.”). Unlike the Joint Commission in medicine, however, PERF is not an accrediting agency that can mandate best practices, and unlike the NTSB in aviation, PERF cannot require review of shooting or other harm-causing incidents by police. See Facts About Hospital Accreditation, JOINT COMMISSION (Sept. 12,

See id. at 558.
ability to identify repeated errors and patterns across harm-causing incidents like police shootings. It also limits the potential for disseminating crucial information from lessons learned. Evidence from other fields has shown that in order for learning to result from sentinel event review, there must be an intentional plan to disseminate the findings of the investigation and to ensure that the recommendations are “salient and actionable.”

Centralization of sentinel event review in aviation also means that reviews are done by an on-call, multidisciplinary team that includes not only subject matter experts (pilots, flight attendants, mechanics) but also experts in risk management. Just as NTSB investigation enables a kind of review that would be impossible for individual airlines, police agencies would benefit from the availability of centralized, multidisciplinary resources for expert investigation and data gathering. Importantly, these external reviews would be designed not to blame individual officers, but to identify system vulnerabilities and systems-oriented solutions.

Sentinel event review by a team that includes risk management experts also ensures that recommendations will be systems-oriented and effective. Recommendations by local teams without such expertise are often what systems analysts would call “weak,” meaning solutions such as reminders, additional training, or policy rewrites. These kinds of fixes may simply result in risk migration, where the mitigation of one risk simply results in a new risk. In addition, they do not address latent causes, such as poorly designed technology or defective operational systems, systems problems that predispose to human error. Involving human factor experts increases the likelihood of stronger, more effective solutions.

The challenges to sentinel event review in policing are real but by no means unsurmountable, and the rewards of such review are enormous. First and foremost, systems review holds the potential to reduce the number of police shootings and begin to chip away at the layers of police-citizen animosity repeatedly stoked by civilian deaths at the hands of police. This would be infinitely good, not only for civilians but for police officers, many of whom labor faithfully in difficult circumstances and bear the brunt of public anger and
suspicion. In addition, focusing on prevention has great potential to increase police officer safety. According to Professor Zimring, there have been no rigorous, scientific, systems-oriented evaluations of the strategies and tactics that are designed to protect police.\textsuperscript{524} These benefits make systems-oriented review worth fighting for.

VI. CONCLUSION

Despite its significant promise, systems-oriented review will likely face resistance. Some of the strongest resistance may come from police departments themselves and from the communities that are most affected by police shootings.

Police departments are notoriously defensive toward outside investigations of police shootings and other incidents.\textsuperscript{525} Systems solutions may be suspect, especially if they are viewed as being imposed by authorities outside of the police department without taking account of the realities on the ground.\textsuperscript{526} Police leaders might be slow to let go of deeply held, but unsupported assumptions about risks to their safety, for example the belief that ordinary traffic stops pose a very high risk of officers being shot.\textsuperscript{527} They are also likely to resist bright-line rules against vigorously defended practices—such as the use of lethal force against suspects in fleeing vehicles or suspects within twenty-one feet brandishing a knife—which increase the risk of unnecessary shootings, i.e., shootings not required to protect police or public safety.\textsuperscript{528} Police may also resist other systems-oriented reforms that threaten police practices offering collateral benefits aside from safety. For example, a move to reduce traffic stops would undermine policing’s widespread practice of using such pretextual stops to investigate unrelated crimes.\textsuperscript{529} Getting police departments on board for systemic changes will pose significant challenges.

In a surprising way, though, systems review actually holds promise for responding to some of law enforcement’s own most vehement criticisms of civil actions and criminal prosecutions against police officers. The law enforcement community complains that legal actions make the officer who pulled the trigger a “scapegoat” for merely doing his job. In addition, they assert that such actions are never about one shooting; rather, legal actions blame one officer for what communities deem a long history of police transgressions. It turns out that systems review may actually address these criticisms in important ways.

The goal of systems review is precisely to get beyond the single-minded focus on blaming the shooter in order to identify workplace and organizational causes that lie behind the last human causer. By focusing on systemic causes,

\textsuperscript{524} ZIMRING, supra note 249, at 97–98.
\textsuperscript{525} See Schwartz, supra note 243, at 559–60.
\textsuperscript{526} Id.
\textsuperscript{527} See supra notes 463–70 and accompanying text.
\textsuperscript{528} See supra notes 454, 486–91 and accompanying text.
\textsuperscript{529} See supra note 470 and accompanying text.
systems-oriented review has the effect of spreading the blame so that individual officers are not the only ones held responsible for harm-causing incidents and are not left to bear alone the professional and personal consequences of having taken a human life. By reducing the likelihood that sharp end actors will make mistakes—including reasonable mistakes—systems solutions should ultimately reduce the likelihood that officers will be blamed for just “doing their job.” Moreover, data-driven improvements in police use of firearms will ultimately increase officer safety. In short, if articulated clearly and done right, systems review should prove appealing to the policing community.

Another source of resistance to systems review will likely come from the communities that have experienced the most harm from police shootings. Public resistance takes us back to where we started: when there is a police shooting, families and communities understandably look for someone—a human being—to blame. The need to hold someone accountable is deeply embedded in human nature. For this purpose, systems review seems inadequate. After all, it looks for causes that lie behind the immediate human causer to identify underlying systems vulnerabilities that contributed to the harm-causing action. Solutions are forward-looking and preventative, rather than backward-looking and blaming. While systems analysis need not (and should not) replace some form of accountability review, loosening the grip on blaming is likely to go down hard in communities plagued by police-involved shootings.

The best response to the anticipated public reaction against systems-oriented review is this: the vast majority of police-involved shootings are ultimately deemed “justified” or “reasonable” by police investigators and courts, and that is the end of the investigation. Most police-involved shootings do not result in criminal charges and even fewer in convictions. This is true even in the many cases in which the shooting was factually unnecessary under the circumstances (i.e., the suspect was unarmed or the officer’s safety was not actually at risk). As much as we might want to think otherwise, under our current system there is almost no “accountability” of the sort communities are crying out for. By adopting systems-oriented review, virtually nothing will be lost, and much will be gained.

I am not arguing that police officers should escape responsibility when they do misbehave. But our current relentless focus on accountability—while an understandable human reaction—has become the enemy of prevention in the very communities that need it most.
Straining Territorial Incorporation: Unintended Consequences fromJudicially Extending Constitutional Citizenship

RILEY EDWARD KANE*

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I. INTRODUCTION

For nearly a century, the Insular Cases have provided the rickety, constitutionally dubious foundation upon which the law of United States Territories was built. The doctrine of territorial incorporation, which serves as its foundation, is approaching the centenary of its unanimous endorsement by the Supreme Court. The doctrine essentially states that the territories are not “a part” of the United States, but are “merely belonging to it.” The Insular Cases and their progeny divided the states from the territories, making them “foreign. . . in a domestic sense.” Congress, by statute, extended citizenship to the inhabitants of all U.S. territories except the American Samoans, who are U.S. nationals. This national status endures partly from congressional inaction and partly because American Samoans themselves are split on the issue. American Samoan political leaders have generally opposed citizenship, fearing

1 Essentially, the Constitution applies fully only in “incorporated” territories that are “surely destined for statehood” and are explicitly incorporated by an act of Congress or treaty, while the Constitution applies partially in “unincorporated” territories. See Boumediene v. Bush, 553 U.S. 723, 757–64 (2008); see also Definitions of Insular Area Political Organizations, U.S. DEP’T OF THE INTERIOR, OFFICE OF INSULAR AFFAIRS, https://www.doi.gov/oia/islands/politicatypes [https://perma.cc/R3SQ-PNTK] (explaining terms related to the U.S. Territories, including incorporated and unincorporated territories).


3 Id. at 305.

4 The Insular Cases are themselves numerous and not precisely defined; different authorities propose different cases. Compare Boumediene, 553 U.S. at 756–57 (referring to six cases as the Insular Cases), with Christina Duffy Burnett, Untied States: American Expansion and Territorial Deannexation, 72 U. CHI. L. REV. 797, 798 n.2 (2005) (analyzing “eight of the Insular Cases”). See also infra Part III (discussing the relevance of the cases at present).


collateral harm to their culture. American Samoans may travel freely to the United States, but on the mainland, they face difficulties citizens would not, which has recently sparked litigation.

*Fitisemanu v. United States*, the most recent action involving the national/citizen distinction, is currently underway in the Federal District Court for the District of Utah. John Fitisemanu and his co-plaintiffs currently live in Utah but were born in American Samoa, and as a result, they are U.S. nationals and did not become U.S. citizens at birth. The plaintiffs assert their national status unfairly causes them “unique obstacles” in obtaining work, accessing government benefits, and sponsoring the immigration of family members, and demeans them as second-class Americans. The plaintiffs seek a decision extending the Fourteenth Amendment’s guarantee of citizenship to American Samoans.

The plaintiffs in *Fitisemanu* seek a different result from the recent decision in *Tuaua v. United States*, where the D.C. Circuit rejected a substantially similar effort to extend constitutional citizenship as inconsistent with territorial

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10 Fitisemanu v. United States, No. 1:18-cv-00036, 2018 WL 6068535 (D. Utah Sept. 10, 2018). Regardless of its outcome, this case will likely be appealed to the Tenth Circuit.

11 See Fitisemanu Complaint, supra note 9, at 2.

12 See id. at 3–6 (describing a statement printed on American Samoans’ passports stating: “THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN,” as a “badge of inferiority” they are forced to wear and this “inferior status” “diminishes their standing in their communities and in our Nation as a whole” and “inflicts irreparable and continuing harm”). Plaintiff John Fitisemanu’s career opportunities have been limited, because many government civil service positions require citizenship. Id. at 5. Plaintiff Pale Tuli, for example, cannot become a police officer because he is not a citizen. Id. at 5–6. No plaintiff is eligible to vote. Id. at 5.

13 Id. at 33–34 (including the finding that 8 U.S.C. § 1408(1) is unconstitutional, that U.S. State Department policies identifying American Samoans as non-citizen nationals are unconstitutional, an injunction against enforcing such policies, and an order to use new passports recognizing plaintiffs’ citizen status).
incorporation and the *Insular Cases*. The *Fitise
tanu* plaintiffs ultimately seek a circuit split. *Fitise
tanu* makes three claims for relief, advanced under three
theories. Taken together, the *Fitise
tanu* plaintiffs assert the Supreme Court should extend Fourteenth Amendment birthright citizenship to American Samoa without abrogating the *Insular Cases* and their doctrine of territorial incorporation. However, the plaintiffs and their amici still question territorial incorporation’s validity. Their argument is likely structured in this way to convince the court to distinguish its ruling from *Tuaua*, but it could lead higher courts to question the constitutional standing of the entire doctrine of territorial incorporation.

Arguing against the *Insular Cases* is no small matter. Currently, they give Congress vast constitutional latitude to govern the unincorporated territories and provide a “peculiar kind” of “constitutional theory of secession.” If the *Insular

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15 Motion for Summary Judgment and Memorandum in Support of Plaintiff at 26, *Fitise
tanu*, 2018 WL 6068535 (D. Utah Mar. 30, 2018) [hereinafter *Fitise
tanu* Summary Judgment Motion].
16 First, that the Fourteenth Amendment’s guarantee of citizenship at birth applies to America Samoa. *Fitise
tanu* Complaint, *supra* note 9, at 8–12. Second, that American Samoa should be considered “Subject To The Jurisdiction” of and “In” the United States. *Id.* at 12–18. Third, their current status deprives them of equal dignity and stigmatizes them as second-class Americans. *Id.* at 18–29.
17 First, that the *Insular Cases* are irrelevant to determining the geographic scope of the Fourteenth Amendment Citizenship Clause, which functionally requires overruling them. *Fitise
tanu* Summary Judgment Motion, *supra* note 15, at 30–32. Second, even if the *Insular Cases* control, the Citizenship Clause still applies within their framework. *Id.* at 33–37. The plaintiffs also contend the State Department’s policies violate the Administrative Procedures Act, but this claim is not analyzed in this Note. *Id.* at 38–39.
18 *Id.* at 30–33.
19 *Id.* at 28–32 (suggesting the *Insular Cases* may not remain good law and highlighting the racial animus incorporated into the decisions); Memorandum for Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party at 15–22, *Fitise
tanu*, 2018 WL 6068535 (D. Utah Apr. 24, 2018) [hereinafter Constitutional Law Amici Curiae Memorandum] (describing “[t]he notion that some territories are ‘incorporated’ while others are not” as “constitutionally infirm” and also discussing the history of racial animus associated with the decisions).
20 This may have struck a chord with the court. During oral arguments, the judge challenged the United States with questions and statements such as: “I don’t have to overrule [the *Insular Cases*], they don’t apply to this case. That’s all I have to find.” Transcript of Oral Argument at 32, *Fitise
tanu*, 2018 WL 6068535 (D. Utah Nov. 21, 2018).
21 See Burnett, *supra* note 4, at 802–03, 877 (“If the *Insular Cases* must be understood as authorizing the deannexation of U.S. territory, then it is polemical, but by no means preposterous, to see these cases as setting forth nothing less than a constitutional theory of secession (albeit of a peculiar kind). Giving tooth to this claim would demand engagement with recent historical scholarship working to situate the United States’ imperial experiment with respect to the racial, social, political, and constitutional crises of the Civil War and its aftermath. . . . Although I have stopped short of developing a full-fledged ‘secessionist’
Cases were abrogated, the territories would be instantly incorporated and permanently bound to the United States, which would remove independence as an option for any territory’s final status. Should the court adopt the Fitimemau plaintiffs’ contention that the Citizenship Clause of the Fourteenth Amendment applies sui generis in the territories, but leaves territorial incorporation unaltered, it would breathe life into a constitutional guarantee of citizenship that would still place major constraints on any plan for a territory’s independence.

This Note considers the potential results of such a ruling. The precise nature of the final decision is profoundly important, as the full abrogation of territorial incorporation constitutionally closes the door on independence as a possible final status for any territory. However, a ruling extending birthright citizenship to the territories under a jus soli\(^\text{24}\) argument that leaves the Insular Cases undisturbed would limit the territories’ options, but still permit a qualified form of independence. The inability to provide adequate representation for the territories is one of, if not the longest lasting, constitutional failures in the American system of government. For more than a century, the United States has endured this rot within the Constitution’s framework. The United States must ensure full self-government for each territory on its own terms. Rectifying this unequal status benefits citizens and nationals both in the territories and the states, as the health of the American system of government is undermined when millions of people under the American flag persist in an unconstitutional quasi-colonial status.

Part II of this Note provides a brief background on the legal history of the U.S. territories. Part III examines the Insular Cases, particularly Balzac v. Porto interpretation of the Insular Cases in this Article, such an understanding could be defended in part on the basis of the deanexnationist account I have offered here . . . .\(^\text{22}\)

\(^{22}\) See infra Part V.A.

\(^{23}\) See Burnett, supra note 4, at 877.

\(^{24}\) Jus soli is a British common law doctrine finding reciprocal bonds of allegiance between the subject and sovereign, articulated most prominently by Sir Edward Coke in Calvin’s Case. See Lisa Maria Perez, Note, Citizenship Denied: The Insular Cases and the Fourteenth Amendment, 94 VA. L. REV. 1029, 1046–48 (2008) (discussing the case and doctrine); infra Part IV.A.

\(^{25}\) See infra Part V.A.

\(^{26}\) See, e.g., Luis Fuentes-Rohwer, The Land that Democratic Theory Forgot, 83 IND. L.J. 1525, 1528 (2008) (discussing the problems with democracy and government that unincorporated territories face); Rafael Hernández Colón, The Evolution of Democratic Governance under the Territorial Clause of the U.S. Constitution, 50 SUFFOLK U. L. REV. 587, 591 (2017). Additionally, one could argue that the problem has existed for the United States’ entire history, given the status of Washington, D.C. and its citizens. While I recognize similarities between D.C.’s status and the territories, including the specter of racial animus in their histories, the fact that D.C. has no claim to international self-determination makes it a distinct, although still relevant, problem requiring a different resolution.

Rico, in conjunction with Texas v. White, arguing Balzac permits the United States to cede or deannex an unincorporated territory, which is otherwise impossible for incorporated territories under Texas v. White. Part IV explores the difference between constitutional protections for citizenship in U.S. territories and the mainland under current law and how the application of Fourteenth Amendment birthright citizenship to the territories could permanently bind them to the Union. Part V considers possible resolutions to Fitisemanu, arguing that the doctrine of territorial incorporation, while seriously flawed, should be retained and control this case. The courts should not extend Fourteenth Amendment birthright citizenship to American Samoa or any territory. Although the status quo is unacceptable, it preserves the most options for Congress and the people of the territories to decide their futures. Part VI proposes, should the Fitisemanu plaintiffs prevail, that especially intimate compacts of free association can serve as a backstop to preserve much of the current system’s benefits and permit significant opportunities for self-government. Part VII briefly concludes.

II. BACKGROUND AND HISTORY OF THE U.S. TERRITORIES

The United States has held territories since the nation’s founding, but originally they were always considered destined for statehood—until the Insular Cases and the American quest for empire in the late 19th century. After defeating Spain in the Spanish-American War, the United States acquired its first unincorporated territories: the Philippines, Puerto Rico, and Guam, from Spain. The United States annexed American Samoa pursuant to the 1899 Tripartite Convention with Great Britain and Germany. In 1916, Congress set

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28 Balzac v. Porto Rico, 258 U.S. 298 (1922). Porto Rico was a common spelling used at the time, while Puerto Rico is used at present. This small inconsistency is retained throughout this Note in favor of consistency with the original text.

29 See Burnett, supra note 4, at 798–801. It seems reasonable that Justice White in Downes would contend there were only incorporated territories during American history until overseas insular expansion. See Downes v. Bidwell, 182 U.S. 244, 321 (1901) (White, J., concurring). Interestingly, this uncertainty about the status of the doctrine of territorial incorporation before the Insular Cases was raised in the Fitisemanu oral arguments. See Transcript of Oral Argument, supra note 20, at 15–20.

30 Treaty of Paris, Spain-U.S., Dec. 10, 1898, S. TREATY DOC. No. 62 (1898) (Spain ceded Guam and Puerto Rico to the United States, but the Philippines were technically purchased for twenty million dollars).

the Philippines on the path to independence, and the United States purchased the Virgin Islands from Denmark. Following the Second World War, the United States granted independence to the Philippines, and in 1947 received the Trust Territory of the Pacific from the United Nations (U.N.). Since 1946, the U.N. has considered all the unincorporated territories, except Puerto Rico.

prevent German domination. Id. at 37–38. In 1901 and 1904, the Samoans issued deeds of cession to the United States, which outlined why the Samoans desired U.S. control. Cession of Tutuila and Aunu’u, Samoa-U.S., Apr. 17, 1900, AM. SAM. B. ASS’N, https://www.asbar.org/images/unpublished_cases/cession1.pdf [https://perma.cc/J8D E-SWKF]; Cession of Manu’a Islands, Samoa-U.S., July 14, 1904, AM. SAM. B. ASS’N, https://www.asbar.org/images/unpublished_cases/cession2.pdf [https://perma.cc/K7 H7-DFX9]. The deeds were eventually confirmed and accepted by the Senate in 1929. 48 U.S.C. § 1661(c) (2012). One could argue these deeds, in fact, are actually the mechanism through which the territory was annexed.


34 See José Cabranes, Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans, 127 U. PA. L. REV. 391, 396–98, 403 (noting the extension of citizenship occurred by a Congress “[i]ndifferent or hostile” to eventual statehood and “unaware of any clear-cut or vigorous” independence movement meant to signal a permanence in the U.S.-Puerto Rican relationship, unlike that with the Philippines). In addition to this permanence, interestingly, the idea of eventual statehood for Puerto Rico was publicly contemplated. 51 CONG. REC. 16,034 (1914) (statement of Rep. Borland) (“I anticipate final statehood for Porto Rico. I have no hesitation about saying that.”).


36 The Trust Territory includes the present-day Republic of the Marshall Islands, Federated States of Micronesia, Republic of Palau, and the U.S. Commonwealth of the Northern Mariana Islands—Japan’s former Pacific colonies, taken after the Second World War. The U.N. Trusteeship system had its origin in the League of Nations Mandate System, the idea being that the territories were held in trust for their inhabitants who would one day be permitted to choose full independence or continue to be ruled by their Trustee. Larry Wentworth, The International Status and Personality of Micronesian Political Entities, 16 ILSA J. INT’L L. 1, 1–9 (1993). Ultimately the Northern Mariana Islands chose to remain under American control. Id. at 12–13. The Marshall Islands, Micronesia, and Palau chose independence, but to establish treaties of free association with the United States. See id. at 13–16.

as “Non-Self-Governing” Territories. This designation prompted the creation of a special compact for Puerto Rico in 1953, which led to its removal from that list. However, Puerto Rico’s status remains subject to scrutiny from the U.N. Special Committee on Decolonization and criticism by countries opposed to the United States.

Almost every territory has a constitutional system of government authorized by Congress, which resemble the systems of government employed in the fifty states. Uniquely, American Samoa is still governed under the original 1929 congressional delegation of power to the Executive, so the Secretary of the Interior exercises substantial authority. The international embarrassment the United States suffers from its failure to fully enfranchise its territorial population pales in comparison to the United States’ normative failure to fulfill its own fundamental promises of popular self-government and political equality.

39 Puerto Rico Federal Relations Act of (July 3) 1950, Pub. L. No. 81–600, 64 Stat. 319 (1950) (granting substantial autonomy to Puerto Rico). Despite the potential importance of that statute, Puerto Rico’s constitutional status remains essentially the same. See Peralta, supra note 27, at 243–53 (discussing how that statute, also known as the Compact was a “constitutional mirage,” the gradual deterioration of the idea that Puerto Rico had a status different from any other territory, and how “PROMESA seems to be the culmination of colonial government”).
40 G.A. Res. 748 (VIII), at 25–26 (Nov. 27, 1953).
42 48 U.S.C. §§ 1421–28 (2012) (pertaining to Guam); §§ 1801–08 (pertaining to the Northern Mariana Islands); §§ 731–916 (pertaining to Puerto Rico); §§ 1541–1645 (pertaining to the U.S. Virgin Islands). That is to say the territories have a tripartite separation of powers between an executive, bicameral legislature, and judiciary, and their constitutions guarantee similar rights.
43 48 U.S.C. § 1661(c) (2012) (vesting “all civil, judicial, and military powers” in the President “[u]ntil Congress shall provide for the government of such islands”); Exec. Order No. 10264, 16 Fed. Reg. 6417 (June 29, 1951) (delegating the President’s authority to the Secretary of the Interior). The Secretary of the Interior can even overturn the decisions of the High Court of American Samoa. Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 384 (D.C. Cir. 1987).
III. THE INSULAR CASES PERMIT THE UNITED STATES TO CEDE LAND

Traditionally, the Insular Cases provide that the Constitution applies fully in states and incorporated territories that enjoy an implicit promise of statehood, while only fundamental provisions apply in unincorporated territories. 45 Today, no scholar defends the Insular Cases as correctly decided; any defense is qualified by practical concerns about overturning a century-old system and precedent. 46 This Note takes a similar position. This Part examines the Insular Cases’ current meaning and explores the possibility that they offer a “constitutional theory of secession,” 47 concluding they permit Congress to grant independence to unincorporated territories, which would otherwise be unconstitutional.

A. The Insular Cases Remain Valid While Shifting to Protect Local Customs

The framework created by the Insular Cases and their progeny give Congress plenary power to govern the territories with limited constitutional restraints. 48 Fortunately, Congress has granted many constitutional rights by statute, and the courts have found that some apply automatically. 49 Although the

45 See Burnett, supra note 4, at 800.
46 See Constitutional Law Amici Curiae Memorandum, supra note 19, at 18 (observing “no current scholar” has defended the Insular Cases from any “methodological perspective” (quoting Gary Lawson & Robert D. Sloane, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered, 50 B.C. L. Rev. 1123, 1146 (2008))); Russell Rennie, Note, A Qualified Defense of the Insular Cases, 92 N.Y.U. L. Rev. 1683, 1685 (2017) (“The foregoing critiques are persuasive, and this Note does not attempt to rationalize or defend the offensive origins and effects of the Insular doctrine. It does seek, however, to complicate the legacy of the cases.”).
47 See Burnett, supra note 4, at 802–03.
48 See infra Part III.A.2. But see Boumediene v. Bush, 553 U.S. 723, 757 (2008) (“The Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position . . . reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories . . . resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.” (internal citations omitted)).
Insular Cases’ central holding has stood for nearly a century,\(^{50}\) it is presently experiencing renewed attack and renovation. Some call for the Insular Cases’ abrogation because their reasoning involves unconstitutional racial animus.\(^{51}\) However, a developing trend adopted by some courts instead reinterprets the cases to protect indigenous cultures and customs.\(^{52}\) The Supreme Court has yet to opine directly, but these recent lower court precedents, combined with Boumediene, suggest increasing support for the protective reinterpretation of the Insular Cases.

\(^{50}\) See Downes v. Bidwell, 182 U.S. 244, 287–345 (1901) (White, J., concurring) (positing the doctrine of territorial incorporation); Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) (unanimously affirming the doctrine of territorial incorporation).

\(^{51}\) See, e.g., Downes, 182 U.S. at 287 (“If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.”); Developments in the Law, American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism, 130 Harv. L. Rev. 1680, 1700–01 (2017) (finding the Insular Cases “serve to perpetuate and unequal and untenable status quo” creating a “regime of . . . political apartheid” derived from “intrinsically racist imperialism of a previous era of United States colonial expansionism” (internal quotations omitted)); Perez, supra note 24, at 1029 (“[T]he doctrine of territorial incorporation reasserts Dred Scott’s race-based approach to citizenship and should be overruled.” (italicization altered)).

\(^{52}\) See Laughlin, Cultural Preservation, supra note 8, at 344 (recognizing the “colonial mentality” that existed when the cases were decided, but seeking to appropriate them, making “the incorporation doctrine [] a basis for upholding local laws designed to protect indigenous people and their traditional culture”); see also American Samoa and the Citizenship Clause, supra note 51, at 1702 (observing “it appears that a significant part of the federal judiciary has now concluded, with Laughlin,” that it is in the best interest of the judiciary to respect local cultures); Rennie, supra note 46, at 1686–87 (arguing such a judicial “accommodationist” policy is “defensible, perhaps even imperative” from a democratic perspective). But see Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Cal. L. Rev. 853, 908 (1990) (arguing formalists could conceive of the Constitution’s stance on territories as “constitutionally mandated colonialism, which is not likely to go over well at cocktail parties,” that devolved powers of self-government exercised by the territories is unconstitutional, which requires major changes in territorial governance or a constitutional amendment); Burnett, supra note 4, at 799 (arguing the Insular Cases permit the United States to “deannex” unincorporated territories).
1. The Insular Cases under Current Law

The entire doctrine of territorial incorporation derives from several cases, but the two most important for this Note are *Downes v. Bidwell* and *Balzac v. Porto Rico*. *Downes* considered the constitutionality of import duties on goods shipped from Puerto Rico to New York. The otherwise-fractured Court held that Puerto Rico “is a territory appurtenant and belonging to the United States, but not a part of the United States,” finding Puerto Rico separate, but in vague terms. Justice White concurred, articulating his theory of territorial incorporation based on international law and America’s previous history of expansion. Two decades later, the *Balzac* Court unanimously adopted Justice White’s theory that newly acquired territories could be part of the United States internationally, but domestically separate and outside the scope of the Uniformity Clause.

*Boumediene v. Bush*, the most recent Supreme Court case to discuss territorial incorporation, surveyed the doctrine’s history and development. In the *Insular Cases*, the Court described its essential feature, the “doctrine of territorial incorporation” as one “under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.” While the contours of the doctrine shifted over time, its core principle that unincorporated territories are constitutionally separate from the United States remains.

The *Boumediene* Court found the *Downes* Court created territorial incorporation because it was “reluctant to risk” creating “uncertainty and instability” by displacing the existing civil law systems of the then-newly acquired territories. While it did not address *Balzac’s* assertion that the territories were not a part of the United States, the Court recognized the U.S.

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53 See *Boumediene*, 553 U.S. at 756–57.
54 *Downes*, 182 U.S. at 244–345.
55 *Id.* at 247.
56 *Id.* at 287.
57 *Id.* at 287–345 (White, J., concurring).
58 *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (“Porto Rico was [not a] territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it . . . .”); U.S. CONST. art. I § 8.
60 *Id.* at 756–66.
61 *Id.* at 757.
63 *Balzac*, 258 U.S. at 307–08 (holding that even the statutory extension of citizenship was insufficient to infer incorporation).
64 *Boumediene*, 553 U.S. at 757 (citing *Downes v. Bidwell*, 182 U.S. 244, 282 (1901)).
Constitution operated in them with some “independent force” and that even in 1922 the Court “took for granted” that “certain fundamental personal rights” existed in the territories, independent of Congress’s choice to extend them. The Court further observed the importance of “particular circumstances,” “practical necessities,” Congress’s potential alternative options, and whether the judicial extension of a constitutional provision would be “impractical and anomalous.” While the Court did not explicitly require consideration of the aforementioned concerns, it signaled their relevance. The altered application of constitutional provisions in territories suggests citizenship rights may be different in unincorporated territories.

2. Recent Lower Court Decisions Favor Reinterpreting Territorial Incorporation to Protect Local Culture

In Tuaua v. United States, the D.C. Circuit determined Fourteenth Amendment birthright citizenship did not extend automatically to American Samoa because the imposition of citizenship would be impractical and anomalous. Tuaua provides direct lower court precedent opposing the plaintiffs in Fitisemanu, as both cases advance essentially the same claim. The court found the Citizenship Clause “textually ambiguous” regarding whether “in

65 Id.
66 Id. at 758 (quoting Balzac, 258 U.S. at 312).
67 Id. at 759 (quoting Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)). In Reid, a plurality decision differed on the precise language, but the Boumediene Court observed the concurrence of Justice Harlan, who “was most explicit in rejecting a ‘rigid and abstract rule’ for determining where constitutional guarantees extend” and stressing the importance of “the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’” Id. at 759 (quoting Reid, 354 U.S. at 74–75 (Harlan, J., concurring)); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (J. Kennedy, concurring) (citing the previous Harlan concurrence approvingly in reference to his impracticable and anomalous test for the applicability of constitutional provisions in the territories).
68 See supra text accompanying note 67.
69 Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015).
70 Compare Complaint at 17, 20, 21, Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 1:12-cv-01143-RJL) (“The defendants refuse to recognize that persons born in American Samoa are U.S. citizens under the Citizenship Clause [of the Fourteenth Amendment] . . . . The State Department will not provide the individual plaintiffs with U.S. passports recognizing that they are U.S. citizens . . . . Defendant’s refusal to recognize the U.S. citizenship of the individual plaintiffs causes material harms.”) (formatting and capitalization altered), with Fitisemanu Complaint, supra note 9, at 8, 18 (“The Fourteenth Amendment’s Citizenship Clause makes all those born in the United States and subject to its jurisdiction citizens from birth . . . . The Defendants’ actions deprive American Samoans of equal dignity under the law and stigmatize them as second-class Americans.”) (formatting and capitalization altered).
the United States” applied to territories.71 Under such uncertainty, the court considered it “impractical and anomalous” to extend citizenship, especially when it would “override the democratic prerogatives of the American Samoan people,” whose representatives filed amici briefs opposing judicial extension.72 Interestingly, the court referenced Boumediene, acknowledging that ties between the United States and its unincorporated territories may strengthen in constitutionally significant ways,73 hinting that the status quo will not endure forever. Since the Supreme Court denied certiorari, the scope of the Fourteenth Amendment’s citizenship guarantees and its application in unincorporated territories remain uncertain.74

Tuaua has important similarities with the Ninth Circuit’s embrace of the revisionist approach in Wabol v. Villacrusis.75 The case related to the Northern Mariana Islands (NMI), where the plaintiff sued to void a lease made in violation of the NMI Constitution’s restrictions against land alienation to non-indigenous people.76 The court found the restrictions did not violate the U.S. Constitution’s Equal Protection Clause because, in this context, its application would be impracticable and anomalous.77 The court noted the importance of the covenant that established American sovereignty, which explicitly protected NMI’s land alienation laws.78 The court stated that “incorporation analysis thus must be

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71 Tuaua, 788 F.3d at 302 (internal citations omitted).
72 Id. (internal citations omitted).
73 Id. at 309 (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”) (quoting Boumediene v. Bush, 553 U.S. 723, 758 (2008)).
75 See Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992).
76 N. MAR. I. CONST. art. XII (restricting land ownership and long-term interests to “persons of Northern Marianas descent” defined as “a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof”). A full-blooded person of Northern Marianas descent is someone born or domiciled in the territory by 1950 and a citizen before the termination of the Pacific Trust Territory. Id. Their constitution also empowers the courts to determine Northern Marianas descent if disputed. Id.; Wabol, 958 F.2d at 1452.
77 Wabol, 958 F.2d at 1460–61 (citing King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975)) (“[T]he particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress’s power to provide for the trial of Americans overseas.’ The importance of the constitutional right at stake makes it essential that a decision . . . rest on a solid understanding of [present conditions in the territory]. That understanding cannot be based on unsubstantiated opinion; it must be based on facts . . . . In short, the question is whether in [the territory] ’circumstances are such that trial by jury would be impractical and anomalous.’”) (quoting Reid v. Covert, 354 U.S. 1, 75 (1957)).
undertaken with an eye toward preserving Congress’s ability to accommodate the unique social and cultural conditions and values of the particular territory."79 The Wabol court found the test satisfied because NMI’s scarcity of land gave their restrictions a unique stabilizing social effect, promoted the preservation of local culture, and because its political union with the United States would not have occurred otherwise.80 Further, the court dramatically stated: “The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.”81

In summation, the Insular Cases provide two important determinations for this Note. First, Balzac’s legal fiction separating unincorporated territories and the incorporated states and territories of the United States rests upon nearly a century of precedent. Second, they establish that the doctrine of territorial incorporation requires the explicit incorporation of territories by Congress for the Constitution to apply fully. That said, the doctrine has recently evolved to accommodate local cultures, the extent to which is not yet known.

B. The Perpetual and Indestructible Union

The legal fiction separating unincorporated territories from the United States and limiting the application of the Constitution makes territorial independence possible.82 Texas v. White,83 read in conjunction with Balzac,84 suggests becoming a part of the United States—incorporation into the Union—is permanent. Texas v. White discusses the United States as a perpetual union of

[U.S.] Constitution…will be without prejudice to the validity of and the power of [Congress] to consent to” the section of the Covenant establishing the racial restrictions on alienation).

79 Wabol, 958 F.2d at 1460 (“In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this international sense.” (emphasis added)).

80 Id. at 1461. Arguably, the same could be said of American Samoa.

81 Id. at 1462.

82 See Burnett, supra note 4, at 799.

83 Texas v. White, 74 U.S. 700 (1868). Because of the important concurrence of Justice White in Downes v. Bidwell, I refer to Texas v. White throughout this Note by its full name to avoid any confusion between the two.

84 It may appear misplaced to discuss a case related to the American Civil War in association with the unincorporated territories, but there are actually important similarities. See Burnett, supra note 4, at 802–03 n.15 (“[Amy Kaplan] offers an elegant reading of Downes. While she focuses less on the details of the different opinions, and more on the broader cultural connotations of the decision…she observes (rightly, in [Burnett’s] view) that the language of the decision reflected lingering Civil War memories, and keenly notes the pervasive preoccupation with dismemberment of the national body.” (internal quotation marks and citations omitted)).
The case focuses on state-federal relations, but its powerful language about the unity and indissolubility of the polity extends to the population. In conjunction with strong constitutional citizenship rights, this suggests that, absent the Insular Cases' modification of constitutional requirements, the United States cannot sever its connection to incorporated territories if it would injure constitutionally protected citizenship.

_Texas v. White_ resolved a dispute over the validity of bonds issued by the Confederate Texan government, requiring the Court to determine if Texas legally remained a state of the Union during the Civil War. The Court found unilateral secession unconstitutional so that, even in rebellion, Texas remained a state. First looking to the Articles of Confederation, the Court observed: “[T]he Union was solemnly declared to be perpetual.” Continuing, the Court found it “difficult to convey the idea of indissoluble unity more clearly” than with the Constitution’s stated purpose “to form a more perfect Union.” According to _Texas v. White_: “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.” Of Texas’s annexation and admission into the Union, the Court said “she entered into an indissoluble relation”:

![Image](https://i.imgur.com/3Q5K5K.png)

85 Texas v. White, 74 U.S. at 725.
86 Id.
87 See infra Part IV.B.
88 Texas v. White, 74 U.S. at 718.
89 Id. at 719.
90 Id. at 726 (stating Texas’s secession and all acts of its Confederate government “were absolutely null” and that the obligations and bonds of the Union “remained perfect and unimpaired”).
91 Id. at 725; see also ARTICLES OF CONFEDERATION OF 1781, pmbl. (1777).
92 Texas v. White, 74 U.S. at 725.
93 U.S. CONST., pmbl; Texas v. White, 74 U.S. at 725.
94 Texas v. White, 74 U.S. at 725.
95 Id. at 726. The use of “consent” as expressed above must refer to a constitutional amendment, since it seems absurd that a mere statute could undo an “indissoluble relation” with otherwise no “reconsideration or revocation.” See id. Therefore, the reference to consent in _Texas v. White_ affirms a rule against leaving the Union without the massive institutional support required for a constitutional amendment and a requirement that individual states leaving must consent—a rule against expulsion, or in alternate terms, against the _deannexation_ of a state. See U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal suffrage in the Senate.”).
Unfortunately, because Texas was an independent nation before its annexation, the case does not directly address whether the perpetual Union encompasses territories. Before the Insular Cases, but after Texas v. White, the Supreme Court described the territories as “but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states.” Before the Insular Cases, precedent suggests incorporated territories were a part of the indissoluble union.

Balzac’s discussion of territorial incorporation appears to build on Texas v. White. Before Balzac, when territorial incorporation remained an uncertain doctrine, the Court expressed uncertainty whether Congress even possessed the power to cede America’s “newly acquired” territories. When the Balzac Court adopted territorial incorporation unanimously, the refusal to recognize the incorporation of Puerto Rico even after Puerto Ricans were given statutory citizenship suggests incorporation is an act of profound gravity. If Texas v. White renders “incorporation. . . final,” then the Balzac Court’s repeated statements that the Philippines and Puerto Rico had not been “incorporated [into] the Union or become a part of the United States,” suggest incorporation of a territory is permanent incorporation into the Union. From a policy perspective, this is consistent with the then-promised independence for the Philippines and the then-uncertain final status of Puerto Rico.

By the Insular Cases’ reasoning, all territories at the time of Texas v. White would have been considered incorporated and all citizens in territories at that time possessed constitutionally protected citizenship. The Texas v. White Court articulates, albeit vaguely, a bond of mutual responsibility between the
federal government and citizens that is of significance.\textsuperscript{104} The Court discussed how rebellion altered the obligations of the federal government, the states, and the citizens, observing “[o]bligations often remain unimpaired, while relations are greatly changed.”\textsuperscript{105} The Court observed it was the duty of the federal government to restore a constitutionally legitimate government in Texas and to ensure the just-freed slaves would be guaranteed participation in the new government.\textsuperscript{106} The Court contemplated a federal responsibility to protect individuals’ exercise of citizenship.\textsuperscript{107} Considering this ruling occurred just after the adoption of the Fourteenth Amendment, well before the incorporation of most constitutional protections, the now-heightened constitutional guarantee directly to individuals should only expand the federal government’s duty to citizens.

The \textit{Insular Cases} and their subsequent interpretation hold the Constitution does not apply the same in the unincorporated territories as it does “in” the United States.\textsuperscript{108} The Constitution operates to the extent it guarantees fundamental rights, but likely does not protect a right that would be impractical or anomalous in a specific territorial context.\textsuperscript{109} Recent decisions invoking the \textit{Insular Cases} suggest their reach should not expand and that, over time, changes of constitutional significance may occur.\textsuperscript{110} It seems that the territorial incorporation doctrine, resting on a century of precedent—even if steeped in folly—may continue to exist, albeit with lessened vigor. The comment about constitutional significance suggests a warning for the legislature (and ultimately territorial citizens as well) that territories could someday become de facto incorporated, in direct contravention of \textit{Balzac}.\textsuperscript{111} Perhaps the Supreme Court would even use \textit{Balzac} to overturn itself by finding a century of congressional inaction serves as de facto incorporation, as \textit{Balzac} did speak about the territories with an eye to their newly acquired and uncertain future statuses.\textsuperscript{112} When read in conjunction with \textit{Texas v. White}, the \textit{Insular Cases} suggest incorporation is the threshold for entry into the United States. Should the \textit{Insular Cases} be overturned, the territories would become a part of the perpetual and indissoluble Union.

\begin{thebibliography}{10}
\bibitem{104} Texas v. White, 74 U.S. at 727.
\bibitem{105} \textit{id.}
\bibitem{106} \textit{id.} at 728–29.
\bibitem{107} \textit{See id.} at 726–28.
\bibitem{109} \textit{See id.} at 758.
\bibitem{110} \textit{See id.} (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”); Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015) (quoting \textit{Boumediene}, 553 U.S. at 758).
\bibitem{111} Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922).
\bibitem{112} \textit{See id.} at 306.
\end{thebibliography}
IV. THE PECULIAR STATUS OF TERRITORIAL CITIZENSHIP

At the heart of Fitisemanu is the question of citizenship. The plaintiffs argue that regardless of the Insular Cases, the common law doctrine of jus soli guarantees Fourteenth Amendment citizenship to the populations of United States territories because the right is associated with American sovereignty rather than being legally in the United States. Fitisemanu only seeks extension to American Samoa, but if granted, birthright citizenship should logically extend to all territories. This Part discusses the jus soli argument and explores the difference between constitutional citizenship and statutory citizenship, concluding that the greater protections of constitutional citizenship could prevent a territory from seeking independence.

A. The Jus Soli Argument

The plaintiffs in Fitisemanu and Tuaua and some scholars contend the common law doctrine of jus soli extends Fourteenth Amendment citizenship to all U.S. territories regardless of their incorporation status. The doctrine of jus soli is derived from the English common law, which determined those born “within the King’s domain” and “within the obedience or ligeance of the King” were subjects or, as we would say today, citizens. While the Supreme Court has previously rejected the argument, a broad interpretation of jus soli contends the Fourteenth Amendment was meant to codify the traditional common law understanding of jus soli, as expressed in United States v. Wong

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113 See discussion supra Part I.
114 Fitisemanu Complaint, supra note 9, at 8–9; U.S. CONST. amend. XIV, § 1.
115 Fitisemanu Complaint, supra note 9, at 34.
116 Fitisemanu Summary Judgment Motion, supra note 15, at 26–27, 32; Reply Brief of Plaintiffs-Appellants at 11–19, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272); see also Brief of Citizenship Scholars as Amici Curiae Supporting Plaintiffs at 2–14, Fitisemanu v. United States, 1:18-cv-00036, 2018 WL 6068535 (D. Utah Apr. 24, 2018) (arguing for a broad interpretation of the Fourteenth Amendment’s jus soli birthright citizenship right); Perez, supra note 24, at 1055 (arguing “in the United States” should be interpreted according to the traditional common law understanding of jus soli, which would include unincorporated territories).
117 See Tuaua v. United States, 788 F.3d 300, 304–05 (D.C. Cir. 2015) (discussing and rejecting plaintiff’s jus soli argument: “[E]ven assuming the framers intended the Citizenship Clause to constitutionally codify jus soli principles, birthright citizenship does not simply follow the flag.” (internal citations omitted)); Perez, supra note 24, at 1046–53 (discussing Calvin’s Case and the common law history of jus soli in detail).
118 Brief for Appellees at 26, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272) (“In fact, Plaintiffs’ and amici’s reliance on an overextension of the principle of jus soli and English common law has already been directly rejected by the Supreme Court in Rogers where the Court stated: We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the jus soli, that is, that the place of birth governs citizenship status except as modified by statute.”) (emphasis and quotation marks omitted, formatting altered) (citing Rogers v. Bellei, 401 U.S. 815, 828 (1971)).
Proponents of this interpretation contend the *Insular Cases* wrongly failed to apply the *jus soli* doctrine in unincorporated territories. Simply, the *jus soli* argument asserts that the citizens of unincorporated territories are entitled to constitutional Fourteenth Amendment birthright citizenship because of their allegiance to the United States. Some contend the territorial incorporation doctrine must be repealed to achieve this end, however, the *Fitisemanu* plaintiffs argue the doctrine poses no obstacle.

B. Constitutional Versus Statutory Citizenship

The Supreme Court affords tremendous protection to constitutional citizenship. In *Afroyim v. Rusk*, the Court made its fundamental analysis of the Fourteenth Amendment’s Citizenship Clause. *Afroyim* challenged the Nationality Act of 1940, which automatically revoked the citizenship of any

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119 United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898). The Court in *Wong Kim Ark* concluded that:

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in *Calvin’s Case* . . . strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject.

> *Id.* (internal quotations omitted).

120 Perez, *supra* note 24, at 1055–60.

121 Similarly, one could assert it is because the people of the territories are subject to U.S. sovereignty. The deeper point is that the Citizenship Clause should apply to states, incorporated territories, and unincorporated territories alike.

122 Perez, *supra* note 24, at 1057, 1081 (arguing the *Downes* Court “took advantage of the unique political and geographical circumstances of the insular territories in order to retroactively reinterpret the rule of *jus soli,*” and concluding “it is doubtful that the Court will be able to properly correct the scope of the Citizenship Clause without overruling the doctrine of incorporation”).

123 Fitisemanu Summary Judgment Motion, *supra* note 15, at 33–37 (“In all events, the *Insular Cases* themselves support the proposition that American Samoans owe allegiance to the United States and are thus granted birthright Citizenship by the Fourteenth Amendment’s codification of the [common law] *jus soli* rule.”).

American who voluntarily voted in a foreign election. The Court found the Fourteenth Amendment protects each citizen from the “forcible destruction” of their citizenship and recognized a “constitutional right to remain a citizen in a free country unless [] voluntarily relinquish[e]d.”126 In the past, Congress could revoke citizenship in such a way under the “ample scope” of its implied power to regulate foreign affairs.127

Afroyim largely controls the field on citizenship, but not entirely.128 There is a serious, although little-discussed, debate over Congress’s ability to revoke Puerto Ricans’ citizenship.129 Because the Fourteenth Amendment’s Citizenship Clause does not extend to Puerto Rico, its people’s citizenship is guaranteed only by statute and is revocable.130 Some dismiss the problem,131 but because the subject is not commonly discussed, a Note by Lisa Maria Perez offers the best analysis. Perez contends that while Afroyim suggests Congress cannot take citizenship without consent, Rogers v. Bellei limited that holding.132 The Bellei Court held Afroyim related to citizenship acquired under the Fourteenth Amendment, explicitly referencing being “born in” the United States, and refused to judicially extend those protections to statutory citizens for a dual citizen born abroad who inherited his citizenship. Bellei raises a

125 Id.
126 Id. at 268.
128 See Tuaua v. United States, 788 F.3d 300, 307 (2015) (recognizing the importance of Afroyim and other cases as supporting that citizenship is a fundamental right in the non-territorial context).
129 Perez, supra note 24, at 1032 (noting the “inferior citizenship status of Puerto Ricans . . . reveals a grave inconsistency in the Supreme Court’s Fourteenth Amendment jurisprudence”). While much of the discussion focuses on Puerto Rico, there is no reason this would not apply similarly in the other territories, as they all possess the same constitutional status. See infra note 136. Perhaps the Northern Mariana Islands would be an exception due to their unique history. See supra text accompanying note 76. Puerto Rico is most discussed, but the legal principles underlying the debate would apply to all territories.
130 Perez, supra note 24, at 1029.
132 Perez, supra note 24, at 1032–34, 1069–73 (concluding the doctrine of territorial incorporation, as currently understood, permits the revocation of Puerto Rican citizenship). But see Blocher & Gulati, supra note 131, at 129–30 (arguing equal protection or some other collateral right should prevent wanton revocation).
134 Id. (“But, as pointed out above, [Afroyim’s] holding on citizenship protections were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment’s direct reference to ‘persons born or naturalized in the United States.’ We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute.”); see also Perez, supra note
serious question about the durability of people born in the territories’ citizenship.\textsuperscript{135}

The people of Puerto Rico, and the other territories,\textsuperscript{136} are arguably not guaranteed the Fourteenth Amendment citizenship protections of\textsuperscript{Afroyim} and can have their American citizenship revoked.\textsuperscript{137} The extension of constitutional citizenship would be necessary to gain\textsuperscript{Afroyim}’s extensive protections.\textsuperscript{Afroyim} and the\textsuperscript{Insular Cases}, read together, raise a question as to how\textsuperscript{Afroyim}’s protections are modified by the revisionist interpretation of the\textsuperscript{Insular Cases}. How the Court would strike that balance is unclear, but it would likely create substantial limitations on any territory’s ambition for independence.

V. The Right to Citizenship Binds the Union

Likely the result of\textsuperscript{Tuaua}, the non-citizen status of American Samoans has been a popular topic in recent scholarship.\textsuperscript{138} Tracking\textsuperscript{Tuaua}, the discussions focus on the Fourteenth Amendment’s guarantee that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are...
citizens of the United States.”139 These discussions generally propose methods for maneuvering around *Tuaua* and advocate the *Insular Cases*’ abrogation.140 The implications of *Fitisemanu*’s assertion that Fourteenth Amendment citizenship can apply to the unincorporated territories within the *Insular Cases* framework are largely unconsidered, particularly the consequences if any territory ultimately determines it desires independence.141

Should the argument that American Samoans are entitled to constitutional citizenship as a result of *jus soli* prevail, it will breathe life into a right to remain under United States sovereignty, permanently binding the current unincorporated territories to the Union.142 Some may argue this is not a problem, but it would prevent the possibility of Puerto Rico, or any other territory from being granted—or made—Independent from the United States, which would remove that option as a possible solution to the problem of the democratic deficit in the American territories.143 Further, any local cultural practices in a territory unable to withstand constitutional scrutiny would likely not be able to be protected.144

Two scenarios are possible, but with profound differences in effect. The first, the Part V.A scenario, would overturn the *Insular Cases* and abrogate territorial incorporation to extend Fourteenth Amendment citizenship to American Samoa because the court finds that necessary in order to find the territory “in the United States” for the purpose of the Citizenship Clause.145 This is less likely, as it would be a dramatic change in law, but is not impossible given the previous discussion of the possibility that “ties between the United States and any of its unincorporated territories [may] strengthen in ways that are of constitutional significance;”146 a century of inaction could be significant. The second, the Part V.B scenario, would find no conflict between the *Insular Cases*

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139 U.S. CONST. amend. XIV, § 1 (emphasis added).
141 *Perez, supra* note 24, at 1053–57 (arguing a *jus soli* argument for Fourteenth Amendment citizenship in Puerto Rico bearing substantial similarity to the argument made by the *Fitisemanu* plaintiffs); see also *Blocher & Gulati, supra* note 131, at 127 (“There is no conceptual need for citizenship and territorial status to rise or fall together. It is easy enough to imagine American citizens living on non-state or even non-American soil. That’s what expatriates do. Nor is it inconceivable to imagine the creation of a new state whose residents would not immediately and automatically become citizens.”).
142 Arguably such a right would, then, have always existed, minimally since the passage of the Fourteenth Amendment. However, it remains untested, as Congress has never ceded an incorporated territory before.
143 See infra Part V.A.
144 See infra text accompanying note 154.
145 U.S. CONST. amend. XIV.
and Fourteenth Amendment birthright citizenship while still preserving the legal fiction separating the unincorporated territories from the Union. Such a scenario seems most plausible if the court is inclined to grant Fitisemanu relief. Retaining the Insular Cases while extending birthright citizenship maneuvers facially around precedent, despite functionally making a major change.

A. Resolving Fitisemanu to Abrogate the Insular Cases and Extend Fourteenth Amendment Birthright Citizenship

Should the Supreme Court eventually extend birthright citizenship and determine it necessary to abrogate the Insular Cases and territorial incorporation to find American Samoa is “in the United States” for purposes of the Citizenship Clause, it is unclear what would then transpire. At present, the Insular Cases require U.S. territories be explicitly incorporated by Congress to be considered in the United States and are otherwise separate from the Union of states and incorporated territories.147 Relatedly, Texas v. White determined that the Union is perpetual and indestructible.148 That said, the doctrine has recently shifted slightly in order to accommodate local cultures, the extent to which is not yet known.149 It is possible such a ruling could be specifically tailored to American Samoa for some reason, despite the straightforward logic that without the exception to the Uniformity Clause created by the Insular Cases, birthright citizenship would apply uniformly.150

Abrogating the Insular Cases would immediately incorporate every territory.151 Once incorporated, they would likely be part of the perpetual, indestructible Union.152 Every territory would be fully incorporated and populated by American citizens sure of that status but trapped in their current status limbo, without the option to pursue temporary or permanent independence.153 Additionally, local customs and race-restrictive laws generally

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147 See discussion supra Part III.A.
148 See discussion supra Part III.B.
149 See discussion supra Part III.A.2.
150 See Constitutional Law Amici Curiae Memorandum, supra note 19, at 14. Arguably, American Samoa is itself a poor candidate for judicially imposed citizenship, given the concerns of some that a greater application of the Constitution might threaten local customs. See, e.g., Tuaua v. United States, 788 F.3d 300, 309–10 (2015) (discussing the “probable danger citizenship poses to American Samoa’s customs and cultural mores”). If this case were focused on another territory, there would at least be a weak policy argument against the uniform application of birthright citizenship.
151 See supra Part III.B.
152 See id.
153 See generally Stanley K. Laughlin, Jr., U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?, 37 OHIO N.U. L. REV. 429 (2011) [hereinafter Laughlin, Colonialism or Reasonable] (discussing the positive and negative aspects of independence, arguing the choice to remain affiliated with the United States should not be disregarded and warning the courts to be careful when applying rights in territories to respect local customs).
thought to preserve local cultures would likely be in legal jeopardy, which could see the attempted remedy of an old injustice inflict new ones. Under this scenario, Puerto Rico could still accede to statehood someday. With independence unavailable, the Puerto Rican people might unite in demanding statehood and finally force Congress’s hand. Other, much smaller, territories would have to remain in their current statuses, be annexed by an existing state, or require a constitutional amendment providing real representation in the federal government.

B. Resolving Fitisemanu to Preserve the Insular Cases and Extend Fourteenth Amendment Birthright Citizenship

A Supreme Court decision extending Fourteenth Amendment citizenship to American Samoa consistent with the Insular Cases is more likely than overturning territorial incorporation if the Court is inclined to change the law. The Court could extend Fourteenth Amendment citizenship under the recent reinterpretation of the Insular Cases, which accounts for particular circumstances and protection of local customs. The Court could also follow the argument of the Fitisemanu amici scholars, that the Insular Cases should be read narrowly to permit the extension of birthright citizenship based on a distinction between being “throughout the United States” under the Uniformity Clause and “in the United States” under the Fourteenth Amendment. The Court could find constitutional significance in Congress’s failure to address the status of the territories for nearly a century and conclude that it has finally metastasized into a de facto desire to retain them with enough permanence that their people should, at birth, be considered citizens. The degree to which the Court relied on a jus soli line of reasoning could alter the shape of the decision.

154 See Laughlin, Cultural Preservation, supra note 8, at 331, 341. But see Marybeth Herald, Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?, 22 HASTINGS CONST. L.Q. 707, 739, 768–69 (1995) (challenging idea that racial restrictions on land alienation should be protected, arguing they are unconstitutional).

155 See infra text accompanying note 185 (comparing the populations of Wyoming, Washington, D.C., and each territory).

156 The territories all currently have non-voting delegates in the House. See Legislative Interests in the Territories, U.S.H.R. HIST. ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Strength-Numbers/Legislative-Territories/ [https://perma.cc/792E-5NTX] (discussing the role of territorial delegates). Such a proposal would also be uncomfortable regarding American principles of equal representation, because if the territories could not be states, then what essentially lesser representation should they be entitled to—one voting representative but no Senator? See Laughlin, Colonialism or Reasonable, supra note 153, at 431–36. It becomes an ugly discussion that could ultimately answer one wrong with another.

157 See supra Part V.A.

158 See supra text accompanying notes 8, 54.

as well.\textsuperscript{160} Similarly, as above, such a ruling would ultimately affect all the territories uniformly.\textsuperscript{161}

The result of this decision would be more interesting. Retaining the \textit{Insular Cases} would likely mean the Citizenship Clause, even if applying of its own force, would remain subject to the “impracticable and anomalous”\textsuperscript{162} test and guarantees of “fundamental personal rights” in the territories.\textsuperscript{163} \textit{Afroyim} stated that “[o]nce acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.”\textsuperscript{164} Without the impractical and anomalous test, the \textit{Afroyim} right to constitutional citizenship could very well prevent Congress from granting independence. However, the concern for the “particular circumstances” and “possible alternatives which Congress ha[s] before it” under such a circumstance could render it “impracticable and anomalous” to prevent Congress from minorly diluting citizenship rights to affirm a popular consensus in favor of independence.\textsuperscript{165} One scholar asserted a right to self-determination existed in the Constitution.\textsuperscript{166} Under a standard that treats territories specifically and guarantees fundamental rights, it seems possible that a locally advanced and democratically determined movement for self-determination could constitutionally permit a qualified form of independence.\textsuperscript{167}

\textbf{C. Resolving \textit{Fitiseimanu} Properly}

The \textit{Insular Cases} may be the exemplar for stare decisis—they are wrongly decided but should be retained. The \textit{Fitiseimanu} Court should rule that the \textit{Insular Cases} and territorial incorporation control. The effort to distinguish the Fourteenth Amendment from the Incorporation Doctrine is interesting, but the judicial extension of citizenship seems difficult to justify without massively undermining territorial incorporation. The doctrine and the \textit{Insular Cases} sit upon more than a century of precedent, and their essential holdings were reaffirmed by the Supreme Court as recently as 2008 in \textit{Boumediene} and by the

\textsuperscript{160} See discussion supra Part IV.A.

\textsuperscript{161} But see supra text accompanying note 137. Efron suggests a claim might only ever be able to be made if Congress attempted to revoke a territorial population’s citizenship status, or if Congress attempted to grant independence to a territory.

\textsuperscript{162} \textit{Boumediene} v. Bush, 553 U.S. 723, 759 (2008) (quoting Reid v. Covert, 354 U.S. 1, 74–75 (1957)).

\textsuperscript{163} \textit{Id.} at 758 (quoting Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)).

\textsuperscript{164} \textit{Afroyim} v. Rusk, 387 U.S. 253, 262 (1967) (emphasis added).

\textsuperscript{165} \textit{Boumediene}, 553 U.S. at 759. Arguably, this could also serve to protect local customs and laws perpetuating indigenous ownership of land in American Samoa and the Northern Mariana Islands; the crucial factors would be the validity of the impractical and anomalous standard and that it be applied consistently with previous cases. Laughlin, \textit{Cultural Preservation}, supra note 8, at 352–53.


\textsuperscript{167} See infra Part VI.B.
D.C. Circuit in 2015 in Tuaua. The American system of territorial law and government, with its serious constitutional and normative democratic flaws, is reliant on the Insular Cases’ determinations. To disturb them would throw the lives of millions into uncertainty.

Further, there is a real possibility that greater constitutional integration would threaten laws protecting indigenous land and ownership and ancient customs, which, given the wrong such litigation seeks to right, is particularly concerning. The reasoning behind the Insular Cases, both past and present, is heavily infected with policy considerations but, ironically, striking them down would make a profound policy choice against independence for any territory. The cases are flawed and have caused their share of harm, but the real blame should lie with Congress, which has contributed more to this democratic deficit and all the evils it entails than any other decision or institution. The collective failure of the legislature to act on behalf of the people of the territories is likely to transcend and eclipse any “victory” in court.

VI. NO EASY ANSWERS

At present, any resolution to the territories’ status and representative challenges discussed above is possible. If independence is preferred, the process could proceed in numerous forms and should involve close communication with and deference to the citizens of the specific territory. However, it is entirely possible that the territories would reject independence. In American Samoa there is a strong desire to remain with the United States: majorities favored

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169 See supra note 48.

170 See infra text accompanying note 185 (estimating the population sizes of U.S. territories).

171 See Laughlin, Cultural Preservation, supra note 8, at 375 (describing the importance of preserving cultural choices for locals and asking if it can be conceivably “in anyone’s interest for mainland judges to tell the U.S. islands that they must abandon those cultures?”); Rose Cuiso Villazor, Blood Quantum Land Laws and the Race Versus Political Identity Dilemma, 96 CAL. L. REV. 801, 801–02 (2008) (questioning whether certain laws based on indigenous ancestry would withstand full constitutional scrutiny); Weaver, supra note 8, at 367 (discussing how the United States’ administration of American Samoa has generally guarded Samoan traditional customs, the “fa’a Samoa,” but is beginning to harm the rights of some residents).

172 See supra text accompanying note 51.

173 See FUTURE POLITICAL STATUS STUDY COMM. OF AM. SAM., supra note 8, at 42–43 (finding “[t]he Samoan public, from leaders to the rank and file, both on and off-island, overwhelming [sic] emphasized two major points: (a) American Samoa must remain part of the American family of states and territories; (b) be certain that a chosen status will not adversely affect customs and culture, and the perpetuation of the Samoan language,” and recommending American Samoa continue in its current status, but initiate negotiations with
statehood in recent Puerto Rican non-binding referenda,\textsuperscript{174} no major party in the U.S. Virgin Islands advocates independence,\textsuperscript{175} and Guam has an active movement challenging its current status.\textsuperscript{176} The Court’s decision in Fitimemanu

\textsuperscript{174}R. SAM GARRETT, CONG. RESEARCH SERV., PUERTO RICO’S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 1, 8 (June 2013), https://fas.org/sgp/crs/row/R42765.pdf [https://perma.cc/9ERB-VDNB] (observing in a 2012 status referendum that “when asked if Puerto Rico should retain its current status, 53.97% answered no; 46.03% answered yes,” and “when asked to select among the three listed status options, 61.16% chose statehood; 33.34% chose sovereign free associated state, and 5.49% chose independence”) (internal quotations omitted). The most recent referendum in 2017 suffered numerous problems, casting doubt on the value of its results. See Frances Robles, 23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood, N.Y. TIMES (June 11, 2017), https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html [https://perma.cc/WU2G-PY8Z] (discussing the status debate, low turnout, and how the pro-statehood government advanced the referendum while the Department of Justice requested a delay and the opposition party called for a boycott).

\textsuperscript{175}See Enrice Gilbert, U.S.V.I. Could Remain with U.S. or Seek Independence; U.S. Gov’t Says, V.I. CONSORTIUM (Apr. 3, 2016), https://viconsortium.com/breaking-news/u-s-v-i-could-remain-with-u-s-or-see-independence-u-s-govt-says/ [https://perma.cc/7HF2-RNKJ] (covering St. Croix speech by the Obama-era Secretary of the Interior, where a promise that U.S.V.I. could choose independence was “received with silence,” about which U.S.V.I. Senate President later said, “I just want to be an American”); April Knight, ‘Homegrown’ Independent Citizens Movement Celebrates 50 Years, ST. JOHN SOURCE (Oct. 22, 2018), https://stjohnsource.com/2018/10/22/homegrown-independent-citizens-movement-celebrates-50-years/ [https://perma.cc/L6AM-UJYS] (noting that while Democrats “dominate” the political landscape and the Republicans are insignificant, the Independent Citizens Movement, a longstanding third-party, advocates “self-determination” and modification of U.S.V.I.’s current status without full separation from the United States, although with greater leeway to maintain personal and commercial relationships with nearby Caribbean countries; however, the party considers education their top priority); Senator Neville James, 33RD LEGISLATURE V.I., http://www.legvi.org/senators/st-croix/senator-neville-james/ [https://perma.cc/TJB7-9PXH] (showing that the U.S.V.I. Senate President represents the Democratic party).

\textsuperscript{176}Davis v. Guam, 932 F.3d 822, 824–33 (9th Cir. 2019) (finding the nonbinding Guam future status plebiscite’s restriction of voting to “Native Inhabitants of Guam” constitutes a proxy for race, making it an impermissible racial restriction on 15th Amendment voting rights); Steve Limtiaco, Court: Political Status Vote Is Illegally Race-Based, PAC DAILY NEWS (July 30, 2019), https://www.guampdn.com/story/news/2019/07/29/federal-court-political-status-vote-illegally-race-based/1863474001/ [https://perma.cc/DTN6-TGKU] (discussing the ongoing status debate, and the intentions of the government and activists to continue seeking a change to Guam’s current political status); Clynt Ridgell,
could have a decisive impact on this debate by limiting Congress’s ability to advance territorial self-government by narrowing the options of what can be done, absent a constitutional amendment.

A ruling that overturns the *Insular Cases* to extend Fourteenth Amendment birthright citizenship to American Samoa should extend that guarantee to all territorial citizens and bind the territories to the United States permanently. A similar ruling that does not overturn the *Insular Cases* would prevent unqualified independence but would preserve the possibility of free association. An ideal resolution of the territorial question would balance a plan’s constitutional legality, the desires of the people of the territory in question, and American commitments to self-government under both normative values and international treaties. Each of these factors is in tension and may not all be possible to satisfy. Present circumstances, however, offend them all. Criticism of the *Insular Cases* is legally compelling, but a potential policy disaster. The legal status quo gives Congress discretion to craft solutions carefully tailored for each territory. This should not be disregarded.

At present, Congress has substantial power to address the problems with the status of the territories, including to grant full independence to any territory, qualified independence with a treaty of free association, as well as a more traditional route of incorporation and eventual statehood. If the *Insular Cases* are abrogated, then the territories would be automatically incorporated, and only statehood, incorporation into a state, or a continuation of the status quo remain as options. If the *Insular Cases* remain untouched, but Fourteenth Amendment


177 See supra Part V.A.

178 See supra Part V.B.

179 See supra Part III.A; see also Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1876 (2016) (suggesting Congress possesses substantial leeway in legislating to give greater autonomy to the territories, specifically Puerto Rico).

180 See Sanchez Valle, 136 S. Ct. at 1876.

181 See Joseph Blocher & Mitu Gulati, Puerto Rico and the Right of Accession, 43 YALE J. INT’L L. 229, 269 (2018) (arguing from a mixed U.S. constitutional and international law perspective that the U.S. Territories have a right to choose to remain under American sovereignty or gain independence); Jovet, supra note 166, at 164–65, 215–17 (offering no specific solution, but arguing “[t]he fact is that, not only internationally, but also federally, most ends are possible, when there is sufficient political will,” and finding that a closer relationship than free association is possible); Laughlin, Colonialism or Reasonable, supra note 153, at 440–41 (suggesting Congress will have to propose a constitutional amendment to “create a more fundamentally sound charter for territorial self-government”); Peralta, supra note 27, at 256 (asserting a future for the territories “cannot include [a] territorial regime,” the source of their problems); Perez, supra note 24, at 1080–81 (concluding it is “doubtful” the Court can “properly correct the scope of the Citizenship Clause” without overruling the *Insular Cases*).
birthright citizenship is found to extend to the territories, then a treaty of free association remains possible, but unqualified independence would become impossible. There has not yet been a serious attempt to address the unique scenario where the *Insular Cases* survive, maintaining the territories’ legal separation from the United States, despite the extension of Fourteenth Amendment birthright citizenship, which is considered below.

**A. Intimate Association is the Best Alternative to the Status Quo**

A ruling that maintains the *Insular Cases*, but extends Fourteenth Amendment birthright citizenship would make unqualified independence for any territory legally impossible. This would remove complete independence as a choice for any territory and necessitate finding some method for representation and self-government within the American system. Puerto Rico, given its population, is an obvious candidate for statehood, but the same might not be true for the other territories. The other territories’ much smaller populations make them problematic candidates, ironically because of potential

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182 See supra Parts V.A, V.B.
183 Id.
overrepresentation.\textsuperscript{186} If a ruling such as that described above in Part V.B occurs, a relationship modeled on free association,\textsuperscript{187} but much more intimate, offers an excellent compromise solution.

Under the Part V.B scenario, a form of free association, where the United States guarantees existing rights and privileges by treaty, would permit a territory to gain independence. The guarantees must be constructed to not dilute, shift, or cancel citizenship rights to avoid offending \textit{Afroyim}.\textsuperscript{188} \textit{Texas v. White} suggests that constitutional, full citizenship within the Union would prevent any territory from gaining independence.\textsuperscript{189} However, if territorial incorporation survives and the Citizenship Clause is applicable in unincorporated territories, that application should operate subject to practical circumstances and cannot cause impracticable or anomalous effects.\textsuperscript{190} An interpretation of the Citizenship Clause funneled through territorial incorporation should find a grant of independence \emph{with} a treaty of intimate free association—an agreement of “intimate association”—valid, even under a newly heightened standard for congressional governance of the territories.

The great advantage of intimate association is that it could, properly drafted, preserve the status quo, allay concerns about threats to local culture and traditions, and also be recognized by the U.N. as a valid form of self-government.\textsuperscript{191} Given the minimal requirements for a compact of free association,\textsuperscript{192} the United States and each territory could craft a treaty meeting their specific needs and new constitutional requirements.

Crucially, the treaty must pass the \textit{Afroyim} citizenship test that Fourteenth Amendment citizenship, once acquired, cannot be “shifted, canceled, or diluted.”\textsuperscript{193} Such a high standard requires any treaty to incorporate the individual rights protected by the U.S. Constitution into the territory-cum-

\textsuperscript{186} See Eric W. Orts, \textit{The Path to Give California 12 Senators and Vermont Just One}, \textit{Atlantic} (Jan. 2, 2019), https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/ [https://perma.cc/FCV2-WCC8] (advocating proportional reform to the Senate because over-allocation to small-population states is “untenable” on numerical and racial grounds). It is also interesting to note he considers the status of Puerto Rico and Washington, D.C., but no other territories. \textit{Id}.

\textsuperscript{187} See Wentworth, \textit{supra} note 36, at 28–33. Wentworth explains how a state in free association is a country whose constitution is determined without external interference; is freely entered into through a democratic process; and whose status can be unilaterally altered by the freely associated state, beyond which the treaty relationship can include any degree of economic aid, agreements to cede responsibility for defense, or even to cede diplomatic affairs. \textit{Id}.

\textsuperscript{188} See \textit{supra} Part IV.B.

\textsuperscript{189} See \textit{supra} Part III.B.

\textsuperscript{190} See \textit{supra} Part III.A.2.

\textsuperscript{191} G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960) (recognizing free association as a valid form of self-government); \textit{see also supra} text accompanying note 154 (discussing racial restrictions on land alienation in American Samoa, which meant to preserve indigenous land ownership and are of questionable constitutionality).

\textsuperscript{192} G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960).

\textsuperscript{193} \textit{Afroyim v. Rusk}, 387 U.S. 253, 262 (1967).
country’s constitution to prevent rights from being canceled. As the individual territories will surely maintain governments offering comparable constitutional protections, there should not be any rights problem resulting from the separation.\textsuperscript{194} Similarly, access to government programs and support would likely need to remain the same as under American sovereignty to prevent citizenship from being diluted. If exact preservation is unworkable, Congress could create special versions to accommodate citizens of the new freely associated states or provide financial support for locally run alternatives similar to current agreements with Micronesia and the Marshall Islands.\textsuperscript{195} Congress should also guarantee visa-free travel rights and the unconstrained movement of money and goods; security could be retained under this scheme if the United States continued to operate customs and border security services in the territories-cum-countries.\textsuperscript{196}

Afroyim’s statement that citizenship cannot be shifted\textsuperscript{197} is the most difficult standard. It faces a straightforward argument that free association, even if intimate, still shifts the duties of the U.S. government onto the newly independent government.\textsuperscript{198} For this argument, the Insular Cases’ recent reinterpretation may be crucial.\textsuperscript{199} Without accommodation for differences in the territories, the Afroyim right to constitutional citizenship\textsuperscript{200} could very well prevent Congress from granting independence. If a decision similar to the one discussed above in Part V.B occurs, the concern for the “particular circumstances” and “possible alternatives which Congress ha[s] before it” could arguably render it “impracticable and anomalous”\textsuperscript{201} to prevent Congress from minorly diluting citizenship rights in favor of increased self-government and protection of local culture.

Language preserving a territory’s right to accession could strengthen the constitutionality of these treaties by underscoring the right of U.S. citizens living in independent territories to full membership in the Union. Concurrently, Congress should pass preemptive-enabling legislation that creates standing-offer terms for the territories-cum-freely-associated-states to be fully

\textsuperscript{194} See supra note 42.
\textsuperscript{196} See Wentworth, supra note 36, at 29–32 (discussing how the U.N. approved of New Zealand’s free association agreement with the Cook Islands where New Zealand continued to maintain responsibility for external affairs and defense; Switzerland’s agreement to conduct diplomatic relations for Liechtenstein; New Zealand’s treaty to act as “a channel of communications” for The Independent State of Samoa’s foreign affairs; and Bhutan’s agreement to “be guided by” India in foreign affairs via a treaty).
\textsuperscript{197} Afroyim, 387 U.S. at 262.
\textsuperscript{198} See supra note 42.
\textsuperscript{199} See supra Part III.A.2.
\textsuperscript{200} Afroyim, 387 U.S. at 262.
\textsuperscript{201} Boumediene v. Bush, 553 U.S. 723, 759 (2008) (quoting Reid v. Covert, 354 U.S. 1, 74–75 (1957)).
incorporated into the Union if their governments determine that statehood or incorporation into a state is the best course for their people.

Above are the more important matters a constitutionally valid compact of intimate association would need to address under the Part V.B scenario. Such a treaty will necessarily be determined after lengthy negotiations and should be passed by the Senate. The legal objective of such treaties would be to ensure the full rights and social guarantees American citizens possessed while living in the U.S. Territories would continue to apply unaltered after independence. The combined social and political objective is to create a space for the people of the territories to determine their own futures and their preferred relationship with the United States without congressional or judicial meddling. The major drawbacks would be the cost, both in political and actual capital. These guarantees would be expensive, and elected officials may be unwilling to fund programs for Americans living outside the country proper. Relatedly, the President can unilaterally terminate any treaty without notice, which could endanger the treaties in the event of a dispute.

An intimate compact of free association would provide the positive elements of the status quo while minimizing, if not rectifying, the democratic deficit in the territories. Free association would also protect American Samoan culture and customs from unwanted encroachment by American constitutional law while preserving a close relationship with the United States. Because free association is recognized as a form of self-government by the U.N., it would allow the territories to be removed from the list of non-self-governing territories that is a national embarrassment. While the compacts of intimate association are discussed in the wake of a Supreme Court decision upending territorial law, they could be created prior to such a decision. Implementation before the law changes would occur with minimal legalistic restraint and would preserve the most options.

202 U.S. CONST. art. II § 2, cl. 2.
205 See supra Part V.A.
206 See supra note 191.
208 See Peralta, supra note 27, at 256 (discussing how territorial status violates international law and arguing that some other status, such as free association, is needed).
B. Seemingly Intuitive Alternative Solutions Are Wanting

As always, the possibility exists to amend the Constitution; Congress is also capable of integrating the territories into existing states, likely requiring their consent. Either of these options is valid under present law and would remain valid under any scenario the judiciary may invent. The difficulty of passing a constitutional amendment would likely be challenging to the point of infeasibility. Assuming an amendment could pass, it would restore a flawed status quo or entrench a system of unequal representation. Unfortunately, a similar risk exists if Congress chooses to incorporate territories into states. These solutions, while they may appear attractive, risk being seriously flawed and are not necessary, making such extreme steps improper solutions.

1. Constitutional Amendment

Passing a constitutional amendment risks certain problems, most seriously that an amendment to provide representation for the territories in Congress could enshrine unequal representation in the Constitution. While the idea of securing some representation in Congress is desirable, if achieved at a status less than statehood, it still would be unequal. An amendment worth passing should not be treated as a resolution to the issue of territories in the American system of government, but rather as a tool to manage their transition to a desirable final status.

An amendment should account for the reality that the territories are practically a part of the United States and provide some voting representation for the territories in Congress, perhaps making their representatives in the House full members. The amendment should provide a mechanism requiring popular approval in the territory for any status changes Congress may enact. A related mechanism may be required for relinquishing constitutional citizenship rights, should a territory choose independence. The amendment could explicitly preserve the protections for local culture and customs recently read into territorial incorporation, which would be particularly beneficial to American Samoa. Perhaps the amendment could create a constitutionally valid commonwealth status that would prevent Congress from meddling in territorial governments, similar to the sovereignty of states.

209 U.S. CONST. art. V.
210 Id. at art. IV § 3.
211 See discussion supra Part V.
213 See supra note 27.
214 See supra text accompanying notes 8, 52.
First, passing a constitutional amendment combined with the difficulty of the necessary debate makes the process an unrealistic solution from the start. Second, this amendment is no panacea and requires potentially uncomfortable trade-offs between substantive representation and equal representation. The territories cannot and should not be treated as states unless Congress is willing to admit them as states. A single representative in Congress would likely convey the second-class status the plaintiffs in *Fitisemanu* decry.\(^{215}\) However, it would be an improvement upon the current non-voting delegate status. Further, if the Supreme Court is truly signaling an intention to alter the Incorporation Doctrine in the future,\(^{216}\) the precise wording of this amendment will likely become the focus of a major interpretative debate and could produce uncertain consequences, however it may be worded and whatever it contains.\(^{217}\) For those reasons, a constitutional amendment is not a preferable solution.

2. Combination with Existing States

The territories could be incorporated into states with their consent. This solution seems attractive but suffers from similar problems as a constitutional amendment. First, it assumes the consent of a state,\(^{218}\) which may not be given. Second, it assumes the consent of the territorial populations, which is not a given.\(^{219}\) Third, this solution would not protect indigenous cultures and customs from constitutional scrutiny whatsoever.\(^{220}\) Fourth, and perhaps most seriously, this solution assumes essentially becoming a county within a state would solve the problem of representation. It is easy to imagine the few state legislators representing an erstwhile territory being overwhelmed by their new peers from the original state. Similarly, the small populations might merely be folded into existing congressional districts, rather than gaining any of their own.\(^{221}\)

\(^{215}\) See *Fitisemanu* Complaint, *supra* note 9, at 18–24.

\(^{216}\) See *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”).

\(^{217}\) *Id.*

\(^{218}\) Geographically, the best candidate to absorb American Samoa, Guam, and the Northern Mariana Islands would be Hawaii. The U.S. Virgin Islands and Puerto Rico could conceivably be incorporated into Florida, but the larger population of Puerto Rico makes it a better candidate for statehood itself.

\(^{219}\) If the state in question consented, Congress has the power to force territories to accept this, but that would be attempting to right one wrong with another. *See* U.S. CONST. art. IV, § 3.

\(^{220}\) See *supra* note 154.

\(^{221}\) Hawaii currently has two representatives, each with a district containing approximately 710,000 people. *Hawaii*, GOVTRACK, https://www.govtrack.us/congress/members/HI#representatives [https://perma.cc/2S8K-QRDJ]. American Samoa, Guam, and the Northern Mariana Islands have a combined population of approximately 270,000 people. *See supra* text accompanying note 185. It is likely the interests of each specific territory’s population would be substantially diluted.
purported solution risks displacing the distant and unmotivated government in Washington with another in Honolulu or San Juan. Combination with another state could be a proper final status for certain territories, and should not be removed as an option, but it cannot be the only option.

VII. CONCLUSION

The Constitution offers inadequate guidance for the future of the territories, and territorial jurisprudence is based upon a century-old unconstitutional policy decision made by the Supreme Court. The Court, in its last case addressing territorial incorporation, signaled that “over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance.”222 The Fitisemanu plaintiffs point to this with hope,223 but it could as easily be observed with dread. A rapid change to such a vast precedent underpinning so many laws and policies would cause tremendous uncertainty and further prevent Congress from taking responsibility for the unincorporated territories. Congress, whatever it chooses to do, must act and seek a solution preserving what is beneficial in the present system while providing more genuine self-government. The sad truth is that not everyone can win: either American patriots or Puerto Rican nationalists will eventually be disappointed. Mr. Fitisemanu may gain his citizenship, but the people in his homeland may have their government thrown into disarray. Fitisemanu is the second court case contesting American Samoan citizenship,224 and more are sure to come. This will likely continue until the Supreme Court is forced to weigh in. The territories are similarly situated to a fine dinner set, and the doctrine of territorial incorporation is the tablecloth beneath it. Congress can choose to clear the table at any time, but the longer it waits, the greater the risk that the Supreme Court may enter and rip out the tablecloth. The finery may remain in place or come crashing to the ground. Congress has abdicated its responsibility for too long. It should act before the Court intervenes.

222 Boumediene, 553 U.S. at 758.
223 Fitisemanu Complaint, supra note 9, at 31–32.
224 See generally Tuaua v. United States, 788 F.3d 300 (2015).