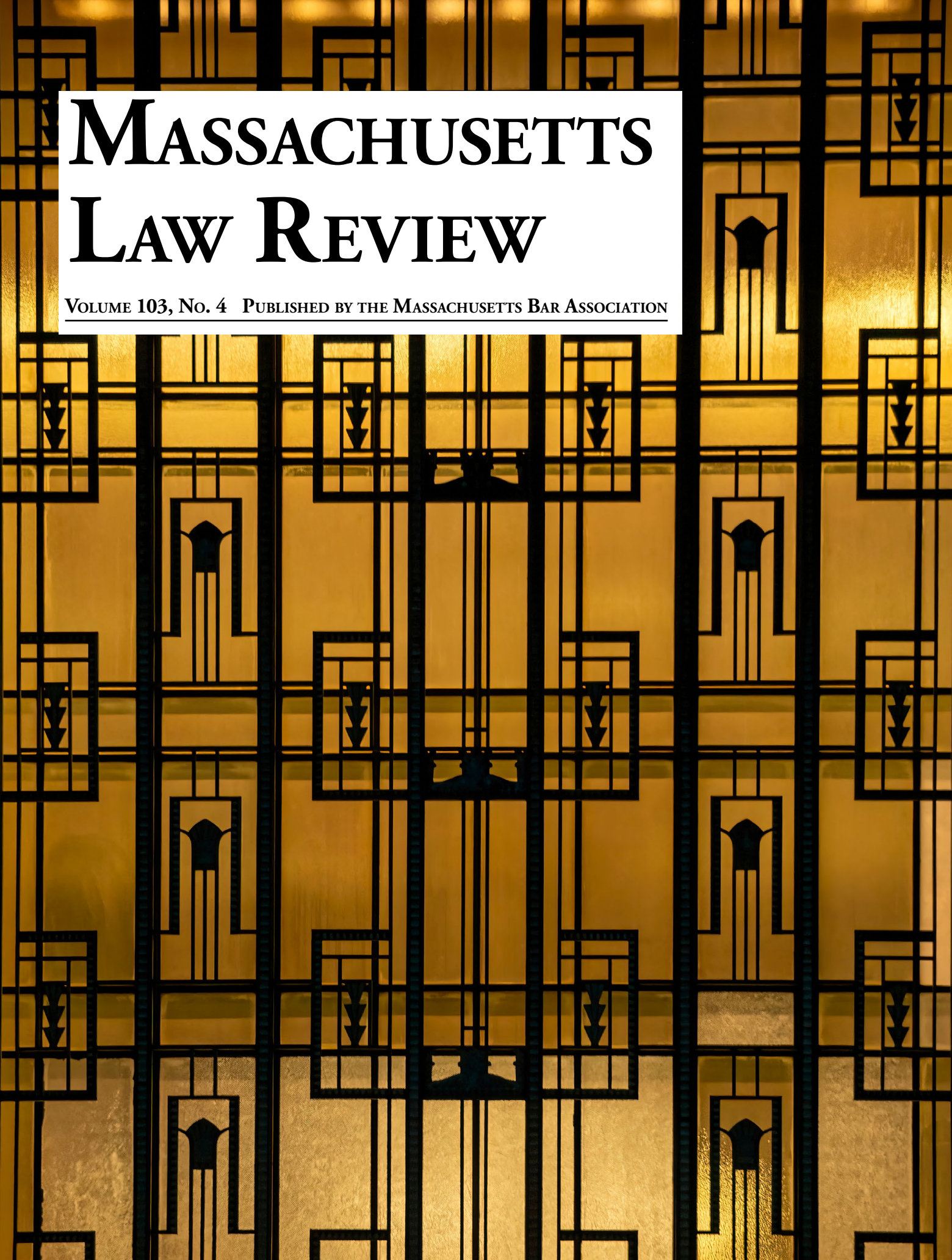

Massachusetts Law Review

Volume 103, No. 4 Published by the Massachusetts Bar Association

Massachusetts Law Review

VOLUME 103 NUMBER 4

December 2022

IN THIS ISSUE

The Massachusetts Law Review is supported in part by the Massachusetts Bar Association Insurance Agency

Cover: Above the entrance to the Pemberton Square Courthouse. Photo by Hon. David S. Ross.

MASSACHUSETTS BAR ASSOCIATION
20 WEST STREET, BOSTON, MA 02111-1204

Massachusetts Law Review (ISSN 0163-1411) is published quarterly by the Massachusetts Bar Association, 20 West Street, Boston, MA 02111-1204. Periodicals postage paid at Boston, MA 02205. Postmaster: Send address changes to Massachusetts Bar Association Member Services Center, 20 West Street, Boston, MA 02111-1204.

Subscriptions are free for members and are available to libraries at $50 and those not eligible for membership in the Massachusetts Bar Association at $75 per calendar year. Single copies are $25.

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Free Speech in the Time of Coronavirus

By Eric A. Haskell

On March 10, 2020, Gov. Charlie Baker declared a state of emergency pertaining to the spread of the SARS-CoV-2 virus ("COVID-19" or simply "the coronavirus"). That declaration, which was issued pursuant to both the commonwealth's Civil Defense Act[1] and its Public Health Act,[2] in turn, empowered the governor to issue extraordinary executive orders "necessary or expedient for meeting said state of emergency."

Before rescinding the emergency declaration on June 15, 2021, Baker issued some 69 extraordinary orders in response to the coronavirus, on topics ranging from the mundane to the sort rarely seen outside of wartime. Other organs of the state government also made extraordinary responses to the pandemic. Numerous administrative agencies issued coronavirus-related orders as delegated by the governor or pursuant to an independent statutory authority. Attorney General Maura Healey promulgated emergency consumer protection regulations concerning debt collection practices during the pandemic. And the legislature passed extensive legislation in response to the pandemic, including a moratorium on "non-essential" residential evictions.

Many of these enactments were challenged in court. Many of those court challenges, in turn, asserted violations of the Free Speech, Assembly or Petition clauses of the First Amendment. This essay reviews those challenges, focusing on what they mean for the issue of First Amendment "coverage" — that is, what activities may be regulated or curtailed by the government without implicating the First Amendment at all.

The Free Speech, Assembly and Petition Clauses of the First Amendment

The Free Speech Clause provides that the government, including the states,[3] "shall make no law . . . abridging the freedom of speech . . . ."[4] But the scope of the "speech" to which the clause refers — that is, the coverage of the Free Speech Clause's prohibition — has long been the subject of judicial interpretation.

The Free Speech Clause undoubtedly protects "pure" speech. But, as Justice Oliver Wendell Holmes Jr. observed in 1919, "the

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First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language."[5] Today, the Free Speech Clause is understood to cover most "pure" speech,[6] with exceptions for certain "unprotected" categories such as speech integral to unlawful conduct,[7] obscenity[8] and incitement.[9]

The Free Speech Clause also has long been understood to protect conduct that, while not precisely speech, is nonetheless "expressive."[10] But the Supreme Court has decisively rejected the view that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[11] Rather, conduct must be "sufficiently imbued with elements of communication" to come within the coverage of the Free Speech Clause.[12]

Once speech or conduct is deemed to be covered by the Free Speech Clause, a reviewing court tests whether a regulation burdening that speech can stand. To do so, the court selects and applies an appropriate level of constitutional scrutiny. For example, regulations that target particular speech based on the content of that speech are typically reviewed under strict scrutiny, which asks whether the

1. Mass. St. 1950, ch. 639.
2. Mass. Gen. Laws ch. 17, § 2A.
3. Gitlow v. New York, 268 U.S. 652, 666 (1925).
4. U.S. Const. amend. I.
5. Frohwerk v. United States, 249 U.S. 204, 206 (1919).
6. *See generally* United States v. Stevens, 559 U.S. 460, 468 (2010).
7. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).
8. Roth v. United States, 354 U.S. 476, 483 (1957).
9. Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam).
10. Texas v. Johnson, 491 U.S. 397, 404 (1989).
11. United States v. O'Brien, 391 U.S. 367, 376 (1968).
12. *Johnson*, 491 U.S. at 404; *see also* Spence v. Washington, 418 U.S. 405, 410-11 (1974) (articulating test for whether conduct is sufficiently expressive to come within coverage of Free Speech Clause).

regulation represents the least restrictive means of advancing a compelling governmental interest.[13] Regulations of commercial speech are typically subject to the test set forth in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.,* which asks whether the regulation directly advances a substantial governmental interest that could not be equally well-served through a more limited regulation of commercial speech.[14] Content-neutral regulations of the time, place or manner of speech are typically subject to scrutiny under *Ward v. Rock Against Racism*, which asks whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication.[15] And many other modes of scrutiny exist for reviewing other types of speech regulation.[16]

Recent years have witnessed an increase in the frequency of court decisions that apply First Amendment scrutiny to activities — especially governmental regulation of economic or commercial activity — that traditionally have not been thought to implicate the Free Speech Clause.[17] This trend has seen the Supreme Court strike down, on free speech grounds, things like:

- A state law that prohibited pharmacies from selling, or using for marketing purposes, data concerning a particular physician's prescribing practices;[18]
- A state consumer protection regulation that prohibited merchants from imposing a surcharge on sales paid for by credit card;[19] and
- The provision of the Lanham Act that prohibited the registration of a trademark that "may disparage . . . persons, living or dead . . . ."[20]

Some observers have characterized this trend as a "*Lochner*-ization" of the First Amendment,[21] evoking the turn-of-the-century doctrine that invalidated economic and social regulations as contrary to the regulated party's economic liberty.[22] Others have lauded it as a boon for civil liberties.[23] Regardless of whether this trend is desirable, the unique legal, cultural and political force of the freedom of speech has meant that skillful lawyers and litigants increasingly seek to frame their challenges to governmental action as a free speech violation.[24]

Apart from the Free Speech Clause, the First Amendment also provides that the government "shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . ." In recent decades, this guarantee has largely been subsumed by an implied freedom "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[25] This freedom of association is not absolute, and must yield to "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[26] Freedom of association claims have most frequently arisen where a state public accommodation law requires a private organization to admit certain members.[27]

A third clause of the First Amendment provides that the government "shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[28] As pertinent to the issues discussed in this essay, one aspect of the petitioning right is a "right of access to the courts[.]"[29] This right of access, however, is limited to situations in which filing suit will "provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong."[30] In other words, the right to access the courts is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court."[31]

The rights guaranteed by the respective Free Speech, Assembly and Petition clauses are "cognate"[32] and "share substantial common ground," and each is "integral to the democratic process, although not necessarily in the same way."[33] "It was not by accident or coincidence that the rights to freedom in speech and press were coupled

13. *E.g.,* McCullen v. Coakley, 573 U.S. 464, 478 (2014).

14. 447 U.S. 557, 564 (1980).

15. 491 U.S. 781, 791 (1989).

16. *E.g.,* Americans for Prosperity Found. v. Bonta, 594 U.S. ---, 141 S. Ct. 2373 (2021) ("exacting scrutiny" applicable to regulations that compel disclosure of identity or affiliation); Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio, 471 U.S. 626, 650-51 (1985) (scrutiny applicable to compelled disclosure of "purely factual and uncontroversial information" in commercial setting); *O'Brien*, 391 U.S. at 376-77 (scrutiny applicable to content-neutral regulations of expressive conduct).

17. *See, e.g.,* Frederick Schauer, "The Politics and Incentives of First Amendment Coverage," 56 Wm. & Mary L. Rev. 1613, 1616-17 (2015); Amanda Shanor, "First Amendment Coverage," 93 N.Y.U. L. Rev. 318, 325-31 (2018).

18. Sorrell v. IMS Health Inc., 564 U.S. 552, 562-71 (2011).

19. Expressions Hair Design v. Schneiderman, 581 U.S. 37, 137 S. Ct. 1144, 1150-51 (2017).

20. Matal v. Tam, 582 U.S. ---, 137 S. Ct. 1744, 1751 (2017).

21. Jeremy K. Kessler & David E. Pozen, "The Search for an Egalitarian First Amendment," 118 Colum. L. Rev. 1953, 1961-64 (2018); Amanda Shanor, "The New *Lochner*," 2016 Wis. L. Rev. 133, 135–36 (2016); Leslie Kendrick, "First Amendment Expansionism," 56 Wm. & Mary L. Rev. 1199, 1206-09 (2015); Neil M. Richards, "Why Data Privacy Law Is (Mostly) Constitutional," 56 Wm. & Mary L. Rev. 1501, 1529-31 (2015); *Sorrell*, 564 U.S. at 591-92 (Breyer, J., dissenting); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 589 (1980) (Rehnquist, C.J., dissenting).

22. Lochner v. New York, 198 U.S. 45 (1905).

23. Jane R. Bambauer & Derek E. Bambauer, "Information Libertarianism," 105 Cal. L. Rev. 335 (2017).

24. Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience," 117 Harv. L. Rev. 1765, 1767 (2004).

25. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); *see also* John D. Inazu, "The Forgotten Freedom of Assembly," 84 Tul. L. Rev. 565, 566-67 (2010) (acknowledging that freedom of assembly has been viewed as synonymous with freedoms of speech and/or association but suggesting that "something is lost" when it is).

26. *Roberts*, 468 U.S. at 623.

27. *See, e.g., Roberts,* 468 U.S. at 515-17 (whether Jaycees are required to admit women as full members); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos., 515 U.S. 557, 561 (1995) (whether organizers of South Boston St. Patrick's Day parade must permit gay and lesbian organization to march); Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (whether Boy Scouts must allow gay man to serve as assistant scoutmaster).

28. U.S. Const. amend. I.

29. Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011); Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741 (1983).

30. Christopher v. Harbury, 536 U.S. 403 (2002).

31. *Id.*

32. Thomas v. Collins, 323 U.S. 516, 530 (1945).

33. *Borough of Duryea,* 564 U.S. at 388.

in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances."[34] Nonetheless, the Supreme Court has instructed lower courts "not [to] presume there is always an essential equivalence" in these clauses' applications, but rather to interpret each clause in light of "the objectives and aspirations that underlie the right."[35]

Temporary Pandemic Restrictions on Debt Collection Practices

Chapter 93A bans unfair or deceptive commercial practices and also empowers the attorney general to make rules and regulations interpreting that ban.[36] On March 26, 2020, Healey exercised that power to promulgate an emergency regulation[37] on "Unfair and Deceptive Debt Collection Practices During the State of Emergency Caused by COVID-19."[38] That regulation, among other things, deemed it unfair or deceptive for a debt collector to initiate a telephone call to a debtor's residence, cellular telephone or other personal phone, with limited exceptions.[39] The regulation also deemed it unfair or deceptive for any creditor to initiate, file or threaten to file a collection lawsuit, again with limited exceptions.[40] The regulation, by its terms, was effective only through June 26, 2020.[41]

Several weeks after the regulation was promulgated, a trade association of debt collectors challenged it in U.S. District Court.[42] The plaintiff claimed that the prohibition on debt collection telephone calls infringed debt collectors' freedom of speech.[43] It also claimed that the prohibition on filing collection suits infringed debt collectors' right to access the courts, in contravention of the Petition Clause.[44] The plaintiff sought a preliminary injunction against Healey to prevent enforcement of these aspects of the regulation.

The district court granted the debt collectors relief on both claims. First, with respect to the prohibition on initiating collection calls, there was no dispute that the Free Speech Clause was implicated because of the nature of the prohibited activity.[45] Accordingly, after concluding that the regulation was a restriction of commercial speech subject to *Central Hudson* scrutiny,[46] the district court queried whether the regulation (1) was supported by a "substantial" governmental interest; (2) advanced that interest "to a material degree"; and (3) was no more speech-restrictive than necessary to serve that interest.[47]

The district court rejected two of three governmental interests asserted by the attorney general; it found no support for the proposition that consumers are more susceptible to undue influence exerted by debt collectors during a pandemic than during ordinary times, and further found no clear connection between the regulation and vouchsafing the financial well-being of Massachusetts residents during the pandemic.[48] The court credited the third interest asserted by the attorney general — preserving residential tranquility and privacy at a time when many people were literally required to remain home — but found that the prohibition on collection calls merely decreased incrementally the number of calls a debtor might receive, beyond the stringent limits imposed by pre-pandemic state and federal law.[49] As such, the court concluded, the regulation did not materially advance the commonwealth's interest in preserving residential tranquility. In reaching these conclusions, the court observed pointedly that "constitutional rights do not take a holiday simply because governing authorities declare an emergency."[50]

With respect to the prohibition on filing collection suits, the attorney general argued that the regulation imposed only a temporary burden that, because state-law statutes of limitation had been tolled in response to the pandemic,[51] would "merely delay a creditor's day in court . . . ."[52] The district court, however, rejected this, stating that "the mere fact of an emergency does not increase constitutional power, nor diminish constitutional restrictions."[53] Ultimately, the district court on May 6, 2020, enjoined enforcement of both the prohibition on collection calls and the prohibition on filing collection suits.[54] The regulation lapsed on June 26, 2020, and the district court case was ultimately dismissed.

The district court's decision in *ACA International* did not plough new ground as to First Amendment coverage: Indeed, the parties did not even dispute that the Free Speech Clause was implicated by the regulation's ban on collection calls. Rather, the most remarkable aspect of the *ACA International* decision was the court's

34. *Thomas,* 323 U.S. at 530.

35. *Borough of Duryea*, 564 U.S. at 388.

36. Mass. Gen. Laws ch. 93A, § 2(c).

37. *See* Mass. Gen. Laws ch. 30A, § 2 (providing for promulgation of emergency regulations).

38. 1415 Mass. Reg. 63 (Mar. 26, 2020).

39. 940 C.M.R. §§ 35.04(1) & (3).

40. *Id.* §§ 35.03(1)(a) & (2).

41. *Id.* §§ 35.03(1) & 35.04(1). In addition, by virtue of being an emergency measure, the regulation could not have been made effective for longer than that period without notice and a public hearing. *See* Mass. Gen. Laws ch. 30A, § 2.

42. ACA Int'l v. Healey, No. 20-10767-RGS (D. Mass.).

43. ACA Int'l v. Healey, 457 F.Supp.3d 17, 25 (D. Mass. 2020).

44. *Id.* at 30.

45. *Id.* at 26.

46. This point was disputed: The plaintiff argued that the regulation should be subject to strict scrutiny as a content-based restriction on speech, based on the Supreme Court's remark in Reed v. Town of Gilbert that a law will be deemed content-based if it "cannot be 'justified without reference to the content of the regulated speech . . . .'" 576 U.S. 155, 164 (2015). The district court, however, accepted the attorney general's argument that *Reed* had not disrupted the long-settled principle that restrictions on commercial speech are subject to scrutiny under *Central Hudson*, even though such restrictions often target speech based on its content. *ACA Int'l*, 457 F. Supp. 3d at 26 n.8 (citing Mass. Ass'n of Private Career Schs. v. Healey, 159 F. Supp. 3d 173, 192 (D. Mass. 2016)).

47. *ACA Int'l,* 457 F. Supp. 3d at 26.

48. *Id.* at 27.

49. *Id.* at 27-30 (citing 15 U.S.C. § 1692(a), 47 U.S.C. § 227, Mass. Gen. Laws ch. 93, § 49, 209 C.M.R. § 18.00 et seq., & 940 C.M.R. § 7.00 et seq.).

50. *Id.* at 28 n.9.

51. *See generally* Shaw's Supermarkets, Inc. v. Melendez, 488 Mass. 338 (2021) (reviewing and interpreting these tolling provisions).

52. ACA Int'l v. Healey, 457 F.Supp.3d 17, 31 (D. Mass. 2020).

53. *Id.*

54. *Id*. at 33.

commitment to "traditional" First Amendment analysis, even under the emergency conditions of the early pandemic.[55] The court's use of "traditional" First Amendment analysis was the first indication of a pattern that would recur again and again in coronavirus-related First Amendment litigation.

The Eviction Moratorium

On April 20, 2020, the Massachusetts Legislature enacted, and Baker signed, House Bill 4647, "An Act Providing for a Moratorium on Evictions and Foreclosures During the COVID–19 Emergency."[56] That legislation forbade landlords, in connection with "non-essential" residential evictions (a category that was defined to include evictions for nonpayment of rent), from terminating a tenancy and from "send[ing] any notice, including a notice to quit, requesting or demanding that a tenant of a residential dwelling unit vacate the premises."[57] The legislation also forbade courts from accepting or adjudicating summary process actions.[58] And it delegated to the Executive Office of Housing and Economic Development (EOHED) the authority to issue implementing regulations.[59] These portions of the legislation were to expire on Aug. 18, 2020 — or 45 days after the state of emergency ended, whichever was sooner — subject to the governor's authority to incrementally postpone their expiration.[60] Baker issued one postponement, through Oct. 17, 2020, at which time the moratorium was allowed to expire.

Landlords challenged the eviction moratorium in U.S. District Court shortly after it was enacted.[61] Among their other claims, they challenged four aspects of the moratorium as contrary to the Free Speech Clause: (1) the prohibition on terminating residential tenancies; (2) the prohibition on sending notices to quit pursuant to statute;[62] (3) the prohibition on sending other notices requesting or demanding that a tenant vacate the premises; and (4) a regulation issued by EOHED that required them, in certain communications with tenants, to include an internet address for the Massachusetts Housing Partnership, an organization that was alleged to advocate for tenants' rights in opposition to landlords.[63] The landlords also challenged the temporary freeze on summary process actions as contrary to the Petition Clause.[64] The landlords sought a preliminary injunction against EOHED Secretary Mike Kennealy to prevent enforcement of these aspects of the legislation.

The district court's adjudication of the plaintiffs' four free speech claims reflected differences in the coverage of the Free Speech Clause. First, with respect to the prohibition on terminating tenancies, the district court found that terminating a tenancy, without more, was "conduct, not speech," that "does not necessarily include any communicative elements."[65] As such, the prohibition on terminating tenancies did not implicate the Free Speech Clause at all.[66] Second, the court found the prohibition on statutory notices to quit also to be outside the coverage of the First Amendment, although for a different reason: The court reasoned that, because a statutory notice to quit had the legal effect of initiating a judicial eviction and most evictions had been banned, sending such a notice was integral to unlawful conduct and thus not protected by the First Amendment.[67]

The district court, however, found that other, non-statutory, notices requesting or demanding that a tenant vacate the premises — which, unlike a statutory notice to quit, would not have any legal effect — were protected commercial speech, and that the prohibition of such notices was subject to First Amendment scrutiny.[68] Applying the *Central Hudson* test, the court found that the commonwealth's interest in limiting the spread of the coronavirus was "substantial" and was "directly advance[d]" by the prohibition on non-statutory notices to quit.[69] The court also found that the prohibition on such notices made an appropriate "fit" with the commonwealth's interest in limiting the spread of the coronavirus; although there existed less restrictive means of serving that interest, the court acknowledged that "least restrictive means" analysis is reserved for strict scrutiny, and "has no role" in *Central Hudson* scrutiny.[70] As such, the court declined to enter preliminary relief against the prohibition on non-statutory notices to quit.

Finally, the district court did enter preliminary relief to prevent the enforcement of the EOHED regulation requiring landlords to direct tenants to the Massachusetts Housing Partnership.[71] Relying on *Nat'l Inst. of Family & Life Advoc. v. Becerra*,[72] the court first found that the required disclosure went beyond "purely factual and

55. Indeed, the court appeared so committed to "traditional" First Amendment analysis as to be cool toward the attorney general's arguments that the nature of the governmental interests justifying a regulation could be reshaped by the presence of an emergency such as the early coronavirus pandemic.

56. Mass. St. 2020, ch. 65.

57. Mass. St. 2020, ch. 65, § 3(a). The legislation also imposed a moratorium on certain actions taken in furtherance of a foreclosure of mortgaged property. *Id.* at § 5.

58. *Id.* at § 3(b).

59. *Id.* at § 3(g).

60. *Id.* at § 6.

61. Baptiste v. Kennealy, No. 20-cv-11335-MLW (D. Mass.).

62. *See* Mass. Gen. Laws ch. 186, §§ 11-13.

63. Baptiste v. Kennealy, 490 F. Supp. 3d 353 (D. Mass. 2020).

64. *Id.*

65. *Id.* at 397.

66. *Id.*

67. *Id.* at 398 (citing *Giboney*, 336 U.S. at 501-02).

68. *Id.* at 399 (citing *Central Hudson,* 447 U.S. at 564).

69. Baptiste v. Kennealy, 490 F. Supp. 3d 353, 400 (D. Mass. 2020).

70. *Id.* at 400-01 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)).

71. *Id.* at 402-08. Rather than enjoin enforcement of that aspect of the regulation, however, the district court permitted Secretary Kennealy to voluntarily comply with the court's declaration that the regulation was unenforceable. *See id.* at 408-09. Secretary Kennealy amended the regulation to omit the offending portion shortly after the district court issued its opinion. 1428 Mass. Reg. 45 (Oct. 1, 2020).

72. 585 U.S. ---, 138 S. Ct. 2361 (2018).

uncontroversial information."[73] Thus, rather than review the regulation pursuant to *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the court subjected it to intermediate scrutiny, seeking a sufficient connection between the regulation and a substantial governmental interest.[74] The court found that the regulation infringed landlords' right to avoid appearing to endorse organizations that "advocate positions with which [they] disagree," and thus deemed the landlords likely to succeed in their free speech challenge to this aspect of the regulation.[75]

The district court also denied the landlords relief on their claim under the Petition Clause. The right to access the courts under the Petition Clause, the district court reasoned, depends on the presence of an underlying claim; absent a viable claim, a would-be litigant enjoys no right of access.[76] "This means that a [state] legislature may, among other things, alter rights and remedies without violating the First Amendment right to petition if doing so does not violate another guarantee of the United States Constitution."[77] By placing a moratorium on evictions, the legislature had modified the rights and remedies available to landlords such that the landlords had no viable claim to assert in court. In reaching this conclusion, the court distinguished the decision in *ACA International* on the ground that the eviction moratorium specifically deprived landlords of the right to evict.[78] In contrast, the regulatory moratorium on debt collection suits in *ACA International* did not change the fact that a debt collector might have a viable monetary claim, and simply burdened the collector's ability to go to court to pursue that claim.[79]

The district court's decision in *Baptiste v. Kennealy* is notable for the way it reached different conclusions on the landlords' various free speech claims based on the specific activity being regulated. The court's conclusion that the ban on terminating tenancies was outside the coverage of the Free Speech Clause reflected the essentially non-communicative nature of the act of terminating a tenancy. Sending a non-statutory notice to quit the premises, on the other hand, was communicative and thus merited some form of First Amendment scrutiny. Sending a statutory notice to quit was likewise communicative, but fell outside the coverage of the First Amendment because it was intertwined with the temporarily illegal act of evicting a tenant. And the compelled disclosure of resources for tenants fell squarely within the coverage of the First Amendment, and within the scope of the protection from compelled speech defined by *National Institute of Family & Life Advocates* and other decisions. Although the district court did not make this explicit, its adjudications turned, in large part, on the specific activity being regulated. In that way, it foreshadowed the outcome of the free speech challenge to the commonwealth's gathering size limits.

The federal Centers for Disease Control and Prevention (CDC) and Congress also promulgated an eviction moratorium during the pandemic. That moratorium, in contrast to the commonwealth's, barred landlords only from "evict[ing] any covered person from any residential property" for nonpayment of rent, as long as the tenant provided proof of inability to pay;[80] it did not purport to bar landlords from any particular mode of communication with their tenants, nor did it purport to require landlords to make any particular communication to their tenants. The federal eviction moratorium was not challenged on First Amendment grounds; rather, it was challenged, and eventually enjoined, as exceeding the scope of the CDC's statutory authority.[81]

Limits on Sizes of Gatherings

Another prominent aspect of the commonwealth's response to the pandemic was to limit the number of people who could gather in any indoor or outdoor space. Emergency gubernatorial orders imposed default limits on gathering sizes, which changed frequently with the ebb and flow of the pandemic. For example, for much of the spring and summer of 2020, the default gathering size limit was 10 persons in any single indoor or outdoor space.[82] For much of the winter of 2020–21, the default gathering size limits were 10 persons in an indoor space and 25 persons in an outdoor space.[83] The gathering size limits were enforceable by health departments and police agencies through civil fines and injunctions, and — for a few months in the spring of 2020 — criminal sanctions.[84]

These default gathering size limits were complemented by a series

73. Baptiste v. Kennealy, 490 F. Supp. 3d 353, 405-06 (D. Mass. 2020).

74. *Id*. at 406.

75. *Id.* at 407. The court simultaneously affirmed other portions of the same regulation that required landlords, when communicating with tenants about rent arrearages, to explicitly state that the tenant was not being evicted and did not have to leave his home. *Id*. at 407-08.

76. *Id.* at 393.

77. *Id.* at 393-94.

78. *Id.* at 392 n.13 ("[A] modification of underlying rights is not necessarily a violation of the right to petition.").

79. Baptiste v. Kennealy, 490 F. Supp. 3d 353, 392 (D. Mass. 2020).

80. *See* 85 Fed. Reg. 55292, 55296 (Sept. 4, 2020). This ban was subsequently extended by a combination of congressional legislation and further orders by the Centers for Disease Control. *See* Ala. Ass'n of Realtors v. Dept' of Health and Human Svcs., --- U.S. ---, 141 S. Ct. 2485, 2486-87 (Aug. 26, 2021).

81. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488-90.

82. Governor's COVID-19 Order #13 (Mar. 23, 2020) (imposing this limit) and Governor's COVID-19 Order #44 (Jul. 2, 2020) (rescinding this limit in favor of higher ones).

83. Governor's COVID-19 Order #59 (Dec. 22, 2020) (imposing these limits) and Appendix to Governor's COVID-19 Order #63 (Mar. 18, 2021) (rescinding these limits in favor of higher ones).

84. *See, e.g.,* Governor's COVID-19 Order #13 at § 5 (Mar. 23, 2020); Governor's COVID-19 Order #38 (Jun. 6, 2020); Governor's COVID-19 Order #54 at § 8 (Nov. 2, 2020).

of orders specific to particular "sectors." Early in the pandemic, most physical enterprises not deemed "essential" were temporarily required to close.[85] Beginning in the late spring of 2020 and continuing into the summer, enterprises were permitted to reopen on a "phased" basis,[86] as long as they complied with "sector-specific rules" issued by a specified administrator — frequently, the commonwealth's director of labor standards — to address "particular circumstances and operational needs of those specific sectors."[87] Those sector-specific rules regularly included a gathering or capacity limit that was specific to that particular sector, and which superseded the default gathering size limit.

The gathering size limits were challenged in court as contravening the Free Speech Clause only once; that suit came in November 2020, some eight months after the first gathering size limits were imposed. In that case, *Zaal Ventures Corporation v. Baker*, an operator of guided historical walking tours filed suit in U.S. District Court to challenge the sector-specific gathering size limit applicable to such tours (at the time, 12 persons).[88] The plaintiff argued that historical walking tours were protected by the Free Speech Clause, and sought a preliminary injunction against Baker to prevent enforcement of the sector-specific gathering size limit.[89]

On the governor's cross-motion to dismiss, however, the district court found that the gathering size limit did not implicate the Free Speech Clause.[90] The court relied primarily on *Arcara v. Cloud Books, Inc.,* a 1986 Supreme Court decision in which an adult bookstore claimed that its freedom of speech was violated when local health authorities threated to close it for having hosted prostitution on its premises.[91] Although the New York Court of Appeals had sustained the bookstore's claim, the Supreme Court refused even to apply First Amendment scrutiny, noting that it would do so only "where it was conduct with a significant expressive element that drew the legal remedy in the first place" or where the challenged law inevitably singled out those engaged in expressive activity.[92] Because the conduct that drew the sanction in *Arcara* — hosting prostitution — "manifests absolutely no element of protected expression," the court found the First Amendment to be inapplicable.[93]

Relying on *Arcara*, the district court in *Zaal Ventures* found that the conduct that would draw legal sanction under Baker's orders — that is, convening an oversize gathering — was not itself speech or expressive conduct; indeed, the district court observed, "tour guides are free to speak or not speak, and the content of tour guides' speech is not subject to sanction."[94] The tour operator did not contend that the size of the tour group was itself expressive.[95] Nor could the tour operator plausibly claim that the gathering size limit "inevitably singled out" those engaged in expressive activity, in view of comparable gathering size limits applicable to many similar forms of outdoor group activities.[96] The district court accordingly concluded that a gathering size limit simply did not implicate the Free Speech Clause, a conclusion that was consistent with those of many out-of-state courts faced with similar claims.[97]

The district court's decision in *Zaal Ventures* is significant for its explicit and rigorous focus on the conduct that drew the sanction. As the Supreme Court observed in *City of Dallas v. Stanglin,* "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[98] What matters, according to *Arcara*, is whether the legal sanction is triggered by expressive activity, or the challenged law inevitably singles out those engaged in expressive activity. In focusing on these points, the district court in *Zaal Ventures* made explicit what was implicit in *Baptiste*: Much of the conduct regulated by the commonwealth in response to the coronavirus was not itself expressive.

In addition to *Zaal Ventures,* the gathering size limits ordered by Baker were also challenged in court as contravening the Assembly Clause. In *Desrosiers v. Governor*,[99] a group of businesses and business owners filed a suit in Massachusetts Superior Court that was quickly transferred to the Supreme Judicial Court (SJC). Their lead claim, which the SJC ultimately rejected, was that Baker's coronavirus-related orders exceeded the scope of his authority under the Civil Defense Act and Public Health Act.[100] They also argued that the

85. Governor's COVID-19 Order #13 at § 5 (Mar. 23, 2020).

86. *E.g.,* Governor's COVID-19 Order #33 (May 18, 2020).

87. Governor's COVID-19 Order #33 (May 18, 2020); Governor's COVID-19 Order #37 (Jun. 6, 2020); Governor's COVID-19 Order #43 (Jul. 2, 2020).

88. Zaal Ventures Corp. v. Baker, No. 20-cv-12054-LTS (D. Mass.).

89. Zaal Ventures Corp. v. Baker, No. 20-cv-12054, 2021 WL 1026715 at *1-2 (D. Mass. Mar. 17, 2021).

90. *Id*. at *3.

91. 478 U.S. 697 (1986).

92. *Id.* at 706-07.

93. *Id.* at 705 & 706 n.3.

94. 2021 WL 1026715 at *3.

95. *Id.*

96. *Id.*

97. *E.g.,* Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 435 (E.D. Va. 2020); Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-965, 2020 WL 2615022, at *4 (E.D. Cal. May 22, 2020); Steel MMA, LLC v. Newsom, No. 21-cv-49, 2021 WL 778654, at *2–3 (S.D. Cal. Mar. 1, 2021); *but see* Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 234-36 (D. Md. 2020) (applying First Amendment scrutiny to gathering size limit after apparently accepting premise that such limits do implicate Free Speech Clause), appeal dismissed, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020).

98. 490 U.S. 19, 25 (1989).

99. 486 Mass. 369 (2020), *cert. denied* 142 S. Ct. 83 (2021).

100. *Id*. at 376-85.

gathering size limits infringed upon their freedom of assembly. The SJC explicitly chose to apply the test for content-neutral regulations of the time, place or manner of speech under *Ward v. Rock Against Racism*. In doing so, the SJC explicitly declined to apply the relaxed standard of *Jacobson v. Massachusetts*,[101] which would defer to the gathering size limits "unless [they] lack[ed] a real or substantial relation to the protection of the public health or represent[ed] a plain, palpable invasion of rights secured by the fundamental law."[102] Proceeding to apply the *Ward* test, the SJC found that the gathering size limits imposed by the governor were not substantially broader than necessary to achieve the commonwealth's interest in reducing the spread of the coronavirus and also preserved alternative methods to assemble, such as in smaller groups or virtually.[103] This application of *Ward* was doctrinally noteworthy for applying a free speech test to a free assembly claim. The SJC apparently assumed that, in this setting, the purposes and objectives of the freedom of assembly were so closely aligned with those of the freedom of speech that no assembly-specific analysis was necessary.[104]

Finally, an interesting constitutional question was posed by *Boston Bit Labs v. Baker*,[105] in which a video arcade owner alleged that Baker had violated its freedom of speech by classifying arcades as "Phase IV" enterprises, with the effect that arcades would remain closed for longer than allegedly similarly situated enterprises such as casinos. The Supreme Court has held that "video games qualify for First Amendment protection." *Brown v. Ent. Merchants Ass'n*.[106] So the constitutional question in *Boston Bit Labs* was whether, under those circumstances, the maintenance of a brick-and-mortar premises was itself an activity entitled to free speech protection.

Neither the district court nor the Court of Appeals answered that question in *Boston Bit Labs,* because the case became moot after Baker reclassified arcades as "Phase III" enterprises.[107] But, under *Arcara*, the answer seems plain: Even if a firm's business activities are protected by the First Amendment, that does not bar the government from closing the firm on the basis of conduct that lacks a significant expressive element. Focusing on the conduct that drew the sanction in *Boston Bit Labs,* it seems likely that a content-neutral business closure order of general application would be deemed not to implicate the Free Speech Clause or to warrant any level of First Amendment scrutiny. Certainly, that was the conclusion reached by several out-of-state courts when confronted with a comparable claim.[108]

A prominent series of decisions by the U.S. Supreme Court dealt with the application of gathering restrictions to places of worship during the pandemic.[109] But, although those cases involved First Amendment claims, they arose under the First Amendment's Free Exercise Clause, rather than the Free Speech or Free Assembly clauses.[110] As such, the court analyzed whether an application of gathering restrictions to a place of worship was "neutral" and of "general applicability" and — if not — whether such application was narrowly tailored to serve a compelling state interest under strict scrutiny.[111] Notably, this line of decisions affirmed that "traditional" Free Exercise principles continued to apply to pandemic-related restrictions, just the same as "traditional" Free Speech law.

Mask Mandates

Another prominent aspect of the commonwealth's response to the pandemic was to mandate the wearing of masks or face coverings. Like the gathering size limits, these mask mandates evolved with the severity of the pandemic. Beginning on May 6, 2020, a gubernatorial executive order required all persons except the very young and those affected by a medical condition to wear a mask: (1) when unable to maintain a distance of approximately six feet from other persons in a public place (indoor or outdoor); and (2) at all times in retail settings and on public transportation.[112] On Nov. 6, 2020, similar requirements were imposed on persons in public places regardless of their ability to maintain distance.[113] And, on April 30, 2021, similar requirements were imposed on persons in indoor public places and when attending an event or gathering at a public location regardless of their ability to maintain distance, as well as persons in outdoor public places when unable to maintain distance.[114] Like the gathering size limits, these mask mandates

101. 197 U.S. 11 (1905).

102. *Desrosiers*, 486 Mass. at 385. By the time of the SJC's decision in *Desrosiers*, the role of the *Jacobson* test in the coronavirus pandemic had become quite controversial. *See, e.g.,* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring in grant of application for injunctive relief) (disputing applicability of *Jacobson* to dispute involving religion clauses of First Amendment); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting from denial of application for injunctive relief) ("It is a considerable stretch to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration are challenged under the [religion clauses of the] First Amendment or other provisions not at issue in that case."); *see also* Delaney v. Baker, 511 F. Supp. 3d 55 (D. Mass. 2021) (applying *Jacobson* and traditional tiers of scrutiny in parallel, in case involving challenge to mask mandate under religion clauses of First Amendment).

103. *Desrosiers*, 486 Mass. at 390-92 (indirectly citing *Ward*, 491 U.S. at 791).

104. *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011) (counseling lower courts to interpret and apply each clause of the First Amendment in light of "the objectives and aspirations that underlie [that] right").

105. No. 20-cv-11641-RGS (D. Mass.).

106. Brown v. Ent. Merchants Ass'n. 564 U.S. 786, 790 (2011).

107. Boston Bit Labs, Inc. v. Baker, 11 F.4th 3 (1st Cir. 2021).

108. *See, e.g.,* Mitchell v. Newsom, 509 F. Supp. 3d 1195, 1201 (C.D. Cal. 2020) (generally applicable business closure order does not implicate Free Speech Clause, even when applied to tattoo parlors that concededly engage in protected conduct); Midway Venture LLC v. County of San Diego, 60 Cal. App. 5th 58, 83-87 (4th Div. 2021) (generally applicable order prohibiting live entertainment at restaurants does not implicate Free Speech Clause, even when applied to adult entertainment establishments that concededly engage in protected conduct).

109. So. Bay United Pentecostal Church v. Newsom, --- U.S. ---, 140 S. Ct. 1613 (May 29, 2020); Calvary Chapel Dayton Valley v. Sisolak, --- U.S. ---, 140 S. Ct. 2603 (Jul. 24, 2020); Roman Catholic Diocese of Brooklyn v. Cuomo, --- U.S. ---, 141 S. Ct. 63 (Nov. 25, 2020).

110. *Id.*

111. *Compare* So. Bay United Pentecostal Church, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief) (denying injunctive relief where "similar or more severe restrictions apply to comparable secular gatherings" as apply to gatherings at places of worship) *with* Roman Catholic Diocese of Brooklyn, 141 S. Ct. at 66 (ordering injunctive relief where gathering restrictions "single out houses of worship for especially harsh treatment.").

112. Governor's COVID-19 Order #31 (May 1, 2020).

113. Governor's COVID-19 Order #55 (Nov. 2, 2020).

114. Governor's COVID-19 Order #67 (Apr. 29, 2021).

could be superseded by applicable sector-specific rules.[115] And, during much of the state of emergency, these mask mandates were enforceable through civil fines and injunctions.[116]

Several *pro se* plaintiffs challenged Baker's mask mandates on free speech grounds, claiming that the mandates suppressed facial expression or inhibited the physical act of speaking.[117] Each of those lawsuits was dismissed for lack of justiciability without generating a decision on the merits of the free speech claim.[118]

But numerous free speech challenges to other states' mask mandates did generate decisions on the merits; those decisions decisively revealed that such mandates do not implicate the Free Speech Clause.[119] For example, a federal district court in Hawaii found that mask mandates "require specific conduct: wearing a mask in public," which "does not include a significant expressive element" because "[p] eople wearing masks can still speak."[120] Similarly, a federal district court in Minnesota found that an individual's choice not to wear a mask was not inherently expressive conduct, because it could easily be misunderstood by an observer to reflect that the individual was exempt from the mask mandate, or simply forgot his/her mask that day.[121] And a federal district court in New York rejected the plaintiffs' argument that a mask mandate violated the Free Speech Clause by obscuring their facial expressions and vocal tone, because "the use of facial expressions or vocal tone is not the conduct that drew the regulation" — the choice not to wear a mask is.[122] Like the district court in *Zaal Ventures,* these decisions illuminate the limits of First Amendment coverage by focusing on the conduct that drew sanction under a mask mandate — the simple, non-expressive choice not to wear a mask.

Conclusion

The coronavirus pandemic was an extraordinary time — perhaps (and hopefully) the most severe disruption of day-to-day life that most readers of this essay will ever experience. It is a credit to our legal institutions and to our constitutional system that the judiciary continued to operate, and the rule of law continued to apply, while the pandemic was ongoing.

As this essay has illustrated, the government's response to the pandemic disrupted the freedom of speech minimally, or not at all. The American experience in previous times of crisis suggests that this result was not preordained.[123] Part of the reason for this result in the pandemic of 2020–21 is courts' and lawyers' careful focus on the coverage of the First Amendment. As the pandemic First Amendment decisions revealed, regulations like eviction moratoria, gathering restrictions and mask mandates could be imposed in a way that protected public health without doing violence to the freedom of speech at all.

115. Governor's COVID-19 Order #55 at § 2(d) (Nov. 2, 2020); Governor's COVID-19 Order #67 at § 2(d) (Apr. 29, 2021).

116, Governor's COVID-19 Order #31 (May 1, 2020); Governor's COVID-19 Order #55 at § 4 (Nov. 2, 2020).

117. *See* Bechade v. Baker, No. 20-cv-11122-RGS, 2020 WL 5665554 (D. Mass.); Beaudoin v. Baker, No. 20-cv-11187-NMG (D. Mass.).

118. *Bechade*, 2020 WL 5665554 (D. Mass. Sept. 23, 2020); *Beaudoin*, No. 20-cv-11187 at ECF #49 (D. Mass. Mar. 25, 2021). In another case, a plaintiff alleged that application of Governor Baker's mask mandate at places of worship violated the Free Exercise Clause. Delaney v. Baker, 511 F. Supp. 3d 55 (D. Mass. 2021). That case was dismissed after the district court found such application to be "neutral and of general applicability," and to satisfy rational basis scrutiny under the Free Exercise Clause. *Id.* at 73-75.

119. Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 236-37 (D. Md. 2020); Stewart v. Justice, 502 F. Supp. 3d 1057, 1066 (S.D.W. Va. 2020); Minnesota Voters All. v. Walz, 492 F. Supp. 3d 822, 837-38 (D. Minn. 2020), appeal dismissed, No. 20-3072, 2020 WL 9211131 (8th Cir. Nov. 9, 2020); Denis v. Ige, 538 F. Supp. 3d 1063, 1078-79 (D. Haw. 2021); Zinman v. Nova Southeastern Univ., Inc., No. 21-CV-60723, 2021 WL 4025722, at *12-14 (S.D. Fla. Aug. 30, 2021), report & reco. adopted, 2021 WL 4226028 (S.D. Fla. Sept. 15, 2021); L.T. v. Zucker, No. 1:21-CV-1034, 2021 WL 4775215, at *4-5 (N.D.N.Y. Oct. 13, 2021); *but see* Stepien v. Murphy, 574 F. Supp. 3d 229, 243- (D.N.J. Dec. 7, 2021) (assuming for sake of argument that claim that in-school mask mandate "physically interferes with actual speech" does implicate First Amendment, although "the matter is not free from doubt"), appeal filed No. 21-3290 (3d Cir. Dec 16, 2021).

120. *Denis*, 538 F. Supp. 3d at 1079.

121. *Minnesota Voters All.,* 492 F. Supp. 3d at 837-38.

122. *Zucker,* 2021 WL 4775215, at *5.

123. *See* Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (1918) (criminalizing utterance or publication of, among other things, words "intended to incite, provoke, and encourage resistance to the United States" in its war effort).

Case Comment

Commonwealth v. Mora, 485 Mass. 360 (2020)

In an iconic scene from the movie *Ferris Bueller's Day Off*,[1] Ferris, Sloane and Cameron visit (among other stops that day) the Chicago Art Institute. There, Cameron stares deeply at Georges Seurat's Pointillist masterwork, "Sunday Afternoon on the Island of La Grande Jatte," which depicts Parisians enjoying a park on the banks of the River Seine. Cameron's focus begins on the entirety of the painting's scene, but soon narrows to a young girl walking hand in hand with her mother, narrows again to the young girl's face, and finally, as he loses perspective of the painting's subject matter altogether, narrows to the individual points of paint on the canvas. When the movie was released in 1986, it seems unlikely that the movie's writer and director, John Hughes, could have imagined that the scene would be used to introduce a major development in the area of constitutional search and seizure law. Yet, 35 years and immeasurable technological advancements later, the scene's depiction of how single points of paint, aggregated, can combine to create a picture proves an apt illustration for an emerging theory of constitutional search and seizure law: the "mosaic theory." Under this theory, the aggregation of information obtained by government activity can be sufficient to trigger a constitutionally recognized expectation of privacy, and thus a search for Fourth Amendment and art. 14 purposes, even if those individual pieces of information, standing alone, would not. In *Commonwealth v. Mora*,[2] the Supreme Judicial Court (SJC), applying this burgeoning theory, concluded that law enforcement's collection of video surveillance of the defendants' homes over an extended period of time, in the aggregate, infringed on the defendants' reasonable expectation of privacy.

I. The Facts

Mora involved the attorney general's investigation of an alleged drug distribution network over a several-month period.[3] After an undercover officer made a controlled purchase of oxycodone and fentanyl from the defendant, investigators installed a hidden surveillance camera on a pole near the defendant's home that afforded a view of the front of the defendant's home, the sidewalk next to it, and the adjacent street.[4] As the investigation progressed, officers installed four more hidden video cameras on public telephone and electrical poles, three of which were directed at homes of alleged members of the drug conspiracy.[5] Each of the cameras "recorded uninterruptedly, twenty-four hours a day, seven days a week," and captured, without limitation, "all persons coming and going from the targeted residences."[6] While none of the cameras had audio, infrared, or night vision capabilities, investigators could "remotely zoom and angle the cameras in real-time."[7] The camera positioned near defendant Mora's home captured 169 days of footage, while the camera near another alleged conspirator's home captured 62 days of footage.[8] "While the cameras were operating, investigators could view the footage remotely using a web-based browser"; "the footage was also saved in a searchable format, allowing investigators to review particular previously-recorded events."[9] All "data gathered through this surveillance was stored on a State police server, and later preserved on a removable computer hard drive."[10]

Based in part on evidence obtained from the pole cameras, and in conjunction with numerous arrests, investigators obtained search warrants for the residences of multiple defendants.[11] As a result of the searches, 12 defendants were indicted for drug-related offenses.[12] Multiple defendants moved to suppress the pole camera footage, as well as other evidence derived from that footage.[13] A Superior Court judge denied the motions on the ground that the pole camera surveillance did not intrude on the defendants' reasonable expectation of privacy and thus did not amount to a search in the constitutional

1. *Ferris Bueller's Day Off* (Paramount Pictures 1986).
2. Commonwealth v. Mora, 485 Mass. 360 (2020). Publication of this comment was held until the First Circuit issued its opinion in United States v. Moore-Bush (*Moore-Bush II*), 36 F.4th 320 (1st Cir. 2022), in which the First Circuit addressed substantially the same issue as was addressed in *Mora*. *Moore-Bush II* is discussed *infra*.
3. *Id.* at 361.
4. *Id.* at 361-62.
5. *Id.* at 362.
6. *Id.*
7. *Id.*
8. Commonwealth v. Mora, 485 Mass. 360, 362 (2020).
9. *Id.*
10. *Id.*
11. *Id.* at 362-63.
12. *Id.*
13. *Id.* at 363.

sense.[14]

The SJC thus confronted whether the recordings made by the pole cameras invaded the defendants' constitutionally protected privacy interest. To address the question, the court applied the nascent "mosaic theory." Before detailing the court's application of the theory to the pole cameras at issue in *Mora*, and to provide context for the court's decision, a brief digression to outline the background of the mosaic theory is in order.

II. The Mosaic Theory

The mosaic theory emerged as courts struggled to reconcile three seemingly competing principles: that a constitutional search, for Fourth Amendment and art. 14 purposes, takes place when government conduct intrudes on a person's reasonable expectation of privacy;[15] that, under long-established precedent, a person does not have an expectation of privacy in that which they expose to the public[16] or is held by a third party;[17,18] and the modern-day reality that technological advances have permitted law enforcement and third parties to harvest and store mountains of digital personal data.[19] Tasked with determining where evidence from modern, ever-advancing technology and surveillance tools fits within these parameters, courts began to warm to the theory that individuals maintain a reasonable expectation of privacy in aggregated quantities of information even if they do not have such an expectation in an individual piece of information.[20] "When collected for a long enough period," the theory posits, "'the cumulative nature of the information collected implicates a privacy interest on the part of the individual who is the target of the tracking.'"[21] Thus, the "mosaic theory": "as the analogy goes, the color of a single stone depicts little, but by stepping back one can see a complete mosaic."[22]

As the basis for applying this new theory, courts harkened to the motivating purposes of the Fourth Amendment and art. 14, that is, the need "'to secure the privacies of life against arbitrary power,'" and to "'place obstacles in the way of a too permeating police surveillance.'"[23] However, and notwithstanding courts' references to these motivating purposes, the mosaic theory represents a departure from the traditional Fourth Amendment and art. 14 analysis. The traditional analysis "takes a snapshot of each discrete step and assesses whether that discrete step at that discrete time constitutes a search."[24] "By aggregating conduct rather than looking to discrete steps, the mosaic theory offers a fundamental challenge" to the traditional Fourth Amendment and art. 14 analysis.[25]

As a matter of art. 14 jurisprudence, the SJC first sketched the theory in *Commonwealth v. Rousseau*.[26] In that case, the court recognized that, while electronic devices could be used to monitor an individual's movements in public to the extent the same could be achieved through visual surveillance, "the government's [encyclopedic and effortless] contemporaneous electronic monitoring of one's comings and goings in public places [by attaching a GPS device to the suspect's vehicle] invades one's reasonable expectation of privacy."[27]

The court next applied a version of the theory in *Commonwealth v. Augustine*.[28] In *Augustine*, the police acquired, without a search warrant, the defendant's cellular site location information (CSLI) that was obtained, maintained and used by a third party, the cellular service provider.[29] The court held that, notwithstanding the line of cases that hold that a person does not have an expectation of privacy in information provided to and held by a third party, it is objectively reasonable for individuals to expect to be free from sustained electronic monitoring of their public movements.[30,31]

14. Commonwealth v. Mora, 485 Mass. 360, 363 (2020).

15. Commonwealth v. Almonor, 482 Mass. 35, 40 (2019) (internal citations omitted).

16. Katz v. United States, 389 U.S. 347, 361 (1967); Commonwealth v. Augustine, 467 Mass. 230, 242 (2014).

17. United States v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979); Commonwealth v. Gosselin, 486 Mass. 256 (2020), *cert. denied,* 141 S.Ct. 2534 (U.S. Apr. 19, 2021) (No. 20-7241).

18. David Gray and Danielle Keats Citron, "A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy," 14 N.C. J.L. & Tech. 381, 402 (2013) ("[A]dopting a mosaic approach to the Fourth Amendment may require abandoning or dramatically altering two important lines of Fourth Amendment law: the public observation doctrine and the third-party doctrine").

19. *E.g.,* Paul Ohm, "The Many Revolutions of *Carpenter*," 32 Harv. J. Law & Tech. 357, 362 (2019); Orin S. Kerr, "The Mosaic Theory of the Fourth Amendment," 111 Mich. L. Rev. 311, 315-17 (2012).

20. United States v. Maynard, 615 F.3d 544, 558 (D.C. Cir. 2010), *cert. denied,* 562 U.S. 1073 (U.S. Nov. 29, 2010) (No. 10-7102) ("[T]he whole of one's movements is not exposed *constructively* even though each individual movement is exposed, because that whole reveals more — sometimes a great deal more — than the sum of its parts"). *Maynard* is generally considered to be one of the first decisions to recognize the mosaic theory, and eventually went on to become United States v. Jones, 565 U.S. 400, 404 (2012), in which the Supreme Court held that the government's installation of a GPS device on the defendant's car constituted a trespass that required a warrant. *See* Matthew B. Kugler and Lior Jacob Strahilevitz, "Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory," 2015 Sup. Ct. Rev. 205, 205-06 (2015).

21. Commonwealth v. Augustine, 467 Mass. 230, 253 (2014).

22. Commonwealth v. McCarthy, 484 Mass. 493, 504 (2020).

23. Carpenter v. United States, 138 S.Ct. 2206, 2214 (2018) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). In *Carpenter*, the U.S. Supreme Court concluded that 152 days', and 127 days', worth of cellular site location information (CSLI) intruded upon a reasonable expectation of privacy. *Id.* at 2217. The court reached this conclusion, despite the fact that the records were held by a third party, because individuals have a reasonable expectation of privacy in the whole of their movements, and the unique nature of the aggregate CSLI is incompatible with the motivating purposes underlying the Fourth Amendment. *Id.* at 2217-19.

24. Kerr, *supra* note 19, at 314.

25. *Id.*

26. Commonwealth v. Rousseau, 465 Mass. 372 (2013).

27. *Id.* at 382.

28. Commonwealth v. Augustine, 467 Mass. 230 (2014).

29. *Id*. at 233-34. Although the police did not obtain a search warrant for the defendant's CSLI, they had obtained an order pursuant to 18 U.S.C. § 2703(d). *Id.* The showing necessary to obtain a § 2703(d) order is less rigorous than the probable cause necessary to secure a search warrant. *Id.* at 236 (describing the standard required for a § 2703(d) order as "'essentially a reasonable suspicion standard'" (quoting In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d), 707 F.3d 283, 287 (4th Cir. 2013))).

30. *Id.* at 247-48.

31. The Supreme Judicial Court (SJC) has since relied on the *Augustine* analysis to hold that a person has a reasonable expectation of privacy in text messages maintained by a third-party service provider, *see* Commonwealth v. Fulgiam, 477 Mass. 20, 34 (2017), and that causing a person's cell phone to reveal its real-time location intrudes on a reasonable expectation of privacy, *see* Commonwealth v. Almonor, 482 Mass. 35, 40-48 (2019). More recently, the SJC held in Commonwealth v. Henley, 488 Mass. 95, 110 (2021), that "an extensive record of the individual's MBTA activity could constitute a search under the mosaic theory." In that case, however, the two days' worth of "Charlie Card" (which is "a reusable card that can be loaded with cash value to pay bus and subway fares") data collected by the Massachusetts Bay Transportation Authority "did not constitute an aggregation of data points that revealed extensive details about [the defendant's] movements, much less a profile of his life." *Id.* at 97 n.2, 113-14.

More recently (indeed, just months before the court's decision in *Mora*), in *Commonwealth v. McCarthy*,[32] the court explicitly adopted the mosaic theory.[33] In *McCarthy*, the court concluded that aggregated information collected by automatic license plate readers (ALPRs) installed and maintained by the state police could, over a long enough period of time, invade a constitutionally recognized expectation of privacy.[34] Applying this theory to ALPRs in general, the court concluded that "[w]ith enough cameras in enough locations, the historic location data from an ALPR system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes. The one-year retention period indicated in the Executive Office of Public Safety and Security retention policy certainly is long enough to warrant constitutional protection."[35] The court cautioned, however, that the analysis is "not an exercise in counting cameras"; it should focus "on the extent to which a substantial picture of the defendant's public movements are revealed by the surveillance."[36] As part of the analysis, the court said, it matters where ALPRs are placed; for example, ALPRs placed near constitutionally sensitive places, like a home or place of worship, "reveal more of an individual's life and associations than one trained on an interstate highway," just as a network of cameras trained on every residential side street will be more invasive than ones limited to major highways open to innumerable destinations.[37] Applying these factors on the record before it, the court concluded that the defendant had failed to establish that the placement of four cameras at two fixed locations at the ends of the Bourne and Sagamore bridges was a constitutional search.[38] The use of these ALPRs was more akin to the traditional surveillance technique of a police officer taking down a person's license plate number, which does not constitute a search.[39] Moreover, the limited number of cameras and their placements at the ends of the Bourne and Sagamore bridges only provided the police with the general information that the defendant had driven, or was driving, on or off of Cape Cod.[40] "Such a limited picture does not divulge 'the whole of [the defendant's] physical movements.'"[41]

III. The court's holding in *Mora*

In *Mora*, the court, using the contours of these cases as a guide, applied the mosaic theory to the pole cameras. Importantly, the court announced at the outset that it was deciding the case under art. 14, not the Fourth Amendment.[42] With this ground rule laid, the court first determined that the cameras that captured surveillance of the defendants *away* from their homes "did not collect aggregate data about the defendants over an extended period."[43] Of the surveillance recorded by these cameras, which captured the defendants, at most, on a few occasions *away* from their homes, the court said, "[s]uch short-term, intermittent, and nontargeted video recording of a person away from his or her own home is a little different from being captured by the security cameras that proliferate in public spaces."[44]

The court concluded, however, that the long-term and continuous surveillance of the defendants' homes "call[ed] for a different analysis."[45] "As [the court has] assessed the constitutional significance of surveillance technologies, [it has] not lost sight of the traditional protections afforded to constitutionally sensitive areas such as the home."[46] The court focused on the relevant privacy interest, that is, "not in a person's movements themselves, but, rather, 'a highly detailed profile, not simply of where we go, but by easy inference, of our associations — political, religious, amicable and amorous, to name only a few — and of the pattern of our professional and avocational pursuits.'"[47] Measured against this privacy interest, the court reasoned, the pole cameras at issue were like the GPS in *Rousseau* and CSLI in *Augustine*:

> [E]ven when pole cameras do not see into the home itself, by tracking who comes and goes over long periods of time, investigators are able to infer who is in the home, and with whom the residents of the home meet, when, and for how long. If the home is a 'castle,' a home that is subjected to continuous, targeted surveillance is a castle under siege. Although its walls may never be breached, its inhabitants certainly could not call themselves secure.[48]

To be sure, persons passing by the defendants' homes would have had the same view as did the cameras, but, in the court's estimation, "it seems unlikely that investigators could have maintained in-person observation over the course of multiple months without the defendants becoming aware of their presence."[49] Moreover, "these pole cameras captured information that a police officer conducting in-person surveillance could not . . . the footage collected by the cameras was stored digitally, in a searchable format, such that

32. Commonwealth v. McCarthy, 484 Mass. 493 (2020).

33. For a thorough and detailed analysis of the court's decision in *McCarthy, see* Patrick Hanley, "Applying the Mosaic Theory to Determine Whether Use of Automatic License Plate Readers Constitutes a Search, *Commonwealth v. McCarthy*," 484 Mass. 493 (2020), 102 Mass. L. Rev. 14 (2020).

34. *McCarthy,* 484 Mass. at 506.

35. *Id.*

36. *Id*.

37. *Id.*

38. *Id.* at 509.

39. *Id.* at 508.

40. Commonwealth v. McCarthy, 484 Mass. 493, 508-09 (2020).

41. *Id.* (quoting Carpenter v. United States, 138 S.Ct. 2206, 2217 (2018)).

42. Commonwealth v. Mora, 485 Mass. 360, 365 (2020). For reasons discussed *infra*, this distinction is important, as three justices of an evenly divided panel of the First Circuit Court of Appeals have held that, on facts similar to those presented in *Mora*, the government's prolonged use of pole camera surveillance did not intrude on a reasonable expectation of privacy recognized by the Fourth Amendment. *See generally* United States v. Moore-Bush (*Moore-Bush II*), 36 F.4th 320, 320 (1st Cir. 2022).

43. *Mora,* 485 Mass. at 370.

44. *Id.* at 369.

45. *Id.* at 370.

46. *Id.*

47. *Id.* at 372-73 (quoting Commonwealth v. Connolly, 454 Mass. 808, 834 (2009) (Gants, J., concurring) (internal citations omitted).

48. *Id.* at 371-72.

49. Commonwealth v. Mora, 485 Mass. 360, 374 (2020).

investigators later could comb through it at will."[50] In fact, the court said, "'recording often will be the *only* way to create a mosaic, since the ability to construct a mosaic depends on the compilation of enough data points — more than human memory can hold — to yield the big picture.'"[51] Taking all of these factors into account, the court concluded that, while a briefer period of pole camera use, or one that had not been targeted at a home, might not implicate the same reasonable expectation of privacy, here, the defendants had established that the prolonged surveillance of their homes had intruded on their reasonable expectation of privacy.[52]

IV. Adding to the mosaic

The court's opinion in *Mora* is noteworthy for several reasons.

First, art. 14 jurisprudence "has developed to accommodate a home's place in the hierarchy of protected interests,"[53] and *Mora* demonstrates that the SJC has concluded that the mosaic theory is no exception. Significant to the court's conclusion that the surveillance camera footage intruded on the defendants' reasonable expectation of privacy was that the cameras were directed at the defendants' homes.[54] Indeed, that those cameras had been set up to target the defendants' homes may have been *the* factor that transformed the series of stones into a mosaic. After all, the court concluded that the pole cameras set up away from the defendants' homes did not intrude on the defendants' reasonable expectation of privacy, declaring that being captured by those cameras was "little different from being captured by the security cameras that proliferate in public spaces."[55] This point is buttressed by the court's pointed observation in *McCarthy* that "where the ALPRs are placed matters . . . ALPRs near constitutionally sensitive locations — the home . . . reveal more of an individual's life and associations."[56] As noted, the court in *McCarthy* concluded that the ALPRs in that case, which were not placed near the defendant's home, did not intrude on a reasonable expectation of privacy.[57]

Mora thus makes the point that a mosaic can be created based on surveillance of a fixed point such as a home, just as a mosaic can be created based on historical data of a person's movements over an extended period of time through the use of GPS or CSLI. Left for another day is the question of whether long-term video surveillance of a location other than a person's home, such as a place of work, could infringe on an expectation of privacy protected by art. 14.

Second, *Mora* — and cases decided both before and since *Mora* — highlights that, under art. 14, the mosaic theory — as it now stands — appears to apply to aggregated information that is obtained through enhanced or advanced technology. Indeed, in adopting the mosaic theory in *McCarthy*, the court referred to the privacy interest that is recognized "[w]hen new technologies drastically expand police surveillance of public space."[58] Similarly, the court, applying the mosaic theory in a case involving aggregated information obtained through the use of an MBTA "Charlie Card," again stated that "technological developments in surveillance of public space require us to take a careful look at society's reasonable expectation of privacy."[59] More recently, the court in *Commonwealth v. Perry* applied the mosaic theory to cellular tower "dumps," which provide officers with CSLI from every device that connected to a particular cell site within a specified period, allowing law enforcement to infer that owners of those devices "most likely were present in that site's coverage area during that time."[60] In holding that the mosaic theory applied to tower dumps, the court explained that "where police use technology to engage in long-term surveillance, [the court has] analyzed their actions in the aggregate."[61] Indeed, the court said in *Perry* that "[i]n determining whether a series of acts constitutes a search under the mosaic theory, the court's "limited precedent" has "primarily [] focused on three general concerns: the extent to which the surveillance reveals the whole of an individual's public movements; the character of the information obtained; and whether the surveillance could have been achieved using traditional law enforcement techniques."[62]

The corollary thus appears to be that, when surveillance is conducted without the aid of enhanced or advanced technology, the principle that law enforcement officers are not required to shield their eyes to that which is publicly on view holds true; it is only "when the duration of digital surveillance drastically exceeds what would have been possible with traditional law enforcement methods, that surveillance constitutes a search under art. 14."[63] Similarly, the court recently reaffirmed that a person does not have a reasonable expectation of privacy in documents held by a third party that, unlike CSLI and "other modern technological information," do not present the government the opportunity to go "rummaging through

50. *Id*. at 375.

51. *Id.* (quoting Rachel Levinson-Waldman, "Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public," 66 Emory L.J. 527, 568 (2017)).

52. *Id*. at 375-76.

53. Commonwealth v. Leslie, 477 Mass. 48, 54 (2017).

54. *See Mora*, 485 Mass. at 371-72 ("Like CSLI or GPS person tracking, targeted long-term pole camera surveillance of the area surrounding a residence has the capacity to invade the security of the home . . . even when pole cameras do not see into the home itself, by tracking who comes and goes over long periods of time, investigators are able to infer who is in the home, and with whom the residents of the home meet, when, and for how long").

55. *Id.* at 369.

56. Commonwealth v. McCarthy, 484 Mass. 493, 506 (2020).

57. *Id.* at 508-09.

58. *Id.* at 502.

59. Commonwealth v. Henley, 488 Mass. 95, 108 (2021). While the court had *Henley* under advisement, the legislature passed a bill, which the governor signed into law on Jan. 14, 2021, requiring that all MBTA police searches of such data be conducted pursuant to a warrant or exigent circumstances. *See* St. 2020, ch. 383, § 12.

60. Commonwealth v. Perry, 489 Mass. 436, 440 (2022). "Tower dumps have proved particularly useful in investigating serial crimes, because they enable investigators to isolate individual devices that were near the scene of multiple offenses." *Id.*

61. *Id.* at 444.

62. *Id.* 445-46.

63. Commonwealth v. McCarthy, 484 Mass. 493, 500 (2020). Recently, the SJC recognized that "the constitutional solicitude for conversational and associational privacy extends to the realm of social media." Commonwealth v. Carrasquillo, 489 Mass. 107, 115 (2022). On the facts of the case, however, the court held that the defendant had failed to show that he had a subjective or objective expectation of privacy in videos he had posted that were viewed by a law enforcement officer who "friended" the defendant on a social media platform under a fictitious name. *Id.* at 117-27.

the complex digital trails and location records created merely by participating in modern society."[64]

Left unresolved is how much, and what kind, of enhanced or advanced technology will create a mosaic. As Professor Orin S. Kerr has written, the mosaic theory is not just a new "theory" of an existing model of Fourth Amendment and art. 14 analysis; it is a new analysis altogether.[65] While the public, the courts, the bar and law enforcement can hypothesize and debate about what kind of conduct may (and should) fall within the theory's parameters, as of this writing, we have but a few concrete examples of what might create a mosaic, leaving us with many questions.

A few hypothetical illustrations will suffice. *Mora* establishes that the government's installation and use of long-term surveillance video footage of a home that can be archived and searched may constitute a search; would the same be true if the surveillance was not in a searchable format? What if the long-term surveillance footage that was digitally archived in a searchable format was not installed, used or maintained by the police, but by a business owner across the street from the target that only incidentally captured the target's home? What if that business owner presented the video to law enforcement without law enforcement asking for it? Of what quality does the video have to be to qualify as a mosaic? After all, if the video is of such poor quality that it does not permit the identification of a person's discernible features, license plate numbers or other distinctions, does it actually create a mosaic? These questions extend beyond just video surveillance. If the police expended the resources to have agents surreptitiously stationed across the street from the defendant's home, around the clock, for 169 days, during which time the agents took photographs of all comings and goings and made handwritten notes in a notebook, would such surveillance create a constitutionally implicated mosaic? What if those hypothetical agents across the street supplemented their mostly traditional surveillance with a small amount of advanced or enhanced technology surveillance?[66] And, what of advanced or enhanced surveillance that is collected, but never put into a single database or aggregated?

These questions take on practical significance in a society that is struggling to balance everyday conveniences made possible with new technology with the corresponding amount of public and private data that one gives up by partaking in modern-day society.[67] These questions are also equally significant to law enforcement, as they affect the extent to which law enforcement is able to rely on information gained by enhanced and advanced technology. Given that the contours of the mosaic theory are still taking shape, law enforcement will struggle with when and where they need to get a warrant and may forego some types of surveillance or reliance on some types of information.[68,69] The sticking point is that, many times, it is that surveillance or information that is necessary to reach probable cause in the first place.[70]

To some of these questions, the court may be able to provide clear ex ante rules. For example, in *Commonwealth v. Estabrook*,[71] the court held that six hours or less of CSLI does not infringe on a person's reasonable expectation of privacy, ostensibly because such a short period of time cannot create enough information to create a mosaic.[72] Nonetheless, the answers to a great many of the unanswered questions are fact-specific and could hinge on matters of minute degree.[73] As a result, the contours of what amount of enhanced or advanced technology will implicate reasonable expectations of privacy will have to wait until we get more of a body of case law.[74] Given the speed with which these issues are reaching the courts, the outlines of this new body of law will gradually come into focus.[75] To borrow the analogy, *Mora* and the cases on which it relies are the first stones in a mosaic, and with each subsequent case, the finer details of that mosaic will become more defined.

Finally, whether the mosaic theory will be recognized under the Fourth Amendment to the U.S. Constitution — or at least as fully as the SJC has recognized it — appears to be an open question. In certain circumstances, the protections afforded under art. 14 may differ from those afforded under the Fourth Amendment; at present, the protections afforded against the prolonged use of surveillance cameras may be just such an example.[76]

In *United States v. Moore-Bush* ("*Moore-Bush I")* a three-justice panel of the First Circuit in 2020 considered a set of facts significantly similar to those in *Mora* and held that the long-term use of pole camera surveillance did not infringe on an expectation of

64. Commonwealth v. Gosselin, 486 Mass. 256, 264 (2020), *cert. denied,* 141 S.Ct. 2534 (U.S. Apr. 19, 2021) (No. 20-7241) (internal citations omitted).

65. Kerr, *supra* note 19, at 314.

66. *See* Gray and Citron, *supra* note 18, at 405.

67. As just one example, *see* Lauren Bridges, "Amazon's Ring is the Largest Civilian Surveillance Network the US Has Ever Seen," The Guardian (May 18, 2021), https://www.theguardian.com/commentisfree/2021/may/18/amazon-ring-largest-civilian-surveillance-network-us.

68. *See* Kerr, *supra* note 19, at 313-14; Gray and Citron, *supra* note 18, at 409-10.

69. Indeed, Chief Justice Ralph D. Gants noted this difficulty in his concurring opinion in *McCarthy*, and proposed as a possible analytical framework that law enforcement should be required to seek a warrant for a mosaic of a person's movements based on probable cause, but for a smaller mosaic, should be required to seek a court order based upon a showing of reasonable suspicion based on specific and articulable facts that the person has, is or was about to commit a crime and reasonable grounds to believe that the data will be relevant and material to the investigation. Commonwealth v. McCarthy, 484 Mass. 493, 514 (2020) (Gants, CJ., concurring). This approach, Chief Justice Gants suggested, would ensure that a search would not be found unconstitutional if law enforcement had obtained the appropriate court order. *Id.*

70. *See* Gray and Citron, *supra* note 18, at 409 ("There is no doubt that this line-drawing problem is serious. Among the most important burdens of any Fourth Amendment standard is that it must provide clear guidance to police officers and lower courts").

71. Commonwealth v. Estabrook, 472 Mass. 852 (2015).

72. *Id.* at 858.

73. In *McCarthy*, the court explicitly declined to establish a bright line rule for when the use of ALPRs constitutes a search, acknowledging that its declining to do so could bring confusion. Commonwealth v. McCarthy, 484 Mass. 493, 509 n.15 (2020). The court noted that, as its cases develop in this area, the "constitutional line gradually and appropriately will come into focus." *Id.*

74. *Id.*

75. Indeed, between the time that the court issued its opinion in *Mora* and the publication of this comment, the SJC issued its opinion in *Henley* regarding the use of Charlie Card data, Commonwealth v. Henley 488 Mass. 95 (2021), and in *Perry* regarding cell tower dumps. Commonwealth v. Perry, 489 Mass. 436 (2022).

76. *See, e.g.,* Commonwealth v. Rodriguez, 430 Mass. 577, 584 (2000).

privacy that society would recognize as reasonable.[77] The court subsequently granted a hearing en banc,[78] and in its ensuing 129-page opinion ("*Moore-Bush II*"), split on the issue.[79] Three justices held that the police's prolonged use of pole camera surveillance of the defendant's home intruded on a reasonable expectation of privacy secured by the Fourth Amendment.[80] In reaching its conclusion, these justices drew on the mosaic theory and cited principles on which the SJC relied in *Mora*: that the Fourth Amendment is aimed at preventing too permeating a police presence and preserving that degree of privacy against government that existed when the Fourth Amendment was enacted;[81] that long-term surveillance video permits law enforcement to do with technology that which would be difficult with traditional surveillance techniques;[82] and that the long-term surveillance of the front of one's home can intrude on a reasonable sense of security.[83] This concurring opinion also drew support from the Supreme Court's decision in *United States v. Carpenter* that 152 days' and 127 days' worth of aggregate CSLI was incompatible with the motivating purposes of the Fourth Amendment and thus intruded upon the defendants' reasonable expectation of privacy in the whole of their movements.[84] Nevertheless, these three justices reversed the order of the Federal District Court allowing the defendants' motion to suppress, holding that the police acted in good faith based on First Circuit precedent when they set up the pole surveillance camera.[85]

Three other justices held that the use of the long-term pole camera surveillance did not constitute a search under the Fourth Amendment. In reaching their conclusion, these justices hewed to the "longstanding fundamental proposition of Fourth Amendment law, that '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'"[86] These justices also rejected the argument that the Supreme Court's decision in *Carpenter* had altered the analysis, distinguishing the public nature of the comings and goings captured by the pole cameras in *Moore-Bush II* from the retrospective records of people's movements created by CSLI that so concerned the court in *Carpenter*.[87] They also noted that the Supreme Court in *Carpenter* specifically distinguished the CSLI at issue there from "conventional surveillance techniques and tools [which it was not calling into question], such as security cameras."[88] These concurring justices are not alone in their determination. Both the Sixth and Seventh circuits have similarly held that long-term pole camera surveillance does not implicate a constitutionally recognized expectation of privacy.[89]

The SJC in *Mora* considered and rejected the rationale underlying the conclusion that long-term pole camera surveillance does not implicate a constitutionally protected privacy interest, stating that its "analysis under art. 14 differs substantially from the Fourth Amendment analysis in *Moore-Bush* [I]."[90] Far from concluding that the "'unrelenting 24/7, perfect' nature of the pole camera surveillance"[91] had no impact on the constitutional analysis, the SJC relied on its holding in *McCarthy* that "'when the duration of digital surveillance drastically exceeds what would have been possible with traditional enforcement methods, that surveillance constitutes a search under art. 14.'"[92] Whether the mosaic theory will be formally recognized as a matter of Fourth Amendment jurisprudence — and if so, whether long-term pole camera surveillance would fall within its ambit — is thus a question to which lower courts, the bar, law enforcement and the public will continue to await an answer.

— Hon. Zachary Hillman

77. *See generally* United States v. Moore-Bush, 963 F.3d 29 (1st Cir. 2020).

78. Publication of this comment was held pending the First Circuit's en banc opinion in *Moore-Bush II.*

79. United States v. Moore-Bush *(Moore-Bush II*), 36 F.4th 320 (1st Cir. 2022). The First Circuit granted an en banc hearing after a three-judge panel had held in United States v. Moore-Bush, 963 F.3d 29 (1st Cir. 2020), that the long-term pole camera surveillance did not constitute a search for Fourth Amendment purposes. In reaching this conclusion, the First Circuit relied on the following principles as established by precedent: "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"; "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares"; and that "conventional" surveillance techniques — like surveillance cameras — do not intrude on an expectation of privacy recognized by the Fourth Amendment. United States v. Moore-Bush, 963 F.3d at 39 (citing United States v. Bucci, 582 F.3d 108 (1st Cir. 2009)).

80. *Moore-Bush* (*Moore-Bush II*), 36 F.4th at 337 (Barron, C.J., Thompson, Kayatta, JJ., concurring).

81. *Id.* at 360.

82. *Id.* at 343.

83. *Id.* at 336-37.

84. *Id.* at 325-26.

85. *Id.* at 359-60. In reaching this conclusion, these justices noted that the First Circuit had held in United States v. Bucci, 582 F.3d 108 (1st Cir. 2009), that the use of pole camera surveillance did not constitute a search under the Fourth Amendment. *Id.*

86. *Moore-Bush* (*Moore-Bush I*), 36 F.4th at 363 (Lynch, Howard, Gelpi, JJ., concurring) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

87. *Id.* at 364-65.

88. *Id*. at 363 (quoting *Carpenter*, 138 S.Ct. 2206, 2220 (2018)).

89. *See* United States v. May-Shaw, 955 F.3d 563, 567 (6th Cir. 2020), *cert. denied,* 141 S.Ct. 2763 (U.S. June 14, 2021) (No. 20-6905); United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021). The Supreme Court has recently denied the defendant's petition for writ of certiorari in *Tuggle*. Tuggle v. United States, 142 S.Ct. 1107 (2022).

90. Commonwealth v. Mora, 485 Mass. 360, 373 n.13 (2020).

91. *Id.* (quoting United States v. Moore-Bush, 963 F.3d 29, 38 n.8 (1st Cir. 2020)).

92. *Id.* (quoting Commonwealth v. McCarthy, 484 Mass. 493, 500 (2020)).

Book Review

Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy

By Adam Jentleson, Liveright Publishing Company (2021), 325 Pages

On Jan. 13, 2022, the House of Representatives, on a straight party-line vote, passed the John Lewis Voting Rights Act and the Freedom to Vote Act, two pieces of legislation designed to remedy weaknesses in the nation's election laws that manifested themselves during the tumultuous 2020 election.[1] In the Senate, the bills were combined into a single measure. Because the Senate was evenly divided between Democrats, who supported the bill, and Republicans, who opposed it, passage required 50 votes plus the tie-breaking vote of Kamala Harris in her role as Senate president.

Before a vote could be taken, though, Democrats had to contend with a filibuster, the product of a Senate rule that, if invoked, requires 60 votes to end debate on a bill and allow it to proceed to a vote on the merits. Republicans, who opposed the legislation, had invoked the rule, and Democrats knew that they could not muster the 60 votes they needed to move the bill to a vote on the merits.

Another Senate rule, though, provides that most Senate rules, the filibuster rule included, can be changed or abolished by a simple majority vote. Indeed, that had happened twice in the recent past. When Republicans repeatedly deployed the filibuster to prevent votes on confirmation of President Barack Obama's nominees to the federal bench, Democrats, who at the time held a Senate majority, exercised the so-called "nuclear option" by voting to make filibusters inapplicable to judicial appointments except appointments to the Supreme Court.[2] Making good on promises they made in opposing Democrats' use of the nuclear option on that occasion, Republicans used the same option to remove the filibuster from consideration of Supreme Court nominees when they gained control of the Senate three years later.[3]

On this occasion, though, two Democratic senators, Kyrsten Sinema and Joe Manchin, blocked the path to the 50 votes the Democrats needed. Both based their opposition on preservation of minority rights. Explaining her opposition, Senator Sinema gave an extended speech on the Senate floor in which she voiced her strong support for both bills "because these strengthen Americans' access to the ballot box, and they better ensure that Americans' votes are counted fairly."[4] But, she said, and the "but" was important, "there was no need for [her] to restate [her] long-standing support for the 60-vote threshold to pass legislation." That threshold, she continued, was an essential device for protecting "our country from wild reversals in federal policy"[5] and ensuring that "millions of Americans, represented by the minority party, have a voice in the process" by which legislation is passed.[6]

A week later, with the legislation still pending, Senator Manchin voiced a similar sentiment in a speech he made to his Senate colleagues. The filibuster, he said, "plays an important role in stabilizing our democracy from the transitory passions of the majority and respecting the input of the minority in the Senate. . . . [P]rotecting the role of the minority, Democrat or Republican, has protected us from the volatile political swings that we have endured over the last 233 years."[7]

With both senators opposed to changing the filibuster rule, passage of the voting rights legislation was impossible. Consequently, the legislation died, not because a majority of senators opposed it, but because a supermajority could not be mustered to let a vote begin.

That is the recurring problem with which Adam Jentleson thoughtfully deals in *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*. Among many other things, Jentleson, now a columnist for *GQ* magazine and an op-ed contributor to *The New York Times* and *The Washington Post*, was the former deputy chief of staff to Sen. Harry Reid. He knows the Senate well and, in this highly readable and richly annotated account

1. PBS News Hour, https://www.pbs.org/newshour/politics/watch-live-house-votes-on-new-voting-rights-legislation (Jan. 13, 2022, 10:58 AM).

2. Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy* 119 (2021).

3. *Id*. at 120.

4. 168 Cong. Rec. S9, 207 (daily ed. Jan. 13, 2022) (statement of Sen. Kyrsten Sinema).

5. *Id.*

6. *Id.*

7. 168 Cong. Rec. S11, 316 (daily ed. Jan. 19, 2022) (statement of Sen. Joseph Manchin).

of the filibuster's origin and impact, he is a historian, not a partisan. Perhaps equally important, he is pessimistic about the Senate's capacity to advance the nation's business or to look after its welfare.

The filibuster, invented 150 years ago by what Jentleson calls an "obstructionist minority," lies at the heart of his pessimism.[8] But it does not lie there by itself. In his view, leadership structures created by Lyndon Johnson and amplified by Harry Reid made "the formerly leaderless [Senate] march in lockstep behind a leader's agenda."[9] More recently, he says, Senate Majority Leader Mitch McConnell has skillfully used the filibuster and the levers of power Johnson and Reid created to give a minority of senators veto power over everything the majority proposes.[10] Unspoken, but clearly implied is that, when they control the Senate and choose to do so, Democrats will be able to do exactly the same thing.

Given the role it plays in obstructing the Senate's ability to pass legislation a majority proposes, it is important to understand the filibuster's origin, particularly the claims by proponents from both parties that the right of unlimited debate the filibuster embodies is and always has been a fundamental Senate device for protecting minority rights. The historical record, Jentleson suggests, says something very different. Alexander Hamilton, for example, said in Federalist 22 that requirements for a supermajority are "one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory."[11] In Hamilton's view, the real effect of supermajority requirements "is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority,"[12] thus ultimately leading to "impotence, perplexity, and disorder."[13]

James Madison's opposition to supermajority requirements was less strident and he agreed that those requirements might have some advantages. But he also believed that their utility was outweighed by the harm they could cause. Were supermajorities required to enact legislation, he wrote in Federalist 58, "[i]n all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority."[14] Understandably, therefore, Federalist 62, in which he laid out his vision of how the Senate would function, does not contain a single word about unlimited debate.[15] Instead, he believed that the proposed Constitution's division of law-making power between the House and Senate ensured that when a majority of the people and a majority of the states, acting through their representatives, agreed upon a measure, that measure would become law.[16]

Ultimately, Madison and Hamilton's view prevailed, and "[f]ive of the nineteen original rules the Senate adopted in 1789 placed limits on debate." Equally important was the spirit with which the original senators approached the question of how long debate on measures should last before it was time for a vote. In the manual for Senate procedure that Thomas Jefferson created when he was vice president, and thus president of the Senate, he included a rule essentially providing that when senators tired of the speeches another senator was making, they could engage in conversation among themselves and the speaker should have the good sense to see that he had lost their attention and sit down. Senators voluntarily followed that principle for years and it became a source of pride to all of them that they did so.[17]

To be sure, one of the rules in Jefferson's handbook did provide a mechanism for ending debate. Called "the previous question rule," it was what Jentleson describes as the "legislative equivalent of giving your kids a five-minute warning to turn off the television."[18] When invoked, it ended debate and the Senate moved on to a vote on the merits of the issue being debated. While the rulebook was being cleaned up in the early 1800s, however, the previous question rule disappeared by accident. Apparently, nobody noticed and senators, adhering to prevailing norms, comfortably proceeded without a debate-ending rule for the next 40 years.[19]

Things changed when John C. Calhoun arrived in the Senate. He had been John Adams' vice president and, as president of the Senate, was a polarizing figure internally and externally.[20] But by 1841, he was a senator from South Carolina and was playing a leading role in the opposition southern senators were mounting to a bill favored by northern senators that would charter a Bank of the United States. For a variety of reasons, southern states vigorously opposed the measure. Calhoun organized the senators from those states, who collectively comprised a Senate minority, to make speeches on the Senate floor seriatim so that no other business, including the bank bill, could occur. After several weeks of that impasse, Henry Clay, then a senator from Kentucky who had already achieved a reputation as "the great compromiser" and had tried unsuccessfully to end debate

8. Jentleson at 239.
9. *Id.*
10. *Id.*
11. *Id.* at 23.
12. *Id.*
13. *Id.* at 57.
14. Jentleson, *supra* note 3, at 28.
15. *Id.* at 45.
16. *The Federalist,* No. 62, 416 (James Madison).
17. Jentleson, *supra* note 3, at 45.
18. *Id.* at 46.
19. *Id.* at 47-48
20. *Id.* at 48-49.

so that other Senate business could move on, called for restoration of the previous question rule. Citing the need to protect the rights of Senate minorities from the excesses of a majority, Calhoun and his colleagues fought back ferociously and beat back the majority's efforts to restore the rule.[21]

Jentleson describes Calhoun's strategy and his defeat of the previous question rule as the birth of the filibuster. His success, in Jentleson's view, had two lasting impacts and they continue to affect Senate operations today. One was the realization that, if organized properly, a minority of senators could successfully delay and frustrate the will of the majority. Secondly, but equally important, the minority could do so under the banner of preserving "minority rights."[22]

Neither of those impacts was much in evidence over the years that immediately followed. Instead, the filibuster was infrequently used and, when it was, those who used it gave way after they had had their say, albeit a say that sometimes went on considerably. In 1917, however, Robert La Follette successfully filibustered a bill that would have armed American merchant ships so they could defend themselves from attacking German submarines that were severely constricting the flow of supplies to European allies. Defeat of the bill produced a furious public reaction and led the Senate to pass, by a vote of 76 to 3, what became Senate Rule 22. Rule 22, a successor to the previous question rule, allowed the Senate to end debate, or invoke "cloture," and proceed to a vote on the merits of a pending bill on a two-thirds vote of the entire Senate, a number later lowered to the three-fifths that exists today.[23]

But a measure designed to end obstruction and allow senators to vote on the merits of pending legislation was later turned on its head because "[f]ilibusters proved to be particularly useful to southern senators who sought to block civil rights legislation, including anti-lynching bills."[24] Consequently, "[i]n one civil rights debate after another through the 1930s and 1940s . . . southern senators elevated the idea of 'unlimited debate' to a foundational principle akin to the First Amendment."[25] Ironically, although those efforts were clearly aimed at ensuring continued white supremacy in the states the southern senators represented, those senators, following the path Calhoun had mapped much earlier, repeatedly urged that their efforts were simply designed to preserve the fundamental principle of "minority rights." Indeed, "the first rule of filibustering on behalf of white supremacy," Jentleson suggests, "was that there was no filibuster on behalf of white supremacy — only principled stands to protect 'minority rights' and 'unlimited debate.'"[26]

But there were occasions when it appeared that senators supporting a civil rights bill might have sufficient votes for cloture and a successful vote on the merits, so the opposing senators needed to find a way to prevent that from happening. They found one. Rule 22 governed debate on the substance of a bill pending on the floor, but it took a motion supported by a Senate majority to bring a bill up to the Senate floor for debate and a vote on the merits. Rule 22 did not apply to debate on motions to bring a bill up. So, senators opposing bills that likely had sufficient support to invoke cloture if they reached the Senate floor shifted their focus to motions to bring those bills up and proceeded to filibuster those motions so that the bills would never arrive.[27]

Ultimately, Rule 22 was modified so that it applied to all substantive votes, including votes on executive nominations, which theretofore had not been covered, and votes on whether to bring a bill up for debate. The result was at least a theoretical mechanism for ending debate in an area where obstructionists had found fertile ground. At the same time, however, the modification made the cloture provisions of Rule 22 inapplicable to debate on Rule 22 itself, thus ensuring that the changes were durable.[28] But so successful had been the southern senators in their use of the filibuster that from 1920 to 1960, "the Senate managed to invoke cloture only five times. Not until 1964 did the Senate successfully overcome a filibuster to pass a major civil rights bill."[29]

While use of the filibuster is at the heart of Jentleson's focus on Senate dysfunction, he suggests that other forces combine with it to amplify its negative force on the Senate's ability to function productively. Polarization is one of those forces. "In a polarized America," he says, "people pick sides and stay there. In a polarized Senate, senators who used to range freely across partisan and ideological lines now toe the party line."[30] In the early 1970s, Congressional

21. *Id.* at 52.

22. *Id.* at 53.

23. Jentleson, *supra* note 3, at 65-67.

24. United States Senate: Art & History/Powers & Procedures, Filibusters and Cloture, Historical Overview https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm (last visited Feb. 8, 2022.)

25. Jentleson, *supra* note 3, at 69.

26. *Id.* at 77

27. *Id.* at 78-79.

28. *Id.* at 83. As the Senate convened for a new term in 1957, Richard Nixon, in his capacity as vice president, ruled that the Senate's procedural rules did not carry over from term to term. Consequently, Rule 22, like all other rules in effect during the previous term, would have no force or effect unless the Senate voted to renew it. Proponents of change, sensing an opportunity to reduce or eliminate the threat of filibusters, were elated. However, Senator Richard Russell, a staunch segregationist, quickly made it known that if reconsideration of Rule 22 were in the offing, he would likely lead a line-by-line reconsideration of and debate on continued use of every other Senate rule. That process, he acknowledged, would take a great deal of time, and, because the Senate would have no effective rules until he was finished, it would be a very long time before the Senate could conduct any business at all. Faced with that prospect, the appetite for reexamining Rule 22 quickly subsided and the session proceeded with the rule firmly in place. *Id.* at 97-98.

29. United States Senate website, *supra* note 25.

30. Jentleson, *supra* note 3, at 121.

Quarterly found that senators from both sides of the aisle sided with their party 60% of the time. Today, they do so almost 90% of the time.[31]

Another factor is what he calls the phenomenon of "insecure majorities."[32] "Between 1980 and 2018," he notes, "control of the Senate majority changed hands nine times."[33] Consequently, both parties were constantly focused on upcoming campaigns that would allow them to attain or preserve a Senate majority. The constant and pervasive campaign mode increases the incentives for drawing sharp and marketable distinctions between the parties and the candidates, thus significantly decreasing incentives for collaboration and compromise. Added to that is the cost of campaigning and the fact that senators depend heavily on funding from their national party.[34]

A third factor is consolidation of power in the hands of the party leaders. That consolidation began with Lyndon Johnson when he became Senate majority leader[35] in 1952 and was amplified by Harry Reid when he became the majority leader 55 years later.[36] Committee assignments and the ability to introduce bills or make amendments to pending legislation all became dependent on the party leader. So, too, is access to the funds necessary to run an effective campaign.[37]

And there is a fourth factor. This one is effectively a silent filibuster. When a senator objects to a particular bill, nomination or other item of business that otherwise would be considered on the Senate floor, all he or she need do is let a member of the leader's staff know that the senator intends to filibuster the bill or nomination. Notice of that intention effectively places a "hold" on the nomination or bill, making it highly unlikely that it will ever even begin the process that could produce a vote on the floor.[38] Moreover, "leaders have traditionally respected senators' desire to keep their holds anonymous."[39] "In an ironic twist," Jentleson says, senators "stealthily filibustering [a] bill will inevitably be doing so in the name of unlimited debate, invoking grand principle to justify naked obstruction, despite the fact that nothing bearing even a passing resemblance to debate will be taking place."[40]

The result of all this, according to Jentleson, is a "political culture controlled by the [Republican or Democratic] leader"[41] in which there is no mechanism for "sustained input, new ideas, or strategic perspectives from voices outside the leader's pre-existing networks. Fueled by money, the process of deciding who runs the Senate, how they run their campaigns, and how they approach the mix of issues and politics once they get there has become a system of control that flows from the leader down."[42]

Jentleson does offer several thoughtful suggestions for fixing the problems he describes.[43] But he does so in the concluding section of the book, the first paragraph of which begins by stating that "[t]he Senate is so broken that it is easy to write it off as irredeemable."[44] And, perhaps ironically, that takes one back to a statement Sen. Sinema made in the course of her Jan. 13 speech on the Senate floor. "We need," she said in that speech, "sustained strategies that put aside party labels and focus on our democracy because these challenges are bigger than party affiliation. We must commit to a long-term approach as serious as the problems we seek to solve — one that prioritizes listening and understanding, one that embraces making progress on shared priorities and finding common ground on issues where we hold differing and diverse views."[45] In the end, new rules are not going to fix what is so badly broken. Self-restraint and a desire to work across party lines to address the difficult and seemingly intractable problems the nation now faces are the only durable solutions. This important, thoughtful and highly readable book shows why.

— Hon. James F. McHugh (ret.)

31. *Id.*
32. *Id.* at 168.
33. *Id.*
34. *Id.* at 170-71.
35. *Id.* at 159-63.
36. Jentleson, *supra* note 3, at 174-77.
37. *Id.* at 170-71.
38. *Id.* at 210-212.
39. *Id.* at 211.
40. *Id.* at 8.
41. *Id.* at 172.
42. Jentleson, *supra* note 3, at 172.
43. *Id.* at 250-53.
44. *Id.* at 239.
45. 168 Cong. Rec. S9, *supra* note 5, at S208.

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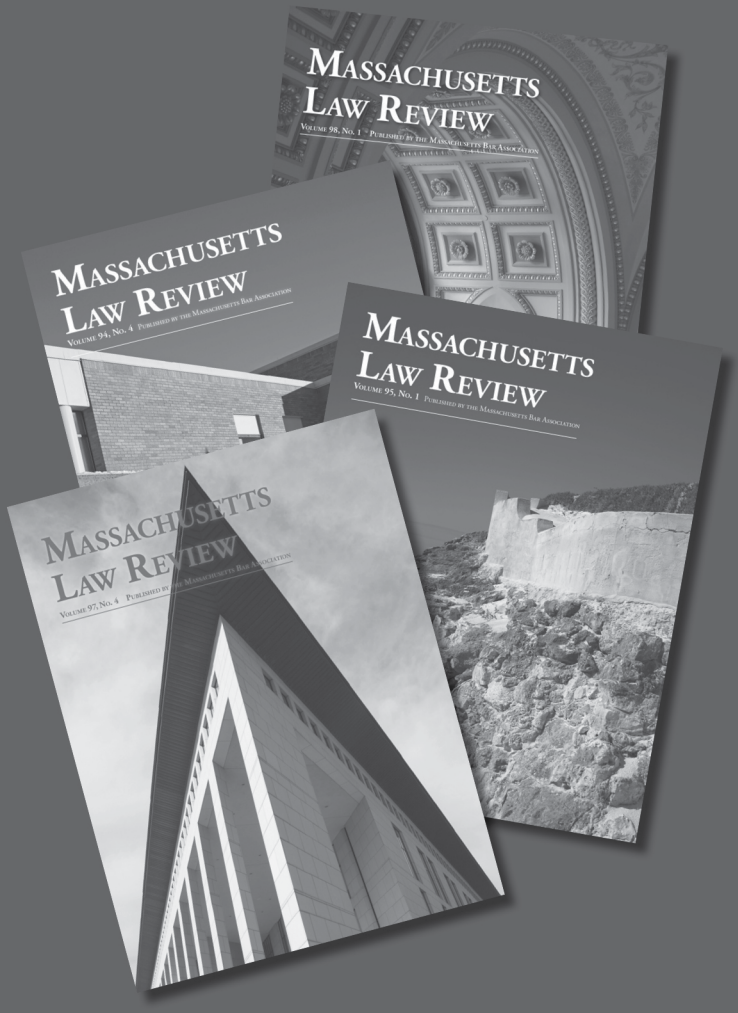

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Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title	2. Publication Number	3. Filing Date
Massachusetts Law Review	0163-1411	09/21/2022
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Quarterly	4	Members-Free Libraries-$50 Non-members-$175

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*
20 West St.
Boston, MA 02111-1204

Contact Person
Jason Scally

Telephone *(Include area code)*
617-338-0682

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
Same as pub. office

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*
Massachusetts Bar Association
20 West St., Boston, MA 02111-1204

Editor *(Name and complete mailing address)*
Jason Scally
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c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a) ▶	0	0
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14. Issue Date for Circulation Data Below: 09/02/2022

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
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