INTRODUCTION

J. MARK BAGGETT

This issue of the Cumberland Law Review is devoted to Harper Lee, whose death on February 19, 2016, closed the last eventful chapter of her life. Her novel Go Set a Watchman, the early draft of the novel that was revised to become To Kill a Mockingbird, was published on July 14, 2015 to swirling controversies over her capacity to assert to publish, over the ethics of publishing a rough draft as an independent work, and over the depiction of Atticus Finch, now a segregationist who works to keep the NAACP out of Maycomb and who opposes Brown v. Board of Education.

All lawyers are invested in Harper Lee. In To Kill a Mockingbird (1960), she exposed the injustices of the entire legal system in the South to an international audience, who reacted with revulsion. Her novel helped propel the Civil Rights Movement. Even in 2015, the popularity of To Kill a Mockingbird was largely responsible for the massive sales of Go Set a Watchman, one of the biggest events in American publishing history. Lee’s creation of Atticus Finch, based on her father, has sustained his iconic status. His moral courage in defending Tom Robinson has made him the role model for lawyers everywhere, the embodiment of Thoreau’s dictum, “Any man more right than his neighbors constitutes a majority of one already.” So powerful was Lee’s fictional character that Atticus has become almost an historical figure. Despite Atticus’s fall in Watchman, the figure of Atticus has undoubt-edly emboldened reform in the South and ennobled the legal profession.

Harper Lee abandoned her study of the law to move to New York, but she never abandoned the primacy of the law in her novels. The one firm link between Watchman and Mockingbird is Lee’s faith in the law as an instrument of social justice. She articulated one of the law’s greatest achievements and one of its greatest challenges in Atticus’s closing argument to the jury in To Kill a Mockingbird: “Our courts

1 Associate Professor of English and Law, Samford University, Cumberland School of Law. B.A. Journalism and English, M.A. English, J.D., University of Alabama; Ph.D. English, University of North Carolina.
have their faults, as does any human institution, but in this country our
courts are the great levelers, and in our courts, all men are created
equal.”

In Birmingham and in Alabama, the crucible of the Civil Rights
Movement, a study of Harper Lee’s works is even more obligatory. Her
father, Amasa Lee, was a respected member of the Alabama Bar Asso-
ciation in Monroeville. His sister Alice, who died in November 2014
at age 103, was the first woman member of the Alabama bar. In 1997,
the bar erected an Atticus Finch Monument in a courtyard outside the
famous courthouse. Its inscription concludes:

Children are the original and universal people of the world; it is only
when they are educated into hatreds and depravities that children be-
come the bigots, the cynics, the greedy, and the intolerant, and it is then
that “there hath passed away a glory from the earth.” Atticus Finch
challenges the legal profession to shift the paradigm and make the child
the father of the man in dealing with the basic conflicts and struggles
that permeate moral existence.

Symbolically, it is the legal profession that now sits in the jury box
as Atticus Finch concludes his argument to the jury; “In the name of
God, do your duty.” The articles in this volume answer the challenge
by trying to assess Harper Lee’s legacy and its implications for the legal
profession.

ARTICLES

“TUMBLING OUT OF THE BEAUTIFUL DREAM”: GO SET A WATCHMAN AND HARPER LEE’S LEGACY

J. MARK BAGGETT

On July 14, 2015, Harper Lee published her novel Go Set a Watchman, the prequel to To Kill a Mockingbird. Overnight, Southerners suffered another disillusionment on their passage through modernity: Scout becomes Jean Louise; Atticus becomes a frail, 72-year-old segregationist who plots to undermine the Brown v. Board of Education decision of 1954; and Lee becomes Ta-Nehisi Coates. To compound the injury, six months later, on February 19, 2016, Lee died at age 89 in a Monroeville assisted-living facility. Like the famous courtroom scene in To Kill a Mockingbird, the public has now stood and paid its respects to Harper Lee’s passing. She bequeathed the public one of the greatest American novels and another sibling novel that threatened to alienate her devoted readers and stain her legacy. But she left questions unanswered, such as whether she intended for Watchman to be published and why she wrote this version of her father first. Now, as the perspective of her life and her two novels lengthens, we can begin to sort through the outlines of her legacy.

For many Southerners, the polarized characterizations of Atticus in the two books will never be reconciled. For literary critics, the publication of a “rough draft” that is uneven, digressive, and pedantic raised ethical questions and muddied Lee’s literary reputation. For lawyers, the iconic character of Atticus Finch, whose moral courage towered like Gregory Peck’s Oscar over the wasteland of Southern bigotry, now has clay feet. But these legacies seem almost frivolous in the

1 Associate Professor of English and Law, Samford University, Cumberland School of Law. B.A. Journalism and English, M.A. English, J.D., University of Alabama; Ph.D. English, University of North Carolina.
face of a nation nearly as bitterly divided on race as it was in the 1960s. *Go Set a Watchman* is Harper Lee’s *Why We Can’t Wait.* In raging against the corruption of Maycomb and her father’s betrayal, she renews Frederick Douglass’s and W.E.B. Dubois’s age-old prophecy: “The problem of the Twentieth Century, and now the Twenty-First Century, is “the problem of the color-line.” Although it is a flawed novel, *Watchman*’s message seems more prescient than *Mockingbird*’s unstated premise that decency and empathy will triumph in due time.

For half a century, Southerners have appropriated Atticus as the mirror image of their better selves. The model of Southern moral rectitude, articulating a progressive, liberating vision of social justice, allowed Southerners of successive generations to latch on to Atticus’s moral authority and even to extricate their guilt. The fact that Atticus Finch’s closing arguments were destined to fail in the 1950s and 1960s enhanced the vision because Southerners who fancied themselves progressive now became co-victims with African-Americans against a common enemy. The symbol of this heroic defender of racial justice allowed them to claim a noble heritage and celebrate their part in racial progress, while ignoring the links to their true heritage of slavery and racism. The fact that Lee’s fictional Atticus was drawn from her father’s life authenticated these claims. Even black leaders like Martin Luther King, Jr. affirmed the portrait of Atticus: “To the Negro in 1963, as to Atticus Finch, it had become obvious that nonviolence could symbolize the gold badge of heroism rather than the white feather of cowardice.” Amasa Lee’s death in 1962, so soon after *Mockingbird* was published and before the filming of the movie was over, kept his own legacy alive. Only recently has the public learned the truth that has been suspected all along: Amasa Lee was a defender of the segregationist status quo but changed his views before his death. Thus, the Atticus of *Go Set a Watchman*, which lay in a manuscript in a safety deposit box for almost 60 years, eventually proved more authentic than the Atticus of *Mockingbird*. Nevertheless, in terms of our regional self-delusion, there is no power like literary fiction.

To benchmark Lee’s evolving legacy, it is worth noting that when

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5 Martin Luther King, Jr., *Why We Can’t Wait* 1 (1963). King’s chronicle of the Civil Rights Movement and what he calls “the Negro Revolution,” focusing on the campaign in Birmingham in 1963 and including “Letter from Birmingham Jail.”


7 Martin Luther King, Jr., supra note 5, at 28.

she died in 2016, the *Mockingbird* industry was still flourishing. Gregory Peck’s portrayal of Atticus Finch in the 1962 film version still regularly ranks him as one of the top movie heroes of all time. Lee’s book has sold more than 40 million copies, has been translated in 40 different languages, and is on *Time’s* list of *All-Time 100 Novels.* *Mockingbird* is still taught widely in schools, although it is not often assigned in colleges and universities, and the novel has maintained a steady international popularity. Citing a 2013 court case filed by Lee’s lawyer Tonja Carter against former agent Sam Pinkus, *Forbes* magazine reported that Lee earned $2.5 million in royalties from *Mockingbird* from July 2009 to July 2010. Although there may be no correlation, it is interesting that the names “Atticus” and “Harper” reached peak popularity in 2015. President Bush awarded Harper Lee the Presidential Medal of Freedom in 2007 in a White House ceremony, and President Obama marked the 50th anniversary of *Mockingbird* in 2010 in another White House celebration with a variety of authors and celebrities, even though Lee’s health kept her from attending. In no small part, the sustained success of *To Kill a Mockingbird* comes from both its book and movie versions, which if not twins are joined at the hip.

By almost every public measure, the legacy of *To Kill a Mockingbird* seemed remarkably healthy in 2015 when *Go Set a Watchman* was published. Despite the fear and trembling surrounding the new book, *Watchman* merely exposed the buried seeds of *Mockingbird*’s deconstruction. Dissenting views of Atticus have existed from the beginning. Andrew Sarris, writing a review of the film in *The Village Voice* in 1963, stated, “It is too early to tell, but it is too late for the Negro to act as moral litmus paper for the White conscience. The Negro is not a

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12 Id.


mockingbird."15 Accusing Harper Lee of making a veiled argument for gradualism through Atticus, Sarris concludes, "Yet somehow the moral arithmetic fails to come out even. One innocent Negro and one murderous redneck hardly cancel each other out."16

Professor Christopher Metress has chronicled the Atticus dissents in his article titled *The Rise and Fall of Atticus Finch*, arguing that the dissents began in earnest in the early 1990s.17 In articles such as “Atticus Finch, Esq., R.I.P.” and “Atticus Finch—Right and Wrong,” Monroe H. Freedman, at the time Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University, rejected the idea of Atticus as a role model for lawyers:

> It means that Atticus Finch never in his professional life voluntarily takes a pro bono case in an effort to ameliorate the evil—which he himself and others recognize—in the apartheid of Maycomb, Alabama. Forget about ‘working on the front lines for the NAACP.’ Here is a man who does not voluntarily use his legal training and skills—not once, ever—to make the slightest change in the pervasive social injustice of his own town.18

Freedman’s articles were met with a flood of outrage and rebuttals.19 Today, post-*Watchman*, Freedman and his allies are vindicated.20

*Watchman* exposes these and other fault lines of *To Kill a Mockingbird* that were lost in the public’s affection for the original book. The public’s perception of *To Kill a Mockingbird* is shaped as much by

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16 Id.
18 Monroe H. Freedman, *Atticus Finch—Right and Wrong* 45 ALA. L. REV. 473, 481 (1994). Freedman accuses Atticus defenders of “presentism” and argues that Atticus’s actions should be judged by universal standards of morality in place then and now:

> This clumsy neologism is meant to express the idea that it is unfair to hold someone in an earlier time to moral standards that we recognize today. Lest anyone miss the point, this contention is derived from cultural relativism. This is a philosophy that rejects the idea that there are any moral values that are absolute (or, at least, prima facie) and eternal. Instead, morality is equated with the notions of right and wrong that are recognized in the culture of a particular time and place. Slavery? Apartheid? Lynching? Sacrificing babies? Well, the cultural relativist says, we might not approve, but who are we to judge the moral standards of people in another time or place?

Id. at 477.
19 See, e.g., MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS (1995).
the movie version and by Elmer Bernstein’s wistful score as it is by a close reading of the text. The passages that exalt the law are memorialized, but other passages showing Lee’s ambivalence about the law are often ignored. The book begins, biblical-like, with a genealogy of the Finch family and mocks Atticus’s foray into criminal law:

His first two clients were the last two persons hanged in the Maycomb County jail. Atticus had urged them to accept the state’s generosity in allowing them to plead Guilty to second-degree murder and escape with their lives, but they were Haverfords, in Maycomb County a name synonymous with jackass. The Haverfords had dispatched Maycomb’s leading blacksmith in a misunderstanding arising from the alleged wrongful detention of a mare, were imprudent enough to do it in the presence of three witnesses, and insisted that the-son-of-a-bitch-had-it-coming-to-him was a good enough defense for anybody. They persisted in pleading Not Guilty to first-degree murder, so there was nothing much Atticus could do for his clients except be present at their departure, an occasion that was probably the beginning of my father’s profound distaste for the practice of criminal law.21

These mock-historical passages occur in Go Set a Watchman as well, such as the passage in chapter four describing Maycomb’s Sinkfield roots.22 Lee is less successful in incorporating these digressive passages into the story line in Watchman. Regardless, in both books the passages describe Maycomb as a colorful, bumbling, foolish town that practices a kind of easy tolerance and “conservative resistance to change.”23 But the humorous histories of Maycomb shadow more sinister implications that come to fruition in Watchman. For example, they prepare the reader for the “marry your own kind” argument of Uncle Jack later in the novel, an argument that seems to be the underlying justification for Atticus’s defiance of the law.24 What passes for small-town charm and quirkiness in Mockingbird acquires an edge in Watchman.

In another passage of Mockingbird, after the trial of Tom Robinson, Jem’s idealism puts him at odds with Atticus’s realpolitik:

“But lots of folks have been hung—hanged—on circumstantial evidence,” said Jem.

“I know, and lots of ‘em probably deserved it, too—but in the absence of eyewitnesses there’s always a doubt, sometimes only the shadow of a doubt. The law says ‘reasonable doubt,’ but I think a defendant’s entitled to the shadow of a doubt. There’s always the possibility, no

23 Id. at 46.
24 Id. at 273.
matter how improbable, that he’s innocent.”

“Then it all goes back to the jury, then. We oughta do away with jury’s.” Jem was adamant.

Atticus tried hard not to smile but couldn’t help it. “You’re rather hard on us, son. I think maybe there might be a better way. Change the law. Change it so that only judges have the power of fixing the penalty in capital cases.”

“Then go up to Montgomery and change the law.”

“You’d be surprised how hard that’d be. I won’t live to see the law changed, and if you live to see it you’ll be an old man.”25

Atticus’s attitude is instructive. With little passion, he admits the moral disintegration of juries and of the court system. Instead, his anger is targeted at the “white trash” and “low-grade” white men who violate their class.26 These are outlying passages in Atticus’s reverence for the law as an instrument of social change, but they foreshadow his fall to the level of mere mortal in Watchman. In Mockingbird, readers indulged Atticus’s acceptance of racial hatred as an inherited characteristic, his tolerance for the slow pace of change, and his gentlemanly refusal to condemn his fellow citizens—these traits were symptoms of his noblesse oblige. Fifty-five years later in Watchman, seen from the perspective of the social justice warrior, this passivity becomes a cowardly paternalism and capitulation. He becomes the kind of lukewarm moderate cursed by Martin Luther King, Jr., calling meekly for gradualism. What always triggers Jean Louise’s denunciation is Atticus’s signature phrase, “As you please.”27

The months prior to the publication of Watchman were foreboding with the promise of a “revised” Atticus who would forever tarnish Lee’s legacy. The novel did not disappoint. Immediately, the first paragraphs reveal a different Atticus and make it clear that we are no longer in the same imaginary world as the one in To Kill a Mockingbird. Geographically, we are still in Maycomb, still within the family circle of Atticus Finch and his daughter. But this is not Scout nor the Gregory Peck version of Atticus. His first lines seem to be uttered by a stranger.28

Now 26 years old and living in New York, Jean Louise is met at the train station by her romantic interest, Henry Clinton.29 Atticus, waiting at home with his sister Alexandra for them to arrive, thinks to

25 Mockingbird, supra note 21, at 251.
26 Id. at 252.
27 Watchman, supra note 22, at 253.
28 Id. at 18.
29 Id. at 9.
himself: “[Alexandra] was an impossible woman, but a sight better than having Jean Louise permanently home and miserable. When his daughter was miserable she prowled, and Atticus liked his women to be relaxed, not constantly emptying ashtrays.”

Atticus likes his women how? In a couple of sentences, Atticus, whose health is declining, is transformed from the genial role model who defends even the bitter Mrs. Dubose in Mockingbird to a prickly impatient figure who dreads welcoming his daughter home. Gone is the nostalgic childhood memory of the movie version of Mockingbird. One of the first things we notice in Watchman is the pervasive cynicism fed by the barbed insults of people miserable with each other. Jean Louise treats Maycomb’s citizens, including her family, as a confederacy of dunces. Her constant eye-rolling lacks humor. Lee’s ironic style is still on display, but the satire is sharper: less Eudora Welty, more Flannery O’Connor.

Predictably for a first novel, the reviews were largely unfavorable: “scenes that don’t always add up, speeches instead of dialogue” is a common complaint. Another critic stated the consensus: “Although [Watchman] sporadically generates the literary force that has buoyed ‘To Kill a Mockingbird’ for over half a century, the new novel is not nearly as gripping as the courtroom drama and coming-of-age story it eventually became.”

Yet a fair number of reviewers pointed out that Watchman raises more uncomfortable and complex questions about race, questions that linger more than the idealized movie version. “Watchman is nowhere near as good a novel as Mockingbird, but it might prove an equally significant one, if it helps us look to history for our lessons, rather than to our consoling, childish, whitewashed fables.”

Harper Lee’s editor, Tay Hohoff, is perhaps the only person—living or fictional—who deserves the title “hero” in the new novel. She saw virtue in the novel and suggested a revision based on the childhood flashbacks. But this crucial change of perspective—changing the

30 Id. at 18.
35 Gabby Wood, Harper Lee: The Inside Story of the Greatest Comeback in Literature,
point of view in *Mockingbird* to that of a child—explains why *Watchman* is so misanthropic. Very early in *Go Set a Watchman*, Henry Clinton delivers a striking description of the new Scout. In their first drive home from the train station, Jean Louise agrees with Henry’s assessment of her:

“I know I’m hateful.”

Henry looked at her. “You’re an odd one, sweet. You can’t dissemble.”

She looked at him. “What are you talking about?”

“Well, as a general rule, most women, before they’ve got ‘em, present to their men smiling, agreeing faces. They hide their thoughts. You now, when you’re feeling hateful, honey, you are hateful.”36

Jean Louise, 20 years older, seems to be not only the perfect recreation of the plucky, feisty Scout, who even as a child mixed it up with her father, but also the real-life Harper Lee, known for her contretemps with her hometown. Furthermore, the point is clear that while the world has changed in 20 years, Maycomb has not; in fact, the town—and Atticus with it—seems to have hardened its shell of prejudice and bigotry. Jean Louise’s frustration and cynicism reach eye-opening levels of outrage and revulsion. She does not confine her targets to the Citizens Council. Her main target besides her father is Aunt Alexandra, who is pilloried in the novel. Now Jean Louise is the adult outsider, and she is getting her revenge. We see the full display of her subversiveness and rage, what Atticus calls his “daughter’s daemon.”37

Ironically, the flawed storytelling we see in *Watchman* may serve to enhance the literary reputation of *To Kill a Mockingbird*. Readers quickly discover that it is a rough draft. It has a thin plot with peculiar diversions, unlikeable characters, and heavy doses of preachiness. The first 100 pages consist mainly of hashing gratuitous Maycomb gossip, lounging, and smoking cigarettes, positioning Jean Louise as something of a pompous, unapologetic malcontent, and flinging out obtuse literary and historical allusions. For readers educated in the public schools of the South in the 1950s and ‘60s, some references would be familiar. Otherwise, for a general audience of millennials, they are showy: Sidney Lanier, Gilbert and Sullivan lyrics, General Principles who fought in the Peninsular War, legal pleading, Johnny Mack Brown, Mary Webster. Some seem to work: “I eat too much, and I feel like the Book of Common Prayer. Lord forgive me for not doing what

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36 *Watchman*, supra note 22, at 15.
37 Id. at 19.
I should have done and for doing what I shouldn’t have done—oh hell.”38 Others, not so much: “When she looked thus, only God and Robert Browning knew what she was likely to say.”39

The book is digressive in a way that stymies the main story line. *To Kill a Mockingbird* moves seamlessly between the plot lines—Boo Radley, Tom Robinson, Scout’s growing up. In *Go Set a Watchman*, the tedious disquisition on Methodist hymnody belabors an obvious theme: the world is changing around Maycomb. The penultimate chapter, chapter fourteen, is almost incomprehensible, a sort of a family feud/political debate between Jean Louise and Uncle Jack as they argue hoary justifications for racial accommodation.

Not much happens in the new novel. The real story begins with a “suddenness” on page one-hundred exactly, chapter eight, and here the real Harper Lee reels us in, as in *Mockingbird*, engaging us instantly in a dramatic scene: Jean Louise watches in horror as Atticus participates in a Citizens’ Council meeting at the courthouse.40 It is hard to imagine that *this* courtroom balcony scene was actually written first. This scene and a later scene where Jean Louise confronts Calpurnia, “the one human who raised me from the time I was two years old”41—these are dramatic scenes as moving as any in *Mockingbird*. The problem is that the rest of the book is largely polemical, consisting of the rationales of so-called “moderate” Southerners such as Atticus and Uncle Jack for maintaining segregation versus the impassioned and personal arguments of Jean Louise. Atticus is a segregationist to be sure, and actually says, “Jean Louise, . . . Have you ever considered that you can’t have a set of backward people living among people advanced in one kind of civilization and have a social Arcadia?”42 His revised version may be more realistic, but the tired, abstract arguments of Southern Agrarians and Jeffersonian Democrats have little dramatic appeal.

*Watchman* has its rough edges, to be sure, but ultimately it demands our reading because we hear Lee’s distinctive voice for one last time; even in its rough form, there are glimpses of the later Harper Lee. Should *Watchman* have been published? The answer is clearly yes. Once again, we can celebrate the voice of Harper Lee, her lively wit spinning even more stories out of her postage stamp of soil in Monroe County, offering a rare glimpse into a first draft, and incidentally put-
ting to rest any old claims that Truman Capote wrote *To Kill a Mockingbird*.

The best moments of Lee’s trademark humor are usually triggered by a violent collision of Southern gentility and graphic insult. The flashbacks to Jean Louise’s childhood are alone worth the price of admission; these flashbacks are the roots of *To Kill a Mockingbird*. Like *Mockingbird*, the book sketches memorable and real Southern characters, particularly Alexandra and Uncle Jack; engages us in a satirical wordplay of one-liners and double-entendres; brings to life the south Alabama landscape and dialect in exquisite detail; creates at least a few moving, compelling scenes rivaling those in *Mockingbird*; and explores the warped consciousness of racism and exposes its pathology in a way that is truer to history.

When Aunty Alexandra tries to dissuade Jean Louise from marrying Henry, Jean Louise replies, “‘Aunty,’ she said cordially, ‘why don’t you go pee in your hat?’” When Henry and Jean Louise are accused of swimming naked at Finch’s Landing and the word gets all over town, Alexandra brings the fact “reluctantly” to Atticus’s attention:

> “What’s the matter?” he said.
> “Mary Webster was on the blower. Her advance agents saw Hank and me swimming in the middle of the river last night with no clothes on.”
> “H’rm,” said Atticus. He touched his glasses. “I hope you weren’t doing the backstroke.”

While critics like Flannery O’Connor call *Mockingbird* “a child’s book,” the truth is both novels are built on a trenchant social satire of the gender, class, and racial layers of Southern society:

In Maycomb, one drank or did not drink. When one drank, one went behind the garage, turned up a pint, and drank it down; when one did not drink, one asked for set-ups at the E-Lite Eat Shop under cover of darkness: a man having a couple of drinks before or after dinner in his home or with his neighbor was unheard of. That was Social Drinking. Those who Drank Socially were not quite out of the top drawer, and because no one in Maycomb considered himself out of any drawer but the top, there was no Social Drinking.

*Go Set a Watchman* allows us to appreciate Harper Lee’s legacy and influence for two generations. Say it quietly, but Faulkner is long dead and his literary influence has waned, yet the stylistic and thematic influences of Harper Lee are palpable in thousands of living Southern writers.

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43 *Id.* at 29.
44 *Id.* at 85.
45 *Id.* at 51–52.
Watchman also maintains the high reputation of the law, although we must remove Atticus’s political maneuverings from the equation. The one consistency in both novels is that the law is the rock of civilization and the last fortress against chaos and ruin. In the final chapter, Uncle Jack defends his brother to Jean Louise by saying Atticus would never sanction violence by the Klan:

The law is what he lives by. He'll do his best to prevent someone from beating up somebody else, then he’ll turn around and try to stop no less than the Federal Government—just like you, child. You turned and tackled no less than your own tin god—but remember this, he’ll always do it by the letter and by the spirit of the law. That’s the way he lives.46

The passage is reminiscent of Atticus’s impassioned defense of Tom Robinson:

But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.47

The passage in Watchman hardly has the dramatic power of Atticus’s closing statement in Mockingbird, but it does salvage Atticus’s reputation, as part of an ending that unconvincingly reaches a truce between Atticus and Jean Louise and brings Atticus back into the human race.

Many months after the publication of Watchman, Harper Lee’s reputation is still secure. The reviews have dried up. A cursory survey suggests it shows up occasionally in course syllabi, even less in secondary schools. To say it will survive as a literary curiosity, however, underestimates the power and relevancy of Harper Lee’s prophetic voice. The one, inevitable, unblinking fact is that Watchman was written first. This was the message the real Harper Lee (not the fictional Scout) wanted to say first by writing a kind of Jeremiad of her frustration and disillusionment with racial progress. We also know that the Atticus of Go Set a Watchman is the portrait of Atticus that she painted first—not the Gregory Peck version. And we can be reasonably certain that Lee harbored no hidden personal motives in degrading the fictional Atticus. Speaking in 1961, Lee revered her father:

46 Watchman, supra note 22, at 268.
47 Mockingbird, supra note 21, at 233.
My father’s a lawyer, so I grew up in this room, and mostly I watched him from here... My father is one of the few men I’ve known who has genuine humility, and it lends him a natural dignity. He has absolutely no ego drive, and so he is one of the most beloved men in this part of the state.48

Jean Louise’s obsession with Robert Browning’s poem—“Childe Roland to the Dark Tower Came”—may offer a clue to the enduring value of Go Set a Watchman and Lee’s legacy. As the novel moves toward its climax of a father-daughter confrontation, Jean Louise continues to invoke the images of Robert Browning’s poem, “Childe Roland to the Dark Tower Came.” Prodded and provoked by her Uncle Jack, she fears the ugliness and violence of exposing her father’s betrayal. She has returned on her quest to an unchanged Maycomb, a wasteland of hate littered with ruins left by Jim Crow; Maycomb is now doubling down on its machinations to evade federal law. Like the apprenticed knight, she approaches the dark tower, the graveyard of failed but noble quests. For Jean Louise, the quest has been personal. She had returned to Maycomb to rest and to ponder the choice between marriage to Henry Clinton and “the stony path of spinsterhood.”49 As the remarkable tribute in chapter nine reveals, she had also returned to pay homage to Atticus, whose influence shaped her life. “She did not stand alone, but what stood behind her, the most potent moral force in her life, was the love of her father.”50 Now he has betrayed her “publicly, grossly, and shamelessly,”51 and she is faced with a bloody severing of her relationship with Atticus, “a man who lives by truth.” Even with all the warnings, readers of Go Set a Watchman are duly shocked by the confrontation in which Jean Louise calls Atticus a “double-dealing, ring-tailed old son of a bitch” and vows to leave.52

But before that confrontation, she wonders whether to go there. “There” becomes not only the fictional battle, but also the personal choice of re-entering the wider battle for racial justice, summoning the moral courage to expose and condemn her hometown as a prophet without honor. The choice is essentialist: engaging the cause of racial justice as her life’s work. In the novel, Jean Louise retreats; she returns to New York after having reached a separate peace with Atticus. In real life, she makes a brave choice: feverishly writing her first novel, facing the prospect of rejection and perhaps a quick end of her writing career, the apprenticed knight Harper Lee did go there, baring her soul

48 Literary Laurels for a Novice, LIFE, May 26, 1961, at 78A.
49 WATCHMAN, supra note 22, at 15.
50 Id. at 117.
51 Id. at 113.
52 Id. at 253.
by condemning her father and her hometown, setting the slug-horn to her lips and ascending the tower. The watchman who calls out racism is not Atticus nor Jean Louise, but Harper Lee.

Harper Lee’s life and work are framed by two recent books by black men: Ta-Nehisi Coates’s Between the World and Me, published in 2015 on the same day as Watchman, and Bryan Stevenson’s Just Mercy, published a year earlier than Watchman in 2014. The basis for Stevenson’s book is the story of Walter McMillian, who was convicted for murder in 1987 and sentenced to death. Stevenson and attorneys from Equal Justice Initiative represented McMillian while he was on death row and presented evidence on appeal of prosecutorial suppression of evidence and the use of paid informants and perjured evidence. In 1993, the Alabama Court of Criminal Appeals reversed McMillian’s death sentence. Perhaps not coincidentally, McMillian is from Monroeville, the real-life Maycomb.

In chapter one, “Mockingbird Players,” Stevenson discovers the Mockingbird culture on full display when he entered the courthouse:

Even though he had lived in Monroe County his whole life, Walter McMillian had never heard of Harper Lee or To Kill a Mockingbird. Monroeville, Alabama, celebrated its native daughter Lee shamelessly after her award-winning book became a national bestseller in the 1960s. She returned to Monroe County but secluded herself and was rarely seen in public. Her reclusiveness proved no barrier to the county’s continued efforts to market her literary classic—or to market itself by using the book’s celebrity. Production of the film adaptation brought Gregory Peck to town for the infamous courtroom scenes; his performance won him an Academy Award. Local leaders later turned the old courthouse into a “Mockingbird” museum. A group of locals formed “The Mockingbird Players of Monroeville” to present a stage version of the story. The production was so popular that national and international tours were organized to provide an authentic presentation of the fictional story to audiences everywhere.

Nevertheless, Stevenson quickly learns that the justice eloquently advocated by Atticus Finch is a matter of fiction, and states “Sentimentality about Lee’s story grew even as the harder truths of the book took

53 Robert Browning, Childe Roland to the Dark Tower Came, in 2 The College Survey of English Literature 558, 562 (B.J. Whiting et. al. eds., 1942).
54 Ta-Nehisi Coates, Between the World and Me (2015).
57 Id. at 949.
58 Stevenson, supra note 55, at 23.
no root.” Stevenson points out that Atticus unsuccess fully represents Tom Robinson. Stevenson’s dramatic juxtaposition of Walter McMillian’s real injustice amid the congratulatory shrines to Atticus Finch demonstrates that fiction has its limits; that the public in Monroe County would be blind to the recreation of the Tom Robinson Trial in 2014 is a sad indictment of our lack of racial progress.

Ta-Nehisi Coates’s Between the World and Me, another powerful and influential book, was published on the same day as Watchman. Both were massive publication events. In fact, Coates, who like Walter McMillian has never read To Kill a Mockingbird, staged a mock book-sale competition with Harper Lee on Twitter. Coates wrote his book as a letter to his 15-year-old son who was devastated by the grand jury’s refusal to bring charges against the police officer who shot Michael Brown in Missouri in 2014 and other police shootings of black men. The book is a bleak, scorched-earth depiction of the state of race relations in America. To call it “literary fiction” is too constraining; it is journalism, history, memoir, poetry, at once metaphorical and imaginative, but also a relentlessly researched and argued Supreme Court brief. Coates argues, “Here is what I would like for you to know: In America, it is traditional to destroy the black body—it is heritage.”

Dreamers, people who are white or think they are white, inhabit a separate galaxy but continue to plunder Black America across the abyss. Coates’ nihilistic vision lacks any of the transcendent hope of the Civil Rights Movement. The book, like Mockingbird, had a galvanizing effect on the public. Toni Morrison called it “required reading” and said Coates had inherited the prophetic mantle of James Baldwin. Critics

59 Id.
60 Id. At 23–24 “Today,” Stevenson writes,

[D]ozens of legal organizations hand out awards in the fictional lawyer’s name to celebrate the model of advocacy described in Lee’s novel. What is often overlooked is that the black man falsely accused in the story was not successfully defended by Atticus. Tom Robinson, the wrongly accused black defendant, is found guilty. Later he dies when, full of despair, he makes a desperate attempt to escape from prison. He is shot seventeen times in the back by his captors, dying ingloriously but not unlawfully.

62 Id. Nicole Levy, supra note 54, at 103.
63 Rebecca Carroll, Ta-Nehisi Coates’ New Book Speaks Resolutely to Black America
were equally passionate, arguing among other things, that Coates ignored the long history of racial progress.64

In one of the final chapters, Coates describes his visit to the mother of Prince Jones, a close friend and classmate from Howard University who was shot and killed by a Prince George County, Virginia police officer in a case of mistaken identity. Coates finds that Jones’ mother receives no comfort from the public, even though Jones was innocent:

And she could not lean on her country for help. When it came to her son, Dr. Jones’s country did what it does best—it forgot him. The forgetting is habit, is yet another necessary component of the Dream. They have forgotten the scale of theft that enriched them in slavery; the terror that allowed them, for a century, to pilfer the vote; the segregationist policy that gave them their suburbs. They have forgotten, because to remember would tumble them out of the beautiful Dream and force them to live down here with us, down here in the world. I am convinced that the Dreamers, at least the Dreamers of today, would rather live white than live free. In the Dream they are Buck Rogers, Prince Aragorn, an entire race of Skywalkers. To awaken them is to reveal that they are an empire of humans and, like all empires of humans, are built on the destruction of the body. It is to stain their nobility, to make them vulnerable, fallible, breakable humans.65

Coates’s description has a chilling familiarity. Substitute Atticus Finch for Buck Rogers and the passage becomes a description of white Dreamers who worship at the shrine of their tribal hero, oblivious to the tragic lives of those who live in the other world. The cult of Atticus Finch—the notion that human decency will eventually wear down a corrupt system—prevents a rigorous self-examination. Jean Louise in Watchman suffers this shock of recognition when she insists that Calpurnia, the woman who raised her, answer, “Did you hate us?” Calpurnia’s ambiguous answer—a shake of the head—reveals the truth that Jean Louise fears.66

In a 1963 interview, as she was promoting the movie version of To Kill a Mockingbird, Harper Lee said that her book is not “an indictment so much as a plea for something, a reminder to people at home.”67

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64 See e.g., Michiko Kakutani, Review: In 'Between the World and Me,' Ta-Nehisi Coates Delivers a Searing Dispatch to His Son, N.Y. TIMES (July 9, 2015), http://www.nytimes.com/2015/07/10/books/review-in-between-the-world-and-me-ta-nehisi-coates-delivers-a-desperate-dispatch-to-his-son.html.
65 COATES, supra note 54, at 143.
66 WATCHMAN, supra note 54, at 160.
67 Elaine Woo & Valerie J. Nelson, Harper Lee, Author of Classic Novel 'To Kill a Mock-
If *Mockingbird* is the plea, *Watchman* is the indictment. *To Kill a Mockingbird*’s influence has spanned nearly 60 years. Its sentimentality is becoming dated, and now the pedestal of its hero has been shaken. Nevertheless, for the foreseeable future, its idealistic vision of a South that would one day “rise above [its] prejudices”\(^{68}\) should survive. Harper Lee’s place in Southern canon seems secure; it is too early to say whether her literary legacy will ultimately resemble that of Faulkner or that of Margaret Mitchell. At least one contemporary African-American reader affirmed the idealism of *To Kill a Mockingbird* and in so doing cast a powerful vote for Lee’s legacy. In his Farewell Address on January 10, 2017, President Barack Obama concluded by saying,

> But laws alone won’t be enough. Hearts must change. It won’t change overnight. Social attitudes oftentimes take generations to change. But if our democracy is to work in this increasingly diverse nation, then each one of us need to try to heed the advice of a great character in American fiction—Atticus Finch—(applause)—who said “You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”\(^{69}\)

Ironically, *Go Set a Watchman*, the novel that threatened to undo her literary legacy, may do more to enhance Lee’s relevance into the 21st century. A new hero emerges out of the dusty pages of the manuscript of her rough draft. Clearly Jean Louise is the real Nelle Harper Lee, who returns to Alabama and, Kurtz-like, sees the horror. The contrived ending aside, *Watchman* argues the urgency of integration to gradualists, accommodationists, Jeffersonian Democrats, and even to racial progressives. Uncle Jack tells her, “Every man’s island, Jean Louise, every man’s watchman, is his conscience.”\(^{70}\) In 2015, Harper Lee through her creation of Jean Louise becomes the moral compass that Atticus cannot be. In the prophetic tradition of Isaiah, she rages, watches, warns, and waits for the fire next time.

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\(^{70}\) *Watchman*, supra note 22, at 264–5.
WATCHMAN’S NEW CONSTITUTIONAL VISION

ALFRED L. BROPHY

The brave, often solitary, figure standing up for justice against steep odds has a claim on the heart. The conservative using legal arguments to cling to the past is justly forgotten. This likely explains why reviewers treated Harper Lee’s Go Set a Watchman the way the central character, Jean Louise, treated the white supremacy pamphlet The Black Plague that she found among Atticus’s papers—like a dead rodent, to be held at arm’s length while it was taken to the garbage.

Those of us who grew up after Brown v. Board of Education was decided learned that the Supreme Court was a place for justice. But Go Set a Watchman opens up the question of just how much “the law” has to do with justice. It also suggests that there was a new mode of constitutional interpretation that looked to the reality of racial inequality and made an effort to ensure equality.

The novel centers around a divide between Jean Louise Finch (presumably a stand-in for Harper Lee) and her father, Atticus Finch, along with pretty much all the other white people in Maycomb, Alabama, over civil rights in the wake of Brown v. Board of Education. The novel is set somewhere in the late 1950s, amidst the push for integration and voting rights. It is here that Atticus Finch, the protagonist of To Kill a Mockingbird who represented a disabled black man falsely accused of assaulting a white woman in the 1930s, appears as an elderly man opposing Brown, supporting the Maycomb County Citizens’ Council, talking about how African Americans have not yet earned citizenship, and worrying what will happen if the voter suppression efforts are unsuccessful.

Amidst the gasps by reviewers that Atticus is a racist reactionary,

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1 Judge John J. Parker Distinguished Professor, University of North Carolina—Chapel Hill. I would like to thank LeAnna Croom for her editorial comments. An earlier, shorter version of this appeared at The Conversation, https://theconversation.com/in-go-set-a-watchman-the-legal-debate-that-racked-americas-conscience-44811
4 HARPER LEE, TO KILL A MOCKINGBIRD (1960) (hereinafter “MOCKINGBIRD”).
5 WATCHMAN, supra note 3, at 103.
few have noticed the use that Atticus tries to make of law in preventing change. To be sure, there are some figures who are turning to law to follow up on *Brown’s* victory. The NAACP’s lawyers in a neighboring county challenge the exclusion of African Americans from jury service. And there are efforts at voter registration, too. But Jean Louise observes that Atticus—who in this book is said to have *successfully* defended an African American man falsely accused of attacking a white woman—has a hollow sense of “justice.” Atticus had what Jean Louise called an “[a]bstract justice written down item by item on a brief—nothing to do with that black boy.” Here, Atticus sounds very much like a man who defends a formalist vision of law without a sense of the surrounding social reality. Amidst all of the recent revelations about Harper Lee’s real father—that his newspaper opposed a federal anti-lynching statute, for instance—it is also significant that he assisted a white man to leave his property to a black woman. In *Go Set a Watchman*, Atticus offers to defend a young African American man (the grandson of his caretaker Capernia) who ran over and killed a drunken white man. He does this so that the NAACP lawyers will not come to Maycomb to challenge the jury pool.

There was a long history in Alabama, stretching back to the 1930s, of running the outside lawyers out of town—and maybe even lynching their clients. It was an effort to intimidate the entire African American community and to stop them from asserting their rights. Back in the 1930s, the NAACP made that argument when it asked the U.S. Department of Justice to prosecute local officials who were complicit with lynchers in Tuscaloosa, Alabama. Karl Llewellyn, a Columbia Law

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6 *Id.* at 149.

7 *Id.* at 243.

8 *Id.* at 109.

9 *Id.* at 248

10 *Id.*


14 *Watchman*, supra note 3, at 147–49.

15 *Id.* at 148–49.

16 Leon Ranson et. al., *Memorandum Brief for the Attorney General of the United States*
professor and leader of the “legal realist” movement that sought to understand what was “actually” happening in law and to bring law into alignment with justice, argued that violence in Alabama—often with the tacit approval of those in power—was central to limiting access to justice. Moreover, local, white lawyers then took those cases, which may have prevented assertion of constitutional claims, such as the challenge to all-white jury pools.

Atticus attacks the whole idea behind Brown by saying that African Americans are not yet ready for citizenship. “What would happen if all the Negroes in the South were suddenly given full civil rights?” he asks. “I’ll tell you. There’d be another Reconstruction. Would you want your state governments run by people who don’t know how to run ‘em?” This refers to the then-dominant ideas about the era of Reconstruction after the Civil War and the period then called “Redemption” as a time when corrupt and incompetent Yankees and African Americans ran the southern state governments. Atticus’s belief in racial hierarchy and that many African Americans were not yet ready for full citizenship was an argument that had been used to stop reform for generations. Maycomb’s residents, including Jean Louise, had other outdated ideas about history. At one point, Dr. Finch, Jean Louise’s uncle, speaking of the Civil War, said, “No war was ever fought for so many different reasons.” That, too, was a based on popular interpretation—I want to add misconception—in the South about the Civil War: that the war was fought for honor rather than slavery. When describing why Southerners fought in the Civil War, despite the fact that only five percent of the population owned slaves, Dr. Finch explains, “They fought to preserve their identity. Their political identity, their personal identity.”

Atticus had a narrow conception of what justice meant. It was an end to lynching, to be sure; however, it did not extend to equal rights

in re: Prosecution of R.L. Shamblin, Sheriff of Tuscaloosa County, Alabama 32 (1933).


18 Watchman, supra note 3, at 246.

19 See, e.g., Claude G. Bowers, The Tragic Era: The Revolution After Lincoln, at v (1929) (characterizing the era of Reconstruction as a “tragic era”).

20 See, e.g., John Randolph Tucker, Esq., Address Delivered Before the Phoenix and Philomathean Societies of William and Mary College, 10–12 (1854) (calibrating the freedom of people to their supposed readiness for freedom).

21 Watchman, supra, note 3 at 196.

22 Id.
in schools, in the voting booth, or at the altar.\textsuperscript{23} It was not just on racial issues that Atticus was out of step with the times. His brother reported that Atticus was opposed to the New Deal as well.\textsuperscript{24}

This is puzzling to many of us who were reared to see the rule of law as promoting justice. Jean Louise’s uncle told her that Atticus will “always do it by the letter and by the spirit of the law.”\textsuperscript{25} Law in Atticus’s mind, then, was not about justice. Law was about order. At best, law in Atticus’s world was a rule of separate but equal. That may be a lot of what explains the shift from Atticus the lawyer working against lynching to the supporter of the White Citizens’ Council. He was against the violence of lynchings, but he was not in favor of a law that upheld equal status nor of other changes to the law as they had been since time out of mind. Atticus’ brother, a physician, worried that even the “time-honored, common-law concept of property—a man’s interest in and duties to that property—has become almost extinct.”\textsuperscript{26}

Even Jean Louise was skeptical of \textit{Brown v. Board of Education}. She told her father she thought it was inconsistent with the Tenth Amendment.\textsuperscript{27} This was an argument popular with states’ rights advocates and segregationists in the 1950s and 1960s.\textsuperscript{28}

Nevertheless, Jean Louise had a sense of legal realism. She believed that the Supreme Court had no choice but to act in \textit{Brown}. “They had to do it,” she said. “[T]he time has come when we’ve got to do right.”\textsuperscript{29} There was a sense for Jean Louise, as for so many Americans of that era, that constitutional arguments about states’ rights (or the original meaning of the Fourteenth Amendment) were subordinated to grander principles of justice. There is a principle in the Constitution that supports civil rights, even though those who opposed civil rights found only principles of limited construction and state sovereignty. Jean Louise appealed to this principle using a phrase that harkens back to the Democrat party of Andrew Jackson’s era, “equal rights for all; special privileges for none.”\textsuperscript{30}

The world was changing and so was the contour of constitutional law. Jean Louise captured the sense that so many Americans had in the

\begin{footnotes}
\item[23] See id. at 243–47 (Atticus discussing his opposition to African Americans voting).
\item[24] Id. at 197–98.
\item[25] Id. at 268.
\item[26] Id. at 197.
\item[27] WATCHMAN, supra note 3, at 240.
\item[28] See, e.g., VA. COMM’N ON CONSTITUTIONAL GOV’T, CIVIL RIGHTS AND FEDERAL POWERS (1963).
\item[29] WATCHMAN, supra note 3, at 241.
\end{footnotes}
midst of the Civil Rights Movement: that the Constitution was designed for uplift, for voting rights, and for better schools. The Constitution for the atomic age had to be different from that of the nineteenth century and the stilted formalism of the Plessy Court—and maybe of Atticus Finch, too. In fact, much of what the Brown Court did was see through to reality of life and craft a constitutional law around the reality that separate was inherently unequal.\(^31\) Much has been written about how Go Set a Watchman deflates the hero of Atticus.\(^32\) But Go Set a Watchman also announces that the Constitution stands for the principles of equal protection and uplift. The train that brought Jean Louise back to Maycomb also brought new constitutional ideas which were central to the Civil Rights Movement.

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\(^31\) In this regard, I see some important parallels between the constitutional vision of Jean Louise and that other fictional character from south Alabama, the Invisible Man, who, like Jean Louise, went from Alabama to New York City. Invisible Man wanted people to see through the fog to the truth—that African Americans had not been treated as humans but as objects of regulation through law. This new constitutional vision of Jean Louise (Harper Lee), and Invisible Man (Ralph Ellison), was also the one advanced by the Supreme Court. See Alfred L. Brophy, Invisible Man as Literary Analog to Brown v. Board of Education, in A RAFT OF HOPE 119-33 (Lucas Morel ed. 2004).

\(^32\) Ariela Gross, Go Set a Watchman and the Limits of White Liberalism, 47 CUMB. L. REV. 59 (2016); Sally Greene, Atticus, Uprising, 47 CUMB. L. REV. 55 (2016).
FOUR REASONS WHY READERS HATE

GO SET A WATCHMAN
(AND ONE REASON WHY I DON’T)

JUDY M. CORNETT

Go Set a Watchman was published to much fanfare on July 14, 2015. The reviews were mixed at best, and hostile at worst. Few were enthusiastic about the novel. Among readers who venerated Atticus Finch, the reaction was disappointment tinged with sorrow. Their desire for additional proof of Atticus’s heroism went unfulfilled—indeed, many felt betrayed by the revelation that the lawyer who could rise

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1 College of Law Distinguished Professor, University of Tennessee College of Law. I am grateful to many colleagues and friends who have shared their thoughts on the novel with me over the past year. I am especially grateful to my colleagues Dwight Aarons and John Zomchick, and to my research assistant Hallie Dyer, UT Law Class of 2018. Versions of the ideas presented here have been presented at a University of Tennessee faculty forum in July 2015, at the Law Day program sponsored by the Knoxville Bar Association in May 2016, and at the Tennessee Municipal Attorneys’ Association annual conference in June 2016. I am grateful to all the participants in those programs. For excellent editorial assistance, I am grateful to the Board and Staff of the Cumberland Law Review.


3 The most enthusiastic review was Joni Rodgers, “Go Set a Watchman” Is a Novel We Can Love, BOSTON GLOBE, July 14, 2015, https://www.bostonglobe.com/opinion/2015/07/15/set-watchman-novel-can-love/F2xqnM4vqYay3mH1Yp8mL/story.html (“Like most people who love ‘To Kill a Mockingbird,’ I came skeptically to ‘Go Set a Watchman.’ Would it be a buried treasure or a hijacked rough draft? Turns out, it’s neither. And both. I loved it for exactly what it is: a brilliantly written, underedited [sic], beautiful Southern novel about a young woman who discovers her father is not a god.”). Id.
above the prejudices of his community in the 1930s could fall prey to those very prejudices in the 1950s.

In contrast to most readers, I find the novel authentic, insightful, and ultimately satisfying. It is not as good as *To Kill a Mockingbird* as a novel—not as nuanced, not as tightly woven, not as consistent in tone. But it is good as something else—as a deeply personal narrative of one young white Southerner’s attempt to come to terms with the culture she loves: a culture based upon abhorrent principles. Over the course of the past year, I have discussed the novel with many friends and colleagues; most of them are lawyers and all of them smart readers. None of them like the novel as much as I do, and each of them has a reason to dislike the novel. What follows are the top four reasons why readers hate *Go Set a Watchman*, along with my one reason for liking it.

**WHY READERS HATE IT**

*The novel was published against Harper Lee’s wishes.*

I recently spoke at a CLE program on “The Ethics of Atticus Finch.” When I asked the audience, “Who has read *Go Set a Watchman*?” one lawyer volunteered that he refused to read the novel on principle. A native of Monroeville, Alabama, he believes that Harper Lee was taken advantage of, and perhaps defrauded, in the publication of the novel. Certainly, the story of the novel’s discovery contains enough inconsistencies to give credence to such a belief.


FOUR REASONS READERS HATE GO SET A WATCHMAN

stantial case to be made that the novel exists only because of overreach- ing by Lee’s personal lawyer.

This objection is the weightiest of the four. If Harper Lee was duped or misled, if she did not in fact give her consent to publish the novel, then it can hardly be read in good conscience. However, there is some evidence that she might have agreed to the novel’s publication. The PBS series American Masters showed a video of Lee’s receipt of a copy of the novel, to which she responded: “Wonderful . . . . Thank you.” When asked whether she ever thought the novel would be published, Lee responded, “Of course, I did—don’t be silly.” Another bit of evidence is the apparent failure of Lee’s family and friends to inter- fere with the novel’s appearance. As the lawyer from Monroeville stated at the CLE program: “Those of us in Monroeville look after one another, and we’re especially protective of Harper Lee.” If Lee’s friends suspected misconduct, they might be expected to bring it to light. But at least one of her friends confirmed the publisher’s statement that Lee had allowed friends to read the manuscript before deciding to publish it.

The two halves of the novel do not fit together.

It is impossible to deny that the novel consists of two distinct halves. In the first half of the novel, we meet the grown-up Scout when Jean Louise Finch returns home from New York City shortly after the United States Supreme Court’s decision in Brown vs. Board of Education. She interacts with her friends and family in Maycomb and makes

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6 This assumes that Lee remained competent when the manuscript was discovered and the novel published. Although her elder sister Alice famously said, “Poor Nelle Harper can’t see and can’t hear and will sign anything put before her by anyone in whom she has confidence,” Lee never had a conservator or guardian. Elaine Woo & Valerie J. Nelson, Harper Lee, author of classic novel ‘To Kill a Mockingbird,’ dies at 89, LA TIMES (Feb. 19, 2016) http://www.latimes.com/entertainment/music/la-me-harper-lee-dies-20160219-story.html.


8 See Sudath, supra note 5.

9 HARPER LEE, GO SET A WATCHMAN 24 (2015) [hereinafter “WATCHMAN”]. It is unclear from the novel whether the decision is Brown I or Brown II. Id.; Brown v. Bd. of Educ. (Brown I), 347 U.S. 483, 493–495 (1954) (“[S]egregation of children in public schools solely on the basis of race” is a denial of Equal Protection under the 14th amendment); Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 299, 301 (1955) (School authorities have the primary responsibility in enforcing Brown I. The Supreme Court ordered “the District Courts to take such proceedings and enter such orders . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”).
a series of discoveries that cast doubt on her idealized view of her fa-
ther, Atticus. Interspersed with these actions are several flashbacks to
the life of a younger Jean Louise told in the inimitable voice of Harper
Lee. Most readers enjoy the logical narrative and charming anecdotes
of this half of the novel.

The second half of the novel is very different. It is talky—almost
preachy. It consists of a series of three dialogues: one between Jean
Louise and her fiancé, Hank Clinton; one between Jean Louise and her
father; and one between Jean Louise and her uncle, Dr. Jack Finch.
There is little action and no charm in these conversations. Moreover,
the dialogues are filled with arid, outworn ideas: rationalizations of seg-
regation that were current in the 1950s but are merely offensive today.
Here is an example of her conversation with her father:

“Let’s look at it this way,” said her father. “You realize that our Negro
population is backward, don’t you? You will concede that? You real-
ize the full implications of the word ‘backward,’ don’t you?”
“Yes, sir.”
“You realize that the vast majority of them here in the South are unable
to share fully in the responsibilities of citizenship, and why?”
“Yes, sir.”
“But you want them to have all its privileges?”
“God damn it, you’re twisting it up!”
“There’s no point in being profane. Think this over: Abbott County,
across the river, is in bad trouble. The population is almost three-
fourths Negro. The voting population is almost half-and-half now, be-
cause of that big Normal School over there. If the scales were tipped
over, what would you have? The county won’t keep a full board of
registrars, because if the Negro vote edged out the white you’d have
Negroes in every county office—”
“What makes you so sure?”
“Honey,” he said. “Use your head. When they vote, they vote in
blocs.”

For the modern reader, a little of this goes a long way. As the
novel becomes more static, the reader’s patience with philosophical de-
bate about outmoded ideas wears thin. Whatever interest these debates
might have held for a reader in the late 1950s or early 1960s, for the
modern reader, they do little more than repetitively drive home the rac-
ist views of the men in Jean Louise’s life. The repetition of these sen-
timents and the smug pseudo-intellectual tone in which they are deliv-
ered are apt to disgust the modern reader.

10 Watchman, supra note 9, at 242–43.
Jean Louise Finch is not a likeable heroine.

A novel about the inner conflicts of its protagonist should boast a likeable main character—one about whom the reader cares. One reason why readers hate *Go Set a Watchman* is that Jean Louise Finch is not very likeable. She has been working in New York City for at least five years, but makes an annual trip back home to Maycomb. Her mother is dead, as is her brother, Jem. Her father still lives in Maycomb along with his sister, Alexandra. Jean Louise has a boyfriend, Hank Clinton, who is a lifelong friend but is considered “white trash” by her aunt.11

Jean Louise speaks in an acerbic voice. Her remarks lack the naïve sweetness of Scout’s social observations. As she and Hank prepare to go swimming in the river near Finch’s Landing fully clothed, her banter with Hank exemplifies the tone of her conversation. She asks Hank whether the steps down to the river are safe:

Henry said, “Sure. The club keeps ‘em up. We’re trespassing, you know.”

“Trespassing, hell. I’d like to see the day when a Finch can’t walk over his own land.” She paused. “What do you mean?”

“They sold the last of it five months ago.”

Jean Louise said, “They didn’t say word one to me about it.”

The tone of her voice made Henry stop. “You don’t care, do you?”

“No, not really. I just wish they’d told me.”

Henry was not convinced. “For Heaven’s sake, Jean Louise, what good was it to Mr. Finch and them?”

“None whatever, with taxes and things. I just wish they’d told me. I don’t like surprises.”

. . . .

Hank said wearily, “The thing I hate most about this place is you always have to climb back up.”

“I have a friend in New York who always runs up stairs a mile a minute. Says it keeps him from getting out of breath. Why don’t you try it?”

“He your boyfriend?”

“Don’t be silly,” she said.

“You’ve said that once today.”

“Go to hell, then,” she said.

“You’ve said that once today.”

11 *Id.* at 36.
Jean Louise put her hands on her hips. “How would you like to go swimming with your clothes on? I haven’t said that once today. Right now I’d just as soon push you in as look at you.”

Although her remarks reveal a certain feistiness and disregard for convention, this introduction to Jean Louise does not exactly endear her to the reader.

A comparison of the tea parties in *To Kill a Mockingbird* and *Go Set a Watchman* further demonstrates the almost studied alienation that Jean Louise affects. In the former novel, the six-year-old Scout endures the uncomfortable clothing and perfect manners demanded by Aunt Alexandra and tries to participate appropriately in the ladies’ conversation, earning a sympathetic hand-squeeze from Miss Maudie Atkinson. In *Go Set a Watchman*, on the other hand, Jean Louise intervenes awkwardly in the conversation, making conventional conversational forays but finding herself repulsed by the insensitive, sometimes racist, responses to her comments. Finally, she comes to a realization: “I can’t think of anything to say to them. They talk incessantly about the things they do, and I don’t know how to do the things they do. If [Hank and I] married—if I married anybody from this town—these would be my friends, and I couldn’t think of a thing to say to them.”

It is hard to love an anti-heroine, especially when she is the adult version of the precocious but innocent narrator of the prequel. We learn about Scout through her words and actions and through others’ reactions to her. We learn about Jean Louise Finch partly through her words and actions (and others’ reactions), but we learn much more through her own ruminations. Much of the narration in *Go Set a Watchman* is interior monologue—Jean Louise’s inner thoughts. In the first half of the novel, these reflections can be poignant. For example, she looks at one of the single women at the tea party who had refused to be her friend in elementary school and says to herself: “Now we are both lonely, for entirely different reasons, but it feels the same, doesn’t it?”

But in the second half of the novel, her inner monologue becomes increasingly anguished and even repetitious as she tries to make sense of what she is learning about her community:

Hell is eternal apartness. What had she done that she must spend the rest of her years reaching out with yearning for them, making secret trips to long ago, making no journey to the present? I am their blood and bones, I have dug in this ground, this is my home. But I am not their blood, the ground doesn’t care who digs it, I am a stranger at a

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12 *Id.* at 74–79.
13 *Id.* at 172–73.
14 *Id.* at 169.
Atticus Finch turns out to be a racist.

Of all the reasons to hate Go Set a Watchman, this is the most popular. For years, Harper Lee faced pressure to write another novel starring Atticus to give his fans more examples of his heroism. Indeed, her refusal to produce another novel came to be seen as perverse or even malicious, as if she were withholding food from her children. So, when publication of the novel was announced, fans of Atticus were excited. At last their hunger would be satisfied. Thus, not surprisingly, early reviews of the novel focused on the portrayal of Atticus. Unfortunately, he turned out to be a racist, just like any other garden-variety racist of the Deep South in the 1950s.

It is easy for us to forget what the Deep South was like in the first six decades of the twentieth century. From 1900 through at least 1964, Jim Crow kept a death grip on the South. Jim Egerton’s monumental history, Speak Now Against the Day: The Generation Before the Civil Rights Movement in the South, traces the intransigence of the racial divide that permeated the former Confederate states post-Reconstruction. Segregation—the de jure and de facto separation of the black and white races—was embedded in the culture of the South. For example, even Eleanor Roosevelt failed to protest segregated seating at the Southern Conference for Human Welfare in Birmingham in 1938. When she was asked about the seating arrangements, she answered:

“What do I think of the segregation of white and Negro here tonight? Well, I could no more tell people in another state what they should do than the United States can tell another country what to do. I think that one must follow the customs of the district. The answer to that question is not up to me but up to the people of Alabama.”

All the themes rehearsed by Atticus in his conversations with Jean Louise—themes which seem dead to us today—were live arguments made by real people in the Deep South throughout the 1930s, ‘40s, and ‘50s. Arguments against segregation—and they were being made with incremental results—were met with counterarguments about the preferability of local and state control in race matters, the rights of states under the Tenth Amendment to make and change laws that were not clearly within the purview of the federal government, and the undesirability of moving too fast in an area likely to inflame the passions of citizens and overturn ingrained habits of everyday life. The soporific

15 Id. at 225.
power of “gradualism,” mentioned by Dr. Martin Luther King Jr. in his “I Have a Dream” speech, was a very real force prior to the 1960s.

The real issue raised by the portrayal of Atticus in Go Set a Watchman is the doubt it casts on his heroism in To Kill a Mockingbird. In other words, can a 1950s racist really have been the 1930s hero? But it would be perfectly possible for a white lawyer in the 1930s to try his best to achieve justice for a black client and for that same white lawyer in the late 1950s to espouse racist views with respect to blacks and to sell out his black client in order to dampen civil rights agitation in his community. The white culture portrayed in Go Set a Watchman can tolerate fairness for individual black defendants—exemplified by Atticus’s motto, “equal rights for all, special privileges for none”\(^{17}\)—and still oppose equal civil rights for black citizens as a group—exemplified by Atticus’s rhetorical questions: “What would happen if all the Negroes in the South were suddenly given full civil rights? . . . Would you want your state governments run by people who don’t know how to run ‘em?”\(^{18}\)

The paradox of the white Southerner who opposed civil rights while still treating individual African-Americans with apparent kindness is illustrated by an anecdote related by President Jimmy Carter. In 1951, Jimmy and Rosalyn Carter were home on leave from the U.S. Navy. While visiting with his parents, they recounted an incident in which the Governor-General of the Bahamas invited the crew of his ship to a dance, but excluded black sailors from the invitation. The officers and crew of the ship reacted by declining the invitation. As Carter relates in his memoir, A Full Life: Reflections at Ninety, “When I was describing this incident, my father quietly left the room, and my mother said, ‘Jimmy, it’s too soon for our folks here to think about black and white people going to a dance together.’”\(^{19}\) Yet, two years later, as Earl Carter lay dying of pancreatic cancer, he received “[a] steady stream of visitors who came to the house. . . just to bring him small gifts and relay their personal thanks for things he had done for them or their families. More than half the visitors were African-American.”\(^{20}\)

**WHY I DON’T HATE IT**

I like Go Set a Watchman because I like Jean Louise Finch. She grew up in the Old South, left home, learned another way of life, and

\(^{17}\) *WATCHMAN*, *supra* note 9, at 108.

\(^{18}\) *Id.* at 242–43.

\(^{19}\) *JIMMY CARTER, A FULL LIFE: REFLECTIONS AT NINETY* 61 (2015).

\(^{20}\) *Id.* at 66.
then returned. The resulting drama is a psychic one, as Jean Louise tries to reconcile her upbringing with her new understanding of how wrong the ethos of the Old South really is. In the process of narrating her inner conflict, Jean Louise gives the reader an insider’s view of the “peculiar” culture that flourished in the Jim Crow era in the South. The reportage of the novel is indicated in its title, which refers to Isaiah 21:6: “For thus hath the Lord said unto me, Go, set a watchman, let him declare what he seeth.”

Jean Louise is the watchman of the title. She declares to the world what she sees in her homeland, which exists in a state of crisis following the Supreme Court’s decision in *Brown v. Board of Education*. This testimonial aspect of the novel echoes William Faulkner’s famous postscript to his speech at the 1955 meeting of the Southern Historical Society:

> We speak now against the day when our Southern people who will resist to the last these inevitable changes in social relations, will, when they have been forced to accept what they at one time might have accepted with dignity and goodwill, will say, “Why didn’t someone tell us this before? Tell us this in time”\(^2\)

Both Faulkner and Jean Louise Finch are watchmen: they see what is coming and they warn their people about the dangers they observe. Just as Faulkner felt a burden to warn the South of the coming denouement of segregation, the biblical watchman invoked by the novel’s title bears responsibility for the welfare of her culture: “But if the watchman see the sword come, and blow not the trumpet, and the people be not warned; if the sword come, and take any person from among them, he is taken away in his iniquity; but his blood will I require at the watchman’s hand.”\(^2\)

In her role as watchman, Jean Louise tries to warn her father that the time has come for change. While he is “fighting a sort of rearguard, delaying action to preserve a certain kind of philosophy that has almost gone down the drain,”\(^2\) she insists that “no matter how hateful the Court was, there had to be a beginning . . . . [T]he time has come when we’ve got to do right.”\(^2\) Jean Louise is not a skilled debater; while defending the need for change, she concedes that the *Brown* decisions impugned the Tenth Amendment. During the debate she becomes frustrated with her father’s smooth, patronizing responses to her assertions.

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\(^2\) *Ezekiel* 33:6 (King James)
\(^3\) *WATCHMAN*, supra note 9, at 188.
\(^4\) *Id.* at 241.
Eventually, she becomes angry and lashes out at her father: “You double-dealing, ring-tailed old son of a bitch!”

But the novel is not a full-throated denunciation; it is not a screed against the South; it is not a jeremiad. When the expatriate Jean Louise returns home to Maycomb, we could have read a story about a disruptive force entering a close-knit community, attracting hostility and unsettling old ways of thinking. Instead it is the story of a loyal white daughter of Maycomb, Alabama, who faces the incongruity of being from the culture but no longer of it. We read about an expatriate returning home, seeing the world she grew up in with new eyes, and undergoing painful reflections on her own identity and place in the world. Jean Louise Finch asks how a culture that produced her—with her distaste for racism, her ability to see the faults of her friends and relatives, her Menckenesque perspective on the town’s upper crust—how can that culture be rotten at its core? Is she, too, rotten? What lies at her core?

Her uncle poses the issue as one of filial identity: “[Y]ou, Miss, born with your own conscience, somewhere along the line fastened it like a barnacle onto your father’s . . . . You were an emotional cripple, leaning on him, getting the answers from him, assuming that your answers would always be his answers.” But Jean Louise realizes that it is not just personal. Her quarrel is not only with her father. Her quarrel is with a way of life represented by her father and also by Aunt Alexandra, the ladies at the tea party, and even Hank, who argues that he must “go along to get along,” given his lower-class background and his need for the community’s goodwill. After seeing her father and Hank at the Citizens’ Council meeting, she reflects: “Now she was aware of a sharp apartness, a separation, not from Atticus and Henry merely. All of Maycomb and Maycomb County were leaving her as the hours passed, and she automatically blamed herself.”

It is, perhaps, this guilt that we see enacted in one of the novel’s most shocking scenes—Jack Finch’s “savage backhand swipe” to her face at the outset of their final conversation. Although I have found no other critic who treats this incident as significant, for me it represents the ultimate indictment of the culture of the Old South, in which violence was simply one more means of social control by whites.

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25 Id. at 253.
26 Id. at 265.
28 WATCHMAN, supra note 9, at 154.
29 Id. at 260.
against blacks. Jean Louise herself does not seem to mind the blow; she accepts Jack’s offer of whiskey and continues her dialogue with him. But the blow, the whiskey, and Jack’s revelation that he was in love with her mother seem to complete the catharsis: after their conversation, she is able to view her father calmly again, telling him, “I can’t beat you, I can’t join you.”

So, Jean Louise does not take the easy way out. The easy way would be to either embrace the community with all its flaws or to reject it entirely. But she does neither. Her conflict with her culture is resolved, symbolized by her ability to get into her father’s car without bumping her head. But the ending is ambiguous. She is not going to marry Hank, but is she going to move home as Uncle Jack had urged? Is she returning to New York with a new, righteous fervor about civil rights? Has she capitulated to Atticus’s view of the Brown decisions? This ambiguity leaves most readers unsatisfied, but the lack of closure means that readers have to rely less on plot and more on their knowledge of Jean Louise’s character. Throughout the novel we have seen her acute observations, her anguished reflections, her self-doubt, her spirited assertions of her views, and her refusal of easy solutions. She knows that reconciliation requires moving beyond judgment, while still remaining true to her basic principles—principles she imbied from Maycomb itself.

The final verdict on Go Set a Watchman will not be rendered for many years. Ultimately, it will probably be judged as an inferior, and perhaps unfortunate, addition to the Harper Lee bibliography. As a raw, ragged narrative it requires a degree of reader tolerance that its predecessor does not. There is no hero in this novel who can make white readers feel vicariously virtuous. There is only conflict, both within and without. But what I find satisfying in Go Set a Watchman are Jean Louise’s courage in facing the sins of her culture and Harper Lee’s courage in serving as her culture’s watchman, born of her realization that the Jim Crow era must give way to the era of civil rights: “He calleth to me out of Seir, Watchman, what of the night? Watchman, what of the night? The watchman said, The morning cometh, and also the night.”

30 Id. at 277.
31 Id. at 278. She had bumped her head on the car when getting into it to go to Finch’s Landing, id. at 50, and, again when she gets into it after seeing Atticus at the Citizens’ Council Meeting, id. at 154.
33 Isaiah 21:11–12.
A WRINKLE IN MAYCOMB COUNTY: LAW, EQUITY, AND CONSCIENCE IN HARPER LEE’S GO SET A WATCHMAN

MATTHEW CROW

Who’s to doom, when the judge himself is dragged to the bar?
- Captain Ahab in Herman Melville’s Moby-Dick

The publication of Harper Lee’s Go Set a Watchman presents legal scholars, critics, educators, and the wider audience of the book with a set of challenging questions about ethics and publication, race and social justice, authorial intention and interpretation, and the many possible relationships and fissures between law and literature.2 The two most prevalent critical receptions of the book have been to either dismiss the work as a poor first iteration of To Kill a Mockingbird; or, to use the book as a welcome opportunity to expose the very real limits of the beloved novel and the racial blindness of a certain kind of genteel white liberalism represented, at least in his Mockingbird incarnation, in the figure of Atticus Finch.3 Neither of these critical approaches is necessarily wrong, but this article will attempt to move past them and suggest that Go Set a Watchman proves its author to have been attuned to a much longer and more complex narrative of legal history than the immediate contexts of the Civil Rights movement and the fraught racial politics of our present might first suggest. Watchman, among other things, is a meditation on the legal and political history of equity. The novel thus provides both a challenge and an opportunity to rethink scholarly narratives regarding the history of jurisprudence and constitutionalism in the United States from its early modern British Atlantic origins to the present.

Literature can gain access to historical realities of law that legal and historical scholarship often cannot. Harper Lee’s Watchman taps into a history of the continuously incomplete attempts to come to terms with theoretical boundaries between civil or positive law and natural

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1 Assistant Professor of History, Hobart and William Smith Colleges
2 See HARPER LEE, GO SET A WATCHMAN (2015) [hereinafter “WATCHMAN”].
law; and between law and equity. Indeed, Lee’s works show the traditional categories used to make sense of and maintain these boundaries are problematic and at best questionable. The lines separating law and justice, ancient or medieval and modern, and more specifically, between equity in the sense of the specific jurisdiction and equity in the sense of wider ideas of natural justice and conscience, become purposefully blurred. The novel sets up space in which interconnectedness and continuity across these lines can be explored. *Watchman* can be read as a creative work of legal history in its probing of the perennial problems of where in the established legal order responsibility for defining and ensuring justice sits and the role of individual conscience and discretion in that process.

Gary McDowell, the conservative and originalist constitutional scholar, has traced the history of equity in American law as a kind of benchmark of the errors of progressive jurisprudence. McDowell argues that what had been a controlled system of private law doctrine for use in chancery suits, elaborated by Justice Joseph Story in his *Commentaries of Equity Jurisprudence* of 1835, became in the Progressive, New Deal, and Civil Rights eras respectively a liberal principle of constitutional interpretation, applying a narrowly defined private law concept to questions of public law. Historian Peter Charles Hoffer has also seen the legal arm of the Civil Rights movement and the arguments and decision in *Brown v. Board of Education* as part of the long reach of concepts of equity in Anglo–American law. Hoffer correctly takes note of the fact that the equitable powers of chancery courts have always been part of constitutional conflict and debate, and inseparable from public law in several respects. Other scholars argue that equity principles and procedures fade over the course of the United States’ history, or at least loses a good deal of their potency as part of constitutional practice and interpretation. Brook Thomas has traced the circumscription of equity to the balance of contract and exchange by exploring literature’s capacity to document the failure of private contractual relations to serve as sufficient bonds of social and political

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5 See generally id.


7 Id. at xii, 4–5, 212–13.
life. More recently, Amalia Kessler has shown the fundamental but now largely forgotten importance of equitable procedure to shaping early American and antebellum legal practice.

Indeed, as Hoffer, Thomas, and Kessler show, equity has been a significant and problematic concept in American law and constitutionalism precisely because of its procedures and their implications for legitimating frameworks of modern law and politics. Chancery courts were characterized by an inquisitorial rather than adversarial system, traditionally embodied in the Lord Chancellor, who decided cases based on their own investigation into the intentions of the parties and the relative justice of possible outcomes, according to discretion of conscience. In this the Chancellor represented the conscience of the Crown, a particularly juridical instantiation of the royal prerogative defended as a necessary corrective to the rigor and sometime injustice of the letter of the common law.

It was a matter of great anxiety and dispute in the early national United States that not only did such a jurisdiction continue to exist in many state constitutions, but that it in fact seemed necessary for fostering national legal and economic development. Equity directly points to the problem of conscience and discretion in a republican or democratic and egalitarian legal order. Watchman plays on the inescapability of that problem and the limits of attempts to systematize, codify, and control individual conscience and discretion as doors through which claims to a transcendent natural justice could gain positive legal validity. Lee dramatizes the implications of the fact that the authoritative and protective conscience of the sovereign father, embodied in the equitable responsibility of the judge, has been dethroned, fragmented, and redistributed. Who is left to ensure justice? Who is left to judge for us, or are we capable of being judges of and for ourselves?

When the adult Jean Louise Finch returns home from New York to visit the father she adores and discovers that the man she always idolized is a committed segregationist, she unleashes the contested history of equity at Atticus. Seeking to understand how the heroic attorney for Tom Robinson could be so manifestly hypocritical in opposing the Warren court’s efforts to mandate integration, she recalls the events that Harper Lee would go onto narrate, albeit differently, in To Kill a Mockingbird:

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8 See Brook Thomas, American Literary Realism and the Failed Promise of Contract ix–xii (1997).
You balanced the equities, didn’t you? I remember that rape case you defended, but I missed the point. You love justice, all right. Abstract justice written down item by item on a brief—nothing to do with that black boy, you just like a neat brief. His cause interfered with your orderly mind, and you had to work order out of disorder. . . Why didn’t you tell me the difference between justice and justice, and right and right? Why didn’t you?10

Here, Jean Louise presents her father and the reader with a stark contrast between justice, as either abstract and formal equality before the law, or equity as a kind of balancing of interests, and equity as the law’s intervening and sometimes disruptive and agonistic responsibility for justice. By phrasing the problem in this light Jean Louise suggests that the conceptual divisions between private and public law, between law and equity, and for that matter between equity and equity do not hold firm under historical and literary scrutiny.

Like in Brown, equity requires that we see the public and the constitutional at stake in the supposedly private, personal, and transactional.11 In the history of legal and political philosophy, as the work of Ernest Weinrib demonstrates, the idea of corrective justice has always had profound implications for the legitimacy of law and the political order.12 Aristotle seemed to have understood this,13 as did Thomas Hobbes, who found it incredible that lines drawn to separate law and equity, executive and judicial power, and private and public law could be thought of as binding on the established sovereign power.14 If sovereignty is really sovereignty, in this framework, at the most fundamental level, executive power is actualized as a kind of juridical or even judicial power. At the core of what it means to be a sovereign is the exercise of legal judgment, or what gets configured in early modern equity as the conscience of the crown.

In Watchman, Atticus Finch, his daughter, and his colleagues of the Maycomb citizens’ council are wrestling with the Leviathan of the modern state and the dictates of its conscience, the Warren court. The moral weight of the U.S. Constitution and of history itself are brought

10 Watchman, supra note 2, at 248–249.
11 See Brown v. Board of Educ. of Topeka, Kan. (Brown I), 347 U.S. 483, 495 (1954) (ruling that the doctrine of “separate but equal” has no place in the field of public education).
14 See generally id. at 165 (discussing the relationship between equity and established sovereign authority under Hobbes’s legal theory).
to bear on the lives of the characters. In setting the story up the way that she does, Lee constructs a stage, or better yet, a case, or series of cases, where matters of state and history get played out in daily life. The link between the daily lives of individuals and supposedly abstract matters of constitutional thought is made explicit; considerations of equity are everywhere in the book. Racial justice in Jean Louise’s own troubled reasoning over the course of the narrative is an obvious example, and her indictment of her father’s activities and his failure to square justice with justice another. In several instances, punishments and reactions are discussed in consideration of motive, conscience, or circumstance, illustrating equitable discretion’s presence at any point of any particular event (we need only think of the grave robber who is let off, or even Jean Louise’s consideration of Calpurnia’s grandson’s accident). The storyline of To Kill a Mockingbird centers around this conscientious exercise of discretion, too, in the games of position and fairness played by the children, as much as in the decision of Atticus to take Tom Robinson’s case, how he explains that decision to his children, as a matter of conscience, and in the completely extra-legal decision he makes with Mr. Tate to hide the circumstances of the death of Bob Ewell. Just as in the Robinson case itself, in Mockingbird, nowhere is law working as it should. Everything that happens around the law happens around people’s differing senses of what is right, what is necessary, what they fear and hate, what they love, and what their conscience tells them.

The ultimate symbol of the importance of conscience and discretion in Watchman is Dr. Finch, Uncle Jack, who is a medical doctor but in the symbolic universe of the story is a doctor of the church, ironically so, given his mild anti-Catholicism. His discussions with Jean Louise anchor the story much more so than her discussion with her father. Uncle Jack delivers a moral defense of participating in something like the racist Citizens’ Council, something that he and she both acknowledge is unjust. In a real and very early modern sense, he offers a casuistic narrative of Atticus and of Southern identity, a narrative appropriate to the discourse of casuistry as the rhetorical art of examining and governing conscience, and a narrative he expects the judge in this particular case, his niece, to acknowledge as a moral and historical reality. Whatever we might think of his version of history, the goal, he later says, is to free Jean Louise’s own conscience from its total investment in that of her father.  

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15 Watchman, supra note 2, at 186–202 (Jean Louise finds her Uncle Jack studying the life of Richard Waldo Slipthorp (1792–1879 A.C.E.), a nineteenth Anglican priest who was ordered back from his first attempt to convert to Roman Catholicism by an English
else define and decide for you.

Just as the South experiences its growing pains of coming into modernity, needing to find its own way to justice, it is unhealthy for Jean Louise as much as it is for Alabama to have to rely on a father figure to direct that process from above. Jean Louise does not fully accept this narrative, nor should she, but she finds herself acting in its logic all the same. The book dramatizes the limits as much as the agency of individual conscience and action. The nature of the beast is that justice is in the balance of these closings and openings, and that in the course of human events their conscience takes people in all sorts of directions. Taken together, Harper Lee’s two books dramatize the trouble legalism has with the inscrutability of motive, conscience, and judgment, and how the history of the law intersects, if it does, with what we might call the history of justice.

We can only take the books together with great care. *Watchman* is not a sequel, and it poses unique and important challenges to its readers. Certainly, the new book paints an illustrative portrait of the dark side of gradualist liberalism and its paternalist engines, of the very idea of being “colorblind,” and that is all for the good. We get a different perspective than in *Mockingbird*, that of the story of an adult woman thinking about history and justice and identity, and not that of the heart and mind of a little girl watching her father living a life that she comes to understand as the same in private as it is in public: good, right, and honest. It is the shattering of that perception that gets dramatized in *Watchman*. It is the best argument the adult Jean Louise has in response to her uncle and father, and the best argument we might have in response to skepticism of the applicability of principles of equity to matters of collective justice: you would never treat someone this way, how has it become conceptually possible to treat people this way? On this readjusted, face-to-face link between private and public, Jean Louise goes on to take her stand.

In the final analysis, we are compelled to drag Atticus to the bar. In our examination and judgment, we might recall the example of Thomas More, the author of *Utopia* and a powerful Lord Chancellor, and as such both a theorist and practitioner of equity. More, no doubt conscientiously, used his position to visit incredible violence upon dissenters, and it is that same power and violence that is visited upon him when it is his conscience and the body that goes along with it before

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the bar.17 The recent first season of the television series *Wolf Hall* portrayed this stark political reality brilliantly.18 Even so, there More sits in his cell, telling Cromwell he could not surrender. Doing so would be to give up the ground he stood on, and that ground itself was Thomas More. If they wanted to get that they were going to have to take it. Despite his elaborately casuistic moral reasoning with himself and Parliament, in the end the law and its nominal protections lie prostrate, and judgment would proceed according to the discretion of conscience. One could, in another context, trace the specifically early modern and modern ambivalence about the power and unavoidability of conscience as a political force to precisely this moment. What I suggest here is that Lee picks up on this history, and Atticus is her vehicle, or vehicles, for exploring its many implications.

With Atticus, as much as for any other character, we are dealing with different perceptions of different histories across Lee’s two books, and that matters. In *Watchman*, Atticus would get Tom acquitted. This is a different trajectory, almost a different direction of time. Like in the movie *Interstellar*, we can imagine a father and a daughter interacting with each other through cracks and half-seen images of different outcomes and possibilities, different instantiations. Where we get deposited in these intersecting lines of history is not entirely up to us, but what judgments and actions we make when we land is. That we must think, judge, and act in such uncertain circumstances is, as the political theorist Hannah Arendt has it, the human condition.19

It may be the case that many readers will only want there to be a tension between Atticus the advocate and Atticus the segregatist, because that saves something of their vision of Atticus, or of America, or of ourselves. All the same, Atticus, in *Mockingbird*, places his body between Tom Robinson and a lynch mob, and saying you have come this far, but no farther. If you want more from me, you will have to take it.20 Harper Lee’s work should provoke in its reader something more than a typical academic desire to merely problematize. Taken today, the point of either book is neither to set Atticus up as a hero nor to tear him down as a former hero. Instead, the books seek to turn the examination back from racism, racial injustice, and the tremendous error of ethical, historical and political judgment in *Watchman*, and to

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direct that examination to the reader. Lee wants us to think about what justice asks of us and from where its call comes, why, and what we are to do about it.

In a world where the father can no longer be your watchman; where God is dead and so is the King; in the “fatherless world” that historian Emma Rothschild describes as the condition of Enlightenment thinking about society. In this world, where Ta-Nehisi Coates must tell his son and everyone else that it has not been given to him to make everything okay, responsibility for justice falls not on him or you or me alone but on us.21 This problem of who is responsible, of who is watching out, of taking the broken inheritances of our politics and history up as the responsibility of living and watching with and for each other will not go away anytime soon. It will be there all night, and it will be there when we wake up in the morning.

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IS GO SET A WATCHMAN AUTHENTIC?

DEREK FINCHAM

For many lawyers, Harper Lee’s To Kill a Mockingbird represents an important goal to which law and its practitioners should strive. The novel describes the struggle to achieve justice for a black man in the face of deep-seated institutional racism. It stands as a beloved work of literature, widely read and deeply appreciated. Therefore, any work that Lee would have written after To Kill a Mockingbird would have sparked tremendous interest, given the beloved place her first novel holds. But many other questions have arisen since the release of Go Set a Watchman. This essay aims to address how the authenticity of the novel should be weighed by using the tools of art historians and the art market.

News that there was a lost novel by Lee emerged in February of 2015 and came as a surprise to many. Prudent art historians are taught to be wary of sudden or surprise discoveries of lost works of art. In fact, the discovery of the novel seemed nearly miraculous. Lee had famously left Manhattan, and vowed never to attempt another novel in the wake of the tremendous success of her first novel. Thus, questions naturally emerged about whether Lee had actually consented to the new novel. Her biographer, Charles J. Shields, claimed the book was only being published because her sister Alice, who had managed her affairs for many years, died in November 2014, and “now the lid’s off, and a book written half a century ago is going to be published.” William Giraldi, writing in the New Republic, expressed skepticism surrounding the story of the publication of Watchman. He wondered if the new lawyer, caretaker, and publisher working on behalf of Ms. Lee, did

1 Professor, South Texas College of Law Houston. Dr. Fincham holds a Ph.D. in Cultural Heritage from the University of Aberdeen King’s College, a J.D. from Wake Forest, and a B.A. in History from the University of Kansas. He writes about art and cultural property at www.illicitculturalproperty.com.
2 HARPER LEE, GO SET A WATCHMAN (2015).
3 See Paula Mejia, Friends Say Harper Lee was Manipulated, NEWSWEEK (Feb. 6, 2015, 12:45 PM), http://www.newsweek.com/friends-say-harper-lee-was-manipulated-304884.

Lee, at the time was 89 years-old, had struggled to fully recover from a stroke she suffered in 2007, lived in an assisted care facility, could see or hear very little, and may not have had the mental capacity to consent to the publication of her long-shelved work. Giraldi pointed out that Lee’s sister, Alice Lee, would likely never have allowed the publication of \textit{Watchman}.\footnote{Id.} In 2010, Harper Lee’s sister stated that Lee “doesn’t know from one minute to the other what she’s told anybody.”\footnote{David A. Graham, \textit{Can Alabama Determine What Harper Lee Wants?}, THE \textit{ATLANTIC} (Mar. 12, 2015) http://www.theatlantic.com/entertainment/archive/2015/03/can-the-state-of-alabama-determine-what-harper-lee-wants/387568/ .} The announcement that \textit{Watchman} would be published came only three months after Alice Lee passed away at 103. Connor Sheets reported soon after the announcement Lee’s new novel would be published that many of Lee’s fellow Monroeville residents believed she never would have consented to the release of the novel, and that she did not “possess sufficient mental faculties to make informed decisions about her literary career.”\footnote{Connor Sheets, \textit{Hometown Friends Say Harper Lee was Manipulated into Publishing Second Book}, AL.COM (Feb. 4, 2015, 7:29 PM), http://www.al.com/news/in dex.ssf/2015/02/friends_say_harper_lee_was_man.html.}

In response, the Alabama Department of Human Resources investigated whether Lee was a victim of elder abuse after news of the publication of \textit{Watchman} emerged. An Alabama Securities Commission investigator visited Lee at her assisted living home.\footnote{Laura Stevens & Jeffrey A. Trachtenberg, \textit{Harper Lee Elder-Abuse Investigation Closed; Allegations “Unfounded,”} WALL STREET J. (Apr. 3, 2015, 4:01 PM), http://www.wsj.com/articles/harper-lee-elder-abuse-investigation-closed-allegations-unfounded-1428080816.} She answered questions and demonstrated that she both understood and approved of the publication of the book.\footnote{Id.} The investigation, which was kept confidential, concluded that there were no grounds to pursue an elder abuse claim.\footnote{Id.} However because the investigation closed very early, after an initial interview with the author, there was no inquiry into Lee’s finances to determine whether she was being taken advantage of.\footnote{Id.} Given this controversy, the question of how to approach the authenticity of \textit{Watchman} should be carefully considered.\footnote{See id.}
One thing about forged works of art: they are often matched to their time. A skilled faker has the advantage of combining the stylistic elements of the earlier artist and can attach modern concerns and sensibilities to them. The art forger Hans van Meegeren faked works by Vermeer, and was the subject of a notorious trial in 1947 in which he demonstrated to a Dutch court that he had not sold a genuine Vermeer to Hermann Göring, but in fact had forged the work.\textsuperscript{13} And to demonstrate his forgery skills, van Meegeren painted a version of Jesus among the Doctors before the Dutch court.\textsuperscript{14} He faked works by Vermeer because they are exceedingly rare, and valuable. His most successful fake, \textit{Supper at Emmaus} was praised as a change of style for Vermeer, depicting more emotion and different subject matter than the artist had used before.\textsuperscript{15} With the benefit of hindsight we can see the work as an obvious fake, one that has much clumsier line and color than any other Vermeer. Literature is a bit different of course. Writers generally don’t write for lone patrons who keep a work for their own use. Instead, an author writes for a bigger audience.

Even if \textit{Watchman} isn’t a forged work of literature, is it authentic? Is this a text Ms. Lee wanted included in her body of work? That is a much more difficult question. Turning back to art history again, when the artist known as El Greco died, his workshop contained four or five copies of nearly every major work the artist had created, some by his hand, some made with the assistance of his apprentices.\textsuperscript{16} Not all of those works should be considered works by El Greco. Even if the artist themselves created the piece; an artist often shifts styles so dramatically that they no longer wish to acknowledge earlier works. Take the contemporary artist Gerhard Richter, who gave the art market a shudder after announcing he no longer claimed works of art from his early period.\textsuperscript{17} Richter claims that the experimental style used during this period substantially differs from the style that he later developed.\textsuperscript{18}

The question of authenticity rarely arises with respect to written

\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{18} \textit{Id.}
works; however, in this case, with a novel published so late in Harper Lee’s life at a point when she may have had diminished capacity, readers should think carefully before embracing *Go Set a Watchman* as a new novel by the Pulitzer Prize-winning Lee. A work of art or piece of writing is considered authentic when it is what it is said to be. For visual art, art authentication is the process by which experts attribute a work of art to an artist, era, or culture. The value of a work of art depends largely on how certain we are that a work of art is authentic. This process of authentication relies on a range of disciplines, including art historians, museum curators, art dealers, auction house experts, appraisers, archaeologists, and collectors of art.

A dispute of authenticity seldom presents itself neatly when the creator can be consulted. Creative works can have varying levels of originality and intent. At one end of this scale would be an original piece of writing by the author, with varying levels of editing by copyeditors, editors and others filling in the middle of the spectrum. At the opposite end of the spectrum are works that copy the writing of others, otherwise known as plagiarism. Forged writings which purport to be authored by another also occupy this end of the spectrum. When the original author is no longer able to give a definitive statement that a piece of writing is what it purports to be, how can we determine authenticity? Fakes can come about by intentional deception on the part

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20 However, complications can still arise when an artist claims or disclaims a work of art. See, e.g., Graham Bowley, *Peter Doig Says He Didn’t Paint This. Now He Has to Prove It.*, N.Y. Times (July 7, 2016), http://www.nytimes.com/2016/07/10/arts/design/peter-doig-painting-lawsuit.html. Artist Peter Doig has been sued in an Illinois district court after refusing to claim a painting as his own work. See id.

21 See Feist Pub’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). Original works come from a specific source or artist. The idea of originality in copyright law hews closely to authorship. See id. at 346. In *Feist*, Justice O’Connor explained the requirement for authorship and originality as follows:

To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice . . . Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. *Id.* at 345 (citations omitted).

22 Blackstone defined a forgery as “the fraudulent making or alteration of a writing to the prejudice of another man’s right.” 4 William Blackstone, *Commentaries* *247* (internal quotations omitted).
of art counterfeiters or by those who may manipulate a work or its history; however, we can distinguish those kinds of works from a misattribution or an innocent failure to identify the proper artist. Nearly every museum has amended or revisited the authentication of a work of art. Even art experts dispute the history and authenticity of works on view.

The visual arts determine authenticity in a few ways that can shed light on the question: connoisseurship, scientific analysis, and the provenance or history of a work of art. These methods all have their strengths and weaknesses and so are best used in concert with each other. Using the stylistic aspects of a work of art to determine its creator, date of creation, and its influences stems from an enlightenment idea in the Eighteenth Century to order and classify the best of human material culture. This led to the idea of “connoisseurship” as the “method by which quality could be determined”. An expert who has trained for a lifetime in the study of the works of an artist, or the writings of a single writer will always be an invaluable tool in determining authenticity. The art historian Peter Sutton offers this description of connoisseurship:

The eighteenth-century French term ‘connoisseur’ initially carried broad connotations of sensibility and discrimination which were implicitly the prerogatives of a cultured upper class. But at the dawn of the twenty-first century, connoisseurship has come to refer to the process by which we determine who made a work, when, and where. That the English language should have failed to coin its own word for ascribing works of art might seem surprising, but the use of French for such refinements has seemed fitting. However, the allied notion that the skills of a connoisseur should be the birthright of the privileged is a fiction left from an age when art was primarily an aristocratic pastime.

The closest approximation the literature world has for a connoisseur’s eye would be the serious book critics and scholars of Harper Lee. Their judgment has been largely negative. Book critic Maureen Corrigan argued Watchman “is a troubling confusion of a novel, politically and artistically.” Another reviewer expressed distaste reading “as
great a character as Atticus Finch undergo such a bizarre upheaval.”

Many critics focused on the very different Atticus Finch in the two works, with critic Michiko Kakutani expressing shock that “Atticus is a racist who once attended a Klan meeting” and who expressed the idea that blacks were “still in their childhood as a people” and openly questions integrated schools, churches and theaters. One explanation for this change may be that Lee had the benefit of a useful editor when she wrote *Mockingbird*. Too often we imagine an author as a solitary genius toiling away without interference from commercialism, publicity, or society at large. Yet the marketplace, and the editors who help choose the works to market, often play an important role. Perhaps rather than viewing *Mockingbird* as a masterpiece that was the sole work of Lee, it might also be considered a wonderful work because of the kind and thoughtful eye of an editor.

Yet history tells us that connoisseurship has its drawbacks. Art history as a field has gradually turned away from connoisseurship towards a variety of theoretical approaches. This has opened up some exciting new ways of thinking about art, but at the expense of connoisseurship, which may make it more difficult for art dealers, art buyers, and the public to find objective and skillful understanding of the works of individual artists.

As a result, scientific testing has proved to be an increasingly reliable tool to help determine if a work of art may be inauthentic. Yet science can never prove a work of art to be definitely authentic, instead science provides data that helps to place a work of art’s creation during

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29 See Patty Gerstenblith, Keynote 1: Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works, 35 COLUM. J. L. & ARTS 321, 338 (2012) (pointing out that “connoisseurship alone cannot reliably determine authenticity as the acceptance or rejection of particular works as authentic has been known to change over time.”).


31 Id.

32 See Gerstenblith, supra note 28, at 339.
IS GO SET A WATCHMAN AUTHENTIC? 51

a given time period. So, we should be cautious when a new undiscovered or hidden work of art is out of character or reveals something very contemporary about an older artist. Depicting Atticus Finch as a complicated man who feared the civil rights movement and advocated segregation, dramatically changes how we think about the character. That change seems awfully contemporary. Almost too prescient given this nation’s continuing struggle with social justice and racial equality. Yet nearly everyone seems to agree that *Watchman* was authored by Harper Lee. The publisher and those releasing the work have consistently held *Watchman* out as an early draft of what came to be *To Kill a Mockingbird*. Some literature professors in Poland have even data mined the text, and analyzing the use of common words, found that *Watchman* is the work of Lee.

Perhaps the manuscript should have been left to future academics to study and does not deserve all this fanfare. One of the core moral rights of an artist in the European view is the ability to withdraw or disavow a work of art, or to claim authorship. These rights are limited in the United States under the Visual Artists Rights Act and would


34 The publisher stated *Watchman* is Harper Lee’s first novel, was written in the mid-1950s, and was submitted to publishers in 1957. *See* Serge F. Kovaleski & Alexandra Alter, *Harper Lee’s ‘Go Set a Watchman’ May Have Been Found Earlier Than Thought*, N.Y. TIMES (July 2, 2015), http://www.nytimes.com/2015/07/03/books/harper-lee-go-set-a-watchman-may-have-been-found-earlier-than-thought.html?_r=0. It was not published then, but the flashbacks to the young girl’s childhood were praised and it seems laid the foundation for a longer book that would eventually be completed in 1959 and became the novel that would be published as *To Kill a Mockingbird* in 1960. *Id.*; Tina Andreadis, *Recently Discovered Novel From Harper Lee, Author of To Kill A Mockingbird*, HARPERCOLLINS PUBLISHERS (February 3, 2015), http://corporate.harpercollins.com/us/press-releases/425/RECENTLY%20DISCOVERED%20NOVEL%20FROM%20HARPER%20LEE,%20AUTHOR%20OF%20TO%20KILL%20A%20MOCKINGBIRD. The typescript for *Watchman* did not emerge into public view until 2014, after Harper Lee’s attorney discovered the typescript in a bank vault in Monroeville. Jeffrey A. Trachtenberg & Laura Stevens, *Lawyer for Harper Lee Describes Discovery of Watchman Manuscript*, WALL STREET J. (July 12, 2015), http://www.wsj.com/articles/lawyer-for-harper-lee-describes-discovery-of-watchman-manuscript-1436759855.


not apply to a work of literature. Although the United States signed on to the Berne Convention, there remains in U.S. law an absence of moral rights for authors of literary works. In an ideal situation, an author certainly should be able to choose which works are or are not included in their life’s work. The Alabama Securities Commission, after questions of Ms. Lee’s capacity were raised, conducted an investigation and concluded Ms. Lee wanted the work published. We must take that as the last word on Lee’s intentions. Yet given her condition and mental capacity, there may perhaps be daunting legal issues relating to elder law and moral rights raised by Watchman and Mockingbird, in addition to the cornerstone issues of race and civil rights.

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40 Stevens & Trachtenberg, *supra* note 8.
ATTICUS, UPRISING

SALLY GREENE

One of the most unforgettable moments of *To Kill a Mockingbird* comes at the end of the trial, after Atticus Finch has done his noble best to gain Tom Robinson’s acquittal. “Miss Jean Louise, stand up.” Rev. Sykes admonishes from his place in the “colored” balcony, where she has insinuated herself. “Your father’s passing.”

This moment of reverence, and fleeting racial solidarity, is chillingly echoed at the conclusion of *Go Set a Watchman*. After a dramatic confrontation with Atticus in which the adult Jean Louise discovers the bald racist assumptions behind his true beliefs, she returns to his office at the end of the day to drive him home. Heading for the car, “[s]he stepped aside to let him pass.”

Let me venture to say at the outset that the novel should not have been published. Despite the claims of Harper Lee’s blessing, anyone who has known a loved one as frail and failing as she reportedly was in 2015 must question the sureness of her intent. If it had to be published, it should have been as a scholarly edition, thoughtfully annotated and contextualized. That is, if sufficient textual evidence to put such a record together could be found. The most helpful analysis to appear so far comes from a story in *The New York Times* focusing on Lee’s editor, Tay Hohoff, who died in 1974. Working closely with Lee over many revisions, Hohoff recalled, “[S]ometimes she came around to my way of thinking, sometimes I to hers, sometimes the discussion would open up an entirely new line of country.” Hohoff’s Quaker roots, this story suggests, may have informed her strategies to move Lee’s thinking toward a more progressive framework.

As to why an editor might have recommended transporting the setting back to the 1930s childhood of Jean Louise, two reasons come to mind. First, the limpid style of Lee’s prose easily lends itself to the perspective of a child (the tomboy “Scout,” recalled in flashbacks).

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1 Associate counsel, BalBrenner P.C., Chapel Hill, North Carolina. Town Council Mem-
ber, Chapel Hill, North Carolina. J.D. 1984, The George Washington University; Ph.D.
1986, University of North Carolina at Chapel Hill.

2 HARPER LEE, *TO KILL A MOCKINGBIRD* 242 (HarperCollins, 50th Anniversary Ed. 2010)
(1960) [hereinafter “MOCKINGBIRD”].


4 Johnathan Mahler, The Invisible Hand Behind Harper Lee’s *To Kill a Mockingbird*, N.Y. TIMES (July 12, 2015), http://www.nytimes.com/2015/07/13/books/the-invisible-
hand-behind-harper-lees-to-kill-a-mockingbird.html?_r=0.
Second—perhaps intended, perhaps a lucky byproduct of the first decision—taking the story out of the immediacy of her 1950s context opens up a more imaginative space.

For certainly, *Go Set a Watchman* is flawed by the didacticism of a writer caught up in the politics of her day. In the pitched moment of the post-*Brown* 1950s, the novel bares uncomfortable truths. Atticus has signed on with the local Citizens’ Council. Justifying himself to his daughter, he turns the question back to her: “Do you want Negroes by the carload in our schools and churches and theaters? Do you want them in our world?”\(^5\) (Jean Louise, now living in New York, holds more sympathy for the Negroes but claims indignantly that the Supreme Court is running roughshod over the Tenth Amendment.)\(^6\)

Hearing Atticus Finch’s unvarnished white supremacy in his own words is dispiriting enough, but watching the scales fall from Jean Louise’s eyes goes to the essence of what this text has to say to us today.

“The Jean Louise, I’m only trying to tell you some plain truths. You must see things as they are, as well as [as] they should be.”

“Then why didn’t you show me things as they are when I sat on your lap? Why didn’t you show me, why weren’t you careful when you read me history and the things that I thought meant something to you that there was a fence around everything marked ‘White Only’?”\(^7\)

Jean Louise’s disillusionment, which may reflect Harper Lee’s own, evokes a narrative familiar to white southern liberals. Mississippi journalist Willie Morris, who went on to become an influential editor of *Harper’s Magazine*, recalls a pivotal trip home. Returning to Yazoo City in the summer of 1955, before his senior year at the University of Texas, he anticipates being enfolded in the familiar love of family and friends. Instead, he stumbles upon the organizational meeting of the town’s White Citizens’ Council, his own father in attendance.

*Who are these people?* I asked myself. *What was I doing there? Was this the place I had grown up in and never wanted to leave? I knew in that instant, in the middle of a mob in our school auditorium, that a mere three years in Texas had taken me irrevocably, even without my recognizing it, from home.*\(^8\)

With new perspective, he looks back to his childhood and sees,

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\(^5\) *Watchman*, supra note 2, at 245.

\(^6\) *Id.* at 238–40.

\(^7\) *Id.* at 243.

much as Jean Louise does, that he had been trained into a delicate illusion:

For my whole conduct with Negroes as I was growing up in the 1940s was a relationship of great contrasts. On the one hand there was a kind of unconscious affection, touched with a sense of excitement and sometimes pity. On the other hand there were sudden emotional eruptions—of disdain and utter cruelty. My own alternating affections and cruelties were inexplicable to me, but the main thing is that they were largely assumed and only rarely questioned. The broader reality was that the Negroes in the town were there: they were ours, to do with as we wished.9

Fellow Mississippi writer Elizabeth Spencer recounts an abrupt awakening, also in 1955, upon her return to Carroll County from Italy, where a Guggenheim fellowship had taken her to work on a novel. Manuscript in hand of The Voice at the Back Door, which would become widely praised for its honest reckoning with the emerging civil rights movement,10 she had anticipated a triumphant homecoming. What happened was quite the opposite. Emmett Till had just been murdered, across the county line in Leflore County. Spencer’s father “reacted to the crime the way a stone wall might if hit by a BB gun,” she recalls. A man she had believed to be fair and “forward-looking about racial matters” was revealed to be someone else.11

And so, after only a few weeks, she left Mississippi permanently for New York. Reflecting on her decision in an introduction to the 1965 edition of The Voice at the Back Door, she situates herself within a long line of self-exiled southerners:

One goes North on a train, traditionally, and one somehow knows when the trip is definitive and final, when it is true that no return visit will ever erase its meaning. This is the traditional American journey—I do not think it has been written about very much as “going West” has been, or “going East.” Perhaps there are ways of understanding why. Yet thousands of people, of every shade of color, of every degree of intelligence and talent, have made this journey and are still making it,

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9 MORRIS, supra note 7, at 78 (emphases in original).
and for all the same reason: they don’t belong down there any more.12

Spencer had understood that her father’s driving principle was to “maintain order.”13 Maintaining order is Atticus Finch’s goal as well. “The law is what he lives by,” Jean Louise’s uncle tells her.14 Atticus would be the first to oppose the Klan’s vigilante tactics. The Atticus of the 1950s and the one who defended Tom Robinson bear a remarkable consistency. A black man wrongly accused of a crime deserves a zealous defense. If he loses, it’s a damn shame. Beyond the courthouse door, the color line would remain brightly drawn.

A man with the standing of an Atticus Finch would not use the n-word or tell racist jokes (at least, not in his children’s presence). His manner is refined. Supported by everyone in his social class, he has no interest in broadcasting his views, and no need to. Growing up in the East Texas of the 1960s, I too could come to the conclusion that my elders were more progressive than they actually were. (Exactly why did the “Colored” sign at the back door of the dentist’s office never come down? Oh.)

In the twenty-first century, the “White Only” signs have at last fallen. Our laws are race-neutral. But their enforcement is not. We’ve drawn our fences more subtly.

By whatever tangled means it emerged, Go Set a Watchman comes to us now “as a gift,” writes the poet Nikky Finney. “It’s a blueprint to decode, something that we need to be better than we are.”15 Elaborating, Isabel Wilkerson writes that this new Atticus

is layered and complex in his prejudices; he might even be described as a gentleman bigot, well meaning in his supremacy. In other words, he is human, and in line with emerging research into how racial bias has evolved in our society. He is a character study in the seeming contradiction that compassion and bigotry can not only reside in the same person but often do, which is what makes racial bias, as it has mutated through the generations, so hard to address.16

Confronted with the uneasy coexistence of compassion and bigotry in the figure of Atticus Finch, we white readers would do well to go further. We need to find the humility to realize, like Jean Louise, that we don’t even see the racism that is plainly right before our eyes.

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13 LANDSCAPES, supra note 11, at 289.
14 WATCHMAN, supra note 2, at 268.
15 Quoted in Wilkerson, infra note 16.
GO SET A WATCHMAN AND THE LIMITS OF WHITE LIBERALISM

ARIELA J. GROSS\(^1\)

Like the other authors in this wonderful symposium I doubt that Harper Lee intended to publish *Go Set a Watchman* ("Watchman"), and I agree with most public commentators that, as a literary work, *Watchman* does not rise to the level of *To Kill A Mockingbird* ("Mockingbird"). The characters speechify and the plot never takes off. I also agree completely that it makes no sense to ask whether Atticus Finch is a coherent character from *Mockingbird* to *Watchman*—the book is not a sequel\(^2\) and Atticus is not a real person. Nevertheless, I do think *Watchman* holds important political lessons for us, particularly at this moment. Regardless of whether *Watchman* is the book Harper Lee’s legacy as a great American writer demanded, it is the book white America needs at the moment because it is a powerful corrective to the myth of the great white savior of black civil rights.

The narrative of a great white leader freeing slaves is a stock trope in American drama, as depicted in motion pictures such as *Amistad*, *Glory*, *Lincoln*, *Mississippi Burning*, and the recent Broadway play *All the Way*. *Mockingbird* portrays the idea of a white leader as well, with Atticus Finch as the leading exemplar of the upstanding white citizen taking a stand against racism.\(^3\) Yet, as Mary Ellen Maatman has ably demonstrated, Southern lawyers as a group took their strong stand against *Brown v. Board*, and turned their efforts toward legal means to fight desegregation.\(^4\) Southern legal periodicals in the immediate aftermath of the 1954 decision were filled with articles about nullification—or “interposition”—just as they would have been one hundred years earlier had there been law reviews at the time.\(^5\) Following *Brown v. Board*...
Board and the Montgomery Bus Boycott of 1955–56, all of Alabama’s U.S. congressmen endorsed the “Southern Manifesto,” which called for the Brown decision to be overturned. State legislators frustrated integration through the 1955 Pupil Placement Act, which allowed local administrators to place students in schools, and the 1956 “freedom of choice law,” which allowed parents to choose their child’s school. Even a decade later, Alabama senators filibustered to keep the 1964 Civil Rights Act from coming to a vote.

Public commentary on Watchman has focused on Lee’s portrayal of Atticus as a racist White Citizens’ Council member. Yet for the most part, commentators have glossed over Lee’s portrayal of Jean Louise (Scout), who seems to speak in Lee’s own voice. To me, what really made the book such an interesting artifact of its time was the expression of the protagonist’s views. If Jean Louise is meant to represent the more enlightened voice of the liberal white Southern woman returning home from the North, able to critique the North and the South with her outsider’s perspective on both, she is hardly the “colorblind” liberal we imagined her to be. Indeed, although at several points the narrator, as well as Uncle Jack, declares Jean Louise to be “colorblind,” the book brilliantly—and unintentionally—demonstrates what a hollow conceit “colorblindness” is.

On the importance of the Manifesto to the development of white supremacist constitutionalism, see Justin Driver, Supremacies and the Southern Manifesto, 92 Tex. L. Rev. 1053 (2014).


For critiques of “colorblindness,” see, e.g., EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (3rd ed. 2010); OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE
Louise does not see race. She shares many of Atticus’s negative views of “Negroes” in her hometown, and she and the narrator both comment disparagingly on the marital and sexual practices of Zeebo and his wife Helen. Jean Louise even agrees with Atticus that Negroes are “backward.” Most shocking of all, she acknowledges that she was “furious” with the Supreme Court for Brown v. Board because the Court had run roughshod over the Tenth Amendment. It is not even clear that Jean Louise opposes nonviolent, legal efforts to turn back desegregation. Instead, what horrifies her the most is the racist rhetoric of the speaker at the Citizens’ Council meeting she overhears, the “shouting nigger” into which she believes good Southerners like her father have fallen. Would Jean Louise—or Harper Lee—have disapproved of the “colorblind,” race-neutral means many “moderate” Southerners adopted to maintain segregation in schools and housing?11 Watchman suggests not.

Furthermore, Watchman does not invite the reader to disavow Atticus, but to sympathize with him. By the end, Jean Louise comes to understand—thanks to the scolding of her Uncle Jack—that she has been as unyielding in her Yankee ways as the Citizens’ Council members are in theirs. Uncle Jack reminded Jean Louise that that Atticus is flawed but still worthy of her admiration. Atticus may be wrong, but he is only trying to hold on to the Southern way of life. Uncle Jack tells her that she has been a “bigot” just as Atticus is a bigot; prejudiced against white Southerners as he is against “Negroes” (only a “turnip-sized bigot,” but still). This “fair and balanced” approach is the essence of colorblindness. It is this blindness that ultimately limits the moral vision of Watchman. It is a fascinating artifact of its time, a teaching tool, and an important—and very timely—reminder of the limits of white liberalism in the pursuit of racial justice in United States history.


THE TRIBES OF MAYCOMB COUNTY: THE CONTINUING QUEST TO TRANSCEND OUR DIFFERENCES

PROFESSOR STEVEN H. HOBBS†

We are a tribal people, we Americans, in spite of our national motto: *E pluribus unum*. We are subdivided by race, class, culture, religion, education, physical and mental health, and so much more. While multiculturalism is said to be enriching and empowering to our communal life, our celebration of diversity seldom permits us to totally look beyond our differences and really see the similarities in our neighbors’ faces.¹ In the grand scheme of things, our essential purposes and common humanity are hidden behind a veil of ignorance, prejudice, self-interest, and distrust. We only temporarily lift the veil in times of distress and disaster, such as September 11th or the devastating tornadoes that struck Alabama in April 2011. Then our common humanity is laid bare and we come together for a common purpose. When the emergency ends, we tend to drift back to our respective tribal corners.

In *To Kill A Mockingbird*² and *Go Set a Watchman*,³ Harper Lee peels back the quiet calm of Maycomb County to explore what she called the various “tribes” of Maycomb.⁴ Of course, the two main tribes are denominated by the racial color line, where the black side of the line struggles with social, political, and economic disenfranchisement. Even within the respective black and white tribes, there are sub-tribes identified by religion, class, upbringing, education, and family ties. Further, other tribes shaped by mental and physical health are revealed in characters such as Boo Radley and Mrs. DuBose. The tribes shaped the legal apparatus in the Robinson trial and determined where everyone stood, both inside the courtroom and outside.⁵ This thick thread that weaves throughout the narrative is a deep puzzlement to Scout who wonders why we cannot drop the tribal labels and see each other as just “folks.”⁶

† Tom Bevill, Chairholder of Law, The University of Alabama School of Law.

¹ See Maya Angelou, On the Pulse of Morning, Poem delivered for President William Jefferson Clinton’s Inauguration (Jan. 20, 1993).


³ HARPER LEE, GO SET A WATCHMAN (2015) [hereinafter “WATCHMAN”].

⁴ MOCKINGBIRD, supra note 2, at 10, 22, 102.

⁵ MOCKINGBIRD, supra note 2, at 182–87.

⁶ Id. at 259.
We are no less struggling with the tensions that our seemingly fixed tribes exhibit today. Looking around Alabama in 2016, one sees the continuing impact of the color line in many aspects of life. While we hope that the really dark days of segregation are passed, the lingering effect of that era reverberates in subtle and not-so-subtle fashion. For example, *I.L. v. Alabama*, a recent and so-far unsuccessful case, challenged the way property is taxed for the purpose of supporting local educational systems. Briefly, Alabama has about the lowest tax on land, especially land used for agriculture and commercial activities such as mining. This disadvantages poor and rural counties with significant minority populations since they are unable to raise property taxes to support local schools. The case argued that the original tax system was embedded into the state constitution in 1901 specifically to keep blacks from exercising local control over education and other government functions. My presentation will consider how our tribal existence keeps us from becoming just “folks.” Further, it will consider examples of efforts that help transcend our tribal differences. With hope, our discussions will provide insightful answers to Scout’s question.

**The Idea of Tribes**

The concept of tribes is a subject studied by Joshua Green in his book *Moral Tribes: Emotion, Reason, and Gap Between Us and Them*. In this work, Greene considers how moral reasoning functions, if at all, when different groups, or tribes, compete for scarce resources, such as land, water or even other human beings, or manage problems that arise between groups. Of particular concern to Greene is on what

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7 See DIANE McWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA—THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* 590–93 (2013 ed. 2001), for a discussion of a restrictive legislation in 2013 targeted at undocumented immigrants designed to burden their legal existence in Alabama and requiring everyone to show proof of legal residency or risk arrest. This was at a time when Birmingham was trying to plan a commemoration of the Civil Rights Movement of 1963.

8 *I.L. v. Alabama*, 739 F. 3d 1273 (11th Cir. 2014), cert. denied, 135 S.Ct. 53.


12 Greene describes a society with four very different tribes who share a common pasture for grazing sheep. Each tribe has differing methods for raising and grazing the sheep and this causes tensions when the pasture cannot accommodate each tribe’s use of the pasture. *Id.* at 1–5.
basis tribes resolve common issues that arise when competing for resources or establishing order when each group has a unique perspective or moral frame of reference.\textsuperscript{13} One can think of the idea of tribes as different countries, persons who hold different religious beliefs, groups with differing cultural values and traditions, or groups organized politically or economically.\textsuperscript{14} Greene argues that humans, from an anthropological perspective, are destined to form protective groups around a range of commonalities: religion, region, culture, race, language, or historical relationships.\textsuperscript{15} Thereby, we humans see the world as my tribe—\textit{Us}—versus some other tribe—\textit{Them}—with each tribe making decisions, asserting claims, or addressing mutual problems motivated by tribal self-interests which are formed through different moral lenses.\textsuperscript{16}

Humans have always functioned in a way that demonstrates that tribes and tribal affiliation matter. It is the source of wars between countries and can be the source of conflicts within a country when that country is made up of different tribes. Consider the greater Middle East where tribal affiliations are based on religion and ethnicity and language. Greene’s project is to study the moral philosophies that could be used in assessing tribal conflicts and then construct moral reasoning frameworks to resolve issues between tribes. As we witness conflicts in the world, we understand how difficult it is to achieve what might look like peace, or at least peaceful coexistence. Greene notes:

Complex moral problems are about Us Versus Them. It’s our interests versus theirs, or our values versus theirs, or both. . . . Here our disparate feelings and beliefs make it hard to get along. First, we are tribalistic, unapologetically valuing Us over Them. Second, different tribes cooperate on different terms. Some are more collectivist, some more individualist. Some respond aggressively to threats. Others emphasize harmony. And so on. Third, tribes differ in their “proper nouns”—in the leaders, texts, institutions, and practices that they invest with moral authority. Finally, all of these differences lead to biased perceptions of what’s true and what’s fair.\textsuperscript{17}

In terms of Harper Lee’s work, \textit{tribe} is an appropriate metaphor for understanding the social dynamics of Maycomb. Each tribe sits

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.} at 22–27.
  \item \textsuperscript{14} \textit{Id.} at 68.
  \item \textsuperscript{15} \textit{Id.} at 68–69.
  \item Greene observes: “Tribalism makes it hard for groups to get along, but group-level selfishness is not the only obstacle. Cross-cultural studies reveal that different human groups have strikingly different ideas about the appropriate terms of cooperation, about what people should and should not expect from one another.” \textit{Id.} at 69–70.
  \item \textsuperscript{17} \textit{Greene, supra} note 10, at 293–94.
\end{itemize}
around its own fire and considers its position vis-à-vis the other tribes.\textsuperscript{18} Within each tribe, there is a moral ethic that shapes and constructs how the tribes interact. One tribe is more powerful than the other tribes and so it is privileged to establish a hierarchy for obtaining the resources of the community, which includes economic and social capital. In contrasting the various tribes, Lee subtly lays bare the inherent inequality and unfair treatment of the tribes without privilege. Such is the nature of tribalism. It forms our moral frame of reference in personal, political and professional context.

\textbf{MAYCOMB’S TRIBES}

The main arc of Harper Lee’s story is usually considered to be Atticus Finch’s representation of Tom Robinson and the impact it has on his family. The climax of that arc is Boo Radley’s saving the Finch children from the murderous intentions of Bob Ewell. Of course, it was the lies of Mayella Ewell and her father, who was most likely the source of her injuries, that initiated the tragic prosecution of Robinson, and it was Atticus Finch’s exposure of the Ewells’ lies that put Atticus and his family, Judge Tyler, and Tom Robinson’s family in danger and ultimately cost Tom his life.\textsuperscript{19}

However, the Robinson trial was the narrative device that Lee used to articulate what I believe to be the primary story arc of her novel. She uses the children to explore the various tribes of Maycomb as Jem, Scout, Dill, and Walter come of age in depression era Alabama. Through their eyes we see the various social constructions that shape the racial, economic, legal, social, and political life of their community.\textsuperscript{20} As Atticus told his sister Alexandra about the children attending the brutal trial, “This is their home, sister . . . . We’ve made it this way for them, they might as well learn to cope with it.”\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{18} Alexandra was committed to passing on to the children the proper understanding of tribal privilege as set out here: “She never let a chance escape her to point out the shortcomings of other tribal groups to the greater glory of our own, a habit that amused Jem rather than annoyed him: ‘Aunty better watch how she talks—scratch most folks in Maycomb and they’re kin to us.’” Mockingbird, supra note 2, at 147–148.
\item \textsuperscript{19} See Mockingbird, supra note 2.
\item \textsuperscript{20} Dolphus Raymond disclosed his secret to the children that he carried around a bottle of Coca Cola in a paper bag to pretend to be drinking alcohol explaining: ‘Because, you’re children and you can understand it,’ he said, ‘and because I heard that one—’ He jerked his head at Dill: ‘Things haven’t caught up with that one’s instinct yet. Let him get a little older and he won’t get sick and cry. Maybe things’ll strike him as being—not quite right, say, but he won’t cry, not when he gets a few years on him.’ Id. at 228–29.
\item \textsuperscript{21} Id. at 243.
\end{itemize}
the innocence of childhood that questions are raised about how peculiar folks are and why convention builds strict boundaries around the various tribes. Boundaries are deeply drawn which both wall similar people in and wall out people who are different.22

A. Mockingbird

Jem identifies the four major tribes (although there are other minor tribes which also inhabit the space in Maycomb and for which each have their own challenges). Jem declares:

“There’s the ordinary kind like us and the neighbors, there’s the kind like the Cunninghams out in the woods, and the kind like the Ewells down at the dump, and the Negroes.”23 All were present in the courtroom for the trial. Of course, the “ordinary” folks were represented by Atticus. The Cunninghams and other country folks, or as they were also identified, the old Sarum bunch, made up the jury.24 The star witnesses were the Ewells, and the black community, led by Reverend Sykes, sat in the segregated balcony.25 Naturally, social convention dictated that black adults had to give up their seats for the white Finch children.26

For Jem and Scout, the ordinary kind were basically white, middleclass folk. These people could be identified by the fact that they owned land and had done so over more than one generation.27 They also possessed that elusive quality identified as background, meaning their tribal lineage had status based on wealth, breeding, occupation, and, according to Jem, they had been reading and writing for a long time.28 (Contrast to the Cunninghams who just of recent time started to read29 and the Negroes who for the most part could not read at all—

22 One example of the rigidity of the tribes appeared when Calpurnia took the Finch children to her church, where they were confronted by Lula, another worshiper, with the declaration: “You ain’t got no business bringin’ white chillun her—they got their church, we got our’n. It is our church, ain’t it, Miss Cal?” Id. at 135–36. Consider also the incident of the rabid dog coming down the street. Calpurnia attempts to warn the neighbors of the mad dog and goes to the front door of the Radley house to warn them. Scout declared that custom for blacks when approaching a white residence was: “She’s supposed to go around in back,’ I said. Jem shook his head. ‘Don’t make any difference now,’ he said. Calpurnia pounded on the door in vain. No one acknowledged her warning; no one seemed to have heard it.” Id. at 107.
23 Id. at 259.
25 Id.
26 Id. at 187.
27 See id. at 148.
28 Id. at 259.
29 Id. at 260.
a legacy of slavery laws which prohibited teaching them to read and Jim Crow laws which provided limited educational opportunities.\textsuperscript{30} Their Aunt Alexandra was the family keeper of the Finch traditions that would identify them as folk of background.\textsuperscript{31}

The old Sarum bunch were country folks: farmers, working class, and poor. They did not possess the necessary refinement which included proper manners at the dining table, as shown when Walter Cunningham poured syrup all over his roast beef. As Scout would learn, people of background would allow their guests to do such a thing and would not comment on it.\textsuperscript{32} Living at the margins of poverty, especially during a depression, they were nonetheless proud people who did not take charity or government assistance.\textsuperscript{33} They paid their way even if it was with a bag of hickory nuts to Atticus in payment for legal work.\textsuperscript{34} Custom also dictated that they would be the ones to keep the lower tribes in their place, as demonstrated by their attempted lynching of Tom Robinson.\textsuperscript{35}

The Ewells, with their place by the dump, were considered trash and of no account.\textsuperscript{36} They did not respect the civilizing rules of the society, such as sending their children to school for an education, having the proper respect for those in authority, such as teachers, or honoring the time bounds of hunting season.\textsuperscript{37} They drew welfare assistance and suffered from a lack of decent health care.\textsuperscript{38} Cleanliness was a luxury they could not afford, so dirt was a part of their skin tone, as Scout observed when it appeared that Bob Ewell seemed to have cleaned up as best he could for the trial.\textsuperscript{39}

The black community, a term I prefer to Negro or the dreaded N-

\textsuperscript{30} Mockingbird, \textit{supra} note 2, at 147.
\textsuperscript{31} \textit{Id.} at 151–52.
\textsuperscript{32} \textit{Id.} at 26–27.
\textsuperscript{33} \textit{Id.} at 22.
\textsuperscript{34} \textit{Id.} at 23.
\textsuperscript{35} \textit{Id.} at 259.
\textsuperscript{36} Mockingbird, \textit{supra} note 2, at 148.
\textsuperscript{37} \textit{Id.} at 29–31.
\textsuperscript{38} See \textit{id.} at 193. Lee sums up the Ewell tribe as follows:

Every town the size of Maycomb had families like the Ewells. No economic fluctuation changed their status—people like the Ewells lived as guests of the county in prosperity as well as in the depths of a depression. No truant officers could keep their numerous offspring in school; no public health officer could free them from congenital defects, various worms, and the diseases indigenous to filthy surroundings.

\textit{Id.} at 193.
\textsuperscript{39} Mockingbird, \textit{supra} note 2, at 194.
word, which is used liberally in the novel, can be viewed from two different perspectives. White Maycomb viewed black Maycomb through the prism of racism and white supremacy that was designed to keep the races in their designated places. For example, when Boo Radley allegedly stabbed his father with a pair of scissors, “The sheriff hadn’t the heart to put him in jail alongside Negroes, so Boo was locked in the courthouse basement.” During the trial when Tom Robinson was on the witness stand, Dill noticed the prosecutor, Mr. Gilmore, was “talking so hateful to him.” Scout tried to downplay this treatment by claiming it was just Mr. Gilmore’s way of doing his job, but Dill was still displeased:

“Well, Mr. Finch didn’t act that way to Mayella and old man Ewell when he cross-examined them. The way that man called him ‘boy’ all the time and sneered at him, an’ looked at the jury every time he answered—”

“Well, Dill, after all he’s just a Negro.”

“I don’t care one speck. It ain’t right to do ‘em that way. Hasn’t anybody got any business talkin’ like that—it just makes me sick.”

This is the moral tension that Harper Lee presents as the challenge for the children as they try to come to terms with the social strata of Maycomb.

Atticus, who willingly and dutifully takes on a black client, sees blacks as vulnerable, as measured by his disgust of white men taking advantage of blacks. Atticus seems to hold that view because blacks are weak-minded or lacking in discerning intelligence. While Atticus obviously loves and respects Calpurnia and credits her with helping him raise his children, his sister does not recognize Calpurnia’s humanity but considers her an unnecessary servant whom she would like removed from the Finch household as soon as possible. She is appalled

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40 Id. at 85. Scout reports that she fought Cecil Jacobs when he taunted her by claiming Mr. Finch defended “niggers,” Atticus told her, “Don’t say nigger, Scout. That’s common.” Id. Describing the word as common divorces it from the negative connotation of the word as an ugly pejorative.

41 Id. at 12.

42 See id. at 225–27.

43 Id. at 227.

44 Mockingbird, supra note 2, at 252–53.

45 See id. at 253.

46 Id. at 155–56. Aunt Alexandra tried to convince Atticus to let Calpurnia go, but he quickly affirms her place in his family and her very important role:

Atticus’s voice was even: ‘Alexandra, Calpurnia’s not leaving this house until she wants to. You may think otherwise, but I couldn’t have got along without her all these years. She’s a faithful member of this family and you’ll simply have to accept things the way they are. Besides sister, I don’t want you working your
that the Finch children had attended the black church and that Scout wants to visit Calpurnia’s home.\textsuperscript{47} Moreover, the business of white folks should not be discussed in front of blacks because such topics would be re-discussed by “them” in their community.\textsuperscript{48} Atticus and the children’s family, friends, and neighbors accuse Atticus of being a “‘nigger lover’” and of “lawing for niggers,” a state of being that condemns him for violating the racial–social conventions.\textsuperscript{49} That convention is epitomized by Atticus’s condemnation of Mayella Ewell when he suggests it might be barely acceptable to give a chaste kiss to an old Negro, considered to be like an “Uncle,” but it was nearly criminal to give a full-on kiss to a “strong, young Negro” like Tom Robinson.\textsuperscript{50} Of course, the social convention that Atticus confronts directly as he attacks the testimony of Mayella Ewell, is that “‘all Negroes lie, that all Negroes are basically immoral beings, that all Negro men are not to be trusted around our women, an assumption one associates with minds of their caliber.’”\textsuperscript{51} From an economic perspective, the black community was consigned to do the hard labor that apparently whites, even poor ones, were too good to do. For example, as Miss Maudie was cleaning up her yard after her house burned down, Jem asked, “Why don’t you get a colored man?”\textsuperscript{52} Moreover, the text also suggested that blacks should be extremely grateful to take whatever pittance they received as wages.\textsuperscript{53} 

\begin{flushright}
head off for us—you’ve no reason to do that. We still need Cal as much as we ever did.’
\end{flushright}

\textit{Id.} at 156.

\textsuperscript{47} \textit{Id.} at 154–55.

\textsuperscript{48} \textit{Id.} at 178.

\textsuperscript{49} \textit{Mockingbird, supra} note 2, at 87, 94, 117. Atticus’s representation of Tom Robinson was criticized by family, friends, and neighbors such as Mrs. Dubose. See \textit{id.} at 85–86, 94–96, 118–19. The tension of Atticus’s representation of Tom Robinson is heightened within his family, and his children take the brunt of it as when Cousin Francis accosts Scout:

‘If Uncle Atticus lets you run around with stray dogs [meaning Dill] . . . that’s his business, like Grandma says, so it ain’t your fault. I guess it ain’t your fault if Uncle Atticus is a nigger-lover besides, but I’m here to tell you it certainly does mortify the rest of the family—’

‘Francis, what the hell do you mean?’

‘Just what I said. Grandma says it’s bad enough he lets you all run wild, but now he’s turned out a nigger-lover we’ll never be able to walk the streets of Maycomb again. He’s ruinin’ the family, that’s what he’s doin.’

\textit{Id.} at 94.

\textsuperscript{50} \textit{Id.} at 231–32.

\textsuperscript{51} \textit{Id.} at 233.

\textsuperscript{52} \textit{Id.} at 83.

\textsuperscript{53} See \textit{id.} at 265–66. The ladies of the missionary circle, meeting after the conclusion of the Robinson trial, complained that “the cooks and field hands are just dissatisfied, but
From the perspective of the black community, there was a deep-seated sense of dignity and purpose. This is evidenced by the black community creating their own church immediately after the abolition of slavery and naming it First Purchase Baptist Church. This designation was chosen because it was the first item the community purchased for itself after slavery had ended.\textsuperscript{54} The church also stood as a testament to the community’s ability to organize what is essentially an ongoing business that succeeded in spite of the many ways the community’s very existence was controlled by the white power structure of Maycomb. Recognizing the great financial need of the Robinson family, Reverend Sykes insisted that the church take up a collection for Robinson family.\textsuperscript{55} It was within the church that blacks overcame their inability to read by the practice of “linin’” the hymns.\textsuperscript{56} Also, as contrasted to the stereotype of the shiftless, lazy Negro held by the white community,\textsuperscript{57} in the community were people who worked hard to take care of their families. Mrs. Robinson walked miles each day to work, even when she was threatened by Bob Ewell.\textsuperscript{58} Others in the black neighborhood looked after her children while she worked. Tom Robinson demonstrated admirable compassion to Mayella, who seemed to they’re settling down now—they grumbled all next day after the trial.” \textit{Id.} at 265. Mrs. Merriweather suggested that her cook would have been let go if she kept being down in the mouth by stating, “I tell you if my Sophy’d kept it up another day I’d have let her go. It’s never entered that wool of hers that the only reason I keep her is because this depression’s on and she needs her dollar and a quarter every week she can get it.” \textit{Id.} at 265–67.

\textsuperscript{54} \textit{MOCKINGBIRD}, supra note 2, at 134. Harper Lee may have engaged in a little play on words by possibly alluding to biblical text. \textit{See Acts} 20:28 (King James) (“Take heed therefore unto yourselves, and to all the flock, over which the Holy Ghost hath made you overseers, to feed the church of God, which he hath purchased with his own blood.”); \textit{see also} 1 \text{Corinthians} 6:20 (King James). The notion of purchase of God is also in the hymn “Blessed Assurance” by Fanny J. Crosby. \textit{FANNY J. CROSBY, BLESSED ASSURANCE} (1873) (“Heir of salvation, purchase of God . . . .”). Lee is a fan of traditional church hymns as demonstrated in \textit{Go Set a Watchman}. \textit{See WATCHMAN, supra note} 3, at 92–94.

\textsuperscript{55} \textit{MOCKINGBIRD}, supra note 2, at 139. Reverend Sykes made sure the congregation reached that goal of support:

To our amazement, Reverend Sykes emptied the can onto the table and raked the coins into his hand. He straightened up and said, ‘This is not enough, we must have ten dollars.’ The congregation stirred. ‘You all know what it’s for—Helen can’t leave those children to work while Tom’s in jail. If everybody gives one more dime, we’ll have it—’ Reverend Sykes waved his hand and called to someone in the back of the church. ‘Alec, shut the doors. Nobody leaves here till we have ten dollars.’

\textit{Id.}

\textsuperscript{56} \textit{Id.} at 137–38, 141.

\textsuperscript{57} \textit{See WATCHMAN, supra note} 3, at 179.

\textsuperscript{58} \textit{MOCKINGBIRD, supra} note 2, at 285–87.
be all alone in the world.59

There are other more minor tribes that have a place in Maycomb and are identified by particular characteristics. Each one is devalued by the dominant tribe and appears to have a place only at the margins of the community. Mrs. Dubose could be said to represent three different tribes. First, she represents the challenge of age.60 It appears that she had no other family, but she was able to stay in her home with the assistance of a young black woman. Moreover, Atticus, in keeping with the best traditions of lawyers, assisted her in achieving her end-of-life goals, even non-legal ones. Second, it was alleged that Mrs. Dubose exercised her Second Amendment right to bear arms by customarily keeping a gun on her person. Braxton Underwood, the publisher, also made use of a gun by watching over Atticus as he confronted the Sarum bunch when they were intent on doing harm to Tom Robinson. The children received air rifles for Christmas one year, but were stunned to discover that at one time their father had been the best shot in the county, as he demonstrated by killing a rabid dog. The wise and safe use of these guns gives the novel its title. Third, Mrs. DuBose was addicted to pain killers due a previous health challenge.61 She was determined to leave this world free from addiction. In the tribe of the aged and infirmed, the values of self-determination and human dignity are most salient at the end of life’s journey.

There were also various religious tribes in Maycomb. The basic Baptist and Methodist churches were where the middle-class whites attended. Jem laments when Atticus will not play for the Methodists against the Baptists in a football game. When Aunt Alexandra moved in with Atticus, she quickly gained the reputation of a hostess in the Methodist Church Missionary Society.62 While they also handed out Christmas baskets to the poor of Maycomb, much of their focus was on foreign missionary work. There were foot-washing Baptists who condemned others with fundamentalist doctrine.63 There were outliers like

59 Id. at 224–25.
60 Id. at 122–23. Lee’s description of Mrs. Dubose captured the reality of aging that we generally do not see until we are faced with it directly, either through a loved one or for ourselves should we get to that stage of life.
61 Id. at 27. Scout is admonished for pointing her air rifle at Miss Maudie’s rear end. Id. at 104–5.
62 Id. at 146.
63 Miss Maudie had an apt description of the foot-washers doctrine: “Foot-washers believe anything that’s pleasure is a sin. Did you know some of ‘em came out of the woods one Saturday and passed by this place and told me me [sic] and my flowers were going to hell?” Id. at 49.
the Mennonites\textsuperscript{64} and apparently a few Jewish people.\textsuperscript{65}

Other outlier tribes include Dolphus Raymond, the apparent local drunk who was often found stumbling around drinking from a bottle in a paper sack. But his so-called drinking habit was just a ruse so that people would leave him alone.\textsuperscript{66} His life situation was that he was married to a black woman, which was certainly a social taboo and against the law. He figured that if people condemned him for being a drunk, they would overlook his marital status.\textsuperscript{67} Unfortunately, the children he had were not consigned to either the black or the white tribe, even though, as Jem declared, having “a drop of Negro blood, that makes you all black.”\textsuperscript{68} As mixed-race individuals, however, they were rejected by both tribes.\textsuperscript{69}

Further, throughout the novel there are references to the Confederacy and how The War Between the States continued to have resonance.\textsuperscript{70} The first American Finch ancestor was Simon Finch, who bought three slaves and built a substantial cotton operation, establishing the family homestead, Finch’s Landing.\textsuperscript{71} Except for the land itself, much of the family wealth was lost during the Civil War.\textsuperscript{72} One family member, Cousin Ike Finch, was an active participant in the war, and often regaled Atticus, Jem, and Scout with stories about the war.\textsuperscript{73} The Maycomb Tribune’s editor, Braxton Bragg Underwood, was named after a Confederate general.\textsuperscript{74} Throughout the novel one senses the intense pride of being Southern.\textsuperscript{75}

Finally, there is the girl tribe, or one might say the female gender

\begin{footnotes}
\footnotetext[64]{Mockingbird, supra note 2, at 181.}
\footnotetext[65]{Id. at 167–68.}
\footnotetext[66]{Id. at 228.}
\footnotetext[67]{Id. at 183–84.}
\footnotetext[68]{Id. at 185.}
\footnotetext[69]{Jem explained the tragic existence of mixed-race children who do not belong to a tribe: “They don’t belong anywhere. Colored folks won’t have ‘em because they’re half white; white folks won’t have ‘em ‘cause they’re colored, so they’re just in-betweens, don’t belong anywhere. But Mr. Dolphus, now, they say he’s shipped two of his up north. They don’t mind ‘em up north. Yonder’s one of ‘em.” Id. at 184.}
\footnotetext[70]{At the Halloween pageant, the hallways were full of adults wearing homemade Confederate caps. Mockingbird, supra note 2, at 296.}
\footnotetext[71]{Id. at 4.}
\footnotetext[72]{Id.}
\footnotetext[73]{Id. at 87.}
\footnotetext[74]{Id. at 178–79.}
\footnotetext[75]{Mockingbird, supra note 2, at 4. When talking about the difficult chances of winning the Robinson case, Atticus, comparing it to the Lost Cause, said, “It’s different this time. . . . This time we aren’t fighting Yankees, we’re fighting our friends. But remember this, no matter how bitter things get, they’re still our friends and this is still our home.” Id. at 87.}
\end{footnotes}
tribe. It is reflected in Jem’s constant taunts to Scout about how “sometimes you act so much like a girl it’s mortifyin.”76 Jem, always leading the children’s adventures, threatened to leave Scout out of the fun if she acted like a girl.77 Jem, as he is quickly entering manhood, observed the essence of their Aunt Alexander’s project with Scout: “She’s trying to make you a lady. Can’t you take up sewin’ or somethin’?”78 At the same time, it is also seen in Aunt Alexandra’s insistence that Scout act and dress like a girl.79 Under her aunt’s tutelage, Scout is trained to be a lady in terms of the proper role for females in a male-dominant society.80 The ever-observant Scout, watching Calpurnia in the kitchen, made a mental note, “and by watching her [she] began to think there was some skill involved in being a girl.”81

B. Watchman

In Watchman, Harper Lee courageously tackles the coming of the Civil Rights Movement in the 1950s. One must note that Watchman foreshadows the narrative of Mockingbird by inserting chapters discussing the childhoods of Jem and Scout, placed mostly after the events explored in Mockingbird. She references the United States Supreme Court’s decision ending school segregation and the integration efforts at The University of Alabama.82 While the tribal lines are discussed in Watchman,83 the principle focus is on the tensions between the white tribe and the black tribe and the impact the NAACP has had in the rapid push for equal rights.84 Throughout the work, the white tribe is fearful

76 Id. at 42.
77 Id. at 45.
78 Id. at 258.
79 Id. at 92.
80 Id. at 261–62. For Scout, watching the interactions of the women of the missionary circle as they discussed the impact the Robinson case had on the black community, as Mrs. Merriweather noted, “[n]ow far be it from me to say who, but some of ’em in this town thought they were doing the right thing a while back, but all they did was stir ’em up.” She was of course referring to stirring up the Negroes. MOCKINGBIRD, supra note 2, at 266.
81 Id. at 131–32.
82 WATCHMAN, supra note 3, at 175.
83 Id. at 29.
84 Id. at 166. Aunt Alexandra marks the source of disequilibrium between blacks and whites:

That NAACP’s come down here and filled ’em with poison till it runs out of their ears. It’s simply because we’ve got a strong sheriff that we haven’t had bad trouble in this county so far. You do realize what is going on. We’ve been good to ’em, we’ve bailed ’em out of jail and out of debt since the beginning of time, we made work for ’em when there was no work, we’ve encouraged ’em to better themselves, they’ve gotten civilized, but my dear—that veneer of civilization’s
that blacks are going to take over, and therefore whites must defend their tribal privileges as Uncle Jack Finch tells Jean Louise: “Baby, all over the South your father and men like your father are fighting a sort of rearguard, delaying action to preserve a certain kind of philosophy that’s almost gone down the drain.”

Jean Louise gets a dose of the clash between traditional social conventions and the push for full equality when her Aunt Alexandra hosts a coffee reception for her on her visit to Maycomb. All of the women of background are invited, and Jean Louise seems to have nothing in common with them. Alexandra is both fulfilling a social tradition by inviting the women to her home to welcome back Jean Louise and, not so subtly, encouraging her to return home by showing her what appropriate social friends from her tribe she would find there. Of course, all of the women show up in their finest dress and separate into subgroups for the purpose of gossiping. Aunt Alexandra bemoans the fact that the old social order between the tribes has changed in a way that penalizes the white tribe, as she observes, “Besides being shiftless, now they look at you sometimes with open insolence, and as far as depending on them goes, why that’s out.” Of grave concern at the coffee reception was the fear of interracial mixing, or the effort by some to “mongrelize the race.” Ironically, this fear was grounded in the idea that white men would be mixing with black women as shown by this colloquy:

“Jean Louise, when I said that I wasn’t referring to us.”

“Who were you talking about, then?”

“I was talking about the—you know, the trashy people. The men who keep Negro women and that kind of thing.”

Jean Louise smiled. “That’s odd. A hundred years ago the gentlemen had colored women, now the trash have them.”

“That was when they owned ’em, silly. No, the trash is what the NAACP’s after. They want to get the niggers married to that class and keep on until the whole social pattern’s done away with.”

Jean Louise also goes to visit Calpurnia after Zeebo’s son is arrested for manslaughter, causing further disillusionment. She notices a so thin that a bunch of uppity Yankee Negroes can shatter a hundred years’ progress in five.

Id. at 166.
85 Id. at 188.
86 Id. at 167–169.
87 WATCHMAN, supra note 3, at 166–68.
88 Id. at 166; see also id. at 166–67.
89 Id. at 176.
90 Id. at 177.
sharp change in how Calpurnia interacts with her. Not only has Calpurnia changed physically in her old age, but she acted as if a gulf has materialized between them, exclaiming: “What’s the matter? I’m your baby, have you forgotten me? Why are you shutting me out? What are you doing to me?” The heart of the matter apparently is that the racial tension between the tribes has built up a noxious dividing wall that symbolizes the new, evolving order where the old conventions of subservience have been washed away. Even the bonds of affection that once connected Calpurnia to the Finch family seem impossible to hold.

Jean Louise’s romantic interest in Watchman is Henry Clinton, who was a life-long friend and is now junior associate to Atticus. Henry wants to marry her, but she refuses in part because Henry is not her kind, meaning a member of her tribe. Henry is considered a part of the white trash tribe and thus is below a Finch no matter how successful he might become as a lawyer. Jean Louise cannot envision herself settling into the expectant role of a Maycomb housewife like the young women who attended the coffee held for her. Henry is following in Atticus’s footsteps as a lawyer and a member of a local group dedicated to preserving the world Lee crafts in Mockingbird, where each tribe had it designated place.

In Watchman, the tribal tension is further demonstrated when Atticus and Henry not only attend but also lead the meeting of the Citizens’ Council, a group committed to maintaining segregation between the white tribe and the black tribe. Jean Louise surreptitiously observed a Sunday afternoon meeting of the Citizens’ Council at which the guest speaker spewed the most vile, racist diatribe that she had ever heard. What was equally shocking was that it seemed that all of the

91 Id. at 159–60.
92 Watchman, supra note 3, at 159.
93 Id. at 158.
94 When Jean Louise visited Calpurnia to encourage her that Atticus had agreed to represent Calpurnia’s grandson, Jean Louise was taken aback by the chilling formality with which the two interacted: “Jean Louise stared open-mouthed at the old woman. Calpurnia was sitting in a haughty dignity that appeared on state occasions, and with it appeared erratic grammar. Had the earth stopped turning, had the trees frozen, had the sea given up its dead, Jean Louise would not have noticed.” Watchman, supra note 3, at 159.
95 Id. at 36–37.
96 Id. at 15.
97 Id. at 103.
98 Lee sums up the speaker’s remarks as follows:

[H]is main interest today was to uphold the Southern Way of Life and no niggers and no Supreme Court was going to tell him or anybody else what to do. . . . [A] race as hammerheaded as . . . essential inferiority . . . kinky woolly heads . . .
white men of Maycomb, both those of prominence and those of trash, were in attendance. Each was committed to the philosophy of “segregation today, segregation tomorrow, segregation forever” that formed the governmental frame of Governor George Wallace in 1960.

Atticus justifies his participation as one in which he is fighting the Supreme Court’s interference with the affairs of Alabama. Moreover, from Atticus’s perspective, contrary to agitation of northern influences in the guise of the NAACP, blacks were not ready for civil rights. He tells Scout that the reason he will represent Zeebo’s son in the manslaughter case was because he did not want their lawyers coming to Maycomb to push their civil rights agenda as they did in Abbottsville. He sums up his rationale as follows:

Honey, you do not seem to understand that the Negroes down here are still in their childhood as a people. You should know it, you’ve seen it all your life. They’ve made tremendous progress in adapting themselves to white ways, but they’re far from it yet. They were coming along fine, traveling at a rate they could be absorbed, more of ‘em voting than ever before. Then the NAACP stepped in.”

From this moral framework, Atticus argues for supremacy of the white tribe and the need for caution in introducing full citizenship to Negroes. For example, he is frightened of the possibility that Negroes with full voting rights would take over the government at a moment in time when they do not have capacity to handle such powerful responsibility.

For Jean Louise, this cuts against everything she learned growing
up in Atticus’s house. First, she had grown up around black people and was taught to treat all people with respect.\textsuperscript{105} She heard, apparently for the first time, someone in her family use the word “nigger”.\textsuperscript{106} Even if another person, even a black person, was not in the same social class as she was, she was still taught to not mistreat anyone. She reflected, “That is the way I was raised, by a black woman and a white man.”\textsuperscript{107} Second, Atticus had practiced law and insisted to his children that our country’s founding principle was true: “All men are created equal.”\textsuperscript{108} These two ideals framed her worldview\textsuperscript{109} and she could not reconcile it with the hatred spewed by the Citizens’ Council and by Atticus, Aunt Alexandra and Henry.

\textbf{C. Tribal Territories}

In Harper Lee’s novels the tribes are the sources of the tensions that structure the plots. It is within the tribe that the individuals form their basic identities and alliances. There is a clear hierarchy, and everyone must stay in their allotted spaces, both geographical and social. Each tribe has separate physical, symbolic space. The middle class white tribe lives mostly in town, possibly reflective of their founding heritage. The poor white tribe not only lives far out in the country, but also lives off of the land to the fullest extent possible. The trashy white tribe lives at the dump and the black tribe lives just beyond the dump, which feels like a no man’s land where no one else wants to live. These residential segregation patterns are still with us today and impact everything from investment to social services, education, health care, and economic opportunity. In so many ways, the current efforts at criminal justice reform consider the residential spaces: there is violent crime in the inner city or meth and prescription drugs in the rural places.

Tribal spaces also dictate opportunities for social advancement. In Old Sarum the residents scratch out a living by tenant farming, and the children may miss schooling because they have to help with the crops. In \textit{Watchman}, they have new opportunities as industries spring up in and around Maycomb in the 1940s and 50s. One notes that many of the young families have moved into new, modest income communities, which are no doubt financed by the Veteran’s Housing Authority. The established tribes must make room for these newcomers.

Finally, one should note the temporal aspect of Lee’s novels.

\textsuperscript{105} \textit{Id.} at 178–79.
\textsuperscript{106} \textit{Id.} at 178.
\textsuperscript{107} \textit{Watchman}, supra note 3, at 179
\textsuperscript{108} \textit{The Declaration of Independence} para. 2 (U.S. 1776).
\textsuperscript{109} \textit{Watchman}, supra note 3, at 177–78.
Mockingbird is set during the Depression and between the World Wars. The social and legal structures have been firmly established and, while there have been efforts to achieve equal rights, the full grassroots efforts have not been fully emerged. During both World Wars, members of the black tribe have served with valor in the armed services. Mrs. Eleanor Roosevelt has visited Alabama and taken a flight with the soon-to-be-famous Tuskegee Airman. During the Korean War, the armed services are integrated, and there is only one tribe in the military. Having fought for freedom around the world, the black tribe will now fight for freedom at home.

When individuals, or even a whole tribe, attempt to step out of their places, chaos ensues as the tribes struggle to adjust either to return the status quo or to accommodate a changing social order. In Mockingbird, a black man is falsely accused of a crime by a white woman and her father. Mayella demands protection in order to maintain the narrative of white-woman purity. It is the children who perceive the injustice in the resulting sacrifice of Tom Robinson as the various white tribes stick together. In Watchman, the black tribe and the white tribe struggle over the meaning of the Constitution. The Supreme Court has ordered school desegregation and the white tribe gathers to protect their social hierarchy under the guise of states’ rights. The black tribe, assisted by Northern interlopers, the NAACP, are beginning to demand full and equal rights with the other tribes. They seek to vote, serve on juries, and obtain the fruits of an education system that previously favored the white tribe.

THE HUMAN TRIBE

What inspires me about Watchman and Mockingbird is Lee’s drawing a map for us to get out of our tribal dilemmas. In Mockingbird, after Jem describes the various Maycomb tribes, Scout speaks in reference to her friend Walter Cunningham, with whom Aunt Alexandra refuses to let her play. They had been pondering the question of how folks get sorted into tribes. One mark is whether or not they could read (the Ewells could not) or how long they have been reading (the Cunninghams’s had only recently started learning to read). While her Aunt Alexander thinks Walter is trash, Scout has her own opinion about the intelligence of Walter Cunningham:

No, everybody’s gotta learn, nobody’s born knowin’. That Walter’s as smart as he can be, he just gets held back sometimes because he has to stay out and help his daddy. Nothin’s wrong with him. Naw, Jem, I think there’s just one kind of folks. Folks.

...
[Jem:] That’s what I thought, too. He said at last, when I was your age. If there’s just one kind of folks, why can’t they get along with each other? If they’re all alike, why do they go out of their way to despise each other? Scout, I think I’m beginning to understand something. I think I’m beginning to understand why Boo Radley’s stayed shut up in the house all this time . . . it’s because he wants to stay inside.110

Harper Lee’s theme then is that we are all alike, and it is only children who seem to still be able to ask that all important question about why we cannot all get along and not despise each other. In Atticus’s summation to the jury, he notes that Tom is human. We seem to forget this as we grow older, when our “instincts catch up to us.” In her argument with Atticus, Jean Louise posits that, even if they assume certain facts about Negroes, there is one ultimate fact that must be considered: “We’ve agreed that they’re backward, that they’re illiterate, that they’re dirty and comical and shiftless and no good, they’re infants and they’re stupid, some of them, but we haven’t agreed on one thing and we never will. You deny that they’re human.”111

Atticus, in defending his stand for segregation, asks Jean Louise, “Then let’s put this on a practical basis right now. Do you want Negroes by the carload in our schools and churches and theaters? Do you want them in our world?”112 Her response hits at the heart of the matter: “They’re people, aren’t they? We were quite willing to import them when they made money for us.”113

Jean Louise makes the case that even if blacks might not be as advanced as whites, they have the right to “the same opportunities anyone else has, they’re entitled to the same chance.”114 Moreover, she firmly believes that justice, as dispensed in the courts, ought to be a living concept—not merely something discussed in theory.115 She brings forward a lesson she learned in her childhood:

I heard a slogan and it stuck in my head. I heard “Equal rights for all; special privileges for none,” and to me it didn’t mean anything but what it said. It didn’t mean one card off the top of the stack for the white man and one off the bottom for the Negro.116

Harper Lee, with a focus on blacks as humans, could have been referencing the Declaration of Independence’s ideal that “All men are

110 MOCKINGBIRD, supra note 2, at 260 (internal quotations omitted).
111 WATCHMAN, supra note 3, at 251 (emphasis added).
112 Id. at 245.
113 Id. at 246.
114 Id.
115 Id. at 248.
116 Id. at 242.
created equal.”117 Hence, no matter one’s tribal affiliation, the ideal applies to all, and it is this fundamental truth that Jean Louise is standing on in her confrontation with Atticus and further reflects the lessons Lee is attempting to teach.

One such lesson comes from Atticus. He says that to understand a person, you have to sometimes get into their skin and walk around and see the world from their perspective.118 If this idea applied to black people, what would it be like to live in their skin? How would it feel to be perpetually disrespected, discounted, and denied basic human decency? How could you cure the problem of one tribe oppressing another tribe? Jean Louise has the following proposal:

I wonder what would happen if the South had a “Be Kind to the Niggers Week?” If just one week the South would show them some simple, impartial courtesy. I wonder what would happen. Do you think it’s give’em airs or the beginning of self-respect? Have you ever been snubbed, Atticus? Do you know how it feels? No, don’t tell me they’re children and don’t feel it: I was a child and felt it, so grown children must feel, too. A real good snub, Atticus, make you feel like you’re too nasty to associate with people. How they’re as good as they are now is a mystery to me, after hundred years of systematic denial that they’re human. I wonder what kind of miracle we could work with a week’s decency.119

This notion of offering common decency to all is reflective of the Biblical ideal: “Do unto others as you would have other do unto you.” If we step out of the boundaries of our respective tribes and see the world as other tribes might, we might recognize the common challenges, hopes, dreams, and realities that all people share. The essence of seeing someone else’s humanity is to recognize that person is human, with strengths and weaknesses, and with pride and prejudices. We are all flawed, as Jean Louise discovers about her father in Watchman. But if you walk around in another person’s skin for a moment, and see the humanity in that person, we will each find a genuine respect for each other. We might just get to a place that if we work together; we might all improve the quality of life in whichever tribal community we inhabit.

A second lesson at the heart of Watchman is that Jean Louise is basically colorblind. She sees the humanity in each member of the various tribes. Her Uncle Jack states it plainly:

“You’re color blind, Jean Louise,” he said. “You always have been, you always will be. The only differences you see between one human

117 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
118 MOCKINGBIRD, supra, note 2, at
119 WATCHMAN, supra note 3, at 252.
and another are differences in looks and intelligence and character and the like. You’ve never been prodded to look at people as a race, and now that race is the burning issue of the day, you’re still unable to think racially. You see only people.”

That is why she enjoyed going to Calpurnia’s church and wanted to visit her home. It is also why she can live in New York and not be phased in the least about moving to a diverse environment. Her one drawback is that she has in many ways acquired Maycomb’s usual disease by buying into the narrative that blacks are either backwards or have not yet progressed enough in acquiring the requisite background built on education, experience in participating in general society, and the ultimate blindness that comes with romantic love with a person who is different.

Colorblindness is more of a concept that permits one to see a neighbor on the street, no matter the tribe, and actually see that individual. Scout saw it clear when she just saw “folks.” While all of us have different and unique qualities, at the core we are human. As Terence said, “I am a man, I consider nothing that is human alien to me.”

The challenge for Jean Louise, and for all of us, is to maintain that perspective in a world of cyberbullying, tribal warfare, and jihadist terrorism. The compassion that is needed when considering whether to allow Syrian refuges into the state of Alabama must be animated by seeing them as human. If we build walls and say “you can’t come in,” then certainly it is incumbent that we work even harder to aid in the amelioration of the horrible situation in which they find themselves: a tribe without a safe space to live.

A CONTEMPORARY REFLECTION ON TRIBES

Tribes in Lee’s work serve as a metaphor for a society’s social structure and reflect a number of realities that have contemporary resonance. First, by Lee’s account, Maycomb’s social order is structured to maintain the dominant tribe’s power and subordination of the other tribes. Specifically, white supremacy is the operative value maintaining the economic, social, and political control over the black citizens. Stated another way, blacks are not even recognized as citizens at all.

120 Id. at 270.
121 Jean Louise proclaims to her Uncle Jack about how white supremacists use sex as a trope to bolster the argument for segregation: “But, Uncle Jack, I don’t especially want to run out and marry a Negro or something.” Id. at 270.
The Maycomb justice system seems designed to place blacks disproportionately in jail. For example, note the reluctance to place Boo Radley in jail because he would be the only white person in the jail.

Today, this is evident in our discourse on policing and the disparate treatment black citizens receive. At the heart of the Black Lives Matter movement is the fact that too many unarmed black men are being killed in encounters with the police force. Moreover, African American males, especially young ones, are disproportionately represented in the criminal justice system. Too many who are under the age of majority are charged as adults and placed in adult jails where they are subjected to physical and sexual abuse. Juveniles who are confined in the system may find themselves in solitary confinement for long periods of time facing psychological and emotional damage. Accordingly, there is a “tribe” that society must recognize is in need of attention.

Secondly, Lee’s focus throughout *Mockingbird* is children, poverty, and education. Poverty burdens the children of Maycomb as the Depression’s impact causes a variety of deprivations. Money is scarce and families struggle to put food on the table. Atticus informs his children that, even with his professional career, they too are poor, although not as poor as the folks in the country. Currently, around 27% of Alabama’s children live in poverty, with rates for African Americans and Hispanics at over 44%. Approximately 26% of Alabama’s children face food insecurity, defined as “a lack of access, at times, to enough food for an active, healthy life for all household members and limited or uncertain availability of nutritionally adequate foods.”

Education is an important value in the novel, but it is clear that Maycomb struggles to provide an adequate education. Moreover, these efforts apply only to the white community. Lee leaves out any mention of education in the black community. Calpurnia and her son are self-taught readers. Educational achievement is still a challenge for Alabama today. Only 38.3% of fourth graders in Alabama have demonstrated reading proficiency. That number increases to 47.9% for eighth graders. On the other hand, math proficiency for fourth graders was measured at 45.1% and decreases to 28.7% for eighth graders. On a positive note, graduation rates have increased over the past

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124 *Id.* at 59.
125 *Id.* at 28.
126 *Id.*.
127 *Id.*.
few years to about 86% in the 2013–2014 school year.\textsuperscript{128} What is clear is that early education is the critical key to success in school and to overcoming the achievement gap that persists as a result of poverty, as noted by Voices for Alabama’s Children:

Access to high-quality early learning opportunities can make the difference in whether a child is successful in K–12 education and beyond. Equipping children with tools they need to succeed socially, emotionally and academically will help diminish the effects of poverty. Children will be ready for school and ready to learn. They will be more likely to meet educational milestones (such as reading on grade level by the end of third grade), less likely to repeat grades and more likely to graduate.\textsuperscript{129}

This commitment to providing quality education is further reflected in the Alabama State Board of Education’s strategic initiative, called Plan 2020, with the goal of preparing Alabama’s students for college and career and life.\textsuperscript{130}

The children are impacted emotionally and psychologically by the events in the story. Jem, who is growing into adolescence, cries for the injustice done to Tom Robinson. The impact of the trial makes Dill physically ill. Dolphus Raymond comments on this phenomenon:

He jerked his head at Dill: “Things haven’t caught up with that one’s instincts yet. Let him get a little older and he won’t get sick and cry. Maybe things’ll strike him as being—not quite right, say, but he won’t cry, not when he gets a few more years on him.”\textsuperscript{131}

Scout is perplexed by this comment and wonders what Mr. Raymond means by crying. Raymond’s answer is profound: “Cry about the simple hell people give other people—without even thinking. Cry about the hell white people give colored folks, without even stopping to think that they’re people too.”\textsuperscript{132} This is the essence of tribalism at its worst: when we act without realizing we are treating members of other tribes in a manner that denies their humanity.

In our society today, we too often fail to notice the “simple hell” that some of our tribes experience. For example, there is a tribe of children who live in poverty or in areas of low-income who are often confronted with a social environment that produces limited opportunities for economic advancement and higher rates of crime, abuse, and violence. Witnessing such despairing circumstances has profound and

\textsuperscript{128} Id.
\textsuperscript{129} VOICES, supra note 116, at 25.
\textsuperscript{130} See generally, Plan 2020, ALABAMA STATE BOARD OF EDUCATION, (Aug. 4, 2016), www.alsde.edu/sec/rd/Plan%202020/Alabama%20plan%202020.pdf.
\textsuperscript{131} MOCKINGBIRD, supra note 2, at 229.
\textsuperscript{132} Id.
lasting consequences for children, as noted by Voices for Alabama’s Children:

Living in underserved neighborhoods can intensify opportunity gaps further isolating families from mainstream society, social networks and stable jobs. Such neighborhoods typically have limited public resources, economic investment and political power ultimately reducing the hope for positive change. As such communities often see an increased number of violent crimes, children are likely to suffer psychological problems . . . leading to trouble in school and increasing a child’s risk of dropping out of school.133

CONCLUSION

We who are lawyers tend towards leadership in our communities, for better or for worse. During the summer of 2015, as South Carolina debated whether to remove the Confederate flag from the state capitol grounds, the matter was decided in part by the speech of legislator Jenny Horne, who is also a lawyer and a direct descendent of Jefferson Davis. Her impassioned plea called her fellow lawmakers to rise to a higher calling in the memory of their fallen comrade, Rev. Clementa Pinckney, and to “do something meaningful such as take a symbol of hate off these grounds on Friday.” She demonstrated the love for her fellow humans in the spirit of Dr. Martin Luther King Jr.: 

Now let me suggest first that if we are to have peace on earth, our loyalties must become ecumenical rather than sectional. Our loyalties must transcend our race, our tribe, our class, and our nation; and this means we must develop a world perspective. No individual can live alone; no nation can live alone, and as long as we try, the more we are going to have war in this world. Now the judgment of God is upon us, and we must either learn to live together as brothers or we are all going to perish together as fools.134

When it comes to respecting the diverse tribes, perhaps another philosopher said it best. Educator and television producer Fred Rogers said at a commencement speech at Middlebury College in 2001: “I believe that appreciation is a holy thing that when we look for what’s best in a person we happen to be with at the moment, we’re doing what God does all the time. So in loving and appreciating our neighbor, we’re participating in something sacred.”135 When we interact with our clients, opposing counsel and their clients, with court personnel, and

133 VOICES, supra note 116, at 49.
135 Fred Rogers, Address at Middlebury College Commencement, (May 27 2001),
judges, and when we help solve the difficult problems of life, we are doing sacred work. Every participant deserves to be appreciated, especially when we have contrary views and values with them. Each one of them is a full member of the human tribe.

http://archive.org/details/rogers_speech_5_27_01.
THE MOCKINGBIRD’S BRIEF

MARY ELLEN MAATMAN

INTRODUCTION

Harper Lee studied law as an undergraduate at the University of Alabama, but dropped out and never finished her degree. Thus, the author of a book that has inspired many legal careers never actually practiced law. Instead, she published *To Kill a Mockingbird* (hereinafter “*Mockingbird*”) and then largely vanished from the public eye. She would later say that she never wrote anything else to avoid “the pressure and publicity” she experienced with *Mockingbird*, and asserted that “I have said what I wanted to say and I will not say it again.” The truth of both assertions is more complex than that, but this brief article will focus on just what it was Harper Lee wanted to say in *Mockingbird* and why she said it in the way that she did.

This analysis is possible due to the July 2015 publication of *Go Set A Watchman* (hereinafter “*Watchman*”). Perhaps *Watchman* should never have been published, but it is nevertheless invaluable as an aid to understanding *Mockingbird*. This understanding starts with the recognition that *Mockingbird* is not a prequel to *Watchman*. Thus, the Atticus of *Mockingbird* is not the Atticus of *Watchman*. Instead, *Watchman’s* Atticus is a different person altogether, though both were inspired by Lee’s real life father, Amasa Coleman Lee (known as A.C. Lee).

Once *Watchman* is understood as a draft that Lee substantially re-worked until it became *Mockingbird*, comparing the two books is deeply instructive. It is generally agreed that Harper Lee wrote a far

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1 Professor of Law, Delaware Law School of Widener University. B.A. in English Literature, Swarthmore College, 1981; J.D. University of Pennsylvania, 1985.


better book when she revised her Watchman text and transformed it into Mockingbird. This article concurs with that consensus, but compares the books to more deeply understand Lee’s purposes and achievements in creating Mockingbird. Specifically, I contend that Mockingbird can be understood as the “brief” written to make the case that Watchman stated: the massive resistance movement of the 1950’s was wrong. When considered as a kind of brief for the Watchman case, Mockingbird’s plot and substance suggest that Lee carefully considered her prospective readers and framed her Mockingbird text in terms that might positively influence her audience.

In fact, Lee’s book ultimately touched many readers, from the era of massive resistance and in the decades since. It is “a perennial best seller,” regarded as “a singular American literary masterpiece.” It “has never been out of print, with more than 40 million copies sold in at least 40 languages. Major polls have ranked it close behind the Bible as one of the most influential books ever written.” In a sense, the exclusive woman who never practiced law wrote one of the most influential “briefs” of the late 20th century.

Part I of this article examines the rhetorical situation Harper Lee confronted as she wrote Watchman and then transformed it into Mockingbird. This situation is defined by considering Harper Lee and her upbringing, her audience in the Deep South, and the need to speak to that audience as the White Citizens’ Council took hold in the region. Part II considers Watchman as Lee’s first attempt to respond to her rhetorical situation by examining her account of the Council movement’s purposes, methods, and rhetoric, and her morality-based counterargument to the movement. Parts III and IV will consider how Mockingbird works as “the Mockingbird’s brief,” with which Harper Lee seized the rhetorical situation with a fairness argument calculated to win over her audience. Finally, this article will conclude with closing thoughts on the effectiveness of the Mockingbird’s brief.

I. THE RHETORICAL SITUATION

In a 1963 interview, Harper Lee said she wrote Mockingbird “‘as a plea for something, a reminder to people at home.’” This statement

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4 This movement actually continued beyond the 1960s, but Lee was speaking to the times in which she wrote Watchman and Mockingbird, which was approximately 1955 or 1956 to 1959.

5 See Alter, supra note 5.


7 See CHARLES J. SHIELDS, MOCKINGBIRD: A PORTRAIT OF HARPER LEE 223 & 304 n.43
suggests that Harper Lee first created *Watchman* and then *Mockingbird* to address a particular rhetorical situation facing the South and the nation. A “rhetorical situation” is “‘the context in which speakers or writers create rhetorical discourse.'”\(^8\) A writer might respond to that context by “see[ing] a need to change reality and see[ing] that the change may be effected through rhetorical discourse.”\(^9\) Thus, “discourse” may be regarded as “rhetorical” if it “functions (or seeks to function) as a fitting response to a situation which needs and invites it.”\(^10\)

At first glance, a novel seems an unlikely rhetorical discourse mechanism, at least by the standards of theorists like the groundbreaking Lloyd Bitzer, who introduced modern rhetorical situation theory.\(^11\) Nonetheless, a novel can work as rhetorical discourse. As John Rodden suggests, stories can operate as rhetoric that is “more full-bodied” than discourse traditionally labeled as rhetoric, “and even impassioned.”\(^12\) Rodden argues that “the narration/argument distinction is a matter of emphasis, with a Henry James story (or any formalist narrative) closer to the narration pole and an essay/editorial closer to the argument pole.”\(^13\) Thus, a narrative work—such as a novel—might “argue a case.”\(^14\) Rodden further contends that even a work of fiction that does not “argue” by “advanc[ing] logical appeals” might function as a persuasive rhetorical device by inviting us to “enter a world that is animated by [particular] values.”\(^15\)

In this sense, I contend that Harper Lee intended both *Watchman* and *Mockingbird* to operate as persuasive rhetorical narratives. Despite Lee’s apparent assent to *Watchman*’s publication as a separate work, it seems most reasonable to regard *Watchman* as Lee’s first attempt to persuasively address the “rhetorical situation” presented by the Deep South’s massive resistance to the Supreme Court’s desegregation deci-
sions, with *Mockingbird* being her revised—and much improved—response to that rhetorical situation. If understanding the “rhetorical situation” that produces an object of rhetoric helps us to analyze and understand that object’s rhetoric, I conclude that understanding the rhetorical situation that produced *Watchman* and *Mockingbird* not only helps us to understand each work, but also reveals *Mockingbird* as the persuasive brief for the case that *Watchman* attempted to present. Looking at *Mockingbird* in this way, we can see the magnitude of Lee’s accomplishment in moving from *Watchman* to *Mockingbird*, and conclude that Lee was—in her way—a highly accomplished advocate. True, she wrote only one “brief,” but it has had an enduring impact.

**A. Harper Lee and Her Rhetorical Situation**

Consideration of the rhetorical situation poses an important starting point for understanding a work responding to that situation. Bitzer argues that “there are three constituents of any rhetorical situation: . . . exigence . . . audience . . . and the constraints which influence the rhetoric and can be brought to bear upon the audience.” By “exigence,” Bitzer meant some state of affairs comprising “an imperfection marked by urgency; . . . something waiting to be done, a thing which is other than it should be.” The “audience” in a rhetorical situation “consists only of those persons who are capable of being influenced by discourse and of being mediators of change”; in other words, a proper rhetorical situation will be one in which the writer/speaker can work upon the exigence that prompted her speech by influencing readers who can act upon the exigence. As for “constraints,” Bitzer speaks of “persons, events, objects, and relations which are parts of the situation because they have the power to constrain decision and action needed to modify the exigence.”

To understand why Harper Lee likely saw the Deep South’s massive resistance to the desegregation as a matter of “exigency,” I will briefly consider Harper Lee as the writer/speaker, her audience, and the exigence (and its constraints) that Lee faced to reach her audience.

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16 See Bitzer, *supra* note 12, at 3 (contending that “[r]hetorical works . . . obtain their character from the circumstances of the historic context in which they occur.”).
17 *Id.* at 6 (italics in original).
18 *Id.*
19 *Id.* at 8.
20 *Id.*
1. The Writer/Speaker: Harper Lee

Famously reclusive, Harper Lee never authorized a biography;\(^{21}\) she gave her last interviews in 1964.\(^{22}\) Nonetheless, Charles J. Shields wrote a well-regarded biography of Lee,\(^{23}\) and some clues to her character relevant to her rhetorical situation may be gleaned from Shields’ work and other sources, as well as from the milieu in which she came of age.

Like Scout in *Mockingbird*, Harper Lee was a child in the late 1920s and 1930s. The latter decade saw the Great Depression and the New Deal, which brought both great poverty and a glimmer of liberalism to Alabama. These two developments were related. Economic circumstances rendered “[m]any southerners . . . so desperate that they were ready to cast off the cultural folkways of centuries—at least temporarily—in the cataclysm that was the Great Depression.”\(^{24}\) A strain of progressive thought and action arose, with spokespersons like newspaperman Virginius Dabney, who “endorsed the right of workers to organize unions . . . [and] regularly and forcefully expressed his editorial disgust with lynching and the Klan, and . . . gave strong support to the anti-poll-tax and anti-lynching movements.”\(^{25}\) Along with Dabney, “the new progressives were calling on their homeland to abandon the myths of the Old South, to surrender false pride and complacency, and to begin the task of self-renewal.”\(^{26}\) By the 1940s, southern liberal Aubrey Williams “thought he saw a ‘bottom deep awakening . . . an unmistakable assertion of decency and a turning on people who live by exploiting hatred, religious bigotry, by trading in people’s prejudices and fears.'"\(^{27}\)

Perhaps the era’s relative progressivism flavored Lee’s perception of her father and her upbringing in small-town Monroeville, Alabama.

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\(^{26}\) Id. at 74.

\(^{27}\) FELDMAN, *supra* note 26, at 164.
A.C. Lee’s editorials in the Monroe Journal espoused “support for racial segregation, wistfulness for the vanquished Confederacy and a strict brand of conservatism.”28 At the same time, A.C. Lee’s views could be eclectic. He editorialized against a federal anti-lynching bill, but also “editorialized against lynchings,” and “sometimes ran positive news stories about Monroe County’s black community on the front page.”29

Such paradoxical thinking seems to have run through Monroeville’s business community. It seems highly likely that a man who supported segregation would equally oppose interracial common law marriage, yet A.C. Lee and many other Monroeville businessmen looked the other way when Ben Watts, a white man of some means, cohabited with Nazarine Parker, an African American woman.30 A local banker named Dees wrote Watts’ will in accordance with his wishes to leave his estate to Ms. Parker.31 Dees recalled that Watts told him:

“I want to leave what I have for this Negro woman that has been taking care of me all the time. You know how white people are about Negroes, and I want to be sure this thing is handled right because I want her to have what I’ve got . . . I want to see that she gets it, and I want to see that some white man sees that she does get it.”32

Dees was not alone in helping Watts. At Watts’ request, A.C. Lee examined the will Dees had prepared, and assured Watts that “it was quite sufficient to carry out his wishes.”33 Lee further assisted Watts by preparing a deed reserving a life estate to convey Watts’ land to Ms. Parker.34 When Watts’ family challenged probate of the estate, Lee calmly testified as to Watts’ sound mind and determination; for that matter, banker Dees testified likewise.35

Whatever the parental and community influences upon her, Lee was a nonconformist at heart. Shields describes her as a child “so un-

29 Id.
30 See Dees v. Metts, 17 So. 2d 137, 141 (Ala. 1944) (“[S]o far as the business men with whom he came in contact . . . are concerned, he was not ostracized, but continued to enjoy their confidence and continued to carry on business with them as usual.”).
31 Id. at 139.
32 Id. at 140–41.
33 Id. at 138.
34 Id. at 138–39.
35 Id.
conventional at every turn that she left her teachers and classmates feeling nonplussed.”36 As an adolescent she “ignored conventions that applied to most girls.”37 By the time she was in college, “[n]ot even the approach of a social event could force Nelle to conform.”38 Lee used “salty language,” smoked, did not care about her looks or clothing, and was “‘unpretentious.’”39 As Charles Shields put it in his accounting of her year at a women’s college: “Nelle Lee was different . . . in a manner that ignored convention, which could be interpreted as a kind of backhanded insult to everything these young ladies stood for.”40 The following year, Lee transferred to the University of Alabama; there, she initially fit in no better than she had the year before, but then found her niche with the student newspaper writers.41 “‘Her specialty was debunking, taking quick sharp jabs at the idols and mores of the time and place.’”42

During Lee’s college years, whatever liberalism existed in Alabama during the New Deal era sputtered towards a halt. World War II spurred the federal government’s creation of the Fair Employment Practices Commission (“FEPC”), which triggered a harsh backlash in the south in general and Alabama in particular.43 A.C. Lee, like most whites, opposed the FEPC.44 After President Roosevelt’s death, President Truman proposed instituting several civil rights reforms, including making the FEPC permanent.45 In 1948, the Deep South bolted from the Democratic Party and formed the Dixiecrat Party, complete with a pro-segregation platform explicitly designed to safeguard White Supremacy.46

Lee moved to New York City in 1949 with the express ambition of becoming a writer.47 She periodically visited Alabama, but otherwise worked in New York.48 Records indicate that Lee completed

36 See SHIELDS, supra note 9, at 35.
37 Id. at 61.
38 Id. at 76.
39 Id. at 76–77.
40 Id. at 77.
41 See SHIELDS, supra note 9, at 79, 87–88.
42 SHIELDS, supra note 9, at 89 (quoting John T. Hamner).
43 See FELDMAN, supra note 26, at 170-78; EGERTON, supra note 27, at 216–17.
44 See SHIELDS, supra note 9, at 122.
45 See EGERTON, supra note 27, at 410–13.
47 See SHIELDS, supra note 9, at 102–09, 128–29.
48 See id. at 109–11, 129.
Watchman in February 1957.49 She revised the manuscript and retitled it “Atticus,” completing that project by May 1957.50 In the end, Lee spent two more years reworking and transforming the material into the Mockingbird manuscript, ultimately completing it on November 10, 1959.51

2. The Audience

We cannot know Harper Lee’s state of mind or motives in conceiving, and writing, Watchman or Mockingbird. Nor can we know exactly what her beloved father’s views on race and civil rights were at the time she produced the Watchman draft and then transported its characters to the vastly different, finished work we know as Mockingbird. Nonetheless, Watchman has an unmistakably autobiographical tone, and is shot through with palpable anger directed both at that draft’s Atticus and the Citizens’ Council movement. Presumably, she saw her audience comprised of people like her father, and adherents to the Council movement.

a. Massive Resistance in Alabama

The Supreme Court’s 1954 decision in Brown v. Board of Education52 elicited outright, angry revolt in the Deep South. The reaction, known as “Massive Resistance,” spawned the White Citizens’ Councils, the rhetoric, and the ugliness Lee portrayed in Watchman.53 This movement lasted from 1954 well into the 1960s. Within that time span, the year preceding Lee’s 1957 delivery of the Watchman manuscript, is arguably the most relevant to understanding Harper Lee’s purpose in first writing the Watchman draft she would later be transformed into Mockingbird.54

Events in Alabama in 1956 must have loomed large in Lee’s mind as she worked on the manuscript that became Watchman and likely comprised the “rhetorical situation” she struggled to address. In 1956 alone, Alabama experienced the Montgomery bus boycott, violent

49 Tucker, supra note 5.
50 Id.
51 Id.
52 Brown v. Bd. of Educ. (Brown I), 347 U.S. 483, 494 (1954) (holding that separate but equal public schools for blacks and whites were unconstitutional).
white riots at the University of Alabama, an anti-NAACP litigation initiative, and the rapid rise of the White Citizens’ Council movement. All of these developments were chronicled in the major newspapers of the day, so Lee would have been aware of them no matter where she was. Moreover, her former college classmate, John Patterson, was now Alabama’s Attorney General and a central player in that year’s events; presumably, his name in the headlines would have caught Lee’s eye.

The Montgomery Bus Boycott began in December 1955. As Jo Ann Robinson—then-President of the Montgomery Women’s Political Council—later remembered: “[O]n December 5, 1955, fifty thousand people—the generally estimated black population [of Montgomery]—walked off public city buses in defiance of existing conditions which were demeaning, humiliating, and too intolerable to endure.” Although the Montgomery Bus Company planned to desegregate its buses based on concerns about the continued legality of segregated seating, the City sued the bus line to preserve the status quo.

Circuit Court Judge Walter B. Jones ruled in the City’s favor, holding bus segregation constitutional in accord with an 1899 Alabama Supreme Court ruling. Jones called that decision “wise and sound,” and dismissed the bus company’s concerns because there was “no straight out decision of the Supreme Court of the United States” concerning intra-state bus segregation. In fact, the Supreme Court had dismissed an appeal from a Fourth Circuit decision striking down bus segregation; Jones not only ignored this signal from the highest court in the land, but also criticized the Fourth Circuit’s undisturbed decision as “not well reasoned, . . . not sound law,” and refused to characterize it as even a “persuasive” authority.

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55 It is difficult to determine where Ms. Lee was during 1956. Shields’ biography does not specify her whereabouts, and her correspondence is not in the public domain. We know she began delivering her Watchman manuscript to her agent in January 1957. See Karla Nielson, Go Set a Watchman in the Papers of Harper Lee’s Literary Agents, OFF THE SHELF (July 14, 2015), https://blogs.cul.columbia.edu/rbml/2015/07/14/go-set-a-watchman-in-the-papers-of-harper-lees-literary-agents/.

56 See SHIELDS, supra note 9, at 103 (listing Patterson among her classmates in the undergraduate law program).


59 See id. at 235–36 (citing Bowie v. Birmingham Ry. & Elec. Co., 27 So. 1016 (Ala. 1899) (holding that segregation of a street car was reasonable)).

60 Id. at 237.

61 Id.
Jones defended his own ruling by falling back on the Tenth Amendment. He fiercely declared:

The Circuit Court of Montgomery County, Alabama, mindful of its obligation to support and maintain the United States Constitution, must declare that under the Tenth Amendment to the United States Constitution the power to regulate the intra-state carriage of passengers on buses in Alabama is a power reserved to the State of Alabama. . . . [T]his court will not be a party to filching the power from the State.62

In fact, Jones’ declaration was utterly inconsistent with Brown v. Board of Education, as the Fourth Circuit recognized in Subin v. Oldsmith, the decision that prompted the Montgomery Bus Company’s desired change in policy.63

Jones’ intransigence reflected the prevailing mood in white Alabama in 1956.64 In February 1956, mobs rioted in reaction to the federal court-ordered desegregation of the University of Alabama. Ms. Autherine Lucy wanted to study library science but there was “no [Alabama] institution, separate or not, in which blacks could obtain a library degree.”65 At first, Ms. Lucy endured the sight of burning crosses on campus and “hateful stares”; on her third day at the University, a mob of students and Tuscaloosa area residents followed her movements from class to class in a dean’s car “as though she was an animal pursued by a pack of hounds.”66 They threw eggs and stones at the car.67 The riot spread into Tuscaloosa, where the mob menaced African

62 Id. at 239.
64 This is not to say that all whites agreed with Jones or rejected the Court’s dismantlement of American apartheid, but progressive voices were in the minority at the time. As Neil McMillen explained, “the perils which many whites believed implicit in the Court’s school desegregation decision required nothing less than the closing of southern ranks and the suppression of intraregional dissent. In this repressive atmosphere the moderate was vilified and he who was found ‘soft’ on integration was adjudged treasonous.” NEIL R. MCMILLEN, THE CITIZENS’ COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64 235 (U. of Ill. Press, 1994).
65 Robert A. Caro, Autherine Lucy at the University of Alabama: How the Mob Won, 37 J. OF BLACKS IN HIGHER EDUC. 124, 124 (Autumn 2002). Nor were African Americans generally able to use public libraries; most were for whites only. See Patterson Toby Graham, Public Librarians and the Civil Rights Movement: Alabama, 1955-65, 71 LIBRARY Q. 1, 2 (Jan. 2001).
66 Caro, supra note 67, at 124 (internal quotation marks omitted).
67 Id.
Americans in cars by “block[ing] their paths, smash[ing] their windows, and climb[ing] on their roofs and stomp[ing] dents in them.”68 The University responded to the mob violence by suspending Ms. Lucy’s enrollment, citing her own safety.69 When a federal court ordered Ms. Lucy’s reinstatement, the University evaded the order by finding grounds to expel her.70

Reaction to Ms. Lucy’s thwarted attempt to pursue a librarian’s degree helped spawn a mass Citizens’ Council rally in Montgomery, Alabama. The New York Times reported that “[t]en thousand stamping, cheering Alabamans jammed the State Coliseum . . . for a mass denunciation of racial integration.”71 The principal speaker, Mississippi Senator James Eastland, exhorted the crowd, urging: “You are not going to permit the NAACP to take control over your state.”72 He vowed, “We have got to fight with every legal weapon and every step of the way.”73 Senator Eastland referred to the Brown v. Board of Education decision by declaring “[t]he people will not be subjected to judicial tyranny by a nine-man oligarchy that has departed from every precept of honor . . . Anglo-Saxon law is the custom of the people . . . . Corrupt decisions of a court do not change the law.”74

Many of the thousands attending the rally joined the Council movement, donated money, and took home Council propaganda. Literature circulated that day included a handbill styled as a “Declaration of Segregation.” It began: “When in the course of human events it becomes necessary to abolish the Negro race, proper methods should be used. Among these are guns, bows and arrows, sling shots and knives.”75 The document concluded with an exhortation to wise up “to these black devils.”76

68 Id.
69 Id.
70 Id.

73 Id. (internal quotation marks omitted).
74 See Phillips, supra note 73, at 1, 38.
76 See id. To be fair, the Citizens’ Council denied authorship of this document. See JOHN BARTLOW MARTIN, THE DEEP SOUTH SAYS “NEVER” 39–40 (1957).
b. The Alabama Citizens’ Council Movement

The Alabama Citizens’ Council movement first mushroomed out of Selma in late 1954. The February 1956 rally further stoked the movement, which spread steadily throughout 1956. The aftermath of the Autherine Lucy riots quashed any impetus for moderation still existing in 1956, and more Council chapters sprang up. By April 1956, Alabama Council organizer Sam Engelhardt claimed there were sixty-two Council chapters in thirty different Alabama counties, with membership approximately 65,000 strong statewide. By early 1957, when Lee delivered her Watchman manuscript to her agent, Council membership in the state was around 80,000 people. This turned out to be the zenith of Council membership in Alabama, but, as no one knew this at the time, the movement must have seemed a gathering juggernaut.

Alabama Council membership ranks included many “respectable” people. For example, at least two of the Central Alabama Council organizers were attorneys. Other members included state and local officials, so meetings were occasionally held at courthouses, giving the organization a government-sanctioned flavor. Speakers at such meetings included ministers and university officials.

David Halberstam’s October 1956 article about the Council movement provided a look at the growth of a Council chapter in Clifford, Alabama. The town was similar to Monroeville, albeit larger. Halberstam described it as “a town of about 15,000, located in the flatlands of southwestern Alabama. It had two main streets.” The town was “still a strictly stratified and predominantly church-going community,”

78 See id. at 274–75, 280.
81 See McMillen, supra note 66, at 57–58 n.45.
83 See McMillen, supra note 66, at 46–47.
84 Halberstam, supra note 84.
85 Id.
86 Id.
87 Id.
with a population “about equally divided between whites and blacks.”

Clifford formed its Council chapter in 1955 after a local lawyer touted the movement’s effectiveness and warned that African Americans wanted “intermarriage, and mixed social groups, white girls going off to dances with some big black buck and dancing to jungle music with him.” The lawyer knew some “big men in the Councils” and suggested inviting them to speak to the town’s whites and help them get organized. Halberstam noted that the membership drive yielded only 100 members, but “[a]ll the young lawyers in Clifford joined except one.” What the membership lacked in numbers it made up for in clout: “[i]ts word [went] virtually unchallenged in public.”

III. \textit{Watchman}: HARPER LEE’S FIRST RESPONSE TO MASSIVE RESISTANCE

Whether something like this also happened in or near Monroeville is unknown, but given the temper of the times it likely did. In any event, Harper Lee’s depiction of a local Council chapter in \textit{Watchman} is so accurate that it seems clear she was familiar with the movement. The depiction’s accuracy, and the quasi-autobiographical Jean Louise Finch’s visceral rejection of the movement depicted, leaves little doubt that \textit{Watchman} was meant to function as a persuasive response to the rhetorical situation posed by the spread of massive resistance and the rise of the Council movement. More specifically, Lee seems to have written \textit{Watchman} as a moral argument against the Citizens’ Council movement and its purposes, methods, and rhetoric.

\textbf{A. Watchman’s Accuracy: The Council Movement Captured}

\textit{Watchman}’s plot is simple: a young woman named Jean Louise Finch who lives in New York City visits her small Alabama hometown. She stays with her beloved father, Atticus Finch. He is a lawyer in the town, and his junior associate is Henry Clinton, who was Jean Louise’s childhood friend and now expects to marry Jean Louise. Atticus, a widower in his seventies, suffers from arthritis, so his sister Alexandra lives with him. His brother Jack, a scholarly eccentric, also lives in the town.

Jean Louise’s visit begins with a nostalgic homecoming, but the visit goes painfully awry when she discovers that her father—whom

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\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Halberstam, \textit{supra} note 84.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
she admired to the point of hero worship—is a leader in the town’s Citizens’ Council chapter, to which Henry also belongs. Jean Louise struggles to reconcile herself with her father, Henry, and her community, eventually confronting both Henry and her father. After a protracted, painful argument with her father, Jean Louise understands but does not accept his views, thereby claiming intellectual and emotional independence as well as a measure of peace with her father and hometown.

*Watchman* is an awkward, uneven work that arguably should never have been published, but it demonstrates a keen understanding of the Council movement and Alabama’s mood in 1956. Its reaction to this rhetorical situation is every bit as strong as Jean Louise’s: just as the novel encompasses a series of arguments amongst its characters, the novel itself is an argument with the South, and its author seems to both embrace and revile the region. The terms of Lee’s argument with the South are implied by the precision with which she depicts the Council movement and the vigor with which she rejects it.

1. The Council Movement’s Purposes in Fact and in Lee’s Fiction

   In *Watchman’s* second chapter, Jean Louise Finch arrives in Maycomb somehow unaware that the Council movement has reached her town. Her father, Atticus, carefully asks her what she has read in northern newspapers; her glib response admits only to noticing coverage of “the bus strikes and that Mississippi business.” Jean Louise comments on the magnitude of the failure to secure a conviction in the Emmett Till case, and her father’s disinterest in that topic is our first clue that the Atticus of *Watchman* is not the Atticus of *Mockingbird*, who, in contrast, would likely have remarked extensively on that tragic case. What the Atticus of *Watchman* is interested in learning about

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93 Evidence strongly suggests Lee wrote *Watchman* in 1956 and 1957. See Nielsen, *supra* note 57 (papers of Lee’s literary agents indicated that she delivered the *Watchman* manuscript in pieces between January 14, 1957, and February 27, 1957, with the manuscript thereafter edited and sold to Lippincott by October 17, 1957). This timeline accounts for *Watchman*’s detailed accuracy in its portrayal of the Citizens’ Council movement, references to the 1955 Emmett Till murder case, the 1956 Montgomery bus boycott, and the University of Alabama riots, together with the lack of any reference to the Little Rock Nine—a crisis that would have logically merited a reference in the book’s argument chapters, but that did not occur until September 1957. See Desegregation of Central High School, *The Encyclopedia of Ark. Hist. & Culture*, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=718 (last updated Mar. 30, 2016).

94 *See Harper Lee, Go Set a Watchman* 24 (2016) (hereinafter “*Watchman*”). Presumably Lee’s text is referring to the bus boycott and the Emmett Till murder case. The boycott was ongoing while Lee worked on *Watchman*, the Till case was tried in 1955.

95 For a helpful, detailed account of the case, see Gene Roberts & Hank Klibanoff, *The
is the NAACP’s activities; however, Jean Louise claims she does not “know anything about that bunch.”\textsuperscript{96} Her ignorance on this subject may be feigned, as she mischievously says she used NAACP stickers on Christmas cards she sent home, and asks if “Cousin Edgar [got] his.”\textsuperscript{97}

Atticus’ focus on the NAACP in Watchman, and Jean Louise’s prank, both point to the Council movement’s obsession with that organization. As James Rorty reported in 1959, the segregationist perception of the NAACP was that it was “a conspiracy of ‘bad nigras,’ abetted by a few dam-yankee whites, its object being to subvert and destroy the established social and political order of the South.”\textsuperscript{98} Segregationists subscribed to the theory that the NAACP “ha[d] allowed itself to become part and parcel of the Communist conspiracy to overthrow the democratic governments of this nation and its sovereign states.”\textsuperscript{99} This charge fit with segregationists’ assertion that the South’s African American population was content with second class status. David Halberstam quoted one as saying: “‘I know our Nigras don’t want this integration, it’s just some agitators.’”\textsuperscript{100}

Thus perceived as an invasive outside force, the NAACP was not only the object of Council vilification but the target of concerted legal action. Harper Lee’s old college classmate, John Patterson, was Alabama’s Attorney General while she worked on Watchman.\textsuperscript{101} In that capacity, he sued the NAACP, alleging that it was not qualified to do business in Alabama because it had not complied with Alabama law requiring certain corporate filings.\textsuperscript{102} He sought an injunction against the NAACP’s operation in the state, and discovery of the NAACP’s records, including its membership rolls.\textsuperscript{103} The suit was initially successful. Judge Walter B. Jones\textsuperscript{104} enjoined the Association’s operations

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\textsuperscript{96} \textit{Watchman}, supra note 94, at 24.
\textsuperscript{97} \textit{Id}.
\textsuperscript{98} James Rorty, \textit{The Embattled NAACP}, 19 \textit{Antioch Rev.} 379, 379 (1959).
\textsuperscript{99} \textit{Bartley}, supra note 73, at 185 (quoting a widely circulated speech by Georgia Attorney General Eugene Cook).
\textsuperscript{100} Halberstam, supra note 84.
\textsuperscript{102} \textit{Id}.
\textsuperscript{104} Jones was the judge who tried to thwart bus desegregation in Montgomery. \textit{See supra
and ordered production of its records.\textsuperscript{105} Council chapters “hailed” the injunction.\textsuperscript{106} When the Association failed to comply with the production order (because revealing members’ identities would put those persons at risk),\textsuperscript{107} Judge Jones fined the organization $100,000.\textsuperscript{108} His order dripped with anger and contempt for the organization.\textsuperscript{109}

\textit{Watchman’s} Atticus Finch is no less hostile to the NAACP. In fact, he tells Jean Louise that he joined the local Citizens’ Council for two reasons: the federal government, and the NAACP.\textsuperscript{110} Like John Patterson, whose brief in Alabama’s suit against the NAACP characterized its members as “forces of confusion,”\textsuperscript{111} this Atticus Finch sees the NAACP as an outside agitating force.\textsuperscript{112} Thus, he sees the Citizens’ Council not as an evil but as a necessary “defense.”\textsuperscript{113}

\textit{Watchman’s} Atticus thus follows the Council line on local control and exclusion of outsiders, especially the NAACP. When Calpurnia’s grandson runs afoul of the law by accidentally killing a local drunk in a driving accident, \textit{Watchman’s} Atticus volunteers to represent him so as to keep the case a local matter out of the NAACP’s hands.\textsuperscript{114} He views “the NAACP-paid lawyers” as “buzzards” “using opportunistic legal “trick[s].”\textsuperscript{115} This is so even though he is well-aware that local

\begin{thebibliography}{10}
\bibitem{105} \textsuperscript{105}Patterson, 357 U.S. at 452–3; William H. McDonald, \textit{Alabama Court Enjoins NAACP Units From Activity}, SOUTHERN SCH. NEWS, July 1956, at 1, 10, http://dlg.galileo.usg.edu/gua_ssn/pdfs/ssnvol3no1.pdf.
\bibitem{106} \textsuperscript{106}See id. at 10.
\bibitem{107} \textsuperscript{107}See Patterson, 357 U.S. at 460–63.
\bibitem{109} \textsuperscript{109}See McDonald, supra note 107 at 4.
\bibitem{110} \textsuperscript{110}\textit{Watchman}, supra note 94, at 238.
\bibitem{111} \textsuperscript{111}See McDonald, supra note 107 at 10.
\bibitem{112} \textsuperscript{112}See \textit{Watchman}, supra note 94, at 245, 247.
\bibitem{113} \textsuperscript{113}See id. at 250–51.
\bibitem{114} \textsuperscript{114}Id. at 148–49. Lee’s novel mimics actual litigation tactics used in 1956, when white lawyer Chauncey Sparks represented African Americans seeking to get their names off of voter rolls (doubtless because of Council pressure). Sparks successfully persuaded Alabama Circuit Court Judge George C. Wallace that it would be better to let his clients intervene in the case before Judge Wallace rather than let the matter make its way to the federal courts by way of NAACP intervention. See William H. McDonald, \textit{Alabama Parties Blame Each Other on Schools}, SOUTHERN SCH. NEWS, Nov. 1956, at 10, http://dlg.galileo.usg.edu/gua_ssn/pdfs/ssnvol3no5.pdf.
\bibitem{115} \textsuperscript{115}\textit{Watchman}, supra note 94, at 149.
\end{thebibliography}
African Americans need legal advocates, having once represented an African American accused of rape because the client would otherwise have only a “half-hearted, court-appointed defense.”

2. The Council Movement’s Methods and Rhetoric in Fact and in Lee’s Fiction

_Watchman_ gives us only one look at official Council activity, yet it is a strikingly accurate one. Jean Louise tracks down her father and Henry at a Council meeting at the local courthouse. From the “[c]olored balcony, . . . where she and her brother had sat when they went to court to watch their father,” she watched and listened to local politicians and Council speakers. The setting and participants typified Council meetings. _Watchman_’s meeting is filled with “[m]en of substance and character, responsible men, good men. Men of all varieties and reputations . . . it seemed that the only man in the county not present was Uncle Jack.” Such ubiquitous membership comports with David Halberstam’s finding that the Council’s activity was particularly strong at local levels in smaller communities such as Maycomb.

Recruitment, indoctrination, and retention of members like Henry Clinton was a major focal point of Council activity. In 1957, Routh and Anthony reported that Council organizers used “a substantial amount of their time and effort in recruiting members and indoctrinating them through speakers and publications which stress and repeat the subversive nature of prointegrationists.” In fact, the Councils exerted strong pressures on southern whites to conform to the Councils’
stance. Thus, the Council in Selma, Alabama “‘drew a tight net of conformity’ around white Selma, directing social and economic retaliation on whites who displayed racial views inconsistent with the norm.”\footnote{See Graham, supra note 67, at 15. In 1956, Virginia Foster Durr wrote of Council recruiters in Montgomery, Alabama who “work[ed] the blocks and buildings and ask[ed] each one to join and if the [didn’t]—Well, there is no doubt you get on a black list.” Virginia Foster Durr, Freedom Writer 109 (2003).}

Numan Bartley characterized Councils as something like “vigilante committees” that “ferret[ed] out and crush[ed] deviant behavior.”\footnote{Bartley, supra note 73, at 195} The key to successful massive resistance was unity and conformity. Herman Talmadge therefore exhorted an Alabama Council group: “‘[a]nyone who sells the South down the river, don’t let him eat at your table, don’t let him trade at your filling station and don’t let him trade at your store.’”\footnote{Id. at 193.} While the Council is most infamous for its economic boycotts of African Americans, local chapters also “dealt summarily with white citizens whose pronouncements or actions dissented from the prevailing view of what constituted racial orthodoxy.”\footnote{Id. at 193.} In sum, the Council movement exerted “constant pressure” on moderates to conform to the segregationist party line.\footnote{Id. at 193.} Ralph McGill put it more darkly, saying that “‘public opinion itself . . . became a sort of mob which terrorized or silenced any who might dare oppose it.’”\footnote{Id. at 195.}

This tactical use of social pressure surfaces in Watchman. Jean Louise’s beau, Henry, excuses his involvement with the Council by citing the necessity to “conform to certain demands of the community.”\footnote{Watchman, supra note 94, at 230.} True, Henry uses this as an excuse for a complicity that is hardly reluctant—he is one of the Maycomb Council’s “‘staunchest members,’”\footnote{Id. at 103.} gladly plots with Atticus to keep the NAACP at bay,\footnote{Id. at 148-49.} and considers African Americans to be “‘assert[ing] themselves’” and a “‘public menace’” merely by buying and driving cars.\footnote{Id. at 80.} Although Henry lamely trivializes his Council membership as akin to joining the “Kiwanis Club,”\footnote{Id. at 230-31.} the comparison is double-edged. Henry is no mere


}\footnote{Bartley, supra note 73, at 195 (quoting Ralph McGill).}

}\footnote{Watchman, supra note 94, at 230.}

}\footnote{Id. at 103.}

}\footnote{Id. at 148-49.}

}\footnote{Id. at 80.}

}\footnote{Id. at 230-31.}
Kiwanis member; to the contrary, he is Maycomb’s Kiwanis “Man of the Year.”

Furthermore, the comparison echoed reality. By their own leaderships’ account, Councils were largely organized “‘through the service clubs. [Leaders] would go and make a talk to Rotary or Kiwanis or Civitans or Exchange or Lions. . . . Invariably the response was favorable.’”

Segregationists and the Councils touted racial orthodoxy with extensive propaganda. *Watchman* realistically depicts these efforts. When Jean Louise discovers a Council pamphlet in her father’s house, she finds that it emphasizes whites’ supposed biological superiority over African Americans. In fact, “scientific racism” was a favorite segregationist touchstone. The Councils even prepared a handbook for white schoolchildren enumerating supposed biological differences between whites and blacks; for adults, they distributed materials with such titles as “Racial Facts.”

When Jean Louise eavesdrops on a Council meeting, the guest speaker’s key talking points similarly focus on using supposed racial differences to justify segregation. Phrases like “Southern Way of Life,” “‘essential inferiority,’” “‘mongrelize,” “Black Monday,” and “God made the races” echo actual Council rhetoric in the late 1950s. The speaker at *Watchman*’s meeting, Grady O’Hanlon, addressed the Maycomb Council as part of a systematic program; Atticus says “[h]e goes about addressing citizens’ councils all over the state.”

Their messages centered on the themes depicted in *Watchman*, and their collective purpose was to generate an “informational program to counter NAACP activities” by “‘unbrainwash[ing] the people who believe that integration is right.’”

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133 *Id.* at 33.


135 See *Bartley*, supra note 73, at 184-85; Routh & Anthony, supra note 81, at 52-53.

136 See *McMillen*, supra note 66, at 162-63.

137 *Watchman*, supra note 94, at 107-08.

138 *Id.* at 108; see, e.g., *Bartley*, supra note 73, at 184 (propaganda “trumpeted the inherent supremacy of white men, reiterating the dangers of biological race mixing and offering racial interpretations of history”); *McMillen*, supra note 66, at 162-63 (discussing the substance of Judge Tom P. Brady’s *Black Monday*, which was “widely regarded as the most systematic expression of Council thought.”).

139 See *Watchman*, supra note 94, at 250.


141 See *Bartley*, supra note 73, at 171.
Although she probably saw Council materials in Alabama, Harper Lee did not have to resort to actual Council materials to see such arguments. She could just as easily read them in *The Alabama Lawyer*, which was delivered to all practicing lawyers in Alabama. The journal featured six pro-segregation articles in 1956 alone.  

On any visit to Monroeville that year, Lee could have seen these articles in her father’s office, or, perhaps, in his home. A typical article, reprinting a speech by Dr. C.K. Brown of Davidson College to students at the college, trumpeted the claim that “almost all of recorded history” is “the white man[’s].”  

Brown crowed over “[t]he intellectual power of the Greeks, the organizational skill of the Romans, the spiritual insight of the Hebrews, the music of the Germans, the art of the Italians, [and] the Anglo-Saxon genius for self-government.”  

Earlier in the same speech, Brown claimed that African Americans are not real Americans. He argued: “The Pilgrim fathers can never be his fathers, the signers of the Declaration can never be his ancestors. Whether he attends mixed schools or separate schools, it will be another’s culture that he is striving to appropriate.”  

B. Three Arguments: Watchman’s Response to the Rhetorical Situation

*Watchman* comprises an angry, even confrontational, response to Alabama’s rhetorical situation in 1956. The novel’s realistic depiction of the Citizens’ Council movement, and its culmination in a series of arguments about that movement, very likely were meant as a pointed response to the situation. In this response, Lee emphasized moral arguments rejecting the movement’s purposes, methods, and rhetoric.  

*Watchman*’s latter chapters are deliberately confrontational: approximately ninety-one of the novel’s 278 pages consist largely of argumentative dialogue. Jean Louise argues first with her Uncle Jack, then with Henry, and finally with Atticus. Lee’s decision to turn her
draft into an extended argument is one reason the novel is flawed; as one critic puts it, there is too much of the author’s intrusive presence in the book. It is nonetheless instructive to look at *Watchman*’s arguments because doing so helps us discover why its arguments were inadequate. Once we see the deficiencies of *Watchman*’s arguments, we can better understand why Lee transformed it into *Mockingbird*.

1. *Watchman*’s Moral Arguments

The three arguments in *Watchman* explore three different facets of thinking among southern whites when Lee wrote the novel. Jean Louise’s first argument with her Uncle Jack focuses on the worries of older southerners who acknowledged that the South was changing, and needed to do so, even as they wistfully remembered aspects of life in the pre-New Deal era. Her next argument with Henry focuses on the social pressures the Council movement created and used. Finally, the argument between Atticus and Jean Louise grapples with a respectable Council movement leader’s viewpoint. Following that argument, Lee attempts to tie ends together and fashion the manuscript into something like a coming of age story with Jean Louise’s truce with Henry and her father, which her Uncle Jack facilitates.

The most important of the three arguments is the last one. Jean Louise’s contest with her father comprises Lee’s most sustained attempt in *Watchman* to engage directly with the rhetorical situation the Council movement created. The Atticus of *Watchman* spouts standard White Citizens’ Council rhetoric and ideas in a chillingly calm—even affable—manner. Jean Louise responds by attempting to articulate a moral argument against the Council movement and its tenets.

The Atticus of *Watchman* is a virtual mouthpiece for the Councils’ views and rhetorical strategies. As the dialogue between Atticus and Jean Louise advances, they first seem to agree on ideas about separation of powers and a sense of judicial overreach in the Supreme Court’s 1954 *Brown v. Board of Education* decision. Then, Atticus vilifies the NAACP, blaming it as an outside, agitating force.

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148 See *Watchman*, supra note 94, at 188–201.
149 See id. at 227–35.
150 See id. at 236–53.
151 See id. at 276–78.
152 See id. at 239–41.
153 See *Watchman*, supra note 94, at 238, 245, 247. Discussing the NAACP, Atticus asks
Jean Louise seizes this moment to confront her father’s “moral double-dealing” and assert that “the time has come when we’ve got to do right.” She lets loose her pent-up rage with an argument about the South’s failings towards its African American population:

[T]he NAACP hasn’t done half of what I’ve seen in the past two days. It’s us . . . Has anybody, in all the wrangling and high words over states’ rights and what kind of government we should have, thought about helping the Negroes? We missed the boat, Atticus . . . I think we deserve everything we’ve gotten from the NAACP and more.

Atticus remonstrates, mouthing ugly but standard Council fare concerning racial inferiority and the threat of “another Reconstruction” if African Americans obtained the franchise. Unpersuaded, Jean Louise lashes out at him as “a coward as well as a snob and a tyrant.” She then “sneer[s]” at her father and exclaims, “I’ll never forgive you for what you did to me. You cheated me.” Although her father once taught her the moral values she holds dear, Jean Louise now believes he is “using frightful means to justify ends that [he] think[s] are for the

whether you can “blame the South for resenting being told what to do about its own people by people who have no idea of its daily problems?” Id. at 247.

154 Id. at 242.
155 Id. at 241. This is Watchman’s self-consciously named “Childe Roland to the dark tower came” moment. Id. (alteration in original). The reference is to a Robert Browning poem Uncle Jack quoted in his earlier argument with Jean Louise. See id. at 201. The poem has many interpretations, but can be regarded at least as an allusion to the aging Atticus’ physical and metaphorical death as Jean Louise’s hero and role model, along with her concomitant independence and coming of age. See, e.g., W. Craig Turner, Browning, “Childe Roland,” and the Whole Poet, 4 S. CENT. REV. 40, 41 (1987) (illustrating the father and child relationship within the poem).

156 Watchman, supra note 94, at 245.
157 Id. at 246. This line of thought predated the Council movement and was often reiterated after the Supreme Court struck down the White Primary system. See Charles Wallace Collins, Whither Solid South?: A Study in Politics and Race Relations 84–87 (1947) (suggesting various social harms that would result from giving African Americans voting rights). In October 1956, the Council movement’s official publication, The Citizens’ Council, repeated Collins’ fears of political and social “erosion” in the wake of African American enfranchisement. See And We Quote, Citizens’ Council, Oct. 1956, at 2 (quoting Collins, Whither Solid South? (1947)), http://www.citizenscouncils.com/index.php?option=com_content&view=newpaper&file=5-Oct56-Dec56.swf. Lee may have been recalling rhetoric surrounding the 1946 debate over Alabama’s Boswell Amendment designed to sustain African American disfranchisement. In that debate, Judge Horace Wilkinson argued that “Negro voting will menace our political structure.” Horace C. Wilkinson, Argument for Adoption of Boswell Amendment, 7 ALA. LAW. 375, 375 (1946). Wilkinson’s assertion rested upon a crudely racist argument. See id. at 379. Lee had opposed the Amendment by writing a play satirizing figures like Wilkinson. See Shields, supra note 9, at 94–95.

158 Watchman, supra note 94, at 247.
159 Id. at 248.
good of the most people.”¹⁶⁰

In a stab that presages the internet age’s “Godwin’s Law,”¹⁶¹ she compares her father to Hitler, saying:

You’re no damn better. You just try to kill their souls instead of their bodies. You just try to tell ’em, ‘Look, be good. Behave yourselves. If you’re good and mind us, you can get a lot out of life, but if you don’t mind us, we will give you nothing and take away what we’ve already given you.”¹⁶²

The invocation of Hitler makes clear that Lee’s Watchman argument is an appeal to moral principles. She is especially vehement about the hypocrisy apparent in the gulf between the moral principles her father transmitted to her and the principles by which he actually lives. She tells him:

Atticus . . . you better go warn your younger friends that if they want to preserve Our Way of Life, it begins at home . . . Tell ’em that, and use your blind, immoral, misguided, nigger-lovin’ daughter as your example . . . Point me out as your mistake . . . Everything that was Gospel to her she got at home from her father.¹⁶³

In a similar vein, she plaintively asks, “[w]hy didn’t you tell me the difference between justice and justice, and right and right?”¹⁶⁴ The thrust of Jean Louise’s complaint is not lost on Atticus, who remarks in response: “You seem to think I’m involved in something positively evil.”¹⁶⁵ Moments later, Jean Louise confirms this impression by declaring that she “despise[s]” Atticus “and everything [he] stand[s] for.”¹⁶⁶

This sweeping indictment reflects Watchman’s overall angry tone, which is especially apparent in chapters sixteen and seventeen of the nineteen chapter text. In these two chapters, Jean Louise is most argumentative. With Henry, Jean Louise “blaze[s],” bangs a sugar bowl

¹⁶⁰ Id. at 251.
¹⁶¹ “[G]odwin’s Law states that as an online argument grows longer and more heated, it becomes increasingly likely that somebody will bring up Adolf Hitler or the Nazis. When such an event occurs, the person guilty of invoking Godwin’s Law has effectively forfeited [sic] the argument.” Godwin’s Law, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=Godwin’s%20Law.
¹⁶² WATCHMAN, supra note 94, at 252. This is actually a concise, yet accurate summary of segregationist tactics. In particular, the Council movement used economic warfare to ruin African Americans who had the temerity to seek voting rights or desegregation. See Halberstam, supra note 84 (“But the main and most effective weapon of the WCC has been economic pressure.”).
¹⁶³ WATCHMAN, supra note 94, at 248.
¹⁶⁴ Id. at 249.
¹⁶⁵ Id. at 250.
¹⁶⁶ Id. at 253 (alteration in original).
down on a table in a drugstore coffee shop, and repeatedly interrupts Henry with scathing words.\(^\text{167}\) She marches out of the drugstore, belittles Henry, and curses at him.\(^\text{168}\) Her argument with Atticus remains respectful to a point (he is, after all, her father), but eventually turns overtly angry. She “sneer[s],” becomes sarcastic, and launches a “wave of invective.”\(^\text{169}\) She uses a voice “heavy with sarcasm”\(^\text{170}\) and finishes their confrontation by calling her father a “son of a bitch.”\(^\text{171}\)

2. The Inadequacy of Watchman’s Moral Argument

Just as Lee’s editors felt Watchman needed reworking if it was to be a publishable novel, Lee’s text also needed reworking if it was to effectively address the South’s rhetorical situation.\(^\text{172}\) Apart from the stylistic shortcomings of a text’s two climactic chapters consisting solely of dialog rather than action, the substance of the dialogue is inadequate for its purpose. The weakness of Watchman’s approach is apparent in the invective Lee so heavily used; more importantly, the terms of her argument—however much she sincerely felt them—were unlikely to succeed.

Watchman’s moral arguments stand on the right side of history, but had little chance of swaying the rhetorical situation when Lee wrote them. The Atticus of Watchman, like his real-life Council contemporaries, was unmoved by moral arguments. Such arguments lacked power because segregationists saw themselves standing on moral high ground, with their opponents articulating what segregationists saw as dangerous and immoral arguments. As Watchman’s Atticus Finch implies in his argument with Jean Louise, Council members and like-minded Southerners regarded segregation as a positive good.\(^\text{173}\) This conclusion stemmed from their unshakeable belief in African American inferiority, which they saw as a complete justification for White Supremacy.\(^\text{174}\)

For segregationists, the concept of human equality was a “Marxist
trick . . . nowhere to be found in our history except as a perversion, repudiated in the Constitution itself.”175 Preachers who expounded on the brotherhood of man were “brain washed,” with ideas “far gone on the road to communism.”176 Thus, segregationists were entirely comfortable seeing their position as a moral one. For example, a segregationist lawyer argued in the pages of Alabama’s bar journal: “If all men are equal and are brothers why do we have a Heaven and a Hell? Those Kingdoms are monuments of God’s truth eternal, that all men are not equal and that there is some sort of segregation in the life everlasting.”177 In this vein of thought, “[e]quality of love stultifies every manly passion, destroys every family altar and mongrelizes the races of men . . . . Equality may be imposed only in a despotism.”178 In short, integration—not segregation—was “un-Christian.”179

At Watchman’s writing, such thinking was mainstream Council doctrine. Neil R. McMillen reported that “prosegregation gatherings frequently exhibited all of the religiosity of old-fashioned revival meetings.”180 McMillen added that “virtually every Council had its chaplain and most meetings [began] with a prayer for God’s blessings.”181 Clergymen were active in the Council movement;182 thus, a 1956 Mississippi Citizens’ Council “suggested list of capable speakers” included the names of three ministers and one “Methodist lay leader” along with Council luminaries such as Judge Tom P. Brady, William J. Simmons, and John Bell Williams.183 Council propaganda issued while Harper Lee worked on Watchman argued that segregation was biblically justified; “the great bulk of this propaganda had but a single theme: ‘segregation—God’s own plan for the races.’”184 Indeed, one of the movement’s founders declared at a 1955 rally in New Orleans that “‘segregation is a holy thing.’”185

175 R. Carter Pittman, All Men Are Not Equal, 17 ALA. LAW. 252, 254 (1956). Mr. Pittman was a Georgia lawyer. Id. at 252 n.1 (providing author’s credits).
176 Id. at 262.
177 Id. (italics in the original).
178 Id. at 263.
179 See HARRIS, supra note 79, at 276 (1978).
180 MCMILLEN, supra note 66, at 173–74 (going on to quote invocations given at a 1958 Council rally in Jacksonville Mississippi). In this vein, an Alabama Baptist minister “who had twice served as state president of Alabama’s more than 600,000 Baptists,” gave a speech entitled “‘Why Integration is Un-Christian.’” Id. at 174.
181 Id.
182 Id. at 174–75.
184 MCMILLEN, supra note 66, at 175 & n.48.
185 Id. at 177.
Despite Jean Louise’s argument that the time had come for the South to loosen its grip on its “Way of Life,” segregationists believed they were on the right side of history. Watchman’s portrayal of Council rhetoric and methods therefore rings true once again when Atticus condescendingly lectures Jean Louise on the Jeffersonian underpinnings of his position. In fact, segregationists often invoked history and Jeffersonian principles as a “respectable way of resisting the Brown ruling.” Herman Talmadge’s 1955 tract, You and Segregation, cited Jefferson to justify defiance of the Supreme Court. “That they could enlist the writings of a revered American hero was all the justification segregationists needed. Through the simple act of lifting and applying Jefferson’s anti-judiciary words, segregationists . . . powerfully linked the founding father to massive resistance.” Jefferson was even put to work in Council-produced propaganda materials for white schoolchildren, issued in 1957. Similar talking points mined from Jefferson and other historical figures were included in “welcome” materials provided to new Council members.

IV. THE MOCKINGBIRD’S THEORY OF THE CASE

When lawyers engage in written or spoken advocacy, they generally fashion and use a “theory of the case” that informs their selection of arguments and use of key facts. An instructive example is Abe Fortas’ approach to the landmark case, Gideon v. Wainwright. Fortas faced two serious problems for his claim that state courts should constitutionally be required to provide a right to defense counsel for indigent defendants charged with crimes. First, there was no precedent

186 Watchman, supra note 94, at 241.
188 See Watchman, supra note 94, at 244.
189 See Parkinson, supra note 191, at 11 (segregationists seized on Jefferson’s “interposition” theories to justify massive resistance).
190 See id. at 16.
191 Id. at 17.
192 Id. at 19.
193 Id. at 19–20.
196 See Abe Krash, The Architects of the Gideon Decision: Abe Fortas and Justice Hugo
for his position; to the contrary, the Supreme Court had explicitly declared that state courts must provide counsel to the indigent only when “special circumstances” obtained. 197 Second, a federal court mandate that state courts provide counsel to the indigent seemingly posed a degree of intervention in state court matters that threatened to disrupt federalism. 198 The “brilliant insight” that became Fortas’ theory of the case was that the Betts “special circumstances” rule actually caused more federal-state court friction than would an across the board requirement for counsel, as every habeas case in the Betts regime required federal courts to second-guess state courts’ “special circumstances” determinations. 199

This brilliant insight helped persuade the Supreme Court to rule unanimously in Fortas’ favor. Justice Douglas was so impressed that he later recalled Fortas’ legal argument as the best he had ever heard in the Supreme Court. 200 Not only had Fortas pinpointed Betts’ shortcomings, but he also took what was perceived to be a weakness in his argument, and turned it into his winning linchpin.

Harper Lee needed to do something similar if Watchman was to be made into Mockingbird. Of course, Harper Lee was not thinking explicitly of herself as a lawyer considering her theory of the case. To the contrary, the likely reason Harper Lee refashioned Watchman’s threads into almost wholly new cloth in Mockingbird is that her agent and editors told her to do so. 201 Yet, Lee’s radical transformation of Watchman suggests she carefully considered the available tactical choices for her rhetorical situation. The evidence for this conclusion lies in the comparison between Watchman and Mockingbird. Mockingbird retains Watchman’s setting in Maycomb, Alabama, its central characters in the persons of the Finch family and their housekeeper Calpurnia, and many satellite characters, including Dill, Dill’s Aunt Rachel, Miss Maudie, Mrs. DuBose, Judge Taylor, Calpurnia’s son Zeebo, the Cunninghams/Coninghams, and so on. However, there are also many significant changes. 202


197 See Betts v. Brady, 316 U.S. 455 (1942); Krash, supra note 200, at 1195–96.

198 See Krash, supra note 200, at 1195–96.

199 See id. at 1199.

200 Id. at 1199–1200.

201 See Neely Tucker, supra note 5.

202 See WATCHMAN, supra note 94, at 54. One major change I will not discuss—despite its intriguing temptations—is the character of Boo Radley. Watchman has no hint whatsoever of Boo Radley, who of course has a major presence in Mockingbird. Only a passing reference in Watchman to a mythical “Two-Toed Tom” who “made tunnels beneath Maycomb and at people’s chickens at night” hints at the psychological space Boo Radley occupies in
These changes are vital to understanding Lee’s use of *Mockingbird* to address the rhetorical situation she recognized when she drafted *Watchman*. One key change is *Mockingbird’s* setting in the mid-1930s, moving the action away from the 1950s and escaping explicit references to the rhetorical situation Lee actually was addressing. Another key change is in the character of Atticus Finch. Hand-in-hand with this second change was Lee’s decision to refashion Atticus’ work in defending an African American accused of raping a white woman from a distasteful—but necessary—task in *Watchman* to an act of principled courage in *Mockingbird*. Embedded within these changes is a new argument framework: rather than mount moral arguments Council adherents would foreseeably deflect, Lee constructed a “fairness” argument that might make her moral points palatable even to a resistant audience.

**A. The Shift from Massive Resistance to the Great Depression**

*Watchman* hints at *Mockingbird’s* setting in a fleeting thought Jean Louise has during her confrontation with Atticus. At the turning point in that argument, just before she disabuses her father of the notion that they agree on matters of racial justice, she muses: “She had been half willing to sponge out what she had seen and heard, creep back to New York, and make him a memory. A memory of the three of them, Atticus, Jem, and her, when things were uncomplicated and people did not lie.”

This vague notion suggests the glimmer of the idea for *Mockingbird*, and is all the more intriguing for the fact that *Mockingbird* actually ends with Atticus collaborating with Sheriff Tate in a very big lie: the cover-up of Boo Radley’s role in Bob Ewell’s death.

Resetting her story in the 1930s must have been a relief for Lee. It allowed Lee to return her characters to what she saw as a relatively uncomplicated time, and to place them in a world with a “‘rich social pattern’” she wished to explore. More importantly, it allowed her to bring the deceased Jem of *Watchman* back to life in late childhood and early adolescence, and to return Jean Louise to her childhood innocence of the early sections of *Mockingbird*.

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203 *Id.* at 241.

204 See *Id.* at 276.

205 See *Shields, supra* note 9, at 241 (quoting Harper Lee speaking in a March 1964 radio interview, discussing her affection for the era colored by rose-tinted glasses, even though the 1930s actually represented Jim Crow’s zenith); *See C. Vann Woodward, The Strange Career of Jim Crow* 116 (3d rev. ed., Oxford U. Press 1966) (describing the early Depression era’s uptick in lynching); *See Richard Wormser, The Rise and Fall of Jim Crow* 152 (2003) (quoting Walter White of the NAACP that “lynchings had risen during the Depression from a low of 7 in 1929, to 21 in 1930, to a high of 28 in 1933”); *See Egerton, supra* note 27 (inferring that this era did spawn a nascent civil rights movement).
as Scout. The importance of using children seems to have occurred to Lee towards the end of her Watchman manuscript, when Uncle Jack reveals to Jean Louise that he was in love with her mother and regarded Jean Louise and Jem as his “‘dream children.” 206 Lee undoubtedly drew this phrase from a semi-autobiographical Charles Lamb essay, in which the author tells his children stories of his own childhood, only to awaken from a dream and realize he is a bachelor, and has no children at all, but only vivid dreams of the children he might have had with the woman he loved but never married. 207

Mockingbird’s opening epigraph returns to Charles Lamb and invokes children, quoting Lamb’s words that “Lawyers, I suppose, were children once.” I have argued in other places that the epigraph suggests Lee was thinking of the lessons Jem turned grown-up lawyer might carry into his 1950s career. 208 Perhaps Lee imagined him opposing the Citizens’ Council, as Watchman’s Jean Louise so fervently wishes Henry would do. 209

Seen in this light, Mockingbird perhaps comprises the lesson Lee wished the youthful segregationist lawyers of the Watchman era had learned during their Great Depression childhoods.

Setting aside Harper Lee’s nostalgia for the 1930s, this setting’s racial order would have been comfortable for the segregationists of the 1950s. In the 1930s, the South was still largely a “feudal land.” 210 Thus, “[e]very member of the society—man and woman, white and black—knew his or her place.” 211 In this sense, segregationists could consider the era a time when “things were uncomplicated.” 212 From the vantage point of Mockingbird’s characters, “the notion that the Jim Crow order would end within their lifetime[s] was simply a remote possibility (or a nightmare).” 213 In short, segregationist readers in the 1950s would not feel threatened by a Maycomb in the 1930s.

The legal strictures and glimmers of progress in 1930s Alabama are perhaps best reflected in the Scottsboro case. Two white women accused nine young African American men of rape. They avoided

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206 See Watchman, supra note 94, at 274.
209 See Watchman, supra note 94, at 233–34.
210 Egerton, supra note 27, at 19.
211 Id.
212 See Watchman, supra note 96, at 241.
lynching, which was a point of pride in some white quarters and frustration in others. Nonetheless, the accused went to trial less than two weeks after their arrest, and were swiftly convicted, with all but one sentenced to death after perfunctory proceedings. Yet, northern lawyers from the International Labor Defense came South to represent them, the Supreme Court established important early criminal procedure precedents in ruling on their behalf, and proceedings dragged on in some of their cases for decades. By the 1950s, all of the Scottsboro defendants were free, and Alabama had no appetite for further prosecutions.

Harper Lee is said to have based Tom Robinson’s trial on the Monroeville case of Walter Lett, but that does not mean she was unaware of Scottsboro’s history and its resonance with her text and for her audience. As she wrote in a 1999 letter, she felt Scottsboro “will more than do as an example (albeit a lurid one) of deep-South attitudes on race vs. justice that prevailed at the time.” More importantly, from the standpoint of the late 1950s, the drawn-out Scottsboro experience had taught Alabamans that it was not unthinkable that a white woman accusing an African American male of rape might be lying or mistaken. Indeed, the fact that Tom Robinson clearly wished to have no intimacy with his accuser, Mayella Ewell, who allegedly “tempted” him, would have played favorably to segregationists’ horror of interracial “mixing” and “amalgamation.” Thus, by placing her story in the 1930s and playing on the sensibilities of the 1950s, Harper Lee could turn an audience that would have been deeply antagonistic to Watchman into one that might be sympathetic to Mockingbird.

B. A Different Atticus Finch

Some Watchman readers have voiced disappointment in how Atticus Finch “turned out” in the decades after he defended Tom Robinson, but this complaint misunderstands Lee’s intent when she wrote

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214 See JAMES GOODMAN, STORIES OF SCOTTSBORO 5–6, 16–18 (1st ed. 1994).
215 See id. at 4. (Haywood Patterson describing the courtroom during their trials as “one big smiling white face.”).
217 See GOODMAN, supra note 218, at 393–97 (chronology of Scottsboro events).
218 Hugh T. Murray, Jr., Changing America and the Changing Image of Scottsboro, 38 PHYLON 82, 86 (1977).
219 See SHIELDS, supra note 9, at 118–20.
220 Id. at 118.
221 See WATCHMAN, supra note 94 at 109.
Mockingbird. She did not write Mockingbird as a “prequel” to Watchman; rather, she wrote it as a replacement of Watchman.222 This was no casual, unstudied change. To the contrary, Lee spent years reworking her materials, to the point that the Atticus Finch of Mockingbird is an entirely different person from the Atticus Finch of Watchman, sharing only his name and his web of relationships with the characters who exist in both books. As Diane McWhorter has put it, “[t]he mystery is how the Mockingbird Atticus was reverse-engineered from raw material that suggests how livid the author must have been at her own father.”223

The Atticus Finch Lee remade is indisputably an icon of American fiction, though even the Mockingbird character has his flaws. He can be criticized for his too-perfect principles and all-encompassing tolerance.224 With these qualities, he can be criticized for too passively accepting the status quo of segregation.225 Moreover the novel can fairly be taken to task as a “‘white savior’ story, except that Atticus Finch fails at saving Tom Robinson.”226 Yet, many of these very weaknesses are traceable to the transformation Atticus undergoes between Watchman and Mockingbird. By definition, the Atticus who is a leader of the local White Citizens’ Council chapter did not possess an all-encompassing tolerance.

Most importantly, keeping Atticus consistently tolerant in Mockingbird may have been a conscious strategy on Lee’s part. Unlike the Atticus of Watchman, who crusades for White Supremacy, the Atticus of Mockingbird has a more modest agenda. Had his character directly challenged all of Jim Crow, Lee would have risked alienating the audience she likely wanted most to engage: the southerners she knew. The reality was that Monroeville was not a receptive ground for Lee’s argument if it had been stated in Watchman’s terms. A month after she completed her work on Mockingbird, “the Monroeville Christmas parade was canceled, because the Klan had warned that if the band from the black high school marched with whites, there would be blood.”227

222 See Neely Tucker, supra note 5 (Discussing that “neither the agent nor the publisher left any traces of a publishing plan for ‘Watchman.’”).
223 See McWhorter, supra note 23 at *3.
226 See Giraldi, supra note 228, at *10 (quoting Toni Morrison).
227 Paul Theroux, What’s Changed, and What Hasn’t, in the Town That Inspired ‘To Kill
By the time *Mockingbird* was published, Monroeville’s “schools were segregated and they remained so for the next five years. And once the schools were integrated in 1965, the white private school Monroeville Academy was established not long after.”

In short, Lee’s “only option for making Atticus both plausible and morally instructive was to place him in the 1930s under a child’s gaze. Not even the liberals back then were advocating the end of segregation . . . and it was possible to do the right thing, . . . without undermining the whole system.” *Mockingbird*’s small town, 1930s setting allowed Lee to avoid the distractions of what segregationists felt to be an attack on traditional rural values; instead, she could weave her protagonists and their values into Alabama’s small town fabric.

Viewed from that standpoint, *Mockingbird*’s Atticus is a man who faces a rhetorical situation similar to that of the 1950s, and, unlike Henry and Atticus of *Watchman*, takes the right side of history no matter the consequences. In that way, he fulfills the most fervent wishes of Jean Louise of *Watchman*: he refuses to be scared of Maycomb because he knows he must live with himself and his conscience. As he does so, he points to a path for resolving the painful situation painted by *Watchman*—of being thoroughly alienated from the people and places one loves—by remembering that even though “‘we are fighting our friends . . . [N]o matter how bitter things get, they’re still our friends and this is still our home.’” Thus, the Atticus of *Mockingbird* has the courage that Henry of *Watchman* lacks: “‘real courage is . . . when you know you’re licked before you begin but you begin anyway and you see it through no matter what.’”

C. A New “Theory of the Case”

*Watchman* addressed the South’s rhetorical situation with moral arguments. Although *Mockingbird* ultimately concerns moral issues,
Lee framed its arguments in terms of simple fairness. The notion of fairness is also present in *Watchman*: Jean Louise interprets “‘[e]qual rights for all; special privileges for none’” as a call to fairness, something other than “‘one card off the top of the stack for the white man and one off the bottom for the Negro.’” Nonetheless, *Watchman* does not sustain its use of this idea.

In contrast, *Mockingbird* stresses this theme. The Atticus of *Mockingbird* possesses an innate sense of fairness. Thus, Miss Maudie speculates that Atticus, blessed with extraordinary marksmanship, long ago “‘put his gun down when he realized that God had given him an unfair advantage over most living things.’” Atticus knows it is important to pass this sensibility on to his children, telling them it would be “‘a sin to kill a mockingbird.’” After Tom Robinson’s death, the local newspaper editor “likened Tom’s death to the senseless slaughter of songbirds by hunters and children.” In other words, what happened to Tom raises a fundamental problem of fairness, for White Supremacy’s arrangements conferred unfair advantages upon one race versus the other: as *Watchman* put it, the top card always went to whites.

This perversion of fairness infuses daily life in ways that *Mockingbird*’s Atticus deplores. Atticus tells Jem:

> As you grow older, you’ll see white men cheat black men every day of your life, but let me tell you something and don’t you forget it—whenever a white man does that to a black man, no matter who he is, how rich he is, or how fine a family he comes from, that white man is trash.

Reflecting on such systemic unfairness, Atticus adds: “‘Don’t fool yourselves—it’s all adding up and one of these days we’re going to pay the bill for it. I hope it’s not in you children’s time.’”

Miss Maudie later drives the point home, saying that Atticus took on the burdens of people in town “‘who say that fair play is not marked White Only; . . . who say a fair trial is for everybody.’” The rest of

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236 See id. at 98.
237 Id. at 254.
238 Id. at 233. This aspect of *Mockingbird* reflected not only the unfairness of segregation and injustice, but also the everyday arrangements of the region’s economy. Formal recognition of economic injustices began to dawn in the late 1930’s. See, e.g., *Taylor v. Copeland*, 181 So. 742, 744 (Miss. 1938); *Mississippi Court Backs Negro Against Landlord*, N.Y. TIMES, May 31, 1938, at 36 (reporting the *Copeland* decision).
239 *Mockingbird*, supra note 116, at 233.
240 See id. at 249–50.
Maycomb’s “handful” of fair-minded people hesitate (like Henry in Watchman) to stand up for this principle, but they trust Atticus “‘to do right.’”

This Atticus doing right in the name of fairness is a stark contrast to the Citizens’ Council leader of Watchman, of whom an elderly and knowing Calpurnia ironically says “‘[h]e always do right.’”

The Atticus of Mockingbird insists that the fairness principle is most important in the courtroom. His jury closing for Tom Robinson connects the concept of equality with due process, which he describes as “‘the integrity of our courts and in the jury system.’”

Taking aim at Citizens’ Council denials of human equality, Lee has this Atticus tell the jury:

[T]here is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court . . . [I]n this country our courts are the great levelers, and in our courts all men are created equal.

In fact, Atticus’ closing articulates a vision rather than a reality, for Tom’s ordeal is unfair from start to finish. Mockingbird parallels the systemic unfairness of Tom’s trial with the daily unfairness of the southern “way of life.” After the prosecutor exploits racial prejudice by using his privileges to browbeat Tom and address him with racial epithets, Dill is sickened with the instinctive reaction of a child who knows unfairness when he sees it. The town’s racial rebel—a man named Dolphus Raymond who has a common law African American wife and “mixed” children (thereby violating the core tenets of Council dogma against “mixing” and “amalgamation”)—comforts Dill. Raymond understands that Dill is sickened by “the simple hell people give other people—without even thinking . . . [T]he hell white people give colored folks without even stopping to think that they’re people, too.”

See id at 249.

See WATCHMAN, supra note 94, at 159. Lee’s text implies that Calpurnia is well-aware of Atticus’ enmeshment with the Council movement, as she responds to Jean Louise’s entreaties to resume a warm relationship with the pointed question: “‘What are you all doing to us?’” Id. at 160.

See MOCKINGBIRD, supra note 116, at 218.

Id.

See id at 210. He calls Tom “‘boy,’” and a “‘big buck.’” Id.

After all, “it’s not fair” might well be the earliest childhood argument to emerge from any future lawyer’s mouth.

See MOCKINGBIRD, supra note 116, at 213.
Raymond’s indictment of White Supremacy closely echoes Jean Louise’s argument in Watchman that the system defended by the Council movement “kills . . . souls” by withholding from African Americans “simple, impartial courtesy,” and with “systematic denial that they’re human.” The difference is that the argument in Watchman is cloaked in filial disappointment and moral anger, whereas the argument in Mockingbird is anchored to fairness principles. Lee ensured that Mockingbird readers would connect Raymond’s version of this argument with fairness by having Scout observe immediately after his remarks that “Atticus says cheatin’ a colored man is ten times worse than cheatin’ a white man . . . . [s]ays it’s the worst thing you can do.”

Given Monroeville’s treatment of Ben Watts’ interracial relationship with Nazarene Parker, Lee had a sound basis for hope that this line of argument would work for her readers. Her own father—like Atticus—had ensured that Watts’ will was “airtight.” Moreover, the business community had rallied around Ben Watts to ensure Nazarene Parker her fair distribution from Watts’ estate, and the court had upheld Watts’ will.

V. THE MOCKINGBIRD’S SONG OF FAIRNESS

Like any good lawyer, Lee seems to have considered her audience as she labored to transform Watchman into Mockingbird. As the Citizens’ Council movement continued to spew propaganda between 1957 and 1959, it must have become clear to Lee that moral arguments would not hold sway with the movement’s adherents and like-minded segregationists. Having submitted her Watchman draft in November 1957, she could have simply turned to the next year’s issues of The Alabama Lawyer and find myriad examples of “moral” and “legal” arguments for segregation and against the case she tried to make in Watchman. The January 1958 issue featured arguments from Judge Walter B. Jones that the Supreme Court’s recent decisions were both “un-wise and un-American.” In April of 1958, she could have read

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248 See Watchman, supra note 94, at 252.
249 See Mockingbird, supra note 116, at 214.
250 See id. at 99.
251 See generally Scalia & Garner, supra note 198, at 5.
252 See Walter B. Jones, We Must Save the Constitution, 19 Ala. Law. 36, 38 (1958).
about *The Federal Invasion of Arkansas in the Light of the Constitution*. In 1959, she could have read about schemes to avoid desegregation by abolishing public schools. April of that year brought articles on *Origin of the Races and Their Development for Peace (Separate But Equal)*. Governor Patterson’s inaugural address staunchly touting states’ rights and declaring his dedication to segregation.

Whether through the bar journal or other media, Lee might have taken particular notice of her former classmate’s speech, which embraced classic Council rhetoric. Patterson vowed:

> There can be no compromise in this fight. There is no such thing as a ‘little integration.’ The determined and ruthless purpose of the race agitators and such organizations as the NAACP is to bring about as fast as possible an amalgamation of our society. They seek to destroy our culture, our heritage, and our traditions. If we compromise or surrender our rights in this fight, they will be gone forever, never to be regained or restored.

Lee might also have noticed, either in the *Alabama Lawyer* or in the national media in which it was placed, the first of Carleton Putnam’s “open letters” to federal government officials laying out a “Yankee’s” argument against the *Brown* decision that functioned as Council propaganda in sheep’s clothing. The end of Putnam’s letter inverted *Watchman*’s morality argument concerning “soul killing.” Seizing on *Brown*’s concern with the state-sponsored message of inferiority transmitted by segregation, Putnam argued that “if a child is by nature inferior, enforced association with his superiors will increase his realization of his inferiority, while if he is by nature not inferior, any implication of inferiority in segregation . . . will only serve as a spur to a greater effort[.]” The continuous stream of such arguments from

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256 See *SHIELDS*, supra note 9, at 103 (listing Patterson amongst Lee’s classmates at the University of Alabama).
257 See Patterson, *supra* note 259, at 131.
258 See Carleton Putnam, *Mr. Putnam’s Letter to U.S. Attorney General Rogers*, 20 ALA. LAW. 276 (1959). Putnam first published the letter in March 1959. *Id.* at 276. Lee was finishing *Mockingbird* in the spring of 1959, *See SHIELDS*, supra note 9, at 132, so Putnam’s letter is emblematic of the rhetoric she would have encountered in national media and on her periodic trips home rather than a specific piece of rhetoric shaping her tactics.
259 See *BARTLEY*, supra note 73, at 179.
segregationist quarters blatantly flagged the uselessness of *Watchman*’s moral arguments.

Comparison of *Watchman* and *Mockingbird* makes clear that, at some point in the grueling re-writing process, Harper turned from arguments based on morality to a less confrontational argument based on fairness. The shift to fairness, which at first blush might be perceived as ducking segregationists’ punches, actually signals a shift to greater effectiveness for the time and place for which Lee wrote. The morality argument had tracity with Southern moderates, but it was unpersuasive to segregationists. “[S]outhern neobourbons saw neither the desirability nor the legitimacy of social change. That demands for Negro equality might ultimately rest on a moral foundation, or might even contain a moral component, was repugnant to the whole system of neo-bourbon values.”

A fairness argument had better odds. Segregationists had long claimed that African Americans as well as whites preferred segregation, which was another way of claiming the “southern way of life” was fair. When pressed to concede that “separate” did not yield equality in resources, segregationists were willing at least to pay lip service to a fairness principle by agreeing to improve facilities for African Americans.

Segregation’s more genteel defenders insisted that all southerners, black and white, preferred segregation. For example, initial reactions in the Deep South to the *Brown* ruling included the assertion that “thinking” African Americans as well as whites regarded the decision as a “calamity.” The cruder way of putting this was voiced by an Alabama businessman and Citizens’ Council member who said, “‘I know our Nigras don’t want this integration, it’s just some agitators.’” This assumption underlay the vigor with which the Council movement scapegoated and targeted the NAACP, which was regarded as the prime force of outside agitation disrupting what otherwise would be continued “harmony” within a segregated society.

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261 *See, e.g., Gilbert C. Fite, Richard B. Russell, Jr., Senator From Georgia 345 (1991)* (noting that Ralph McGill could not in principle support the status quo).

262 *Bartley, supra* note 73, at 244.

263 *See Charles S. Johnson, A Southern Negro’s View of the South, 26 J. NEGRO EDUC. 4, 4 (1957).*


265 *See Halberstam, supra* note 84.

266 *See Rorty, supra* note 100, at 379 (noting that the NAACP was perceived as “a conspiracy of ‘bad nigras,’ abetted by a few dam-yankee whites, its object being to subvert and
this train of thought, segregation could not be unfair, because “thinking people” of both races agreed to, and desired, the legal and social arrangements that flowed from segregation. Even the groundbreaking federal Judge J. Waties Waring recalled that he long assumed African Americans were content with segregation because “they never asked for any rights, and I didn’t question it.”

More significantly, segregation’s defenders explicitly paid lip service to the principle of fairness, as a kind of trade-off for retaining segregation. For example, South Carolina lawyers defending school desegregation cases admitted that “‘inequalities in the facilities, opportunities, and curricula of the schools of this district do exist,’” as part of a larger strategy of “plead[ing] for time to equalize facilities and resources.”

The 1952 ruling against desegregation of Prince Edward County schools captured the segregationists’ viewpoint on fairness. First, the court found nothing wrong or unfair about segregation in itself. The court wrote:

[T]he separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored ‘children’ in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and wont.

In fact, the court viewed school segregation as a positive good for African Americans because it was a source of jobs for African American teachers; moreover, “the president of the University of Virginia expressed to the Court his judgment that its involuntary elimination would severely lessen the interest of the people of the State in the public schools, lessen the financial support, and so injure both races.”

At the same time, the court noted the many and wide disparities in resources afforded the schools for each race and made clear that these gaps must be closed. Nonetheless, the court was satisfied with the progress made to date. It noted:

Through the activities of the school board and the . . . superinten-
dent, . . . $840,000.00 has been obtained, the land acquired, and plans

destroy the established social and political order of the South”).

268 See Egerton, supra note 27, at 596.
270 Davis, 103 F. Supp. at 340.
271 Id. at 340–41.
completed, for a new high school and necessary facilities for the Ne-
groes. Both local and State authorities are moving with speed to com-
plete the new program. An injunction could accomplish no more.272

This strategy seemed to hold promise in the days before the Su-
preme Court’s Brown decision, so “state after state announced new
funding plans aimed at convincing federal judges of their good inten-
tions.”273 Although such promises turned out for the most part only to
pay lip service to fairness,274 they pointed the way to Lee’s use of a
fairness argument in Mockingbird.

While the theme of fairness recurs throughout Mockingbird, Lee’s
tactics are most apparent in her treatment of Atticus’ closing to the jury
in Tom Robinson’s case. As I have argued elsewhere, Atticus’ closing
paints a picture of a functioning judicial system that is in actuality a
fantasy.275 After all, the prosecutor had just finished using vile epithe-
tists and what we would today call “white privilege” to obtain Tom’s con-
viction on the flimsiest of evidence. Yet, Atticus’ closing, put together
with the jury’s near-inevitable verdict,276 works like a logical proof.
Atticus tells the jury:

A court is only as sound as its jury, and a jury is only as sound as the
men who make it up. I am confident that you gentlemen will review
without passion the evidence you have heard, come to a decision, and
restore this defendant to his family. In the name of God, do your
duty.277

The logic that flows from this closing operates like an enthymeme
presented as a three-part syllogism:278 1) courts are as good as their
juries; 2) a jury that does its duty in a fair legal system will find Tom
Robinson not guilty; and 3) if the jury finds Tom Robinson guilty, then
it has not done its duty, and the legal system is not fair. Given that the
jury in Mockingbird indeed finds Tom guilty, this syllogism carries
Lee’s readers to the conclusion that the legal system it portrays is un-
fair. Lee finishes the argument by pointing to racism as the root cause
of the law’s unfairness. Scout spells this out for us when she concludes

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272 Id. at 341.
273 See Egerton, supra note 27, at 603.
274 The region’s leadership lacked both the will and the financial resources to make equal-
ization of facilities a reality. See id.
275 See Maatman, supra note 212, at 241.
276 Atticus later tells the children that he thought a guilty verdict was perhaps inevitable.
See Mockingbird, supra note 116, at 235. Miss Maudie thought so as well. See id. at
228.
277 Id. at 218.
278 See Rodden, supra note 14, at 163–64.
that “in the secret courts of men’s hearts.” (i.e., the jury that is the measure of the court’s fairness) “Tom was a dead man the minute Mayella Ewell opened her mouth and screamed.”

VI. CONCLUSION “IN CHAMBERS”: EVALUATING THE *M*OCKINGBIRD’S BRIEF

In *Watchman*, Harper Lee attempted to confront the Deep South’s rhetorical situation head on by “arguing” a moral case against the tenets of the White Citizens’ Council movement and its pro-segregation project. Had *Watchman* actually been published when written, it is doubtful whether its impact would have been discernible. As it was, Monroeville’s initial reaction to even *Mockingbird* was chilly: “[T]he fiction was so raw and real that many in the white population—which numbered just over 2000 when the book came out—despised it.”

Nonetheless, Lee’s rhetorical strategy with *Mockingbird* was to hold a kind of reverse mirror up to segregationists by remodeling her Atticus into a man who lives and tells a counterstory of what southern law and lawyers could be, if guided by fairness principles. *Mockingbird*’s play on fairness was certainly effective with those receptive to that argument. For example, Diane McWhorter recalls seeing the movie as a fifth grader unfamiliar with “the meaning of southern justice”; like Jem and Dill in *Mockingbird*, she assumed the jury would acquit Tom Robinson and was distraught when it did not. For McWhorter, Atticus’ syllogism made a lasting impression.

Whites in Monroeville “who were trying to take a stance for civil rights took great encouragement from [*Mockingbird*], though it did not directly address the issue.” Lee’s elision served a purpose. As a friend of Harper Lee explains, “[i]t was hard for the Klan and the White Citizens’ Council to speak against the book, because it told the story of a family and of a lawyer who did his duty. You can’t fight that.” The same friend opines: “[i]f you ask Harper Lee, she says it’s a love story. It models how a professional person should conduct himself in the face of prejudice.”

*Mockingbird*’s “love story” goes beyond the love between a father and his children and also shows a love of place and people. For those

279 See *Mockingbird*, supra note 116, at 254.
280 See Toohey, supra note 3.
281 See McWhorter, supra note 23, at 322.
282 See Toohey, supra note 3 (quoting Harper Lee’s friend Dr. Thomas Lane Butts, a minister associated with Monroeville’s Methodist church).
283 Id.
284 Id. This is certainly how I have understood the story.
who knew of, or have studied, the time and place of *Mockingbird*’s setting, Lee’s depiction is true to life. Southern liberal Virginia Foster Durr called the movie version of *Mockingbird* “awfully true to much of the South,” 285 According to John Egerton’s sprawling portrait of the South in the New Deal era, “there were saving graces in the South and in its people—strengths of family and community that manifested themselves in manners and fellowship, in generational continuity and respect for history . . . . These . . . belonged to rich and poor, white and black, old and young.” 286 These qualities are elements *Mockingbird* embeds in its brief, as if calling the South to become its better self. For despite all of *Watchman*’s anger, Jean Louise’s struggle is great because her love of family and place is so deep. As William Faulkner said of the South: “you don’t love because: you love despite; not for the virtues, but despite the faults.” 287

Lee’s *Mockingbird* “brief” of love and fairness has had an enduring impact, with millions of copies read worldwide. There is a reason it has repeatedly been regarded as one of the most influential books ever written. Yet, fifty-six years after it was published, we are still seeking—and often falling short of—the loving fairness Harper Lee called for in *Mockingbird*. When we consider *Watchman*’s arguments transformed into *Mockingbird*’s brief, perhaps Harper Lee can bring us to likewise transform ourselves.

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286 *Egerton*, supra note 27, at 79.
PLACE AND IDENTITY IN HARPER LEE AND ROBERT PENN WARREN

MARC L. ROARK

INTRODUCTION

Southern writers in the 20th century wrestled with whether “southernness” was an exceptional quality that could transcend race and class or whether race and class were bound up in the very definition of whether the South was “exceptional.” Later critics have fallen into the trap of debating whether characters like Atticus Finch are exceptional or whether they are merely ordinary in an exceptional place. This debate has been exacerbated by a seeming bait and switch the “new” Atticus reveals in Go Set a Watchman. Frankly, the debate misses the point. Could a racialized Atticus Finch in Go Set a Watchman be consistent with the seemingly docile and non-racial Atticus in To Kill a Mockingbird? I argue yes and that very likely, one Atticus can easily beget the other.

In asserting this, I suggest that the place of Southern literature, i.e.,

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2 For example, Flannery O’Connor in response to editorial critiques that “southern writers were in anguish because they were isolated from the rest of the country,” said:

I feel that this would be news [to] most Southern writers. The anguish that most of us have observed for some time now has been caused not by the fact that the South is alienated from the rest of the country, but by the fact that it is not alienated enough, that every day we are getting more and more like the rest of the country, that we are being forced out, not only of our many sins but of our few virtues. This may be unholy anguish but it is anguish nevertheless.

Louise Blackwell, Flannery O’Connor and the Southern Renaissance, 17 REVISTA DE LETRAS 101, 101 (1975) (citing Flannery O’connor, The Fiction Writer and his Country, in GRANVILLE HICKS, THE LIVING NOVEL: A SYMPOSIUM at 159 (New York 1957). For similar regarding William Faulkner, see JOEL WILLIAMSON, WILLIAM FAULKNER AND SOUTHERN HISTORY 6 (1980) (“The stage happened to be the South, the subject was the human condition, and the play was ongoing and without end.”) and generally CHARLES S. AIKEN, WILLIAM FAULKNER AND THE SOUTHERN LANDSCAPE (2010) (arguing that Faulkner’s interest in the problems of the human heart only make sense when contextualized to a particular place and social setting, namely the South).
the South, is far more determinative of social relationships than the characters themselves. Atticus Finch does not emerge, but is created from the very place he is found. Maycomb County, in as much as it is a setting, is also a character with ideals, tolerances, and prejudices that act upon the characters in both *Go Set a Watchman* and *To Kill a Mockingbird*. Harper Lee’s Maycomb creates a gravity on the wealthy whites, the poor blacks, and the poor white trash that acts like a matrix over the ways they engage with one another. Likewise, Robert Penn Warren’s places of the South reveal how progress happens around black persons, but never with them. This essay explores how the places of the South within Southern literature create a version of Southern exceptionalism that allows us to forgive the place, while holding the characters culpable for actions we deem morally problematic.

This romanticism with the South allows readers to hold Bob Ewell in contempt in *Mockingbird*, while making Atticus an archetype of a flawed but noble hero. At the same time, the places of the South rarely are implicated in the flaws of people like the Ewells, but are seen as formative for characters like Atticus. Outside of the Southern Gothic, traditional writers rarely take on the South’s moral culpability for how it treats those outside the gentry.

For example, in early to mid-20th century Southern literature, black people are often passive persons that things happen to in the places of the South. The ways that characters respond to those things is what makes us believe the characters are morally culpable. Harper Lee’s *Go Set a Watchman* makes the audacious suggestion that it’s not just the characters that illicit responses but the places as well. Geography becomes a character itself, morally culpable and expanding the blame for Southern attitudes not just to the persons but to the landscapes surrounding them.

That place-centric identity can be characterized as what I have called in other places a form of Southern Exceptionalism. No writer better captures and helps explain how Southern Exceptionalism shapes Southern writing than a consideration of Robert Penn Warren’s work on place and Southern identity. Robert Penn Warren’s preeminent subject was the American South. Born in Kentucky and living in various places; hence, he was able to capture the essence of the place and its people. His works in both fiction and nonfiction detail a fascination with the American South. His nonfiction works, *John Brown: The Making of a Martyr*, (1929); *Segregation: The Inner Conflict in the South*, (1956); *Who Speaks for the Negro*, (1960); *The Legacy of the Civil War: Meditations on the Centennial*, (1961); and *Jefferson Davis Gets His City-
southern states, including Louisiana, Mississippi, and Tennessee, Warren once reflected, “[t]he South never crossed my mind except as an imaginative construct before I left it.”5 Later, Warren claimed, “[he] really became a Southerner by not being there.”6 His novels reflect the tension felt by the author whose characters, like him, are out of place in their environment, while at the same time in the only place that seems best suited for their identity.

Through his characters, Warren performs the tension of Southern Identity—wrestling with the problem of not belonging, while also being in the only place where one belongs.7 Notably, this tension between belonging and not belonging is expressed by Atticus in *To Kill a Mockingbird* and Scout in *Go Set a Watchman*. Warren’s reflections of feeling isolated in a place he calls home has led some scholars to describe Warren’s view of Southern Identity as hallmarked by a perception of loneliness.8 While loneliness is a theme that Warren’s work captures, another more prevalent theme emerges from Warren’s characters and places—that of Southern Exceptionalism.

In this essay I will describe what I mean by Southern Exceptionalism and describe how that theme emerges in Warren’s novels *All the King’s Men* and *Flood*, and why those novels help us understand Maycomb more fully. *All the King’s Men* follows the workings of Jack Burden and Willie Stark through the political machinery that reveals identities as against place and time. Jack Burden, thought to be the character that Warren most closely aligns with,9 finds himself torn between the Jack Burden that existed in the past at Burden’s landing, and the Jack Burden of the present—a journalist lackey of Governor

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5 TALKING WITH ROBERT PENN WARREN, 273 (Floyd C. Watkins et al. eds., 1990).

6 Id. at 383.

7 Warren himself described this tension personally reflecting about a farm he considered buying in Tennessee later in life. Though the Middle Tennessee area where the farm was located was the place he claimed to know best, he also said he felt if he bought the farm he’d be isolated. “A lot of friends are dead and gone, but I also felt a real change in the whole nature of the world. And I felt it would be an idle dream for me to go back there. It would be ridiculous.” Id. at 274.


9 Simpson, supra note 8, at 337 (suggesting that Warren can no more disclaim Jack Burden than Shakespeare can Hamlet).
Stark—who seems to have a knack for “making things stick” and “uncovering the past.” Both Burden and Willie Stark find themselves at one in the same time, in and out of contradictions.

Likewise, Warren’s novel, *Flood: A Romance of our Time*, tells the story of Bradwell Toliver, a novelist and screenwriter returning to his home town of Fiddlersburg to tell its final story. Fiddlersburg is set to be flooded by the Army Corp of Engineers’ TVA project in Middle Tennessee, leaving as the preeminent question for everyone in the town—can Fiddlersburg residents be themselves without Fiddlersburg. Like Burden and Stark, Toliver and other characters find themselves living out contradictions, like Toliver’s inability to write about Fiddlersburg while in Fiddlersburg.

I argue in this piece that loneliness itself cannot answer the question of Southern identity, but rather is one piece of a broader identity question in the South. For Warren, the collective action of being “lonely together” helps explain certain aspects of the South. It may also explain why characters like Burden, Toliver, and Stark move through the South the way they do, able to both associate and disassociate themselves from their actions and physical surroundings, while others cannot. But it does not necessarily explain the South, despite the claim by Warren’s characters and scholars alike. Loneliness is a description for a people that invoke a state of mind about their surroundings—the choices to embrace or not embrace their surroundings. Exceptionalism, on the other hand is defined by the irony of living with the contradiction. For the characters, it is the various contradictions of

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10 See Martin Lumpkin, *Jack’s Unconscious Burden: A Psychoanalytic Interpretation of All the King’s Men*, in *“To Love So Well the World”: A Festschrift in Honor of Robert Penn Warren* 197–98 (Dennis L. Weeks ed., 1992) (describing Jack Burden’s tensions as between “deny[ning] his past and living with his cynical present without aims”).

11 See Lumpkin, *supra* note 10, at 207 (rejecting Burden’s tale as mere tragedy, for its failure to account for “ambiguities, conflicts, complexities of the human personality); Robert Feldman, *Responsibility in Crisis: Jack Burden’s Struggle in All the King’s Men*, in *“To Love So Well the World,” supra* note 10, at 105 (arguing that Burden’s contradiction is the temptation to avoid versus confront the burden of guilt and responsibility); Steven D. Ealy, *Corruption and Innocence in Robert Penn Warren’s Fiction*, 47 Mod. Age 139 (2005) (describing Willie Stark as an idealist turned pragmatist with an idealist bend).


13 Bradwell Toliver can’t seem to understand himself in the town of Fiddlersburg. This emerges in two ways throughout the novel. First, Toliver’s best selling novel is based on Fiddlersburg, but is written when Toliver is away from the town. The second is the movie script that he writes while in the town, but which, according to Yasha Jones, does not capture the essence of Brad in Fiddlersburg. Mark L. Roark, *Robert Penn Warren and Southern Exceptionalism*, The Literary Table (Apr. 15, 2014), https://literarytable.com/2014/04/15/robert-penn-warren-and-southern-exceptionalism/.
moral purpose, outcomes, and identities that present contradictory moments. For the region, Warren describes the ability to balance the surroundings with its narrative of superiority. The constructs of place and time provide boundaries by which characters in Warren’s work navigate the central notion of those ironies.

EXCEPTIONALISMS AND SOUTHERN EXCEPTIONALISM

Exceptionalism is a common term reflecting the uncritical narratives that set one people apart from another. For example, the idea of American Exceptionalism, as framed by Martin Lipset, is what he labels the American Creed: “Liberty, egalitarianism, individualism, populism and laissez faire,” or what he calls a set of dogmas for a good society. American narratives often draw on these dogmas as sources of validation, suggesting that the society is good, right-directed, or pursuing valid-goals. Exceptionalisms often, though highlighting the narratives at work by the majority, leave some with counter narratives for why those dogmas didn’t work for them. The Southern African American is hard pressed to find that narratives of egalitarianism validate his access to education, politics, or liberty in a society constrained by segregation. Nevertheless, exceptionalisms help explain why society believes itself different from others. They also serve to explain the past as a triumph of the social system, rather than a mar on the past. Thus, a narrative invoking exceptionalisms might choose to appreciate the progressive move out of slavery, Jim Crow, and segregation rather than focus on the enduring effects any of those institutions may continue to have.

If the American experience is explained by exceptional qualities, then the Southern Experience may be described by a different reference

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16 See W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880 182 (1935) (suggesting that the choice for an American narrative is one between “freedom, intelligence and power for all men; the other was industry for private profit directed by an autocracy determined at any price to amass wealth and power”).

17 DUBOIS, supra note 16, at 182 (invoking W.E.B. Duboise’s emphasis on choice,).
to the past: “defeat, humiliation, and impotence in the face of intractable social problems.”

The South eagerly adopted the idea of American exceptionalism for itself, believing Southern society should be set apart, unique, and validated by moral superiority. But as eminent southern historian C. Vann Woodward’s *The Search for Southern Identity* argues, time proved that the real southern experience was characterized by “grinding poverty, political impotency, military defeat, racial conflict, and social guilt.” Sheldon Hackney has argued that Southerners “have had to define themselves in opposition to a presumed American norm.” Similarly, Orville Burton contends that the Southerner remains an “other” or “stranger” in the American narrative.

For our purposes, Robert Penn Warren embraced the idea that Southerners found themselves looking backward more than forward so to speak—consistently defining themselves, their environment, and their identity against the backdrop of how the exceptionalism failed in its promise, and the fact that the war was not won. This is revealed in Warren’s life experience and works.

For Warren, the presence of the counter narrative—or the contradiction—and the ability to reconcile the counter narrative is a primary

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19 This is best characterized by the collection of essays *I’ll Take My Stand*, in which Robert Penn Warren, Allen Tate, and Donald Davidson, argued that the Southern rural life should be preserved in what they apprehended was Northern industrialization. DONALD DAVIDSON ET AL., *I’LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION BY TWELVE SOUTHERNERS* (1930). For an analysis of Warren’s contribution, which some of the writers believed was contradictory to the overall message, see Steven Ealy, “A Place for the Negro” in the Agrarian Scheme: Robert Penn Warren’s Contribution to I’ll Take My Stand, 30 POL. SCI. REVIEWER 120 (2001).

20 Jannson, supra note 18, at 90.


23 Warren himself takes up the mantle of exceptionalism in a number of contexts. Jewishness and its meaning are pre-eminent constructs in a number of Warren’s novels including *Flood* and *Wilderness*. In both novels, Jewish persons find themselves, like Warren’s southern characters as both out of place and in place. Warren outside of his literary endeavors also pursued social justice on behalf of Soviet Jews by joining with the Conference on the Status of Soviet Jews to urge Soviet writers to take up the mantle of Tolstoy, Dostovsky, Checkov and others to find a place in Soviet society for Jewish persons. Each of Warren’s suggestions in his letter to the Soviet Writers Conference urges support for physical space allocated to the preservation of Jewish Identity—schools, synagogues, cultural centers and the like. Similarly, it was primarily because of American Exceptionalism that Warren declined a Chaired Professor at the University of California. At the time, California law mandated that government employees sign a loyalty oath affirming their allegiance to the country and their disavowal of communist tendencies.
reason the South exists as lonely. Those contradictions are depicted in the way physical space and the law’s relationship to that space are described in both works.

WARREN’S EXCEPTIONALISM IN ALL THE KING’S MEN

In All the King’s Men, the question of progress and means to progress lie as the animating narrative to reveal the personal characters of Jack Burden and Willie Stark. The role of progress has been explored in other contexts of the novel, such as automobiles and gender relationships. I want to consider how place illustrates the tension of progress against Southern Exceptionalism in Warren’s Novel. Specifically, I want to focus on two markers on progress on the landscape—namely roads and public schools.

Robert Penn Warren begins his novel in the very first scene with an illustration of progress and social relations.

“You follow Highway 58, going northeast out of the city, and it is a good highway and new. Or was new, that day we went up it. You look up the highway and it is straight for miles, coming at you, with the black line down the center coming at and at you, black and slick and tarry-shining against the white of the slab, and the heat dazzles up from the white slab so that only the black line is clear, coming at you with the whine of the tires, and if you don’t quit staring at that line and don’t take a few deep breaths and slap yourself hard on the back of the neck you’ll hypnotize yourself and you’ll come to just at the moment when the right front wheel hooks over into the black dirt shoulder off the slab, and you’ll try to jerk her back on but you can’t because the slab is high like a curb, and maybe you’ll try to reach to turn off the ignition just as she starts the dive. But you won’t make it, of course. Then a [black worker] [he used a different term] chopping cotton a mile away, he’ll look up and see the little column of black smoke standing up above the vitriolic, arsenical green of the cotton rows, and up against the violent, metallic, throbbing blue of the sky, and he’ll say, “Lawd God, hit’s a-nudder one done done hit!” And the next [black worker] down the next row, he’ll say, “Lawd God,” and the first [black worker] will giggle, and the hoe will lift again and the blade will flash in the

24 See generally EALY, supra note 19. Progress and the question of Progress—namely industrialization—was a primary focus of the Southern Agrarians in their Work I’ll take my Stand. Seeking to preserve rural identity of the south as a positive value, only Warren takes up the question of race directly.

25 See generally Brian Abel Ragen, ‘We’ve Always Gone West:’ Automobiles, Innocence, and All the King’s Men, in WEEKS, supra note 10 at 189–96.

26 See generally Lana K. Payton, Out of the Strong shall come forth Sweetness: Women in All the King’s Men, in WEEKS, supra note 10 at 303–12.

27 An ample discussion could also be had of Willie’s hospital.
Warren’s first image in the book is a freshly tarred road (an image of technological progress) with black workers in the field (an image of past racial servitude). In the early twentieth century, roads were visible markers of economic prosperity and technological advancement. Yet, the South’s lack of paved roads in the early 20th century posed a concern that appeared numerous times in National Geographic magazine. David Janson, in his article *American National Identity and the Progress of the New South in “National Geographic Magazine,”* writes: “For the First half of the twentieth Century, the South’s roads were a concern for National Geographic writers, “Although the wealthiest counties of the state have their own excellent paved highways, there is no dodging Georgia’s deficiency with respect to many of her roads.”

Janson continues that “[r]oads were clearly important to economic development, which is why a National Geographic writer observed with approval when ‘rough old roads of sand or clay [had] widened into smooth paved highways.’”

Just as Warren’s description of the smooth black top leading to Mason City is highlighted as a triumph of Willie Stark—a candidate whose political messages were populist in their promise to deliver government services to more than just the wealthy—the presence of African Americans in the fields suggests that progress remains illusive for some in the South. As Stark and his crew travel down the good new blacktop, off to the side Warren’s African American field workers are in the distance—close enough to see the march of progress before them, to chuckle at the irony of tragedy in the face of progress, yet clearly not be in the path of progress.

That exclusion of African Americans from economic progress in the South also impacts Willie Stark. In chapter two, Jack Burden retells being assigned to cover a School Bond issue in Mason City where Stark served as the elected county treasurer. The reader is immediately tuned in that things are not on the road to progress in Mason City as Jack Burden drives “with his jaws clamped tight” when driving over the road described as a “washboard” leaving dust in his trail. Jack discovers, talking to people on the street, that the schoolhouse bond has stalled because Stark wants the county to “take the low bid” for the building

28 ROBERT PENN WARREN, ALL THE KING’S MEN 1 (2001) [“hereinafter KING’S MEN”].


30 Id. at 350.

31 Id.
of the new schoolhouse. It becomes clear very soon that “taking the low bid” means two things in Mason: giving jobs to African Americans, and conversely, taking jobs away from white folk. Burden reflects on this saying “Yeah, I said to myself, so that is the tale, for Mason County is red-neck country and they don’t like black people, not strange black people anyway, and they haven’t got many of their own.”

32 The last word from folks on the street, however is that giving jobs to African Americans meant taking jobs from white folk. Dolph Pilsbury, the chairman of the Mason City Commissioners, sees the problem the same way, saying to Burden when asked if the Winning Bid was low says:

‘Now look a-here’—and the shadow passed from Mr. Pillsbury’s face and he sat up in his chair as suddenly as though he had been stuck by a pin—‘you talk like that, and ain’t nuthen done but legal. Ain’t nobody can tell the Board what bid to take. Anybody can come along and put in a little piss-ant bid, but the Board doan have to take it. Naw-sir-ee. The Board takes somebody kin do the work right.’

33 Later, they refer to Stark as a “lover of black people” before telling Burden to Git out.

Burden walks away from the meeting with Pilsbury and the Sheriff contemplating whether they are “real.” Their archetype of rural politics seemed too fake and in a strange place. But then, Burden is able to hold the contradictions together—of course they were real and grew up wading in creeks, and watching sunsets, and having babies and wives and having reasons for why they do what they do.

But these are not the only contradictions relating to the schoolhouse. The exchange suggests to Burden that the sole reason why the Commissioners preferred the higher bid was because of the racial dimension. But as we delve deeper into the story we learn that the problem is far more complicated. As Stark tells the story the problem of race was merely bait to turn the locals’ interest away from the fact that two other bids were presented that were also lower than the winning bid. Dolph Pilsbury had a financial stake in seeing that the bid was awarded to the contractor that prevailed. The fact that African Americans stood to be paid more money (as more skilled laborers) than white workers from Mason City, threw oil on the fire. As Warren would later argue in *The Legacy of the Civil War*, once race was implicated, everything in the South became about race, even if it wasn’t.

with Warren. Warren himself early in his career approached the problem of race with the idea that segregation was intractable. In his early essay the Briar Patch, Warren perceived the race problem as one of common respect, but which was not easily resolved by forced desegregation. Later coming off of that opinion, Warren observed that his view of race was primarily informed by his image of the South. He said “[t]he image of the South I carried in my head was one of massive immobility in all ways, in both its virtues and vices—it was an image of the unchangeable human condition, beautiful, sad, tragic.” Despite changing his views on segregation, one aspect of Warren’s perception of the race problem did not change—its source. Much of the angst against African Americans stemmed from poor whites who were afraid that Black Mobility meant diminished economic opportunity for white folks. Warren saw this challenge as one that led to increased violence by poorer white persons who felt isolated by their wealthy white counterparts and black workers looking to obtain a foothold. Thus Warren wrote in the Briar Patch, “what the White workman must learn . . . is that he may respect himself as a white man, but, if he fails to concede the negro equal protection, he does not properly respect himself as a man.” In Warren’s South there is always a “them versus us” that is prevalent in how choices are made. When Willie chooses sides—or at least chooses to be different from the southerners of Mason City’s government—it’s merely confirmation that Willie was never an “us,” thus turning the political machine against him and them. Willie Stark pursuing an end that favors “them” means really that Willie never belonged with the folks in Mason City. He was an outsider who, as it turns out fits really well in Mason City. What makes Stark and Burden different is their willingness to accept the contradictory or irony. For Willie, good and bad are mere materials with which you make something.

WARREN’S IRONY OF LONELINESS

Flood’s deeper meaning towards the South has been described in a number of ways: “representative of an obliteration of a relatively homogeneous way of life;” “the microcosmic death of Southern Rural culture;” as a narrative in contrast to the “rootless urbanites continuing

36 ROBERT PENN WARREN, WHO SPEAKS FOR THE NEGRO 12 (1965).
37 BRIAR PATCH, supra note 35, at 260.
desire for a tangible history.”

But Flood represents best a tale of people coming to a “new awareness” of the past while accepting “a personal responsibility for the present.”

Two physical places mark where this activity happens in the Town of Fiddlersburg—the graveyard, where residents go about disintering their loved ones (or not) before the flood waters rise; and the penitentiary, which remains outside the flood’s reach. In both of these places, the vision of Fiddlersburg becomes clearer by understanding certain aspects of southern exceptionalism.

The graveyard scenes in the novel are primarily premised on Brad Toliver looking for Izzie Goldburg’s grave, so he can eventually disinter his old friend’s remains. Izzie Goldburg, was remembered fondly by Toliver as

The little tailor—the only Jew in Fiddlersburg, live one I mean, when I was a boy. He taught me to play chess and never let me win He would look at a sunset or at a man or a dog in the same way, a way that made the thing seem real. He was not Fiddlersburg, but he made Fiddlersburg real.

Izzie, like Toliver, was an outsider to Fiddlersburg. But also like Brad, saw Fiddlersburg as the only place he could be.

Similarly, the Penitentiary is described by the common Warren referent as being lonesome. The Warden of the penitentiary says that the reason people end up in the Pen is lonesomeness—“some folks are born lonesome and they can’t stand the lonesomeness out there. It is lonesome in here maybe, but it ain’t as lonesome when you are with folks that knows they are as lonesome as you are.”

Then the Warden describes the punishment of solitary confinement:

Ever see a man come out of Solitary? Sometimes, it is like they wanted to lay their head in your lap and cry. They are so grateful to see you. Solitary – you can’t run a prison without it. It is the last lonesomeness. It is the kind of lonesomeness man can’t stand, for he can’t stand just being himself.

Warren then brings both the graveyard and the penitentiary (and Izzie and Fiddlersburg) closer together more directly in a later scene where Brad Toliver returns to look for Izzie again. Again ruminating on Izzie, Toliver remarks that Izzie was “alone but not lonesome,” he

40 FLOOD, supra note 4, at 86.
41 Id. at 158.
42 Id.
was “Fiddlersburg and at the same time he was not Fiddlersburg. He was non-Fiddlersburg and he was anti-Fiddlersburg.”

Then Brad contemplates:

Hell your Philosopher friend [the Warden] was right. It is the lonesomeness. The only reason everybody in Fiddlersburg does not get himself in the Pen out of lonesomeness is because Fiddlersburg is kind of a Pen already, and everybody knows already he is with folks who are as lonesome as he is.

It is here that Warren, through Brad Toliver, begins to explain the connection of Loneliness to the South and Southern Exceptionalism.

Hell, the whole south is lonesome. It is lonesome as coon hunting, which has always been a favorite sport, and it is lonesomer than anything except frog-giging on a dark night in a deep pond and your skiff leaking and some folks prefer it that way.

Hell the south is the country where a man gets drunk just so he can feel lonesomer, and then comes to town and picks a fight for companionship. The confederate states were founded on lonesomeness. They were all so lonesome, they built a pen around themselves so they could be lonesome together. The only reason the confederate army held together as long as it did against overwhelming odds was that everybody felt it would just be too damned lonesome to go home and be lonesome by yourself.

The South . . . . Folks say ‘the South’ but the word doesn’t mean a damned thing. It is a term without a referent. No—It means something, but it does not mean what people think it means. It means a profound experience, communally shared—yeah. But you know what that shared experience is that makes the word South?

‘It is lonesomeness,’ Brad said. ‘It is angry lonesomeness. Angry lonesomeness makes southerners say the word South like an idiot Tibetan monk turning a broke down prayer wheel on which he has forgotten to hang any prayers.’

Hell no southerner believes there is any South. He just believes that if he keeps on saying the word he will lose some of the angry lonesomeness. The only folks in the South who are not lonesome are the colored folks. They may be angry but they are not lonesome.

That is the heart of the race problem. It is not guilt. That is crap. It is simply that your southerner is deeply and ambiguously disturbed to have folks around him who are not as lonesome as he is . . . . Especially if they are black folks. Fiddlersburg is a praying town, just like the South is a praying country. But it is not that they believe in God. They do not believe in God. What they believe in is the black hole in the

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43 Id. at 165.
44 Id.
sky God left when he went away.45

In Warren’s writings, the concept of lonesomeness is a symptom of a greater problem—the inability to not be lonesome—or to be comfortable with one’s own lonesomeness. This ability to hold two contradictory moments together—to be both something and not-that-something—reflects Warren’s views on history, self and responsibility. As in All the King’s Men, where Willie Stark conflates concepts of good and bad into indiscernible motivations—You only have the bad to make the good from and how Jack Burden contemplates the meaning of being alone with oneself and all the many selves that one had—it’d be quite the party he notes—Brad conflates the meaning of belonging and not belonging to an individual’s ability to be lonesome. These three characters find themselves out of place due to a striking self-awareness. Like Izzie Goldburg, they realize that they walk in tangles of contradiction—which both allows them to feel at home and at the same time out of place with those that don’t share the same sense of irony around them. The South might know its lonesome, but understanding what its lonesomeness creates is a different story.

**NOBODY HAS MUCH CHANCE TO BE FURTIVE IN MAYCOMB**

Like the places in Warren’s novels, Lee’s Maycomb doesn’t allow the reader to stand neutral in the face of social conflict. In short, Maycomb makes you choose. You either passively accept the role you play or you actively act against Maycomb’s otherwise overwhelming force.

Part of the force that Maycomb exerts over its inhabitants is race and class. The tension of being able to get along and play one’s role in a community occupied by white gentry, poor blacks, and white trash, make the conflicts in Maycomb ones that either succumb to the normal rules of order or those that resist those rules. Those rules operate in a matrix of conflict when these persons come into contact with one another. White gentry should cause no harm to others, though render no help either; poor black folk are expected to render their help while causing no harm; and poor white trash are expected to both cause harm yet render no help. Operating outside these prescribed forms at the very least causes a spectacle, but at worst erupts in conflict that embroils the entire town.

The way that Maycomb reveals this matrix of behavior is through both minor actions and major conflicts throughout both stories. The minor actions tend to show Maycomb and its inhabitants conforming to the matrix and maintaining accepted roles. For example, in *Go Set

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45 *Id.* at 165–66.
a Watchman, Albert a black waiter recognizes Jean Louise and politely asks about New York. No one but Jean Louise takes the question seriously, not even Albert. 46 Similarly, in To Kill a Mockingbird, Mr. Ewell spits a wad of tobacco at Atticus accompanied by threats of violence. 47 Atticus’s only response is to wish that Mr. Ewell didn’t chew tobacco, indicating an expectation that such behavior comes from people like Bob Ewell. 48 One author describes the matrix this way:

Viewers never see the Ewell’s dilapidated cabin, which in the novel Harper Lee describes as “the playhouse of an insane child.” [This commentator chose to rely on the film adaptation.] Nor do viewers see the white trash family picking through the town dump. Lee’s eugenic allusions are muted in the film, but the viciousness of Mayella’s father, Bob Ewell, is underscored. He spits in the face of Atticus Finch, Robinson’s heroic, morally impeccable defense attorney . . . and he attempts to murder Finch’s two children. Of course, nothing could be more insidious than child murder. There is only one possible verdict for Bob Ewell. Just as Atticus Finch shoots a “mad dog” in the street, the same fate awaits the vicious, vengeful poor white villain in the film’s denouement. It is not the father who resorts to violence, though; it is his ghostly neighbor, Boo Radley. A social outcast with a troubled past, Radley acts the part of a guardian angel, saving the children on Halloween night. 49

As minor actions, go any one might be isolated and unmeaningful. But just as many mickles make a muckle, these smaller interactions pile up to suggest that these behaviors are not merely isolated but are defining for the expected social norms in Maycomb.

In contrast, the bigger conflicts, which are fewer but more dramatic, tend to highlight instances where individuals bucked against the matrix of behavior. It’s in these conflicts that Harper Lee sets out to explain how her characters navigate within the matrix by noting that they are outside. In Go Set a Watchman, it’s the interactions that happen outside the matrix that take up a significant portion of dialogue between the characters that serve to explain why things may not be right. For example, early, Jean Louise and Hank are passed by a “[c]arload of negroes.” 50 Hank explains their speed, saying: “That’s how

46 HARPER LEE, GO SET A WATCHMAN 49 (2015) [hereinafter “WATCHMAN ”]. Calpurnia describes this as “polite speech” trying to explain to Jean Louise why she can’t understand the relationships with black persons.

47 HARPER LEE, TO KILL A MOCKINGBIRD 230 (J.B. Lippincott Co., 1960) [hereinafter “MOCKINGBIRD”].

48 Id.


50 WATCHMAN, supra note 46, at 80.
they assert themselves these days. They’ve got enough money to buy used cars, and they get out on the highway like ninety-to-nothing. They’re a public menace.51

When Jean Louise asks whether they have drivers’ licenses, Hank says “[n]ot many. No insurance, either.”52 Hank’s commentary seems to implicate that now that order is out of sorts in Maycomb, all black drivers not only drive without drivers’ licenses and insurance, but do so recklessly. This is seemingly confirmed for Hank when Zeebo’s son Frank hits Mr. Healy in Zeebo’s car. Atticus and Hank discussing the incident reveal how black people outside of the accepted matrix are simply bound to cause problems. The presence of the NAACP will only continue to exacerbate those problems. As Atticus in Go Set a Watchman observes, preventing their lawyers from taking the case will “stem the tide a little bit this way.”53 In short, the presence of the NAACP lawyers makes everyone in Maycomb worst off.

In contrast, one cannot come to the conclusion that Atticus’s defense of Tom Robinson makes him better off. At best, Atticus satiates his own internal sense of justice while failing to deliver any for Tom. Tom is convicted. And he is later lynched by a mob acting outside the justice system. At worst, Atticus’ defense highlights why Tom Robinson can’t get a fair trial in Maycomb—the town is more interested, like Ms. Stephanie, in “what Atticus’s is up to” rather than if Tom Robinson is getting a fair trial.54 In fact the only people concerned with whether Tom Robinson is getting a fair trial are geographically as far from the process as possible and still be present—up in the balcony, there to watch so-called progress happen, and mourn from a distant its effects on their passive lives.

CONCLUSION

In Warren’s world, law stands as the impartial arbiter of society. Segregation, he wrote early in his career was not the problem—it was the tendency of white southerners to treat African Americans poorly in segregation. Eventually coming around to the view that Segregation too had to end, Warren’s solution for the South remained consistent—treat all men fairly. That treatment struggles against matrixes of behavior like in Lee’s Maycomb County. Both Warren’s work and Lee’s work present rich ironies when considering places. The Prison remains the only standing structure in Fiddlersburg—the place where law and

51 Id.
52 Id.
53 Id. at 149–50 (emphasis added).
54 MOCKINGBIRD, supra note 47, at 213.
responsibility meet most directly. The Graveyard finds itself buried with the town—taking on a second death as it were for the residents that remain interred. The Schoolhouse built with dirty money (and legally) in All the King’s Men tumbles under faulty workmanship, killing three children and launching Willie Stark’s political career. Willie does legal and not-legal things and is not immune to backroom deals and public projects that favor politically powerful people. Lee’s Maycomb depicts a courthouse with justice in name only. It is instead a place where characters strive to leave in place the matrix of social life—first the town in To Kill a Mockingbird and then Atticus in Go Set a Watchman. It seems that for both, the irony of where justice happens is as important as how it happens. Perhaps they don’t want to confuse good and bad, right and wrong, legal and illegal. Perhaps it’s best to simply be aware of the irony.
COMMENTS

REGULATION A+: NAVIGATING EQUITY-BASED CROWDFUNDING UNDER TITLE IV OF THE JOBS ACT

CHRISTIAN W. BOREK

I. INTRODUCTION

The “Great Recession” of 2008 caused many legislators to sound the siren for increasingly stricter financial regulations in the lending and securities markets. At the same time, however, small businesses were attempting to combat the already massive governmental regulations in the aforementioned areas in order to improve their access to capital. Between 2008 and 2012, Congress, in its partisan divide, did little to ease the restrictions on small businesses’ access to capital. As of April 2012, 12.5 million Americans were unemployed and the United States economy was still in a state of stagflation. The fact that


5 Stagflation, INVESTOPEDIA, http://www.investopedia.com/terms/s/stagflation.asp (last visited Aug. 29, 2016). Stagflation, a portmanteau of stagnation and inflation, occurs when there is slow economic growth and relatively high unemployment accompanied by “rising prices, or inflation, or inflation and a decline in the Gross Domestic Product (GDP).” Id.
small businesses account for roughly 73% of jobs in the United States creates a problem for the economy when these businesses struggle. Small businesses were the lynchpin for rapid economic growth and were seen as the life raft for subsiding the economic downturn in the United States during this time of stagflation. In 2011, toward the end of the Great Recession, approximately 600,000 small businesses reported being entirely shut-off from credit, with an additional 800,000 obtaining less capital than desired. However, Congress finally heard and witnessed the effects small businesses had on the American economy and took action to cure a problem created by their predecessors. Looking at the success of other modes of crowdfunding popularized by websites such as Kickstarter, Kiva, GoFundMe, and Indiegogo, Congress contemplated the use of a form of crowdfunding popularized in Europe: equity-based crowdfunding. In April of 2012, President Barack Obama signed the Jumpstart Our Business Startups Act (“JOBS Act”) that received bipartisan support from the bill’s inception. The JOBS Act, which established an exemption for equity-based crowdfunding under Title III, realized the potential of tapping the wealth of the masses in order to spur business development.

The purpose behind the JOBS Act was to spur small businesses and entrepreneurs by removing costly regulations and to make it easier for them to access capital through the new registration exemptions. In drafting the JOBS Act, Congress theorized that crowdfunding, and more specifically equity-based crowdfunding, would be able to democratize the investment process and give small businesses the necessary funds to survive the recession and prosper in the future.

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11 See JOBS Act, supra note 10.
enacted the JOBS Act in an attempt to aid American small businesses’
demand for capital by creating a readily available supply of investors.14
Senator Jeff Merkley, the sponsor of the influential crowdfunding
bill,15 speculated that if Americans moved just 1% of their retirement
saving to crowdfunding, “[t]he result would be $170 billion of invest-
ment in our startups and small businesses,” which would be “extraor-
dinarily powerful.”16 This is because over the next decade the demand
for new investments is estimated to be $13 trillion.17 Fifty-eight per-
cent of all American adults maintain that they are willing to help fund
a start-up or emerging growth company (“EGC”)18 in pursuit of the
“American dream,” which could prevent small businesses from essen-
tially begging for additional capital from whatever source possible.19
In light of these figures, crowdfunding, if implemented correctly by the
SEC, has the potential to remedy the market inefficiency because it
“connects entrepreneurs who could not otherwise get financing to a
new source of capital—public investors who would not traditionally be
investing in small business startups.”20

II. BACKGROUND

In this section, I will introduce the basic concepts of crowdfund-
ing, which includes the definition of crowdfunding and its origins. Sec-
ondly, I will discuss what the crowdfunding climate in the United

Concerns in the Internet Age and the JOBS Act’s Safeguards, 64 ADMIN. L. REV. 473, 487
(2012).
“[T]he JOBS Act will get small businesses and entrepreneurs back into the game by re-
moving costly regulations and making it easier for them to access capital. This legislation
also paves the way for more start-ups and small businesses to go public, which will attract
new investors and will allow small businesses to grow and create jobs.” Id.
17 See Paul White, Comments on SEC Regulatory Initiatives under the JOBS Act: Title
III—Crowdfunding, SEC (July 22, 2013), https://www.sec.gov/comments/jobs-title-
iii/jobstitleiii-248.pdf.
18 15 U.S.C. § 77b(a)(19) (2012). An emerging growth company is defined by the Secu-
rities Act as “an issuer that had total annual gross revenues of less than $1,000,000,000 (as
such amount is indexed for inflation every 5 years by the Commission to reflect the change
in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor
Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed
fiscal year.” Id.
19 See White, supra note 17, at 2 (noting the average crowdfunding investment is $1,300
and 69% of investors earning greater than $75,000 per year would be willing to invest an
average of $1,900 per year).
20 Steven Bradford, The New Federal Crowdfunding Exemption: Promise Unfulfilled, 40
States was during the pre-JOBS Act era and what exemptions were available to small businesses and EGCs. Finally, the last section illustrates, in a broad sense, the effect the JOBS Act will have on the EGCs and small businesses in terms of crowdfunding and potential access to more capital.

A. What is Crowdfunding?

Professor Steven Bradford, a leading scholar on the issue of crowdfunding, defines crowdfunding as “rais[ing] money through relatively small contributions from a large number of people.” At its most basic level, crowdfunding, as a concept of a capital financing scheme, is not new but has gained popularity in the wake of the Great Recession of 2008. The conceptual foundations of crowdfunding are twofold, stemming from the ideas of crowdsourcing and microfinance. The idea of microfinance was originally developed in the mid 1800s by a theorist named Lysander Spooner while Spooner was “writing about the benefits of small credits to entrepreneurs and farmers as a way of getting people out of poverty.” The modern version of microfinance was developed in the 1970s with the primary focus of designing a banking and credit system targeting developing nations that had a high level of poor and rural areas. The practice of microfinancing traditionally involved small, low-interest, unsecured loans that were repaid in small installments. The second concept that makes up crowdfunding, crowdsourcing, is commonly defined as the “‘inverse of microfinance; instead of one institution making loans to thousands of individuals, crowdfunding allows thousands of individuals to make

21 Bradford, supra note 13.
22 See Thomas Powers, SEC Regulation of Crowdfunding Intermediaries Under Title III of the JOBS Act, 31 BANKING & FIN. SERVS. POL’Y. REP. 1 (2012) (noting the increasing popularity of crowdfunding due to the need “for entrepreneurs to raise capital quickly and inexpensively in the wake of the financial crisis”).
25 See Olson, supra note 23, at 542; The History of Microfinance, GLOBAL ENVISION (Apr. 14, 2006), http://www.globalenvision.org/library/4/1051/ (“Starting in the 1970s, experimental programs in Bangladesh, Brazil, and a few other countries extended tiny loans to groups of poor women to invest in micro-businesses . . . . These ‘microenterprise lending’ programs had an almost exclusive focus on credit . . . targeting very poor (often women) borrowers.”).
26 Olson, supra note 23, at 542.
contribution to a single entrepreneur or business."

Crowdsourcing uses the power of a large and vast group of people who voluntarily undertake a task in a collaborative manner. The difference between microfinance and crowdsourcing is who receives the benefit. With microfinance, the entrepreneurs who are having difficulty accessing capital or are encountering a funding gap are benefitted, whereas in crowdsourcing, the "crowd" benefits because of the actions of the individual members of the "crowd" working together to achieve a goal.

Crowdfunding is thus a synthesis of the two aforementioned ideas—a large number of people providing access to capital to fund small entrepreneurial ventures that are struggling to gain access to traditional methods of financing.

There are five types of crowdfunding: (1) the donation model; (2) the reward model; (3) the pre-purchase model; (4) the lending model; and (5) the equity model (hereinafter “equity-based crowdfunding”). Though the reward and pre-purchase models are the most recognizable and popular forms of crowdfunding, this article will focus on the equity-based model. Equity-based crowdfunding, the newest model of crowdfunding, "offer[s] investors a share of the profits or return of the business they are helping to fund." Though this model may be new to the United States, other countries, like the United Kingdom, have been using this model of crowdfunding for years.

B. Crowdfunding in Pre-JOBS Act America

Prior to April of 2012, crowdfunding was limited to all but equity-based crowdfunding, because federal securities laws were not used to directly regulate crowdfunding. This is because equity-based crowdfunding would have likely fallen under the domain of the Securities Act of 1933.

Much like the financial regulations that arose in the wake of

27 Id.
28 See id. at 543.
29 See Bradford, supra note 13, at 29.
30 Id.
31 See id.; Olson, supra note 23, at 543.
33 Id. at 16 n. 52. (66.7% of crowdfunding offerings not involving pure donations offered the right to receive a product).
34 Id. at 24.
the Great Recession, the Securities Act of 1933 (“Securities Act”) was enacted in response to the Great Depression to provide enhanced investor and market protections.\(^{38}\) As a threshold matter, equity-based crowdfunding would have fallen under the definition of a “security,” which includes many enumerated financial instruments.\(^{39}\) One of these listed financial instruments is an “investment contract.”\(^{40}\) Because the SEC left the term “investment contract” undefined, the Supreme Court of the United States was left to create a test to determine what fell under the broad and sweeping language of “investment contract.”\(^{41}\) In \textit{SEC v. Howey}, the Supreme Court stated that “an investment contract for the purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of a promoter or a third party.”\(^{42}\)

In \textit{Howey}, W.J. Howey Co. sold investors real property interests in Florida orange groves in addition to service contracts for the cultivation and development of the groves.\(^{43}\) These service contracts were sold by W.J. Howey Co. for a share in the groves’ profits.\(^{44}\) Despite Howey’s argument that it was selling a land contract coupled with a service contract, the Supreme Court held that Howey was offering securities in the form of investment contracts under the Securities Act.\(^{45}\) The Supreme Court reasoned that Howey was offering investment contracts because it was offering purchasers the opportunity to: (1) invest money by purchasing land and service contracts; (2) in a common enterprise of orange grove cultivation and development; (3) with an expectation of profit for the investors; (4) that predominantly depended

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\(^{39}\) See 15 U.S.C. § 77b(a)(1) (2012); see also Joan MacLeod Heminway & Shelden Ryan Hoffman, Proceed at Your Peril: Crowdfunding and the Securities Act of 1933, 78 TENN. L. REV. 879, 904 (2011) (“[I]t is probable that a court would find that crowdfunding under Section 2(a)(1) of the Securities Act, an investment contract is a security . . . .”).

\(^{40}\) See Heminway & Hoffman, supra note 39, at 904.


\(^{42}\) Id. at 298–99; see also United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975) (“The touchstone of an investment contract is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.”).

\(^{43}\) Howey, 328 U.S. at 295–96.

\(^{44}\) See id. at 299.

\(^{45}\) Id. at 300–01.
upon the efforts of others.46

Howey thus set forth a five-pronged test that directly applies to equity-based crowdfunding campaigns.47 The first prong of the Howey test—a contract, transaction, or scheme—is broad enough “to cover all crowdfunding business operations.”48 Equity-based crowdfunding meets the first prong, “[r]egardless of whether the purchase of crowdfunding interest constitutes a valid, binding, and enforceable contract, the purchase by funders of a crowdfunding interest qualifies as a transaction or scheme . . . .”49 The second prong, the investment of money, is met when an investor pays for a share of equity in the venture.50

The third prong, a common enterprise, was not defined by the Howey Court, resulting in a circuit split on how to satisfy this element.51 The Sixth and Seventh Circuits52 prescribe a “horizontal commonality” test that analyzes the relationship between the investors and relies on the success of the contracts in the aggregate or common pooling of assets in a single investment fund.53 According to scholars, the “horizontal commonality” test is satisfied under equity-based crowdfunding.54 The Ninth Circuit55 applies a less restrictive standard of “strict vertical commonality” that requires the success of an investment in an operating entity to be proportionate to the success of the entity itself; the gain or loss incurred by the investor must be proportionate to the gain or loss incurred by the operating entity.56 In the equity-based crowdfunding realm, the “strict vertical commonality” test offered by

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46 Id. at 299–300.
47 Heminway & Hoffman, supra note 39, at 891.
48 Id. at 892.
49 Id. at 895.
50 Id. at 901.
51 See id. at 887.
53 See id.; see also Schofield v. First Commodity Corp. of Boston, 638 F. Supp. 4, 7 (D. Mass. 1985).
55 See SEC v. Glenn W. Turner Enters., 474 F.2d 476, 482 n.7 (9th Cir. 1973) (“A common enterprise is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.”); see also Heminway & Hoffman, supra note 37, at 888 (noting that the standard adopted by the Ninth Circuit has been coined “strict vertical commonality.”).
56 See Glenn W. Turner Enters., 474 F.2d at 482 n.7; see also Heminway & Hoffman, supra note 39, at 888 ([S]trict vertical commonality requires a link between investment performance and promoter remuneration.”).
the Ninth Circuit could be met if “a crowdfunding website . . . takes a fee or commission once the featured venture’s target is achieved and has an ongoing interest in the success of that venture parallel to that of the funders.”\(^{57}\) The final test under the third prong of \textit{Howey} is the “broad vertical commonality” standard created by the Fifth Circuit and adopted by the Eleventh Circuit.\(^{58}\) This test requires that the gain or loss incurred by an investor in an operating entity be dependent upon the efforts of the operating entity.\(^{59}\) Accordingly, the “broad vertical commonality” test is met under equity-based crowdfunding because the success of investors depends upon the efforts of the operating entity.\(^{60}\)

The fourth prong of the \textit{Howey} test, expectation of profits, is met when an investor “purchase[s] crowdfunding interests that promise a current return or capital appreciation.”\(^{61}\) The final prong of the \textit{Howey} test, relying solely on the efforts of others, is met under equity-based crowdfunding when the purchaser of the share of equity expects some other person working for the venture to create a profit.\(^{62}\) Because of the strict requirements set forth by the SEC under the Securities Act and the \textit{Howey} test, there were only two exemptions available to businesses before the JOBS Act: Regulation D and Regulation A.

i. Regulation D

Regulation D, comprised of Rules 501–506, was issued by the SEC under Sections 3(b)\(^{63}\) and 4(a)(2)\(^{64}\) of the Securities Act. Regulation D sets forth exemptions from registering offerings depending on, inter alia, the size of the offering, the number of purchasers, and whether purchasers are sophisticated investors or accredited investors.\(^{65}\) The purpose of Regulation D is “to simplify and clarify existing exemptions, to expand their availability, and to achieve uniformity be-

\(^{57}\) Heminway & Hoffman, \textit{supra} note 39, at 901.
\(^{58}\) \textit{See} SEC v. Koscot Interplanetary Inc., 497 F.2d 473, 479 (5th Cir. 1974) (creating the broad vertical commonality standard); \textit{see also} SEC v. ETS Payphones, Inc., 408 F.3d 727, 737 (11th Cir. 2005) (adopting the broad vertical commonality standard).
\(^{59}\) \textit{Koscot Interplanetary, Inc.}, 497 F.2d at 479 (“[T]he requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy of the [operating entity].”).
\(^{60}\) Heminway & Hoffman, \textit{supra} note 39, at 901.
\(^{61}\) \textit{See id.} at 902–03.
\(^{62}\) \textit{See id.} at 903–04.
between Federal and state exemptions in order to facilitate capital formation consistent with the protection of investors. Rule 502 of Regulation D lays out the general conditions that must be met to qualify for the registration exemption. Rule 502 prohibits participation in general solicitations or general advertisements of the equity shares, and restricts participation to accredited investors.

The other pertinent aspects of Regulation D—Rules 504, 505, and 506—provide three different types of exemptions. Rule 504, often referred to as the “seed capital” exemption, covers offerings up to $1 million in any 12-month period with no restriction on the type of offering. Rule 505, in similar fashion, covers offerings up to $5 million in any 12-month period to an unlimited number of accredited investors, yet allows only 35 unaccredited investors to participate. Rule 506, known as the “private placement” exemption, is used for more than ninety percent of all exempt offerings in the United States. Prior to its amendment in 2013, Rule 506 provided an exemption for the sale of securities to an unlimited number of accredited investors, and if no general solicitation or advertising occurred, 35 unaccredited investors were allowed to participate in the offering. These unaccredited investors could take part in the private placement exemption offering so long as they met the sophistication condition prescribed by the SEC under this Rule.

ii. Regulation A

The second exemption in existence in the pre-JOBS Act era was Regulation A. The predecessor to Regulation A+ was embodied in the pre-amendment Rules 251 through 263 and was enacted under Section

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71 Robert B. Robbins, Practical Implications of the JOBS Act Changes to Private Placements: Rule 506(c), Crowdfunding, and Reg A+, SW017 ALI-CLE 77 (Mar. 10-12, 2016).
3(b) of the Securities Act. The purpose behind the enactment of Regulation A was to assist small businesses in obtaining capital from the sale of securities. Under Regulation A, there was a maximum cap of $5 million, including no more than $1.5 million that could be offered by selling security holders (i.e., insiders) that could be raised in any 12-month period, “less the aggregate offering price for all securities” sold by the issuer during the previous 12-month period in reliance on Regulation A. Additionally, unlike other pre-JOBS Act exemptions, the individual securities offered during a Regulation A offering were not subjected to a price floor or ceiling. This is because “[t]he Commission [was] persuaded that exclusion of legitimate small business operating companies from the exemption because of the trading price of their securities is not necessarily for investor protection and would foreclose significant financing options to small developing companies.”

Similar to Regulation D, there was no limit on what type of investor could partake in Regulation A offerings. Unlike pre-amendment Rule 506, a potential issuer was allowed to execute a general solicitation and advertisement of the securities per approval by the Commissioner, commonly referred to as a “test the waters” provision. However, this provision did not allow a permanent general solicitation and/or advertisement. The “test the waters” provision was a short-term period where the SEC permitted a prospective issuer of securities to publish “to prospective purchasers a written document or make scripted radio or television broadcasts to determine whether there is any interest in a contemplated securities offering.” Other somewhat unique aspects of Regulation A included: substantial pre-sale information requirements, akin to a mini-registration statement for a public company, no requirement of audited financial statements, non-exemption from state blue sky laws, and no requirement of ongoing

77 Small Business Initiatives, supra note 75.
78 Id. at 36443.
81 See id.
82 Id.
84 Id.
Despite the SEC’s attempt to create a private small business exemption in hopes of spurring small business growth and access to capital, the SEC fell short of their goal. In the three years between 2009 and 2012, arguably the time small businesses needed to tap into the funds of the masses, only sixteen Regulation A offerings were filed. This was because of the mini-registration that is required under Regulation A. Potential issuers who originally considered Regulation A as a viable option to obtain additional capital found out that the costs of the mini-registration were—and still are—similar to that of a full public offering registration. Because most small businesses are attempting to close the capital funding gap by utilizing a registration exemption to tap the wealth of the masses, the cost of the mini-registration coupled with the cost and coordination of state blue sky laws discouraged a large volume of offerings under Regulation A.

The JOBS Act

Equity-based crowdfunding is subject to the Securities Act registration requirement because equity-based crowdfunding constitutes a sale and offer of investment contracts. Such are also subject to the Act’s requirement because the primary method of sale is conducted through a means of interstate commerce (i.e. the internet). In the pre-
JOBS Act economy, small businesses had a survival rate of approximately 33% over a ten year period. Generally, the only way small businesses could access the capital of the masses was through an initial public offering (“IPO”). However, for most small businesses, the average cost of going public was extremely prohibitive, effectively isolating the masses from the small businesses. The cost of going public for a small business in the United States is between $100,000 and $1.5 million in third party fees.

Congress, heeding the squalls of the small businesses, decided to take action that would help alleviate the burden that small businesses were, and to some extent still are, encountering. After much debate and many changes by the House and Senate in committee, on April 5, 2012, President Obama signed the JOBS Act into law. The purpose behind the JOBS Act was to “put more people back to work and put more money in the pockets of working Americans” by “mak[ing] it easier for small companies to raise capital in U.S. financial markets, thereby facilitating their growth and creating jobs.”

The main provisions of the JOBS Act, mainly those found under Title III, were enacted to provide a path of least resistance for small businesses to access capital. With this goal in mind, Congress eliminated the overly restrictive requirements of a security under Section 4 of the Securities Act and permitted the use of equity-based crowdfunding through a registration exemption for crowdfunded securities. In addition, Title II of the JOBS Act lifted Rule 502’s ban on general solicitation in connection with Rule 506 of Regulation D. In essence,

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102 Id. at 315.
103 Id. at 313–314.
issuers conducting equity-based crowdfunding campaigns under a Rule 506(c) offering can solicit and advertise the security so long as all participating investors are accredited.104

Additionally, Title II also amends Rule 144A of the Securities Act, which is a safe harbor exemption that allows an individual to resell restricted securities to “qualified institutional buyers.”105 Thus, Title II mandates the SEC to change Rule 144A to allow offers to nonqualified institutional buyers, including by means of general solicitation or general advertising.106 Finally, Title II allows individuals who conduct Rule 506 offerings via the internet or other platforms to avoid registering as brokers or dealers.107 The final provision of the JOBS Act, Title IV, mandates the SEC revise Section 3(b) of Regulation A in order to provide another crowdfunding alternative to small businesses, known as Regulation A+.108 Title IV, referred to as Regulation A+, is the main focus of this article and will be explained in-depth below.

III. REGULATION A+

This section will introduce the newly revised Regulation A+. In the first section, I will address the inner workings of Regulation A+ in a systematic manner. In the second section, I will diverge from what Regulation A+ entails, and illustrate the differences between Regulation A and Regulation A+.

A. What is Regulation A+, and What Does It Entail?

The JOBS Act required the SEC to revise Regulation A109 to make crowdfunding more feasible and enticing for small businesses and EGCs. Practitioners and scholars alike have been speculating about the details of the revised Regulation A,110 commonly referred to as “Regulation A+.”111 On March 25, 2015, the SEC unanimously agreed on the proposed rules to amend Regulation A, and adopted the final rules to

104 Day Pitney, LLP, supra note 67.
105 Capital Raising Online While Deterring Fraud and Unethical Non—Disclosure Act, 126 Stat. at 314.
106 Id.
107 Id.
108 Id. at 323–24.
implement Title IV, specifically Section 401, of the JOBS Act. Section 401 of the JOBS Act amended Section 3(b) of the Securities Act by changing the designation of Section 3(b) to Section 3(b)(1), and created Sections 3(b)(2) through 3(b)(5). On June 19, 2015, Regulation A+ took effect with the intent of “eas[ing] the burden of [the] Securities Act registration for small public offerings.”

Section 3(b)(2) directed the Commissioner of the SEC to adopt new regulations that would allow for an exemption of a certain class of securities for up to $50 million within a 12-month period. In addition, Section 3(b)(5) compelled the Commissioner to review the $50 million offering limit provided for in Section 3(b)(2) two years after the enactment of the JOBS Act, and then on a biannual basis after the first two years. The SEC sought to remedy the problems associated with mini-registration under Regulation A by expanding Regulation A’s exemption into two tiers. Tier 1 would have an exemption for securities offerings up to $20 million, and Tier 2 would offer an exemption for offerings up to $50 million.

i. Scope of the Exemption

As previously stated, the offering limits provided under newly created Regulation A+ are twofold. Tier 1 issuers may offer and sell up to $20 million of securities, plus the gross proceeds sold pursuant to other offerings, including no more than $6 million offered by security holders that are affiliates of the issuer over the course of a 12-month period. Tier 2 issuers may offer and sell up to an aggregate of $50 million of securities over a 12-month period, including no more than

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116 Id.
117 See id. at 7.
$15 million offered by all selling security holders that are the affiliates of the issuer.\footnote{121} Additionally, with respect to secondary offerings or sales, Regulation A+ eliminated the last sentence of Section 251(b) of the Securities Act, which prohibited affiliate resales unless the issuer had net income from continuing operations in at least one of its last two fiscal years.\footnote{122} As such, Rule 251 limits secondary sales to no more than 30% of the aggregate offering price in an offering.\footnote{123} After the expiration of the first 12-month period of the initial offering, in Tier 1, affiliates are limited to selling no more than $6 million over a 12-month period.\footnote{124} In Tier 2, affiliates are not permitted to sell more than $15 million over a 12-month period.\footnote{125}

Rule 251 of Regulation A+ also sets out eligibility criteria for both issuers and securities.\footnote{126} Regulation A+ promulgates the rules set forth by Regulation A, limiting the exemption to entities organized in and with their principal place of business in the United States or Canada.\footnote{127} Following the precedent set forth by its predecessor, the Regulation A+ exemption is not available to: companies subject to ongoing reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934;\footnote{128} companies registered or required to be registered under the Investment Company Act of 1940;\footnote{129} a development stage company without a specific business plan, purpose, or plans to merge or acquire unidentified companies;\footnote{130} an offeror that issues equity rights in oil or gas companies;\footnote{131} and issuers that are subject to the “bad actor” disqualification under Rule 262.\footnote{132}

Regulation A+ also added two new categories of issuers that are disqualified from filing for a Regulation A+ exemption: issuers that

\footnote{121}{17 C.F.R. § 230.251(a)(2) (2015).}
\footnote{123}{17 C.F.R. § 230.251(a)(3) (2015).}
\footnote{124}{17 C.F.R. § 230.251(a)(1) (2015).}
\footnote{125}{17 C.F.R. § 230.251(a)(2) (2015).}
\footnote{126}{See 17 C.F.R. § 230.251 (2015).}
\footnote{127}{17 C.F.R. § 230.251(b)(1) (2015).}
\footnote{128}{17 C.F.R. § 230.251(b)(2) (2015).}
\footnote{129}{17 C.F.R. § 230.251(b)(4) (2015).}
\footnote{130}{17 C.F.R. § 230.251(b)(3) (2015).}
\footnote{131}{17 C.F.R. § 230.251(b)(5) (2015).}
\footnote{132}{17 C.F.R. § 230.251(b)(8) (2015); 17 C.F.R. § 230.262 (2015). Section 262 disqualifies securities offerings from reliance on Regulation A+ if the issuer or other relevant persons have experienced a disqualifying event such as being convicted of, or subject to court or administrative sanctions for, securities fraud or other violations provided by this provision. 17 C.F.R. § 230.262 (2015).}
were required to, but did not, file ongoing reports under Regulation A during the two years preceding the filing of a new offering circular;\textsuperscript{133} and issuers that are, or during five years preceding the filing of an offering circular have been, subject to an SEC order that denied, suspended, or revoked the registration of a class of securities pursuant to Section 12(j) of the Exchange Act.\textsuperscript{134} Additionally, “only equity securities (including warrants), debt securities and debt securities convertible or exchangeable into equity interest, as well as guarantees of any such securities, are eligible to be offered and sold pursuant to the Regulation A[+] exemption.”\textsuperscript{135} As such, asset-backed securities\textsuperscript{136} are expressly excluded from the definition of eligible securities under Regulation A+.\textsuperscript{137}

Despite the hopes and claims by Congress, the Executive Branch, and practitioners, that the new crowdfunding exemption would democratize the investing world, Regulation A+ still imposes restrictions on investment, limitations on who can invest, and how much certain investors can invest.\textsuperscript{138} According to the text of Rule 251, only those purchasers who are not “accredited” under Tier 2 are subject to those limitations.\textsuperscript{139} Regulation A+ promulgates the trend under Regulation A that a person deemed to be an “accredited investor”\textsuperscript{140} under Tier 1 or Tier 2 is not subject to an investment cap. Rule 501 defines an “accredited investor” as anyone who has a net worth of $1 million or any person who has an individual income of $200,000 in the two most recent years—or a combined joint income with that person’s spouse of $300,000 in the two most recent years—and has a reasonable expectation of making that in the coming years.\textsuperscript{141} However, those who cannot meet this standard in a Tier 2 offering, or “unaccredited investors,” are

\begin{itemize}
\item \textsuperscript{133} 17 C.F.R. § 230.251(b)(7) (2015).
\item \textsuperscript{134} 17 C.F.R. § 230.251(b)(6) (2015).
\item \textsuperscript{135} SIDLEY AUSTIN LLP, \textit{supra} note 114, at 2.
\item \textsuperscript{136} Asset-backed securities (“ABS”) are financial instruments such as bonds or notes that are backed by financial assets. “Typically these assets consist of receivables other than mortgage loans, such as credit card receivables, auto-loans, manufactured-housing contracts, and home equity loans.” \textit{Types of Bonds: What are Asset-Backed Securities?,} THE SEC. INDUS. & FIN. Mkt. ASS’N., \texttt{http://www.investinginbonds.com/learn-more.asp?catid=5&subcatid=16&id=10} (last visited Sep. 4, 2015).
\item \textsuperscript{138} See 17 C.F.R. § 230.251(d)(2)(i)(C) (2015).
\item \textsuperscript{139} See id.
\item \textsuperscript{140} 17 C.F.R. § 230.501 (2012).
\item \textsuperscript{141} \textit{Id.}
limited to investing no more than 10% of either annual income or net worth, whichever is greater. Some practitioners note that unlike a Tier 2 offering, an unaccredited investor is not limited to the amount they are permitted to purchase under a Tier 1 offering. In addition to the investing limit, Tier 2 issuers are required to notify investors of the investment limitations, but are not required to investigate further or have a reasonable belief that the investor qualifies as an accredited investor. Finally, Regulation A+ offerings preserve the existing integration safe harbor under Regulation A, and therefore, new offerings will not be integrated with any prior offers or sales of securities, nor will they be integrated with subsequent offers or sales of securities that are registered under the Securities Act.

ii. Testing The Waters

Under the new rules, issuers are still permitted to “test the waters” with all potential investors and use solicitation materials before the offering statement is filed. However, in order to keep “testing the waters” solicitations within the realm of antifraud and civil liability protections, Rule 255 mandates that all solicitation matters be filed as an exhibit to the offering circular. Under this “testing the waters” exception to the general solicitation ban, the SEC has determined that “[r]egularly released factual business communications” do not fall under the category of solicitation of interest materials under Regulation A+. As such, the SEC has also stated “factual business communications typically include information about the issuer, its business, its financial condition and its products, and generally do not include predictions, projections, forecasts, or opinions with respect to the valuation of a security.”

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143 17 C.F.R. § 230.251(d)(2)(i)(C)(2) (2015). If the investor is a corporation, the annual revenue or net assets of the company’s most recent completed fiscal year. Id.
144 GREENBERG TRAURIG LLP, SEC ADOPTS REGULATION A+: TWO NEW ALTERNATIVES FOR EXEMPT CAPITAL RAISES 3 (Apr. 2015).
149 SIDLEY AUSTIN LLP, supra note 114, at 3.
150 Id.
Offering Statements

All offerings made under Regulation A+, whether made under Tier 1 or Tier 2, will require an offering statement made on Form 1-A. Regulation A+ also permits non-public submission of a draft offering statement to the SEC by issuers who have never sold securities pursuant to a qualified offering circular under Regulation A or an effective registration statement under the Securities Act. These non-public submissions, along with any non-public amendments and correspondence submitted by or on behalf of the issuer, must be made public at least 21 calendar days before the qualification of the offering circular. When submitting a non-public draft offering statement, it is critical to understand that these drafts are not shielded by the Freedom of Information Act (“FOIA”), which means that the SEC could be required to divulge a copy of the draft statement.

The vast amount of information required by Form 1-A is strikingly similar to the information required when filing a 10-K for a publicly traded company. For example, under Part I of Form 1-A, the offeror must include: certification that it meets various eligibility criteria and is not subject to the “bad actor” disqualification, information about the offering and the jurisdiction in which the securities will be offered, and disclosure about unregistered issuances or sales of securities within the last year. Additionally, Part II of Form 1-A deals with the text of the offering circular, which includes financial statements. The topics required to be disclosed under Part II are, inter alia: basic information about the issuer and offering for the purchaser; risk factors that would affect the future of the company; descriptions of the type of industry the business is participating in and all material assets held by the company; a section of management, discussion, and analysis (commonly referred to as the “MD&A”); a statement about the directors, executives and 10% or greater shareholders of the issuing company; and “related-party transactions and the material terms of the offered securities.”

In addition to the disclosure requirements required of publicly traded companies, Tier 1 issuers are not required to provide audited

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153 Id.
154 See SIDLEY AUSTIN LLP, supra note 114, at 4.
155 See id.
156 See id.
157 Id.
financial statements unless the financial statements are already available to the issuer.158 Tier 2 issuers, however, must file audited financial statements that are in accordance with either the United States Generally Accepted Auditing Standard (“GAAS”) as set forth by the American Institute of Certified Public Accountants (“AICPA”) or the standards of the Public Company Accounting Oversight Board (“PCOAB”).159 Finally, Part III of Form 1-A requires signatures of all parties, an exhibit index that includes the “testing the waters” solicitation if offered, and exhibits to the offering circular.160 Once Form 1-A is filed with the SEC, the issuer cannot sell equity shares until the SEC’s Division of Corporation Finance issues a “notice of qualification.”161

iv. Continual Reporting and Disclosure

Tier 1 issuers, unlike Tier 2 issuers, are not required to continue reporting obligations after the notice of qualification has been filed by the SEC.162 The only reporting required by Tier 1 issuers after the SEC accepts their Form 1-A offering circular is the filing of an exit report that contains summary information set forth in Form 1-Z163 no later than 30 days after the termination or completion of the offering.164 Yet, for issuers attempting to utilize the crowd under Tier 2, there are more stringent reporting requirements that include annual, semi-annual, and current event reports.165 Annually, Tier 2 issuers are required to electronically file Form 1-K within 120 calendar days of the issuer’s fiscal year end.166 Form 1-K requires issuers to update certain information previously filed with the Commission, in addition to: disclosures relating to the issuer’s business operations for the preceding three fiscal years; MD&A discussing the issuers operating results, liquidity and capital resources, and audited financial statements for the two most recent years; related-party transactions; information on the directors, executive officers, and significant employees; information regarding executive compensation of the three highest paid executive officers for

158 Id.
160 See SIDLEY AUSTIN LLP, supra note 114, at 5–6.
161 Id. at 7.
the two most recent and completed fiscal years; and identification of who has beneficial ownership of voting securities (e.g. directors, officers, 10% owners, etc.).

Subsequently, Tier 2 issuers are required to submit semi-annual reports on their activities under Form 1-SA. This must be completed within 90 days after the end of the first six months of the issuer’s fiscal year. Form 1-SA must include interim financial statements and an MD&A which do not have to be audited or reviewed. Practitioners have noted that the interim financial statements required are similar to that of a 10-Q required by public companies but have “reduced disclosure requirements.” An example of the relaxed disclosure required is that “there is no requirement to include quantitative and qualitative disclosures about market risk or controls and procedures disclosures.”

Finally, Tier 2 issuers are required to submit current reports under a new form, Form 1-U, within four business days of the occurrence of a triggering event. Practitioners who have studied the requirements under Form 1-U state that these “[t]riggering events are similar to a number of the events that SEC registered companies report on Form 8-K but do not include all of the Form 8-K items.” Form 1-U classifies the following events as triggering events: fundamental changes; bankruptcy or receivership; material modification to the security holders; changes in the issuer’s certifying accountant; non-reliance on previous financial statements or a related audit report of completed interim review; changes in control of the issuer; departure of the principal executive officer, principal financial officer, or principal accounting officer; and unregistered sales of 10% of more of outstanding equity securities. However, an issuer’s ongoing reporting and disclosure obligations are suspended when a class of securities is held of record by less

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171 GREENBERGTRAURIG LLP, supra note 144, at 7.
172 Id.
174 GREENBERGTRAURIG LLP, supra note 144, at 7.
than 300 individuals and the issuer has satisfied its reporting obligations. After all of this is completed, the Tier 2 issuer must still file an exit report under Form 1-Z as done in Tier 1 issuances.

v. Blue Sky Preemption

Prior to Congressional amendments to Regulation A, an issuer attempting to utilize the exemption under Regulation A was still subject to the individual state “blue sky” laws in addition to the regulations set forth by the SEC. However, the JOBS Act provides that securities issued under Regulation A+ exemption are “covered securities” and therefore preempt state blue sky laws. The exempt securities under Regulation A+ will remain exempt from state blue sky laws so long as they are either offered or sold on a national securities exchange or are offered or sold to a qualified purchaser. Rule 256 defines a “qualified purchaser” as “any person to whom securities are offered or sold pursuant to a Tier 2 offering . . . .” According to the language of Rule 256 and the JOBS Act, only Tier 2 offerings will preempt state blue sky laws—leaving Tier 1 offerings subject to the enhanced requirements set forth not only by the SEC, but also by the individual states. Both Tier 1 and Tier 2 offerings remain subject to state anti-fraud enforcement and filing and fee requirements.

B. The Similarities and Differences Between Regulation A and A+

As seen in the previous sections outlining Regulation A and its successor, there are numerous similarities and differences. One of the main components of Regulation A that Congress and the SEC were sure to keep was the “testing the waters” provision. Another similarity between Regulation A and Regulation A+ is that a significant

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180 Id.
182 See id.; SIDLEY AUSTIN LLP, supra note 114, at 9.
183 Id.
amount of pre-sale information is required to complete the registration requirements for the SEC before equity shares can be sold through the private exemption. As previously stated, this mini-registration is termed as such because the steps that companies must take to utilize the private exemption mirrors that of what companies must do when attempting to offer an IPO. A final and significant similarity between the two regulations is that both contain the bad actor disqualification provision, whereby a company is disqualified from securities offerings relying on Regulation A+ if the issuer or other relevant persons involved in the offering have experienced a disqualifying event such as being convicted of, or subject to court or administrative sanctions for, securities fraud or other violations provided by the provision.

Despite some overlap between Regulation A+ and its predecessor, the differences between the two regulations far outnumber the similarities. The first departure between the two regulations is the investment limitation per offering. Under Regulation A, the offering was limited to $5 million, but Regulation A+ quadrupled the offering limit in Tier 1 to an aggregate offering cap of $20 million. Additionally, the Tier 2 offering cap was raised tenfold and now provides for an aggregate offering cap of $50 million. The second difference between Regulation A+ and Regulation A is a limitation on the amount of money that can be invested by “unaccredited” investors. Regulation A+ sets forth that an unaccredited investor participating in a Tier 2 offering cannot invest more than 10% of income or net worth, whichever is greater. Third, Regulation A+, though only under Tier 2 offerings, provides an exemption from state blue sky laws. Fourth, the SEC added a provision to Regulation A+ that requires issuers of a Tier 2


offering to provide audited financial statements. The fifth and final significant divergence from Regulation A is that Tier 2 issuers are now subject to substantial continual and current events reporting after the offering company has completed the filing requirements under Form 1-A.

IV. THE SHORTFALLS AND “BENEFITS” OF REGULATION A+

President Franklin Delano Roosevelt, when speaking to Congress about the inevitable enactment of the Securities Act, proclaimed, “[t]he purpose of the legislation I suggest is to protect the public with the least possible interference to honest business.” As scholars have noted, the Securities Act has had an adverse effect on small businesses from the time it was enacted, because there is “no insuperable barrier to small business financing [than that which] has been created by [securities] laws.” When Congress charged the SEC with the task of enacting Title IV of the JOBS Act, the SEC originally took a cynical stance on the Act, leading many to believe that the SEC did not share the same views on crowdfunding as Congress. This skepticism about the effectiveness of Regulation A+ arose from the antagonistic views of the Chairwoman of the SEC towards equity-based crowdfunding. This subsequently led to a new law full of shortcomings. Commissioner Daniel M. Gallagher proclaimed that “[u]nfortunately, despite having passed Regulation A+, the Commission does not merit a grade of A+ in its attempt to capital formation issues. At best, our grade is ‘incomplete’ given the significant number of critical investor protection issues

195 77 CONG. REC. 937 (1933).
197 See e.g., David S. Hilzenrath, Jobs Act Could Remove Investor Problems, SEC Chair Mary Shapiro Warns, WASH. POST (Mar. 14, 2012), https://www.washingtonpost.com/business/economy/jobs-act-could-open-a-door-to-investment-fraud-sec-chief-says/2012/03/14/glQAIv1xIBS_story.html (“Too often, investors are the target of fraudulent schemes disguised as investment opportunities . . . . [I]f the balance is tipped to the point where investors are not confident that there are appropriate protections, investors will lose confidence in our markets, and capital formation will ultimately be made more difficult and expensive.”).
198 Daniel M. Gallagher, Comm’r, Sec. Exch. Comm’n., Address at Vanderbilt Law School’s 17th Annual Law and Business Conference: Grading the Commission’s Record on Capital Formation: A+, D, or Incomplete? (Mar. 27, 2015) (stating author’s elation that congress finally gave the SEC the opportunity to “revitalize the currently-moribund Regulation A offering exemption.”).
that need to be taken up in the near future.” In light of his comments on the incompleteness of Regulation A+, Commissioner Gallagher maintains there are still benefits of Regulation A+ which can be used for small business capital formation.

A. Benefits of Regulation A+ For Small Business Capital Formation

As Commissioner Gallagher has previously stated, there are some benefits to Regulation A+ despite receiving a grade of “incomplete.” Upon conducting a review of Regulation A+, four benefits can be seen from the revision of Regulation A. These benefits are: the “testing the waters” provision carried over from Regulation A, an increase in the investment cap, blue sky law preemption under Tier 2, and the availability for unaccredited investors to participate in Tier 2 offerings. The first benefit provided by Regulation A+, that both Tiers are able to test the waters both before and after an offering statement has been filed, is not a new creation of the SEC. The inherent benefit that exists with being able to “test the waters” is that the offeror can first determine the level of interest in the security. This can aid in the initial determination of whether there is enough interest that would warrant the offering of the security. Additionally, the “testing the waters” provision can aid in assessing how much of the security and what type of security to offer to the interested party. Finally, being able to “test the waters” can enable a company to decide geographically where the most interest in the security is derived from.

Second, the increased maximum funding cap is beneficial to help small businesses overcome the capital funding gap that often stresses the small business community. Regulation A+ increased the maximum

199 Id.
200 Id. ("I am very pleased that the Commission was finally able to adopt changes to Regulation A to substantially resolve several of the key issues that previously afflicted the rule.").
201 Id.
funding cap from $5 million per 12 months under Regulation A to either $50 million per 12 months under a Tier 1 offering,207 or $20 million per 12 months under a Tier 2 offering.208 Small companies often experience difficulty when attempting to get off the ground because capital dries up relatively quickly. Individuals often look first to their own personal funds, funds of friends or families,209 credit cards, second mortgages, or equity lines of credit210 when raising capital for a new business venture. However, with the enormous upfront costs of starting a business in an “era of regulatory excess,”211 the seed money from family and friends is quickly utilized leaving small businesses looking for more capital to continue operations. When small businesses run out of money, they quickly look to either angel investors or venture capitalists because traditional methods of funding are not available to start-ups.212 The reasons these small businesses cannot attain traditional financing, such as bank loans, are their lack of credit and operating history213 and a proven track record of failure within the first five years.214

Additional methods of traditional financing, such as angel investors and venture capital firms, are seldom available for start-ups’ utilization. The reasons venture capital firms are unavailable to startups

209 See David Mashburn, The Anti-Crowd Pleaser: Fixing the Crowdfunding Act’s Hidden Risks and Inadequate Remedies, 63 EMORY L. J. 127, 141 (2013). “Friends and family financing violates Section 5’s registration requirements and is often discovered only when a company is preparing for its initial public offering.” Id. at n. 95.
210 See Bradford, supra note 13, at 101.
212 See Ben Horowitz, How Angel Investing Is Different Than Venture Capital, BUS. INSIDER (Mar. 2, 2010), http://www.businessinsider.com/how-angel-investing-is-different-than-venture-capital-2010-3. The differences between an angel investor and venture capitalist are somewhat distinct. An angel investor is typically an individual who invests in a vast array of companies and on an individual basis contributes an average of $10,000 to $150,000, or collectively over $1 million. In addition, they generally do not have a position in the company, but contribute by imparting some kind of knowledge necessary to advance the business. A venture capitalist, on the other hand, is generally a company rather than an individual, seldom invests in the early stage of a company’s formation, and generally requires a seat on the board in addition to the equity shares. Id.
are exhaustive. For example, venture capital firms tend to focus on companies that are past the initial start-up phase and are seeking help with additional growth;\textsuperscript{215} they typically only invest between $2 and $10 million;\textsuperscript{216} and they generally only focus on certain industries that have trends of rapid growth.\textsuperscript{217} Because of this strict criteria set forth by venture capital firms, only 1% of all proposals to venture capital funds are accepted.\textsuperscript{218} The issues small businesses encounter with angel investors are similar to the issues small businesses encounter with venture capital firms. However, angel investors are not as strict in some of the ways they view investments.\textsuperscript{219} Nonetheless, requirements imposed by angel investors are still extremely strict and are prohibitive to most entrepreneurs.\textsuperscript{220} This is because the typical financing round for an angel investor is between $100,000 and $2 million,\textsuperscript{221} yet some angel investors have provided a capital investment as little as $25,000.\textsuperscript{222} Much like venture capital funds, angel investors typically look for “high-growth, high-return” investment opportunities, though some angel investors may invest for the social good, putting a high-yield on their investment second to societal interests.\textsuperscript{223} Thus, angel investors are typically of little use to small businesses when attempting to fill the funding gap.\textsuperscript{224}

Third, Regulation A+ exempts Tier 2 issuers from state blue sky laws.\textsuperscript{225} The reason this is such an impactful benefit is because of exorbitant costs that are incurred when attempting to comply with individual state blue sky laws. Though the cost will generally vary from state to state, compliance with state and federal security registration

\textsuperscript{215} Bradford, \textit{supra} note 13, at 102.
\textsuperscript{216} Id. Additionally, this range seems to be increasing with each passing year, only making it more difficult for small business to acquire the necessary financing to stay above water. Id.
\textsuperscript{217} U.S. GOV’T ACCOUNTABILITY OFF., GAO-00-190, Small Business: Efforts to Facilitate Equity Capital Formation 3 (2000). Some of the prominent firms that venture capital funds tend to focus much of their efforts on are businesses in the financial or technology (“FinTech”) industry. Id.
\textsuperscript{218} Id. at 20.
\textsuperscript{219} See Bradford, \textit{supra} note 13, at 103.
\textsuperscript{220} Id.
\textsuperscript{221} Id. The average angel investment in 2004 was $470,000. Id. at n. 540.
\textsuperscript{222} Bradford, \textit{supra} note 13, at 103 (“[T]he minimum deal size for most angel investors in the United States is about $1 million.”).
\textsuperscript{223} GAO Report, \textit{supra} note 217, at 10; see also Bradford, \textit{supra} note 13, at 103.
\textsuperscript{224} See Bradford, \textit{supra} note 13, at 103; see generally Abraham J. B. Cable, \textit{Fending for Themselves: Why Securities Regulation Should Encourage Angel Groups}, 13 U. PA. J. BUS. L. 107 (2010) (emphasizing the issue that securities regulation is having an adverse effect on the impact of angel investors on the economy.).
requirements is highly prohibitive for smaller businesses. Blue sky laws are inherently prohibitive because they are based on the merit system.226 A merit review system grants “authority of state securities administrators to deny securities registration to an offering that, in the administrator’s view, was ‘unfair, unjust[,] or inequitable’ to, or would ‘tend to work a fraud’ on investors.”227 The issue that arises when attempting to comply with state security laws under the merit system is that a company must essentially duplicate its work done to comply with federal registration requirements.228 A study conducted on the merit system implemented in Arizona, which represents the most common type of merit system, revealed there was a “definite correlation” between the SEC approving a registration filing and Arizona approving the state registration filing.229 Researchers concluded the efficacy of the merit based system was called into question because of the correlation of Arizona mainly approving state registration requests only if they had or were going to have SEC approval as well.230 Finally, the study noted companies that received approval from Arizona had an average asset value in excess of $76.8 million, whereas companies that withdrew from the registration process only had an average asset value of just under $28.8 million.231 Researchers noted the nearly $50 million dollar swing illustrated “the merit review process discriminates against small issuers.”232 In light of the fact that Tier 2 issuers no longer have to comply with state blue sky laws, it stands to reason that there is a tangible economic benefit incurred by the small businesses that can utilize this private exemption.

Finally, the last significant benefit conferred upon small businesses that can utilize Regulation A+ is the ability to tap the resources of the masses. As previously stated, small businesses that can conduct an offering under Regulation A+ are able to utilize the wealth of unaccredited investors.233 Under Rule 251, a person who is an unaccredited

226 U.S. SEC. EXCH. COMM’N., REPORT ON THE UNIFORMITY OF STATE REGULATORY REQUIREMENTS FOR OFFERINGS OF SECURITIES THAT ARE NOT “COVERED SECURITIES”, n. 6 (1997). This report stated that roughly 40 states had embraced the merit system of securities law. Id.
229 Id.
230 Id.
231 Id.
232 Id.
The investor can invest up to 10% of their annual net worth or income, whichever is greater. The problem that Regulation A+ attempts to remedy is that, as of 2010, only 7.4% of Americans have been deemed to be accredited based on their net worth. However, estimates project that if Americans invest just 1% of their investable income into crowdfunding activities, $300 billion would be injected into the national economy. This injection of capital into the national economy in one fiscal year alone could have a drastic positive impact on the stagnation that this country is currently facing.

B. Shortfalls of Regulation A+ For Small Business Capital Formation

Despite the significant improvements made by Congress and the SEC under Regulation A+, “the rule is not as good as it could have been.” Based on Commissioner Gallagher’s remarks about the inadequacy of Regulation A+, it is apparent that the cynical attitude of Chairwoman Mary Jo Shapiro towards the JOBS Act permeates throughout Regulation A+. Aside from the four benefits of Regulation A+, there are at least eight shortcomings of the updated regulation. These shortcomings include: a catch-22 to the “testing the waters” provision; an inadequate maximum investment limit under both Tiers; an inability to raise capital under the $5 million minimum; an incomplete blue sky exemption that leaves Tier 1 exposed; an arbitrary investment cap on unaccredited investors; the requirement of audited financial statements; substantial on-going reporting; and limited secondary-market liquidity for equity-based shares.

At first glance, it seems the “testing the waters” provision is purely beneficial and could not be detrimental to a small business seeking to raise additional capital. However, there is an aspect of this provision that is commonly overlooked that could cause trouble for a small business down the road. On its face, it seems that the “testing the waters” provision is what most prudent entrepreneurs would do in order to understand where to concentrate their advertising costs to maximize participation in the offering. However, if a company engages in any pre-filing testing of the waters, a company is subsequently excluded from

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234 Id.
237 Gallagher, supra note 198.
238 Saunders, supra note 236, at 958–59.
conducting an offering under Tier 1. The significant implication to this course of action is that the company that commenced the pre-filing testing the waters solicitation is now subject to substantial on-going reporting requirements under Tier 2.

Another shortcoming of Regulation A+ is the maximum offering cap imposed on both Tiers. Commissioner Gallagher, in a speech to Vanderbilt School of Law, stated, “we should have exercised our clear authority under the JOBS Act to raise the offering limit to $75 million.” The problem that companies are facing after a Regulation A+ offering is that $20 or $50 million is not an adequate amount of capital. Though it is a vast improvement from the previous $5 million cap, the $20 or $50 million caps do not suffice for accomplishing the goal of continual small business growth. For a company that is attempting to break out of the “survival” stage of businesses development and into the later stages of “success” and “take off,” $50 million is not enough. One practitioner who engaged in a Regulation A+ filing stated, “[o]nce we hit $50 [million], we’re maxed out. We’ve been advised that the limit is applied toward the parent company, so we really can’t just file another [Regulation] A+ every time [we] hit the [$50 million] max.” Thus, each time an offering limit is hit, whether it be the full cap or a limit set by the company, there must be another offering made if additional capital is required. The final problem that plagues the improved offering limit is the fact that if small businesses are in the latter stages of “success” and “take off” and are seeking to use Regulation A+, the maximum offering cap under Tier 2 (the largest of the

242 Gallagher, supra note 198.
244 Id.
245 Id.
246 See id.
249 Churchill & Lewis, supra note 243.
two Tiers), is essentially a short term surge of capital and not a long term capitalization event.\textsuperscript{250}

Moreover, the expanded offering cap can force a small business to comply with Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”).\textsuperscript{251} The issue that arises under the Exchange Act is that any company with more than $10 million in assets and a class of equity securities held by either 2,000 persons or 500 persons who are not accredited investors must register and report under the Exchange Act.\textsuperscript{252} For all intents and purposes, the 500 unaccredited investor cap—which actually means there can only be 499 unaccredited investors participating in the offering—will cause nearly every issuer of a Tier 2 offering to become a full reporting company under Section 13 of the Exchange Act if seeking to raise the full $50 million.\textsuperscript{253}

The overall costs of a Regulation A+ offering is one of great problems posed by this regulation. The overall costs associated with a Regulation A+ filing can be prohibitive in three aspects: the lack of a blue-sky preemption under Tier 1, the requirement for an audited financial statement under Tier 2, and continual ongoing reporting required under Tier 2. In this broad category of costs associated with Regulation A+, the first to consider is the lacking blue sky preemption under Tier 1.\textsuperscript{254} As prescribed by the JOBS Act, the Government Accountability Office (“GAO”) was mandated to conduct a study on why Regulation A+ was drastically underused and report its findings to Congress.\textsuperscript{255} The GAO study found that “the costs to issuers of addressing blue sky laws have been a significant factor in the historic underuse of Regulation A by small businesses.”\textsuperscript{256} The GAO report further stated that most issuers attempted to avoid states that conducted a merit review.\textsuperscript{257} The report concluded its section on the effect of blue sky laws on Regulation A+ by stating that “[i]ssuers with whom we met stated that they [only] registered in 3 to 11 states.”\textsuperscript{258}

\textsuperscript{250} Ippolito, \textit{supra} note 247 (quoting Amy Wan, “So really [the capital received from a Regulation A+ offering would] only be a short-term solution . . . that would last a couple months at tops.”).


\textsuperscript{252} § 78l(g)(1)(A)(i)–(ii).

\textsuperscript{253} See id.

\textsuperscript{254} 17 C.F.R. § 230.256 (2015); SIDLEY AUSTIN LLP, \textit{supra} note 114, at 9–10.


\textsuperscript{256} U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-839, SECURITIES REGULATION: FACTORS THAT MAY AFFECT TRENDS IN REGULATION A OFFERINGS 17 (2012).

\textsuperscript{257} \textit{Id.} at 18. Roughly 40 states are using the merit system. U.S. SEC. EXCH. COMM’N, \textit{supra} note 221.

\textsuperscript{258} GAO Report, \textit{supra} note 256, at 18.
In his address, Commissioner Gallagher noted that the North American Securities Administrators Association (“NASAA”), a non-governmental organization, has a coordinated review program that has brought some “speed and predictability to the states’ filing review.”\(^{259}\) This voluntary review process takes approximately 21 days after filing Form CR–3b with all required SEC registration forms.\(^{260}\) Yet, if a company agrees to participate in the NASAA coordinated review system, their agreement to participate immediately avails the company to a merit review, even if the state does not conduct a merit review.\(^{261}\)

Finally, a company that is a member of the Financial Industry Regulatory Authority (“FINRA”) must also file a registration with FINRA to participate in a public offering.\(^{262}\) More specifically, FINRA implemented a provision in its rules that explicitly applies to businesses making a Regulation A+ offering.\(^{263}\) Commentators on the issue have noted “unless an issuer plans on going [at] this alone and relying on the safe harbor provision of SEC Rule 3a4-1,\(^{264}\) the offering must be filed with FINRA and will be subject to their rigorous comment and review process, which includes a thorough assessment of the underwriting terms and arrangements.”\(^{265}\) As previously stated, the issue that arises for those seeking to commence an offer under Tier 1 is that they will be subjected not only to SEC review and qualification, but also the review by the individual states.\(^{266}\)

The next burdensome cost associated with Regulation A+, more specially under Tier 2, is the cost of an audited financial statement.\(^{267}\)

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\(^{259}\) Gallagher, supra note 198.


\(^{261}\) Id.

\(^{262}\) FINRA Rule 5110(b)(1) (2014). Because this requirement is only for FINRA members, it obviously does not apply to all small businesses. See also Regulation A+ and the Overlooked FINRA Filing Requirement, SEEDINVEST, https://www.seedinvest.com/blog/jobs-act/regulation-a-and-the-overlooked-finra-filing-requirement (last visited Sept. 2, 2016) [hereinafter FINRA Filing Requirement].

\(^{263}\) FINRA Rule 5110(b)(9)(G) (2014); see also FINRA Filing Requirement, supra note 262.

\(^{264}\) 17 C.F.R. § 230.3a4-1 (2012). Rule 3a4-1 is a “non-exclusive safe-harbor” under which an “associated person” of an issuer that performs limited securities sales for the issuer as prescribed by the rule would be deemed not to be a “broker” under Section 3(a)(4) of the Exchange Act, and, thus, not required to register in accordance with Section 15 of the Act. Id.

\(^{265}\) FINRA Filing Requirement, supra note 262.

\(^{266}\) Id.

For a small business that is attempting to gain access to capital because of capital shortages, an audit requirement for a company attempting to raise over $500,000 is oppressively burdensome.\textsuperscript{268} Studies suggest that an audit for a small company could cost anywhere from $5,000 to $75,000 depending on numerous factors such as the audit firm, geographic location, and complexity of the business.\textsuperscript{269} Looking from a relative perspective, this could result in a potential reduction of 10% of profits, excluding additional fees included in the initial registration process. One practitioner stated, “[a]t a cost of $100k+ and 3+ months to complete, I don’t see [Regulation A+] being an appropriate tool . . . .”\textsuperscript{270} In addition to the costs of an audited financial statement, Tier 2 offerings are also subjected to continual reporting.\textsuperscript{271}

The continual reporting required by Tier 2 is particularly more prohibitive on small businesses than larger, public firms. Tier 2 requires companies that utilize this aspect of Regulation A+ to prepare semi-annual reports that are similar to a 10-Q filed by a publically traded company.\textsuperscript{272} Though there are no particular figures provided by the SEC or the GAO on the potential costs of the continual reporting requirement under Tier 2, one can logically infer the range of these costs. The SEC estimates that costs of semi-annual compliance under Title III of the JOBS Act, which has substantially fewer requirements than Tier 2, costs between $4,000 for an offering of $50,000 and $32,700 for an offering of $750,000.\textsuperscript{273} Additionally, the SEC estimates the cost of continual reporting for a public company to be around $1.5 million.\textsuperscript{274}

Despite the vast range of costs a small business could face merely for semi-annual reporting,\textsuperscript{275} small business must also comply with

\textsuperscript{268} See Heminway & Hoffman, supra note 39, at 28.
\textsuperscript{270} Ippolito, supra note 247 (quoting Ian Formigle, VP of Investments at Crowd Street).
\textsuperscript{271} See 17 C.F.R. § 230.257(b) (2015).
\textsuperscript{272} See 17 C.F.R. § 230.257(b)(3) (2015); GREENBERGTAURIG LLP, supra note 144, at 7.
\textsuperscript{273} Thomas, supra note 235, at 65–66.
\textsuperscript{275} Compare Thomas, supra note 235, with Proposed Crowdfunding Rules, 78 Fed. Reg.
other reporting requirements under Tier 2.\textsuperscript{276} That tier also subjects offers to current reporting that is not explicitly covered when a Form 1-SA is filed.\textsuperscript{277} Commissioner Gallagher stated, “[Regulation A+] introduces a needless transactional friction by failing to deem Regulation A[+]’s semiannual reporting to be ‘reasonably current’ for purposes of Rules 15c2-11, 144, and 144A.”\textsuperscript{278} Commissioner Gallagher further stated that “[b]y not deeming balance sheets with dates up to 9 months to be ‘reasonably current,’ issuers may need to file updated financial statements on a ‘voluntary’ basis on Form 1-U in order to bring current the issuer’s financial information.”\textsuperscript{279} Later in the address, Commissioner Gallagher stated that in the past, the SEC has commonly held that filing semi-annual reports satisfied the “reasonably current” requirement; but because the SEC failed to do so with Regulation A+, the SEC has created an unwritten backdoor requirement which amounts to another form of quarterly reporting that Tier 2 issuers must comply with.\textsuperscript{280}

Moreover, scholars have noted that securities regulation imposes undue burdens on small businesses.\textsuperscript{281} With the acknowledgement that there are inherent benefits to securities regulation of all businesses, using a marginal analysis on the costs and benefits, it appears that securities regulation disproportionately affects small businesses in an adverse manner.\textsuperscript{282} This is because small businesses carry a substantially higher proportional burden of the compliance costs.\textsuperscript{283} Because of this occurrence, “securities regulation is less effective when applied to [small] companies.”\textsuperscript{284} Despite the notion that “[a] publically minded

\begin{itemize}
\item See id.
\item Id.
\item Id.
\item Id. at 382.
\item Id. “For example, assume that it costs a firm with $1 million in annual revenue $10,000 per year to comply with a certain regulatory requirement. Meanwhile, assume that, because of everything mentioned above, it costs a larger company that makes $10 million per year only $20,000. Revenue is ten times higher, but expenses only double. It costs the former firm 1% of revenues and the latter only 0.2%.” Id.
\item Id. at 379. This is because:
\item [T]here are relatively greater marginal benefits to regulating larger firms. Increased size translates mathematically and proportionally to a greater price impact for any given change to a firm’s cost of capital. Regulating a firm that is twice as large yields twice the marginal benefits; a firm one hundred times as
\end{itemize}
regulator . . . should do whatever it can to increase the marginal benefits relative to the marginal costs of regulation because this is the way to maximize net social benefits," it appears that the SEC’s Chair- woman’s disdain for crowdfunding is further permeating through the rules.

In conjunction with the overall costs being extremely prohibitive for small businesses because of reporting and filing compliance, another problem that arises is the cost to the companies who seek to raise less than $5 million. Commissioner Gallagher, in one of his addresses on the issues of Regulation A+, commented on this matter stating, "[f]or an issuer to raise $0 to $5 million in capital under Regulation A+[—that is, within the scope of old Regulation A—our new rules don’t do much to help facilitate capital formation."] Looking at the proportionality of the costs for either a Tier 1 or Tier 2 filing, the cost cannibalizes a significant portion of the capital raised. For example, if filed under Tier 1, the offeror would have to deal with the expenses of individual blue sky qualifications which can amount to a considerable amount of time and money. On the contrary, if an offering circular was filed for a Tier 2 offering, the capital raised by the small business would be quickly eaten up by fees associated with the initial filing and subsequent annual and ongoing reporting. Though it may seem contrary to the purpose of implementing Regulation A+, it appears that one of the best solutions to the capitalization efforts for amounts less than $5 million would be to seek a different “paradigm” other than Regulation A+.

Another issue that seems to plague Regulation A+ is the limited secondary market liquidity for equity-based shares. This issue arises mainly due to the fact that most businesses that are start-ups, small, or young, can be classified as either a closely held corporation or as a “standard” corporation for filing purposes under Regulation A+. The

large yields one hundred times the benefits. The value of regulation is further amplified because of the size of retail-investor holdings in large firms and the relative safety of their businesses. On top of this, because of their outsized societal footprint, there are positive spin-off effects associated with regulating these companies. These externalities further increase the marginal benefits of large-firm regulation.

Id.

285 Id. at 359.
286 Gallagher, supra note 198.
287 Id.
288 Id.
289 See supra notes 231 to 256 and accompanying text.
290 See supra notes 239 to 256 and accompanying text.
291 Gallagher, supra note 198.
issue that arises for both Tiers, is the aggregate cap of 30% on the secondary sale of the securities offered under Regulation A+. Letters submitted to the SEC suggested “limiting the liquidity options of selling security holders, including sales by affiliates of the issuer, may discourage investment in the issuer in the first instance and increase the issuer’s cost of capital.” The SEC rebutted this assertion by stating that the balancing of investor protection outweighed the need for a greater secondary market liquidity.

However, this raises the issue that the SEC might not be acting in the best interests of the investor and “honest business[es]” by adding a cap on secondary market sales, because Regulation A+ already applies an overall protection for investors under civil liability and anti-fraud rules, including Sections 12 and 17 and Rules 10b-5 and 10(b) of the Securities Act. The GAO, in a study presented to Congress regarding ways to increase capital for small businesses, found that “a small [business’s] ability to raise capital is ultimately affected since it is difficult to sell securities initially when a secondary market for the securities is lacking.” In conjunction, Commissioner Gallagher has stated that “secondary market liquidity can make or break a primary offering, as we are learning in our Regulation A+ rulemaking,” and “[i]nvestors will be more likely to purchase securities, and at a higher price, if they know they can readily exit their investment.” The answer to the challenging question of how to cure the problem of illiquidity in the secondary markets appears to some as instituting a venture exchange.

294 Id. at 49.
295 77 CONG. REC. 937 (1933).
297 U.S. Gov’t Accountability Off., supra note 217, at 59.
299 Gallagher, supra note 211.
300 Id.; see also Louis A. Aguilar, Comm’r., Sec. Exch. Comm’n., The Need for Greater Secondary Market Liquidity for Small Businesses (Mar. 4, 2015), https://www.sec.gov/news/statement/need-for-greater-secondary-market-liquidity-for-small-businesses.html. The Commissioner stated that a venture exchange is a possible option to cure the woes of an illiquid secondary market in the United States, but in order to do so would require an analysis of past United States venture exchanges and those currently
The remaining two shortcomings of Regulation A+ revolve around the idea of incorporating the unaccredited investor under Tier 2 offerings. First, the offeror, not the unaccredited investor, must check that the unaccredited investor meets the 10% investment limit.301 Secondly, the investment limit placed on unaccredited investors is arbitrary and not necessary. Though no figures have been published regarding the amount of time and capital it costs for an issuer of a Tier 2 offering to perform a due diligence check on unaccredited investors, one can logically conclude such is a time consuming endeavor. This issue is significantly prohibitive to small businesses because of the inherent nature of small businesses—roughly 70% of all small businesses employed, and still employ, five people or less.302 For corporations not classified as small businesses (i.e., companies that exceed 500 employees)303, this is less costly because large businesses have resources available to prevent a dramatic effect on productivity and, therefore, overall costs. However, for a small business, this is an indirect cost that diverts both low level employees and management away from wealth maximizing projects, and instead focuses their attention on a wealth minimizing activity.304 Overall, scholars note that economies of scale305 “make registration inefficient for small offerings, even if registration creates a net benefit for larger offerings.”306 This was the same problem that plagued the SEC with Regulation A, and it appears that it was not fixed when discussing Tier 2. Because the filing costs under Regulation A and Regulation A+ are fixed costs, there is a disproportionate expense for large and small businesses.307 Thus, as presented by the GAO study on Regulation A failures, the disproportionate cost may, in part, explain

in place abroad. *Id.*


305 Reem Heakel, *What Are Economies of Scale?*, INVESTOPEDIA, http://www.investopedia.com/articles/03/012703.asp. Economies of Scale are generally defined in the microeconomics field as the cost advantages that enterprises obtain due to size, output, or scale of operation, with cost per unit of output generally decreasing with increasing scale as fixed costs are spread out over more units of output. *Id.*


why small business IPOs are at “record lows.”

It also may explain why there were only sixteen Regulation A offerings in a time when they were arguably needed most, “even though both methods provide[d] full access to retail investors.” In addition, Tier 2 also allows unaccredited investors to take part in this offering, but only up to ten percent of the greater of their net worth or annual income.

When the SEC enacted the investment cap for unaccredited investors, it justified the arbitrary limit by claiming it would ensure an individual does not have “too much skin in the game.” This justification presented by the SEC and other scholars is similar to the justification for using wealth as a proxy for sophistication under Rule 506. Because of their wealth, some crowdfunding investors may be accredited, when in reality they are only “financial neophyte[s].” For example, a “high school dropout who wins $10 million in a lottery . . . would be an accredited investor, even though the way in which she accumulated her wealth does not demonstrate that she is capable of evaluating the merits and risks of investing in the offering.” As such, it is estimated that 69% of investors earning greater than $75,000 per year would be willing to invest an average of $1,900 per year. In a society driven by striking it big, and where one can spend their entire life’s earnings in a casino or on the lottery, it seems highly paternalistic of the SEC to set an arbitrary limit on investors. Some scholars state, and rightfully so, that investing in a start-up is a high-risk, high-yield environment. Despite the potential for failure, the purpose of Regulation A+ opening the doors for unaccredited investors was to “democratize” crowdfunding. This overly paternalistic action by the SEC and Congress is nothing more than another barrier to entry that one must overcome to

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308 Id.; GAO Report, supra note 256, at 2.
309 Parsont, supra note 307, at 292.
311 Hogan, supra note 87, at 1113.
314 Bradford, supra note 13, at 125.
316 Bradford, supra note 13, at 123.
maximize return.

V. ALTERNATIVES TO REGULATION A+ THAT ARE MORE COST EFFICIENT

From the time that Congress sought to reform Regulation A, it aimed to “democratize” crowdfunding by allowing average Americans to participate in equity-based crowdfunding in addition to accredited investors already allowed to participate. However, it appears that Regulation A+ fell short of what Congress was hoping to accomplish. For example, though the number of Regulation A+ filings increased from 19 under Regulation A to 68 filings under Regulation A+, it appears that there are more cost-effective alternatives to raising capital in equity-based crowdfunding. This is because Regulation A+ should only be used in unique circumstances where “an issuer may need to offer securities to a wide range of buyers, without being restricted to accredited investors, and the reasons for the offering are substantial enough to make the disclosure cost, ongoing reporting and risk of liability worthwhile.” In lieu of the information presented in this article, it appears that Regulation A+ will be nothing but a “small-tent sideshow” in comparison to Rule 506 and Title III.

A. Regulation D: Rule 506

In 1982, Congress promulgated Regulation D to “provide a unified scheme for exempting certain capital offerings from registration requirements.” Congress’s purpose for creating Regulation D, much like their intent for creating the JOBS Act, was to “simplify existing rules and regulations to facilitate capital formation, particularly for small businesses . . . .” Prior to the JOBS Act, there was only one downfall to an issuer looking to utilize the private placement exemption: no general solicitation or advertisement was permitted. However, under Title II of the JOBS Act, Congress compelled the SEC to

318 Id.
319 GAO, SECURITIES REGULATION, supra note 87, at 2.
320 This data was derived by the author looking at all filings to the SEC under Form 1-A and using Excel to deduce the number of individual filings from the time Regulation A+ took effect to February of 2016.
321 Robbins, supra note 71, at 6.
322 Id.
324 Id.
325 Small Business and the SEC, U.S. SECURITIES AND EXCHANGE COMMISSION (Oct. 10,
eliminate the prohibition on general solicitation under Rule 506(c), thereby eradicating the significant downfall that caused offerors to reconsider using this private placement exemption.\(^\text{326}\) Though there are two other common types of exemptions under Regulation D, Rule 506 is the most commonly used exemption.\(^\text{327}\) For example, businesses filed a Rule 506 exemption 78.6% of the time for offerings of $1 million or less, even though that is the offering size that Rule 504 was enacted to cover.\(^\text{328}\) Additionally, 91.9% of Regulation D filings for offerings between $1 million and $5 million were conducted under Rule 506, while only 3.9% were conducted under Rule 505.\(^\text{329}\) The reason that Rule 506(b), and potentially Rule 506(c), are the premier choice for crowdfunding ventures is because of the low transaction costs of complying with this private placement exemption.

Under amended Rule 506(c) offerings, there are seven main advantages to conducting a private placement offering over a Regulation A+ and a Title III offering: there is no offering cap;\(^\text{330}\) a blue sky exemption;\(^\text{331}\) a SEC registration exemption;\(^\text{332}\) no required disclosures to accredited investors;\(^\text{333}\) no continual reporting is required;\(^\text{334}\) immunity from suit for negligent misrepresentation;\(^\text{335}\) and all types of companies are permitted to partake in this type of exempted offering.\(^\text{336}\) The first significant departure from all other types of registration exemptions used for crowdfunding is that Rule 506(c) allows offerors to raise as much capital as the business needs.\(^\text{337}\) This gives issuers the flexibility to amass as much capital as possible in one offering, which can effectively lower the proportional cost of the offering versus the amount of capital generated.
Another benefit of using a Rule 506(c) exemption is, unlike Tier 1 offerings under Regulation A+, the issuer is exempted from state blue sky filing requirements. Upon a review of NSMIA and Rule 506, issuers are only required to comply with notice filing for each state where the “covered security” is being offered. Furthermore, Rule 506(c) states that only notice filing is required for the SEC. This means that there is no requirement for the issuer to file or for federal or state securities agencies to review the offering documents of the issuer.

Yet another major departure from other registration exemptions used for equity-based crowdfunding is that Rule 506(c) does not require disclosures to the investors. Under Rule 506(c), only accredited investors are allowed to participate in this type of offering. Because Rule 506(c) only permits the participation of accredited investors, there is a presumption that these accredited investors are sophisticated and have enough capital withstand a loss. Although allowing only accredited investors to participate in an offering runs contrary to Congressional intent to democratize equity-based crowdfunding, it allows the issuer to keep the transaction costs associated with the exemption low, thereby increasing the amount of capital a company can raise. However, under the private placement exemption, the SEC leaves it to issuers to “take reasonable steps to verify” whether the investor is accredited.

Moreover, coinciding with no specific disclosure requirements, an

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339 Notice filing can be defined as a type of filing that is done by an SEC-registered financial advisor that includes certain types of information that the state and SEC can verify the advisor’s expertise. See generally Notice Filing, INVESTOPEDIA, http://www.investopedia.com/terms/n/noticefiling.asp.
340 17 C.F.R. § 230.502(b)(1); NSMIA, supra note 331.
341 17 C.F.R. § 230.502(b)(1); NSMIA, supra note 331.
342 Robbins, supra note 71, at 2. “FINRA requires broker-dealers to file copies of certain private placement offerings in which they participate, but these filings are only notice filings, and FINRA will not comment on or provide clearance for the offerings.” Id. (citing FINRA Rule 5123).
343 17 C.F.R. § 230.506(c).
344 17 C.F.R. § 230.506(c)(2)(i).
345 17 C.F.R. § 230.506(b)(2)(ii). Rule 506 defines sophistication as “such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment.” Id.
347 17 C.F.R. § 230.506(c)(2)(ii).
issuer utilizing Rule 506(c) also does not have any obligation to conduct annual or continual reporting. This further reduces the transaction costs compared to Regulation A+ and Title III exemptions and makes Rule 506(c) even more enticing to potential offerors of covered securities. Yet another benefit to a Rule 506(c) offering is that disappointed investors are unlikely to prevail under federal securities law based on a theory of negligent misrepresentation. Because of a 1995 Supreme Court case, Gustafson v. Alloyd, a disappointed investor cannot sue for liability under Section 12(a)(2) of the Securities Act, which leaves investors only the ability to sue for negligent misrepresentation under Section 10(b) and Rule 10b-5 of the Securities Exchange Act. The difficulty for investors (and the benefit for issuers) is that the investor must attempt to prove that the issuer acted with scienter—an intent to deceive, manipulate, or defraud, or a high degree of recklessness suggesting an indifference to deceit. Though there are still state level claims that can be brought against the issuers for misrepresentations, it has been noted that “the practical effect of Gustafson has been to make it much harder for lawsuits to be maintained by investors in Rule 506 offerings.”

The final benefit that Rule 506(c) provides issuers compared to Regulation A+ and other registration exemptions is that both foreign and domestic, as well as public and private companies may engage in a Rule 506(c) offering. This allows for greater market diversification, and thus greater investor diversification which can lead to more capital being raised for companies that are struggling with capital—whether a start-up, a well-established company, public, or private. Additionally, after the JOBS Act was passed, Rule 506(c) became more enticing to issuers of equity shares in an equity-based crowdfunding offering because general solicitation is now permitted under the amended rule. Overall, it appears the immense flexibility Rule 506(c) provides issuers is the reason it seems to prevail over all other types of exemptions used for equity-based crowdfunding offerings.

Though Rule 506(c) appears to present a potential issuer with the lowest transaction cost in proportion to the amount of capital raised, Rule 506(c) still lurks in the shadows of Rule 506(b): the preserved

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348 See Robbins, supra note 71, at 3; see generally 17 C.F.R. § 230.506(c)(2).
350 Robbins, supra note 71, at 3.
352 Robbins, supra note 71, at 3.
353 See Robbins, supra note 71, at 3; see generally 17 C.F.R. § 230.506(c)(2).
Rule 506 after the JOBS Act created the new Rule 506(c). There are only limited differences between the two rules. First, Rule 506(b), does not permit a general solicitation and advertisement of the security being offered. However, there is a general caveat to the prohibition of general solicitation and advertisement under 506(b), whereby general solicitation and advertisement is allowed if there is a prior or preexisting relationship between the offeror and offeree. The second difference between the two types of Rule 506 private placement exemptions is that Rule 506(b) allows for the participation of up to 35 unaccredited investors. These unaccredited investors must meet the sophistication standards set forth by Rule 502 which defines a sophisticated investor as someone who “has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment . . . .”

The third and final difference between the two exemptions within Rule 506 is that Rule 506(b) requires, depending on the involvement of unaccredited investors, varying types of information to be provided to the investors. If only accredited investors partake in the Rule 506(b) offering, the issuer is not required to provide any specific information to investors, but should comply so as not to avail themselves of the antifraud provisions of the rule. However, if unaccredited investors are also involved in the offering, there are various amounts of information that must be provided on the offering size. These reporting requirements can vary from reporting a biannual audited balance sheet to a full financial statement if the issuer files under the Securities Exchange Act of 1934. Furthermore, if there is a mix of accredited and unaccredited investors, the issuer must also make available to

355 17 C.F.R. § 230.502(c).
360 See 17 C.F.R. § 230.502(b)(1).
362 17 C.F.R. § 230.502(b)(2)(i)(B)(1). For offerings up to $2 million and by incorporation, Rule 506(b) states that for small companies, an audited balance sheet bi-annually is required. 17 C.F.R. § 210.8-02.
363 17 C.F.R. § 230.502(b)(2)(i)(B)(3). For offerings that exceed $7.5 million, Rule 506(b) prescribes a financial statement that is required by companies who are filing for a registered security. Id.
the unaccredited investors all information that it provides to the accredited investors.\textsuperscript{364}

Despite the costs associated with the involvement of unaccredited investors, data collected by the SEC from 2009 to 2014 shows that Rule 506(b) (pre-JOBS Act Rule 506) is still the most prevalent exemption for raising capital.\textsuperscript{365} From the time Rule 506(c) was enacted to December 31, 2014, there were only 2,117 Rule 506(c) offerings raising only $24.4 billion.\textsuperscript{366} However, during the same period, there were 24,500 Rule 506(b) offerings raising $821.3 billion.\textsuperscript{367} Though dwarfed by Rule 506(b) exemptions, Rule 506(c) was used more often than Rule 505, which shows that Rule 506(c) is the most cost effective when looking at the costs associated with the offerings in comparison to the amount raised.\textsuperscript{368}

The SEC notes that there are three reasons that Rule 506(c) has not garnered much attention and use. First, issuers who have prior relationships or ongoing relationships with investors may not need the flexibility to ascertain new methods of financing.\textsuperscript{369} The second reason is that there is still some uncertainty over what constitutes general solicitation, because the law has not fully developed due to the novelty of Rule 506(c).\textsuperscript{370} However, the Director of the Division of Corporate Finance has stated that the definitions of “general solicitation” and “advertisement” has not changed since Rule 506’s inception in 1982.\textsuperscript{371} The final reason the SEC provides for Rule 506(c) not catching on as quickly as hoped is concerns about adding to the burden of the appropriate levels of self-verification that is required to determine if someone is an accredited investor.\textsuperscript{372}

\textsuperscript{364} 17 C.F.R. § 230.502(b)(1).
\textsuperscript{365} Bauguess, supra note 323, at 13.
\textsuperscript{366} Id. Rule 506(c) filings, on a relative basis, accounted for only 2.1\% of the reported capital raised under Rule 506 since its enactment. Id.
\textsuperscript{367} Id.
\textsuperscript{368} Id. at 15.
\textsuperscript{369} Bauguess, supra note 323, at 13.
\textsuperscript{370} Id.
\textsuperscript{371} See Keith F. Higgins, Director, Sec. Exch. Comm’n., Keynote Address at the 2014 Angel Capital Association Summit (Mar. 28, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370541320533. “The truth of the matter is that the recent rulemaking has not changed any notions of what constitutes a general solicitation. The analysis for determining whether a specific communication or activity constitutes a general solicitation for an offer or sale of securities under Rule 506 remains the same as when the rule was first adopted in 1982, with the particular facts and circumstances surrounding the communication or activity determining the final answer.” Id.
\textsuperscript{372} Bauguess, supra note 323, at 13.
B. Title III of the JOBS Act: Regulation Crowdfunding

Congress sought to democratize equity-based crowdfunding, by drafting Title III as the crown jewel of equity-based crowdfunding. Title III of the JOBS Act, referred to as the CROWDFUND Act, amended Section 4 of the Securities Act by stating that the provisions of Section 77d of the Securities Act do not apply to certain registration requirements set forth by Section 5 of the Securities Act for certain crowdfunding transactions. The main provision of Title III includes: a $1 million investment cap per 12 months; the ability for accredited and unaccredited investors to participate in the offering; general solicitation and advertisement; state blue sky law exemption; pre-sale disclosures to the SEC; annual reporting requirements; a requirement to conduct offerings through a broker-dealer or funding portal; and liability for negligent misrepresentations.

Title III has some similarities imported from Rule 506 that keep the transaction costs lower than a Regulation A+ offering. For example, there is an allowance for general solicitation of the securities and an exemption for covered securities from state blue sky laws. Yet, the differences between Rule 506(c) and Title III are what generate the higher transaction costs for issuers. Compared to Rule 506(c), Title III has six significant differences: a maximum offering cap; the ability
for unaccredited investors to participate in the offering and subse-
sequently an investment cap per investor;\textsuperscript{386} substantial pre-sale infor-
mation reported to the SEC;\textsuperscript{387} audited financial statements depending on the size of the offering;\textsuperscript{388} moderate continual reporting require-
ments;\textsuperscript{389} and liability for negligent misstatements or omissions in an action for rescission.\textsuperscript{390}

Title III has made great strides in modernizing equity-based
crowdfunding; however, it has not gone far enough. One of the first
differences in comparison to Rule 506(c) is that there is a relatively low
offering cap per offering. The JOBS Act limited Title III to a $1 million
offering cap per 12 months, which is significantly lower than that of a
Regulation A+ offering.\textsuperscript{391} This means that there will be a proportion-
ally higher transaction cost per dollar for small businesses than per of-
fering under Rule 506(c). Additionally, Title III allows unaccredited
investors to participate in an offering, but puts a considerab-
le investment limit on both accredited and unaccredited investors.\textsuperscript{392} Fur-
thermore, substantial pre-sale information needs to be filed with the
SEC.\textsuperscript{393} Depending on the size of the offering, the issuer must report
to the SEC information ranging from the issuer’s most recently filed
income tax returns and financial statements to audited financial state-
ments.\textsuperscript{394} The final difference between Title III and Rule 506(c) is the
continual reporting requirement. The JOBS Act mandates that the is-
suer “not less than annually, file with the Commission and provide to
investors reports of the results of operations and financial statements of
the issuer . . . .”\textsuperscript{395}

(2012).
(2012).
\textsuperscript{390} 15 U.S.C. § 77d-1(c)(1)(A), (B); see JOBS Act, Pub. L. No. 112–106, 126 Stat. 306,
318 (2012).
\textsuperscript{392} See 15 U.S.C. § 77d(a)(6)(B)(i), (ii). The JOBS Act mandated that a person can either
invest the greater of $2,000 or 5% of their annual income or net worth if they make less
than $100,000 or 10% of their annual income or net worth not to exceed a maximum ag-
gregate amount sold of $100,000, if either annual income or net worth is equal to or greater
than $100,000. \textit{Id}.
(2012).
306, 317 (2012). The smallest amount of information that is required to be reported is for
offerings of $100,000 or less. 15 U.S.C. §§ 77d-1(b)(1)(D)(i)(I), (II).
Compliance with the disclosure requirements, in conjunction with the low offering cap, is likely to produce the most significant cost on a Title III exemption. The SEC estimates that an issuer utilizing the Title III exemption will expense $6,000 on fees for nonfinancial compliance.396 This cost estimation is a static figure, regardless of the size of the offering and relies on the assumption that the issuer would perform 75% of the work.397 Furthermore, some commentators have noted that “a company hoping to raise $100,000 could end up paying more for capital than it would by borrowing money with a credit card.”398 In addition, the SEC also estimates that the cost of third party intermediaries will vary from 5% to 15% of the offering.399 As previously stated, the SEC also estimates costs of semi-annual compliance to be between $4,000 for an offering of $50,000 and $32,700 for an offering of $750,000.400 Because of the significant costs incurred in connection with compliance which arise from the ability to participate—but not necessarily actual participation of—unaccredited investors, it does not make economic sense to conduct a Title III offering over other Regulation D offerings.

VI. CONCLUSION

From the time that Regulation A+ was announced under Title IV of the JOBS Act, there was excitement in the business media about how this reinvented exemption could be the tool to demolish the wall between the small businesses and traditional methods of financing.401 The mainstay of Regulation A+ that everyone, the media and practitioners alike, had their eyes on was the allowance for an unlimited number of unaccredited investors to participate in the offering.402 Those watching hoped that the democratization of crowdfunding would help ease the woes of the small businesses and their inability to close the

397 Id.
399 Crowdfunding, supra note 374, at 175.
400 Thomas, supra note 235.
capital funding gap. Yet, after a thorough examination of Regulation A+, it appears that Regulation A+ is not exceeding or even meeting expectations. However, future changes implemented by Congress and the SEC could allow Regulation A+ to become more effective than Rule 506(c).

The most significant change that Congress and the SEC should consider to make Regulation A+ more effective is to eliminate the participation of unaccredited investors in offerings. A primary reason for the substantial reporting requirements under Tier 2 of Regulation A+, Title III, and 506(b) exemptions is due to the fact that unaccredited investors may participate in these offerings. According to the SEC, in 2014, 301,000 investors participated in Regulation D offerings, but approximately only 10% of these offerings included unaccredited investors. Though this number may be skewed because of the inclusion of Rule 506(c), which does not allow for the participation of unaccredited investors, it shows that unaccredited investors have a marginal effect in the amount of participation and capital contribution to these offerings. Furthermore, because of the participation of unaccredited investors, there is a high risk for fraud, and the SEC attempts to deter this risk of fraudulent activity by requiring substantial initial and ongoing reporting requirements.

Because of the high transaction costs that are required to accommodate unaccredited investors, it would be judicious of Congress and SEC to eliminate the ability for unaccredited investors to participate in Tier 2 offerings. This would effectively eliminate the need for pre-sale information, audited financial statements, and continual reporting after the initial offering. Because most transaction costs are incurred to comply with the SEC’s attempt at protecting the unsophisticated, unaccredited investors, it would cut the transaction costs drastically by allowing only accredited investors to participate in the offerings. This would have the effect of making Regulation A+ more attractive to potential issuers, thereby giving small businesses an alternate exemption to Rules 506(b) and (c). Maybe then Regulation A+ would transition from a “small-tent sideshow” to a viable contender to Rules 506(b) and (c). However, until the SEC takes action to reduce the costs of registering and reporting under Regulation A+, Rule 506(b) and potentially Rule 506(c) will likely continue to be the most flexible and most used exemption for small businesses seeking to raise additional capital to close the funding gap.

403 Harrington, supra note 401.
404 Bauguess, supra note 323, at 2.
405 Robbins, supra note 71.
CLEAR WATERS AHEAD? THE CLEAN WATER RULE ATTEMPTS TO BRING CLARITY TO THE SCOPE OF THE CLEAN WATER ACT.

KAYLA A. CURRIE

INTRODUCTION

Clean water is a critical component to a healthy society and a thriving economy.1 In order to maintain clean water the streams and wetlands from which rivers, lakes, bays, and coastal waters begin must be protected.2 Over the last seventy years, the federal government has proposed a variety of water protection statutes ultimately leading to the enactment of the Clean Water Act of 1972 (CWA).3 Although the CWA’s jurisdiction has been well defined as it relates to navigable waters, there has been confusion in determining which streams and wetlands are subject to the Act’s jurisdictional reach.4 The Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) recently issued the final version of the Clean Water Rule to resolve this confusion.5 Under the Clean Water Rule, the phrase “waters of the United States” is redefined to include streams and wetlands that significantly impact “downstream water quality and form the

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2 Id.


4 William Andreen, “Waters of the United States” – Myths and Facts, CPR BLOG (May 1, 2014), http://www.progressivereform.org/CPRBlog.cfm?idBlog=B992BD05-0EA1-1C89-A6FF9D9EE9E6628B. According to the Clean Water Act (CWA), the Environmental Protection Agency (EPA) is responsible for permits initiated under section 402, and the Army Corps of Engineers (Corps) is responsible for permits administered under section 404. See 33 U.S.C. §§ 1311, 1344 (2012). The waters subject to such permits must be “navigable waters” for the EPA and the Corps to have jurisdiction over them. Id. § 1344.). Under the CWA, “navigable waters” are defined as “waters of the United States.” 33 U.S.C. § 1362(7) (2012).

foundation of our nation’s water resources.”

Since the Clean Water Rule became effective on August 28, 2015, there have been attempts to void the Rule through both legislative and judicial proceedings. Most of the opposition to the Rule has come from farmers and ranchers who have launched a campaign through the American Farm Bureau to “ditch the rule.” Litigation against the Rule continues to push through the judicial system. Consequently, on October 9, 2015, the United States Court of Appeals for the Sixth Circuit granted a nationwide stay of the Rule. Although the circuit courts claim to find some merit behind the challenges to the Rule, challenges in the United States Congress have failed. President Obama used his veto power to override attempts by both chambers of Congress to void the rule. In asserting his veto power President Obama stated, “[w]e must protect the waters that are vital for the health of our communities and the success of our businesses, agriculture, and energy development.” It is only a matter of time until challenges to the Rule make it to the Supreme Court of the United States. At that point we will know for certain whether our nation’s vital water resources will be protected.

6 ENVTL. PROT. AGENCY, supra note 1.
9 Natasha Geiling, A Controversial EPA Rule is Pitting Small Farmers Against Big Agribusiness, THINK PROGRESS (last visited Jan. 14, 2016), http://thinkprogress.org/climate/2016/01/14/3738100/farmers-support-clean-water-rule/ (The president of the American Farm Bureau called the Clean Water Rule “one of the worst examples of overregulation” and has promised to fight the Rule in the courts and before Congress.). Id.
11 In re E.P.A., 803 F.3d 804, 808–09 (6th Cir. 2015).
12 Id. at 807. In issuing the stay of the Rule, Circuit Judge McKeague wrote, “we conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims.” Id.
14 Id.
IMPACT OF WETLANDS AND STREAMS ON THE ECOSYSTEM

Wetlands and isolated streams are vital bodies of water that have been neglected for years prior to the Clean Water Rule. Yet, today it is well established in the scientific community that wetlands play a vital role in the preservation of the aquatic ecosystem. “Among other things, wetlands filter out pollutants and purify and recharge groundwater, provide protection against storm surges in coastal areas, provide erosion protection, reduce flood damage, provide fish and wildlife habitat, and even mitigate global warming.” Despite the immense value of wetlands, they are being lost at an alarming rate.

In a study sponsored by the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, and U.S. Department of Interior, scientists determined that between 1998 and 2004 about 361,000 acres of wetlands were lost. Although some of the loss was attributable to massive storm surges, human development was also a major factor. Given the continued stark decline in wetland acres, it is important that actions be taken to limit the adverse effects that human development has on the nation’s wetlands.

To date, the single most vital federal provision protecting our dwindling wetland resources is section 404 of the Clean Water Act.

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20 Theis, supra note 18, at 1–2.


23 Id.

24 Theis, supra note 18, at 1.
Under section 404 the Corps has the authority to “issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” Yet, federal regulation of wetlands under section 404 has been controversial. While defenders see section 404’s permit program as the most effective means of preserving wetlands, critics view the program as an unprecedented federal restriction on land use. This controversy is ultimately the result of continued confusion over which waters and activities are subject to section 404’s regulations. To gain a better understanding of this confusion it is beneficial to consider the evolution of water regulation in the United States and the public policy concerns that accompanied each stage of that evolution.

**EVOLUTION OF WATER REGULATION IN THE UNITED STATES**

As previously discussed, wetlands were not historically perceived to be of any particular value. In fact, early Congressional land policies encouraged the destruction of wetlands through draining and filling processes. Initially, the concern of the federal government was the preservation of commerce and nothing more. However, in the mid-twentieth century the future of the nation’s natural resources became a matter of significant public concern. From the late 1950s to the mid-1970s, Congress sought to encourage conservation and efficient use of the nation’s natural resources through the enactment of various broad resource management statutes. The nation’s waters were among the natural resources that Congress sought to protect. As a result, the federal statutes addressing water management underwent a transformation from promoting commerce to protecting the United

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27 *Id. See also* Theis, supra, note 18, at 1–2 (evaluating the agricultural industry’s opposition to section 404’s regulation of wetlands).
28 Blumm & Zaleha, supra note 26, at 713.
32 Kalen, supra note 29, at 877.
33 *Id.* at 877–78.
34 *Id.* at 878.
States’ waterways against pollution.\textsuperscript{35}

In protecting United States’ waterways from pollution, the federal government moved through three stages: (1) post hoc federal actions; (2) water use zoning; and (3) technology-based standards on effluent discharges.\textsuperscript{36} During the first stage, the federal government attempted to protect traditional interest in interstate commerce by preserving navigation through post hoc actions against those who discarded substances into navigable waters.\textsuperscript{37} At the center of these actions was a statute that remains relevant today: the Rivers and Harbors Act of 1899.\textsuperscript{38}

\textit{Attempts to Control the Introduction of Materials and Structures to Navigable Waters: The Rivers and Harbors Act of 1899}

Congress began to regulate navigable waters with the passage of the Rivers and Harbors Act of 1899.\textsuperscript{39} Congress delegated the power to enforce the provisions of the 1899 Act to the Corps.\textsuperscript{40} The two most relevant provisions of the Act are sections 403 and 407.\textsuperscript{41} Section 403 establishes that it is not “lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or [e]nclosure within the limits of any breakwater, or of the channel of any navigable water of the United States . . . .”\textsuperscript{42} Under section 407, often referred to as the Refuse Act, it is “unlawful for any person or corporation to throw, discharge, or deposit any refuse matter of any kind . . . into the navigable waters of the United States . . . without a permit, or in violation of a permit.”\textsuperscript{43} These particular provisions were primarily concerned with protecting navigability; thus, the Corps’ initial role in pollution control was limited to special problems with waters that were

\textsuperscript{35} Id. at 879.
\textsuperscript{36} ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 608 (7th ed. 2015).
\textsuperscript{39} 33 U.S.C. § 403 (2012).
\textsuperscript{40} Id.
\textsuperscript{42} 33 U.S.C. § 403 (2012).
navigable in fact.44

The Corps’ ability to regulate navigable waters is derived from the federal government’s commerce power.45 During the antebellum era, the Supreme Court of the United States interpreted the Commerce Clause of the Constitution to have a broad scope.46 In the landmark case, Gibbons v. Ogden, the Supreme Court of the United States found that the word “commerce” included navigation.47 The Gibbons Court asserted, “[t]he mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . .”48 Following the Gibbons decision, the Court further refined jurisdiction and the definition of “navigable waters of the United States” in The Daniel Ball case.49

In The Daniel Ball, the Supreme Court was faced with the issue of whether a vessel traveling on the Grand River between the cities of Grand Rapids and Grand Haven required inspection or licensing under the laws of the United States.50 The defendants argued that such inspection and licensing were not required because the Grand River was not navigable, thereby not subject to the federal government’s jurisdiction.51 In response to the defendants’ argument, the Court articulated a test for determining which waters are navigable and subject to federal laws:

[Rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in

45 U.S. CONST. art. I, § 8, cl. 3. It is important to realize the distinct differences between sections 404 and 402 of the Clean Water Act. Under section 404 of the Clean Water Act, which we focus on in this article, the Corps was given the power to regulate wetlands and implicitly protect them from dredge and fill directly from the Commerce Clause. However, section 402 of the Clean Water Act protection derives from the classic definition of “navigable waters” embodied in the River and Harbors Act of 1899. Due to these stark differences, it is arguable that different interpretations of the general term “Waters of the United States” are necessary. Id.
48 Id.
50 Id. at 558.
51 Id. at 559.
contradistinction from the navigable waters of the States, when they
form in their ordinary condition by themselves, or by uniting with other
waters, a continued highway over which commerce is or may be car-
ried on with other States or foreign countries in the customary modes
in which such commerce is conducted by water.52

Because the evidence showed that the Grand River was capable of
supporting steamboat traffic, the Court found it to be navigable, and
therefore subject to federal laws.53

After The Daniel Ball, federal courts continued to expand and re-
fine the scope of federal jurisdiction over navigable waters. One Su-
preme Court decision that forever changed the course of navigability
was United States v. Appalachian Electric Power Co.54 At issue in
Appalachian Electric Power Co. was the construction of a dam on a
section of the New River in Virginia.55 The defendants argued that
New River was not navigable in its “natural condition” at the location
where the dam was placed, and therefore not subject to federal protec-
tion under the Rivers and Harbors Act of 1899.56 However, the Court
rejected this argument and expanded the definition of “navigable wa-
ters of the United States.”57 The Court held that “‘[e]ven absence of
use over long periods of years, because of changed conditions . . . does
not affect the navigability of rivers in the constitutional sense.”58 With
respect to use in the future, the Court stated: “‘In determining the nav-
igable character of [a river] it is proper to consider the feasibility of
interstate use after reasonable improvements which might be made[,]’
and ‘[i]t [is not] necessary that the improvements should be actually
completed or even authorized.’”59 Additionally, the Appalachian Elec-
tric Power Co. Court broadened the federal government’s commerce
power,60 and found that “[n]avigability . . . is but a part of this

52 Id. at 563.
53 John F. Baughman, Balancing Commerce, History, and Geography: Defining the Nav-
55 Id. at 398.
56 See id. at 402–03. The construction of a dam on any navigable water of the United
States without the consent of Congress is unlawful under Sections 9 and 10 of the Rivers
58 Jeremy Ward, If it’s Worth a Dam, it’s “Navigable Waters”: A Proposed Revision of
Section 3(8) of the FPA Derived from Decisions Followed in FPL Energy Main Hydro LLC
at 409–10).
60 U.S. CONST. art. 1, § 8, cl. 3 (“The Congress shall have power . . . to regulate Com-
merce . . . among the several States.”).
whole.”61 In broadening the limits of the federal government’s commerce power, the Court reasoned, “[t]he plenary federal power over commerce must be able to develop with the needs of that commerce . . . .”62 Subsequent Supreme Court jurisprudence reflects that Congress may exercise its commerce power over waters for reasons unrelated to navigation; nevertheless, the Court restricted Congressional authority to waters classified as “navigable.”63

Congress was hopeful that the Rivers and Harbors Act of 1899 would help prevent pollution in the waters of the United States.64 However, application of the 1899 Act, as seen in Supreme Court cases following its passage, remained restricted to navigable waters or waters capable of becoming navigable.65 It was not until 1948 and the passage of the Federal Water Pollution Act that Congress asserted significant control over water pollution.66

Congressional Shift to Addressing Water Pollution

In 1948, the federal government attempted to expand its role in combating water pollution with the Federal Water Pollution Control Act.67 Although the majority of authority for controlling water pollution remained with the states under the 1948 Act, the federal government retained jurisdiction over those waters that were interstate in nature.68 Additionally, the 1948 Act provided that the Surgeon General was authorized to “conduct investigations; make grants to state and local agencies for research; make loans for construction of treatment works; and declare interstate pollution a public nuisance, although the necessary investigation to determine if a nuisance in fact existed could not begin unless the local agency authorized it.”69

Essentially, the Federal Water Pollution Control Act of 1948 only

62 Id. at 409.
63 Baughman, supra note 53, at 1040.
64 See Robert L. Glicksman et al., Environmental Protection: Law and Policy 608 (Erwin Chemerinsky et al. eds., 7th ed. 2015).
66 Glicksman, supra note 64, at 609 (“Until 1948, the federal government’s role in pollution control was limited to special problems, such as refuse discharge into navigable waters and oil spills. The Federal Water Pollution Control Act of 1948 expanded the federal government’s role.”).
68 See generally Glicksman et al., supra note 64, at 609 .
69 Id.
positioned the federal government to “encourage” water pollution control at the state level.70 Under the Act, the federal government still had no authority to establish water quality standards, limit discharges, or engage in enforcement actions for intrastate waters.71 Congress attempted to strengthen the 1948 Act through amendments in 195672, but the amendments had little affect on the Act’s enforcement powers.73 Despite the initial delay, federal regulation gained momentum in 1959 after the National Conference on Water Pollution.74 At the conference the Assistant Surgeon General offered three major war related influences that aggravated the pollution situation:

- There was a fantastically increased tempo in the transition to metropolitan and industrial development—the formation of gigantic metropolitan complexes extending hundreds of miles generally following major watercourses. Industries go where there is water and populations build up where there is industry.
- There was practically no construction of municipal or industrial waste treatment works over the period 1940 to 1947. Men and materials were needed for the war effort.
- The avalanche of technological progress brought with it a whole array of new-type contaminants, such as synthetic chemicals and radioactive wastes. Production and use of such materials continue upward at substantial rates.75

Around the same time that these pollution influences were being recognized, northern states began expressing concerns that southern and western states were not doing enough to protect their waters.76 Northern states believed that federal regulation was necessary to prevent the southern and western states from keeping their water standards low to lure industry.77 Similarly, big firms within industries sought

71 Id.
74 See Glicksman et al., supra note 64, at 609.
76 Glicksman et al., supra note 64, at 609.
77 Id.
federal regulation in order to eliminate competition from smaller firms that would not be able to comply with such standards.\footnote{Id.} In recognition of the new pollution contributions as well as the state and industry concerns, Congress adopted the Water Quality Act of 1965.\footnote{See id. at 609–10.}

**Congress Considers Water Quality Standards for the First Time**

Congress brought forth the idea of “water quality standards” for the first time with the passage of the Water Quality Act of 1965.\footnote{Water Quality Act of 1965, Pub. L. No. 89–234, 79 Stat. 908, https://www.gpo.gov/fdsys/pkg/STATUTE-79/pdf/STATUTE-79-Pg903.pdf.} Under the 1965 Act, “[s]tates were to decide the uses of water to be protected, the kinds and amounts of pollutants to be permitted, the degree of pollution abatement to be required[, and] the time to be allowed a polluter for abatement.”\footnote{S. REP. NO. 92–414, at 3675 (1971).} Additionally, the 1965 Act empowered the federal government to address pollution problems that substantially endangered the health of citizens in other states or injured the ability to market shellfish in interstate commerce.\footnote{GLICKSMAN ET AL., supra note 64, at 610.} However, if the pollution was wholly intrastate in nature, federal power was limited to situations in which a state’s governor requested assistance and thereby triggered federal intervention.\footnote{Id.} In 1966, amendments were added to increase federal contribution of funds for sewage treatment plants and funding of water quality planning programs.\footnote{Id. at 610.} Even at that time it was recognized that the necessary authority for preventing inception of pollution was lacking in the enforcement provisions of the existing Federal Water Pollution Control Act.\footnote{See Andrew W. McThenia, Jr., An Examination of the Federal Water Pollution Control Act of 1972, 30 WASH. & LEE L. REV. 195, 200 (1973).}

**Adopting a New Way to Address Pollution Control**

In 1972, Congress ultimately realized that the water quality approach they were using to regulate water pollution was not working.\footnote{See Poe, supra note 70, at 5.} Congress adopted new amendments that reorganized the Federal Water Pollution Control Act in 1972; from then on the Act became known as the “Clean Water Act.”\footnote{Summary of the Clean Water Act, EPA (last visited Nov. 26, 2016), https://www.epa.gov/laws-regulations/summary-clean-water-act.} The Clean Water Act departed from formal
quality control statutes in three major ways, including: (1) Congress’ substitution of the goal of no pollution discharges, for the goal of calibrating discharges to water use; (2) Congress’ establishment of a two-tiered system of progressively higher technology-based effluent limitations that were supplemented by existing water quality standards; and, (3) the expansion of the federal role in pollution policy, yet delegation of a significant amount of authority to the states if they chose to enact qualifying programs.88

There is no doubt that the passage of the Clean Water Act dramatically expanded the federal government’s jurisdiction over water. One primary factor that led to this expansion was the change of the definition of “navigable waters.”89 Senator Muskie declared “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible interpretation unencumbered by agency determinations which have been made or may be made for administrative purpose.”90 With this new definition Congress adopted an expansive definition similar to the United States Supreme Court’s in Appalachian Electric Power Co.91 In reviving that case Congress concluded, “this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.”92 While this expansion may have been clear in the early 1970s, the definition of “waters of the United States” became somewhat murky in some recent Supreme Court cases.93

TRIAD OF SUPREME COURT CASES ATTEMPT TO DEFINE “WATERS OF THE UNITED STATES.”

Between 1985 and 2006, the Supreme Court of the United States issued three prominent opinions addressing the definition of “waters of the United States.”94 These cases included: United States v. Riverside Bayview Homes, Inc. (hereafter Riverside Bayview)95, Solid Waste

90 S. REP. NO. 92–1236, at 144 (1972) (Conf. Rep.).
94 See GLICKSMAN ET AL., supra note 64, at 615.
Agency of Northern Cook County v. United States Army Corps of Engineers (hereafter SWANCC)\(^{96}\), and Rapanos v. United States (hereafter Rapanos).\(^{97}\) Each of the cases considered the scope of navigable waters in the context of the Clean Water Act’s section 404 permitting program, which is administered by the Corps.\(^{98}\) Although the Supreme Court sought to clarify the scope of navigable waters in these cases, the outcome of the final case, Rapanos, only seemed to spark more confusion among lower courts.\(^{99}\)

United States v. Riverside Bayview Homes, Inc.: Wetlands contiguous to and physically connected to navigable waterways are “waters of the United States.”

In Riverside Bayview the Supreme Court deferred to the United States Army Corps of Engineers’ ecological judgment and unanimously upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.”\(^{100}\) At issue in Riverside was eighty acres of low-lying marshland near the shores of Lake St. Clair in Michigan, which the respondent, Riverside Bayview, Inc. (hereafter respondent), owned and began to fill while constructing a housing development.\(^{101}\) The Corps filed suit against respondent in the United States District Court for the Eastern District of Michigan seeking to enjoin them from filling the property without a permit.\(^{102}\) The district court found that a portion of acres owned by respondent constituted wetlands covered by the Clean Water Act and enjoined respondent from filling the property without a permit.\(^{103}\) Following the district court’s ruling, respondent appealed and the Sixth Circuit reversed the

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\(^{96}\) Solid Waste Agency of N. Cook Cty. v. United States Army Corps. of Eng’rs (SWANCC III), 531 U.S. 159 (2001).


\(^{98}\) See GLICKSMAN ET AL., supra note 64, at 615.

\(^{99}\) Id. at 631.

\(^{100}\) United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (according to the Corps of Engineers’ ecological judgment, “adjacent wetlands are inseparably bound up with the waters” to which they are adjacent).

\(^{101}\) Id. at 124.

\(^{102}\) Id. In 1975, the Corps of Engineers issued interim final regulations that expanded the definition of “the waters of the United States” to include “freshwater wetlands” that were adjacent to other waters covered under the Clean Water Act. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975) (codified at 33 C.F.R. § 209 (2016)). The Corps of Engineers believed that Riverside Bayview Inc.’s property constituted “adjacent wetlands,” and were therefore covered under the 1975 definition of “waters of the United States.” Riverside Bayview Homes, Inc., 474 U.S. at 124.

\(^{103}\) Id. at 125. (“The District Court held that the portion of respondent’s property lying below 575.5 feet above sea level was a covered wetland and enjoined respondent from filling it without a permit.”).
decision finding that respondent’s land was not within the Corp’s jurisdiction. The court of appeals held that respondent was free to fill the land because the semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters and therefore not “waters of the United States.”

The Supreme Court of the United States granted certiorari to consider whether the Clean Water Act required landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. Recognizing that Congress intended “waters of the United States” to include “at least some waters that would not be deemed ‘navigable’ under the classical understanding of the term,” the Court upheld the Corps’ definition. The Court stated, “the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” After Riverside Bayview, it became clear that wetlands contiguous to and physically connected to navigable waterways constituted “waters of the United States” and were subject to federal jurisdiction. However, the issue of whether waters geologically and hydrologically isolated from traditional navigable waters were considered “waters of the United States” remained subject to further review.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: Isolated intrastate waters and wetlands are not “waters of the United States” due to the lack of a “significant nexus” to navigable waters.

The Supreme Court of the United States had another occasion to consider the scope of the term “waters of the United States” in SWANCC. This time around the United States Corp of Engineers

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104 See id. (“Under the [circuit] court’s reading of the regulation, respondent’s property was not within the Corps’ jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters. Respondent was therefore free to fill the property without obtaining a permit.”).
105 Id.
106 Id. at 126.
107 See id. at 133 (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term “waters” to encompass wetlands adjacent to waters as more conventionally defined.”).
108 Id. at 134.
110 See id. at 16.
111 Solid Waste Agency of N. Cook Cty. v. U. S. Army Corps. of Eng’rs, 531 U.S. 159
sought to include isolated intrastate waters used as habitat by migratory birds in the definition of “waters of the United States.”\textsuperscript{112} The Supreme Court ultimately rejected the Corps’ assertion that Riverside Bayview’s limitation of traditional navigation principles supported the Corps’ broad reading of “navigable waters” to include such isolated intrastate waters.\textsuperscript{113} In writing for the majority of the Court, Justice Rehnquist put a limit on the Riverside Bayview decision.\textsuperscript{114} Justice Rehnquist maintained that both Congress and Supreme Court precedent had always made navigability a basis for the Clean Water Act’s jurisdiction; thus, moving forward, such non-navigable water bodies would not be protected by the CWA.\textsuperscript{115}

At issue in SWANCC was an abandoned sand and gravel pit containing excavation trenches that a consortium of municipalities sought to use as a solid waste disposal site.\textsuperscript{116} Over several years the pit had evolved into permanent and seasonal ponds, which were used by a number of migratory bird species.\textsuperscript{117} Because the proposed disposal site called for the filling of some of these ponds, the municipalities contacted the Corps to determine if a federal permit was required under section 404 of the Clean Water Act.\textsuperscript{118} Through investigations the Corps observed that 121 bird species were dependent upon the ponds located at the site.\textsuperscript{119} Ultimately, the Corps asserted jurisdiction over the site pursuant to the “Migratory Bird Rule.”\textsuperscript{120} The Corps interpreted the Migratory Bird Rule to extend section 404(a) protection to intrastate waters that were “or would be used as habitat by birds protected by Migratory Bird Treaties” or to “migratory birds which crossed state lines . . . .”\textsuperscript{121} After establishing jurisdiction, the Corps

\begin{itemize}
\item \textsuperscript{113} See id. at 286–87.
\item \textsuperscript{114} See \textit{SWANCC III}, 531 U.S. at 171–72 (Justice Rehnquist wrote that in \textit{Bayview Riverside}, “the word ‘navigable’ in the statute was of ‘limited import’ and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever.”(citations omitted)).
\item \textsuperscript{115} Id. at 170–72.
\item \textsuperscript{116} Turner, supra note 113, at 286.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} \textit{SWANCC III}, 531 U.S. at 163; see also 33 U.S.C. § 404 (2012).
\item \textsuperscript{119} \textit{SWANCC III}, 531 U.S. at 164.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 164 (quoting 51 Fed. Reg. 41217).
\end{itemize}
refused to issue a section 404 permit because the consortium of municipalities “had not established that its proposal was the ‘least environmentally damaging, most practicable alternative’ for disposal” of the waste.\footnote{SWANCC III, 531 U.S. at 165.}

In response to the Corps’ refusal to issue a permit, the municipalities sued under the Administrative Procedures Act (APA) in the United States Northern District Court of Illinois.\footnote{Id. at 165 (citing 5 U.S.C. 701 et seq. (2012)).} The municipalities provided four arguments in support of their assertion that the Corps lacked jurisdiction:

1. the Migratory Bird Rule was beyond the legislative authority of the Commerce Clause; (2) the Corps’ assertion over the waters on the site was arbitrary and capricious; (3) the Migratory Bird Rule goes beyond the mandate of the Act; and (4) the rule was adopted in violation of notice and comment procedures of the APA.\footnote{Turner, supra note 113, at 295 (citing Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng’rs (SWANCC I), 998 F. Supp. 946, 949 (N.D. Ill. 1998), aff’d, 191 F.3d 845 (7th Cir. 1999), rev’d, 531 U.S. 159 (2001)).}

The district court ruled in favor of the Corps on all four arguments.\footnote{Id. at 952–54.} With regard to the Migratory Bird Rule, the court determined the rule was well within Congress’s commerce power.\footnote{Id. at 955–57.} The court reasoned that the cumulative degradation of isolated interstate waters that migratory birds relied upon for survival could have substantial effects on the interstate commercial interest in those birds.\footnote{Id. at 952.} As for the second and third arguments the municipalities presented, the court deferred to a presumption favoring agency action.\footnote{See id. at 952.} Finally, the court disposed of the municipalities’ APA claim finding the Migratory Bird Rule was an interpretative measure by the Corps, and thus not subject to the APA’s comment and notice requirements.\footnote{Id. at 952–54.}

Unsatisfied with the district court’s decision, the municipalities appealed to the Seventh Circuit Court of Appeals.\footnote{Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng’rs (SWANCC II), 191 F.3d 845 (7th Cir. 1999), rev’d, 531 U.S. 159 (2001).} The Seventh Circuit affirmed the district court’s decision ruling along similar lines as the four primary arguments.\footnote{Stephen A. Gibbons, Just Because You Say It, Doesn’t Make It So: What Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers Really Says,} In pertinent part, the circuit court addressed the Commerce Clause issue by distinguishing the Migratory
Bird Rule from the gun statute at issue in *United States v. Lopez*.\(^\text{132}\) In *United States v. Lopez* the Supreme Court rejected the Gun-Free School Zones Act of 1990, thereby narrowing the congressional authority of the Commerce Clause.\(^\text{133}\) Justice Rehnquist, writing for the majority of the Court in *Lopez*, stressed that the Commerce Clause limited congressional authority to the regulation of economic activities that substantially affected interstate commerce.\(^\text{134}\) The circuit court in *SWANCC* determined that the doctrine of cumulative effect trumped the precedent set in *Lopez*.\(^\text{135}\) Further, the court found that the Migratory Bird Rule, unlike the gun statute at issue in *Lopez*, actually had a rational and substantial impact on interstate commerce.\(^\text{136}\)

The Supreme Court of the United States granted certiorari to decide whether the provision of section 404(a) of the Clean Water Act could be fairly extended to isolated intrastate waters that provided habitat for migratory birds.\(^\text{137}\) Writing for the majority, Justice Rehnquist held that applying the Migratory Bird Rule to the waters at issue exceeded the authority granted to the Corps under section 404(a) of the Clean Water Act.\(^\text{138}\) Although the Court recognized their previous decision in *Riverside Bayview* gave the word “navigable” in the statute “limited effect,” the majority emphasized “it is one thing to give a word limited effect and quite another to give it no effect whatsoever.”\(^\text{139}\) Under the majority’s reasoning, the *Riverside Bayview* decision was contingent upon a “significant nexus” between the wetlands at issue and the adjacent “navigable waters.”\(^\text{140}\) The majority found no such “sig-

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\(^{13}\) Lopez, 514 U.S. at 567–568.

\(^{14}\) See id.

\(^{15}\) SWANCC II, 191 F.3d at 850 (The Seventh Circuit noted that its previous decisions had found that “Lopez expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce.”).

\(^{16}\) SWANCC II, 191 F.3d at 850 (The Seventh Circuit cited to various statistics regarding the economic value of birds, and stated, “[t]he effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.”).


\(^{18}\) Id. at 174.

\(^{19}\) Id. at 172.

\(^{20}\) Id. at 167–68 (citing U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–32 n.8 (1985)).
significant nexus” under the facts of SWANCC, explaining the mere presence of migratory birds in the ponds was not enough to invoke jurisdiction under section 404 of the Clean Water Act.141 Further, the majority declined to address the issue of whether congressional authority could be exercised consistent with the Commerce Clause.142

Following SWANCC, federal circuit courts were split as to when the Corps may regulate tributary wetlands or wetlands not adjacent to navigable waters.143 Some courts interpreted SWANCC broadly, limiting federal jurisdiction under the CWA to navigable waters, as well as non-navigable waters, and wetlands immediately abutting navigable waters.144 Other courts read SWANCC to mean that federal jurisdiction under CWA does not reach isolated, non-navigable waters, but does reach waters or wetlands with a hydrological or ecological connection to navigable waters.145 Courts and commentators remain perplexed as to when the Corps may regulate non-adjacent wetlands despite the Supreme Court of the United States’ recent attempts to address the issue.146

Rapanos v. United States: Determining which wetlands constitute “waters of the United States” gets messy.

The most recent Supreme Court decision concerning the scope of “navigable waters” was handed down in two consolidated cases, Rapanos v. United States147 and Carabell v. United States Army Corps of Engineers.148 Both cases were centered around four Michigan wetlands located near man-made drains that eventually emptied into waters that were navigable in fact.149 The wetland in Carabell was distinct in that it “did not share a continuous or documented flow with its neighboring tributary, a ditch that carried an indeterminate amount of water about a mile to the navigable Lake St. Clair.”150 Given these facts, the

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141 Id.
142 Id. at 162.
145 Id.
146 See Mank, supra note 144, at 292–93.
149 Rapanos, 547 U.S. at 729.
150 James Murphy, Muddying the Waters of the Clean Water Act: Rapanos v. United States
Supreme Court was tasked with determining whether the four wetlands at issue constituted “waters of the United States” within the meaning of the Clean Water Act.151

In the original *Rapanos* case, the United States brought an enforcement action against the petitioners under the CWA.152 The district court found the wetlands at issue were subject to federal enforcement because they were “‘adjacent to other waters of the United States . . . .’”153 On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court’s holding.154 The Sixth Circuit reasoned that the wetlands were subject to federal jurisdiction because “‘there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters.’”155 The circumstances were somewhat different in *Carabells*, a case in which petitioners were denied a permit to deposit fill material in a wetland.156 Despite the lack of evidence showing the wetland had a continuous flow, the district court held that there was federal jurisdiction.157 The district court’s reasoning behind this ruling was that the wetland was “adjacent to neighboring tributaries of navigable waters and [had] a significant nexus to ‘waters of the United States.’”158 The Sixth Circuit once again affirmed, finding the wetland was “adjacent” to navigable waters.159

The Supreme Court granted certiorari and consolidated the cases to determine whether the wetlands constituted “waters of the United States” as used in the CWA.160 Before the Court, the Solicitor General

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151 See *Rapanos*, 547 U.S. at 729.
154 Id. at 729–30.
155 Id. at 730 (quoting United States v. Rapanos, 376 F.3d 629, 643 (6th Cir. 2004)).
157 See *Rapanos*, 547 U.S. at 730. As Justice Scalia pointed out, a man-made berm separated the wetland in *Carabell* from a man-made drainage ditch that emptied into another ditch, which was connected to a creek that ultimately emptied into Lake St. Clair. Id. Justice Scalia further noted that the berm that separated the wetland from the man-made drainage ditch was “impermeable to water and blocks drainage from the wetland, though it may permit occasional overflow to the ditch.” Id.
158 *Carabell*, 257 F. Supp. 2d. at 931–32.
159 See *Carabell v. United States Army Corps of Eng’rs*, 391 F.3d 704, 710 (6th Cir. 2004).
for the Bush Administration, Paul Clemet, argued that broad deference should be given to the Corps’ interpretation of “waters of the United States.”\textsuperscript{161} However, the majority of the Court sought to rein in the government’s interpretation, and ultimately remanded the case to the lower court.\textsuperscript{162} There was no consensus on which standard should be applied by that court as the justices were split four to one to four.\textsuperscript{163} Out of this divergence, two major opinions emerged addressing the scope of CWA jurisdiction: Justice Scalia’s plurality opinion, and Justice Kennedy’s concurring opinion.

Justice Scalia began his opinion for the plurality by acknowledging that the “waters of the United States” definition of “navigable waters” should not be limited to the traditional “navigable in fact” standard.\textsuperscript{164} Furthermore, Scalia noted that “[w]e need not decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act. Whatever the scope of these qualifiers, the Clean Water Act authorizes federal jurisdiction only over ‘waters.’”\textsuperscript{165} In defining this key term, “waters,” Scalia turned to a 1954 edition of Webster’s New International Dictionary.\textsuperscript{166} Based on the dictionary definition, Scalia determined that “the waters of the United States” include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in ‘streams,’ ‘oceans,’ ‘rivers,’ ‘lakes,’ and ‘bodies’ of water ‘forming geographical features.’\textsuperscript{167} With regard to wetlands, Justice Scalia found that only those wetlands with a continuous surface connection to bodies of water that constitute “waters of the United States” in their own right are subject to federal jurisdiction under the Clean Water Act.\textsuperscript{168}

Justice Kennedy, on the other hand, provided a more malleable


\textsuperscript{162} Rapanos, 547 U.S. at 791–92.

\textsuperscript{163} See id.

\textsuperscript{164} Gould, supra note 162, at 429.

\textsuperscript{165} Id. at 429 (alteration in original) (quoting Rapanos, 547 U.S. at 731).

\textsuperscript{166} Id. Justice Scalia relied on the dictionary in determining that “the waters,” as used in the phrase “the waters of the United States,” “refers more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’” Rapanos, 547 U.S. at 732 (alteration in original).

\textsuperscript{167} Rapanos, 547 U.S 732–33.

standard for federal jurisdiction over wetlands. Under Justice Kennedy’s standard, wetlands constitute “waters of the United States” if they have a “significant nexus” to nonnavigable tributaries. To clarify the term “significant nexus,” Justice Kennedy provided a substantive structure:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

This analysis differs significantly from Justice Scalia’s plurality opinion. With such fractured opinions, lower courts are conflicted as to which opinion to follow and have found it difficult to apply Rapanos.

Confusion Following the Rapanos Decision

Since the Supreme Court handed down its decision in Rapanos, courts across the country have expressed “bafflement” over how they are to apply the decision. In particular, the circuit courts are split as to which of the justices’ opinions to rely on. “[T]he Seventh, Ninth, and Eleventh Circuits have applied Justice Kennedy’s test; the First and Eighth Circuits have held that there is CWA jurisdiction ‘whenever either Justice Kennedy’s or the plurality’s test is met’; and the Fifth and Sixth Circuits have ‘finessed’ the issue.” Additionally, Rapanos has wreaked havoc on the government’s implementation of the Clean Water Act’s section 404 enforcement program. After Rapanos, the Environmental Protection Agency (EPA) shifted its caseload to minimize cases with jurisdictional uncertainty. In response to these issues, in

169 Id.  
170 Rapanos, 547 U.S. at 780–82 (Kennedy, J., concurring).  
171 Gould, supra note 162, at 432 (alteration in original) (quoting Rapanos, 547 U.S. at 780).  
172 See Hurley, supra note 163.  
173 GLICKSMAN ET AL., supra note 64, at 619.  
174 Id. at 631.  
175 Id. (quoting Keith A. Johnston & Kristine Sendek-Smith, Muddy Waters: Recent Developments under the Clean Water Act, 24 NAT. RESOURCES & ENV’T 31, 34 (2010)).  
176 Id. at 630.  
177 Between July, 2006 and December, 2007 the EPA dropped 77 potential enforcement cases brought under section 33 of the CWA because of jurisdictional uncertainty. ENVTL. PROT. AGENCY, EPA NEEDS A BETTER STRATEGY TO IDENTIFY VIOLATIONS OF SECTION 404
2014, the EPA and the Corps proposed a new Clean Water Rule to alleviate the confusion. 178

THE CLEAN WATER RULE SEEKS TO PROVIDE CLARITY TO THE CLEAN WATER ACT’S MURKY JURISDICTION.

The Clean Water Rule, which came into effect on August 28, 2015, 179 aims to protect the streams and wetlands that form the foundation of the nation’s water resources. 180 To protect these valuable resources the rule ensures that waters within the jurisdiction of the Clean Water Act are precisely defined and predictably determined. 181 This clarification is “grounded in law and the latest science, and is shaped by public input.” 182 The EPA claims that no new permitting requirements have been created by the rule; rather, the rule seeks to make permitting easier for business and industry. 183 Below are the specific goals the Clean Water Rule seeks to achieve through clarifying which waters are protected by the Clean Water Act. 184

One of the main goals of the Clean Water Rule is to clearly define and protect tributaries 185 that impact the health of downstream waters. 186 To warrant such protection, tributaries must show physical features of flowing water. 187 Additionally, the Rule protects headwaters 188

178 GLICKSMAN ET AL., supra note 64, at 631.
181 Id.
182 Id.
183 Id.
185 “A tributary is a river that feeds into another river, rather than ending in a lake, pond, or ocean . . . Usually the bigger the river gets to be the ‘main’ river, but sometimes history or other factors come into play.” What are the key parts of a river’s anatomy?, AMERICAN RIVERS, https://www.americanrivers.org/rivers/discover-your-river/river-anatomy/ (last visited Feb. 3, 2016).
187 Such physical features of flowing water include: a bed, bank, or ordinary high water mark. Id.
188 Headwaters are the source from which rivers originate. What makes a river? AMERICAN RIVERS (last visited Sept. 3, 2016) https://www.americanrivers.org/rivers/discover-your-
that have these flowing features and that show a significant connection to downstream waters.\textsuperscript{189} The Rule also protects waters located next to rivers, lakes, and their tributaries by setting boundaries that are physical and measurable.\textsuperscript{190} Other bodies of water that fall under the new Rule’s protection include the nation’s “regional water treasures.”\textsuperscript{191} The following water bodies are considered such treasures: “prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they impact downstream waters.”\textsuperscript{192}

While the Clean Water Rule provides for broad protection, there are specific water bodies that the Rule expressly does not extend to. The Rule specifies that most ditches shall not be regulated:

\begin{quote}
[i]the following are not ‘waters of the United States’: (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary. (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (iii) Ditches that do not flow, either directly or through another water, into [a traditional navigable water, interstate water, or the territorial seas].\textsuperscript{193}
\end{quote}

Further, the Rule’s preamble specifies that regulators are to take the physical characteristics of excluded ditches into consideration.\textsuperscript{194} The exclusions will apply to ditches that regulators conclude are not apart of a “significant nexus”.\textsuperscript{195} Among the excluded ditches are: “certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines.”\textsuperscript{196}

\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{195} CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 5 (2016). See also The Clean Water Rule For: Agriculture, ENVTL. PROT. AGENCY, https://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_agriculture_final.pdf (last visited Mar. 15, 2016) (“The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.”).
\textsuperscript{196} Clean Water Rule: Definitions of “Waters of the United States,” 80 Fed. Reg. 124,
Furthermore, the Clean Water Rule does not change preexisting exemptions for agriculture.\footnote{37098 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).} In developing the Rule, the EPA and the Corps carefully considered input from the agricultural community.\footnote{The Clean Water Rule Fact Check, supra note 195.} According to the EPA, the Rule protects water sources that farms across America depend on without getting in the farmers’ way.\footnote{The Clean Water Rule For: Agriculture, supra note 196.} The Agency asserts that the Rule will only provide farmers with greater certainty and will not add economic burdens to the agricultural industry.\footnote{The Clean Water Rule Fact Check, supra note 195.} The EPA recognizes that, “Congress has exempted certain discharges, and the [R]ule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities.”\footnote{The Clean Water Rule For: Agriculture, supra note 196.} In other words, agricultural activities that have long been excluded from permitting such as planting, harvesting, and moving livestock across streams will remain excluded under the Clean Water Rule.\footnote{The Clean Water Rule Fact Check, supra note 195.}

Along with the agricultural industry, the Clean Water Rule also seeks to provide businesses with a more precise understanding of which waters are covered.\footnote{The Clean Water Rule For: Business, ENVTL. PROT. AGENCY, https://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_business_final_0.pdf (last visited Mar. 15, 2016).} Businesses depend on clean water to operate efficiently.\footnote{Id. (“Clean and reliable water is an economic driver, including for manufacturing, farming, tourism, recreation, and energy production.”).} The following are examples of ways that businesses rely on clean water: manufacturing companies use over nine trillion gallons of water each year; the beverage industry uses twelve billion gallons of water every year to produce products valued at $58 billion; the fishing industry generates $48 billion per year; and aquatic recreation generates $86 billion each year.\footnote{Id.} Given businesses’ dependency on clean

\begin{quote}
37098 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).
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197 The Clean Water Rule Fact Check, supra note 195.
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198 The Clean Water Rule For: Agriculture, supra note 196. After releasing the proposed rule in 2015, EPA officials visited farms in Arizona, Colorado, Maryland, Mississippi, Missouri, New York, Pennsylvania, Texas, and Vermont to answer questions and address concerns. Id.
\end{quote}

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199 Id. The farming, ranching, and forestry industries rely on clean, reliable water for livestock, crops, and irrigation. The Clean Water Rule is geared towards protecting these resources without harming the industries that depend upon them. Id.
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200 Id.
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201 The Clean Water Rule Fact Check, supra note 195.
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202 The Clean Water Rule For: Agriculture, supra note 196. Among the agricultural permitting exemptions under the Rule include: soil and water conservation practices in dry land; agricultural storm water discharges; return flows from irrigated agriculture; construction and maintenance of farm or stock ponds or irrigation ditches on dry land; ensure fields flooded for rice are exempt and can be used for water storage and bird habitat.
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204 Id. (“Clean and reliable water is an economic driver, including for manufacturing, farming, tourism, recreation, and energy production.”).
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205 Id.
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water, the EPA and Corps relied significantly on stakeholders’ input in developing the final Clean Water Rule.\textsuperscript{206} According to the agencies, the majority of business officials were in favor of improved federal protection of small streams and headwaters.\textsuperscript{207}

While developing the Rule, officials from the EPA and the Corps held more than 400 meetings with stakeholders across the country and visited farms across the country to hear concerns.\textsuperscript{208} The agencies also relied on a “synthesis prepared by EPA’s Office of Research and Development of more than 1,200 published and peer-reviewed scientific reports.”\textsuperscript{209} EPA’s Science Advisory Board (SAB)\textsuperscript{210} reviewed the report and emphasized, “streams and wetlands fall along a gradient of connectivity that can be described in terms of frequency; duration; magnitude; timing; and rates of change of water, material and biotic fluxes to downstream waters. However, science cannot in all cases provide ‘bright lines’ to interpret and implement policy.”\textsuperscript{211} The EPA and Corps acknowledged this crucial point in the preamble to the final rule:

\textit{The agencies’ interpretive task in this rule . . . requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies’ task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part,

\textsuperscript{207} Id. According to a survey conducted by American Sustainable Business Council, 80% of small business owners favor federal protection of upstream headwaters as proposed by the EPA’s Clean Water Rule. AM. SUSTAINABLE BUS. COUNCIL, SMALL BUSINESS OWNERS FAVOR REGULATIONS TO PROTECT CLEAN WATER 1 (2014). Additionally, 300 small businesses wrote a letter to President Obama supporting efforts to restore the clarity and protection of the Clean Water Act. See Letter from Nick Longo et al., to President Barack Obama (March 30, 2014), http://environmentamerica.org/sites/environment/files/resources/Clean%20water%20smal%20business%20letter%20FINAL.pdf?_ga=1.208425234.1298191909.1458078045.
\textsuperscript{208} The Clean Water Rule For: Agriculture, supra note 196.
\textsuperscript{209} Claudia Copeland, EPA and the Army Corps’ Rule to Define “Waters of the United States,” CONG. RESEARCH SERV. 1, 3 (Jan. 6, 2016), https://www.fas.org/sgp/crs/misc/R43455.pdf.
\textsuperscript{210} Id. The Science Advisory Board provides independent engineering and scientific advice to the Environmental Protection Agency. Id.
\textsuperscript{211} Id.
by the compelling need for clearer, more consistent, and easily implementable standards to govern the administration of the Act, including brighter line boundaries where feasible and appropriate.\textsuperscript{212}

Additionally, the EPA and Corps took more than one million public comments into consideration before promulgating the final rule and its preamble.\textsuperscript{213} These comments came as the result of the agencies’ notice and comment procedure (required by the Administrative Procedures Act (APA)) before the final Rule was enacted.\textsuperscript{214} On April 21, 2014 the agencies published the proposed Clean Water Rule for public comment, and extended the comment period through October 20, 2014.\textsuperscript{215} The agencies addressed the public comments made during this period and incorporated the same into the final Rule.\textsuperscript{216} Although the EPA and Corps followed APA procedures before enacting the final Rule, challengers allege that the final version substantially varies from the proposed rule.\textsuperscript{217} As a result, the challengers argue an adequate opportunity for public comment was not provided.\textsuperscript{218} In issuing a nationwide stay of the Rule, the Sixth Circuit concluded, “[T]he rulemaking process by which the distance limitations were adopted is facially suspect.”\textsuperscript{219} Along these lines, challengers of the Rule contend that the proposed rule did not include any proposed distance limitations.\textsuperscript{220} These challengers further contend that there is no record of scientific

\begin{footnotes}
\item[218] Id.
\item[219] In re EPA, 803 F.3d 804, 807 (6th Cir. 2015).
\end{footnotes}
support for the distance limitations in the final Rule. For the aforementioned reasons, challengers of the Rule argue that the final Rule is not the product of reasoned decision-making and is impermissibly “arbitrary [and] capricious” under the APA.

Aside from claiming that the Rule was developed through a flawed process, challengers also claim that the Rule is too vague and complex. However, both the EPA and the Corps have provided ample information to assist laymen in interpreting the Rule.

**PARSING THE WATERS: WHICH WATERS DOES THE CLEAN WATER RULE COVER?**

Under the first section of the Clean Water Rule, there are six categories of water covered by the jurisdictional rule without additional analysis. The six categories include: (1) waters susceptible to interstate commerce; (2) interstate waters and wetlands; (3) territorial seas; (4) tributaries of the aforementioned waters; (5) impoundments of aforementioned waters and tributaries; (6) all waters adjacent to the aforementioned waters and tributaries. The agencies concluded waters under the sixth category are jurisdictional under the Rule because they have a “significant nexus” to traditional navigable waters, interstate waters, or the territorial seas. This “significant nexus” is important because courts have consistently held that CWA jurisdiction over water is contingent on “some measure of the significance of the connection for downstream water quality.”

However, there has been an expressed need for limits to finding such connectivity. In Justice Kennedy’s concurring opinion in the *Rapanos* case, he found that “[m]ere hydrologic connection should not

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222 Adler, *supra* note 221 (alteration in original).

223 See Bakst, *supra* note 222.


225 Id.

226 Id.


228 Copeland, *supra* note 210, at 6 (quoting Rapanos v. United States, 547 U.S. 715, 784–85 (Kennedy, J., concurring)).

229 See id.
suffice in all cases; the connection may be too insubstantial for the hy-
drologic linkage to establish the required nexus with navigable waters
as traditionally understood.” The EPA and the Corps observed that
significant nexus is not itself a scientific term, but a determination
made by the agencies in light of the law and science, as well as the
expertise and experience of the agencies. To provide limits on the
definition of adjacent waters, the Clean Water Rule provides that such
waters are not jurisdictional unless they meet the definition of “neigh-
boring.” The Rule specifies measurable boundaries from jurisdic-
tional waters for defining “neighboring” waters. These measurable
boundaries include: (1) “all waters located in whole or in part within
100 feet of the ordinary high water mark (OHWM) of a jurisdictional
water”; (2) “all waters located in whole or in part within the 100-
year floodplain that are not more than 1,500 feet from the OHWM of a
jurisdictional water”; (3) “all waters located in whole or in part
within 1,500 feet of the high tide line of a jurisdictional water and
within 1,500 feet of the OHWM of the Great Lakes.”

Waters that do not fall within the six categories mentioned above,
and do not clearly qualify as “neighboring” waters, are subject to a sig-
ificant nexus analysis. Under the Rule, there are two defined sets
of additional waters that will be a “water of the United States” and sub-
ject to the CWA. The first of these sets contains five subcategories
of waters: prairie potholes, Carolina bays and Delmarva bays, pocosins,
western vernal pools, and Texas coastal prairie wetlands. If a case-
specific evaluation of these waters shows a significant nexus to down-
stream waters, in combination with waters in the same subcategory in
the same watershed, such waters will be considered jurisdictional. According to the EPA, these waters may not be categorically jurisdic-
tional, but if case-specific analysis finds them to be “water[s] of the

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230 Id. (quoting Rapanos, 547 U.S. at 784–85 (Kennedy, J., concurring)).
231 Id. at 5–6.
232 Id. at 6.
234 Copeland, supra note 210, at 6 (footnote omitted).
235 Id. (footnote omitted).
236 Id.
238 Copeland, supra note 210 at 7.
239 Id. at 7–8.
240 Id. at 8.
The second set of waters that may be subject to the significant nexus analysis include: waters located in whole or in part within the 100-year floodplain of traditional navigable waters, interstate water, or the territorial seas; and within 4,000 feet of the high tide line or OHWM of a jurisdictional water. Both of these sets of additional waters are part of the agencies’ attempt to develop a rule that will lessen the number of instances requiring time-consuming inquiries to determine CWA jurisdiction. Yet, not everyone sees the provisions of the Clean Water Rule in this manner. Since the proposed rule was released, challengers have seen the Rule as a form of federal overreach.

**THE CLEAN WATER RULE HITS TURBULENT WATERS**

The Clean Water Rule has faced multiple challenges in the lower federal courts, as well as in Congress. Republicans and agricultural groups that claim the Rule gives too much power to the federal government remain the primary challengers. Recently, Agricultural Committee Chairman K. Michael Conaway communicated the views of these challengers’ by issuing the following statement:

> America’s farmers and ranchers are the original conservationists, and they have a vested interest in protecting our natural resources. Yet, when it comes to the regulatory agenda of the United States Environmental Protection Agency (EPA), we are repeatedly confronted by an agency seemingly oblivious to the voluntary conservation efforts of America’s farmers and ranchers, and perhaps most alarmingly, apparently addicted to writing regulations that ignore Congressional intent, ignore the input of stakeholders—including other Federal agencies—and put our ability to produce food and fiber at risk in the U. S.

Despite this sentiment, Republicans have not been able to stop the Clean Water Rule through legislation. Likewise, courts across the

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241 Id.
242 Id.
243 See id.
United States have ruled inconsistently on the issue.\textsuperscript{249} It is likely that there will not be a general consensus among the courts until the Supreme Court of the United States reviews the Rule.

\textit{A wave of congressional action seeking to overturn the Clean Water Rule is stopped by a presidential veto.}

Both chambers of Congress sought to overturn the Clean Water Rule by using a rarely invoked law known as the Congressional Review Act (CRA).\textsuperscript{250} Republican Senator Joni Ernst of Iowa sponsored the use of the CRA to overturn the Rule.\textsuperscript{251} According to Senator Ernst, the Rule ‘‘‘is not about clean water. Rather, it is about how much authority the federal government and unelected bureaucrats should have to regulate what is done on private land.’’’\textsuperscript{252} In November 2015, the Senate approved the CRA in a 55 to 43 vote\textsuperscript{253}, which allowed the CRA to move on to the House where it passed with a 253 to 166 vote.\textsuperscript{254} These results were far short of the two-thirds vote needed in each chamber to overturn a presidential veto, and on January 19, 2016 President Obama vetoed the bill.\textsuperscript{255}

President Obama’s veto of the CRA, aimed at overturning the Clean Water Rule, marks the ninth veto of his presidency.\textsuperscript{256} In support of his decision to issue the veto, President Obama said, “this resolution seeks to block the progress represented by this rule and deny businesses and communities the regulatory certainty and clarity needed to invest in projects that rely on clean water . . .”\textsuperscript{257} However, some businesses
and communities do not view the Rule in such a positive manner. In fact, several businesses and states have filed actions against the Rule.

*The Clean Water Rule embarks on a journey through the judicial system.*

Lawsuits challenging the Clean Water Rule have spread across the country. The plaintiffs who have brought these lawsuits “range from industry groups, to agricultural and other interest groups, to individual corporations, to more than half of the states in the union.” Thirty states have sued to stop the Rule in various federal district courts including: the United States District Court for the Southern District of Georgia, Northern District of West Virginia, Northern District of Oklahoma, Southern District of Ohio, Southern District of Texas, and District of North Dakota. The states opposed to the rule couched their arguments on federalism and assert that the “EPA has usurped the states’ primary responsibility for the management, protection, and care of intrastate waters and lands.”

The lawsuit in front of the United States District Court for the Southern District of Georgia was initially brought by eleven states: Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, and Wisconsin. A few months after filing, the State of Indiana and North Carolina’s Department of Environmental and Natural Resources also joined the lawsuit. The states sought declaratory and injunctive relief in their initial complaint contending that the Rule was unlawful. In support of this contention the states argued that the Rule, “(1) was issued in violation of the CWA and the APA; (2) is arbitrary and capricious in violation of the APA; (3) renders the CWA in excess of Congress’ constitutional authority; (4) interferes with state sovereignty in violation of the Tenth Amendment; and (5)
was issued in violation of the notice and comment provision of the APA.”

District Court Judge Lisa Godbey Wood denied the States’ request for injunctive relief and dismissed the case for lack of jurisdiction. Judge Wood concluded the Rule constituted a “limitation” promulgated under Section 1311, and is therefore subject to the jurisdiction the court of appeals per Section 1369(b)(1)(E). To support this conclusion, Judge Wood relied on the Eleventh Circuit’s broad interpretation of the term “limitation” in *Friends of the Everglades v. EPA.* In *Friends of the Everglades,* the Eleventh Circuit looked to the impact instead of the plain language of a water transfer rule to determine whether the rule was an effluent or other limitation. Judge Wood applied the same analysis in *Georgia v. McCarthy,* and found that the Clean Water Rule “operates as a limitation or restriction on permit issuers and people who would discharge into the bodies of water the Rule now includes as waters of the United States.” The states that brought the lawsuit disagree with Judge Wood’s analysis, and an appeal of the case is currently pending in the Eleventh Circuit.

A similar lawsuit was filed by Texas, Louisiana, and Mississippi against the EPA and the Corps in the United States District Court for the Southern District of Texas. In that case, as in *Georgia v. McCarthy,* the states sought a declaration invalidating the Rule. The states argued that the EPA and the Corps violated the APA in enacting the Rule governing federal jurisdiction over waters of the United States. The district court judge granted a stay in the case, pending a ruling on

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265 Id.
267 Id. at 11.
269 *Georgia,* 2015 WL 5092568, at *2 (citing *Friends of the Everglades v. EPA,* 699 F.3d 1280, 1286 (11th Cir. 2012)).
270 *Friends of the Everglades v. EPA,* 699 F.3d 1280, 1286 (11th Cir. 2012).
271 *Georgia,* 2015 WL 5092568, at *2.
274 Id.
275 Id.
whether the EPA can consolidate the “patchwork quilt” of lawsuits it faces.  

In *North Dakota v. EPA*, the United States District Court for the District of North Dakota granted an injunction filed by thirteen states to stop the enforcement of the Rule. According to the states, the Rule would strip them of their sovereignty over intrastate waters by allowing the EPA to regulate small bodies of water—drains, ditches, and streams—that are located far from navigable waters. The district judge presiding over the case, Ralph R. Erickson, reasoned that the injunction was appropriate, reasoning: “[the] states had a substantial possibility to succeed on the merits because the rule’s treatment of tributaries and similar bodies of water went beyond a U.S. Supreme Court decision setting parameters for the act.” However, Judge Erickson denied the states’ motion to expand the injunction to all fifty states, which limited the injunction to Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. Despite the injunction, EPA Administrator, Gina McCarthy, has stated that the agency will continue to implement prior regulations governing the permits under CWA in those states impacted by the injunction.

Some unusual legal maneuvering ensued after the district court decisions with the same eighteen states filing protective appeals in four different circuit courts. Those appeals were consolidated before the Sixth Circuit Court of Appeals where the states moved to dismiss their own case arguing that the court lacked jurisdiction. Despite their argument that the Sixth Circuit lacked jurisdiction, the states also asked the court to stay the rule pending resolution of the challenges. On

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276 *Id.*
279 *Id.*
280 Koeing, *supra* note 258.
281 Cicero, *supra* note 278.
282 *Id.*
284 Milenkovski, *supra* note 283.
285 *Id.*
October 9, 2015, a majority of the court found that a temporary stay of the Rule was necessary to silence “the whirlwind of confusion that springs from the uncertainty about the requirements of the new Rule and whether they will survive legal testing.” As a result of this nationwide stay, the EPA and the Corps have not implemented the Rule. Instead, the agencies are using the 1986 regulations and associated guidance in making jurisdictional determinations.

While the majority of the Sixth Circuit believed that a stay was necessary, Circuit Judge Keith dissented finding that it was “not prudent for a court to act before it determines that it has subject-matter jurisdiction.” The panel of judges for the Eleventh Circuit United States Court of Appeals approached a parallel case against the EPA with the same caution. In State of Georgia, et al v. McCarthy, et al, the Eleventh Circuit postponed oral argument until the Sixth Circuit rendered a decision as to its jurisdiction. The Sixth Circuit issued its crucial decision regarding jurisdiction on February 22, 2016, holding that the circuit courts of appeals have jurisdiction to review consolidated challenges to the Clean Water Rule. This decision was a narrow victory for the EPA and Corps who would prefer to see a streamlined process that gets the Rule to the Supreme Court of the United States as quickly as possible. Such a streamlined approach would allow briefing to be done by the same administration that crafted the Rule. However, industries and states challenging the rule are still pushing for a slower judicial process that they believe will provide an opportunity to collect more viewpoints.

In reviewing the Sixth Circuit’s decision, it is clear that Supreme
Court precedent weighs heavily against arguments that district courts lack jurisdiction over challenges to the Rule. The court determined that the petitions for review of the Rule fell within the scope of section 1369(b)(1)(E) and (F) of the Clean Water Act, therefore jurisdiction was proper in the circuit courts. To this end Circuit Judge McKeague, writing for the majority of the court, stated,

Since enactment of the Clean Water Act in 1972, the jurisdictional provisions of § 1369(b)(1)(E) and (F) have been subjected to judicial scrutiny in relation to various regulatory actions and have been consistently construed not in a strict literal sense, but in a manner designed to further Congress’s evident purposes. Pursuant to the uniform trend of the instructive case law, the scope of direct circuit court review has gradually expanded.

Judge McKeague further asserted, “to rule that we lack jurisdiction would be to contravene prevailing case law and frustrate congressional purpose without substantial justification.”

The congressional purpose that Judge McKeague referred to can be found in section 1369(b)(1) of the Clean Water Act, which identifies seven kinds of EPA actions that are reviewable in circuit courts. Subsections (E) and (F) of 1361(b)(1) are the only actions the court

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296 See In re U.S. Dept. of Defense, 817 F.3d 261.
298 In re U.S. Dept. of Defense, 817 F.3d at 274.
299 Id.
300 Id.
301 See 33 U.S.C. § 1369(b)(1) (2012). In full section 1369(b)(1) of the Clean Water Rule provides:

(1) Review of the Administrator’s action
   (A) in promulgating any standard of performance under section 1316 of this title,
   (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
   (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
   (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
   (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
   (F) in issuing or denying any permit under section 1342 of this title, and
   (G) in promulgating any individual control strategy under section 1314(1) of this title,

may be had by any interested party in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such persons.

In re U.S. Dept’t of Defense, 817 F.3d at 261 (quoting 33 U.S.C. § 1369(b)(1) (2012)).
clear waters ahead?

considered to be implicated by the Rule.302 The Sixth Circuit first considered whether the Clean Water Rule falls under subsection (E), which authorizes circuit court review of EPA Administrator’s actions in approving any effluent limitation or other limitation.303 In its analysis, the court considered decisions from the D.C., Fourth, and Eight Circuits in conjunction with the United States Supreme Court’s ruling in *E.I. du Pont.*304 The primary contention that the court took away from *E.I. du Pont* was that Congress intended section 1361 (b)(1)(E) to be read broadly, thus allowing circuit courts to review more agency actions than those specified in the provision.305 Ultimately, the Sixth Circuit held that “although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule, per the teaching of *E.I. du Pont* and its progeny, subject to direct circuit court review under § 1369(b)(1)(E),”306

Once the Sixth Circuit established that it had jurisdiction to review the Rule under subsection (E), the court went on to evaluate circuit court jurisdiction under subsection (F).307 In evaluating the Rule under subsection (F), the court relied on the Supreme Court’s findings in *Crown Simpson Pulp Co. v. Costle.*308 The important finding that the court took from *Crown Simpson* was that “an action of the Administrator ‘functionally similar’ to denial of a permit is encompassed within section (F).”309 Given the direct effect that the Clean Water Rule has on permitting under CWA, the Sixth Circuit held that the Rule was subject to its review under section 1369(b)(1)(F).310

**CONCLUSION**

Now that the Sixth Circuit has that ruled circuit courts have jurisdiction to review the Clean Water Rule, litigation will likely erupt throughout the circuits. Such circuit court cases may end up—as the EPA and Corps hoped—being fast tracked to the Supreme Court of the

302 *In re U.S. Dep’t of Defense,* 817 F.3d at 265.
304 *In re U.S. Dep’t of Defense,* 817 F.3d at 267–69.
305 See id. at 267(citing E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 136–37 (1977)).
306 Id. at 269.
310 Id. (finding that this decision “would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA actions.”).
United States in the not too distant future. Without Justice Scalia on the bench it is likely that the Court will adopt Justice Kennedy’s “significant nexus” standard for determining “waters of the United States”.311 Another factor that could significantly impact the Clean Water Rule is the 2017 election of Donald Trump and a Republican majority in the House and Senate. This administration change could mean an entire overhaul of the Clean Water Rule as President-elect Trump has blasted the Rule as “extreme” and “unconstitutional.”312 The incoming Trump administration could persuade the courts to send the Rule back to EPA for a rewrite, which would render challenges to the Rule moot.313 If the Rule is sent back to EPA for reconsideration, then it is highly unlikely that the Supreme Court of the United States will review any challenges.314 Though there is currently a nationwide stay of the Clean Water Rule keeping it from being implemented, the ultimate fate of the Rule remains fairly uncertain.

311 Id.
314 Id.
CASENOTES

CRIMINAL PROCEDURE—RETROACTIVITY—INVALIDATION OF ACCA’S RESIDUAL CLAUSE DEEMED NEW SUBSTANTIVE RULE WITH RETROACTIVE EFFECT IN CASES ON COLLATERAL REVIEW.


JOHN KENDRICK

In Welch v. United States, 1 the Supreme Court of the United States analyzed whether its decision in Johnson v. United States, 2 which invalidated the “residual clause” 3 of the Armed Career Criminal Act (hereinafter “ACCA”), 4 announced a new substantive rule with retroactive application to cases on collateral review. Petitioner Gregory Welch pled guilty to one count of being a felon in possession of a firearm. 5 Federal law generally imposes a maximum punishment of ten-years imprisonment for violations of this restriction; 6 however, the ACCA mandates an enhanced fifteen-year sentence for an offender with three or more prior felony convictions for a “serious drug offense” or “violent felony” at the time of conviction. 7 At trial, a presentence report illustrated that Welch had three prior violent felony convictions, 1 Welch v. United States (Welch II), 136 S. Ct. 1257, 1264 (2016).
2 Johnson v. United States, 135 S. Ct. 2551, 2581 (2015) (holding that the ACCA’s residual clause violates due process as unconstitutionally vague).
4 The Armed Career Criminal Act provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

6 See 18 U.S.C. § 924(a)(2) (2012) (establishing a maximum ten-year prison sentence for violations of § 922(g)).
including a 1996 strong-arm robbery conviction.\(^8\) The district court overruled Welch’s objection to the report\(^9\) and found that the robbery conviction at issue qualified as a violent felony under the elements clause and the residual clause of the ACCA.\(^10\) Accordingly, the district court ruled that Welch qualified as an armed career criminal and sentenced him to the ACCA’s mandatory fifteen-year prison term.\(^11\)

Following his conviction, Welch appealed to the United States Court of Appeals for the Eleventh Circuit.\(^12\) The Eleventh Circuit affirmed the district court and held that the 1996 robbery conviction qualified as a violent felony under the ACCA’s residual clause.\(^13\) The court did not address whether the conviction was applicable under the elements clause.\(^14\) Subsequently, the Supreme Court denied certiorari and Welch’s conviction became final in 2013.\(^15\) Welch then began a pro se collateral challenge to his conviction as an armed career criminal under 28 U.S.C. § 2255.\(^16\) The district court—relying on the residual clause—denied Welch’s motion and further declined to issue a certificate of appealability.\(^17\) Thereafter, Welch appealed to the Eleventh Circuit, at which time Johnson was pending before the Supreme Court.\(^18\) The Eleventh Circuit declined to issue a certificate of appealability and further denied Welch’s motion to hear his case until Johnson was announced.\(^19\) Less than three weeks later, and two years after Welch’s conviction became final, the Supreme Court decided Johnson.\(^20\) After exhausting all possible habeas remedies, Welch again appealed pro se,

\(^8\) Id. at 1262. The report provided that Welch “punched the victim in the mouth” during the course of the 1996 robbery. Id.

\(^9\) Id. Welch objected to the presentence report on grounds that the conviction did not qualify as a violent felony under the ACCA. Id.

\(^10\) Id. at 1262; see 18 U.S.C. § 924(e)(2)(B)(i)–(ii) (2012) (defining the elements clause and the residual clause of the ACCA).

\(^11\) Welch II, 136 S. Ct. at 1262.

\(^12\) United States v. Welch (Welch I), 683 F.3d 1304, 1310 (11th Cir. 2012).

\(^13\) See id. at 1313–14. The court reasoned that the act of “sudden snatching” during the robbery was sufficient to qualify the conviction as a violent felony. Id. at 1312.

\(^14\) Id. at 1313. The court hinted at the notion that the conviction would not qualify under the elements clause but noted “the issue is not cut and dried.” Id.

\(^15\) Welch II, 136 S. Ct. at 1263 (citing Welch v. United States, 133 S. Ct. 913 (2013)).

\(^16\) Id.; see 28 U.S.C. § 2255 (2012) (providing a method for federal prisoners to challenge a sentence imposed in violation of federal law or the Constitution).

\(^17\) Welch II, 136 S. Ct. at 1263; see 28 U.S.C. § 2253(c)(2) (2012) (“A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.”).

\(^18\) Welch II, 136 S. Ct. at 1263.

\(^19\) Id.

\(^20\) Id. at 1263. Johnson was announced in 2015 and Welch’s conviction became final in 2013. See id.
and the Supreme Court granted certiorari on the issue of whether the district court erred in denying Welch’s § 2255 motion and whether Johnson announced a new substantive rule of constitutional law with retroactive effect in cases on collateral review.\textsuperscript{21}

The Court held that its decision in Johnson qualified as a substantive rule with retroactive effect on collateral review.\textsuperscript{22} In its analysis, the Court relied on the standard set forth in Teague v. Lane, which held that new procedural rules are generally not given retroactive effect to cases on collateral review but that new substantive rules are applied retroactively.\textsuperscript{23} The Court reasoned that Johnson qualified as a substantive rule because it “changed the substantive reach of the Armed Career Criminal Act, altering ‘the range of conduct or the class of persons that the [Act] punishes.’”\textsuperscript{24} The Court then clarified the relationship between substantive rules and the Teague standard.\textsuperscript{25} The Court explained that the Teague standard hinges on the procedural or substantive function of the rule rather than the rule’s “underlying constitutional guarantee.”\textsuperscript{26} Additionally, the Court reasoned that a new rule does not have to “limit [Congress’s] power” in order to qualify as substantive.\textsuperscript{27}

The Court did not address whether the district court erred in denying Welch’s § 2255 motion but noted that the retroactive effect given to Johnson serves to allow “reasonable jurists [to] at least debate whether Welch is entitled to relief.”\textsuperscript{28} Consequently, the Court remanded the case to determine whether Welch’s 1996 robbery conviction was applicable under the ACCA’s elements clause.\textsuperscript{29} With its holding, the Court redefined the method of determining whether a new rule is substantive, thus having retroactive effect, based on the rule’s

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 1268.
\item Id. at 1264 (citing Teague v. Lane (Teague IV), 489 U.S. 288, 310 (1989) (plurality opinion)).
\item Welch II, 136 S. Ct. at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).
\item See id. at 1265–67.
\item Id. at 1266. The Court explained that a new rule which is founded on a substantive source can still qualify as procedural under the Teague analysis. See, e.g., Beard v. Banks 542 U.S. 406, 408 (2004) (holding a new rule altering the function of juries in capital sentencing proceedings qualifies as procedural).
\item Welch II, 136 S. Ct. at 1267. The Court explained that new rules derived from interpreting federal criminal statutes are simply treated as substantive rules under the Teague analysis. Id.
\item Id. at 1269.
\item Id.
\end{enumerate}
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function. In doing so, the Court further altered the doctrine of retroactivity by moving away from the traditional substantive-procedural rule distinction, and instead retroactively applying a new rule with a substantive effect in cases on collateral review.

Almost three decades before *Welch*, the United States Supreme Court set forth the general standard governing the retroactive application of new rules in cases on collateral review in *Teague v. Lane*. Petitioner Frank Teague, an African American, was convicted of numerous felonies by an all-white jury. During jury selection, the prosecutor utilized all ten of his peremptory challenges to remove African Americans from the jury pool. The trial court twice denied Teague’s motion for a mistrial and proceeded to impose its sentence. On appeal, the Illinois Appellate Court rejected Teague’s claim that the jury was not “representative of the community” and affirmed the trial court. Teague then sought collateral relief in the United States District Court for the Northern District of Illinois. The district court denied relief, and Teague appealed to the United States Court of Appeals for the Seventh Circuit. In the interim, the Supreme Court decided *Batson v. Kentucky* and *Allen v. Hardy*. The Seventh Circuit

30 See id. at 1266.
31 *Teague v. Lane,* (Teague IV), 489 U.S. 288, 301 (1989) (plurality opinion).
32 Id. at 292–93. Teague was convicted of three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery. *Id.*
33 Id. at 293.
34 Id. On appeal, Teague contended the jury was an inadequate representation of the community; however, the prosecutor successfully maintained that the strikes were to achieve a jury equally comprised of both men and women. *See id.*
35 *Teague IV,* 489 U.S. at 293. This claim is also referred to as the “fair cross section claim.” *Id.* at 293–94; *see People v. Teague* (Teague I), 439 N.E.2d 1066, 1069–70 (Ill. App. Ct. 1982) (finding that the trial judge’s questioning of the jury and the prosecutor’s explanation were sufficient to overcome the existence of constitutional error).
36 Along with his fair cross section claim, the petitioner also requested the district court to examine the validity of *Swain v. Alabama*; *Teague IV,* 489 U.S. at 293; *see Swain v. Alabama,* 380 U.S. 202 at 222 (1965) (holding that a prosecutor may use peremptory strikes to remove blacks from a petit jury without providing a valid reason for doing so), *overruled by* *Batson v. Kentucky,* 476 U.S. 79 (1986).
37 *Teague IV,* 489 U.S. at 293. The district court “held that it was bound by *Swain* and Circuit precedent.” *Id.* (citations omitted).
38 Id. at 294. A panel of the court of appeals reasoned that the petitioner had established an elemental case of discrimination and agreed that the Sixth Amendment’s fair cross section claim applied to petit juries; however, a majority of the court voted to rehear the case en banc. *Id.* (citing United States ex rel. Teague v. Lane (Teague II), 779 F.2d 1332 (7th Cir. 1985)).
39 See *Allen v. Hardy,* 478 U.S. 255, 255 (1986) (per curiam) (holding that *Batson* was not retroactive on collateral review to convictions deemed final before the new rule was announced); *Batson v. Kentucky,* 476 U.S. 79, 80–81 (1986) (altering the evidentiary
held that the precedent in effect at the time barred the retroactive application of *Batson* and that the fair cross section requirement was inapplicable to petit juries.  

Following the Seventh Circuit’s decision, the United States Supreme Court granted certiorari to examine whether *Batson* applied retroactively in cases on collateral review and whether the Sixth Amendment’s fair cross section requirement applied to petit juries. The Court held that *Batson* did not apply retroactively in cases on collateral review. However, the Court declined to address the merits of the fair cross section requirement’s application to petit juries and held that a new rule, if adopted, would not apply retroactively in cases on collateral review. In its analysis of Teague’s first claim, the Court relied on its prior decision in *Allen v. Hardy*, which was governed by the *Linkletter* standard. The Court reasoned that the rule announced in *Allen* effectively barred the retroactive application of *Batson* in cases on collateral review. Accordingly, the Court ruled that Teague could not benefit from *Batson* because his case became final before the new rule was announced.

In examining Teague’s fair cross section claim, the Court focused its analysis on the retroactive effect that this proposed “new rule” would have in cases on collateral review. By doing so, the Court...
departed from its *Linkletter* standard and articulated a new approach to
govern the retroactive effect of new rules in cases on collateral re-
view.\(^{49}\) The Court first explained that a new rule is announced “if the
result was not *dictated* by precedent existing at the time the defendant’s
conviction became final.”\(^{50}\) The Court then adopted the suggestions of
Justice Harlan\(^{51}\) and held that new constitutional rules are always given
retroactive effect on direct review but generally are not retroactive in
cases on collateral review.\(^{52}\) Additionally, the Court provided two dis-
tinct exceptions to the general bar against retroactivity.\(^{53}\) The Court
explained that a new rule that “places ‘certain kinds of primary, private
individual conduct beyond the power of criminal law-making authority
to proscribe’” or “requires the observance of ‘those procedures that . . .
are ‘implicit in the concept of ordered liberty’” would be applied retro-
actively on collateral review.\(^{54}\)

Applying Teague’s proposed new rule under its new standard, the
Court reasoned that the rule would not apply retroactively unless it
qualified under one of the articulated exceptions.\(^{55}\) The Court ex-
plained that the rule did not qualify under the first exception because
“[the rule] would not accord *constitutional protection* to any primary
activity whatsoever.”\(^{56}\) The Court further reasoned that the rule did not
qualify as a “watershed rule of criminal procedure” because the ab-

\[^{49}\text{See Teague IV, 489 U.S. at 301.}\]
\[^{50}\text{Id. at 301 (emphasis added).}\]
\[^{51}\text{Justice Harlan’s approach to retroactivity on collateral review was founded upon the}
\text{purpose of habeas corpus rather than the “purpose of the new rule whose benefit” is sought. Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., opinion concurring in judgments in part and dissenting in part) (advocating that new rules should not be given retroactive effect on collateral review unless the rule qualifies under an exception).}\]
\[^{52}\text{Teague IV, 489 U.S. at 310–11.}\]
\[^{53}\text{Id. at 311 (adopting Justice Harlan’s noted exceptions).}\]
\[^{54}\text{Id. (quoting Mackey v. United States, 401 U.S. 667, 692–693 (1971)). The Court}
\text{termed rules falling under the second exception as “watershed rules of criminal procedure.”}\]
\[^{55}\text{Id. at 310.}\]
\[^{56}\text{Id. at 311 (alteration in original).}\]
accurate conviction. Consequently, the Court utilized the issue of extending the Sixth Amendment’s fair cross requirement to determine that a new rule, if adopted, would not be given retroactive effect in cases on collateral review.

The Court’s holding established a uniform approach to retroactivity designed to benefit all similarly situated defendants, while also retaining the interests of finality in criminal cases. The Court did not address the distinction between substantive and procedural rules, but stated, “The relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.” As a result, this unrecognized substantive-procedural distinction has served to extend the scope of the Teague standard and further define a class of rules falling outside the general bar against retroactivity.

Less than ten years after its decision in Teague, the Court altered its approach to retroactivity in Bousley v. United States by recognizing the retroactive application of substantive rules. Petitioner Kenneth Bousley was convicted of a federal firearm crime under 18 U.S.C. § 924(c)(1). Following his conviction and unsuccessful efforts on direct appeal, Bousley sought collateral relief in the United States District Court for the District of Minnesota. The district court dismissed his petition and Bousley appealed to the United States Court of Appeals for the Eighth Circuit. While his appeal was pending, the Supreme

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58 Id. at 316.
59 The Court explained that the “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” Id. at 309. The Court further reasoned that recognizing the petitioner’s proposed new rule would not apply retroactively to other similarly situated defendants. See id. at 315.
60 Id. at 306 (quoting Mackey v. United States, 401 U.S. 667, 682 (1971) (internal quotation marks omitted)).
61 Less than six months after Teague, the Court held “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense” are also covered under the Teague standard’s first exception. Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (holding that the Eighth Amendment does not bar the execution of mentally handicapped defendants), abrogated by Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of mentally handicapped criminals qualifies as cruel and unusual punishment under the Eighth Amendment).
63 Id. at 616; see 18 U.S.C. § 924(c)(1) (2012) (prohibiting the “use” of a firearm during “any crime of violence or a drug trafficking crime.”).
64 Bousley II, 523 U.S. at 616–17. The petitioner sought to challenge the factual basis of his guilty plea. Id. at 617.
65 See id. The district court reasoned that the location of drugs and guns in the petitioner’s
Court decided Bailey v. United States.\textsuperscript{66} The Eighth Circuit declined to apply Bailey retroactively and affirmed the district court’s dismissal.\textsuperscript{67} Bousley again appealed, and the United States Supreme Court granted certiorari to analyze whether its decision in Bailey applied retroactively in cases deemed final before the new rule was announced.\textsuperscript{68}

On appeal, the Court reversed the Eighth Circuit and held that Bailey applied retroactively in cases on collateral review.\textsuperscript{69} In reaching its decision, the Court did not utilize the Teague standard but instead used its decision in Bailey to define a new group of rules that inherently require retroactive effect in cases on collateral review.\textsuperscript{70} The Court explained that the standard articulated in Teague only applied to procedural rules—not in cases where “[the] Court decides the meaning of a criminal statute enacted by Congress.”\textsuperscript{71} After distinguishing substantive rules as falling outside the general bar against retroactivity, the Court drew upon the underlying purpose of the Teague standard to support the retroactive application of Bailey. The Court explained that the key purpose of habeas corpus, upon which Teague was founded, is “to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”\textsuperscript{72} The Court further reasoned that the narrow group of procedural rules that qualified under the first exception to Teague are equivalent to “decisions . . . holding that a substantive federal criminal statute does not reach certain conduct,”\textsuperscript{73} because each carries a substantial threat that “a defendant stands convicted of ‘an act that the law does not make criminal.’”\textsuperscript{74} In accordance with the foundational purpose of habeas corpus, the Court held that Bailey applied retroactively in cases on collateral review because the rule altered the reach of a federal criminal

\textsuperscript{66} Id. at 617–18; see Bailey v. United States, 516 U.S. 137, 150 (1995) (holding that the word “use” requires a showing of “active employment of the firearm” in convictions under 18 U.S.C. § 924(c)(1)).

\textsuperscript{67} Bousley II, 523 U.S. at 617–18; see generally Bousley v. Brooks (Bousley I), 97 F.3d 284, 286–87 (8th Cir. 1996), rev’d sub nom. Bousley II, 523 U.S. at 624.

\textsuperscript{68} Bousley II, 523 U.S. at 618. The Court explained that the pertinent issue was “to resolve a split among the Circuits over the permissibility of post-Bailey collateral attacks on § 924(c)(1) convictions obtained pursuant to guilty pleas.” Id. (footnote omitted).

\textsuperscript{69} Id. at 621, 624.

\textsuperscript{70} Id. at 620. The Court noted, “[W]e do not believe that Teague governs this case.” Id.

\textsuperscript{71} Id.

\textsuperscript{72} Bousley II, 523 U.S. at 620 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (internal quotations omitted)).

\textsuperscript{73} Id. at 620.

\textsuperscript{74} Id. (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).
statute. 75

Although the Court defined a new class of rules outside the Teague standard, the Court did not address the factors used in distinguishing procedural rules from substantive rules. 76 Nevertheless, the Court’s holding extended the narrow limitations of the Teague standard by allowing rules qualified as substantive to apply retroactively in cases on collateral review. In doing so, the Court began its trend of distinguishing substantive rules from procedural rules when analyzing retroactivity under the Teague standard. 77

The Court further clarified the function of substantive rules under its retroactivity standard in Schriro v. Summerlin. 78 Respondent Warren Summerlin was convicted of sexual assault and first-degree murder. 79 State law in existence at the time authorized the use of the death penalty upon a judge’s finding of qualified aggravating factors. 80 At trial, the presiding judge found two such factors and imposed the death penalty. 81 On direct appeal, the Arizona Supreme Court affirmed the lower court’s judgment. 82 Summerlin then began a series of collateral attacks to challenge his conviction and sentence. 83

Following the district court’s denial of relief, Summerlin appealed to the United States Court of Appeals for the Ninth Circuit. 84 While his motion was pending in the Ninth Circuit, the Supreme Court decided Ring v. Arizona, which held that the existence of aggravating factors must be determined by a jury. 85 Relying on Ring, the Ninth Circuit affirmed Summerlin’s conviction but invalidated his death penalty sentence on grounds that Ring applied retroactively. 86 The Ninth Circuit

75 See id. at 621.
76 See id. at 620–21. Aside from new rules that alter a federal criminal statute, the Court did not elaborate on other rules that would qualify as substantive. Id.
77 See Bousley II, 523 U.S. at 621. The Court did not abolish the established exceptions under the Teague standard, but rather created a new class of rules—substantive—that fall outside the general bar against retroactivity. Id.
79 Id. at 350.
80 See id.
81 See id. Specifically, the court found a prior felony conviction involving violence and that the felonious act was conducted in a “depraved manner.” Id.
82 Id.
83 Summerlin II, 542 U.S. at 350.
84 See Summerlin v. Stewart (Summerlin I), 341 F.3d 1082 (9th Cir. 2003) (en banc), rev’d sub nom. Summerlin II, 540 U.S. at 348.
85 Summerlin II, 540 U.S. at 350–51. After the Court’s decision in Ring, the respondent sought retroactive benefit from the new rule in his collateral attack. Id. at 351; see Ring v. Arizona 536 U.S. 584, 607–09 (2002) (requiring the existence of aggravating factors to be found by a jury).
86 Summerlin I, 341 F.3d at 1121.
found that *Ring* qualified as either a substantive rule or a watershed procedural rule, thus having retroactive effect in Summerlin’s collateral challenge. Following the Ninth Circuit’s decision, the United States Supreme Court granted certiorari to analyze whether the rule announced in *Ring* qualified as procedural or substantive, which in turn determined retroactive application of the rule.

The Court reversed the Ninth Circuit and held that *Ring* was not entitled to retroactive application under the *Teague* standard, because the rule was procedural and did not qualify as a watershed rule of criminal procedure. In reaching its decision, the Court first noted the general premise of the *Teague* standard: giving retroactive application to new rules on direct review while strictly limiting retroactive application in cases on collateral review. The Court then set forth the controlling interpretation of *Teague’s* exceptions and explained that “[n]ew substantive rules generally apply retroactively.” As a result, the Court employed the reasoning behind its prior decision in *Bousley* and incorporated a substantive-procedural rule distinction under its standard of retroactivity.

The Court reasoned that a rule altering the reach or meaning of a federal criminal statute, along with a rule that changes the scope of conduct punishable under a criminal statute, qualifies as substantive. The Court further reasoned that substantive rules demand retroactive application due to the risk that “a defendant stands convicted of ‘an act that the law does not make criminal’ or faces a punishment the law cannot impose upon him.” In contrast, the Court explained that procedural rules are generally barred from retroactive application on collateral review. The Court noted that procedural rules “do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” Under this interpretation, the Court explained that procedural rules are only given retroactive application on collateral review when the absence of the new rule exposes the defendant to a substantial threat of receiving

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87 See *Summerlin II*, 540 U.S. at 352–53.
88 Id. at 351.
89 Id. at 353, 356.
90 See id. at 351–352.
91 Id. at 351.
92 See id. at 351–52.
93 *Summerlin II*, 542 U.S. at 351–52.
94 Id. at 351–52 (quoting *Bousley II*, 523 U.S. at 620).
95 Id.
96 Id.
an inaccurate conviction.\textsuperscript{97} Applying its redefined substantive-procedural approach under the \textit{Teague} standard,\textsuperscript{98} the Court held that \textit{Ring} did not qualify as a substantive rule.\textsuperscript{99} The Court reasoned that its decision in \textit{Ring} “did not alter the range of conduct Arizona law subjected to the death penalty” but rather “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death” by placing the burden of factfinding upon the jury.\textsuperscript{100} After establishing the rule in \textit{Ring} as procedural, the Court analyzed the rule’s qualification under the second exception of the \textit{Teague} standard.\textsuperscript{101} The Court explained that the narrow construction of the watershed rules of criminal procedure exception to the general bar against retroactivity is centered on the question of “whether judicial factfinding so ‘seriously diminishes[es]’ accuracy that there is an ‘impermissibly large risk’ of punishing conduct the law does not reach.”\textsuperscript{102} The Court then found that the possible discrepancies between judicial and jury factfinding regarding the existence of aggravating factors did not present a substantial threat of injustice as required under the exception.\textsuperscript{103} Accordingly, the Court held that \textit{Ring} was retroactively barred under the \textit{Teague} standard, because the rule qualified as procedural and did not fit an exception.\textsuperscript{104}

The Court’s decision altered the scope and operation of the \textit{Teague} standard by establishing a new substantive rule exception to the general bar against retroactivity in cases on collateral review.\textsuperscript{105} Additionally, the Court shifted the focus of its \textit{Teague} analysis on a substantive-procedural rule distinction. As a result, the Court further expanded the narrow limitations of the \textit{Teague} standard and opened the door to a variety of rules that could be classified as substantive.\textsuperscript{106}

\textsuperscript{97} The Court provided a general qualification that a rule must satisfy in order to fit the watershed rules of criminal procedure exception. \textit{See id.}
\textsuperscript{98} The Court made clear that an analysis under \textit{Teague} hinges on whether the new rule is substantive or procedural. \textit{See id. at 351–52.}
\textsuperscript{99} \textit{Summerlin II}, 542 U.S. at 354.
\textsuperscript{100} \textit{id}. at 353.
\textsuperscript{101} \textit{See id}. at 354–57.
\textsuperscript{102} \textit{id}. at 355–56 (quoting \textit{Teague IV}, 489 U.S. at 312–13) (emphasis removed).
\textsuperscript{103} \textit{id}. at 356.
\textsuperscript{104} \textit{id}. at 358.
\textsuperscript{105} The Court stated the first exception to the \textit{Teague} standard as pertaining to substantive rules. \textit{See Summerlin II}, 542 U.S. at 351–52. However, the Court also noted that certain constitutional determinations that “place particular conduct or persons covered by the statute beyond the State’s power to punish” under \textit{Teague’s} first exception are “more accurately characterized as substantive rules not subject to the [non-retroactive] bar.” \textit{id}. at 366 n.4 (emphasis added).
\textsuperscript{106} \textit{See generally} Montgomery v. Louisiana, 136 S. Ct. 718, 724 (2016) (holding that a rule
In *Welch*, the Court’s interpretation of substantive rules under the *Teague* standard illustrates this substantive rule based approach to retroactivity. The Court drew upon its prior decisions in *Bousley* and *Schriro* to clarify the relationship between substantive rules and the *Teague* standard. Accordingly, the Court found that *Johnson* qualified as a substantive rule, because it altered the range of conduct punishable under the ACCA’s residual clause. However, the Court went beyond this established understanding and held that the *Teague* standard is based on the substantive effect or function of a new rule rather than the “underlying constitutional guarantee” of the rule. Under this approach, the Court has seemingly moved beyond its substantive-procedural distinction in favor of extending retroactive effect to a new rule so long as it carries a substantive function.

The direct impact of *Welch* will undoubtedly be seen when scores of federal prisoners, convicted as armed career criminals under the ACCA’s residual clause, seek resentencing and burden courts with the task of reviewing each conviction. On a larger scale, however, the impact of the Court’s decision on the future of retroactivity has the potential to severely hinder the interest of finality in criminal cases by diminishing the limitations set forth under the original *Teague* standard. Whether the Court will continue this trend of expanding the substantive rule exception is not wholly clear; however, this decision illustrates the Court’s willingness to disrupt seemingly final convictions in order to preserve the Constitution’s guarantee of justice.

barring the imposition of mandatory life without parole prison sentences upon juveniles is substantive). The Court opined that “the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.” *Id.* at 729.


108 See *id.* at 1265.

109 *Id.* at 1266.


111 See *Welch II*, 136 S. Ct. at 1266 (noting the *Teague* standard creates a balance between need for finality in criminal cases and “countervailing imperative to ensure that criminal punishment is imposed only when authorized by law.”).
CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—LIMITATIONS PERIOD FOR CONSTRUCTIVE DISCHARGE UNDER TITLE VII RULED TO COMMENCE ON RESIGNATION OF EMPLOYEE—NOT ON LAST DISCRIMINATORY ACT OF EMPLOYER.


ALEXANDER G. THRASHER

In *Green v. Brennan*, the United States Supreme Court considered when the limitations period for filing a claim begins in cases where an employee has been constructively discharged rather than terminated. Marvin Green was employed as postmaster of the United States Postal Service in Englewood, Colorado at the time he applied for the postmaster position in Boulder, Colorado. After being denied this promotion, Green alleged racial discrimination as the basis for the denial, and soon thereafter, his interactions with his superiors began to deteriorate. Subsequently, the Postal Service accused Green of intentionally delaying the mail, a criminal offense, and launched a formal investigation against him.

On December 16, 2009, Green and the Postal Service signed an agreement wherein the Postal Service agreed not to pursue any criminal charges if Green resigned from his position as postmaster in Englewood, or alternatively, Green had the option to accept the postmaster position in Wamsutter, Wyoming. However, this position was at a

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1 Candidate for Juris Doctor, 2018, Cumberland School of Law, Samford University; Bachelor of Arts, Washington University in St. Louis.

2 *Green v. Brennan* (Green II), 136 S. Ct. 1769, 1774 (2016) (explaining that constructive discharge occurs when an employee “[is] not fired, but resigns in the face of intolerable discrimination”).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* (referencing 18 U.S.C. § 1703 (2012)).

7 *Green II*, 136 S. Ct. at 1774. The Postal Service’s Office of the Inspector General (OIG) investigated the allegations and Green was placed on off-duty status during this time. *Id.* Even though the OIG found no basis for additional investigation, Green was informed that “the OIG [was] all over this” and that the ‘criminal’ charge ‘could be a life changer.’ *Id.*

8 *Id.*
significantly lower salary.\(^9\) Thereafter, Green submitted his resignation to the Postal Service on February 9, 2010.\(^10\)

Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”) requires an employee claiming unlawful discrimination to contact an Equal Employment Opportunity (EEO) counselor within 45 days of the “matter alleged to be discriminatory.”\(^11\) Failure to do so within this timeframe bars the employee’s claim.\(^12\) On March 22, 2010, 41 days after submitting his resignation and 96 days after signing the settlement agreement, Green contacted an EEO counselor.\(^13\) Green alleged that the threatened criminal charges were retaliation for his complaint regarding the promotion.\(^14\) Green also alleged that the resulting agreement effectively forced his resignation and violated Title VII.\(^15\)

Green ultimately filed a constructive discharge\(^16\) suit against the Postal Service in the United States District Court for the District of Colorado.\(^17\) The Postal Service moved for summary judgment on grounds that Green “failed to make timely contact with an EEO counselor within 45 days of the ‘matter alleged to be discriminatory,’ as required by 29 CFR § 1614.105(a)(1).”\(^18\) Summary judgment was granted in favor of the Postal Service.\(^19\) On appeal, the Tenth Circuit affirmed summary judgment after finding that the “‘matter[s] alleged to be discriminatory’ encompassed only the Postal Service’s discriminatory actions and not Green’s independent decision to resign on February 9.”\(^20\) Consequently, the court of appeals reasoned the appropriate date for beginning the 45-day limitation period was the signing of the settlement agreement on December 16, 2009, and determined Green’s claim was barred.\(^21\)

Green appealed the Tenth Circuit’s decision, and the United States
Supreme Court granted certiorari to resolve a circuit split on the issue of whether the limitations period begins to run after the employer’s last discriminatory act, or when the employee actually resigns. The Court held that the limitations period for a constructive discharge claim begins to run when an employee gives notice of his resignation rather than when an employer commits its last discriminatory act.

The Court began its analysis by considering the language of the EEOC regulation, and looking specifically to the meaning of the word “matter.” Because “matter” simply means “an allegation forming the basis of a claim or defense,” and because the regulation made no reference to cases of constructive discharge specifically, the Court determined that applying the plain meaning of the word “matter” was insufficient for settling whether a “matter alleged to be discriminatory” includes acts of the employee or only the discriminatory acts of the employer.

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22 Compare Mayers v. Laborers’ Health and Safety Fund of N. Am., 478 F.3d 364, 370 (D.C. Cir. 2007) (per curium) (holding that the continuing violations doctrine did not save a former employee’s untimely claim against the employer), and Davidson v. Ind.-Am. Water Works, 953 F.2d 1058, 1059 (7th Cir. 1992) (finding that the statute of limitations began to run when the defendant took an adverse action against the former employee, not when the employee felt the consequences of that action at some later time), with Flaherty v. Metromail Corp., 235 F.3d 133, 138–39 (2nd Cir. 2000) (finding that employee’s claim for constructive discharge began when she submitted her formal notice of retirement, not when she informed employer that she was considering retiring), and Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1107–08 (9th Cir. 1998) (holding that events that occur outside the limitations period may be considered a basis for a discrimination claim as long as the events are part of the same ongoing and unlawful employment practice), and Hukkanen v. Int’l Union of Operating Eng’rs Local 101, 3 F.3d 281, 285 (8th Cir. 1993) (holding that when Title VII violations are continuing in nature, the limitations period does not begin to run until the last occurrence of discrimination), and Young v. Nat’l Ctr. for Health Servs. Research, 828 F.2d 235, 238 (4th Cir. 1987) (holding that related discrimination claims which are barred by limitations should be allowed as evidence on the question of whether plaintiff was constructively discharged).

23 Green III, 136 S. Ct. at 1775.

24 Id. at 1776–77.

25 Id. at 1776.

26 Id. (quoting Black’s Law Dictionary 1126 (10th ed. 2014) (internal quotation marks omitted)).

27 Id. The Court’s decision in Green was not entered in the absence of any disagreement between the Justices. In his dissent, Justice Thomas argued that the majority applied an “atextual reading of the regulation that expands the constructive-discharge doctrine” that is inconsistent with the text and the historical roots of the doctrine. Green III, 136 S. Ct. at 1791 (Thomas, J., dissenting). Justice Thomas argued that just as the Morgan Court refused to allow the word “practice” to be read to mean a combination of multiple acts into a single unlawful act for purposes of overcoming a limitations period, neither should “matter” be interpreted to mean the coupling of discriminatory acts of the employer and subsequent acts of the employee in response. Id. at 1792.
Instead, the Court applied the previously established “standard rule” that a “limitations period commences when the plaintiff has a complete and present cause of action.”

“A cause of action does not become ‘complete and present’ for limitations purposes until the plaintiff can file suit and obtain relief.” By applying this standard rule to cases of constructive discharge, the Court found that the employee’s resignation is an essential element of the matter alleged to be discriminatory for three reasons. First, the resignation is part of establishing a “complete and present cause of action.” Second, the language of the EEOC regulation failed to indicate any intent to preclude the application of the standard limitations rule in constructive discharge cases. Third, application of the standard limitations rule yields the most practical result. Given these reasons, the Court held that the limitations period for a constructive discharge claim begins when the employee resigns.

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29 Green III, 136 S. Ct. at 1776 (quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)).
30 Id.
31 Id. (internal quotations omitted). In constructive discharge claims, a resignation becomes part of the “complete and present cause of action” necessary before a limitations period ordinarily begins to run. Id. at 1776. Without the resignation, no claim of constructive discharge can be brought, and therefore, the employee’s act of resigning is essential for establishing a “complete and present” cause of action. Id. at 1777. Cf., Mac’s Shell Serv., Inc. v. Shell Oil Products Co., 559 U.S. 175, 189–190 (2010) (the limitations period for a constructive termination of a franchise agreement starts running when the agreement is constructively terminated). The resignation of the employee in this context is no different than a case in which the employee was discriminated against and then terminated. Id.; see also St. Mary’s Honor Ctr. v. Hick’s, 509 U.S. 502, 506 (1993).
32 Green III, 136 S. Ct. at 1776. When the text clearly indicates that the standard rule should not be followed then the regulation prevails over the default rule. Id. at 1777. However, the Court found nothing in Title VII or the regulation sufficient to displace the standard rule. Id.
33 Green III, 136 S. Ct. at 1776. From a practical standpoint, the Court concluded that “[s]tarting the limitations clock ticking before a plaintiff can actually sue for constructive discharge serves little purpose in furthering the goals of a limitations period—and it actively negates Title VII’s remedial structure. Id. at 1778; Cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982) (holding that the Title VII limitations period should be construed to “honor the remedial purpose of the legislation as a whole without negating the particular purpose”). Requiring an employee to file a complaint after the employer’s discriminatory conduct, but before actual resignation, would force the employee to subsequently amend the complaint to include a constructive discharge claim. Green III, 136 S. Ct. at 1778. Furthermore, filing a complaint prior to being able to perfect a constructive discharge claim may place an employee in an uncomfortable situation wherein the employee forces himself to tolerate discriminatory conditions because of a need for money or other circumstances. Id.
submits his resignation.\(^{34}\)

The Court addressed and refuted three other areas of concern raised by *amici*, the dissent, and the concurrence.\(^{35}\) First, the Court dispelled the assertion that the phrase “matter alleged to be discriminatory” is clearly read to mean that the standard claim accrual method should not apply in constructive discharge cases because “matter” is not analogous to “claim” or “cause of action.”\(^{36}\) *Amici* contended only the acts of the Postal Service are relevant for determining when the limitations period begins.\(^{37}\) *Amici* and the dissent further argued that a constructive discharge is not a separate claim altogether, and that the constructive discharge doctrine is intended only to allow an employee to expand his claim for damages related to leaving a job in face of discrimination by an employer.\(^{38}\)

These arguments heavily relied on *Pennsylvania State Police v. Suders*, in which the Court held that “an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes.”\(^{39}\) The Court rejected this argument, however, finding that the *Suders* opinion “did not hold . . . that a constructive discharge is tantamount to a formal discharge for remedial purposes exclusively. To the contrary, it expressly held that constructive discharge is a claim distinct from the underlying discriminatory act.”\(^{40}\) For these reasons, the Court found no reason to separate the employee’s act of resigning, an essential part of a constructive discharge claim, solely for the purpose of determining the limitations period.\(^{41}\)

Next, the Court addressed the argument that Green’s resignation was merely an inevitable consequence of the employer’s discrimination, not a part of the discriminatory matter itself, and therefore could not be considered an act that extends the limitations period.\(^{42}\) In Green’s case, however, resignation was not only an inevitable consequence of the discrimination, but also an essential element of his constructive discharge claim.\(^{43}\) Without resigning, Green had no claim at

\(^{34}\) *Id.* at 1782.

\(^{35}\) See *id.* at 1778–82.

\(^{36}\) *Green III*, 136 S. Ct. at 1778.

\(^{37}\) *Id.*

\(^{38}\) See *id.* at 1779.

\(^{39}\) *Id.* (quoting Pa. State Police v. Suders, 542 U.S. 129, 141 (2004)).

\(^{40}\) *Id.* (applying *Suders*, 542 U.S. at 149).

\(^{41}\) See *id.*

\(^{42}\) *Green III*, 136 S. Ct. at 1780.

\(^{43}\) *Id.*
all, and therefore, the “inevitable consequence” argument failed.\textsuperscript{44} Finally, the Court swiftly dismissed two additional arguments\textsuperscript{45} of amici and the dissent.\textsuperscript{46} Amici argued that viewing Green’s resignation as a mere consequence of the discriminatory behavior, rather than a component of the matter alleged to be discriminatory, “better advance[d] the EEOC’s goal of promoting conciliation for federal employees through early, informal contact with an EEO counselor.”\textsuperscript{47} The dissent contended that allowing the employee’s resignation to be included as part of the discriminatory matter will allow a victim to “extend the limitations period indefinitely by waiting to resign.”\textsuperscript{48}

In response to amici’s concern, the Court noted that although conciliation\textsuperscript{49} is important, this goal alone is insufficient justification for treating a constructive discharge different from an actual termination for purposes of a limitations period.\textsuperscript{50} As for the dissent’s concern, the Court reasoned that a plaintiff has a greater incentive to file a constructive discharge claim sooner, rather than later, because the success of a claim requires proof of a causal link between the discriminatory conduct and the resignation.\textsuperscript{51}

In the last component of the Court’s analysis, it addressed the question of when the employee is considered to have resigned: the date of notification to the employer, or the last day of employment.\textsuperscript{52} Both parties stipulated that the proper date of resignation, for purposes of

\textsuperscript{44} Id.\textsuperscript{45} Id. at 1781–82. The Court also refuted an additional concern of Justice Alito’s, expressed in his concurring opinion, that “an employee who relies on the limitations period in waiting to resign is ‘doubly out of luck’ if his otherwise-meritorious discrimination claim is time barred and he cannot show the discrimination was so intolerable that it amounted to a constructive discharge.” (Alito, J., concurring). The majority concluded that it is highly unlikely that a plaintiff would have a rational basis for delaying a legitimate claim on the ground that doing so may help “resuscitate other time-lapsed claims.” Id. at 1781–82. The limitations period is always analyzed on a claim by claim basis. Id. at 1782.\textsuperscript{46} Green III, 136 S. Ct. at 1781–82.\textsuperscript{47} Id. at 1781. (referencing Exec. Order No 11478, § 4, 34 Fed. Reg. 12986 (1969)) (“counseling for federal employees ‘shall encourage resolution of employee problems on an informal basis.’”).\textsuperscript{48} Id. (internal quotation marks omitted).\textsuperscript{49} See Conciliation, BLACK’S LAW DICTIONARY (8th ed. 2004) (defining conciliation as “[a] settlement of a dispute in an agreeable manner,” or “[a] process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved.”).\textsuperscript{50} Green III, 136 S. Ct. at 1781.\textsuperscript{51} Id.\textsuperscript{52} Id. at 1782.
beginning the limitations period, is the date of notification to the employer.\textsuperscript{53} The Court agreed, citing precedent established in \textit{Delaware State College v. Ricks} and \textit{Chardon v. Fernandez}.\textsuperscript{54} In \textit{Ricks} and \textit{Chardon}, “the Court explained that an ordinary wrongful-discharge claim accrues—and the limitations period begins to run—when the employer notifies the employee he is fired, not on the last day of his employment.”\textsuperscript{55} Ultimately, however, the Court did not resolve the dispute as to whether this notice was effective when Green signed his settlement paperwork on December 16, 2009, or when he submitted his resignation paperwork on February 9, 2010.\textsuperscript{56} Though the Court held that the limitations period began when Green gave notice of his resignation, the Court vacated the Tenth Circuit’s judgment and remanded the matter for further proceedings to determine on which date notice was given.\textsuperscript{57}

The constructive discharge doctrine was established by the National Labor Relations Board (NLRB) in the 1930’s to address situations in which employers created harsh working environments for some employees in an attempt to force the employee’s resignation.\textsuperscript{58} After its establishment, courts routinely upheld the validity of constructive discharge claims, and by the mid-1960s the doctrine was well established in federal courts.\textsuperscript{59}

In a 1980 discrimination case, the Supreme Court of the United States considered the timeliness of a complaint filed under Title VII by a professor who was allegedly denied tenure because of his nationality.\textsuperscript{60} In \textit{Delaware State College v. Ricks}, a black Liberian, Columbus Ricks, was denied tenure by the College, and was instead offered a “terminal” contract—meaning he would be permitted to teach for one additional year prior to the termination of his employment; a standard policy of the college.\textsuperscript{61} The Board of Trustees voted to deny Ricks

\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} (citing Del. St. C. v. Ricks, 449 U.S. 250, 259 (1980); Chardon v. Fernandez, 454 U.S. 6, 7 (1981)).
\textsuperscript{56} \textit{Green III}, 136 S. Ct. at 1782.
\textsuperscript{57} \textit{Id.}
\textsuperscript{59} \textit{Id.} at 141–42; see, e.g., Cathy Shuck, Comment, \textit{That’s It, I Quit: Returning to First Principles in Constructive Discharge Doctrine}, 23 BERKELEY J. EMP. & LAB. L. 401, 410 (2002).
\textsuperscript{60} \textit{Ricks}, 449 U.S. at 252.
\textsuperscript{61} \textit{Id.} at 253. The practice of offering a one year “terminal” contract is a common practice among colleges and universities that deny tenure to faculty members. \textit{Id.}
tenure on March 13, 1974, and Ricks filed a grievance in response.62 The College offered Ricks the one year contract on June 26, 1974.63 Ricks signed the contract on September 4, 1974.64 On September 12, 1974, the Board of Trustees denied Ricks’ grievance.65 On April 4, 1975, Ricks attempted to file an EEOC claim, but was instead directed to a state agency that had primary jurisdiction over employment discrimination claims arising under Title VII of the Civil Rights Act.66 The state agency ultimately waived its jurisdiction, and the EEOC subsequently accepted Ricks’ complaint and issued a “right to sue” letter over two years later.67

Ricks filed suit in the district court in September 1977 alleging discrimination on the basis of Ricks’ national origin.68 The court granted the College’s motion to dismiss Ricks’ claims as untimely.69 The court concluded: (1) that the unlawful practice alleged was the College’s decision to deny tenure; (2) that the limitations period commenced when the College informed Ricks that he would be offered the one year contract; and, (3) that Ricks’ claims had not been filed within 180 days of that event.70

On appeal, the Court of Appeals for the Third Circuit reversed and remanded, holding that the limitations period begins on the last day of employment.71 The court of appeals agreed that the discriminatory practice was the denial of tenure.72 However, it determined that the limitations period did not commence until the one year contract expired on June 30, 1975.73 The court stated that “[a] terminated employee who is still working should not be required to consult a lawyer or file charges . . . as long as he is still working . . . .”74 In addition to concerns over conciliation between the aggrieved employee and the employer, the court of appeals also reasoned that implementing a rule based on the last day of employment would provide a bright line test

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62 *Id.* at 252.
63 *Id.* at 253.
64 *Id.* at 253–54.
65 *Ricks*, 449 U.S. at 254.
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 254–55.
71 *Ricks*, 449 U.S. at 255.
72 *Id.*
73 *Id.*
74 *Ricks*, 449 U.S. at 255 (citing Ricks v. Del. St. C., 605 F.2d 710, 712 (3rd Cir. 1979) (quoting Bonham v. Dresser Indus., Inc., 569 F.2d 187, 192 (3rd Cir. 1977))).
The Supreme Court granted certiorari, and ultimately held that the district court had properly determined that Ricks’ claims were untimely. In so holding, the Court rejected Ricks’ argument that discrimination not only motivated the denial of tenure, but also termination of his employment. Instead, the Court reasoned that his termination was merely an inevitable consequence of the denial. Ricks’ “allegation [that] his termination [gave] present effect to the past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination” was insufficient to sustain his cause of action.

Similarly, decades later in National Railroad Passenger Corp. v. Morgan, the Supreme Court considered whether a Title VII plaintiff could file suit based on events that occurred outside the limitations period. Abner Morgan alleged he was the victim of persistent discriminatory harassment and harsh discipline from Amtrack. Morgan filed suit on October 2, 1996, but many of the discriminatory acts he claimed occurred outside the 300-day limitations period. The Supreme Court granted certiorari and considered the question of what constitutes an “unlawful employment practice.” In doing so, the Court rejected the continuing violations doctrine argument that “practice” can be the incorporation of multiple discrete acts into a single ongoing act for purposes of timely filing a claim. The Court noted that such acts “are not actionable if time barred, even when they are related to acts alleged in timely filed charges.” As a result, the Court reversed the portion of

75 Id. at 255–56.
76 Id. at 256.
77 Id. at 257.
78 Id. at 257–58.
79 Id. at 258 (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 557 (1977)).
81 Id. at 106. Amtrak filed a motion for summary judgment on all claims that were outside the 300-day limitations period, and the District Court granted this motion in part. Id. Morgan appealed, and the Court of Appeals for the Ninth Circuit reversed by relying on the principle that “courts [may] consider conduct that would ordinarily be time barred ‘as long as the untimely incidents represent an ongoing unlawful employment practice.’” Id. (citing Morgan v. Nat’l R.R. Passenger Corp. (Morgan II), 232 F.3d 1008, 1014 (9th Cir. 2000), aff’d in part, rev’d in part, 536 U.S. 101 (2002)).
83 Id. at 110. The Court also addressed the question of when a practice is said to have occurred and determined, quite clearly, that a practice has occurred on the day it happened. See Morgan, 536 U.S. at 110.
84 Id. at 110–11.
85 Morgan III, 536 U.S. at 113.
the court of appeals’ ruling that relied on the continuing violations doctrine.\footnote{See id. at 114.}

The Court continued, however, by distinguishing hostile environment claims, which are based on repeated conduct rather than specific acts such as demotion, termination, or transfer.\footnote{See id. at 115.} In contrast to discrete acts, hostile environment claims cannot be said to occur on a specific day, but instead are based on the cumulative effect of persistent discriminatory behavior.\footnote{See id.} Because a hostile environment claim is based on these cumulative acts, and not any one single act, “[i]t does not matter, for purposes of \[42 U.S.C. § 2000e-5(e)(1)\], that some of the component acts of the hostile work environment fall outside the statutory time period.  \[If any\] act contributing to the claim occurs within the filing period, the entire time period . . . may be considered . . . .”\footnote{Id. at 117–18 (“It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct . . . . Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim . . . . [T]he employee need only file a charge within [the limitations period] of any act that is part of the hostile work environment.”).} The Court affirmed the court of appeals’ conclusion that “pre and post-limitations period incidents involve[d] the same type of employment actions,”\footnote{Id. at 120 (quoting Morgan II, 232 F.3d at 1017).} and therefore, even though some of the acts on which Morgan’s claim was based occurred outside the limitations period, they were part of the same actionable hostile environment claim.\footnote{Morgan III, 536 U.S. at 120–21.}

Not long after Morgan, in Pennsylvania State Police v. Suders, the Supreme Court had its first occasion to consider whether a claim for constructive discharge was actionable under Title VII.\footnote{Suders, 542 U.S. at 142.} In Suders, Nancy Drew Suders alleged sexual harassment by her supervisors of such severity and pervasiveness that she felt there was no other available remedy but to resign.\footnote{Id. at 133.} Subsequently, Suders filed a lawsuit against the Pennsylvania State Police (PSP) alleging sexual harassment and constructive discharge in violation of Title VII.\footnote{Id. at 136–37.} The district court granted the PSP’s motion for summary judgment, finding that the PSP

\begin{itemize}
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\item \footnote{See id. at 115.}
\item \footnote{See id.}
\item \footnote{Id. at 117–18 (“It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct . . . . Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim . . . . [T]he employee need only file a charge within [the limitations period] of any act that is part of the hostile work environment.”).}
\item \footnote{Id. at 120 (quoting Morgan II, 232 F.3d at 1017).}
\item \footnote{Morgan III, 536 U.S. at 120–21.}
\item \footnote{Suders, 542 U.S. at 142.}
\item \footnote{Id. at 133.}
\item \footnote{Id. at 136–37.}
was not vicariously liable for the harassing conduct of the supervisors. The district court ignored Suders’ constructive discharge claim. On appeal, the Court of Appeals for the Third Circuit reversed and remanded, holding, in relevant part, that the district court erred in failing to recognize Suders’ constructive discharge claim. Additionally, the court of appeals held that “a constructive discharge, when proved, constitutes a tangible employment action.”

The Suders Court was tasked with expanding on its prior decisions in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth as it resolved the courts of appeals’ prior holdings finding a constructive discharge that results from supervisor harassment constitutes a “tangible employment action.” In Faragher and Ellerth, the Court held that “an employer is strictly liable for supervisor harassment that ‘culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment.’” In its opinion, the Court stated that the claims at issue were of the same kind of hostile work environment claims evaluated in Faragher and Ellerth. Although actual termination always occurs from some tangible action of the company, a constructive discharge does not necessarily involve such an act. Both, however, are functionally the same in terms of ending an employer-employee relationship and in the infliction of economic harm. Ultimately, the Suders Court vacated and remanded the case, and in so doing, acknowledged that constructive discharge claims may lie in Title VII cases.

The Court’s decision in Green resolves any uncertainty about the mechanics of filing a Title VII constructive discharge claim that remained in the wake of the Court’s decisions in Ricks, Morgan, and Suders. The Ricks Court began the decades long progression of the constructive discharge doctrine in holding that a termination following

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95 See Vicarious Liability, BLACK’S LAW DICTIONARY (10th ed. 2009) (“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”).
96 Suders, 542 U.S. at 137–38.
97 Id. at 138–39.
98 Id. at 139 (quoting Suders v. Easton, 325 F.3d 432, 447 (3rd Cir. 2003), vacated sub nom. Penn. St. Police v. Suders, 542 U.S. 129 (2004)).
101 Suders, 542 U.S. at 137.
102 Id. (citing Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808).
103 Id. at 147.
104 Id. at 148.
105 Id.
106 Id. at 152.
discriminatory conduct was insufficient to extend the life of a claim, and was instead a mere consequence of the discrimination. 107 More than twenty years later, in Morgan, the Court distinguished constructive discharge claims between hostile work environment claims and ones of discrete, discriminatory acts. 108 In doing so, the Court held that Morgan’s claim constituted a hostile work environment, and therefore, though some of his claims were barred individually due to the lapse of the limitations period, since they were a component of a hostile work environment claim of which some of the conduct was not time-barred by the limitations period, the time-barred acts could be considered as part of his cause of action. 109

Finally, shortly after Morgan, the Suders Court considered a constructive discharge claim filed under Title VII for the first time and held that “Title VII encompasses employer liability for a constructive discharge,” 110 solidifying the applicability of constructive discharge claims in the Title VII context. In Green, the Court resolved a circuit split and unequivocally provided the test for lower courts to use when determining the validity of claims that face scrutiny based on the limitations period. The limitations period begins when an employee submits notice of her resignation to the employer in response to discriminatory acts sufficient to sustain a constructive discharge action. 111

Though some policy arguments suggest the Court applied a misdirected interpretation of the regulation, or that the constructive discharge doctrine is merely a counter-defense available to a plaintiff in response to an employer’s defense, 112 the Court’s decision represents a logical approach to remedying the circuit split. The day an employee submits a notice of resignation, the statute of limitations clock begins to run. Resolving the uncertainty on this issue serves several important functions for all interested parties. First, it easily preserves valid constructive discharge claims for employees who have been subjected to discrimination while protecting employers from increased exposure to unfounded claims or prolonged liability. Additionally, it provides courts with a bright line test for determining whether claims are time barred. Finally, it promotes the conciliation in the employer-employee relationship, which is perhaps the most fundamental cornerstone of American enterprise.

107 Ricks, 449 U.S. at 257–59 (1980).
108 Morgan III, 536 U.S. at 115–18.
109 Id. at 122.
110 Suders, 542 U.S. at 143.
112 Id. at 1794–96 (Thomas, J., dissenting).