WHAT IS ENABLED? HOW "BLOCKCHAIN ENABLING" LEGISLATION FAILS COMMERCIAL CONTRACTS

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I.   Introduction

An option contract limits the power of acceptance and is a promise not to revoke an offer, in exchange for consideration.[1] Without the enforceability of option contracts, parties would not be able to trust that the other party would not revoke the offer whenever it sees fit.[2] Even with the myriad of ways contract law alleviates the need for blind trust, contracting carries with it an innate requirement that a party either trusts the system in its entirety, or trusts the other party to honor the contract.[3] But, with the advent of online exchanges, how can anyone be sure their online activities are secure, or of the identity of a contracting party? What if there was a way to eliminate the need to trust people or institutions to carry out commercial contracting?

The emergence of blockchain, through the advent of Bitcoin, initially created societal distrust for the new technologies.[4] Yet, while Bitcoin made waves in the financial sector, the most innovative aspect of Bitcoin is the underlying technology: blockchain. Blockchain mitigates the inherent risk involved in transacting with unknown parties and is therefore the closest thing to a trustless system created thus far.[5] In fact, most proponents of blockchain technology define blockchain implementations

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[1] Restatement (Second) of Contracts § 25 (Am. Law. Inst. 1981).

[2] *See Id.* (exemplifying how contract law concerns itself with trust and power dynamics between unknown, and often distrustful, parties).

[3] *See* Simon Deakin, Christel Lane & Frank Wilkinson*, Trust or Law — Towards an Integrated Theory of Contractual Relations between Firms*, 21 J.L. & S OC'Y 329, 337–38 (1994) (discussing insecurity in contracting, particularly with asymmetric relationships).

[4] *See* Thomas Lowenthal, *Bitcoin: Inside the Encrypted, Peer-To-Peer Digital Currency,* A RS T ECHNICA (June 8, 2011, 9:00 AM), https://arstechnica.com/tech-policy/2011/06/bitcoin-inside-the-encrypted-peer-to-peer-currency/ (explaining Bitcoin and other cryptocurrencies, and alluding to their underground use).

[5] *Infra* notes 28–35 and accompanying text.

(hereinafter "protocols")[6] as "trustless."[7] Understandably, the discussion of "trust" is confusing because trust is inherent in blockchain protocols in that they are incredibly transparent and secure, which eliminates the *need* for trust.[8] Somewhat paradoxically, the Economist wrote that blockchain technology is "the greatest chain of being sure about things."[9]

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[6] *See Protocol*, BRITANNICA, https://www.britannica.com/technology/protocol-computer-science (last visited Feb. 13, 2019) ("[A] set of rules or procedures for transmitting data between electronic devices, such as computers."); Bryant Nielson, *Review of the 6 Major Blockchain Protocols*, RICHTOPIA https://richtopia.com/emerging-technologies/review-6-major-blockchain-protocols (last visited Feb. 13, 2019) (listing the six most successful blockchain protocols, for example, Ethereum and Hyperledger).

[7] *See* Jacor, *Trustless — What Does It Mean in Laymen's Terms*, STEEMIT, https://steemit.com/technology/@jacor/trustless-what-does-it-mean-in-laymen-s-terms (last visited Feb. 13, 2019) (explaining why society trusts banking institutions and how this trust is also created, by default, in the blockchain structure).

[8] *See* DON TAPSCOTT & ALEX TAPSCOTT, BLOCKCHAIN REVOLUTION 6 (2016) (describing the blockchain as "the Trust Protocol"); Vitalik Buterin, *Visions, Part 2: The Problem of Trust*, ETHEREUM BLOG (Apr. 27, 2015), https://blog.ethereum.org/2015/04/27/visions-part-2-the-problem-of-trust/ ("Unlike traditional (financial or other) systems . . . blockchains allow you to create systems where you can [transact] . . . without any need to trust anyone.").

[9] *See The Promise of the Blockchain: The Trust Machine*, THE ECONOMIST (Oct. 31, 2015), https://www.economist.com/news/leaders/21677198-technology-behind-bitcoin-could-transform-how-economy-works-trust-machine [hereinafter *The Trust Machine*] (defining those in the "trust business" as institutions such as banks and governments which are, in our current system, required for many transactions to be certified, and therefore trustworthy).

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In response to the billions of dollars invested in blockchain startups in 2015–2016 alone,[10] regulators are scrambling to understand the technology and its many implications. Additionally, innovative businesses across vastly different industries are beginning to think about how blockchain can help them.[11] State governments in Nevada, Vermont, and Arizona were the first to have formally recognized blockchain technology as a powerful tool for innovation.[12] Each group of lawmakers has done so in different ways, with Arizona and Nevada lawmakers taking similar approaches, amending their state's Uniform Electronic Transactions Acts (UETA),[13] while Vermont lawmakers opted to amended the state's court procedure to allow records stored on the blockchain as evidence in trials.[14] While all three states recognize blockchain's innovative importance by focusing laws on blockchain

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[10] John Kennedy, *$1.4bn Investment in Blockchain Start-ups in Last 9 Months, Says PwC Expert*, SILICON REPUBLIC (Nov. 4, 2016), https://www.siliconrepublic.com/start-ups/blockchain-pwc-investment.

[11] *See Banking Is Only The Start: 27 Big Industries Where Blockchain Could Be Used*, CB INSIGHTS (Aug. 25, 2017), https://www.cbinsights.com/research/industries-disrupted-blockchain/, [hereinafter *Banking is Only the Start*] (listing twenty-seven blockchain startups ranging from music industry sales run by smart contracts to secured healthcare data sharing).

[12] *See* ARIZ. REV. STAT. ANN. § 44-7061 (2017); S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at NEV. REV. STAT. § 719); VT. STAT. ANN. tit. 12, § 1913 (2016).

[13] Uniform Electronic Transactions Act (UETA), Nev. Rev. Stat. § 719 (2001). *See infra* notes 190–192 (discussing the Uniform Law Commission's recent guidance on this approach).

[14] *Compare* § 44-7061 (adding an article to the UETA), *and* S.B. 398 (amending the definitions section of the UETA and prohibiting the board of county commissioners from imposing taxes on or requiring licenses for using a blockchain in business), *with* tit. 12, § 1913 (adding a section to Vermont's Court Procedures).

protocols outside of the Financial Technology ("FinTech")[15] space, legislators in all three states seem to lack a complete understanding of blockchain technology as a dynamic and interactive ecosystem.[16] Rather, their constructions of blockchain definitions indicate that they understand the technology to be a secured vault (i.e. a static database) system. They therefore use ineffective terminology to define the blockchain.

This article first introduces blockchain technology and provides a short overview of the legislative landscape. Secondly, it analyzes the differences in legislative approaches among the states, and articulates where each law is lacking and why. The laws are then analyzed through their application to Hyperledger Sawtooth's supply chain use case.[17] Finally, this article offers recommendations for future legislation and touches on regulatory strategies.

II.   Blockchain Bills: The Emergence of "Blockchain Enabling" Legislation

A. Blockchain Primer

For the purposes of this paper, a blockchain is a decentralized, consensus-driven[18] database (often described as a

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[15] *See* Bernard Marr, *The Complete Beginner's Guide to FinTech in 2017*, F*ORBES* (Feb. 10, 2017) https://www.forbes.com/sites/bernardmarr/2017/02/10/a-complete-beginners-guide-to-fintech-in-2017/#72d20bf13340 (clarifying "FinTech," which stands for Financial Technologies; for example, Bitcoin).

[16] *Compare* § 44-7061 (failing by over defining as well as incorrectly defining the technologies), *and* S.B. 398 (failing to include smart contracts at all), *with* tit. 12, § 1913 (defining the technology more effectively, but potentially precluding dynamic blockchain ecosystems).

[17] *See generally* Kelly Olson et al., *Sawtooth: An Introduction*, H*YPERLEDGER* (Jan. 2018), https://www.hyperledger.org/wp-content/uploads/2018/01/Hyperledger_Sawtooth_WhitePaper.pdf.
[18] *See* Arati Baliga, *Understanding Blockchain Consensus Models,* P*ERSISTENT*, 5–6 (Apr. 2017), https://www.persistent.com/wp-

"ledger system") that logs, maintains, and validates an exchange network of cryptographically-secured digital transactions.[19] The term 'blockchain' is not synonymous with Bitcoin. [20] Instead, the Bitcoin protocol uses blockchain technology to facilitate and record its transactions.[21] The Bitcoin protocol is an early version of the same type of decentralized ledger system that smart contracts use. [22] However, due to technological differences, such as the

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content/uploads/2017/04/WP-Understanding-Blockchain-Consensus-Models.pdf (explaining the numerous blockchain consensus mechanisms required to solve the problem of agreement in a decentralized system in which any number of actors will try to trick the system, such as Proof of Work ("PoW") or Proof of Stake ("PoS")); *see also* Leslie Lamport, Robert Shostak & Marshall Pease, *The Byzantine Generals Problem*, MICROSOFT (July 5, 1982), https://www.microsoft.com/en-us/research/wp-content/uploads/2016/12/The-Byzantine-Generals-Problem.pdf (explaining that the blockchain solves the trust/agreement problems associated with decentralized systems as the "Byzantine Generals' Problem").

[19] *See* Shawn S. Amuial et al., THE BLOCKCHAIN: A GUIDE FOR LEGAL AND BUSINESS PROFESSIONALS, § 2.3 (Oct. 2016) (exploring blockchain as it pertains to the legal community and for the less technically-sophisticated); WILLIAM MOUGAYAR, THE BUSINESS BLOCKCHAIN, 6–7, 10 (2016) (listing the core tenets of a blockchain as: peer-to-peer network, consensus algorithms, a virtual machine creating a historical record, and state balances); Nolan Bauerle, *What is Blockchain Technology*, COINDESK, http://www.coindesk.com/information/what-is-blockchain-technology/ (last visited Apr. 23, 2018) (describing blockchain technology for the technical layperson).

[20] *E.g.,* David Z. Morris, *Bitcoin is not just digital currency. It's Napster for finance,* FORTUNE, (Jan. 21, 2014), http://fortune.com/2014/01/21/bitcoin-is-not-just-digital-currency-its-napster-for-finance/.

[21] *Id.*

[22] *See* Amuial, *supra* note 19, at § 2.3 ("While the Bitcoin protocol contains a basic scripting language . . . it is not nearly as robust as the. . .

sophistication of the coding language used to create its blockchain, Bitcoin uses an older and simpler blockchain.[23]

"The old adage "Is it in the database?" will be replaced by "Is it on the blockchain?"[24] Blockchain is often understood simply as a secure vault, or a basic ledger in which records of transactions, which have taken place outside the blockchain ecosystem, are stored (i.e. like a secure Excel spreadsheet).[25] However, this is a misunderstanding of a blockchain's full functionality. Most blockchain enthusiasts are not interested in a new vault for storing transactions, but instead in a dynamic ecosystem that is *anchored* by blockchain technologies.[26] In other words, the former ('vault system' or 'secured Excel spreadsheet') is simply a storage container for transactions (including contracts) *created outside* the blockchain ecosystem, whereas the latter is a "new paradigm" which enables entire transactions to occur within this new ecosystem, facilitated and anchored by blockchain technology.[27]

Blockchain is a base layer technology upon which different types of applications or systems can be implemented, many of

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Ethereum Protocol [and] similar protocols with Turing-complete [i.e. an immutable scripting language] programming capabilities.").

[23] *Id.*

[24] Vitalik Buterin, *Introduction* to WILLIAM MOUGAYAR, THE BUSINESS BLOCKCHAIN, at xxv (2016) (exemplifying the massive difference between current database structures and the blockchain).

[25] *See* MOUGAYAR, *supra* note 19, at 2–4, 6–7, 10 (describing the various ways that blockchain technology can be harnessed, of which a database is one but by no means the most important, useful, or revolutionary).

[26] *See id.* at 19 (comparing current state of UCC filings with future as smart contract UCC filings).

[27] *See id.* at 17, 20–21 (explaining what it means to be "anchored" by blockchain technology, and the components of a blockchain architecture).

which employ the blockchain to facilitate transactions.[28] Fundamentally, a blockchain is made up of three main tenets: first, a blockchain is a "state machine," meaning the time at which a transactions occurs is remembered by the system, and second, it operates on a decentralized peer-to-peer network that does not depend on a central authority to validate transactions or ensure their authenticity.[29] Instead, consensus algorithms solve the trust problem posed by a decentralized system.[30] Third, each block is wrapped in a type of encryption and cryptographically secured, which in combination with the consensus algorithm, validates the authenticity of the transaction.[31] Each tenet is a silo with additional features or solutions implemented in different blockchain protocols.[32] For example, two competing consensus methods, Proof-of-Work ("PoW") and Proof-of-Stake ("PoS"), solve the same decentralized trust problem; additionally, there are also many different cryptography solutions.[33]

Together, the tenets described above make up a blockchain and provide complete attestation. If new data proves a previous

[28] Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, HARV. BUS. REV., 118–27 (Jan.–Feb. 2017) ("[a] blockchain is an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way. The ledger itself can also be programmed to *trigger transactions automatically*." (emphasis added)).

[29] *See* MOUGAYAR, *supra* note 19, at 19–23 (expounding on the blockchain's ten "simultaneously exhibited" properties).

[30] *See* MOUGAYAR, *supra* note 19, at 19–23; *see also* Baliga, *supra* note 18 and accompanying text.

[31] Baliga, *supra* note 18.

[32] Baliga, *supra* note 18.

[33] *Proof of Work vs Proof of Stake: Basic Mining Guide*, BLOCKGEEKS, https://blockgeeks.com/guides/proof-of-work-vs-proof-of-stake/ (last visited Apr. 23, 2018).

block's data is objectively wrong, a new block needs to be added to invalidate the wrong information (as opposed to other information structures where old information is simply deleted or changed).[34] This concept, known as attestation, is why blockchain is often described as "immutable."[35]

Blockchain technology also has an impact on industries that rely heavily on contracts and complex record-management.[36] Smart contracts have a variety of definitions across technical and legal fields,[37] however a majority of literature has identified distinctions between what are called "smart *legal* contracts," and

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[34] *See* Diana Ngo, *Microsoft and Tierion Collaborate on New Blockchain-Based Attestation and Data Platform*, COIN J. (Jan. 31, 2017), https://coinjournal.net/microsoft-tierion-collaborate-new-blockchain-based-attestation-data-platform/ (describing attestation as the concept that the system verifies, through consensus, that a given piece of data—for example, a transaction—is true at that point in time).

[35] *See* Cliff Moyce, *How Blockchain Can Revolutionize Regulatory Compliance*, CORP. COMPLIANCE INSIGHTS (Aug. 10, 2016), http://corporatecomplianceinsights.com/blockchain-regulatory-compliance/ ("One of the most exciting features of blockchain . . . is its practical immutability: as soon as data is saved into the chain, it cannot be changed or deleted.").

[36] *See* Smart Contracts Alliance & Deloitte, *Smart Contracts: 12 Use Cases for Business & Beyond*, CHAMBER OF DIG. COM., 2, 26, 28 (Dec. 2016), http://digitalchamber.org/assets/smart-contracts-12-use-cases-for-business-and-beyond.pdf [hereinafter, Deloitte] (examining twelve use cases for smart contracts, such as financial data recording and mortgages).

[37] *Compare* Amuial, *supra* note 19, at § 2.3 (distinguishing a smart contract with legal implications from a smart contract as code), *with* GT Staff, *Blockchain Smart Contracts for Supply Chains*, GLOBAL TRADE (Jul. 24, 2017), http://www.globaltrademag.com/global-logistics/blockchain-smart-contracts-supply-chains ("A smart contract is computer code hosted on a blockchain that defines and executes the terms of an agreement between parties.").

smart contracts at the development level (i.e. computer codes).[38]
For the purposes of this paper, a smart contract is defined as the
legal transaction that is triggered by the fulfillment of a set of pre-
coded and agreed-to conditions, which are then executed by
software code. Essentially, this paper discusses the smart legal
contract as a concept, that from an overall legislative perspective,
cannot be examined in isolation from the code that facilitates the
transaction.[39] Additionally, smart contracts are presumed to be
facilitated by blockchain technology.[40] A very well-known
blockchain protocol[41] that supports smart contracts is Ethereum.[42]
While Ethereum was the first general blockchain protocol to

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[38] *See* Amuial, *supra* note 19, at § 2.3; Christopher D. Clack, Vikram A.
Bakshi & Lee Braine, *Smart Contract Templates: foundations, design
landscape and research directions*, B*ARCLAYS* B*ANK* PLC 2016, 3–4,
https://arxiv.org/pdf/1608.00771.pdf (last updated Mar. 15, 2017).

[39] *See* Clack, *supra* note 38, at 3–4 (defining a smart contract as
"automatable," rather than "automated"); M*OUGAYAR*, *supra* note 19, at
42–43 ("Smart contracts are not law . . . but the consequences of their
actions can be made part of a legal agreement. . . .").

[40] Kristen Silverberg, Conan French & Dennis Ferenzy, *Getting Smart on
Smart Contracts*, I*NST. OF* I*NT'L* F*IN.*, 2 (May 2016),
https://www.iif.com/system/files/32370132_smartcontracts_report_ma
y_2016_vf.pdf ("The term was coined in the mid-1990s by Nick Szabo [in
his whitepaper] . . . [and] existed largely as a theoretical concept until the
development of blockchain technology. . . ."); *see generally* Vitalik
Buterin, *Ethereum White Paper: A Next Generation Smart Contract &
Decentralized Application Platform*, E*THEREUM*,
http://blog.lavoiedubitcoin.info/public/Bibliotheque/EthereumWhitePap
er.pdf (describing Ethereum's blockchain protocol and smart contract
functionality) (last visited Apr. 23, 2018).

[41] *See Protocol*, *supra* note 6 (defining "protocol" in computer
engineering); Nielson, *supra* note 6 and accompanying text.

[42] *See Protocol*, *supra* note 6 (defining "protocol" in computer
engineering); Nielson, *supra* note 6 and accompanying text.

support smart contracts and will thus be mentioned throughout,[43] The Linux Foundation's Hyperledger Fabric is a competitor for enterprise solutions and will subsequently be employed as a use case.[44]

The most important concept needed to understand blockchain, is the ability to distinguish between blockchain as a database and blockchain as a dynamic ecosystem.[45] Blockchain protocols which support smart contracts, like Ethereum and Hyperledger, are dynamic in that the blockchain, often interacting with Internet-of-Things (IoT) data, actively facilitate or enforce the terms, conditions, conditions precedent, etc. coded into the contract.[46] A smart contract does not sit passively on top of a

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[43] *See* Nielson, *supra* note 6; Massimo Bartoletti & Livio Pompianu, *An Empirical Analysis of Smart Contracts: Platforms, Applications, and Design Patterns*, U. DEGLI STUDI DI CAGLIARI, 1 (Mar. 18, 2017), https://arxiv.org/pdf/1703.06322.pdf (It.) ("The archetypal implementation of smart contracts is Ethereum …").

[44] *See* Techracers, *Hyperledger v/s Ethereum*, MEDIUM (Aug. 3, 2017), https://medium.com/techracers/hyperledger-v-s-ethereum-f15ba54b35d0 (explaining that Ethereum's current (pre-Casper release) PoS consensus model is inefficient for enterprise-size solutions).

[45] *See* Bettina Warburg, *How the Blockchain Will Radically Transform the Economy*, TED (June 2016), https://www.ted.com/talks/bettina_warburg_how_the_blockchain_will _radically_transform_the_economy/transcript?language=en#t-7899=39 (analogizing the blockchain to Wikipedia *vis-a-vis* Wikipedia's consensus-driven model for validating the articles' factualness (i.e. truth)).

[46] *See* Mougyar, *supra* note 19, at 42–43 ("[s]mart contracts are ideal for interacting with real-world assets . . . [and] Internet of Things."); *see generally* Stacy-Ann Elvy, *Contracting In The Age Of The Internet Of Things: Article 2 Of The UCC And Beyond*, 44 HOFSTRA L. REV. 839, 842 (2016) (exploring contractual issues regarding IoT-enabled devices).

blockchain.[47] While an immutable record of paper transactions that take place outside a blockchain ecosystem (i.e. audit trail) are important to many industries, such as a blockchain-as-database system that keeps track of property servitudes, many industries are looking beyond a secured vault system.[48] This is an important distinction that is often overlooked in the blockchain discussion: the smart contract functionality of blockchain protocols facilitate actual interaction between the application level (i.e. the contract language) and the blockchain system (i.e. the code that triggers transactions based on the contract language).[49] The "smart" piece of the definition comes from a blockchain *interacting with* the application layer (i.e. contract language) to facilitate self-executing transactions and then recording each transaction in a new block.[50]

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[47] *See* Mougyar, *supra* note 19, at 42–43 (explaining that smart contracts are a type of "enabling technology," meaning that a smart contract can enforce the "implementation of a particular requirement").

[48] *See* Deloitte, *supra* note 36, at 29 (exemplifying how a blockchain-based, smart contract system for land deeds would be more efficient than the current system; in contrast to a secured ledger, without the transactional functionality, which would be useful but not quite as efficient as a blockchain); MOUGAYAR, *supra* note 19, at 24 (identifying the difference between the blockchain as a new type of database and not merely a "process improvement technology," versus the blockchain "at its fullest deployment potential [as a] disruptive technology."). Buterin, *supra* note 27, and accompanying text (distinguishing the blockchain as 'Excel spreadsheet' or 'secured vault' and the blockchain as 'dynamic ecosystem').

[49] *See* Clack, *supra* note 39, at 3–4 ("[T]o be a 'smart contract' . . . some part of the execution [must be] capable of being automated.").

[50] Deloitte, *supra* note 36, at 10 ("A block is a software-generated container that bundles together the messages relating to a particular smart contract. Those messages may act as inputs or outputs of the smart contract programing logic.").

B. Piecemealing Blockchain Legislation

Nevada and Arizona lawmakers recently amended their state's respective versions of the Uniform Electronic Transactions Act ("UETA") to include blockchain technology.[51] Arizona's legislation enables smart contracts to have full legal effect, validity, and enforceability whereas Nevada's does not mention smart contracts.[52] Similarly, Vermont's legislation does not define smart contracts but does reference their use.[53]

Federally, there are no regulations focused on the legal effect or validity of a smart contract.[54] This is not to say that regulators are not aware of the developments in blockchain technology, but they are most focused on Fintech.[55] In October 2016, at The

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[51] ARIZ. REV. STAT. ANN. § 44-7061 (2017); S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at NEV. REV. STAT. § 719); *see also* Molly Jane Zuckerman, *Tennessee Passes Bill Recognizing Blockchain, Smart Contracts For Electronic Transactions*, COINTELEGRAPH, (June 24, 2018), https://cointelegraph.com/news/vtennessee-passes-bill-recognizing-blockchain-smart-contracts-for-electronic-transactions (illustrating that Tennessee also passed a smart-contracts focused bill, but it was enacted after this paper was written and it is thus, excluded from discussion).

[52] ARIZ. REV. STAT. ANN. § 44-7061 (2017); S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at NEV. REV. STAT. § 719).

[53] VT. STAT. ANN. tit. 12, § 1913 (2016).

[54] *See* Mike Orcutt, *Congress Takes Blockchain 101*, MIT TECH. REV. (Mar. 15, 2017), https://www.technologyreview.com/s/603820/congress-takes-blockchain-101/ (mentioning that there are still no federal regulations in place).

[55] *See id.* (describing the Congressional Blockchain Caucus); *Client Update: SEC Enforcement Provides Clarity on When a Blockchain Token Is a Security*, DEBEVOISE & PLIMPTON (July 26, 2017), http://www.debevoise.com/~/media/files/insights/publications/2017/07/20170726a_sec_enforcement_provides_clarity_on_when_blockchain_token_is_a_security_2.pdf (exemplifying regulatory focus on FinTech).

Institute of International Finance Annual Meeting, Governor Lael
Brainard of the Federal Reserve System discussed the possible
implications of smart contracts in the financial sector.[56] While her
speech is indicative of some trepidation, it is also a step in the right
direction for blockchain advocates.[57]

On June 5, 2017, Nevada's governor signed Senate Bill No.
398 into law, effective immediately.[58] The new law amended
Nevada's UETA to include blockchain technologies.[59] The bill
provided its own definition of blockchain,[60] recognizing "blockchain
technology as a type of electronic record,"[61] and prohibiting local
governments from taxing a blockchain, requiring a license or
certificate to use a blockchain, or "imposing any other requirement
relating to the use of a blockchain."[62]

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[56] *See* Lael Brainard, Governor, Fed. Res. Board, Speech at the Institute Of
International Finance Annual Meeting Panel On Blockchain, (Oct. 7,
2016) (focusing on financial markets' reliance on trust . . . blockchain
technologies could, if not properly "understood, managed, and
controlled," impede the "daily operation of markets and their clearing and
settlement functions [which] are built on trust and confidence."). *See also*
Ali Breland, *Lawmakers introduce the Blockchain Caucus*, THE HILL
(Feb. 9, 2017, 7:15 PM), http://thehill.com/policy/technology/318845-
lawmakers-introduce-the-blockchain-caucus ("The caucus will be focused
on advocating for 'sound public policy toward blockchain-based
technologies and digital currencies.'").

[57] *See* Lael Brainard *supra* note 57 (explaining the FRB's blockchain
working group and the FRB's commitment to supporting innovation).

[58] S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at NEV.
REV. STAT. § 719).

[59] *Id.* §§ 1, 3.

[60] *Id.* § 1.

[61] *Id.* (Legislative Counsel's Digest summary).

[62] *Id.*

The amendments to Arizona's UETA are the most recent blockchain-enabling changes in legislation.[63] Signed into law on March 29, 2017 by Arizona Governor Doug Ducey, the Arizona legislation uses the most specific language and is the only one of the three laws which defines and expressly discusses smart contracts.[64] Additionally, lawmakers in Arizona, like in Nevada, amended the state's UETA to include an article entitled "Blockchain Technology."[65]

Vermont is the outlier of the three states with blockchain laws mentioned above. Vermont's "blockchain enabling" law was written in 2015 and came into effect on July 1, 2016; almost a full year earlier than both Nevada's and Arizona's.[66] Vermont lawmakers did not amend the state's Electronic Transactions Act unlike lawmakers in both Nevada and Arizona.[67] Interestingly, Vermont lawmakers amended the state's Court Procedure chapter of the state code, adding a blockchain enabling law to the rules of evidence.[68] As one of the earliest states to adopt blockchain-focused legislation, the focus of Vermont's law is to allow, as

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[63] ARIZ. REV. STAT. ANN. § 44-7061 (2017).

[64] *Id.*; *Arizona Governor Signs Blockchain Records Bill*, BUCKLEY SANDLER: INFOBYTES BLOG (Apr. 4, 2017), https://buckleysandler.com/blog/2017-04-04/arizona-governor-signs-blockchain-records-bill.

[65] ARIZ. REV. STAT. ANN. § 44-7061 (2017).

[66] VT. STAT. ANN. tit. 12, § 1913 (2016).

[67] *See* ARIZ. REV. STAT. ANN. § 44-7061 (2017); S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at Nev. Rev. Stat. § 719); VT. STAT. ANN. tit. 12, § 1913 (2016) (allowing smart contracts for broader use because Arizona's and Nevada's laws are tied to the UETA's scope).

[68] VT. STAT. ANN. tit. 12, § 1913 (2016).

evidence in court proceedings, digital records that are maintained on a blockchain.[69]

C. Smart Contracts Applied: The Supply Chain

Supply chains and the contracts that govern them can be complex and are often written quickly.[70] Blockchain startups target supply chains because of the complexity of the arrangements, the vast network of moving parts and parties, and the huge losses that occur each year from simply losing track of goods.[71] However, integral to solutions for these problems are the contracts that govern relationships within the supply chain.[72]

The Linux Foundation's Hyperledger Sawtooth is an open-source blockchain project for enterprise use.[73] One of its use cases

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[69] *Id.* § 1913(b).

[70] Michael J. Casey & Pindar Wong, *Global Supply Chains Are About to Get Better, Thanks to Blockchain*, HARV. BUS. REV. (Mar. 13, 2017), https://hbr.org/2017/03/global-supply-chains-are-about-to-get-better-thanks-to-blockchain.

[71] J. DAX HANSEN & CARLA L. REYES, PERKINS COIE, LEGAL ASPECTS OF SMART CONTRACT APPLICATIONS 9 (May 2017), https://www.virtualcurrencyreport.com/wp-content/uploads/sites/13/2017/05/Perkins-Coie-LLP-Legal-Aspects-of-Smart-Contracts-Applications.pdf (Blockchain protocols, combined with "the capacity of smart contracts to update the state of the transaction in real time or to 'trigger events that can be used to indicate the success or failure of a transaction,' . . . [significantly mitigate] many routine difficulties in supply chain management.").

[72] Rich Weissman, *How Contracts Help Define Supplier Performance*, SUPPLY CHAIN DIVE (July 11, 2017), http://www.supplychaindive.com/news/contract-management-supplier-performance-UCC/446811/.

[73] *Sawtooth: Introduction*, INTEL CORP., https://sawtooth.hyperledger.org/docs/core/releases/latest/introduction.html (last visited Feb. 14, 2019).

is a supply chain management solution.[74] Through a combination of IoT-enabled sensors, blockchain-based software, and smart contract integration, "the Sawtooth platform [manages] the chain of custody of [goods], enabling ownership to be transferred and traded on the blockchain, according to smart contracts."[75] The events proceed as follows; First, all parties to the supply chain sign contracts on the application layer of the blockchain-driven platform, knowing that certain terms are coded to self-execute at a later date depending on a given set of conditions.[76] The smart contract includes "if-then" statements, or other parameters, which manage the parties' relationships regarding the goods and assets in question.[77] Second, the goods are mined, caught, or manufactured.[78] Third, IoT-enabled tags are attached to each product to ensure accurate tracking capability.[79] Fourth, the goods are placed in shipping containers, loaded onto boats, planes, or

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[74] Hyperledger, *Introduction to Hyperledger Sawtooth*, YOUTUBE (Apr. 18, 2017), https://www.youtube.com/watch?time_continue=1&v=8nrVlICgiYM.

[75] *See id.* (illustrating the chain of transactions).

[76] *See Bringing Traceability and Accountability to the Supply Chain Through the Power of Hyperledger Sawtooth's Distributed Ledger Technology*, THE LINUX FOUND. PROJECTS, https://sawtooth.hyperledger.org/examples/seafood.html (last visited Jan. 10, 2019); *see also* Clack, *supra* note 39, at 13 (listing requirements for a smart contract, including the parties' digital signatures).

[77] *See* Hyperledger*, supra* note 75; Clack, *supra* note 39, at 8–9 (describing a smart contract template set of parameters).

[78] *See* Hyperledger*, supra* note 75 (exemplifying the cross-industry supply chain applications of this protocol).

[79] *See* Hyperledger*, supra* note 75 (explaining that the tags will sense tilt, temperature, location, and myriad other data points).

trucks, and moved to a secondary location.[80] It is at this point the chain of custody exchanges hands, and legally, the IoT-enabled sensor sends input data to the smart contract, along with some sort of signature from each party (whether it be a traditional signature, or electronic), to create a transfer of ownership rights from one party to another.[81] Lastly, the goods are transferred over and over again until reaching their final destination.[82] Throughout the process, IoT-enabled tags are transmitting time and location information to the smart contract, and the blockchain-enabled contract is facilitating if-then contract conditions.[83]

III.   Blockchain Protocols: Ecosystems, not Secured Vaults

Regulation without accuracy, at the very least, leads to public and judicial confusion.[84] At most, imprecise legislation can chill innovation in the industry that it seeks to bolster.[85]

The legislatures' attempts in Nevada, Vermont, and Arizona each fall short in fully defining and embracing the breadth of

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[80] *See* Hyperledger, *supra* note 75 (illustrating a typical global supply chain).

[81] *See* Hyperledger, *supra* note 75 (explaining that this transfer will be automated).

[82] *See* Hyperledger, *supra* note 75.

[83] *See* Hyperledger, *supra* note 75 and accompanying text.

[84] *See* Luke A. Stewart, *The Impact of Regulation on Innovation in the United States: A Cross-Industry Literature Review*, I*NST. OF* M*ED.*, 5–6 (2010), https://www.itif.org/files/2011-impact-regulation-innovation.pdf ("Regulation can promote more complete information about products and processes in the marketplace. Regulation can also induce uncertainty . . . [which] occurs in the absence of complete information.").

[85] *See id.* at 3 (discussing how compliance burdens halt radical innovation).

current blockchain implementations.[86] Given that each state's law could give rise to its own individual analysis, the following commentary is narrowed specifically to the issue of smart contract enforceability.

A. Moving Targets: Infantile Blockchain Solutions Used Inaccurately and Ineffectively in Blockchain Definitions

There are many definitions of blockchain, and each word used in any given definition has multiple implementations.[87] This makes the creation and analysis of legislative definitions all the more difficult. However, legislators can use blockchain's central tenets and conceptual silos to help guide their efforts. Blockchain is a state machine, it is decentralized, and it is secured by cryptography.[88] Due to the continually evolving terminology used to describe the ever-changing technology, Nevada,[89] Vermont,[90] and Arizona[91] have considerably different statutory definitions of blockchain. While the statutory definition of blockchain in Arizona is very specific, Nevada and Vermont force a level of open-endedness in their state's statutes by describing the general concepts of blockchain systems. However, the statutory definitions of blockchain in Nevada and Vermont do not fully embrace the

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[86] *Compare* Ariz. Rev. Stat. Ann. § 44-7061(E)(1) (2017) (specific blockchain definition), *with* S.B. 398 § 1, 79th Reg. Sess. (Nev. 2017) (general blockchain definition), and Vt. Stat. Ann. tit. 12, § 1913(a) (2016) (general blockchain definition).

[87] *See* Angela Walch, *Path of Blockchain Lexicon (and the Law)*, 36 Rev. Banking & Fin. L. 713, 719–22 (2017) (examining conflicting definitions).

[88] *See* Mougayar, *supra* notes 25, 29–33 and accompanying text.

[89] S.B. 398, § 1, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at Nev. Rev. Stat. § 719).

[90] Vt. Stat. Ann. tit. 12, § 1913(a) (2016).

[91] Ariz. Rev. Stat. Ann. § 44-7061(E)(1) (2017).

dynamic nature of the blockchain ecosystem because some of their definitional choices effectively preclude a potential blockchain protocol.[92] Both Nevada and Vermont statutes indicate that blockchain stores data in a certain order. The Nevada statute includes the phrase, "uniformly ordered," while the Vermont statute uses the word "chronological."[93] In doing so, what legislators are attempting to include in their definitions is the concept of blockchain as a state machine.[94] While the effectiveness of the phrase "uniformly ordered" is nuanced enough to portray the concept of "state" as the transactions are being processed by the blockchain,[95] the Vermont statute's use of "chronological"[96] does not. Of the two, the phrase "uniformly ordered" is preferable because "chronological," by its definition, requires the state values to be time (instead of ordered in some other way) which precludes certain ordering structures.[97] As many of these blockchain

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[92] *Compare* § 44-7061(E)(1) (specific blockchain definition), *with* S.B. 398 § 1 (general blockchain definition), *with* tit. 12, § 1913(a) (general blockchain definition).

[93] S.B. 398 § 1(1); VT. STAT. ANN tit. 12, § 1913(a).

[94] *See* MOUGAYAR, *supra* note 25, at 24 (explaining that the blockchain is a state machine, meaning that it "remembers the status of something at a given instant in time"). *See generally Sawtooth: Architecture: Global State & Radix Merkle Tree Overview*, INTEL CORP. (last visited Jan. 10, 2019) https://sawtooth.hyperledger.org/docs/core/releases/latest/architecture/global_state.html [hereinafter Merkle Tree] (describing Hyperledger Sawtooth's state architecture).

[95] S.B. 398 § 1(1).

[96] tit. 12, § 1913(a).

[97] *See generally Sawtooth: Architecture: Serialization Concerns*, INTEL CORP., https://sawtooth.hyperledger.org/docs/core/releases/latest/architecture/global_state.html#serialization-concerns (last visited Feb. 14, 2019) [hereinafter Serialization Concerns] (discussing different preferable data

architectures are in their infant stages and are hotly debated, it is imprudent to define blockchain with one of the solutions to the conceptual silo, rather than simply the concept itself.[98]

The blockchain statutes in Nevada and Arizona both miss the mark in defining a vital aspect of the technology: consensus.[99] The Nevada statute states that blockchain is "redundantly maintained," meaning the data stored on a blockchain is copied and hosted on multiple nodes, simultaneously.[100] Unlike the Nevada statute,[101] Vermont's statute specifically includes the concept of decentralized consensus,[102] meaning that each additional transaction stored on a blockchain is added only after it is validated by a consensus algorithm.[103] The Nevada statute attempts to cover this concept by adding that blockchain is "redundantly maintained," but the statute places validation on cryptography, rather than consensus.[104] The Nevada statute's short definition instead focuses on the *outcome* of

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ordering structures, suggesting that there is not one preferred industry approach).

[98] *See id*. *See also* discussion *supra* p. 7 for an explanation of blockchain conceptual silos.

[99] *See* Baliga*, supra* note 18; Lamport, et al., *supra* note 18 and accompanying text.

[100] S.B. 398 § 1 ("redundantly maintained or processed by one or more computers or machines"); *see also* Merkle Tree, *supra* note 94 ("[t]he ability to ensure a consistent copy of data amongst nodes in Byzantine consensus is one of the core strengths of blockchain technology.").

[101] S.B. 398 § 1.

[102] VT. STAT. ANN. § 1913(a) ("decentralized consensus ledger or database").

[103] *See* Baliga, *supra* note 18, at 5–6 (explaining consensus algorithms); MOUGAYAR, *supra* note 19, at 24–25.

[104] S.B. 398 § 1.

the "redundantly maintained" system: that the system "guarantee[s] the [authenticity] . . . of the recorded transactions or other data."[105]

In defining blockchain with the "guarantee[d]" authenticity of the transactions or records, the Nevada statute defines the technology by its desired outcome, which is problematic because, if, for example, there is a bug in the code, it is unclear whether the contracts in the system would instantly lose enforceability.[106] Similarly, albeit more explicitly, the Arizona statute defines a blockchain's data as "immutable and auditable . . . *provid[ing] an uncensored truth*."[107] These definitions are both problematic because while current blockchains are by definition much more secure than any other database structure, no technology can ever guarantee true authenticity of data.[108]

In contrast to the Nevada and Vermont statutes, Arizona's statute defines blockchain with striking specificity, covering all of the technical buzz words required to sufficiently express some of the major qualities of the implementations of blockchain.[109] The most problematic feature of the Arizona statute, as described above, is its use of the outcome of the data's authenticity as definition.[110] The problematic features are, however, enough to make the Arizona statute's definition, overall, ineffective for promoting the use of smart contracts because the definition itself precludes some

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[105] *Id.*

[106] *Id.*

[107] ARIZ. REV. STAT. ANN. § 44-7061(E)(1) (2017) (emphasis added).

[108] *See* Walch, *supra* note 87 at 44 ("[S]tating that the 'data on the ledger is . . . immutable' does not [*actually*] mean that the data is immutable. . . .").

[109] § 44-7061(E)(1).

[110] *See* Walch, *supra* notes 87, 108 and accompanying text.

blockchain protocols and is an example of how too much specificity can be ineffective when legislating for new technologies.[111]

Unlike lawmakers in Nevada and Arizona, Vermont's legislature carefully crafted the following presumption: "[a] fact or record verified through a valid application of blockchain technology is authentic."[112] At first, the phrase sounds like the "guarantee" language in Nevada and Arizona's statutory blockchain definitions, however, the language in Vermont's statute does not guarantee authenticity of data.[113] In actuality, the Vermont statute's presumptions simply provide the court with guidance on how to view data that is maintained by the blockchain.[114]

Vermont's statutory definition is less limiting than Nevada's in that the Vermont statute does not discuss the guaranteed authenticity of the data stored in a blockchain.[115] Vermont's statutory definition is more effective than Arizona's for the same reason.[116]

None of the statutory blockchain definitions are entirely effective as each contains incorrect phrasing or terminology, or

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[111] *See* § 44-7061(E)(1); *See also id.*

[112] VT. STAT. ANN. tit. 12, § 1913(b)(3)(A) (2016).

[113] *Compare* § 44-7061(E)(1) ("provides an uncensored truth"), *and* S.B. 398 §1(2) ("to guarantee the consistency or nonrepudiation"), *with* tit. 12, § 1913(b)(3)(A) ("A fact or record *verified* through a valid application of blockchain technology is authentic." (emphasis added)).

[114] tit. 12, §§ 1913(b)–(c).

[115] *Compare* S.B. 398 §1(2) (defined, in part, by the "guaranteed authenticity"), *with* tit. 12, § 1913(a) (excluding a conclusory definition about the authenticity of the data; more broadly stating "consensus").

[116] *See supra* note 114–17 and accompanying text. *See* § 44-7061(E)(1) ("provides an uncensored truth").

leaves out a possible implementation's characteristics.[117] None of the state laws effectively combine all three conceptual silos with technical words describing different ways of creating blockchains, without *requiring* "immutabl[ility]"[118] or "guarantee[d]"[119] authenticity of the data.[120] Defining blockchain is incredibly challenging because of the wide-range of descriptors and solutions for its central tenets, but ineffective statutory language hinders the technology from progressing by precluding certain innovative protocols.[121]

B. Smart Contracts in State Legislation

While blockchain statutes in Nevada, Arizona, and Vermont aim to enable the use of blockchain-driven smart contracts in commerce, only Arizona lawmakers made the choice to include a specific smart contract definition in their legislation.[122] The Arizona law effectively defines a smart contract by describing it as a

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[117] *See supra* notes 93–116 and accompanying text. *See* NEV. REV. STAT. § 719.090; Ariz. H.B. 2417 at § 44-7061(E)(1); VT. STAT. ANN. § 1913(a).

[118] § 44-7061(E)(1).

[119] S.B. 398 §1(2).

[120] *Compare* § 44-7061(E)(1) ("The data on the ledger is protected with cryptography, is immutable and auditable and provides an uncensored truth."), *and* S.B. 398 §1(2) ("Redundantly maintained or processed by one or more computers or machines to guarantee the consistency or nonrepudiation of the recorded transactions or other data . . . ."), *with* tit. 12, § 1913(a) ("'blockchain technology' means a mathematically secured, chronological, and decentralized consensus ledger or database, whether maintained via Internet interaction, peer-to-peer network, or otherwise.").

[121] *See* Walch, *supra* note 87, at 43–45 (arguing that Arizona's definition reflects a misunderstanding of the technology itself and a misunderstanding of the terms used to describe it).

[122] § 44-7061(E)(2).

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dynamic, blockchain-based, "event-driven program" that "can take custody over and instruct transfer of assets on that ledger" (together, the equivalent of what has previously been described in this paper as "self-executing").[123] This definition is vital to any legislation that seeks to support blockchain-based applications which have contract functionalities built into their systems.[124] The Arizona bill also expressly allowed the use of smart contracts to facilitate transactions that transfer "rights of ownership or use," so long as the transfer of "ownership or use" are express terms of a contract.[125]

In contrast, the statutes in Nevada[126] and Vermont[127] do not include definitions of smart contracts. The legislature in Nevada, like lawmakers in Arizona, passed blockchain legislation as an amendment to its UETA.[128] However, unlike the Arizona statute, which inserted "blockchain technology" as a method of securing "an electronic signature"[129] or "an electronic record,"[130] Nevada simply

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[123] *See* Iansiti & Lakhani, *supra* note 28 and accompanying text.

[124] *See* Max Raskin, *The Law and Legality of Smart Contracts*, 1 GEO. L. TECH. REV. 305304, 311 (2017).

[125] § 44-7061(E)(2).

[126] S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at NEV. REV. STAT. § 719).

[127] VT. STAT. ANN. tit. 12, § 1913 (2016).

[128] S.B. 398.

[129] § 44-7061(A) ("A signature that is secured through blockchain technology is considered to be in an electronic form and *to be an electronic record.*").

[130] § 44-7061(B) ("A record or contract that is secured through blockchain technology is considered to be in an electronic form and *to be an electronic record.*").

inserted "a blockchain" as an "electronic record."[131] If "a blockchain" is "a record [that can be] created . . . by electronic means", the definition alone potentially precludes a legal agreement being facilitated by a blockchain, because a contract facilitated by a blockchain is not simply a record.[132] Nevada's law contains a fundamental misunderstanding of what blockchain is.[133] Equating blockchain to an "electronic record" undermines the utility of blockchain and treats it as though it passively stores information, rather than interacting with smart contracts by facilitating transactions.[134]

In amending the UETA this way, Nevada lawmakers either overlooked, or mistakenly precluded, the more dynamic and innovative use of blockchain as a mechanism through which contracts can be formed and executed by transacting entirely within the blockchain ecosystem.[135] Many blockchain-based technologies interact with the underlying blockchain.[136] For example, the Ethereum protocol is able to facilitate transactions that occur on the application layer (sitting on the blockchain) in such a way that by definition, the blockchain is not *just* an electronic "record of transactions" but it also participates in the transaction.[137] By not

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[131] S.B. 398 § 3.

[132] *See Id.*; TAPSCOTT & TAPSCOTT, *supra* note 8 at 7 ("[s]o the blockchain is a distributed ledger representing a network consensus of every transaction that has. . . occurred.").

[133] *See supra* text accompanying note 25.

[134] *See supra* text accompanying note 16.

[135] *See* S.B. 398 §3 (amending an "electronic record" to include the blockchain).

[136] Buterin, *supra* note 40 and accompanying text.

[137] Silverberg et al., *supra* note 40 ("Ethereum . . . provides a decentralized platform for developers and entrepreneurs to create and publish next-

addressing this innovative use of blockchain, Nevada's law is problematic because it could become obsolete very quickly. On the other hand, if it is interpreted narrowly, the statute will chill innovation in the blockchain space in Nevada.

The legislative history of Nevada's bill indicates that earlier versions of the text included provisions specifically recognizing "smart contracts" that were not adopted in the final bill.[138] Among the multiple provisions specifically focused on smart contracts, was a definition for "smart contract" meaning "a contract stored as an electronic record[139] . . . which is verified by the use of a blockchain."[140] While the language still contains some conflicting provisions, legislative intent to include smart contracts, and the attempt to articulate the ability of smart contracts to self-execute would aid blockchain-based startups (dealing with smart contracts) in being within the scope of the law.[141] Eliminating smart contract provisions from the final iteration of the blockchain bill cuts against the validity and enforceability of any contract created within a blockchain ecosystem because the law defines a blockchain simply

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generation *distributed applications* [which use] blockchain technology to *facilitate* smart contracts . . . ." (emphasis added)).

[138] S.B. 398 §9, 79th Leg. Reg. Sess. (Nev. 2017) (as introduced on Mar. 20, 2017) (defining blockchain smart contracts as electronic records, and ensuring legal validity and enforceability of smart contracts in commerce and in evidence).

[139] Uniform Electronic Transactions Act (UETA), NEV. REV. STAT. § 719.090 (2001) ("'Electronic record' means a record created, generated, sent, communicated, received or stored by electronic means.").

[140] S.B. 398 § 9.

[141] *See* S.B. 398 § 9 (comparing the definition of a smart contract as, "a contract *stored as an electronic record*" (emphasis added)), *with* S.B. 398 § 11, in which the *blockchain* is able to "*create*, store or verify the smart contract" (emphasis added)).

as a "record."[142] Therefore, if a party now attempts to convince a court to construe the current legislation in favor of the validity and enforceability of a contract created entirely within the blockchain ecosystem, a court would likely decline to construe it broadly, due to the decision to take out the smart contract provision. This would relegate the impact of the law to only protect contracts which were created outside the blockchain ecosystem and then recorded on the blockchain.[143]

In comparison to Nevada's legislation, Arizona's statutory language is much more aligned with the way blockchain-based smart contracts work, indicating that smart contracts can facilitate transactions within the blockchain ecosystem, rather than simply recording outside transactions.[144] However, Arizona's statute does not expressly state that the contract terms may be created entirely within the blockchain ecosystem.[145] All of the terms are "smart contract term[s]."[146] A slight conflict in the definition of smart contract and a clause in a subsequent subsection in Arizona's statute is likely to cause confusion for a court when deciding the validity of a smart contract that was created and executed entirely within the blockchain ecosystem. Subsection B (including the definition of an "electronic record"), reads: "a . . . contract that is secured through blockchain technology is considered to be in an electronic form and to be a[147] [record that is created, generated,

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[142] *Id.*

[143] *Compare* S.B. 398 § 9 *with* TAPSCOTT & TAPSCOTT, *supra* note 8, at 102–103.

[144] ARIZ. REV. STAT. ANN. § 44-7061(E)(2) (2017).

[145] *Id.*

[146] *Id.* § 44-7061(C) ("A contract *relating to a transaction* may not be denied legal effect . . . solely because that contract *contains a smart contract term.*" (emphasis added)).

[147] § 44-7061(B).

sent, communicated, received or stored by electronic means][148]." Because the legislature defines a contract as a "record"[149] instead of as a "contract,"[150] it is unclear whether the legal obligations attach to the smart contract as a *contract*.

As it is written, Subsection D is equally as unclear and problematic. By using the "terms of the transaction," it is unclear whether the legislation is referring to those of the "smart contract" and are thus part of the information to be "secure[d]" on the blockchain.[151] Further, it is also unclear whether they "take custody over and instruct transfer of assets"[152] or if the "information [that is] secure[d]" [153] must be digital *records* of transactions that occur outside of the blockchain ecosystem prior to being stored and secured on the blockchain.[154] This ambiguity is problematic due to the fine differences between defining and using blockchain as a secured ledger system and using blockchain-based technologies as ecosystems, which enable secured, efficient, and self-executing contracts in commerce.[155]

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[148] § 44-7002(7).

[149] *Id.*

[150] § 44-7002(4).

[151] § 44-7061(D).

[152] § 44-7061(E)(2).

[153] § 44-7061(D).

[154] *Compare* § 44-7061(D) *with* § 44-7061(E)(2).

[155] § 44-7003(C) ("Article 5 [Blockchain Technology] of this chapter applies only to transactions governed by Title 47 [UCC], Chapters 2 [Sales], 2A [Leases] and 7 [Documents of Title]"); *see supra* notes 36–50 and accompanying text.

In contrast to Arizona's statute, Vermont's legislation does not specifically mention smart contracts.[156] Despite Vermont's legislation's focus on enabling blockchain-authenticated documents, the text does not explicitly allow transactions that occur within a blockchain ecosystem.[157] However, Subsection C could be construed as allowing digital documents which both originate and execute within the blockchain ecosystem.[158] For example, the law states that the "fact or record maintained by blockchain technology [can] determine . . . contractual parties, provisions, [and] execution."[159] Even the word, "maintain" is more dynamic than the other obvious word choice here, "store." While "store" is passive, "maintain" indicates something more than a record.[160]

Additionally, Vermont's law lists "ownership, assignment, negotiation, and transfer of money, property, contracts, instruments, and other legal rights and duties," as types of relationships that can be determined by the facts or records maintained by the blockchain.[161] By subtly allowing the "execution" of a contract to be determinable by "fact[s] or record[s] maintained by blockchain technology," the Vermont statute allows for

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[156] VT. STAT. ANN. tit. 12, § 1913 (2016).

[157] *Id.*

[158] § 1913(c) ("Without limitation, the presumption established in this section shall apply to a fact or record maintained by blockchain technology to determine: . . . [a list of the types of relationships that are determinable.]").

[159] § 1913(c)–(c)(1).

[160] *Id.*

[161] § 1913(c)(2).

Ethereum-type blockchain ecosystems and the smart contracts that are created and executed within such ecosystems.[162]

While Arizona's statute is incredibly specific in its use of technical language, the Vermont statute's language is more effective as it is more active and all-encompassing.[163] If and when blockchain technology evolves and the terminology changes or is specified, Arizona's law will likely become obsolete, while the Vermont statute will likely be able to retain its same language.[164] Unfortunately, because Nevada's legislative history cuts against self-executing smart contracts, Nevada lawmakers will likely need to write new legislation specifically allowing blockchain-driven smart contracts.[165] While all three laws have varyingly-problematic definitions, the Vermont statute is much more successful than the statutes in Arizona and Nevada in allowing for self-executing smart contracts, specifically due to the dynamic language used to describe records stored and "maintained" by the blockchain, and because of the list of dynamic uses to which the blockchain applies.[166]

C. Hyperledger Sawtooth: A Supply Chain Use Case

Supply chain management is one of the most complex and outdated systems in which contracts function.[167] Arizona and

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[162] *Id. See* Iansiti & Lakhani, *supra* note 28 and accompanying text.

[163] *Compare* ARIZ. REV. STAT. ANN. § 44-7061 (2017), *with* VT. STAT. ANN. tit. 12, § 1913 (comparing Arizona's specific language that often uses solutions, instead of concepts, as definitions, with Vermont's conceptual language).

[164] *See* ARIZ. REV. STAT. ANN § 44-7071 (2017); VT. STAT. ANN. tit. 12, § 1913 (2016).

[165] S.B. 398, 79th Reg. Sess. (Nev. 2017) (as introduced on Mar. 20, 2017) (unenacted). *See supra* notes 138–140 and accompanying text.

[166] VT. STAT. ANN. tit. 12, § 1913(c).

[167] *See generally* Joe McKendrick*, Why Blockchain May Be Your Next Supply Chain*, FORBES (Apr. 21, 2017, 1:07 PM),

Nevada[168] specifically applied their blockchain laws to UCC transactions because, at the very least, Arizona lawmakers had the foresight to understand how transformational smart contracts will be in the commercial space.[169] The following section will apply some of the best parts of the foregoing blockchain legislation to a current smart contract for supply chain use case. This type of smart contract was chosen because there are already a number of supply chain blockchain applications.[170]

Not only does Hyperledger Sawtooth envision and enable transfers of ownership, it does the same for government licenses, border control, and statements of product authenticity.[171] Yet, for this system to function, the transfers of ownership and other documentation throughout the supply chain must be legally binding.[172] Whether the contract would be legally enforceable in

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https://www.forbes.com/sites/joemckendrick/2017/04/21/why-blockchain-may-be-your-next-supply-chain/#3d0dcc9113cf ("Blockchain . . . can only help speed up supply chains . . . [and can] be especially powerful when combined with smart contracts, in which contractual rights and obligations, [like] terms for . . . delivery of goods and services, can be automatically executed.").

[168] Established smart contract are likely not protected as valid and enforceable in Nevada.

[169] *See* Deloitte, *supra* note 36 and accompanying text.

[170] *See generally* Lester Colman, *Ethereum-Based Swiss Blockchain Startup Readies Tech for the Food Supply Chain*, CRYPTO-COINS NEWS (Apr. 26, 2017), https://www.cryptocoinsnews.com/ethereum-foodblockchainxyz-supply-chain/ ("With Ethereum blockchain allowing a Turing-complete language, [the Switzerland-based startup, Food Blockchain XYZ, has] fully unlocked the . . . ability . . . to create dedicated smart contracts, protocol and decentralized software to . . . make food supply chains more effective, efficient and equitable.").

[171] *See id.*

[172] Restatement (Second) of Contracts § 25 (Am. Law Inst. 1981).

Arizona, Vermont, or Nevada turns on whether the smart contract is a valid, enforceable contract within the bounds of the UCC and state jurisprudence, and whether the existing blockchain-focused legislation effectively enables said contracts.

Under a combination of an Arizona-Nevada-Vermont blockchain-based smart contract-enabling regime, Hyperledger Sawtooth supply chain contracts are valid and enforceable.[173] If the definitions follow conceptual, macro-principles of the blockchain as a technology (for example, phrasing more akin to "uniformly ordered"),[174] rather than the specific solutions ("chronological"),[175] and the language used to describe transactions are not passive, vault-like word choices ("record . . . stored by electronic means"),[176] but are instead, dynamic and facilitative ("facilitate"),[177] the smart contract used to transfer ownership throughout the supply chain would be enforceable. Likewise, legislation that defines the blockchain through "guarantee[es]" of data authenticity[178] or legislation with outcome-driven language, such as "provides an uncensored truth,"[179] are wholly ineffective because either could be read to invalidate an enforceable contract, simply because of a system glitch.

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[173] *Compare* ARIZ. REV. STAT. ANN. § 44-7061 (2017), *and* S.B. 398, 79th Reg. Sess. (Nev. 2017) (enacted) (to be codified at NEV. REV. STAT. § 719), *with* VT. STAT. ANN. tit. 12, § 1913 (2015).

[174] S.B. 398 § 3(1).

[175] tit. 12, § 1913(a).

[176] S.B. 398 § 3.

[177] tit. 12, § 1913(c) ("maintained" is, as previously stated, somewhat dynamic, although using the word "facilitate" is more effective).

[178] S.B. 398 § 1(2).

[179] § 44-7061(E)(1).

Currently, Arizona's smart contract statutory definition is the most effective language to give legal significance to the supply chain smart contract. [180] However, Arizona's definition must be combined with more facilitative, active language surrounding the definition itself because, as it stands, Arizona's construction falls short.[181]

IV.   Leadership: How Legislatures Can Work Together to Bolster Smart and Safe Innovation in Uncharted Territory

Many blockchain-enthusiasts liken the bourgeoning blockchain industry to the early days of the Internet.[182] David Ticoll, a technology theorist, says "[i]f the blockchain is as big and universal as the [Internet], we are likely to do a comparably bad job of predicting both its upsides and downsides."[183] However, because of society's experience with some major let-downs of the Internet, it may be *too* risk adverse with respect to blockchain. The United States, therefore, risks losing an opportunity to reinvent efficiencies in everything from commercial contracts to mineral tracking.[184] Therefore, it is imperative that regulators and lawmakers in the

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[180] § 44-7061(E)(2) ("'Smart Contract' means an event-driven program, with state . . . that can *take custody over and instruct transfer of assets on that ledger*." (emphasis added)).

[181] *See id.*

[182] *See* TAPSCOTT & TAPSCOTT, *supra* note 8 at 299 ("Whereas the Internet democratized information, the blockchain democratizes value and cuts to the core of traditional industries[,] . . . [and] our research suggests that the Internet governance model is a good template.").

[183] *Id.* at 25.

[184] *See* Darren Campbell, *Startup Uses Blockchain To Ensure Minerals Come From Ethical Sources*, THE GLOBE AND MAIL (May 18, 2017), https://www.theglobeandmail.com/report-on-business/small-business/startups/startup-uses-blockchain-to-ensure-minerals-come-from-ethical-sources/article35022916/ (describing how blockchains are being used to facilitate ethical minerals sourcing and supply chains).

United States understand blockchain functionality. Poorly-written regulation and ill-informed legislatures can easily ruin the chance for blockchain technology to flourish into a well-oiled machine.[185] With such important technology, it is critical that lawmakers in the United States not interfere with the evolution of blockchain too early because it will preclude the innovation from building its best implementation. The statutes in Arizona and Nevada, more so than in Vermont, are examples of legislation written with an inadequate conceptual understanding of blockchain technology's full landscape, and a focus on specific solutions, rather than the broader concepts.[186] As even the technology sector cannot reach an agreement on the appropriate terminology, legislatures should not attempt to define such technology themselves.[187] By using conceptual silos and foregoing specificity, legislatures will write much more effective laws for promoting new technologies. Likewise, by focusing on the use of the technology, rather than how the technology is built, regulators can allow for innovation, while controlling activities which they deem harmful.

Additionally, lawmakers in Nevada and Arizona failed to carefully and surgically legislate in an effective space — Vermont's use of existing rules of evidence is a unique and much more thoughtful approach to protecting the use of smart contracts in commerce. Others have argued that various state and federal laws already protect the use of smart contracts, so while this particular line of argument is outside the scope of this article, it is worth noting that Arizona and Nevada likely did not even need to enact smart contract or blockchain-specific laws.[188] In doing so, it might

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[185] *See* TAPSCOTT & TAPSCOTT, *supra* note 8, at 297 (" . . . [t]he United States . . . welcomes innovations that push the boundaries . . . [but] [t]he risks of regulating prematurely—before firmly grasping the implications—can have profound consequences.").

[186] *Supra* notes 94–102 and accompanying text.

[187] *See supra* note 87 and accompanying text.

[188] *See* Alan Cohn, Travis West, & Chelsea Parker*, Smart After All: Blockchain, Smart Contracts, Parametric Insurance, And Smart Energy*

not only chill innovation (as discussed above)[189] but may also be federally preempted or create years of chaotic ligation.[190]

Finally, education is essential in this space. Blockchain is much more than a secured Excel-like ledger.[191] It is vital that legislators, policymakers, and possible stakeholders (in addition to the public), are educated on the many dynamic ways that blockchain can be implemented.[192] To focus solely on the FinTech sector is to ignore ninety-percent (if not more) of the industries that blockchain-based technologies will revolutionize and make more efficient.[193] Moving away from discussing blockchain with respect

Grids, 1 GEO. L. TECH. REV. 273, 284–88, https://perma.cc/TY7W-Q8CX (uploaded Apr. 25, 2017) (arguing that blockchain-based smart contracts are already valid and enforceable under state laws modeled after the UETA and, federally, under the Electronic Signatures in Global and National Commerce Act ("ESIGN")).

[189] *See supra* notes 184–89 and accompanying text.

[190] *See* Uniform Law Commission Executive Committee, *Guidance Note Regarding The Relation Between The Uniform Electronic Transactions Act And Federal Esign Act, Blockchain Technology And "Smart Contracts,"* UNIFORM L. COMM'N., 6–7, https://www.uniformlaws.org/HigherLogic/System/DownloadDocument File.ashx?DocumentFileKey=059d500a-3aed-3cb1-080e-755142971236&forceDialog=0 (uploaded Feb. 11, 2019) (strongly opposing amendments to states' Uniform Electronic Transactions Act, citing "unnecessary and redundant legislation," "inconsistent definitions," and "threat of federal preemption").

[191] *See* MOUGAYAR, *supra* note 25, at 20–21 (explaining that the blockchain's functionality is not to replace large databases).

[192] *See* Orcutt, *supra* note 55 ("Digital currencies. . . make some policymakers and government officials wary. But focusing on currency keeps people from seeing the potential the blockchain has to reinvent how we control and manage valuable information.").

[193] *Banking Is Only the Start, supra* note 11.

to FinTech is also important because of the bad name that digital currencies such as Bitcoin, and even Ethereum's currency, Ether,[194] have given to blockchain technologies. Furthermore, the technical structure of blockchain is complicated and, like the early stages of the Internet, there is a fine line between those who understand and those who do not. Until consumer-friendly blockchain applications reach the market in which the technical side of blockchain functionalities are hidden from user's view, education is necessary to move people from skeptical to trusting.

Legislators will hopefully find value in this work as they attempt to enact their own blockchain legislation. It is vital to understand how other states approach legislation that has the ability to either chill or encourage innovation, while protecting parties from being exploited. As other countries create regulatory sandboxes within which blockchain-focused startups can thrive, the U.S. falls behind in its ability to promote and support blockchain solutions.[195] Quickly enacting legislation without understanding its implications is not the way to catch up.

V.   Conclusion

William Mougayar wrote, "[i]f you do not understand smart contracts, then you do not understand the power of blockchains[;]. . . smart contracts promise to program our world on the head of

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[194] *See generally* Nathaniel Popper, *Move Over, Bitcoin. Ether Is the Digital Currency of the Moment*, N.Y. TIMES (June 19, 2017), https://www.nytimes.com/2017/06/19/business/dealbook/ethereum-bitcoin-digital-currency.html?mcubz=0.

[195] *See* Dan Cummings, *Regulatory Sandboxes: A Practice For Innovation That Is Trending Worldwide*, ETHNEWS (Feb. 28, 2017), https://www.ethnews.com/regulatory-sandboxes-a-practice-for-innovation-that-is-trending-worldwide ("Regulatory sandbox[es] usually implement a set of rules that allow trailblazers to test their products and business models in a live environment with minimal legal requirements.").

blockchains."[196] Each of the approaches taken by lawmakers in Nevada, Vermont, and Arizona have lost sight of blockchain's full capabilities and, to varying degrees, have focused on the technical solution to a given conceptual silo, instead of defining blockchain by its macro concepts. The states' governments have attempted to simplify legislation about a complex technological innovation that is at its infant stages. In doing so, each has made mistakes that could preclude future radical innovation if not corrected.

Many people believe it is too early to regulate blockchain.[197] Nevertheless, if lawmakers in other states choose to adopt legislation similar to Nevada, Vermont, and Arizona, they should ensure that they regulate at the conceptual level, staying away from defining blockchain or smart contracts with inaccurate or incomplete terminology. To do so could preclude future innovation, or favor certain existing protocols, and chill competition.

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[196] MOUGAYAR, *supra* note 19, at 41.

[197] *The Trust Machine*, *supra* note 9 ("[Until the] full potential [of blockchain protocols become] clear . . . regulators should stay their hands, or find ways to accommodate new approaches within existing frameworks, rather than risk stifling a fast-evolving idea with overly prescriptive rules.").

THE FIRST AND SECOND AMENDMENTS ARE NOT MUTUALLY EXCLUSIVE: A LOOK AT THE FIRST AND SECOND AMENDMENTS AFTER THE "UNITE-THE-RIGHT" RALLY IN CHARLOTTESVILLE, VIRGINIA

Colin Klika

James Madison defined factions as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community."[1] Madison noted the dangers of factions, describing them as "the mortal diseases under which popular governments have everywhere perished."[2] In his mind, there were two methods of "curing the mischiefs of faction[s]:" either remove the causes or control its effects.[3] Madison wrote Federalist No. 10 to argue in favor of a representative form of government as opposed to a direct democracy; specifically citing the dangers of factions as one of the compelling reasons in favor of the former. [4] Although Madison's vision of a young and new United States of America has blossomed into something well beyond his imagination, his warnings of factions have stayed relevant throughout the nation's history.

In August 2017, the American Civil Liberties Union (ACLU) helped defend the rights of white nationalists to hold a rally at Emancipation Park in Charlottesville, Virginia.[5] The event, originally billed as an ideological and constitutional battle to protect the civil liberties and rights of those with, at best, unpopular opinions, is now remembered as a day of violence. In addition to the scuffles that broke out between opposing groups of protesters, a

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[1] THE FEDERALIST NO. 10 (James Madison).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles With Its Role*, NEW YORK TIMES, Aug. 17, 2017, https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html?mcubz=0, (last visited Oct. 2, 2017).

thirty-two-year-old woman was killed, and 19 others were injured after a rallygoer drove his car into a group of pedestrians.[6] The ACLU's defense of white supremacist groups is not a new occurrence. Nearly forty years ago, in *Nationalist Socialist Party of America v. Village of Skokie*, the ACLU won what many viewed as one of its seminal cases, in which a small group of Neo-Nazis were permitted to hold a rally in the small town of Skokie, Illinois.[7] It has always been the ACLU's policy to consider the potential for violence in defending free speech cases in public gatherings. After Charlottesville, that factor will likely take on more weight the next time the organization determines whether to litigate on behalf of white nationalists.[8]

The cancelation of "alt-right" or "right-wing" speakers and protests has become more commonplace.[9] With silence from the ACLU on several of these controversies, there is a growing sentiment that hate speech should no longer be considered protected speech under the First Amendment.[10] A survey of college campuses, published by the Brookings Institution, shows that 4 in 10 survey takers believed, regardless of their political affiliation,

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[6] Joe Heim, *Recounting a day of rage, hate, violence and death: How a rally of white nationalists and supremacists at the University of Virginia turned into a "tragic, tragic weekend"* WASHINGTON POST, Aug. 14, 2017, https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?noredirect=on&utm_term=.d20416b6e658 (last visited on Jan. 21, 2019).

[7] Goldstein, *supra* note 5.

[8] *Id.*

[9] *Id.* (As the article mentions, there have been several "right-wing" speakers canceled at UC Berkeley and Texas A&M).

[10] *Id.*

that hate speech is not protected under the First Amendment.[11] It is unclear whether those who were surveyed believed that hate speech *should not* be protected as opposed to believing hate speech is *currently not* protected. In fact, two months after the violent events in Charlottesville, Florida Governor Rick Scott declared a state of emergency in Alachua County in anticipation of demonstrations at the University of Florida protesting an event where a known white nationalist was scheduled to speak.[12] However, for the purposes of this comment, one should read with the assumption that hate speech is in fact protected speech as held and reaffirmed by the United States Supreme Court in several cases.[13]

In the court proceedings leading up to Charlottesville, the ACLU brought suit on behalf of a man from Charlottesville, who was organizing a rally to protest the removal of a statue of Confederate general Robert E. Lee. The statue was located in Emancipation Park, which had been renamed from Lee Park in June of 2017.[14] The city initially granted the permit for the protest at Emancipation Park but then attempted to relocate the

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[11] Catherine Rampell, *A chilling study shows how hostile college students are toward free speech*, opinion piece, WASHINGTON POST, Sept. 18, 2017, https://www.washingtonpost.com/opinions/a-chilling-study-shows-how-hostile-college-students-are-toward-free-speech/2017/09/18/cbb1a234-9ca8-11e7-9083-fbfddf6804c2_story.html?utm_term=.a923068bd63d (last visited on Oct. 2, 2017).

[12] Eric Levenson, *State of emergency declared ahead of white supremacist speech in Florid*, CNN, Oct. 17, 2017, https://www.cnn.com/2017/10/17/us/university-florida-richard-spencer-speech/index.html (last visited April 17, 2019).

[13] *See* Matal v. Tam, 137 S. Ct. 1744, 1750 (2017); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995); Nat'l Socialist Party v. Skokie, 432 U.S. 43, 44, 97 (1977).

[14] Goldstein, *supra* note 5.

demonstration to a larger park, citing safety concerns. The larger park was in a less accessible location, about a mile away from Emancipation Park.[15] The ACLU argued the symbolism associated with holding the protest in Emancipation Park, where the statue was going to be removed, was significant and the District Court agreed.[16] Due to the outcome of the case, some have placed a degree of responsibility on the ACLU for the violence that happened in Charlottesville, and others have expressed fear that other municipalities will now be more hesitant to let groups with extreme views hold rallies.[17]

The escalation of polarizing viewpoints, facially, appears to simply be an issue of the First Amendment and its protections afforded to free speech. However, words alone are not the sole cause of the violence that occurred in Charlottesville and are not the only determining factor in court-sanctioned and city-approved protests. This article highlights the difficulties that lawyers, judges, politicians, and Americans as a whole face in reconciling our notions of individual liberty with the safety and equality of all people. Part I of this article analyzes the relevant jurisprudence of First and Second Amendment law. Part II discusses the facts and circumstances surrounding the events in Charlottesville using the legal frame work provided in Part I, and briefly applies that legal analysis to the events. Part III postulates any possible solutions, problems, and difficulties, in reconciling the First and Second Amendments' protections in the country's highly polarized political climate. The unique Federalism issue, of the right to bear arms as enumerated in Virginia's state constitution will also be discussed.

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[15] *Id.*

[16] *Id.*

[17] *Id.*

I.   Analyzing the First and Second Amendments

A. First Amendment

It is common knowledge that the First Amendment of the United States Constitution guarantees the right of all individuals to freely and openly express themselves. For the purposes of this discussion, it is important to understand the notion that the First Amendment prohibits the Government from viewpoint discrimination.[18]   The Supreme Court has held that viewpoint discrimination is an "egregious form of content discrimination" and the Government must not regulate speech if the rationale for restriction lies in ideology or speaker opinion.[19]

The First Amendment is not a blanket protection to say and do whatever one chooses at any given time. In the context of public protests, there are restrictions called "time, place, and manner" regulations.[20] In *Cox v. New Hampshire*, these restrictions were recognized by the Supreme Court due to the traditional authority given to municipalities to control and regulate public streets.[21] *Cox*

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[18] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828-29 (1995); *see also* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641-643 (1994) (stating discrimination against speech because of its message is presumed to be unconstitutional); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (stating "any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open").

[19] Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45-46 (1983) (also stating that any such regulations must be neutral as to both viewpoint and subject matter).

[20] *Mosley*, 408 U.S. at 98-99 (stating that in certain circumstances states may have a legitimate interest in prohibiting some picketing to protect public order but these circumstances must be carefully scrutinized).

[21] Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941); see also Cox v. Louisiana, 379 U.S. 559, 574 (1965) (reaffirming several decisions that

validated a licensing scheme for public gatherings and the right of a municipality to charge for said licenses if the funds are used for a limited purpose, such as policing or controlling the gathering.[22]

In the infamous flag burning case of *Texas v. Johnson*, the Supreme Court definitively reinforced the right of self-expression contained within the First Amendment.[23] The test for determining whether expressive conduct falls within the First Amendment is whether the particular conduct contains sufficient "communicative elements" and whether there was an intent to covey a particular message.[24] In *Johnson*, the Court recognized that speech and non-speech were identical; stating that in order to justify the suppression of expression, it must be determined that the suppression and governmental interest is unrelated to such expression.[25] A year after the *Johnson* decision, a federal flag protection statute was challenged before the Supreme Court. The Flag Protection Act sought to criminalize any compromise to a flag's physical integrity.[26] The Government sought to categorize such conduct within the categories of obscenity or "fighting words" which do not receive protection under the First Amendment.[27]

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there is no place for violence under the right to protest and that there is a proper time and place for such protests).

[22] *Cox*, 312 U.S. at 576-77.

[23] Texas v. Johnson, 491 U.S. 397, 404 (1989); see also, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969) (upholding the rights of students to use their expressive nature and that they have a right to wear black armbands to protest American military action in Vietnam).

[24] *Johnson*, 491 U.S. at 404.

[25] *Id*. at 407.

[26] United States v. Eichman, 496 U.S. 310, 315 (1990).

[27] *Id*.

Nonetheless, the Supreme Court chose not to reconsider *Johnson* and reaffirmed its decision in *Johnson*, while also reaffirming the broad protections guaranteed under the First Amendment.[28]

B. Second Amendment

District of Columbia v. Heller and *McDonald v. City of Chicago* make up the modern foundations of our understanding of Second Amendment law.[29]   Despite the language of the Second Amendment, an individual's right to bear arms for the purposes of self-defense in a home, was not recognized until *Heller* in 2008.[30] *McDonald* extended this right to the states through the use of the Fourteenth Amendment.[31] *Heller* and *McDonald* have left the issue unclear as to the right to bear arms outside of one's home, thus leaving state governments to enact vastly different gun laws and regulations. For example, the Constitution of the Commonwealth of Virginia has an enumerated right to bear arms, which has been interpreted as a right that exists outside a home.[32] Circuit courts are still split on the type of scrutiny to apply when determining the constitutionality of laws which seek to regulate firearms. Most courts have begun to apply a hybrid two-step analysis, first

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[28] *Id.* at 318-19.

[29] Beth Coplowitz, Comment, *Fitting a Gun in a Circle-a How-To Guide: A Comprehensive Look at the Standard of Review for Gun Regulations Under the Second Amendment*, 71 U. MIAMI L. REV. 895, 898-899 (2017).

[30] *Id.*; *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

[31] Coplowitz*, supra* note 29, at 901-04.

[32] VA. CONST. art. I, § 13; *see also* Digiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127 (2011) (surprisingly a case of first impression on the application and applicability of Virginia's right to bear arms as enumerated in their state constitution).

determining whether intermediate or strict scrutiny applies, then determining whether an undue burden exists.[33]

Guns are a sensitive topic. It is no secret firearms are extremely dangerous, and can be used for horrible means. The right to bear arms, like all other rights, applies to law-abiding citizens. Convicted criminals and those who have had their rights lawfully extinguished are not the focus of this discussion. The United States Constitution supplies a method of due process to rescind an individual's inalienable rights through the legal system. The purpose of this article is not to debate whether the Second Amendment should exist, whether it is outdated, or any other common criticisms.

It is not unreasonable or too farfetched to imagine a world, or for that matter, a Supreme Court case, in which the Second Amendment's right to bear arms extends outside the home. *Heller* only recognized the right to bear arms inside a home and the Court purposefully did not discuss nor decide the issue of the right to bear arms outside a home.[34] For instance, several states across the country have either concealed carry and/or open carry gun laws, dictating whether and how an individual may carry a legally obtained firearm.[35] Every state in the United States has a concealed carry law; forty-two states require a permit to carry a concealed weapon;[36] forty-three states, including Virginia, have open carry laws; eleven states require a permit to openly carry, and thirty-two

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[33] Coplowitz, *supra* note 29, at 908-11.

[34] *Id.* at 898.

[35] Mark Hardy, *States That Allow Concealed Carry*, AMERICAN CONCEALED, Aug. 11, 2016, https://americanconcealed.com/articles/second-amendment/states-that-allow-concealed-carry/ (last visited on Dec. 15, 2017).

[36] *Id.*

states, including Virginia, do not.[37] As every state has some process for allowing the possession firearms outside of the home, it is not difficult to imagine a situation in which either the restriction of both concealed carry and open carry laws would be held unconstitutional.

C. Guns: Speech or Symbol?

Guns are not speech.[38] Much like the flag in *Johnson,*[39] possessing a gun could be considered a symbol in both the exercise of one's Second Amendment right to bear arms, and First Amendment right of freedom of expression. In this instance, the individual possessing the symbolic firearm is provided legal protections under the First Amendment. However, an individual must use the firearm in an expressive manner in order to constitute it as a symbol before it can be protected under the First Amendment as protected speech.[40] In cases involving the arrest of individuals who were openly carrying a firearm, especially in states with ambiguous gun carry laws, the First Amendment protection arguments have been prominently used as a defense, albeit a consistently unsuccessful one.[41]

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[37] *Id.*

[38] Daniel Horwitz, Article, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AMEND. L. REV. 96, 112 (2016).

[39] Texas v. Johnson, 491 U.S. 397, 402 (1989).

[40] *Id.*

[41] *Id.*; *See* Burgess v. Town of Wallingford, 569 F. App'x 21, 23 (2d Cir. 2014); Chesney v. City of Jackson, 171 F. Supp. 3d 605, 616 (E.D. Mich. 2016); Deffert v. Moe, 111 F. Supp. 3d 797, 814-15 (W.D. Mich. 2015); Baker v. Schwarb, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014).

D. True Threats

True threats are forms of communication the conveyor intends to express. [42] Further, the conveyor intends to communicate that they have an intent to commit an act that is not only unlawful but also violent. True threats are often targeted at a particular group or individual.[43] Do guns contain a *per se* true threat or even a *per se* true threat to kill? The answer to this question is key to the way in which the United States approaches guns rights and regulation. Daniel Horwitz, author of *Open-Carry: Open-Conversation or Open-Threat*? suggests, "any time an individual openly displays a gun, intentional or not, the message is clear: that individual now has the power to kill."[44] Horwitz argues the harm of restricting free speech while simultaneously bearing arms must be weighed against the harm that those arms could *possibly* cause against other individuals.[45] Horwitz cites several cases in attempt to support the argument that guns cannot be categorized as a symbol;[46] arguing guns are more likely to be placed into a category of true threats, especially if one operates under the premise that guns do in fact contain a *per se* true threat.[47] The author

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[42] Horwitz*, supra* note 38, pg. 115-17 (the article also points out that courts and commentators have difficulty identifying the level of scrutiny necessary to constitute a true threat).

[43] *Id.*

[44] *Id.* at 117.

[45] *Id.*

[46] Horwitz, *supra* note 38.

[47] *See generally* Horwitz*, supra* note 38.

vehemently argues there is a clear, true threat, contained within a gun.[48]

Courts have been deciding symbolism issues in First Amendment law using the rationale that a symbol by itself does not contain speech and therefore, a symbol, without more, is not covered by the First Amendment until an individual uses the symbol to convey a message.[49] However, placing guns under the category of a true threat would remove them from a symbolism analysis altogether. This would fundamentally narrow First Amendment analysis on guns from something that is in need of an operator to convey a message, to an instrument that can only convey one message, death. The idea of carrying a weapon, either open or concealed, as an exercise of an individual's Second Amendment rights, may already be conflated to encompass the First Amendment rather than the Second. Any time an individual is known to have a gun, it may be seen as an attempt at a form of expression under the First Amendment. If the expression is then categorized as a true threat, the analysis blurs the very essence of rights enumerated within the Constitution.

E. The Language Itself

The First Amendment and Second Amendment are closely related linguistically.[50] The legal language, which is nearly identical in both amendments, asserts strong and seemingly absolute protections. The phrases "shall not be infringed or abridged" contained within both amendments are vastly different than, for example, the Fourth Amendment's "unreasonable" language.[51]

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[48] *Id.*

[49] *See* Coplowitz, *supra* note 29.

[50] Joseph Blocher, Article, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U.L. REV. 375, 399-400 (2009).

[51] *Id.* at 401.

Scholars have also shown the history surrounding the adoption of the First and Second Amendments, as well as the creation of the United States of America itself, originated on the idea of political dissent.[52] The First Amendment, and many will argue, also the Second, promotes the values of political dissent, democracy, and the ability to empower individuals to resist government oppression or suppression.[53]

While it is true that the First and Second Amendments have limited authority, the claim by Joseph Blocher, author of *Categoricalism and Balancing in First and Second Amendment Analysis* that, "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose," is a gross over simplification.[54] Yes, there are limits placed on free speech. However, these limits are narrow, as Blocher himself states there are exceptions for obscenity, libel, and disclosure of state secrets.[55] Besides narrow exceptions, the First Amendment essentially protects citizens who speak for any purpose, especially those who speak of extremely unpopular or, in Blocher's words, "wrong-headed views."[56]

Similarly, Second Amendment exceptions would also be required to be narrow if one were to make textualist arguments, given the language of the amendments. This would be especially true if the limitations do not affect other individuals. Looking at the exceptions of the First Amendment, the commonality between

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[52] *Id.* at 400.

[53] *Id.*

[54] Blocher*, supra* note 50, at 406.

[55] *Id.* at 405 (this list being illustrative and not exhaustive).

[56] *Id.*

exceptions show an outward effect on other individual(s).[57] For example, libel has the effect of injuring the reputation of another individual; disclosure of state secrets has the effect of possibly injuring not only other individuals, but also the country as a whole; and obscenity essentially has its roots in a lack of expression or symbolism, which would take such speech outside the bounds of First Amendment. Absent any direct outward effect, excluding the effect on individuals who simply are offended by the expression,[58] generally all other speech is protected. The same must then ostensibly be true for the Second Amendment. If legal analysts and judicial interpreters want to keep any sort of reputable authority, it would strain credibility to argue that the strong language of the First Amendment bears no relation to the nearly identical language of the Second.

F. Inferences Upon Inferences Upon Inferences

There are several inferential steps one must take to reach the conclusion that a law-abiding citizen with a gun *will* hurt others. One must not only presume that a person in possession of a firearm will injure another person, but also that the possessor intends to use the firearm to cause injury. If this rationale used for the Second Amendment is true, the same ostensibly should be true for free speech under the First Amendment. Anyone who can talk has the capability to use words and expression to profess libel, obscenity, or any other type of verbal or non-verbal act that would fall outside the bounds of the First Amendment. People have the ability to express "true threats," yet it is not presumed that people will. For example, people do not necessarily buy insurance with the intention of using it. Many people buy insurance for the peace of mind in knowing they or their loved ones will be taken care of in the event of a catastrophe. It is many times a "just-in-case" product. While no one *hopes* to use insurance, it is there if needed. This can also be a

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[57] *Id.*

[58] *See supra* note 13 (offending others is not grounds for restricting one's First Amendment rights).

theory behind the use of firearms for self-defense. Proponents of the ideology that firearms inherently represent a "true threat" should ask themselves whether their reasoning is rooted in a different interpretation of the Constitution and Second Amendment, or if it is actually rooted in a disagreement therewith. If the First Amendment is used to restrict rights enumerated in the Second Amendment by placing firearms in a true threat category, both amendments will ultimately lose their potency.

G. Looking into the Future

The First and Second Amendments will likely continue to clash as the current state of legal analysis cannot seem to separate the Amendments as two distinct concepts when both the right of freedom of expression and the right to bear arms are simultaneously exercised. While this incongruency is only taking place in a very small corner of constitutional case law, if either the First or Second Amendment are effectively used silence the other, it could result in a nullification of one or both of the Amendment's broad protections. It is important to note, free speech and the right to bear arms are rooted in political dissent and not as a means to hurt others, and while legally obtained firearms should not be used to silence those with different viewpoints, the First Amendment should not be used to belittle the Second.

II.   Charlottesville Through a Constitutional Lens

The violence which took place in Charlottesville was a tragedy. It should be unconscionable for a person to lose their life for engaging in one of the most fundamental and essential rights founded in the United States of America and its Constitution. Unfortunately, historians will point out that the death of Heather Heyer is consistent with history.[59] Protests in the United States

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[59] *See generally*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (Harper Perennial ed., 2005) (this book discusses several protest movements, along with several other topics, within United States History

have a bloody past, in which deaths are not unusual occurrences.[60]
The country's history of protests is filled with bloodshed, death, and
violence, sometimes at the hands of the government.[61]
Nevertheless, the past (and present) does not excuse the events at
Charlottesville. Furthermore, the Second Amendment should not
become a target of blame for the violence at Charlottesville. It is
important to note, Heather Heyer, the woman killed during the
violence, did not die from firearms.[62] She died from injuries she
sustained after being hit by a car driven by a white nationalist.[63]

U.S. District Court Judge Glen E. Conrad presided over the
attempt to relocate the Charlottesville protest from Emancipation
Park.[64] Judge Conrad wrote, "merely moving [the] demonstration
to another park will not avoid a clash of ideologies." [65]   He also
acknowledged that a change in location would not change the need
for law enforcement, fire, and medical services at Emancipation
Park due to the park being at the center of the original idea behind

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and the fight that many individuals went through by exercising their First
Amendment rights).

[60] *Id.*

[61] *Id.*

[62] *See supra* note 6.

[63] Dahlia Lithwick and Mark Joseph Stern, *The Guns Won: Charlottesville
showed that our First Amendment jurisprudence hasn't reckoned with
our Second Amendment reality*, SLATE, Aug. 14, 2017,
http://www.slate.com/articles/news_and_politics/jurisprudence/2017/0
8/the_first_and_second_amendments_clashed_in_charlottesville_the_
guns_won.html (last visited on Dec. 16, 2017).

[64] *Id.*

[65] *Id.*

the protest.[66] Changing the location of the protest, Judge Conrad believed, would only result in having to assign city personnel to two locations, thereby stretching the city's resources.[67] As *Slate* and several other reputable news organizations reported, both white nationalists and counter protestors attended the Charlottesville rally with weapons and firearms, with many people openly carrying semi-automatic guns.[68]

The *Slate* article is rooted in the idea that the events in Charlottesville demonstrated that the Second Amendment "won," and that it overpowered the First Amendment, just like guns would overpower words. There is a popular and consistent idea circulating, that while Judge Conrad's holding was technically correct in its legal analysis, it still somehow seemed wrong.[69] Judge Conrad's decision was supported by a healthy list of legal precedent in holding that the First Amendment prohibited the city of Charlottesville from relocating the white nationalist rally due to the content of the demonstrator's speech.[70] Yet, articles from *Slate*, *The New York Times*, *Time*, and other media outlets appear to be on a similar consensus, that once guns are added into the equation, either the First Amendment or the Second Amendment needs to give way and the legal analysis must fundamentally change.[71]

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Lithwick and Stern*, supra* note 63.

[70] *Id.*

[71] *See e.g.* Lithwick and Stern*, supra* note 63; Goldstein, *supra* note 5; Martin London, *Why States Should Ban Guns From Political Rallies*, TIME, Aug. 22, 2017, http://time.com/4910900/first-amendment-second-amendment-charlottesville/ (last visited on Dec. 21, 2017)

Specifically, the *Slate* article, written by Dahlia Lithwick and Mark Stern, criticizes Judge Conrad for a failure to reconcile First Amendment precedent with the "reality" of the Second Amendment.[72] Lithwick and Stern argue that Judge Conrad failed to answer the central and important question of whether "when demonstrators plan to carry guns and cause fights, does the government have a compelling interest in regulating their expressive conduct more carefully than it'd be able to otherwise?".[73]

While there are several issues with the authors' legal question, if properly reframed, the question is the root of the debate. Essentially, in a non-legal phrasing, which Amendment should take priority? Which Amendment is more powerful, the First or the Second? In this context and framing, Lithwick and Stern argue that the right to bear arms trumped the freedom of speech in Charlottesville,[74] and protestors who attended the rally with firearms effectively silenced the protestors who came unarmed.[75] However, seeing as both white nationalists and counter protestors showed up armed, it's tough to determine which viewpoints were heard that day. Additionally, even if only the white nationalists came armed, there is no evidence that counter protestors would have been effectively silenced, although that is not too hard to imagine.

(arguing that there is no Constitutional right to bear arms at political rallies and that state gun laws can regulate that).

[72] Lithwick and Stern, *supra* note 63.

[73] *Id.*

[74] *Id.*

[75] *Id.*

III.   Constitutional Protections in a Polarized Political World

There is a myriad of hypothetical changes/solutions to the above-mentioned constitutional issues. Some policies would necessarily require hefty legislative lifting by either state or federal legislatures. Other avenues, such as steps taken by a state or federal judiciary, could bypass the legislative process by interpreting state or federal law, while analyzing a challenged state or federal program/regulation. Substantive change to gun regulation, especially the regulation of legally obtained firearms by presumptively law-abiding citizens, will likely prove incredibly difficult to achieve without a functioning legislative body or courts altering the ways they interpret civil liberties or constitutions.

A. Balancing Civil Liberties

It is unclear if its legally possible to restrict a person's Second Amendment rights in order for a group or an individual to exercise their First Amendment rights. Looking past the already questionable license[76] and fee required to protest in nearly every state in the country,[77] the first question to ask is whether a judge should deny[78] a group or individual's First Amendment right to assemble and protest if it could be proven that a large number of protestors were going to be carrying firearms. Without a deep analysis of the question, many people may view the answer as an easy yes. Presumably, proponents of the affirmative answer to this

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[76] *See supra* note 22.

[77] *Protest Laws by State*, FIND LAW: CIVIL RIGHTS, http://civilrights.findlaw.com/enforcing-your-civil-rights/protest-laws-by-state.html (last visited on Dec. 29, 2017) (Every state in the Union has some form of permit requirement/application procedure and nearly all fifty states also require a fee for the application ranging anywhere from $30 to $150).

[78] It necessarily follows that if a permit is denied, one would be denied from exercising their First Amendment rights.

question might rationalize that if guns and weapons of any kind are going to be commonplace at an event, that fact alone should be heavily scrutinized, and event organizers should likely try to restrict guns all together. Framed in this context, the answer seems very simple and logical.

The second question to ask is whether a judge could deny a group or individual's First Amendment right to assemble and protest if it could be proven that a large number of protestors would be concurrently exercising their Second Amendment rights. Hopefully, the answer to this question does not come as easily. One must assume that carrying a legally obtained firearm openly, concealed, or both is constitutional.[79] Despite in Charlottesville, where many protestors were openly carrying firearms,[80] a different situation where many are only carrying concealed firearms should not change the analysis. It should make no difference to the analysis whether or not others can physically see a gun, and if it does, one should re-assess what their fundamental issues with law abiding citizens carrying legally obtained weapons actually are.

If the concern is the safety of all individuals in a public setting, the visibility of firearms could be a major factor. There could even be an argument that openly carrying firearms, as opposed to carrying concealed firearms would be safer, at least from the perspective of law enforcement. If the concern is inciting violence by toting firearms openly, the issue can become much more complicated. In this instance, protestors would have to be carrying firearms with the intent to intimidate and frighten others with the possibility of significant harm or even death.[81] Intent alone would be incredibly hard to prove, along with demonstrating

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[79] *See supra* pages 8-10.

[80] Lithwick and Stern, *supra* note 63.

[81] To be fair, I do not doubt that there are indeed people out there that would do exactly what I am describing.

an attempt at incitement. A protestor would have to be actively pointing their firearm at others or threating to shoot them. It would be futile to argue that the mere presence of a firearm on a person, either in a holster or being carried by a strap on a person's back, is enough for intent to incite violence or intimidate others; this type of legal standard would create a very large and murky grey area of the law.

A protestor who is simply in possession of a firearm can hardly be considered to be "inciting violence." Intent to intimidate, frighten, incite violence, or threaten would bring the analysis into the realm of a true threat.[82] The overarching answer to the fundamental question also depends on how one answers the legal questions contained within a true threats analysis as well.[83] If one believes guns in fact are a *per se* true threat, which in this case would be the "easy way out" of the analysis, the issue of due process would still need to be analyzed.[84]

Even on a fundamental and theoretical level, it is unclear if it is possible to constitutionally restrict or flat out deny the use, access, or exercise of one inalienable right at the expense of another. People do not forfeit their Fourth Amendment rights to be free from unreasonable searches or seizures[85] when they exercise their First Amendment rights to practice religion by attending a

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[82] *See supra* pages 12-13.

[83] *See supra* pages 10-11.

[84] *Infra* page 23.

[85] U.S. CONST. amend. IV ("The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

house of worship.[86] If the Second Amendment right of individuals to "bear arms" are to be restricted during an exercise of First Amendment rights of expression, it could easily follow that the Fourth Amendment right to be free from unreasonable searches and seizures would diminish as well, considering there would most certainly be calls for searches of individuals at public protests to check for the possession of firearms. An argument could be made that if guns were to be banned at protests, the searches of individuals would then be justified and therefore, the Fourth Amendment would still be in effect.[87] However, looking at the analysis, we have effectively gone from a protest of individuals gathered in a public space, to lengthy lines of protestors awaiting entry into a sectioned-off public area, which can only be accessed upon a search or perhaps a pass through of a metal detector.

Many see slippery slope arguments as an argument of last resort and dramatization, but the public policy implications from anything of this nature could have a staggering and chilling effect. Large protests could be denied simply due to a city's lack of funds to control the event. Or, perhaps more likely, the price of permits and application fees for public gatherings, demonstrations, and even parades, could skyrocket. This would effectively place the power of assembly exclusively into the hands of those who can afford it.[88] Municipalities would necessarily need more time to organize, which would likely cause permit applications to be obtained further in advance, and possibly cause demonstration organizers to lose out

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[86] Obviously, places of worship are private areas that are presumably allowed to prohibit firearms but the analogy of losing one right at the expense of another still holds true.

[87] *See supra* note 79.

[88] *See supra* note 72 (with some major cities already charging $150 for an application fee, without a guarantee of the permit being issued, and with some requiring deadlines as early as ninety days in advance, it is hard to see how any sort of increase in these policies would benefit the democratic process or public at large).

on political momentum. Long lines to essentially enter "free speech zones" could act as a deterrent for many people wanting to participate in demonstrations. Furthermore, a scrupulous police force at an event would also likely deter groups of people traditionally fearful of law enforcement, including undocumented immigrants, and historically oppressed minority populations. The consequences of changing the way firearms are monitored at demonstrations may seem dramatic, or far-fetched, but it only takes one major event to dramatically change how security is conducted in the United States. For example, in response to the September 11, 2001 terrorist attacks, the Transportation Security Administration was hastily formed, and airport security functions have never been the same.[89] Now, in order to travel on commercial airlines, people are subjected to extensive searches of their bodies and belongings.[90] The analogy here is nearly identical. It is not hard to imagine a large number of people being killed or injured at a protest, rally, or public gathering. Consequently, the state of public protests or gatherings could quickly change overnight, especially if the deaths at this hypothetical event were to happen at the hands of guns.[91]

B. Due Process

The right to due process is rooted in the Fifth Amendment and is applied to individual states through the Fourteenth Amendment.[92] It is difficult to imagine how due process can fit into the analysis. Procedural due process, which would more likely be at

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[89] Rick Seaney, *After 9/11: Are We Safer in the Air?*, ABC NEWS, Aug. 25, 2011, http://abcnews.go.com/Travel/911-safer-air/story?id=14372486 (last visited April 17, 2019).

[90] *Id.*

[91] Just to clarify, this is not an argument for less safety precautions. While it may at times seem so, there is a fine line between a world with total security and a free society.

[92] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

issue here, "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[93] The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[94] For the purposes of this article, whether or not due process has been served is not wholly relevant.[95] All that needs to be recognized is that in order to take away a liberty interest from a law abiding citizen, there needs to be an appropriate procedure to ensure against an erroneous deprivation.[96] Regardless of whether the state actor seeking to restrict a fundamental right is the federal government or a state, the analysis is essentially the same. However, for purposes of analyzing Charlottesville, the applicable state firearms laws and the Fourteenth Amendment should be the focus of the discussion. The Fourteenth Amendment states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

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[93] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

[94] *Id.* at 333.

[95] *See id.* at 335 (For reference, the three factors are: "[1.] The private interest that will be affected by the official action; [2.] The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3.] The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[96] *Id.*

nor deny to any person within its jurisdiction the
equal protection of the laws.[97]

For the purposes of the Second Amendment, the key term in the
Fourteenth Amendment is "liberty," which ultimately means
fundamental rights like those that are enumerated in the Bill of
Rights.

    The Second Amendment is fully applicable to the states.[98]
However, the application of due process of law in the context of
guns and the Second Amendment is unclear.[99] In *McDonald v. City
of Chicago*, the Supreme Court, in deciding the issue of due process
pertaining to the Second Amendment, discussed the fact that other
rights, such as the First Amendment, were also once considered not
to be binding to the states through the due process clause.[100] The
court noted, it was not until the 1930's that the First Amendment
was considered a fundamental right applicable to the states.[101] In
fact, it was only until the very late 1800's, with the Fourteenth
Amendment immediately preceding this new found enlightenment,
that courts and scholars started to consider whether the due process
clause prohibited states from infringing inalienable rights set out in
the Bill of Rights.[102]

    What is interesting about the *McDonald* decision is the way
the Court framed the issue of whether the Second Amendment is
incorporated into the concept of due process. The Court posed the

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[97] U.S. CONST. amend. XIV, § 1.

[98] McDonald v. City of Chi., 561 U.S. 742, 750 (2010).

[99] *Id.* at 753.

[100] *Id.* at 759.

[101] *Id.*

[102] *Id.*

question of whether "the right to keep and bear arms is fundamental to our scheme of ordered liberty or . . . whether this right is "deeply rooted in this Nation's history and tradition[?]"[103] Ultimately, the Court concluded that while the Second Amendment is deeply rooted in the Nation's history and tradition, the Second Amendment is better suited to the category of "among those fundamental rights necessary to our system of ordered liberty."[104] Further, the Court in *McDonald* also specifically stated that Constitutional rights, which have controversial public safety implications, are not limited to the Second Amendment, and this fact should not place the Second Amendment in a fundamentally different category than the rest of the Bill of Rights in terms of the application of due process.[105]

The general gun debate in the United States should not be viewed as a debate between total anarchy of gun laws versus a total and complete ban of guns, although it may often seem as if it is. In *McDonald*, the court struck down a Washington D.C. firearms ban, finding that due process was required before an individual could be prohibited from obtaining a handgun for the purposes of self-defense of his home.[106] Due process as applied to guns, as the *McDonald* Court noted, does not affect in any way, regulations prohibiting, for example, those who are mentally ill from obtaining guns.[107]

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[103] *Id.* at 767 (internal citations omitted).

[104] *McDonald*, 561 U.S. at 77.

[105] *Id.* at 783.

[106] *Id.* at 750.

[107] *Id.* at 786.

C. Due Process and Public Assembly

McDonald definitively established that due process under the Fourteenth Amendment applies to states in relation to the Second Amendment. There is currently no clear legal doctrine that reconciles the First, Second, and Fourteenth Amendments in the context of public assembly. In Charlottesville, protestors, at least before the protest, had a presumption of innocence as law-abiding citizens. At the time of the demonstration, Virginia state law allowed people to openly carry firearms, but required a permit to carry concealed firearms.[108] Absent the hypothetical interpretation of the Second Amendment right to exist outside the home, a weapons ban at the Charlottesville protest would have worked well in relation to due process. Arguably, due process would not be required in this situation. However, in a world where the Second Amendment right to possess firearms is understood to exist outside the home, the due process analysis is not nearly as easy. If there is a constitutional right to possess firearms outside of the home, due process would be triggered in an attempt to restrict the possession of firearms in a public place. This would require a procedure in place in order to ensure that every person attempting to attend the protest with a firearm would be afforded due process. Postulating the scope and reasonable methods of affording due process in this situation is incredibly difficult, if not impossible. Would it be constitutional to restrict ones right to carry a legally obtained firearm without due process? Assuming the right to bear arms is the most narrow and strict interpretation of *Heller*, and the right is exclusively for the possession of handguns, for the use of self-defense within the home, then the answer is no. However, if the right to bear arms is presumed to be fundamental outside the home,

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[108] *Firearms / Concealed Handguns*, VA. ST. POLICE, http://www.vsp.state.va.us/Firearms.shtm, (last visited on Dec. 31, 2017).

due process and the possession of a legal firearm in a public space, will have much stronger implications and protections.

D. State and Federal Gun Laws

Arguably, there is a need for a more uniform understanding of how state and federal gun laws effect the analysis of granting protest-permits. The federal courts' interpretation of the Second Amendment is scarce and unclear.[109] Due to the hands-off approach of the federal government, states have taken the bulk of responsibility in regulating firearms. This has led to drastically different gun laws across the nation.[110] Federalism can be summarized as a separation of powers between all areas of federal and state governments. While there is no single sentence in the Constitution that explicitly sets forth the Federalist system, the different parts of the Constitution inherently create the system by delegating certain powers and restrictions to different areas and levels of government. The Tenth amendment can be seen as one aspect of this delegation of authority. The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[111] Traditionally, the Tenth Amendment has been seen as giving states the power to regulate anything not delegated to the Federal government or specifically mentioned in the Constitution. Interestingly, firearms are specifically mentioned in the Constitution, yet states have been the primary legislators and regulators of firearms.

Article 1, section 13 of the Constitution of the Commonwealth of Virginia protects the right to bear arms for all of its citizens, which contains language that is nearly identical to the

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[109] Coplowitz, *supra* note 29, at 908-11.

[110] Hardy, *supra* note 35.

[111] U.S. CONST. amend. X.

Second Amendment of the United States Constitution.[112] Section 13 states:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.[113]

This amendment poses two interesting roads to follow. First, there is language that is nearly identical to the Second Amendment, specifically the phrase, "the right of the people to keep and bear arms shall not be infringed."[114] This phrase has been interpreted very differently by both the Supreme Court of Virginia and the Federal court system.[115] Second, the language of section 13 poses additional questions as to what and how much power Virginia has over the regulation of firearms, and what the second half of the amendment, starting after "infringed" actually means.[116]

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[112] VA. CONST. art. I, § 13.

[113] *Id.*

[114] *Id.*

[115] *See* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chi., 561 U.S. 742 (2010). *But see* Digiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127 (2011).

[116] VA. CONST. art. I, § 13.

E. Statutory Interpretation – Part I

While the Federal court's interpretations of the Second Amendment through *Heller*[117] and *McDonald*[118] have been discussed, the Supreme Court of Virginia has interpreted Article 1, section 13 of its constitution differently.[119] Surprisingly, *Digiacinto v. Rector & Visitors of George Mason University*, a recent Second Amendment case from 2011, was a case of first impression for the Supreme Court of Virginia.[120] Initially, the court in *Digiacinto* held the right to bear arms in Section 13 was "co-extensive" with the Second Amendment of the federal constitution, "concerning all issues in the instant case."[121] Therefore, for the rest of the opinion, the Court would analyze Digiacinto's state and federal constitutional rights concurrently.[122]

Despite stating that the rights contained within the Federal and Virginia amendments were nearly identical in scope and meaning, the Supreme Court of Virginia glossed over the holdings in both *Heller* and *McDonald*.[123] The court briefly mentioned the two cases then turned to an analysis of the restriction of firearms from sensitive places. The latter of which was only discussed briefly

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[117] *See* discussion *supra* pages 7-9.

[118] *See* discussion *supra* pages 24-26.

[119] *See Digiacinto*, 281 Va. 127.

[120] *Id.* at 133.

[121] *Id.* at 134 (this phrase leaves open the question as to whether the Virginia Supreme Court wanted to leave open room for disagreement with federal interpretation).

[122] *Id.*

[123] *Id.* at 134-35.

in *Heller* and *McDonald*.[124] While the Court's analysis is technically correct in using *Heller* and *McDonald*, its use is fundamentally flawed because *Digiacinto* was not a case about the use of firearms inside the home for self-defense.

The holdings of both *Heller* and *McDonald* ultimately only recognized the right to bear arms inside the home for self-defense. However, in *Digiacinto*, the issue was the possession of a firearm on the campus of George Mason University (GMU), by an individual who was not a student, but frequently used the campus facilities.[125] Therefore, any such analysis of a possession of a firearm could not be done under a *Heller* or *McDonald* analysis because the entire situation took place outside of any type of concept which could resemble the "home." *Heller* and *McDonald* only apply to *Digiacinto* in the most abstract and distant ways. Language in both *Heller* and *McDonald* state that neither holding disturbs laws and regulations that restrict firearm possession in cases such as the mentally ill, or in Digiacinto's case, in "sensitive places."[126] In that sense, both cases do apply; that a law or regulation restricting firearms from those enumerated classes are not presumptively unconstitutional. However, anything further would then have to be analyzed and recognized through state law and could not be challenged under the Second Amendment of the United States Constitution because according to the U.S. Supreme Court, the constitutional right to bear arms ends as soon as a person leaves their home.[127]

In *Digiacinto*, the Supreme Court of Virginia stated that laws and regulations "restricting the carrying of firearms" in "sensitive places," such a schools and government buildings, are

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[124] *Id.*

[125] *Digiacinto*, 281 Va. at 131.

[126] *Id.* at 135.

[127] *See supra* note 108.

"presumptively legal."[128]   As previously stated, Digiacinto was not a student nor an employee of GMU, but did frequently use university resources, such as the library.[129] Digiacinto desired to carry his firearm on campus, but as per state regulation, it was prohibited.[130] The regulation read as follows:

> Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.[131]

Digiacinto argued the GMU regulation violated his constitutional right to carry a firearm, that GMU lacked statutory authority to regulate firearms, and that the regulations conflicted with state law.[132] GMU argued the right to bear arms is not absolute and the Second Amendment did not prevent the prohibition of firearms in sensitive places.[133] These sensitive places, GMU argued, included university buildings and "widely attended university events."[134]

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[128] *Id.*

[129] *Digiacinto*, 281 Va. at 131.

[130] *Id.*

[131] *Id.* at 130-31.

[132] *Id.* at 131.

[133] *Id.* at 133.

[134] *Id.*

The Supreme Court of Virginia ultimately held that GMU, in its entirety, was a sensitive place and that the regulation did not violate either section 13 of the Virginia's Constitution or the Second Amendment of the U.S. Constitution.[135] While the outcome in *Digiacinto* broadly seems to be in line with federal court decisions, the language and reasoning of the decision calls for a closer look. First, the Supreme Court of Virginia found that "GMU is a sensitive place," which would in turn, allow for justification of such a regulation.[136] The Court was of the opinion that a university, which "traditionally has not been open to the general public," is fundamentally different than a public street or park.[137] Despite GMU being a public university, which most certainly has facilities the general public use, GMU is an "institute of higher learning that is devoted to its mission of public education."[138]

On its face, the Supreme Court of Virginia's reasoning in *Digiacinto* seems wholly logical, but the court's holding may not fully comport to current Second Amendment jurisprudence. In *Heller*, The U.S. Supreme Court did not create a "sensitive places" exception for future courts to follow. *Heller* simply mentioned the presumptive validity of restrictions of firearms at places such as schools and government buildings, and used the term "sensitive places" as a grouping mechanism.[139] Deeming an entire public university a "sensitive place" which would then allow for a complete prohibition of a constitutional right, is not something to take lightly. The *Digiacinto* Court expressed that in its view, the regulation did not necessarily impose a total ban of firearms on

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[135] *Digiacinto*, 281 Va. at 136-37.

[136] *Id.* at 137.

[137] *Id.* at 136.

[138] *Id.*

[139] District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

campus, and therefore it was constitutional.[140] This necessarily means that a regulation totally banning all firearms would be unconstitutional. This statement by the Court is interesting due to the language of section 13.[141] The regulation prohibits the possession of a firearm "on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events."[142] The regulation's list of areas where firearms are prohibited effectively covers anything on a university campus, which begs the question; is the regulation effectively a total ban on firearms? Also noteworthy is that the regulation prohibits possession of firearms in on-campus student residences, which could be considered a "home" for the purposes of *Heller* and *McDonald*. It could then be argued that the Supreme Court of Virginia's holding extinguishes a person's right to possess firearms for self-defense in their homes upon becoming a college student and choosing or needing to live on-campus. It's doubtful that, upon becoming a college student, an individual does not need or effectively loses the right to use self-defense.

Despite the Courts illogic, it essentially said the carrying of firearms in a public place is constitutional, if not for sensitive places.[143] This confusing case is some of the only information and analysis Virginia has on its state constitutional right to bear arms, which seems much less restrictive than *Heller*. For the Supreme Court of Virginia, the deciding line seems to be somewhere before a university campus or buildings, wherever that might be.

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[140] *Digiacinto*, 281 Va. at 136.

[141] *See* discussion *supra* page 31-32.

[142] *Digiacinto*, 281 Va. at 130-131.

[143] *Id.* at 136-137.

F. Statutory Interpretation – Part II

The second half of section 13 of Virginia's Constitution reads "that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."[144] Seeing as *Digiacinto* was a case of first impression for the Supreme Court of Virginia, section 13 has not been heavily litigated, especially the second half of it.[145] The first question to ask is whether this clause has any true legal meaning. If not, the clause could be summarized as immaterial, but yet still hold historical importance. However, if the clause does have a true legal meaning, that meaning and its implications to firearms regulation may be difficult to ascertain.

The first clause of the second half of Section 13, referencing standing armies, seems to support the idea that the second clause is nothing but dicta. It is a warning so to speak, about the historical dangers of armies present amongst citizens in a time of peace. This argument is supported by the first clause of Section 13, which reads, "[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state."[146] Much like the Second amendment of the U.S. Constitution, which references militias comprised of everyday citizens, these clauses can be seen as pure history; an idea that once was popular but which is no longer viable.

However, what is unique about Section 13 of Virginia's Constitution is that both the words militia, mainly understood to

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[144] VA. CONST. art. I, § 13.

[145] *Supra* note 111.

[146] VA. CONST. art. I, § 13.

mean citizen armies,[147] and military,[148] are used, and they seem to be used differently. When reading the first and second clause together (referring to the second half of Section 13), support for the argument that these clauses have legal meaning gain much weight. Essentially, the plain meaning of Section 13 seems to be that the authors of Virginia's Constitution intended that, groups of armed citizens, in theory, would help regulate and subdue the standing army of the United States.[149] This regulation could be achieved by, in the eyes of the authors, a hypothetical threat of civilian resistance. It seems that in the authors' minds, if they could guarantee an inalienable right to bear arms to all citizens, any threat of liberty at the hands of a powerful federal army could be mitigated.

Another strange caveat of Section 13 is the last phrase, "civil power."[150] This phrase is used in relation to the regulation of standing armies. However, it is quite odd the authors did not just use the phrase militia or civil militia. Whether the phrase is simply a term of art, or the authors intended to be metaphorical and more ideological in their conveyance, the different language, necessarily begs legal analysis into the meaning. If "civil power" means something other than a militia, it is possible the words militia and military actually contain a distinctly different meaning. Stated differently, the phrase "civil power" may leave open the possibility for courts to interpret any specific gun regulation differently than it would be if civil militia would have been used instead of civil power.

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[147] *See* VA. CONST. art. I, § 13 (defining the composition of a militia as "comprised of the body of the people").

[148] *Id.* (referring to "standing armies" and that their regulation can be governed by the citizens, i.e. their militia).

[149] VA. CONST. art. I, § 13.

[150] *Id.*

The end of the clause reads, "and governed by, the civil power."[151] Therefore, it is plausible for Virginia courts to interpret this clause to actually mean the legislature has an enumerated power to regulate firearms. It is a very easy argument to make that, "civil power" means the will of the people, i.e. democracy.

The legal analysis of Section 13 dramatically changes depending on which definition is attributed to those select few words and phrases. If military and militia are used interchangeably and the authors intended to refer to both as one indistinguishable entity, the term "civil power" more likely seems to mean the will of the people to govern through the legislative process. If military and militia are fundamentally distinct entities, a debate of the definition of "civil power" remains. However, defining "civil power" in the second scenario as the will of the people, renders Section 13 utterly confusing. Therefore, it is more probable that "civil power" was a term of ideological art used to refer to the armed civil militia, but without giving clear constitutional consent to essentially wage war against the federal government in order to regulate the militia.

While this distinction may not seem important, it appears the definitions of one or two words, are the difference between interpreting a constitutional power to substantively regulate the use of firearms and a near absolute restriction of government regulation of firearms.[152] These distinctions vary between every state in the United States, as each state constitution contains different language. While states already regulate firearms, using individual constitutions to do so would be a new avenue. Virginia, which did not litigate a case dealing with a state right to bear arms until 2011, presumably is not alone in that context. Depending upon the

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[151] *Id.*

[152] *See* Blocher, *supra* note 50 (The language of the Second Amendment and Section 13 both contain absolutist language, "shall not be infringed").

interpretation of the language used in each constitution, states could regulate firearms consistent therewith.

G. Fears Come to Fruition

There is one last piece of scholarship that still must be addressed. An essay, *Your 'Little Friend' Doesn't Say 'Hello': Putting The First Amendment Before The Second in Public Protests* by Kendall Burchard, was published while this article was nearing completion, and addresses a few of the issues that have been discussed here.[153] Burchard's main argument is for all public protests be designated as sensitive places, which would prohibit the possession of firearms for any and all who would attend the protest, except for law enforcement.[154] To support this proposition, Burchard cites five cases, including *Digiacinto,* which hold that certain places, including an entire university campus, could be designated as sensitive places.[155]

Burchard simultaneously argues that those attempting to exercise free expression and ideas under the First Amendment need to have protection from armed law enforcement. Burchard writes, "in Charlottesville and in other similar instances, the state is unable to secure the speaker's rights, their protection, or the protection of their listeners because an individual's "self-defense" right challenges the state's monopoly on violence."[156] First, it is a distortion of the Second Amendment to frame the issue as "self-defense" versus free speech, let alone framing it as "self-defense" versus a "state's monopoly on violence," whatever that might be.

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[153] Kendall Burchard, Essay, *Your 'Little Friend' Doesn't Say 'Hello': Putting The First Amendment Before The Second in Public Protests*, 104 VA. L. REV. ONLINE 30.

[154] *See Id.* § 3.

[155] *Id.*; *See also supra* note 138.

[156] *See* Burchard, *supra* note 153.

Burchard argues that First Amendment doctrine demands "an unpopular speaker's protection from the hostile audience and the heckler's veto" and therefore, protests, demonstrations, and the like are "entitled to police protection to ensure the speaker's ability to speak."[157] While the government certainly cannot discriminate on the basis of view point or content of speech,[158] abdicating all individual self-defense rights to the state during a protest is not the right cause of action. The state does not have the power under the First Amendment to force individuals to listen to anyone who wants to speak.

Burchard opines that Charlottesville created a situation where "the exercise of 'self-defense' rights" castrated the state's ability "to maintain order or protect and serve the public safety interest."[159] Burchard therefore concludes that an individual's right to self-defense should be secondary to police power, state power, and "the public interest in freedom of expression."[160] Essentially, any right an individual may have to use self-defense during a protest, regardless of the presence of a firearm, should be secondary to the freedom of expression and the First Amendment. Obviously, when viewed in a vacuum, a "violent" act, like self-defense can be seen as something "negative" when compared to expressive conduct, like speech, which generally carries a positive connotation to it. But again, this is the conflation between two fundamental rights that is difficult to reconcile. Burchard even abandons using the word "firearms" and replaces it with the much broader term of "self-defense." Law abiding individuals do not seek out opportunities to use self-defense. Designating all self-defense rights

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[157] *Id.*

[158] *See supra* note 18.

[159] *Id.*

[160] *Id.*

to police officers is not only anathema to the idea of a free state, but also speaks to the previous arguments of cost and personnel.[161]

Due process, which Burchard did not address, is the most difficult and fundamental hurdle that must be overcome to prescribe any of the ideas floated in the essay. If armed individuals are threatening others who are trying to exercise their First Amendment rights, that is a problem. However, making threats is already illegal, regardless if it is at a protest. The difficulty with designating a public protest as a sensitive place is that protests contain an inherent, natural fluidity due to their presence in an open public space. A protest can be held near citizens walking by, who are not participating. This again is analogous to an argument discussed earlier.[162] Protests would necessarily need to be sectioned off and First Amendment/free speech zones would need to be created, especially if the safety and defense of all individuals attending were to be legally designated to law enforcement. Searches of all wishing to protest would necessarily have to occur to ensure that no individuals were carrying anything law enforcement would deem unsafe.

Ultimately, one of the major issues with Burchard's argument, and similar arguments made about this topic, is the generalized presumption that individuals who are carrying firearms legally will use them.[163] Burchard writes "the expressive rights of demonstrators and protesters alike are severely curtailed when firearms are permitted at demonstrations because disagreement could result in death."[164] This presumption is borderline offensive. To essentially argue that law-abiding citizens who legally obtain and

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[161] *See* discussion *supra* p. 23.

[162] *See* discussion *supra* p. 23.

[163] *Id.*

[164] *See* Burchard, *supra* note 153.

carry firearms are in any way likely to use their firearm on those who they might have an ideological disagreement with is absurd.

Burchard concludes by reaffirming the argument for state obligated protection at protests.[165] However, there is a large and important argument contained in these closing sentences: "[T]he policy justification for carrying a firearm in public for the lawful purpose of self-defense loses credence in light of the state's obligation to protect the speakers, the listeners, and the municipality writ large during permitted demonstrations."[166] This article is not long enough to cover the lengthy analysis needed to examine the true implications of what Burchard is advocating for. However, it is important to note that the amount of liability that would be placed upon the state and/or municipality if it were to take on this responsibility of defense, would be unfathomable. It would necessarily open the door to litigation the next time an individual suffers harm at a protest. Furthermore, the government could assert sovereign immunity, leaving citizens without any right to self-defense during a protest *and* no legal recourse if the state were to fail at its obligation.[167] The only way to defeat sovereign immunity would be if state or federal lawmakers passed legislation specifically designating liability to the government without recourse in any type of immunity law.[168]

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[165] *Id.*

[166] *Id.*

[167] *See generally* W. E. Shipley, Comment Note, *Municipal immunity from liability for torts,* 60 A.L.R.2D 1198 (discussing the body of immunity law in conjunction with municipalities). *See also* Gary L. Wickert, Detailed Chart, *Suing The King: State Sovereign Immunity And Tort Liability In All 50 States*, https://www.mwl-law.com/wp-content/uploads/2013/03/STATE-GOVERNMENTAL-LIABILITY-IN-ALL-50-STATES-CHART-GLW-00211981.pdf.

[168] *See* Shipley, *supra* note 167; Wickert, *supra* note 167.

IV.   Conclusion

Issues facing the United States pertaining to gun regulation must be addressed. However, when two fundamental rights clash, both must be viewed as entirely separate, whole, and distinct. Diminishing one right at the expense of the other renders either one or both ineffective and deficient. What is a right if it can simply wither away at the introduction or exercise of another right?

The First and Second Amendments to the U.S. Constitution are nearly as old as the United States itself. The two politically dissenting ideas, along with another fundamental concept, due process, have for the most part survived the test of time. Ignoring a violation of a right, or attempting to circumvent a right through crafty wordsmanship might "solve" a temporary problem, but it will only serve as precedent to accomplish a similar task in the future. Take for example the national dialogue generated as a result of comments made by President Donald Trump following a fatal shooting of students at Marjory Stoneman Douglas High School in Parkland, Florida.[169] President Trump publicly stated that he would prefer a system of confiscating weapons before any due process procedures.[170] Admittedly the idea is not likely to be enacted, but the fact that it was even been conceived, or remotely normalized in a national dialogue, is a cause for concern. Normalizing restrictions of fundamental rights is a long and dark road that should not be followed.

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[169] Jack Healy, *Scared but Resilient, Stoneman Douglas Students Return to Class*, N.Y. TIMES, Feb. 28, 2018, https://www.nytimes.com/2018/02/28/us/stoneman-douglas-parkland-shooting.html (last visited April 17, 2019).

[170] Toluse Olorunnipa, et al. *President Trump's 'Take the Guns First' Remark Sparks Due Process Debate*, TIME, March 3, 2018, http://time.com/5184160/trump-guns-due-process/ (last visited April 17, 2019).

While this issue is certainly niche, the overall ideas are applicable in broader concepts of gun control and legislation. There is no doubt the status quo of national gun law is unacceptable. However, changes *must* be made in a way that is consistent with the Second Amendment and the Bill of Rights as a whole. Any solution that ignores the Second Amendment to achieve an immediate fix will ultimately come back to hurt other areas of the law and other fundamental rights.

Reflecting on the words and ideas of James Madison, in Federalist No. 10, his fear was of both majority and minority factions.[171] The root of Madison's fear was the loss of liberty.[172] He posed two methods of dealing with factions; remove the causes or control the effects.[173] Removing the causes would be worse than factions themselves:

> It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.[174]

The second remedy, to control its effects, is also not a practical solution to Madison. "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable

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[171] *See* Madison, *supra* note 1.

[172] *Id.*

[173] *Id.*

[174] *Id.*

obstacle to a uniformity of interests. The protection of these faculties is the first object of government."[175]

Madison saw factions as inevitable, with a republic governmental structure acting as not only the sole mitigating factor, but as the defender of the very freedoms that allow humans to create the very factions that are anathema to a free society. Madison's topic and conclusion both serve as a perfect analogy for the difficulties discussed in this article. Madison did not see an absolute cure for the disease of factions because he believed that one did not exist. Frankly, at least in the eyes of the law, a solution to this issue may not exist. A faction, whose attempts can be deduced to a reduction of liberty, is the exact fear Madison was speaking of, and just as Madison argued, this disease is best cured in the arena of the mind, philosophy, and individual mentality.

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[175] *Id.*