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Lading and Weight: Suggested Evidentiary Burdens in Senate Judicial-Nominee Hearings Post-Kavanaugh

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Brendan T. Beery

Lading and Weight: Suggested Evidentiary Burdens in Senate Judicial-Nominee Hearings Post-Kavanaugh

17 U.N.H. L. REV. 229 (2019)

ABSTRACT. The Senate proceedings occasioned by Dr. Christine Blasey Ford's allegation against Justice Brett Kavanaugh left the then-nominee calling them a "circus" and observers confused about who was supposed to prove what and by what standard. Since the Senate is ill-suited to sorting out cases and controversies (and since the Ford-Kavanaugh matter will surely not be the last of its kind), the Senate should adopt standards (burdens of proof) for future judicial-nominee proceedings that it borrows from a sister branch—the judiciary.

In any proceeding, the burden must be laded—it must be determined which party has the burden in the first place. It must also be weighted—it must be determined how much of a burden is to be imposed. This lading and weighting takes place with regard to both the burden of making out a colorable claim (the burden of production) and also the threshold for deciding in a party's favor (the burden of persuasion). Courts often lade the burden of persuasion, in particular, on the party that (a) has the lesser interest at stake, (b) precipitates (as distinguished from initiates) the action, or (c) warrants special suspicion and scrutiny. This Article applies these principles to Senate judicial-nominee proceedings, noting that those proceedings sometimes involve two separate inquiries: (1) the qualification (or general suitability) inquiry, and (2) the inquiry into any allegation of specific and potentially disqualifying wrongdoing. The Article posits that, as to the qualification inquiry, the nominee has the burdens of production and persuasion and must show with convincing evidence that he or she is suitable for office. As to the allegation inquiry, although the accuser should have the burden of producing credible evidence to establish a plausible claim of wrongdoing, sound principles mitigate against the accuser bearing the ultimate burden of persuasion. That burden should rest with the nominee, who must show that the allegation is implausible, incredible, or unreasonable. Finally, this Article proposes a sliding scale for determining the precise threshold of proof required to meet this burden, focusing on the three different levels of federal judicial appointments (district judge, circuit judge, and Supreme Court justice) and accounting for the different interests involved as to each.

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INTRODUCTION

“Have we learned nothing since Anita Hill?”¹ This was the ubiquitous question around the Brett Kavanaugh hearing after Dr. Christine Blasey Ford accused him of sexually assaulting her when the two were teens.² In one sense, the answer seemed clear: not on Capitol Hill.³ To the extent that American culture has caught up to the misogynist reality through which women must navigate (and we have a long way to

¹ Ruth Marcus, *Have We Learned Nothing Since Anita Hill?*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/opinions/have-we-learned-nothing-since-anita-hill/2018/09/21/bdc649a4-bddb-11e8-8792-7871917725of_story.html?noredirect=on&utm_term=.b126e4f1428f [https://perma.cc/3PM2-XCQG].

² See Emma Ford, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html?utm_term=.c9b0483838b2 [https://perma.cc/DNC4-8KCF].

³ A similar lament was heard after the Clarence Thomas hearings involving Hill. See Anne C. Levy, *The Anita Hill-Clarence Thomas Hearings*, 1991 WIS. L. REV. 1106, 1106–07 (1991) (“[W]hat is surprising is that the policymakers themselves, the United States Congress, also seemed to be largely ignorant about what courts and government agencies have known for some time—women are tired of the status quo . . .”).

go in that regard, the “Me Too” movement notwithstanding),⁴ there has been that much inertia in what is supposed to be the greatest deliberative body in the history of republics: the United States Senate.⁵

This has to do with the composition of that body.⁶ But it has also to do with the failure of the Senate to develop neutral guideposts to govern its own factfinding when its advice and consent function⁷ devolves into arbitrating salacious allegations.

The structure of the Constitution is such that each of the three branches of the federal government is generally obligated to stay in its own lane.⁸ The legislative branch, obviously, exists to make law. But the Senate, the upper chamber, has a strange parentage: it was born in one sense as an accident of history that compelled a “great compromise” among a confederation of states,⁹ and in another sense as a chamber where the whims of the mob would yield to a “sober second thought.”¹⁰

⁴ See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>]; see also Eugene Scott, *Revisiting Anita Hill in the Wake of the Kavanaugh Allegations*, WASH. POST (Sept. 17, 2018), https://www.washingtonpost.com/politics/2018/09/17/revisiting-anita-hill-wake-kavanaugh-allegations/?utm_term=.6bbec162a7da [<https://perma.cc/22MD-6XC�N>] (“The [Anita Hill and Christine Blasey Ford] stories aren’t identical, and neither are the times. One big difference: . . . the #MeToo movement . . .”).

⁵ Cf. Claude Pepper, *The Senate of the United States: Its History and Practice*, 52 HARV. L. REV. 1026, 1026 (1939) (book review) (“Like democracy itself, . . . it is strong, it is sound at the core, it has survived many changes, it has saved the country many catastrophes, it is a safeguard against any form of tyranny . . .”). See generally M. Blane Michael, *The Power of History to Stir a Man’s Blood: Senator Robert C. Byrd in the Line Item Veto Debate*, 108 W. VA. L. REV. 593 (2006) (discussing the history of legislative power and authority).

⁶ On the Senate Judiciary Committee, at least, the majority side remains strikingly monochromatic and patriarchal. See Richard Cowan, *Senate’s Judiciary Committee, Then and Now*, REUTERS (Sept. 26, 2018), <https://www.reuters.com/article/us-usa-court-kavanaugh-committee/senates-judiciary-committee-then-and-now-idUSKCN1M635A> [<https://perma.cc/7LCB-F4T8>] (“[N]early three decades after the Thomas-Hill confrontation, the Judiciary Committee is still dominated by white males, including all 11 of its Republicans.”).

⁷ See U.S. CONST. art. II, § 2.

⁸ See generally *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (noting that the separation of powers requires all legislation be presented to the President before becoming law and that one segment of Congress cannot solely override executive power).

⁹ See Jennifer Carr, *Proportional Union or Paper Confederacy?*, 48 CONN. L. REV. 595, 599–600 (2015).

¹⁰ Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67, 77 (2010).

Whatever its origins and purposes, neither the Senate nor the Congress more generally was to be the place for resolving cases and controversies.¹¹ That function falls to courts under Article III of the Constitution,¹² not politicians toiling under Article I.¹³

An allegation against an individual made by another individual under circumstances where the accused stands to pay a price is, in a sense, a case and controversy: it has parties, the parties are in an oppositional posture, and there exists a dispute about a discrete, factual episode.¹⁴ Thus, Congress is ill-suited to sit in judgment over such a matter;¹⁵ the function of sorting out cases and controversies is not a natural fit for pols driven more by Nietzsche's "will to power"¹⁶ than a neutral and untainted interest in drilling down to truth.

That is why, if the Senate is to manage such matters, especially in an age of reality-television politics,¹⁷ it should adopt rules for handling such matters. Being

¹¹ See U.S. CONST. art. III, § 2; see also *Muskrat v. United States*, 219 U.S. 346, 356–57 (1911) (explaining the Constitution's meaning of judicial power over cases and controversies).

¹² U.S. CONST. art. III, § 2.

¹³ The notion that Congress was not intended as the arbiter of individual disputes or controversies is undergirded by the constitutional proscriptions against ex post facto laws or bills of attainder: the lawmaking function involves public policy and the public good, not the exercise of jurisdiction over the rights or conduct of individual persons in isolated instances. See U.S. CONST. art. I, § 9, cl. 3.

¹⁴ See Debra Lyn Bassett & Rex R. Perschbacher, *Realigning Parties*, 2014 UTAH L. REV. 109, 127–28 (2014).

¹⁵ See Mollie Hemingway, *The Kavanaugh Allegation Process Is a Miscarriage of Justice for Everyone*, FEDERALIST (Sept. 19, 2018), <https://thefederalist.com/2018/09/19/the-kavanaugh-allegation-process-is-a-miscarriage-of-justice-for-everyone/> [<https://perma.cc/G5PV-K6F3>] (opining about the allegations against Brett Kavanaugh by Dr. Ford that "the Senate is . . . an inappropriate place to litigate claims of sexual assault. Since Maryland apparently doesn't have a statute of limitations on felony sex assault, charges could still be filed there if the case is strong enough to do so").

¹⁶ See Anthony Carty, *Nietzsche and Socrates/Or the Spirit of the Devil and the Law*, 24 CARDOZO L. REV. 621, 622–23 (2003) (citing FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 28–29 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994)).

¹⁷ See Michael J. Gerhardt, *Practice Makes Precedent*, 131 HARV. L. REV. F. 32, 37–38 (2017). Professor Gerhardt suggests:

American politics is not that different from American reality television: preferences and tastes will dictate the winners and losers. The fact that we have a former reality television star in the Oval Office is a reminder that what we see on television might not differ much, if at all, from reality. It reminds us how much playing to an audience matters in our lives and politics, and how political or constitutional conflicts play out in the media. Thus, in the contemporary fight to control the Supreme Court, the judges themselves become the "contestants"; the senators become the judges; the contestants tailor their performances to suit the judges; the senators proclaim to the audience their reasons for voting one way or another; and at the end the audience, the public, shouts its approval or disapproval of the final vote.

ill-suited to that task by design, it should borrow those rules from its sister branch, the judiciary.

Justice Kavanaugh seemed to be onto something when he claimed, during his confirmation hearings, that the existing paradigm yielded “a circus.”¹⁸ We might aim for something less embarrassing and better thought-out in the future. One of the more troubling shortcomings in the Kavanaugh hearings (all two of them—one a general hearing about his suitability as a Supreme Court Justice and the other a special hearing about Dr. Ford’s allegation) was the rampant confusion around the hearing on Dr. Ford’s allegation about who was supposed to prove what and by what standard.¹⁹

To manage a legal case, a tribunal must assign burdens of proof in two different dimensions as applied to (at least) two different stages.²⁰ As to the two dimensions, first, in any given proceeding, the burden must be *laded*;²¹ that is, it must be determined which party has the burden and which party does not.²² Second, it must be *weighted*; that is, it must be determined how much of a burden is to be imposed.²³ As to the two stages, this lading and weighting must be undertaken with regard to

The outcome is either popular or unpopular, but the judges’ rulings are (usually) final.

Id.

¹⁸ *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.9d4b94e8b0fd [<https://perma.cc/LG7Q-FACS>] [hereinafter *Kavanaugh Transcript*].

¹⁹ See, e.g., Caprice Roberts, *Kavanaugh’s Senate Hearing Isn’t a Trial. The Standard Isn’t Reasonable Doubt*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/outlook/kavanaughs-senate-hearing-isnt-a-trial-the-standard-isnt-reasonable-doubt/2018/09/20/1eb1ee34-bd15-11e8-b7d2-0773aa1e33da_story.html?utm_term=.d34cf2be0c1d [<https://perma.cc/86YR-UVNJ>] [hereinafter Roberts, *Hearing Isn’t a Trial*].

²⁰ See Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1180, 1186 (2013) [hereinafter Kaplow, *Multistage Adjudication*] (“[M]ultistage legal procedures are ubiquitous, vary tremendously across legal systems, and constitute one of the most important institutional features of adjudication.”).

²¹ I note here that no other commentator, to my knowledge, has used the word *lade* in this context, but it seems the best word available in our language. *Lade* means, “[t]o put a load or burden in or on; put freight or cargo in or on; load; also, figuratively, to weigh down; oppress; common only in the past participle laden; as trees laden with fruit.” FUNK AND WAGNALLS NEW STANDARD DICTIONARY (1923).

²² See Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1299–1300 (1977) (“[The] burden is said to have both a location and a weight: the location specifies the party that loses if the burden is not met, and the weight specifies how persuasive the evidence must be . . . to carry the burden.”).

²³ See *id.* at 1300.

both the burden or responsibility of producing evidence in the first place, (this is typically called the burden of *production*²⁴) and also the burden of reaching an appropriate evidentiary threshold that would permit a tribunal to ultimately decide the matter in favor of one party or the other (this is typically called the burden of *persuasion*²⁵).

Theoretically, one party may be laded with the burden at one stage and the other laded with the burden at the next stage,²⁶ and the weight of evidence required is typically heavier as to the burden of persuasion (because it involves deciding the ultimate outcome in a case) than it is as to the burden of production, which typically involves only whether a party has made out a colorable case that should proceed further.²⁷ And certainly, “[b]oth sides cannot have the burden of proof on the same issue. The whole point of assigning the burden of proof is to identify the party who loses if the evidence is inadequate.”²⁸

Consider a mundane illustration. A parent has told two children, Adam and Bernie, that whoever finishes his homework first will get to pick what movie the family watches later in the evening. Bernie reports finishing his homework at 5:30, and Adam at 5:45. Adam, however, levels a devastating accusation: Bernie cheated Adam out of choosing the movie by lying about finishing his homework first. The

²⁴ See John T. McNaughton, *Burden of Production of Evidence: A Function of Burden of Persuasion*, 68 HARV. L. REV. 1382, 1383 (1955) [hereinafter McNaughton, *Burden of Production*] (“[B]urden of production describes the onus cast upon one party or the other during the trial by a comparison of the above standard with the evidence actually adduced. The onus can of course be on only one party at a time.”); see also Thomas E. Raccuia, Note, *RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases*, 80 FORDHAM L. REV. 1853, 1862 (2012) [hereinafter Raccuia, *Exclusionary Zoning*].

²⁵ See McNaughton, *Burden of Production*, *supra* note 24, at 1382–83; see also Raccuia, *Exclusionary Zoning*, *supra* note 24, at 1862.

²⁶ See Candace S. Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics and Substance*, 39 AM. U. L. REV. 615, 623–24 (1990) [hereinafter Kovacic-Fleischer, *Proving Discrimination*].

²⁷ See Kaplow, *Multistage Adjudication*, *supra* note 20, at 1189 (“The choice at the first stage is between termination (an immediate judgment of no liability) and continuation. Continuation is taken to entail costs but to generate additional information that is used to reach a final determination of liability at the second stage”); see also Raccuia, *Exclusionary Zoning*, *supra* note 24, at 1862 (“The burden of persuasion, by contrast, is a higher standard. In most civil actions, it requires a party to establish the truth of a given proposition by a preponderance of the evidence. A party with this burden bears the ultimate risk of non-persuasion; in other words, he prevails only if he convinces the fact-finder that he is correct.” (footnotes omitted)).

²⁸ George Rutherglen, *Fisher II Whose Burden, What Proof?*, 20 GREEN BAG 2d 19, 20 (2016) [hereinafter Rutherglen, *Whose Burden*].

parent must now decide which child—Adam or Bernie—to lade with the burden of production. It hardly seems appropriate that Bernie should have the burden. After all, Adam is the one making the accusation, Adam stands to gain if his accusation is believed, and Bernie is the one who will suffer if Adam's accusation is true. Therefore, the parent would likely lade Adam, the accuser, with the burden of production: Adam must produce some evidence beyond his mere assertion. The parent must then also decide what quantum of evidence must be produced—not to establish Bernie's guilt, but to warrant further inquiry. Must Adam have been an eyewitness to Bernie's diabolical nonfeasance, or will circumstantial evidence suffice? Will the parent rely on Adam's word alone as to the factual basis of his allegation, or must Adam produce a corroborating witness before his charge is taken seriously?

Suppose that the parent (in his or her own mind, of course; we routinely apply quasi-legal analyses in our everyday lives without doing so explicitly or even consciously) settles on a standard of credible circumstantial evidence: if Adam can produce that quantum of evidence, then the inquiry is on. Adam says (testifies, in a sense), with a bearing bespeaking honesty and solemnity, that he has circumstantial evidence. He knows that Bernie was assigned a book report as homework, and he avers that Bernie could not have completed the report by 5:30. He also claims that, in any event, the book Bernie was supposed to be reporting about was on Adam's desk during the entire time Bernie was "doing his homework."

Many parents would likely agree that the lading and weighting will shift as we enter the burden of persuasion stage of this whole sordid affair: now it is Bernie who has the burden, and as to the weight of evidence required, he will have to produce conclusive evidence that he did his homework—probably in the form of a completed book report. This shift makes sense under the circumstances. The parent is justifiably suspicious of the newly laded party, Bernie; the interest in Bernie finishing his homework outweighs any interest Bernie might have in picking a movie to watch; and it was Bernie's declaration that he'd finished his homework first—a precipitating event reflecting his own self-interest—that really initiated the problem, even though Adam was the one who originally complained.

Moving from the mundane to the more ethereal, in Part I of this Article, I explain how courts typically decide which party to *lade* with the evidentiary burden. As to the burden of production, courts typically lade the burden on the party alleging wrongdoing,²⁹ which seems to make sense. As to the burden of persuasion, courts often lade this burden on the party that (a) has the lesser interest at stake (with careful attention to whether society in general has any real interest in the outcome);

²⁹ See Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 621–22.

(b) initiates the action or proceeding—or, critically, *precipitates* the action or proceeding—for the purpose of vindicating its own self-interest; or (c) warrants special suspicion and scrutiny given the nature of the cause of action or claim at issue.³⁰

In Part II, I discuss the *weighting* of the burdens in different contexts and proceedings, some at the pre-litigation stages of a case and some at the litigation stage. In particular, Part II surveys evidentiary thresholds typically associated with establishing credibility or a reasonable suspicion of wrongdoing that would warrant further investigation; initiating a formal proceeding (or stating a claim, one might say); establishing cause to proceed to litigation; and trial. I ask in Part II whether any of these weights or standards is a good fit in the context of judicial-nominee proceedings and suggest that the Senate might opt for more appropriate standards given the unique interests and constitutional functions involved.

In Part III, I apply these principles, concluding that judicial-nominee proceedings, when they include issues like those that arose in the Anita Hill and Christine Blasey Ford matters, involve two separate inquiries: (1) the qualification (or general suitability) inquiry; and (2) the inquiry into any allegation of specific and potentially disqualifying wrongdoing. Part III posits that, as to the qualification inquiry, the nominee has the burdens of production and persuasion and must show with convincing evidence that he or she is appropriately credentialed and suitable for office. As to the allegation inquiry, although the accuser should have the burden of producing credible evidence to establish a plausible claim of wrongdoing, the principles discussed in Parts I and II mitigate against the accuser having the ultimate burden of persuasion. That burden should rest with the nominee, who must show that the allegation is implausible, incredible, or unreasonable. Part III proposes a sliding scale for determining the precise threshold (or weight) of proof required to meet this burden, focusing on the three different levels of federal judicial appointments (district judge, circuit judge, and Supreme Court Justice) and accounting for the different interests involved as to each.

I. LADING

Lading, as I use the term here, refers to the process of determining *which party has the burden*—not *how much of a burden is to be imposed*. This process must take place both as to producing evidence that warrants further inquiry and also persuading the factfinder, at the conclusion of any inquiry, to find for one side or the other. The reader will notice throughout the Article, however, that there is some overlap in

³⁰ See *infra* Part I, section B and accompanying notes.

analyzing which party should be laded, and what weight of evidence should be required.

A. Factors That Commentators Have Suggested

Commentators have taken a stab at identifying factors that tribunals and lawmakers consider in lading burdens of proof—both as to the burden of production and the burden of persuasion—but with little success in identifying concrete guideposts:

The treatise writers agree that no one principle governs how courts allocate burdens of persuasion and production. The writers note that courts should consider issues of policy, convenience, fairness, and probability. Policy issues include factors such as burdening the plaintiff because that person seeks to change the status quo or burdening the defendant when certain defenses are disfavored or unusual. Included under convenience and fairness issues are factors such as who has knowledge and access to information and whether the burden follows the natural order of storytelling. Authorities agree, however, that access to information should not be overrated as a reason for allocating burdens because fairness may override an issue of access to information. . . .

As with burdens of persuasion, no uniform rule exists to direct allocation of burdens of production. Courts use the same factors that they consider in allocating burdens of persuasion, which ultimately rest on broad policy considerations. Although the party with the burden of persuasion usually has the burden of production, situations arise which necessitate splitting the burdens. If the plaintiff provides evidence sufficient to require the fact finder to rule for the plaintiff, then the burden of production may shift to the defendant. In that case, the defendant may also have the burden of persuasion.³¹

1. The Burden of Production

Care should be taken to differentiate between discrete meanings of the term *burden of proof*:

The phrase “burden of proof” is often used to refer to two concepts, burden of production and burden of persuasion. The burden of proof is more frequently used to refer to the latter concept, which is also referred to as the risk of nonpersuasion. As the names of the terms indicate, a burden of production is merely a burden that requires a party to produce evidence. The burden of persuasion requires the party to prove to the fact finder the truth or existence of those facts for which the party has the burden.³²

The burden of producing evidence is, as an informal and practical matter, a burden that may seesaw back and forth throughout a legal proceeding as evidence

³¹ Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 622–24 (footnotes omitted).

³² *Id.* at 620 (footnotes omitted).

is developed and presented by both sides:

A plaintiff initially will be required to produce evidence of a defendant's negligence in an action for negligent tort. At some point he may have produced so much evidence, of such convincing force, that the defendant must offer conflicting evidence or lose on the issue of his negligence. As a practical matter, once reasonable [jurors] *may* find [the] defendant negligent, he should introduce evidence to show he was not negligent or run the risk of incurring liability. As a legal matter, once reasonable jurors *must* find the defendant negligent, he must introduce evidence to show he was not negligent, or liability will be imposed, absent some limiting factor like contributory negligence. At that point, the burden of producing evidence on the issue of negligence has shifted to the defendant. Conceivably, the defendant could shift the burden of producing evidence back to the plaintiff by introducing overwhelmingly probative evidence that he was not negligent. Thus, as everyone agrees, the burden of producing evidence may shift back and forth throughout the [proceeding].³³

Be that as it may, as applied to judicial-nominee hearings, we're concerned mostly with which party has the burden of producing evidence (beyond a mere allegation³⁴) in the first instance, because there are no evidentiary motions, trials, or appeals in a judicial-nominee proceeding. In most legal proceedings, for reasons that border on self-evident, the initial burden of producing evidence is laded on the party making the allegation and seeking the attention of investigative or law-enforcement agencies or tribunals—normally a plaintiff (or, at the law-enforcement level, an accuser or a complaining witness). “Law students are generally taught that the plaintiff must plead and prove the elements of plaintiff's prima facie case and that the defendant must plead and prove affirmative defenses.”³⁵ And “[a]s litigators know, the allocation of burdens of production and persuasion can determine the outcome of the case. If the plaintiff has the burden of production and does not produce evidence, the plaintiff's suit will be dismissed.”³⁶

The concern that a high-profile appointment like a Supreme Court nomination will bring politically or ideologically motivated false allegations to the fore was expressed vociferously by supporters of Justice Brett Kavanaugh's nomination,³⁷

³³ Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1159 (1972).

³⁴ See *Texas Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 255 n.9 (1981) (“An articulation not admitted into evidence will not suffice.”).

³⁵ Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 621–22 (footnotes omitted).

³⁶ *Id.* at 621 (footnotes omitted).

³⁷ See, e.g., Richard Cowan & Steve Holland, *Amid Kavanaugh Fight, Trump Says It Is a “Scary Time” for Young Men*, REUTERS (Oct. 2, 2018, 12:52 PM), <https://www.reuters.com/article/us-usa-court-kavanaugh/amid-kavanaugh-fight-trump-says-it-is-a-scary-time-for-young-men-idUSKCN1MC2A3> [<https://perma.cc/9SD8-3UML>]; Anna North, *#HimToo: The Online Movement Spreading Myths*

and indeed by Justice Kavanaugh himself during his Senate testimony:

This confirmation process has become a national disgrace. The Constitution gives the Senate an important role in the confirmation process, but you have replaced advice and consent with search and destroy.

...

This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election. Fear that has been unfairly stoked about my judicial record. Revenge on behalf of the Clintons. And millions of dollars in money from outside left-wing opposition groups.³⁸

Although Justice Kavanaugh's outburst was panned in some circles as disqualifying for its partisanship and ill temper,³⁹ it did summarize a widespread suspicion among conservatives that activists' insistence that survivors of alleged sexual assaults be heeded was rhetorical chaff deployed to mislead the public in a "hit job" designed to raze a good man's character.⁴⁰ Leaving aside the unique and controversial nature of allegations about sexual misconduct, certainly no mere allegation without more should ever cause the accused to suffer in any concrete way. Were this not so, we would each have arbitrary power and jurisdiction over the fates of our neighbors (and each of those neighbors over each of us) that surely no person ever enjoyed in a state of nature.⁴¹

About False Rape Allegations, Explained, VOX (Oct. 10, 2018, 3:50 PM), <https://www.vox.com/policy-and-politics/2018/10/10/17957126/himtoo-movement-pieter-hanson-tweet-me-too> [https://perma.cc/7T3P-E4JC].

³⁸ *Kavanaugh Transcript*, *supra* note 18.

³⁹ See, e.g., Andrew Cohen, *Brett Kavanaugh Has Already Disqualified Himself*, NEW REPUBLIC (Sept. 24, 2018), <https://newrepublic.com/article/151359/brett-kavanaugh-already-disqualified> [https://perma.cc/Q5HR-K3T4]; see also Elizabeth Preza, *Retired Supreme Court Justice Says Kavanaugh's Behavior at the Senate Hearings Disqualifies Him: Senators Should Pay Attention to This*, ALTERNET (Oct. 4, 2018), <https://www.alternet.org/retired-supreme-court-justice-says-kavanaughs-behavior-senate-hearing-disqualifies-him-senators> [https://perma.cc/7Q2M-2V3D] ("John Paul Stevens, a retired United States Supreme Court justice who was appointed by former President Gerald Ford, on Thursday issued a stunning statement about Brett Kavanaugh's temperament, telling 'a small crowd in Boca Raton that Judge Brett Kavanaugh's performance at confirmation hearings should disqualify him' . . .").

⁴⁰ See, e.g., Matt Vespa, *Let's Be Honest: The Kavanaugh Allegations Are Nothing More Than A Political Hit Job*, TOWNHALL (Sept. 24, 2018, 1:02 PM), <https://townhall.com/tipsheet/mattvespa/2018/09/24/the-kavanaugh-allegations-really-look-like-nothing-more-than-a-political-hit-job-n2522015> [https://perma.cc/U77U-UDHC] ("As I've said before, this has all the makings of a political hit job of the vilest kind. Democrats are using unprovable allegations to delay the process.").

⁴¹ The reference here is to John Locke, who opined that "the individual, in a state of nature, is autonomous and sovereign over himself or herself," and that no person has "jurisdiction [over another's] property or . . . peaceful enjoyment of [one's] own life and . . . personal affairs." Brendan

So what is required, beyond a mere allegation, is *evidence*, and that evidence must be *produced* by someone; and as a practical matter, the party in the best position to produce the evidence is the one who is most likely to possess it: the accuser.⁴² There seems much confusion, however, about what is meant by the word “evidence” in the legal context. As one commentator opined:

The “burden of proof” issue is the crux of the debate surrounding Dr. Ford’s accusations against Judge Kavanaugh precisely because she has produced no evidence to support her accusations against him. She has no physical evidence, though that is unsurprising given that she is alleging a three-decades-old-crime. . . .

In sum, Dr. Ford’s accusation against Kavanaugh is unsupported save for the accusation itself, and those who say that she told them about Kavanaugh in the last handful of years, three decades after the alleged incident.⁴³

This was a common narrative, and it was also “pure applesauce,” or, if you prefer, evidentiary “jiggery-pokery.”⁴⁴ Eyewitness testimony is evidence, and the eyewitness testimony of a traumatized victim (who, as Dr. Ford herself explained, is likely to have an accurate recall of the traumatizing events seared into her memory⁴⁵), can be especially reliable evidence.⁴⁶ If this kind of testimony is *not* evidence (and arguably compelling evidence), then we had best open the gates to our prisons and empty a good number of the detainees warehoused therein back onto the streets.⁴⁷

T. Beery, *How to Argue Liberty Cases in a Post-Kennedy World: It’s Not about Individual Rights, But State Power and the Social Compact*, 75 NAT’L LAW. GUILD REV. 1, 6–7 (2018) [hereinafter Beery, *How to Argue*].

⁴² See Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 622–24 (footnotes omitted).

⁴³ Adam J. White, *The Democrats’ “Flight 93” Nomination*, WKLY. STANDARD (Sept. 26, 2018, 8:06 AM), <https://www.weeklystandard.com/adam-j-white/brett-kavanaugh-christine-blasey-ford-and-the-senates-burden-of-proof> [https://perma.cc/5U5R-5RYJ] [hereinafter White, *Flight 93*].

⁴⁴ See David Gesspass et al, *Putting Scalia in Perspective*, 73 NAT’L LAW. GUILD REV. 245, 251 (quoting King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting)).

⁴⁵ See *Kavanaugh Transcript*, *supra* note 18.

⁴⁶ See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (explaining that indicia of eyewitness reliability “include the opportunity of the witness to view the criminal at the time of the crime, the witness’[s] degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation”). “Against these factors is to be weighed the corrupting effect of the suggestive identification itself.” *Id.*

⁴⁷ See *Eyewitness Misidentification*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/eyewitness-misidentification> [https://perma.cc/QZE2-UXKV] (last visited Feb. 2, 2019) (“Despite solid and growing proof of the inaccuracy of traditional eyewitness ID procedures – and the availability of simple measures to reform them – traditional eyewitness identifications remain

It is certainly true that the story of a witness, told in an unsworn setting, subject to no penalty for its potential dishonesty and made no part of the record in any kind of formal proceeding, does not constitute evidence. The same cannot be said, however, when the same story is told under oath and submitted as the truth under penalty of perjury in the context of just such a formal proceeding (and, in most cases, subject to cross-examination or skeptical scrutiny, to boot).⁴⁸ In the context of sexual-assault allegations, there was a time when special evidentiary requirements attached and witness testimony alone would not suffice, but that time has passed:

Like the traditional prompt complaint requirement, the corroboration requirement has also been almost eradicated from formal rape law. Only three states . . . continue to impose a corroboration requirement in their criminal codes for certain sexual offenses. . . .

. . . .

Fourteen other state codes indicate that corroboration of a sexual offense complainant's testimony is not required. The remaining thirty-three states' codes are silent on the issue of corroboration. However, case law from each of these states indicates that corroboration of the complainant's testimony is not ordinarily required. Twenty-two states . . . allow a defendant to be convicted of rape based on the uncorroborated testimony of the complainant. Twelve states and the District of Columbia appear to qualify a general rule that no corroboration is required. For example, in Alaska, when a complainant of sexual abuse later recants her allegation, the state must produce corroborating evidence to support the original allegation. In Arizona, corroboration may be needed when the witness' story is physically impossible or incredible. Oklahoma and West Virginia require corroboration only when the complainant's testimony is inherently improbable. In Kansas and Kentucky, the complainant's testimony need not be corroborated if it is clear and convincing and not unbelievable. In Mississippi, Missouri, Montana, and the District of Columbia, corroboration is not required except to explain inconsistencies within the complainant's testimony. Wisconsin requires corroboration when the complainant's

among the most commonly used and compelling evidence brought against criminal defendants."); accord John Bohannon, *Eyewitness Testimony May Only Be Credible Under These Circumstances*, SCIENCE (Dec. 21, 2015, 3:00 PM), <https://www.sciencemag.org/news/2015/12/eyewitness-testimony-may-only-be-credible-under-these-circumstances> [<https://perma.cc/JRU5-EPBR>] ("Courts may be 'leaving more criminals on the streets and putting more innocent people behind bars than they should be.") [hereinafter Bohannon, *Eyewitness Testimony*].

⁴⁸ See *Taylor v. Neven*, No. 2:07-CV-00183-KJD-RJ, 2010 WL 3001633, at *18 n.84 (D. Nev. July 27, 2010) (stating that a party's "purported unsworn recantations to investigators clearly would not constitute reliable evidence . . . particularly [if] she did not follow through with any such alleged recantation when called under oath and subject to cross[examination]").

testimony is unreliable.⁴⁹

A number of principles emerge from this summary. First, the testimony of a victim, as an eyewitness to the crime committed against him or her, is obviously evidence (and direct evidence, one might add⁵⁰) upon which a criminal conviction (let alone a mere finding that a judicial nominee is disqualified for service on a federal court) may rest.⁵¹ This didn't stop Senator Jeff Flake from opining, in the midst of the Ford-Kavanaugh hearings, "[w]hat I do know is that our system of justice affords a presumption of innocence to the accused, *absent corroborating evidence*. That is what binds us to the rule of law. While some may argue that a different standard should apply regarding the Senate's advice and consent responsibilities, I believe that the [C]onstitution's provisions of fairness and due process apply here as well."⁵² Second, a victim-witness need only produce corroborating evidence when his or her accusation seems physically impossible or manifestly implausible.⁵³

So as to any allegation of wrongdoing, the burden of production normally does—and probably should—rest with the accuser, and that burden may be met with the production of sworn testimony or other evidence that lays a plausible predicate for the allegation.⁵⁴ As to the nature of the evidence produced, one supposes that it should relate, among other things, to such factors as motive, opportunity, and capability.⁵⁵ Yet, as to other matters (that is, matters other than

⁴⁹ Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 968–73 (2004) [hereinafter Anderson, *The Legacy*] (footnotes omitted).

⁵⁰ See Donald F. Paine, *Direct Versus Circumstantial Evidence*, 48 TENN. B.J. 31 (Oct. 2012) (“Direct evidence is ‘based on personal knowledge or observation . . . that, if true, proves a fact without inference or presumption.’ Circumstantial evidence is ‘based on inference and not on personal knowledge or observation.’ Eyewitness testimony describing commission of a crime is direct evidence. The alleged perpetrator’s flight from a crime scene is circumstantial evidence.” (footnotes omitted)).

⁵¹ See Anderson, *The Legacy*, *supra* note 49, at 968–73.

⁵² Aaron Keller, *Jeff Flake’s Kavanaugh Endorsement Is Based on an Incorrect Legal Standard*, LAWFARE (Sept. 29, 2018, 10:08 AM), <https://lawandcrime.com/legal-analysis/jeff-flakes-kavanaugh-endorsement-is-based-on-an-incorrect-legal-standard/> [https://perma.cc/6CL6-GLKJ] (emphasis added).

⁵³ See Anderson, *The Legacy*, *supra* note 49, at 968–73.

⁵⁴ See *id.*

⁵⁵ This can be conceptualized as “corroborating evidence” as well, and it may range “from weak—the suspect was known to be close to the scene of the crime—to strong—the suspect’s shoes matched a footprint at the scene.” Bohannon, *Eyewitness Testimony*, *supra* note 47; see also

accusations of specific wrongdoing) that require the production of evidence—like the qualification inquiry involved in a judicial-nominee hearing, for example—the burden of production should be laded on the party that is asking for something (the nominee) and who is most likely to have access to whatever evidence and information is required (again, the nominee).⁵⁶

2. The Burden of Persuasion

As Professor Kovacic-Fleischer notes above, the burden of *persuasion* need not be laded on the same party laded with the burden of *production*.⁵⁷ And as she elucidates in her summary of existing standards, the lading of the burden of persuasion (once the party alleging wrongdoing has produced enough evidence to make out a claim) hardly involves a well-structured, rigid, or formally realizable application of concrete principles.⁵⁸ That is not to say that such principles do not exist, and try we must to discover them—a task made easier with a focus on the special problems associated with a judicial-nominee proceeding where the interests and temporal markers involved are relatively easily discernible.

For the sake of clarity, here is a summary of the prevailing factors identified by Professor Kovacic-Fleischer, bullet-pointed for ease of application later in the Article. Lawmakers should assess the following:

- Which party “seeks to change the status quo” or raise issues that “are disfavored or unusual.”
- Which party “has knowledge and access to information.”
- “Whether the burden follows the natural order of storytelling.”⁵⁹

Laurence J. Alison et. al., *Why Tough Tactics Fail and Rapport Gets Results: Observing Rapport-Based Interpersonal Techniques (Orbit) to Generate Useful Information from Terrorists*, 19 PSYCHOL. PUB. POL'Y & L. 411, 417 (2013) [hereinafter Alison, *Tough Tactics*] (“Suspect behavior was also measured to reflect the amount of useful information from the interview. . . . It is measured in relation to information which is of evidential significance Responses are coded across the following categories, which were highlighted by tactical interviewing advisors during consultation with the research team: capability (ability to commit offense); opportunity (circumstance allowing commission of offense); motive (reason to commit the offense); and descriptions (details about people, locations, actions and times that may be related to the offense).”).

⁵⁶ See *infra* Part III, section B (2).

⁵⁷ See Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 622–24; accord Raccuia, *Exclusionary Zoning*, *supra* note 24, at 1862 (“In some cases, . . . once the party charged with the burden of production establishes a prima facie case, the burden of persuasion shifts to the opposing party.”).

⁵⁸ See Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 622–24.

⁵⁹ See *id.*

These factors seem adequate—as a starting point, at least—in lading the burden of persuasion in a garden-variety case, but they do not account for the gravity of the interests involved in a federal judicial-nominee hearing. Obviously, federal judges serve for life (during “good [b]ehaviour”) and cannot have their compensation reduced while in office.⁶⁰ More to the point, they rule on cases and controversies that implicate more far-reaching consequences than a fight between or among competing private parties in a case for civil damages or a tangle between the state and a defendant in the typical criminal case.⁶¹ All Article III judges have the power of judicial review, meaning the power to rule on the constitutionality of the act of a coordinate branch or of a state.⁶² As to federal district court judges, the reach of this power may be limited to the parties before the court, but that is hardly any limit at all when one of the parties is the United States of America or one of the fifty states.⁶³ And Supreme Court justices, of course, exercise judicial supremacy, which is the power to bind up not just all lower courts, state and federal, throughout the United States, but also to bind up all state actors throughout the United States.⁶⁴ (Just ask Kim Davis).⁶⁵

B. Other Factors to Consider in Lading Burdens of Proof

With all this in mind, it doesn't seem that the mundane factors summarized above will do. We might also look to more fateful cases involving matters of grave public concern—cases involving not just the plight of an individual out to exact or preserve a pound of flesh, but rather the application of fundamental rights against the government, the interests of equality and fairness in constitutional cases, and the preservation of sacrosanct constitutional principles against political mischief and overreach. These other issues, and the considerations courts take into account

⁶⁰ See U.S. CONST. art. III, § 1.

⁶¹ See U.S. CONST. art. III, § 2.

⁶² See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶³ See, e.g., Martha Bellisle, *Federal Judge Puts Temporary Hold on Trump's Travel Ban Nationwide*, BUSINESS INSIDER (Feb. 3, 2017), <https://www.businessinsider.com/seattle-judge-blocks-trump-immigration-ban-2017-2> [<https://perma.cc/US9L-WRVP>].

⁶⁴ See generally *Cooper v. Aaron*, 358 U.S. 1 (1958) (explaining that all state legislators must act in accordance with the federal Constitution since the federal Constitution is the “supreme Law of the Land” as declared in Article VI).

⁶⁵ See Joshua J. Schroeder, *America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAP. U. L. REV. 833, 867 n.215 (2015) (discussing briefly a Kentucky government employee who refused to issue marriage licenses to same-sex couples after the Supreme Court ruled that same-sex couples had the right to marry).

in analyzing them, more closely approximate the grave and widespread public concerns in play around judicial-nominee proceedings.

In this section (Part I, section B), I will focus mainly on the lading of the burden of persuasion, but I will also refer to the burden of production when appropriate. As we will see below, in cases involving the broad public interest, courts typically lade the burden of persuasion on the party that (a) has the lesser interest at stake (with careful attention to whether society in general has any real interest in the outcome); (b) initiates the action or proceeding—or, critically, precipitates the action or proceeding—for the purpose of vindicating its own self-interest; or (c) warrants special suspicion and scrutiny given the nature of the cause of action or claim at issue.⁶⁶

Constitutional legal tests come in different varieties, among them “elements, factors, balancing tests, means-ends tests, and categorical tests.”⁶⁷ For purposes of this Article, I will pay particular attention to means-ends tests and balancing tests, because it is in the context of these species of legal tests that the Court has spent much time explaining which party has the burden of persuasion.⁶⁸

1. The Party with the Lesser Interest

a. Means-Ends Tests

One constitutional doctrine in particular involves the lading of burdens based on the importance of the interests at stake:

The doctrine of substantive due process breathes life into the Ninth Amendment’s promise that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Since both of the Constitution’s due process provisions use the word *liberty*, courts have regarded those clauses as the textual homes for the unenumerated (retained) rights whose existence was memorialized in the Ninth Amendment.⁶⁹

Under this doctrine, courts consider whether certain governmental laws or policies run afoul of fundamental unenumerated rights.⁷⁰ A law or policy that does substantially interfere with the exercise of a fundamental right survives only if the law or policy serves a compelling governmental interest and employs the least

⁶⁶ See *infra* Part I, section B (1–3) and accompanying notes.

⁶⁷ Brendan T. Beery & Daniel R. Ray, *Five Different Species of Legal Tests—And What They All Have in Common*, 37 QUINNIPIAC L. REV. (forthcoming, 2019).

⁶⁸ See *infra* Part I, section B (1) (a & b) and accompanying notes.

⁶⁹ Beery, *How to Argue*, *supra* note 41, at 1–2 (alteration in original) (citing U.S. CONST. amend. IX; U.S. CONST. amend. V; U.S. CONST. amend. XIV).

⁷⁰ See *id.* at 2 (citing *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting)).

restrictive means possible—means that are “narrowly tailored.”⁷¹ This formulation is an exacting means-ends test.⁷² The question has arisen, of course, which party in such a case has the burden of showing what? As one commentator, Professor Russell W. Galloway, Jr., put it:

A claimant seeking redress for an alleged violation of substantive due process must initially meet three preliminary requirements. First, the court must have jurisdiction over the claim. Second, the claim must be justiciable. Third, the conduct giving rise to the claim must be government action. Failure to demonstrate any of these requirements normally results in dismissal without reaching the merits of the substantive due process claim.⁷³

Professor Galloway’s summary here seems mostly to implicate the lading of the burden of *production*: certain evidentiary thresholds—mostly involving more technical matters but nonetheless requiring the production of evidence—must be met before a court may get to the business of sorting out the real issue (whether a constitutional provision has been violated)—and the party to be laded with the burden of *persuasion*.

To decide whether a right or liberty interest is sufficiently important to warrant treatment as a fundamental right and trigger strict scrutiny, the Supreme Court has considered several factors: “[t]he most important test is whether the right has been traditionally recognized as fundamental in American society. Another test is whether the right is inherent in any scheme of ordered liberty. The practical importance of the right also has been a factor in some cases.”⁷⁴

Applying these factors, the Supreme Court has identified a number of fundamental rights, both under substantive due process principles and also, in some cases, as a component of equal protection:

By far the most important fundamental right in substantive due process law is the so-called right of privacy. This right includes the right to possess and use contraceptives, the right to terminate a pregnancy, the right not to be sterilized, the right to choose a marriage partner, the right to choose family living arrangements, the right to send one’s child to a parochial school, the right to have one’s child study a foreign language, and the freedom of intimate association.

....

⁷¹ See Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 626–27, 649 (1992) [hereinafter Galloway, *Basic Due Process*].

⁷² See *id.* at 627.

⁷³ *Id.* at 626 (footnotes omitted).

⁷⁴ *Id.* at 634 (footnotes omitted); see also *Washington v. Glucksberg*, 521 U.S. 702, 762, 767 (Souter, J., concurring) (citations omitted) (explaining that a finding that a right is fundamental in rank triggers “strict scrutiny”).

Equal protection cases define the term “fundamental rights” as those rights “explicitly or implicitly guaranteed by the Constitution.” This definition sweeps a number of additional rights into substantive due process. For example, the right to be free from punitive incarceration without trial and conviction is a fundamental right. Similarly, the Court has suggested that the right to travel is a fundamental right, although this view has been questioned in later cases. Further, the Court has recognized several fundamental rights, including interstate migration, equal voting weight, and ballot access, in equal protection cases.⁷⁵

Fundamental rights, then, are interests that courts view as inherently more important than any likely governmental interest in snuffing them out.⁷⁶ That is why, to overcome a challenge to a law or policy that substantially interferes with the exercise of such a right, the government bears the burden of persuasion.⁷⁷ “To satisfy strict scrutiny, [the government] must prove that the conduct infringing claimant’s fundamental right was undertaken to further a compelling interest.”⁷⁸ Furthermore, “[the government] must prove that the challenged government action is necessary to further the compelling interest.”⁷⁹ It is telling that, substantively, the government may only meet its burden by producing a *compelling* interest to justify it: if the government’s interest must be compelling to overcome the individual’s interest in exercising a fundamental right, then the individual’s interest must, as to its weight, be something very nearly compelling itself.

In substantive due process (and some equal protection) cases, then, the burden of persuasion is laded in favor of the party with the presumptively superior interest at stake, or, if you will, against (and *on*) the party with the presumptively inferior interest at stake. Which party’s interest is superior or inferior to the other’s depends, in turn, on whether the individual right at issue is fundamental (if it is, then the individual’s interest is superior to the government’s, and if it is not—if it is merely a low-level right—then the government’s interest is presumptively superior to the individual’s).

Sometimes Congress creates a strict scrutiny standard in a statute. Take, for

⁷⁵ *Id.* at 633–35 (footnotes omitted).

⁷⁶ *See, e.g.,* Moran v. Clarke, 296 F.3d 638, 652 (8th Cir. 2002) (quoting *Glucksberg*, 521 U.S. at 720–21) (“[F]undamental rights that are ‘deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’”); *see also* Olejnik v. England, 147 F. Supp. 3d 763, 777 (W.D. Wis. 2015) (Loken, J., dissenting) (likewise explaining that fundamental rights are only those that are deeply rooted in history and implicit in the concept of ordered liberty).

⁷⁷ *See* Galloway, *Basic Due Process*, *supra* note 71, at 641.

⁷⁸ *Id.* at 639.

⁷⁹ *Id.* at 641.

example, the Religious Freedom Restoration Act (RFRA),⁸⁰ which applies to, among other cases, Free Exercise cases involving federal prisoners.⁸¹ RFRA lades the burden on a challenger to produce evidence to establish a *prima facie* case, but then lades the burden of persuasion on the government once that evidence is produced:

[T]o state a *prima facie* claim under RFRA, an inmate must demonstrate that prison officials (1) substantially burdened a (2) sincerely held (3) religious belief, and these requirements are the same in each circuit.⁸² Then “the *burden of persuasion* shifts, and the defendants must . . . prove that the restriction furthers a ‘compelling governmental interest[.]’ [and] . . . that the challenged burden is the ‘least restrictive means’ [available].⁸³

Why did Congress create such an exacting statutory standard? Because given the importance of the individual’s interest in religious freedom, it was dissatisfied with the legal framework that emerged from court decisions under the Constitution’s Free Exercise Clause:

Put simply, suits brought under the Free Exercise Clause are exceedingly deferential to prison administrators. Even when an inmate can show a *prima facie* violation of the right to free exercise under the First Amendment, the defendants win if the challenged restriction is deemed “reasonable,” a low standard akin to the rational-basis test used elsewhere in constitutional law. On the other hand, once an inmate has demonstrated a *prima facie* violation of RFRA . . . , prison administrators must justify their action by overcoming strict scrutiny, a much higher standard.⁸⁴

So it is not always a court that sees an interest as sufficiently important to lade the burden on one party or the other; legislatures may do so as well. Since Congress has done it before in other contexts, the Senate should have no difficulty lading burdens of production and persuasion in judicial-nominee hearings. This would seem preferable to plunging the nation into another standard-less melee the next time a controversial nominee steals the national stage. Dangers abound when such standards are either lacking or confused.

Affirmative-action cases provide an especially illuminating exemplar of the struggle involved in lading burdens of proof when there are strong interests on both

⁸⁰ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4).

⁸¹ See 42 U.S.C. § 2000bb-1(c) (LEXIS through PL 115-281); T.W. Brown, *Ensuring the Application of RFRA and RLUIPA in Pro Se Prisoner Litigation*, 41 OHIO N.U. L. REV. 29 *passim* (2014) (discussing the application of the First Amendment’s Free Exercise Clause and RFRA to prisoners in federal penitentiaries).

⁸² Brown, *supra* note 81, at 41 (footnotes omitted).

⁸³ *Id.* at 42.

⁸⁴ *Id.* at 31 (footnotes omitted).

sides—and the confusion that results from indecision as to which party is laded with what burden. In affirmative-action cases, generally, when a governmental actor uses ethnic heritage as a factor in admissions or hiring, strict scrutiny applies (as it does to any case where a law or policy facially draws lines involving ethnicity).⁸⁵ But in the most recent Supreme Court case on the issue, *Fisher v. University of Texas*,⁸⁶ Justice Kennedy, writing for the majority, seemed to indulge a “convoluted layering of burdens upon burdens” in holding that “the University had carried its burden, or more precisely, that [the challenger] had not carried her burden of showing that the University had failed to carry its burden.”⁸⁷

As Professor George Rutherglen notes:

Justice Powell tried to do the same thing in his separate opinion in *Bakke v. Regents of the University of California*. But that opinion, now over 35 years old, “amounted to a proclamation of ambivalence that dramatically recognized and proclaimed the existence of legitimate moral and constitutional claims on both sides of the issue.”⁸⁸

Professor Rutherglen, after discussing the shifting burdens in affirmative-action cases (given both the government’s compelling interest in achieving diversity in higher education and the constitutional, equal-protection aversion to considering ethnicity in governmental lawmaking and policymaking), concluded:

[T]he University did not really bear the entire burden of proof. [This perspective on the evidence] reveals that the standard for sufficient proof is not social scientific validity but something like adherence to managerial best practices. The legal standard is the state of the art, not the state of the science, of admissions decisions in higher education. Once a university has shown that it conforms to the state of the art, the burden appears to shift back to those attacking affirmative action to identify race-neutral alternatives that are both “available” and “workable.” Shifting the burden of production repeatedly among the parties looks more like a relic of common law pleading, in the form of declaration, plea, replication, and so on, than it does an effective means of resolving an intensely debated constitutional issue. The implications of the burden of production at each stage tend to be subordinated to the end result, creating more equivocation than transparency, and leaving the parties with the risk that they might fail to meet an uncertain burden of proof.⁸⁹

This seems a wise admonition to bear in mind as lawmakers consider where to

⁸⁵ See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁸⁶ 136 S. Ct. 2198 (2016).

⁸⁷ *Id.* at 2214; Rutherglen, *Whose Burden*, *supra* note 28, at 19.

⁸⁸ Rutherglen, *Whose Burden*, *supra* note 28, at 21 (citing *Bakke*, 438 U.S. at 316–17).

⁸⁹ *Id.* at 30–31 (footnotes omitted).

lade the burdens of production and persuasion in judicial-nominee proceedings. It won't do to lade the burden on one party and then require the other party to show that the laded party has not met its burden. As Professor Rutherglen cogently noted, the burden cannot be on both parties at once.⁹⁰ Were it on both parties at once, then a factfinder would have no means of evaluating which party to reward or punish for failing to meet its obligation to produce or persuade.

b. Balancing Tests

Courts also consider which party has the greater or lesser interest when they formulate balancing tests that, in turn, sometimes lade the burden on one side in a constitutional dispute.⁹¹ Consider *Marsh v. Alabama*,⁹² in which the Supreme Court addressed whether a company-owned town could prohibit Jehovah's Witnesses from distributing literature in its town:

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, *we remain mindful of the fact that the latter occupy a preferred position*. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and appraise * * * the reasons * * * in support of the regulation of (those) rights.' In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on [a Jehovah's Witness] for undertaking to distribute religious literature in a company town, its action cannot stand.⁹³

The Court could not have been clearer about the burdens when the competing

⁹⁰ *Id.*

⁹¹ See generally Brendan Beery, *Tiered Balancing and the Fate of Roe v. Wade: How the New Supreme Court Majority Could Turn the Undue-Burden Standard into a Deferential Pike Test*, 28 KAN. J.L. & PUB. POL'Y (forthcoming, 2019) [hereinafter Beery, *Tiered Balancing*].

⁹² 326 U.S. 501 (1946).

⁹³ *Id.* at 501 (emphasis added) (footnotes and citation omitted).

interests were, on one side, mere control of the use of property and, on the other, sacrosanct public interests in religious freedom, free speech, and the availability of information that might inform decisions about “the welfare of community and nation.”⁹⁴ Because the company-owned town had the lesser of the interests at stake, it bore the burden under a balancing test that favored the other party.⁹⁵ In other cases, the scales may be weighted in favor of the government.⁹⁶

For example, one commentator has noted the prevalence of what she calls “deferential balancing” in the context of Supreme Court decisions about presidential authority in wartime:

Under the deferential balancing model, the Court examines the reasonableness of the President’s actions in a highly deferential manner, allowing infringement of citizens’ rights. . . .

Under the deferential balancing model, the Supreme Court defers to the President’s determination that his policies strike the proper balance between defending national security and protecting civil liberties during wartime. Constitutional rights normally provided during peacetime are outweighed by the President’s need to conduct the war effort. Scholars who defend the deferential balancing model argue that the Court’s defense of constitutional rights during wartime will unduly burden the President’s protection of national security. However, critics of the model argue that the Court should review the reasonableness of the President’s actions without such deference to determine whether the cost of infringing citizens’ rights outweighs national security objectives.⁹⁷

So it is possible, even when constitutional rights are at issue, that courts may tip the scales in favor of the party with the greater interest—in the case of wartime authority, the government—and against the party with the lesser interest—the individual.⁹⁸ In a sense, then, the burden is laded on the individual in such cases. This may be so when the public good (for example, national security in wartime) is weighed against the rights or activities or interests of a mere individual. Indeed, the Supreme Court, in evaluating burdens of proof generally, has considered whether society in general has any real interest in the outcome of a case.⁹⁹

In sum, in cases involving more than just the competing interests of private parties, but rather more ethereal issues around constitutional or individual-rights

⁹⁴ *Id.* at 13–14.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ Pooya Safarzadeh, *The Supreme Court and the President: Toward a Balancing Test with Bite*, 10 CHAP. L. REV. 501, 506–07 (2006) (footnotes omitted).

⁹⁸ *See id.*

⁹⁹ *See Addington v. Texas*, 441 U.S. 418, 423–24 (1979).

issues in particular and public-interest issues more generally, courts and lawmakers tend to lade the burden (at least the burden of persuasion) on the party with the lesser interest at stake to favor the party with the greater interest at stake. As will be discussed more thoroughly below, because a judicial-nominee hearing or proceeding implicates constitutional principles and the public interest, the Senate should adopt a similar approach: the party laded with the burden of persuasion should not simply be the party making the accusation, but rather the party with the lesser interest at stake *vis-à-vis* the greater public good.¹⁰⁰

2. The Party that Precipitated (Rather than Initiated) the Action or Accusation of Wrongdoing When that Party Stands to Gain from a Favorable Outcome at the Expense of a Weighty Countervailing Interest

When one party has a weightier interest at stake than the other, courts do not just look to which party initiated legal proceedings or accused another of wrongdoing in lading the burden of persuasion. As will be explained immediately below, other relevant considerations—again, when some weighty interest is at stake—are which party *precipitated* (as distinguished from *initiated*) the action by moving against the other and which party stands to gain from a favorable outcome.

In *Dolan v. City of Tigard*,¹⁰¹ the facts were as follows:

Florence Dolan, who owned a plumbing and electrical supply store in Tigard's business district, sought a permit from the city to expand her store and parking lot, and to build another structure on her land. Tigard informed Dolan that she could have her permit if she met two conditions: first, that she deed to the city the portion of her property lying within the floodplain of the adjacent Fanno Creek, and second, that she provide a strip of land next to the floodplain for use as a bicycle/pedestrian path. To justify this dedication of over ten percent of Dolan's property, Tigard claimed that its previously adopted comprehensive zoning plan had identified the floodplain as a protected greenway that would be strained were Dolan to add additional impervious surface to the area, and that the bike path could alleviate the anticipated traffic congestion from Dolan's expanded facility.¹⁰²

Dolan challenged the city's action claiming that it was unconstitutional under the Takings Clause of the Fifth Amendment.¹⁰³ In a sense, Dolan *initiated* the proceedings at multiple stages—first by applying for the permit, and then by

¹⁰⁰ See *infra* Part III, section B (2).

¹⁰¹ 512 U.S. 374 (1994).

¹⁰² Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Shift in Dolan v. City of Tigard*, 71 N.Y.U. L. REV. 1301, 1302 (1996) [hereinafter Sprung, *Taking Sides*] (footnotes omitted).

¹⁰³ *Dolan*, 512 U.S. at 382 (citing U.S. CONST. amend. V).

challenging the city's conditional grant of the permit and commencing litigation.¹⁰⁴ But it was arguably the city that *precipitated* the action: the city was the party asking for Dolan's land, and its insistence that she cede her property interests to the city was the precipitating cause of the controversy.¹⁰⁵ Under these circumstances, the Court saw fit to lade the city with the burden of persuasion; as one commentator noted:

[A]lmost matter-of-factly, the Court announced a shift in the burden of proof to the government. However, while it devoted a great deal of effort to its discussion of constitutional issues . . . , the *Dolan* Court chose to make this burden shift without extended comment That a burden of proof shift occurred so quietly, yet coincided with considerable advancement in the substantive law, represents a familiar judicial tactic.

Whether subtly achieved as in *Dolan* or not, burden of proof shifts have been a part of some of this nation's most celebrated cases. . . . [I]n each of these cases . . . the burden of proof shift acted as the medium for important substantive legal change. . . . Many of the considerations that steer the direction of the substantive law may also motivate a reassignment in the burden of proof, and the two have often acted interchangeably.

While the Court may not have chosen to acknowledge it, the decision in *Dolan* falls well within this tradition. . . .

In deciding whether Tigard's demands amounted to a taking, the *Dolan* Court significantly altered the substantive law of regulatory takings: it required that there be "rough proportionality" between the government's demands and the harm it fears from development, and it required that the government establish that proportionality. Building on the Court's increasing distrust of government regulation of property, and containing forceful rhetoric deploring the marginal status of the Takings Clause, *Dolan* and its burden shift represent another example in the class of cases where burden reallocations and substantive legal change reinforce one another.

. . . [T]he burden shift in *Dolan* represents the desire of the Court to disadvantage a litigating party and its argument. Seeming to heed the warnings of both public choice theorists and property rights advocates that local government cannot be trusted to regulate private property, the *Dolan* majority, through its burden shift, retreated from the historical deference accorded to government in the land use area. However, rather than handicap the government with an announcement that all regulatory takings cases would now come under a heightened scrutiny review, the *Dolan* Court chose a more subtle but equally significant approach: it demanded that governments come forward and justify their regulatory land use decisions to the factfinder. If this requirement amounts to a shift in both the burden of production and the burden of persuasion, local governments after *Dolan* may find land use regulation a far more treacherous task. Far from a mere procedural move, the burden of proof shift in *Dolan* packs a powerful yet

¹⁰⁴ See *id.* at 379–83.

¹⁰⁵ See *id.*

largely unspoken substantive legal punch.¹⁰⁶

This is an astute analysis. The interplay between burden shifting and more substantive legal machinations is often manifest, and again we see that lading the burden has much to do with the interests at stake as a substantive matter.

In *Dolan*, the Court was protective of the individual right to property and suspicious (even dismissive) of the government's interest,¹⁰⁷ which is usually, in such a case, a merely local interest involving mundane and practical considerations.¹⁰⁸ And although the challenger (*Dolan*) initiated the allegation in court,¹⁰⁹ in a takings case the government often moves first; the initiation of legal proceedings is *reactive*, not *assertive*.¹¹⁰ *Dolan* was reacting to an adverse governmental decision, and it was the government that stood to gain from its own claim to a portion of her property.¹¹¹

In many cases, of course, the party that precipitates the action and stands to gain at the expense of another's interests will be the same party that initiates the action. This is so in a typical torts case, where a plaintiff stands to improve his own financial position at the expense of a defendant—to be “made whole” to the extent that a court of law can make one whole again after he has suffered an injury or insult at the hands of another.¹¹² The same is true in a typical contract action, where again a plaintiff seeks damages—at the expense of a defendant—that will inure to the plaintiff's benefit.¹¹³ Even in a case where a plaintiff initiates a proceeding and seeks

¹⁰⁶ Sprung, *Taking Sides*, *supra* note 102, at 1302–03 (footnotes omitted).

¹⁰⁷ *See id.* at 1303.

¹⁰⁸ *See, e.g., Dolan*, 512 U.S. at 379–80 (explaining that the City's concerns revolved around a floodplain, a greenway adjoining the floodplain, and a pedestrian/bicycle path).

¹⁰⁹ *See id.* at 382.

¹¹⁰ *See, e.g., J. Peter Byrne, Basic Themes for Regulatory Takings Litigation*, 29 ENVTL. L. 811, 818 (1999). As Professor Byrne explains:

A central function of government is to mediate between competing interests, such as between a property owner and the community, or between different individuals or groups of individuals. The risk of takings liability tends to skew government decision making in favor of those in a position to assert takings claims, at the expense of the community as a whole. While there are political costs to most decisions that politicians make, the risk of government takings liability and the resulting budget impacts exert an especially direct and powerful effect on government decision makers. For example, rejecting an application to develop wetlands may give rise to a takings claim, but granting such an application creates little, if any, risk of government financial liability.

Id. (footnote omitted).

¹¹¹ *Dolan*, 512 U.S. at 382.

¹¹² *See Jill Wieber Lens, Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation*, 59 KAN. L. REV. 231, 231, 235 (2011).

¹¹³ *See id.* at 233.

only equitable or injunctive relief, the plaintiff typically stands to gain something: the right to do something, for example, or the peace of living without further nuisance.¹¹⁴

In sum, when lading the burden of persuasion, regardless of which party initiated a formal legal proceeding, one should consider whose conduct precipitated the action or allegation and which party stands to gain at the expense of the interests of another.

3. Which Party Warrants Suspicion or Scrutiny

Sometimes the burden of persuasion is laded on the party that, given the very nature of the case, warrants suspicion and careful scrutiny.¹¹⁵ This is especially true in equal protection cases, in which the allegation is usually that the government has targeted a discrete and insular minority for disfavored treatment:

[C]ourts generally consider three factors in determining whether a classification deserves special protection under the [Equal Protection Clause of the] Fourteenth Amendment: 1) whether the characteristic that marks the classification is immutable; 2) whether the class of persons at issue has suffered a history of political powerlessness; and 3) whether the characteristic that marks the class has any bearing on one's ability to contribute to and participate in society and its institutions.

In any equal protection case, regardless of whether the classification at issue is suspect, some form of a means-ends test will be applied by a court to determine whether the government has improperly targeted some group. The use of means-ends analyses in the equal protection context makes sense; means-ends tests are used to “smoke out” improper purposes. Most parents have applied means-ends tests to their children, even if they didn't know they were doing so. When a parent comes upon a child who has emptied all the ingredients of a dinner recipe (including the egg whites) onto the kitchen counter, claiming, “I was just trying to help,” that parent is likely to reply, “Well if you were just trying to help, this was not the way to do it.” What the parent would really be saying, of course, is that the reason proffered by the child is bogus; the means employed don't match up with the stated goal, and we've smoked out what was really going on here: it's called mischief.

What kind of means-ends test applies in an equal protection case depends on whether the targeted group is deemed to be suspect—based on the three factors noted above. Unfortunately, those factors tend not to be formally realizable (easily applied). Most classifications, as one might expect, are non-suspect; laws targeting non-suspect groups—like age, income level, health, or, for that matter, criminal disposition—are

¹¹⁴ See Jason Schwalm, *The Eye of the Beholder: A Defendant-Reliant Approach to Valuing Injunctive Relief for the Purposes of the Amount in Controversy Requirement*, 36 OHIO N.U. L. REV. 171, 181 (2010).

¹¹⁵ See Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal-Protection Quiver*, 69 SYRACUSE L. REV. (forthcoming, 2019) (manuscript at 3) (on file with *Syracuse University Law Review*) [hereinafter Beery, *Rational Basis*].

upheld unless the *challenger* can show either that the government has no legitimate purpose underlying its law or that the means the government has employed do not rationally relate to achieving its proffered interest.¹¹⁶

So generally speaking, in an equal protection case, the identity of the *group* targeted by a governmental law or policy (which one commentator, Professor David L. Faigman, nonetheless refers to as the “interest” involved¹¹⁷) determines the level of scrutiny to be applied:

Multitiered tests . . . best exemplify the shifting burdens of persuasion inherently a part of constitutional adjudication. For example, the Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to mandate a three-tiered analysis that directs its review of government purposes and describes the corresponding burdens of persuasion. For rights at the core of the clause, the Court strictly scrutinizes the state action and requires the *state* to demonstrate that its action is necessary to accomplish a compelling government interest. At the clause’s periphery, the Court employs minimal scrutiny and requires the *challenger* to demonstrate that the state action is not rationally related to a legitimate state interest. Certain rights situated between the core and the periphery receive intermediate scrutiny, a standard that retains but reduces the burden on the state, requiring it to demonstrate that its action is substantially related to an important government interest.¹¹⁸

To be more precise, again, the Equal Protection Clause generally protects groups, not rights or interests.¹¹⁹ Nonetheless, Professor Faigman’s explication of tiered review and the lading of burdens is helpful. With regard to interests at or near the core of the equality principle, where a court’s suspicion should be at its greatest, the burden of persuasion is laded on the government; where the interests at stake lie “at the periphery” of concerns about equality, the burden is laded on the challenger.¹²⁰

Courts’ use of the terms “suspect class” and “quasi-suspect class” elucidates courts’ attitude or posture in these cases: suspicion.¹²¹ Where groups that implicate the core principles of equal protection are targeted by the government, courts look not to the members of the affected class to show that the government has behaved badly, but to the government to show that it has not.¹²² There are cases, then, where

¹¹⁶ *Id.* (manuscript at 5–6) (on file with *Syracuse University Law Review*) (footnote omitted).

¹¹⁷ David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1537 (1992).

¹¹⁸ *Id.* (footnotes omitted).

¹¹⁹ See Beery, *Rational Basis*, *supra* note 115.

¹²⁰ Faigman, *supra* note 117, at 1537.

¹²¹ See *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Nyquist v. Mauclet*, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting).

¹²² See Beery, *Rational Basis*, *supra* note 115.

evidence of certain innately diabolical conduct might raise an inference of wrongdoing that is for the accused to rebut rather than for the accuser to establish at some heightened evidentiary threshold (one can see how this might apply in the judicial-nominee context).¹²³

In cases arising under the Free Exercise Clause, as well, courts sometimes have their suspicions aroused and apply strict scrutiny, shifting the burden of persuasion to the government after the challenger has met its burden of production (despite its tendency in many cases to defer to the government, discussed above):

Prior to 1990, the Free Exercise Clause was understood to require courts to apply strict scrutiny analysis to any laws interfering with the free exercise of religion. When courts apply strict scrutiny, the burden of persuasion is always on the government.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, however, the Supreme Court expressly rejected the assumption that strict scrutiny applies to all laws impeding the free exercise of religion. *Smith* arose when two Native Americans were fired from their jobs because they used peyote, which Oregon classifies as an illegal drug. When their applications for unemployment benefits subsequently were denied because they had been fired for misconduct—ingesting peyote—they [sued,] claiming that the denial violated the Free Exercise Clause.

The Court rejected the plaintiffs' argument that strict scrutiny should apply, and held that the Free Exercise Clause does not exempt activity forbidden by neutral laws of general applicability merely because such activity is of a religious nature. The practical result of *Smith* was that neutral laws, even those that burden the free exercise of religion, are subject to rational basis review. In rational basis review, the plaintiff always has the burden of persuasion.

Smith, however, did not result in the death of strict scrutiny for all Free Exercise cases. Three years later, the Court again faced a Free Exercise challenge in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. In *Lukumi*, members of the Santeria religion challenged a zoning ordinance . . . [that] forbade ritual animal sacrifices. The Court unanimously held that the zoning ordinance violated the Free Exercise Clause.

The Court distinguished *Smith*, explaining that strict scrutiny applied because the challenged zoning ordinance was not neutral or generally applicable; it was clearly enacted to suppress the practice of Santeria. The ordinance could not survive strict scrutiny because the city could employ other means to achieve its purported goals—protecting public health and preventing cruelty to animals—without burdening the exercise of Santeria. Thus, after *Lukumi*, non-neutral laws that interfere with the free exercise of religion are subject to strict scrutiny.

Stated alternatively, *Smith* and *Lukumi* stand for the proposition that the assignment of burdens of proof in Free Exercise claims depends on the challenged statute's neutrality. If the statute is neutral and generally applicable, the plaintiff has the burden of persuasion. But if a plaintiff produces evidence that a non-neutral law

¹²³ See *id.*

interferes with the free exercise of his religion, the burden of persuasion shifts to the government.¹²⁴

The same insistence in neutrality applies to governmental taxes imposed on the press:

[T]he Supreme Court has . . . [held] that the burden imposed by . . . tax legislation on the press must be necessary to serve a “compelling” or “overriding” governmental interest . . .

Before this “strict scrutiny” standard is applied, however, the Court first requires proof that the tax has in fact substantially burdened the press. The Supreme Court has never suggested that the press is immune from the general forms of taxation necessary to sustain the operations of the government. Instead, it has identified . . . factors which, if present in a state’s tax scheme, raise the presumption of unconstitutionality because of the substantial burden placed upon the press. This two-prong analysis—identification of the discrimination and application of the strict scrutiny standard—has become the test to quash unconstitutional means of abridging the freedom of the press through discriminatory tax treatment.

. . . Whether a particular tax scheme is discriminatory is determined by distinguishing between a generally applicable tax and a “differential” or “selective” tax. Differential taxation of the press is generally defined as taxing members of the media in a manner different than that customarily accorded non-media businesses. . . . If properly employed, the nondiscrimination principle, exemplified by the two-prong analysis, maintains an equitable balance between a government’s privilege to tax and the press’ guaranteed freedoms under the Free Press Clause.¹²⁵

In both the free exercise cases and the free press taxation cases, we see again that the burden of persuasion (once evidence of non-neutrality has been produced) follows, i.e., is laded on, the party whose conduct has raised a suspicion that something nefarious is afoot.

II. WEIGHTING

Once the burdens of production and persuasion have been *laded* on the appropriate party, the question arises: what quantum or *weight* of evidence must be produced to (a) initiate an investigation; (b) warrant a formal hearing or proceeding; and (c) find for or against the parties involved in the controversy. One consideration to keep in mind as we wade through the standards that apply in both civil and criminal cases is that a judicial-nominee proceeding, at least as to an

¹²⁴ Raccuia, *Exclusionary Zoning*, *supra* note 24, at 1873–74 (footnotes omitted) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Emp’t Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)).

¹²⁵ Gregory S. Ascioia, Note, *Leathers v. Medlock: Differential Taxation of the Press Survives Under the First Amendment*, 41 CATH. U. L. REV. 507, 508–09 (1992) (footnotes omitted).

accusation of disqualifying wrongdoing, is *neither*, and yet, in some senses, *both* civil and criminal. A Senate hearing is not a trial at all, either civil or criminal, and yet it may involve an allegation of conduct that would meet the elements of a crime—but in an arena (a Senate hearing) where the stakes are more akin to a civil case (involving no prospect that the losing party will suffer the forfeiture of life or liberty¹²⁶).

A. Investigation

At each of three stages of a criminal investigation at the federal level (normally conducted, of course, by the Federal Bureau of Investigation (FBI)¹²⁷), the production of some evidence is required. The weights of evidence needed to graduate from one stage to the next are spelled out in guidelines promulgated by the U.S. Attorney General:

The lowest level of investigative activity is the “prompt and extremely limited checking out of initial leads,” which should be undertaken whenever information is received of such a nature that some follow-up as to the possibility of criminal activity is warranted. This limited activity should be conducted with an eye toward promptly determining whether further investigation (either a preliminary inquiry or a full investigation) should be conducted.

The next level of investigative activity, a preliminary inquiry, should be undertaken when there is information or an allegation which indicates the possibility of criminal activity and whose responsible handling requires some further scrutiny beyond checking initial leads. This authority allows FBI agents to respond to information that

¹²⁶ See generally Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 15 (2005). Professor Fellmeth explains:

Different theories explaining the distinction between civil and criminal necessarily reflect different value judgments about the centrality of individual liberty and dignity to the constitutive order. In the federal and state legal systems of the United States, criminal sanctions are typically conceived of as kinds of punishment, and . . . punishment “must (by anyone who takes liberty to be an important moral value) be considered *prima facie* wrong and in need of moral justification.”

Id.

¹²⁷ See Anthony R. Gordon, *A Day in the Life of an FBI Agent*, 5 NEV. LAW. 28, 28 (Nov. 1997).

As the former Special Agent describes:

A day in the life of an FBI Special Agent can be as varied as the type of work conducted by the FBI. Being the primary investigative agency for the United States Department of Justice, the FBI’s investigative jurisdiction ranges from the traditional violent crime and fugitive work to domestic and international terrorism, organized crime and drug investigations, civil rights enforcement, public corruption, and white collar crime.

Id.

is ambiguous or incomplete.¹²⁸

A formal investigation, as opposed to a mere inquiry, requires a higher threshold (greater weight) of evidence, which must of course be developed by the law enforcement agency itself. The agency acts as both the agent of the real party in interest (the United States) and, in a sense, as a proxy for the victim or victims of the alleged crime¹²⁹:

A general crimes investigation may be initiated where facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed. Preventing future criminal activity, as well as solving and prosecuting crimes that have already occurred, is an explicitly authorized objective of general crimes investigations. The “reasonable indication” threshold for undertaking such an investigation is substantially lower than probable cause.¹³⁰

When discussing when the FBI would open an investigation (particularly in a counterterrorism case), former FBI Director James Comey explained that the FBI would first need to find “a credible allegation of wrongdoing or reasonable basis to believe that an American may be acting as an agent of a foreign power.”¹³¹ In other words, not just any allegation or basis will do: there must be some assessment, even at this stage, of the reliability of evidence.

¹²⁸ *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, EPIC, <https://www.epic.org/privacy/fbi/FBI-2002-Guidelines.pdf> [<https://perma.cc/4GSG-Y6E5>] (last visited Feb. 25, 2019) [hereinafter *FBI Guidelines*].

¹²⁹ There is scarce literature on the relationship between a law-enforcement agency like the FBI and the crime victims with whom FBI agents work. There is considerable scholarship, however, about the prosecutor-victim relationship; to the extent that the prosecutor-victim relationship mirrors the law-enforcement-and-victim relationship, the scholarship is helpful. See, e.g., Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 559–60 (2005). According to Professor Gershman:

The role of the victim in the criminal justice system has increased dramatically in recent years. Whereas crime victims in the past lacked any meaningful role in the criminal justice process, crime victims today are afforded broad legal protections, including a right to be treated fairly and with dignity, a right to restitution for their injuries, a right to be protected from the accused, a right to be notified of and to be present at court proceedings, and a right to be heard at critical stages in the proceedings. These protections are not self-executing, however. At a minimum, their enforcement requires the involvement and cooperation of the prosecutor. Yet despite the prosecutor’s important role in safeguarding the rights of victims, there has been little examination of the relationship between prosecutors and victims, and the extent to which that relationship implicates ethical rules regulating a prosecutor’s conduct.

Id. (footnotes omitted).

¹³⁰ *FBI Guidelines*, *supra* note 128.

¹³¹ See John Cassidy, *Trump’s Russia Problem Is Far from Marginal*, NEW YORKER (Mar. 23, 2017), <https://www.newyorker.com/news/john-cassidy/donald-trumps-russian-marginalia-problem> [<https://perma.cc/Z53H-GRLF>].

B. *Formal Proceedings*

To initiate a formal case or proceeding, beyond merely an investigation, an accuser or plaintiff generally must establish probable cause:

Probable cause is not a single standard. The phrase is used by courts to describe the justification needed to support either criminal proceedings or civil proceedings; but the showing required for the first is greater than the showing required for the second. Probable cause, then, is best understood to mean “sufficient cause,” where the meaning of “sufficient” depends on what follows from the decision. . . .

. . . Probable cause [in a criminal case] . . . is a reasonable belief that the facts and the law support the particular charge made against the accused. The factual side of the standard is a reasonable belief that the accused has acted or failed to act in the manner charged. The legal side is a reasonable belief that those acts or omissions constitute the offense at issue.¹³²

As to civil cases, the rules are understandably looser:

Probable cause to support a civil claim is an easier standard to satisfy than the probable cause needed to justify . . . initiating a criminal charge. The difference is supported by three principal considerations. First, the less severe consequences of a civil judgment also support a less demanding rule to justify the pursuit of it. Second, the public interest is sometimes served by civil lawsuits that advance claims that have not yet been recognized by the courts but that have a sound chance of success. Third, civil proceedings sometimes must be brought before significant investigation of the facts is possible; the means of conducting such an investigation may become available only with commencement of a lawsuit. Criminal cases more often (though not always) are supported at the time they begin by substantial investigation or by firsthand knowledge on an accuser’s part. The confidence required of a civil plaintiff is therefore less than that required of an accuser who initiates a criminal prosecution.

. . . .

. . . Probable cause to support a civil claim is an objective standard. The claim must reasonably appear to have a legitimate or “sound” prospect of success at the time the claim is made. This does not necessarily mean the claim is likely to prevail. It means the claim is not frivolous. Sometimes a legitimate claim will have only a small chance of acceptance.¹³³

In a typical civil case at the federal level, a plaintiff must plead in her complaint enough “factual matter” to establish a plausible inference that further discovery may unearth evidence of wrongdoing by the defendant.¹³⁴ These pretrial standards are designed to separate the wheat from the chaff—the meritorious claims from the frivolous nonsense:

¹³² RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 22 TD (AM. LAW INST. 2018).

¹³³ *Id.* § 25 (citations omitted).

¹³⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

The cases can be viewed as addressing a dilemma. On one hand, if conclusory claims are sufficient to survive a motion to dismiss, there may be a flood of groundless suits that threaten to impose high costs—monetary and otherwise—on blameless defendants. On the other hand, if plaintiffs must already possess information that adequately inculcates defendants as a prerequisite to discovery—a main purpose of which is to give plaintiffs access to information solely in defendants' possession, posing a classic catch-22—important groups of meritorious cases may be eliminated from the system.¹³⁵

C. *Liability or Guilt*

Then there is the matter of the weight of evidence required to establish liability or guilt. In one case, the Supreme Court suggested that the weight of proof required in a given case should be a function of society's interest in the outcome:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.¹³⁶

Although this approach (the consideration of the interests of society in the outcome of a particular case) has drawn criticism from some,¹³⁷ it seems apt in the context of a judicial-nominee proceeding, especially one involving the Supreme Court, where the outcome is clearly of so much greater concern than the outcome of litigation between two parties whose interests do not implicate national and global consequences.

Distinguishing the preponderance standard from the standards involving more serious consequences, the Court explained:

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the

¹³⁵ Kaplow, *Multistage Adjudication*, *supra* note 20, at 1182–83 (footnotes omitted).

¹³⁶ *Addington v. Texas*, 441 U.S. 418, 423 (1979).

¹³⁷ See Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 742–43 (2012) [hereinafter Kaplow, *Burden of Proof*].

likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.

[An] intermediate standard, which usually employs some combination of the words “clear,” “cogent,” “unequivocal,” and “convincing,” is less commonly used, but nonetheless “is no stranger to the civil law.” One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof. Similarly, this Court has used the “clear, unequivocal and convincing” standard of proof to protect particularly important individual interests in various civil cases.¹³⁸

So there are various weights that may be assigned to a party’s burden of persuasion to achieve a legal win on the merits of a case, ranging from a mere preponderance of evidence to proof beyond a reasonable doubt. And we see again the common thread that runs through so much of the discussion about lading and weighting burdens: the concern, ultimately, is about the gravity of the interests at stake on both sides of a dispute.¹³⁹

But a note of caution is in order: one scholar has complained that this whole enterprise of sorting out burdens and standards of proof can be arbitrary and whimsical. Professor Roger B. Dworkin wrote:

The concept of burden of proof exists on a theoretical level because we believe it does. . . . Since it performs a bad function unrelated to its theoretical purpose, does not perform its supposed function, and badly confuses the law, we should abandon the entire notion of a burden of proof in order to simplify the law, stop fooling ourselves, and remove a misused tool from the hands of appellate judges.¹⁴⁰

Notwithstanding Professor Dworkin’s anxieties as to the misapprehension of burdens of proof in the wrong appellate hands, the Kavanaugh hearings illuminated an even more harrowing misadventure: the absence of any clarity as to which party has to show what, and by what standard, at any stage of a quasi-judicial proceeding underway before a political body.¹⁴¹ Professor Dworkin may have a point, though: there is nothing inherently sensible about adhering, in an overly formalistic way, to the weights that courts traditionally assign to burdens of persuasion; those weights do not address the full range of interests and contexts involved in resolving myriad

¹³⁸ *Addington*, 441 U.S. at 423–24 (footnote and citations omitted).

¹³⁹ *Id.*

¹⁴⁰ Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1153 (1972).

¹⁴¹ See Roberts, *Hearing Isn’t a Trial*, *supra* note 19.

different species of cases and controversies.

Professor Louis Kaplow offers an instructive illustration:

To introduce evidence and the setting of an evidence threshold, consider a simple and reasonably familiar example in the medical context: the use of test results to determine whether to treat a patient—perhaps to administer a drug, perform surgery, or employ a more invasive follow-up diagnostic procedure. The test is an imperfect signal, higher scores indicating a greater likelihood that the disease in question is present. That is, individuals who truly have the ailment produce a range of test results, but their scores cluster toward the high end, whereas individuals who really are disease-free also produce a range of results, but their scores cluster toward the low end. The problem is to choose a cutoff or threshold, above which treatment will be applied. A high cutoff will result in few false positives, which is to say that only a small portion of disease-free individuals will be mistakenly given the treatment; however, a high cutoff will also result in many false negatives, so a nontrivial fraction of diseased individuals will mistakenly fail to receive treatment. In determining the optimal threshold, these error costs will be traded off: if nontreatment of diseased individuals is serious and the treatment involves little cost to disease-free individuals, a low cutoff will be optimal, but if nontreatment is only moderately problematic whereas treatment is very costly to disease-free individuals, a high cutoff will be optimal.¹⁴²

Applying the principles underlying this example, Professor Kaplow explains that there is nothing magical about the standards we generally apply in legal cases, including the preponderance standard:

An immediate implication . . . is that, depending on the context, the optimal evidence threshold could be much more demanding or notably more lax than the preponderance rule (or a requirement of proof beyond a reasonable doubt). For example, if much benign activity might be chilled and the harmful acts in question cause little social loss and are mostly undeterrable in any event, very strong evidence should be required for liability. In contrast, if there is little prospect of chilling beneficial activity and the pertinent harmful acts impose extreme damage and might readily be deterred, a low threshold should be employed.¹⁴³

Setting the optimum threshold (or what we might call the proper quantum or weight of evidence required to persuade), then, requires, essentially, that we evaluate the risk of error that is tolerable in light of the gravity of the consequences when an error occurs.¹⁴⁴ This is not altogether inconsistent with existing Supreme Court case law, but that case law focuses on constitutional due process rather than the narrow question of what weight should be assigned to the burden of persuasion in a given type of case (although, as we will see shortly, these due process principles

¹⁴² Kaplow, *Burden of Proof*, *supra* note 137, at 756.

¹⁴³ *Id.* at 748 (footnote omitted).

¹⁴⁴ *See id.*

certainly do apply in that context).¹⁴⁵

In *Mathews v. Eldridge*,¹⁴⁶ the Supreme Court ruled that, as a matter of procedural fairness, the process to which a litigant is due depends on three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁴⁷

So, for example, a state may not terminate the custodial rights of a parent on a mere showing, by a preponderance of the evidence, that the parent is neglectful.¹⁴⁸ In *Santosky v. Kramer*,¹⁴⁹ the Supreme Court stated that parents have a "vital interest in preventing the irretrievable destruction of their family life."¹⁵⁰ As to the adequacy of the preponderance standard in light of this vital interest, the Court stated:

A standard of proof that . . . demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. Given the weight of the private interests at stake, the social cost of even occasional error is sizable.¹⁵¹

The Court concluded that "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State."¹⁵² Based on these findings, the Court held that a state may not deprive a person of his or her parental rights by anything less than a "clear and convincing evidence" standard.¹⁵³

The Court's analysis in *Santosky* tracks relatively well with the optimal threshold approach proposed by Professor Kaplow. Given the relatively low cost to the state of proving a case by a higher standard, the seriousness of the consequences of making a mistake, and the risk of making such a mistake under a low threshold of proof, the Court settled on a higher threshold that would minimize (or at least

¹⁴⁵ See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁴⁶ 424 U.S. 319 (1976).

¹⁴⁷ *Id.* at 335.

¹⁴⁸ See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

¹⁴⁹ 455 U.S. 745 (1982).

¹⁵⁰ *Id.* at 753.

¹⁵¹ *Id.* at 764 (citation omitted).

¹⁵² *Id.* at 767.

¹⁵³ *Id.* at 748.

reduce) the risk of error.¹⁵⁴ To play off of Professor Kaplow’s metaphor,¹⁵⁵ let us conceptualize the “disease” the state was trying to “treat” as child neglect—a serious disease, to be sure. The state set the evidentiary threshold at a low level (a mere “fair preponderance”¹⁵⁶), presumably because the seriousness of the “disease” warranted more “treatment” than less—better to tackle the disease aggressively than to leave it untreated in too many cases. What the state failed to consider, on the Supreme Court’s analysis, was that “treating” a “patient” who didn’t actually have the “disease” could be harmful on an order of magnitude approximating fatality.¹⁵⁷ And given the costs associated with “treating” a “healthy” person, the state should have set the threshold much higher.¹⁵⁸

III. LADING AND WEIGHTING IN JUDICIAL-NOMINEE PROCEEDINGS

There are four broad functions performed by law-enforcement agencies or courts as a legal case progresses in time: (1) investigation; (2) the initiation of formal proceedings; (3) litigation and deliberation; and (4) appeal and correction of error.¹⁵⁹ Judicial-nominee hearings generally involve only investigation, deliberation, and, in a sense, litigation.¹⁶⁰ The initiation function in a typical legal case (the stage where a prosecutor in a criminal case produces an indictment or a plaintiff in a civil case files a complaint that states a recognized claim, for example) is supplanted in judicial-nominee hearings by the constitutional prerogative of the President to make an appointment, ostensibly with the advice of the Senate.¹⁶¹ There is no appeal, so that stage of legal litigation is inapposite in the context of a judicial-nominee hearing.

As to its obligation to consent¹⁶² (or dissent), however, the Senate retains an

¹⁵⁴ *Id.* at 764.

¹⁵⁵ See Kaplow, *Burden of Proof*, *supra* note 137, at 756.

¹⁵⁶ *Santosky*, 455 U.S. at 747.

¹⁵⁷ See *id.* at 753.

¹⁵⁸ See *id.* at 764.

¹⁵⁹ See generally Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018).

¹⁶⁰ See Denis Steven Rutkus, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, CONG. RESEARCH SERV. 1, 21–22 (Feb. 19, 2010), <https://fas.org/sgp/crs/misc/RL31989.pdf> [<https://perma.cc/KX9D-N3HH>] (“Since the late 1960s, the Judiciary Committee’s consideration of a Supreme Court nominee almost always has consisted of three distinct stages—a pre-hearing investigative stage, followed by public hearings, and concluding with a committee decision on what recommendation to make to the full Senate.”).

¹⁶¹ See U.S. CONST. art. II § 2.

¹⁶² See *id.*

investigatory function—both to evaluate the qualifications and suitability of the nominee and to undertake whatever factfinding is required as a result of credible allegations of wrongdoing against the nominee.¹⁶³ The Senate may also deliberate based on the evidence adduced—debating both (a) whether the nominee is generally qualified and suitable for office;¹⁶⁴ and (b) whether any specific and credible allegation against the nominee is, notwithstanding the nominee’s other credentials and attributes, disqualifying.¹⁶⁵

We should therefore bifurcate the judicial-nominee hearing process into two species of inquiry: the qualification inquiry (in which the Senate investigates and debates about the nominee’s credentials, general reputation for good character, neutrality, judicial temperament, and expertise, for example)¹⁶⁶ and the allegation inquiry (in which specific allegations of wrongdoing may emerge, requiring additional factfinding investigation and additional deliberation as to the suitability of the nominee).¹⁶⁷ Burdens of proof in both dimensions—lading and weighting—are involved in both species of inquiry.

A. The Qualification Inquiry

Recall that commentators have suggested the following factors for lading burdens of production and persuasion:

- Which party “seeks to change the status quo” or raise issues that “are disfavored or unusual.”
- Which party “has knowledge and access to information.”
- “Whether the burden follows the natural order of storytelling.”¹⁶⁸

A federal judicial nominee, particularly to the Supreme Court, can move the

¹⁶³ See Rutkus, *supra* note 160, at 22–24 (describing the extensive investigative proceedings typically available to and undertaken by the Senate Judiciary Committee in Supreme Court nomination proceedings).

¹⁶⁴ See Carolyn B. Lamm, *A Proud Tradition*, 96 A.B.A. J. 10 (Apr. 2010) [hereinafter Lamm, *A Proud Tradition*] (describing the work of the American Bar Association as evaluating judicial nominees as to their “integrity, professional competence and judicial temperament”).

¹⁶⁵ See Dennis E. Curtis, *The Fake Trial*, 65 S. CAL. L. REV. 1523, 1523 (1992) [hereinafter Curtis, *Fake Trial*] (“The Senate Judiciary Committee’s handling of the charges by Anita Hill against Clarence Thomas had a more than superficial resemblance to a criminal proceeding.”).

¹⁶⁶ See Lamm, *A Proud Tradition*, *supra* note 164.

¹⁶⁷ See Curtis, *Fake Trial*, *supra* note 165.

¹⁶⁸ See *supra* Part I, section B and accompanying notes.

ideological needle of the federal judiciary considerably.¹⁶⁹ So it is typically the nominee who seeks to change the status quo (or, one supposes, to preserve it, to equal effect). And obviously it is the nominee who has access to his or her own thinking, records, and writings. As to storytelling, judicial-nominee hearings have become a “very public stage [that] serves as an important site for storytelling about America’s highest court, about the people we deem fit to sit there, and about justice more generally.”¹⁷⁰ That is a story to be told by various individuals of varying opinions, but ultimately, of course, by the nominee himself or herself.¹⁷¹

So it seems an unremarkable proposition that, as to the qualification inquiry, the nominee should be the laded party, both as to the burden of production and the burden of persuasion. And given the grave societal interests at stake, he or she should be required to show by something approximating clear and convincing evidence that he or she is suitable; in other words, in the context of the qualification inquiry, the nominee should produce a considerable *weight* of evidence.

B. The Allegation Inquiry

Here is where much analysis is required in appropriately lading and weighting the burdens of production and persuasion. While it seems clear that a nominee should have both burdens as to establishing his or her own bona fides relating to the Senate’s qualification inquiry, the nominee will not be the one in possession of the testimony or evidence against his or her own self, and he or she will not be the one with a story to tell.

As discussed above,¹⁷² to initiate formal proceedings in federal court, a plaintiff must establish in her complaint “plausible grounds to infer . . . that discovery will reveal evidence of [illegality].”¹⁷³ This federal standard (plausible evidence) was reflected (although seemingly not intentionally) in an op-ed piece about the Kavanaugh proceedings penned by Professor Caprice Roberts, who wrote, “[e]ven if senators aren’t sure what, if anything, happened between Ford and Kavanaugh, if they think the accusation is probable, or even plausible, and decide that it’s too great

¹⁶⁹ See generally, e.g., Brendan T. Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. (forthcoming, 2019); Beery, *How to Argue*, supra note 41; Beery, *Rational Basis*, supra note 115; Beery, *Tiered Balancing*, supra note 91.

¹⁷⁰ Patrick Barry, *Sites of Storytelling: Supreme Court Confirmation Hearings*, 94 IND. L.J. SUPPLEMENT 1, 2 (2018).

¹⁷¹ See *id.* at 1 (“Supreme Court confirmation hearings have an interesting biographical feature: before nominees even say a word, many words are said about them.”).

¹⁷² See supra Part II, section B and accompanying notes.

¹⁷³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

a risk to put a maybe-sexual-assaulter on the high court, they're entitled to vote no."¹⁷⁴

But in either a civil or criminal case, some factual basis rising to the level of probable cause (probably somewhere between that associated with a criminal case and that associated with a civil case), or "sufficiency" of evidence, must have been laid as a predicate.¹⁷⁵ It seems reasonable to conclude, then, that as to an allegation of wrongdoing that is potentially disqualifying, the *accuser* should be laded with the burden of *production*, at least as to the stages of the judicial-nominee proceedings most closely associated with their *investigatory* function or, arguably, the beginning stages of litigation (the initiation of formal proceedings). And as to its weight, as suggested above, the evidence must establish that the allegation is plausible and that there are reasonable grounds for believing that the allegation is true. Recall that, before an allegation may warrant even a preliminary inquiry or formal investigation, it must be shown that the allegation is credible and reliable.¹⁷⁶ Recall also that when an allegation seems wholly implausible (one might imagine that the nominee was in a different country at the time of the alleged wrongdoing, for example), corroborating evidence might be required.¹⁷⁷

Beyond bearing the burden of production at the investigation and preliminary litigation stages of the proceedings, questions around lading and weighting become more difficult—as they relate, of course, to the ultimate burden of persuasion bearing on the decision whether to seat the nominee. As will be discussed below, this is especially so because it is not clear, as a matter of procedural due process, that once a nominee has been credibly accused of wrongdoing, he or she is entitled to any process at all.

1. Does a Judicial Nominee Have a Cognizable Interest in Obtaining a Seat?

Before deciding what burdens of proof should be laded on whom (and the weight of the burdens so laded) *after* a credible allegation has been established, I address whether a judicial nominee facing a Senate hearing or proceeding is really entitled to any due process *at all*. "The requirements of . . . due process apply only to the deprivation of . . . liberty and property. . . . [T]he range of interests protected by procedural due process is not infinite."¹⁷⁸

¹⁷⁴ Roberts, *Hearing Isn't a Trial*, *supra* note 19.

¹⁷⁵ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 22 TD (AM. LAW INST. 2018).

¹⁷⁶ See *supra* Part II, section A and accompanying notes.

¹⁷⁷ See Anderson, *The Legacy*, *supra* note 49, at 973.

¹⁷⁸ Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569–70 (1972).

And what interests are at stake in a judicial-nominee hearing or proceeding? One assumes that the answer to that question may vary from case to case, but the Kavanaugh hearings seemed illustrative: the nominee's primary concerns seemed to be that, were the Senate to act on the allegation against him (finding it to be credible and plausible, thereby denying him a seat on the Supreme Court), then it would deprive him of (1) his reputation and good name; and (2) the seat to which he aspired on the nation's highest court.¹⁷⁹

As to his reputation, then-Judge Kavanaugh lamented during his opening statement during the hearing on Dr. Ford's accusation that "[t]his has destroyed my family and my good name. A good name built up through decades of very hard work and public service at the highest levels of the American government."¹⁸⁰ But one's good name is not necessarily (standing alone, at least) a liberty or property interest that implicates due process protections. In *Paul v. Davis*,¹⁸¹ a citizen who was accused by police of shoplifting, whose name and visage were posted at retail stores even before he had been convicted, claimed that the postings deprived him of due process.¹⁸² The Supreme Court disagreed:

But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in [prior] decisions. [The] law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.¹⁸³

Although one's good name, *standing alone*, is not a property or liberty interest that implicates due process protections, then-Judge Kavanaugh also had it in mind that he was entitled to take a seat on the Supreme Court:

I will not be intimidated into withdrawing from this process. You've tried hard. You've given it your all. No one can question your effort, but your coordinated and well-funded effort to destroy my good name and to destroy my family will not drive me out. The vile

¹⁷⁹ *Kavanaugh Transcript*, *supra* note 18.

¹⁸⁰ *Id.*

¹⁸¹ 424 U.S. 693 (1976).

¹⁸² *Id.* at 696.

¹⁸³ *Id.* at 711–12.

threats of violence against my family will not drive me out.¹⁸⁴

So Justice Kavanaugh certainly had a passion and determination around *getting that seat*. Perhaps in this way he signaled that his interest in employment, and his interest in serving in particular on the nation's highest court, was an interest concrete enough to warrant due process protections.

Any claim by a judicial nominee to a constitutionally protected property or liberty interest in employment, as applied to a seat on the federal bench, would seem tenuous at first blush. In *Board of Regents of State Colleges v. Roth*,¹⁸⁵ the Supreme Court took up the case of a non-tenured university professor who was informed, after completing his contractual term spanning one academic year, that his contract would not be renewed.¹⁸⁶ The Court stated:

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment.

Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have *more than an abstract need or desire for it*. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to [vindicate] those claims.¹⁸⁷

Under these principles, it seems dubious that a judicial nominee would have any interest at all that would entitle him or her to be heard and to defend against credible allegations of wrongdoing. But the notion that a nominee has no due

¹⁸⁴ *Kavanaugh Transcript*, *supra* note 18.

¹⁸⁵ 408 U.S. 564 (1972).

¹⁸⁶ *Id.* at 566–67.

¹⁸⁷ *Id.* at 576–77 (emphasis added) (citations omitted).

process rights at all is undercut by two considerations. First, in *Roth*, the Court noted:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'¹⁸⁸

The Court then observed: "[i]n the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake."¹⁸⁹ So it seems that although reputation alone is not a liberty or property interest, it may acquire the rank of such an interest when joined with some concrete harm being inflicted by the government. In the Kavanaugh hearings and in any future judicial-nominee hearings where salacious allegations are made, we obviously have a different matter than the facts presented in *Roth*: no fair-minded observer would deny that Justice Kavanaugh's good name, reputation, honor, and integrity hung in the balance.

Nonetheless, *Roth* involved someone who had already held a position and then was let go; it did not involve someone who had never acquired a position in the first place. It seems unlikely that then-Judge Kavanaugh could have acquired a legitimate expectation of *continued* employment during a process designed to determine whether he would get the job to begin with. In this sense, *Roth* seems not to suggest, on its own, that somebody in the position of a judicial nominee before the Senate has any claim to any process at all.

But then-Judge Kavanaugh held among his effects something that the employees discussed in *Roth* did not: a presidential nomination¹⁹⁰ that, when blessed with the consent of the Senate, constituted an appointment to the position he sought—as a constitutional matter.¹⁹¹ So even though a nominee to the federal bench does not likely have a *property* or *liberty* interest in obtaining the position, he

¹⁸⁸ *Id.* at 573 (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Peters v. Hobby*, 349 U.S. 331, 352 (1955) (Douglas, J., concurring); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *United States v. Lovett*, 328 U.S. 303, 316–17 (1946)).

¹⁸⁹ *Id.*

¹⁹⁰ See Senate Judiciary Committee's Nomination Actions in the 115th Congress, CONGRESS.GOV, <https://www.congress.gov/nomination/115th-congress/2259> [<https://perma.cc/V4FG-D8MP>] (last visited Feb. 26, 2019).

¹⁹¹ U.S. CONST. art. II, § 2.

or she does have a *constitutional* interest in obtaining the position—not just incident to his own whims and aspirations, but also incident to the President’s own constitutional authority, subject, of course, to the consent of the Senate.¹⁹²

In this sense, it was more rhetorical gamesmanship than careful constitutional interpretation that led so many politicians and commentators to opine that a Senate confirmation hearing is nothing more than a “job interview.”¹⁹³ Given that a potentially disqualifying allegation against a nominee for a seat on a federal court implicates both the nominee’s reputation and integrity and also some constitutionally sensitive interests, we should conclude that such a nominee, even if his interest is *de minimis*, should be afforded some due process, an opportunity to clear his name, and, if he meets an appropriate threshold of proof, to take a seat on the bench.

It would seem also that the interest of the nominee in being seated, and of the President in having the nominee seated, is strengthened when the Senate has already concluded, as to its qualification inquiry (and divorced from any salacious or scandalous wrongdoing) that the nominee is otherwise qualified and suitable for office. And of course, the Senate’s constitutional obligation to advise and consent can be read as a mandate that the Senate undertake fair processes in assessing a nominee once the President has selected one.¹⁹⁴ This, of course, would have given rise to a colorable claim by Merrick Garland that he—and by extension President Obama—were denied due process when the Senate failed to fulfill its constitutional obligation to give him a hearing.¹⁹⁵ Meritorious as any such claim might have been, there likely would have been no judicial remedy available.¹⁹⁶

¹⁹² See *id.*

¹⁹³ See, e.g., Laura McGann, *The Brett Kavanaugh Hearing Isn’t a Trial, It’s a Job Interview*, VOX (Sept. 27, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/9/27/17906230/brett-kavanaugh-hearing-accusers-sexual-assault-confirmation> [<https://perma.cc/8FTL-CQT2>]; Eric Wasson, *Feinstein Says This Isn’t Ford Trial but Kavanaugh Job Interview*, BLOOMBERG (Sept. 27, 2018, 10:36 AM), <https://www.bloomberg.com/news/articles/2018-09-27/einstein-says-this-isn-t-ford-trial-but-kavanaugh-job-interview> [<https://perma.cc/AH5B-MEVW>].

¹⁹⁴ See U.S. CONST. art. II, § 2.

¹⁹⁵ See Harper Neidig, *No Hearing for Obama’s Supreme Court Nominee, McConnell Says*, THE HILL (Mar. 16, 2016, 12:04 PM), <https://thehill.com/blogs/blog-briefing-room/news/273230-mcconnell-no-hearing-for-garland> [<https://perma.cc/KF77-DBQ5>].

¹⁹⁶ A court would likely hold that such a claim presents a non-justiciable political question. See generally *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the sufficiency of the Senate’s trial of an impeached federal judge presented a political question); *Goldwater v. Carter*, 444 U.S. 996 (1979) (holding that the question whether the president may withdraw from a treaty without

Put simply, a presumptively qualified individual, having been nominated by the president and requiring the focus of the Senate as it undertakes its obligation to advise and consent, likely has some reasonable expectation (which is not to say unfettered entitlement to the seat itself) of some process rooted in principles of fundamental fairness before he or she is denied a seat on the federal bench.

2. The Burden of Persuasion—Lading in an Allegation Inquiry

Again, as to an allegation of wrongdoing, the accuser should have the burden of production, which, if it is satisfied, triggers some level of due process for the nominee. But to say that the nominee is entitled to due process is not to say that the nominee should be the favored party as to the lading and weight of the burden of *persuasion*.

Once the Senate has concluded that a nominee is otherwise qualified and suitable for office, and once some interest, however minimal, has vested in the nominee, it is then that the most involved question emerges: what standards should apply to proceedings resulting from an allegation of wrongdoing that is potentially disqualifying?

Some of the factors commentators have discussed as guiding the lading of the burden of persuasion militate against lading the burden of persuasion on the nominee.¹⁹⁷ First, the nominee is at a disadvantage when it comes to possessing or gathering evidence and rebutting the allegation;¹⁹⁸ this is especially so when the allegation, as in the Ford-Kavanaugh matter, stems from an incident long ago. Second, the accuser rather than the nominee has the story to tell in this phase of the Senate's inquiry.¹⁹⁹ Third, there is a sense in which the accuser "started it" all by leveling the allegation in the first place, and this argues for lading the burden of persuasion on the accuser.

But the inclination to lade the burden of persuasion on the accuser does not hold up under more salient factors in cases involving the broad public interest. I consider them one at a time.

a. *The Interests at Stake*²⁰⁰

While it may be so that a nominee has some interest in obtaining a seat once nominated, that interest dims into near obscurity when juxtaposed against the

Senate consent presents a non-justiciable political question); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (holding that courts are not competent to supervise military rules of engagement).

¹⁹⁷ See Kovacic-Fleischer, *Proving Discrimination*, *supra* note 26, at 622–24.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *supra* Part I, section B (1) and accompanying notes.

glaring interests of all society involved in seating federal judges—particularly, of course, on the Supreme Court. To take the most conspicuous example, consider that President Ronald Reagan nominated the late Robert Bork for the seat that was ultimately occupied, after Bork’s nomination foundered, by Anthony M. Kennedy.²⁰¹ How important is a Supreme Court seat to society? Had Robert Bork rather than Anthony Kennedy been seated, it is fair to say that we might be living in a different kind of society in very fundamental ways. Take the issue of abortion, for example:

One can sum up the essence of Robert Bork’s views on abortion by reading a single passage from his book *Slouching Toward Gomorrah*:

It was argued that abortion on demand would guarantee that every child was a wanted child, would keep children from being born into poverty, reduce illegitimacy rates, and end child abuse. Child poverty rates, illegitimacy rates, and child abuse have soared. But it is clear, in any event, that *the vast majority of all abortions are for convenience*.

In an effort not to belabor the point, suffice it to say that Robert Bork was not a proponent of finding any sort of a constitutional right to an abortion. . . . The more fundamental question, though, is this: Would Bork, despite his obvious distaste toward abortion, nevertheless have voted to uphold *Roe v. Wade* out of deference to *stare decisis* . . . ?

It appears . . . that Bork would never have deferred to precedent regarding *Roe v. Wade*. Testifying before Congress in 1981, he proclaimed that *Roe* was “a serious and wholly unjustifiable usurpation of state legislative authority.” He castigated the decision . . . , typically using it as his primary exhibit of how “activist judges” create constitutional rights that never actually appeared in the Constitution. In one speech in 2010, he announced that *Roe* had “invented a wholly fictitious right to abortion.” “Though they have tried desperately,” he continued, “nobody, not the most ingenious academic lawyers nor judges, in the thirty-six years since it was decided has ever managed to construct a plausible legal rationale for *Roe*, and it is safe to say nobody ever will.”

There is, however, [a] wrinkle in Bork’s views on abortion. In 1981, . . . Bork . . . oppose[d] the notion of a “Human Life Bill.” Among other things, the Bill defined “life” as beginning from the moment of conception. . . . To the surprise of his supporters, though, Bork spoke out against the Bill. In essence, he argued that it would be wrong for Congress to pass a law abridging a freedom that the Supreme Court had held to be a constitutionally protected right. Ultimately, the Bill was never passed.

However, it still appears unlikely that Bork’s refusal to support the Human Life Bill would signal his . . . acquiescence to . . . *Roe*. While Bork protested the notion of Congress

²⁰¹ Benjamin Pomerance, *What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court*, 1 BELMONT L. REV. 221, 223–25 (2014).

overturning the Court's determination of constitutionality, it appears that he would have had no qualms about the Judicial Branch reversing this decision. Tellingly, in a 2003 interview, Bork stated that "if the Court makes a bad mistake about the Constitution, nobody can cure it except the Court." Clearly, Bork view[ed] *Roe v. Wade* as precisely that: "a bad mistake about the Constitution." There seems to be little doubt that [he would have voted to] "cure it."²⁰²

And what of Justice Kennedy's legacy on this issue? As I have noted elsewhere:

In one of the more noteworthy uses of his much-ballyhooed "swing vote" on the U.S. Supreme Court, Justice Anthony Kennedy sided with Justices Breyer, Ginsburg, Sotomayor, and Kagan in striking down two Texas laws that restricted access to reproductive-healthcare facilities by imposing toilsome admitting-privileges and surgical-facility standards that clinics had difficulty abiding.

The proposition that a woman has an unenumerated constitutional right to terminate a pregnancy (at least before the point of fetal viability) won the day in 1973. But as 2018 fades into 2019, no judicial precedent is more endangered than the one that has evolved in a triumvirate of cases: *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Woman's Health v. Hellerstedt* (save, perhaps, for the principle that LGBT persons are entitled to the equal protection of the laws²⁰³). As one scholar noted in the immediate wake of the *Hellerstedt* decision, "[T]he future of abortion regulation . . . will be affected by the makeup of the Court . . . Assuming that Justice[s] Ginsb[u]rg, Breyer, Kagan, and Sotomayor remain for the foreseeable future, the power of *Hellerstedt* will depend on Justice Kennedy remaining on the Court." Justice Kennedy, of course, is now gone.²⁰⁴

So a woman wanting to terminate a pregnancy in a society where doing so is legal would, in all likelihood, have inhabited a different legal landscape had Justice Kennedy instead been Justice Bork—at least in those states governed by dogmatists "hostile to notions of freewheeling individual autonomy in matters relating to family, marriage, or reproductive and sexual practices."²⁰⁵

On other matters, Robert Bork's views have been summarized this way:

He opposed the Supreme Court's one man, one vote decision on legislative apportionment.

He wrote an article opposing the 1964 civil rights law that required hotels, restaurants and other businesses to serve people of all races.

He opposed a 1965 Supreme Court decision that struck down a state law banning contraceptives for married couples. There is no right to privacy in the Constitution, Bork said.

²⁰² *Id.* at 237–39 (footnotes omitted).

²⁰³ See Beery, *Rational Basis*, *supra* note 115.

²⁰⁴ Beery, *Tiered Balancing*, *supra* note 91 (manuscript at 1) (on file with *Syracuse University Law Review*) (alterations in original) (footnotes omitted).

²⁰⁵ Beery, *How to Argue*, *supra* note 41, at 1.

And he opposed Supreme Court decisions on gender equality, too.²⁰⁶

Justice Kennedy was not a champion of voting rights²⁰⁷ or laws designed to protect the integrity of elections,²⁰⁸ but he never questioned the basic principle of one person, one vote.²⁰⁹ He was, in some instances, a champion of civil rights and the equality principle, especially as to LGBTQ Americans,²¹⁰ and he recently voted with the majority to uphold public affirmative-action programs.²¹¹ He recognized personal privacy rights, in fact holding that a mere moral objection to a person's private choices is not a legitimate state interest (prompting the late Justice Antonin Scalia to lament "the end of all morals legislation").²¹² And he seemed to have no qualms with the idea that gender should be treated as a quasi-suspect class in equal protection cases.²¹³

²⁰⁶ Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever,'* NPR (Dec. 19, 2012, 4:33 PM), <https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> [https://perma.cc/CJ4L-83ZZ].

²⁰⁷ See generally, e.g., *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (involving an instance in which Justice Kennedy voted with the majority to strike down a portion of the federal Voting Rights Act requiring preclearance for state and local laws affecting elections in areas with a history of past racial discrimination).

²⁰⁸ See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (involving an instance in which Justice Kennedy, writing for the majority, held that Congress could not limit corporate spending on independent political advertising during an election contest).

²⁰⁹ See Michael S. Kang, *When Courts Won't Make Law, Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1118 (2007) ("Equally telling is that Justice Kennedy cites the one-person, one-vote rule as a positive example for the development of the law of partisan gerrymandering. For Justice Kennedy, the appeal of the one-person, one-vote rule is easy to understand. Today the rule represents a model of the popular consensus he seeks for partisan gerrymandering. The one-person, one-vote rule has become ingrained in the popular culture such that it is difficult for the layperson to imagine any alternative." (footnote omitted)).

²¹⁰ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

²¹¹ See *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016).

²¹² *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

²¹³ See Adam Lamparello, *Restoring Constitutional Equilibrium*, 39 U. DAYTON L. REV. 229, 254 (2014) ("[T]he Court could have viewed same-sex marriage bans as discrimination on the basis of gender, an issue which Justice Kennedy claimed he was 'trying to wrestle with' and applied an intermediate level of scrutiny."). If Justice Kennedy was wrestling with whether sexual orientation should be treated like a gender case for equal protection purposes, he must have implicitly recognized that gender itself implicated heightened (intermediate) scrutiny. See *id.*; cases cited *supra* note 210.

So in a world where Robert Bork rather than Justice Kennedy had been the decisive vote on issues around voting rights, federal civil rights laws, unenumerated fundamental privacy rights, and the equality principle generally, we would likely be living in a country where abortion was illegal in some states; the federal government had diminished authority to ensure civil rights for all citizens; women had diminished protections afforded them under the Fourteenth Amendment; public affirmative-action programs were illegal in all cases; and LGBTQ Americans, far from having anything approaching a right to marry, might still have their private sexual practices criminalized at the whim of the political majority. Some would say that this would be a much better world, but the point is simply this: it would be a much *different* world. The gravity of society's interest in who sits on the Supreme Court—both as to the nature of the interest and its weight—is breathtaking when measured against a would-be justice's (or even a President's) interest in having a particular nominee seated.

These societal interests, and the interest of society generally and the Senate in particular, of avoiding a misjudgment or misadventure in this realm, point to lading the burden of persuasion on the nominee, not the accuser, in an allegation inquiry involving a federal judicial appointment.

*b. The Party Precipitating the Action and Standing to Gain*²¹⁴

Although it might seem that an accuser like Anita Hill or Dr. Ford is the one who “starts it,” recall that the party initiating an action is not always the one laded with the burden of persuasion.²¹⁵ We must look to what precipitated the accusation of wrongdoing and consider which party stands to gain something from the proceedings.²¹⁶

We learned from the sworn testimony of both Hill and Dr. Ford that the precipitating cause of the accusations was not the episodes of wrongdoing in the first place (neither Hill nor Dr. Ford publicly accused the alleged wrongdoers at the time of the alleged wrongdoing²¹⁷), but rather the duty each felt to come forward as a result of the *nominations themselves*—and the resulting Senate inquiries into the nominees' characters and backgrounds.²¹⁸

²¹⁴ See *supra* Part I, section B (2) and accompanying notes.

²¹⁵ See *generally supra* Part I, section B (2).

²¹⁶ See *Dolan v. City of Tigard*, 512 U.S. 374, 398–99 (1994).

²¹⁷ See *Testimony to Senate Judiciary Committee*, SPEECH VAULT, http://www.speeches-usa.com/Transcripts/anita_hill-testimony.html [https://perma.cc/9837-UWJB] (last visited Feb. 5, 2019); *Kavanaugh Transcript*, *supra* note 18.

²¹⁸ See *Kavanaugh Transcript*, *supra* note 18; *Testimony to Senate Judiciary Committee*, *supra* note 217.

Anita Hill explained in her opening statement before the Senate Judiciary Committee:

It is only after a great deal of agonizing consideration that I am able to talk of these unpleasant matters to anyone except my closest friends These last few days have been very trying and very hard for me, and it hasn't just been the last few days this week.

It has actually been over a month now that I have been under the strain of this issue.

Telling the world is the most difficult experience of my life, but it is very close to having to live through the experience that occasioned this meeting. I may have used poor judgment early on in my relationship with this issue. I was aware, however, that telling at any point in my career could adversely affect my future career, and I did not want early on, to burn all the bridges

. . . Perhaps I should have taken angry or even militant steps, both when [the alleged wrongdoing occurred] or after I left [the agency where the alleged wrongdoing occurred]. But I must confess to the world that the course that I took seemed the better, as well as the easier, approach.

I declined any comment to newspapers, but later, when Senate staff asked me about these matters, I felt I had a duty to report. I have no personal vendetta against Clarence Thomas. I seek only to provide the committee with information which it may regard as relevant.

It would have been more comfortable to remain silent. . . . But when . . . asked by a representative of this committee to report my experience, I felt that I had to tell the truth. I could not keep silent.²¹⁹

Similarly, in her opening statement before the Senate Judiciary Committee, Dr. Ford said:

I do not recall each person I spoke to about [the alleged] assault. And some friends have reminded me of these conversations since the publication of the . . . story on September 16th, 2018. But until July 2018, I had never named Mr. Kavanaugh as my attacker outside of therapy.

This changed in early July 2018. I saw press reports stating that Brett Kavanaugh was on the shortlist of a list of very well-qualified Supreme Court nominees. I thought it was my civic duty to relay the information I had about Mr. Kavanaugh's conduct so that those considering his nomination would know about this assault.

On July 6th, I had a sense of urgency to relay the information to the Senate and the [P]resident as soon as possible, before a nominee was selected. I did not know how, specifically, to do this.²²⁰

In a very real sense, then, public accusations of the kind involved in the Hill and Dr. Ford matters are occasioned not by the wrongdoing, but by the triggering event of a Supreme Court nomination—the President making the nomination and the

²¹⁹ *Testimony to Senate Judiciary Committee, supra* note 217.

²²⁰ *Kavanaugh Transcript, supra* note 18.

nominee accepting it. And certainly, the accuser in neither case stood to gain anything; both expressed mortification at having to discuss such unsavory, painful, and deeply personal matters in such a public forum.²²¹ The party that stands to gain in a judicial-nominee proceeding, in either the qualification inquiry or an allegation inquiry, is the nominee. This too cuts in favor of lading the burden of persuasion on the nominee, not the accuser.

*c. Which Party Warrants Suspicion and Scrutiny?*²²²

A person credibly accused of serious wrongdoing under circumstances where the accusation is plausible—meaning that the accused had the opportunity and capability of committing the wrongful act, and potentially a motive as well²²³—is a person who deserves special scrutiny. In the same way that an allegation that a state actor deserves to be laded with the burden of persuasion when accused of interfering with a fundamental right or discriminating against a suspect class,²²⁴ an allegation that a nominee to a federal judgeship (and again, especially as it relates to the Supreme Court) has committed wrongdoing on the level of sexual harassment or, worse yet, assault, raises grave societal implications. Those implications involve not just an individual, but, if the allegation is borne out, potentially against all society and the Constitution itself.²²⁵

More to the point, however, whatever suspicion or scrutiny might follow the *accused*, none should follow the *accuser*. It is one thing for pols and partisans, in a frenzy of undisciplined debate, to assert that an accusation against a nominee is nothing more than a “political hit”;²²⁶ absent any evidence that an accuser is acting from political motives, however, and given the nature of the risks associated with coming forward, there exists no sound reason to cast a suspicious eye at the party making the allegation. As Dr. Ford stated at the outset of her testimony, “I am here today not because I want to be. I am terrified.”²²⁷

We should be mindful, as well, that a nominee for judicial office does not have to stand for confirmation all the way through to an ultimate decision. He or she is

²²¹ See *Kavanaugh Transcript*, *supra* note 18; *Testimony to Senate Judiciary Committee*, *supra* note 217.

²²² See *supra* Part I, section B (3) and accompanying notes.

²²³ See *Alison*, *Tough Tactics*, *supra* note 55, at 417.

²²⁴ See *supra* Part I, section B (1) and accompanying notes.

²²⁵ This is so because of the vast powers wielded by Supreme Court justices and the self-evident importance of the character and integrity of each individual justice in fulfilling his or her constitutional obligations under Article III of the Constitution. See U.S. CONST. art. III.

²²⁶ *Kavanaugh Transcript*, *supra* note 18.

²²⁷ *Id.*

free, if he or she wishes not to be scrutinized or eyed with suspicion, to withdraw from consideration and recede back into the civilities and protocols of his or her former life. Seeking power is not for the meek, and he or she who seeks it is worthy of far more scrutiny than anyone trying to stop him or her.

This factor, too, cuts in favor of lading the burden of persuasion with the nominee, not the accuser.

3. Weighting the Burdens in the Allegation Inquiry

So the nominee should bear the burden of persuasion on the ultimate question whether he or she should be seated on the federal bench in the face of a credible and plausible allegation of potentially disqualifying wrongdoing. The question that remains is this: what weight of evidence must the nominee produce to warrant the outcome he or she seeks? It is especially important to keep in mind, as to a “he-said-she-said” controversy inviting tortured factfinding, that the weighting of the burden of persuasion is critical: “each party wants to know the facts he must prove, and the fact finder must know what to do when his mind is in a state of equilibrium.”²²⁸ In particular, “[t]he burden of persuasion is supposed to tell the trier of fact what outcome to reach when a decision based on mental conviction is impossible.”²²⁹ In other words, if one finds that the nominee and the accuser both seem credible, then one must use the burden of persuasion as a tiebreaker of sorts: when the factfinder can’t decide which one to believe, the factfinder should find against the party that failed to meet the appropriate standard.

We return to our medical analogy.²³⁰ The threshold that is optimal—most appropriate—is the threshold that best reflects the seriousness of the concerns involved, the risks associated with setting the threshold too high or too low, and the consequences that might follow from those risks materializing.²³¹

As we have seen, the implications of a federal judicial appointment could scarcely be more serious. There is some difficulty, however, in assigning the same gravity to judicial appointments at three different levels of the federal judiciary.²³²

²²⁸ Dworkin, *supra* note 33, at 1158.

²²⁹ *Id.* at 1160 (footnote omitted).

²³⁰ See Kaplow, *Burden of Proof*, *supra* note 137, at 756.

²³¹ See *id.*; see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²³² See Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 KAN. J.L. & PUB. POL’Y 1, 1 (1997) (“The United States Constitution requires that there be ‘one supreme court,’ and allows for such lower federal courts as Congress ‘may from time to time ordain and establish.’ In 1789, the two-tiered federal court system was created when President Washington signed the first Judiciary Act. Since then, the federal court structure has been overhauled only once, in 1891, with the passage of the Evarts Act.

All federal judges wield considerable power. For example, in February 2017, a federal district judge halted President Donald Trump’s “travel ban” in an order whose reach was nationwide.²³³ So a single district judge may affect national policy with the stroke of a pen. It goes without saying, however, that a district judge’s judgment may be undone by the pens of circuit court judges,²³⁴ whose judgments, in turn, may vaporize with the pen strokes of a sufficient number of Supreme Court justices.²³⁵ It is not where judicial power starts, but rather where it ends, that should inform the analysis of what standard should apply to what level of judgeship.

A bad district court appointment—the appointment of a person who lacks the mental acuity or strength of character required to do the job—is a serious blunder, but one from which all society is generally guarded by the prophylaxis of limited jurisdiction and appellate review.²³⁶ A bad circuit court appointment is more serious, as circuit courts bind up more parties than just those before them, and issue rulings that, unlike district court rulings, are unlikely to be reviewed by a higher court (seeing as how there is only one higher court remaining, and its review is discretionary and generally limited to eighty or so cases per year²³⁷).

A bad Supreme Court appointment (and the seating of a person so morally bankrupt and bereft of human empathy as to sexually harass or assault someone would certainly constitute a bad appointment) might have catastrophic, national, and even international, and potentially generational, implications.²³⁸

It would seem, then, that the Senate should adopt something of a sliding scale:

The Evarts Act added a third tier to the court system by creating courts of appeals intermediate between the trial courts and the Supreme Court.” (footnotes omitted)); *see also Introduction to the Federal Court System*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/usao/justice-101/federal-courts> [<https://perma.cc/P5RA-553P>] (last visited Feb. 5, 2019) [hereinafter *Introduction to the Federal Court System*].

²³³ *See* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

²³⁴ *See Introduction to the Federal Court System*, *supra* note 232 (“The federal district court is the starting point for any case arising under federal statutes, the Constitution, or treaties. This type of jurisdiction is called ‘original jurisdiction[,]’ and “[o]nce the federal district court has decided a case, the case can be appealed to a United States court of appeal.”).

²³⁵ *See id.* (“The Supreme Court of the United States is the highest court in the American judicial system, and has the power to decide appeals on all cases brought in federal court or those brought in state court but dealing with federal law.”).

²³⁶ *See id.*

²³⁷ *See About the Court: FAQs – General Information*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/V57W-89WX>] (last visited Feb. 14, 2019).

²³⁸ *See* U.S. CONST. art III, § 1 (conferring on federal judges’ lifetime tenure).

the evidentiary threshold should be set higher for Supreme Court justices than circuit judges and higher for circuit judges than district judges. We should recall, also, that there is nothing necessarily optimal about a prefabricated legal standard like preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt.²³⁹ And to the extent that an optimal threshold might be almost impossible to conjure, I seek here not to identify the exact quantum and quality of evidence that a nominee must produce, but merely to suggest ranges that might be appropriate.

In all cases, if the standard for triggering a hearing is that the accusation against the nominee be credible, plausible, and reasonable,²⁴⁰ then it stands to reason that the nominee's burden should be to show that the accusation, after further development (including the nominee's own testimony, which, like the accuser's, is direct and valid evidence²⁴¹), is actually incredible, implausible, or unreasonable. But at what threshold?

At the district court level, a "diseased" appointee (a reminder: we are speaking here metaphorically²⁴²)—one who is ill-tempered or undisciplined of mind or depraved in his or her character—will impose harm on the parties that come before such a judge, but that harm is generally reversible and limited in scope, in most cases, to the parties before the judge.²⁴³ From a practical standpoint, it is also a more pressing need to fill trial court vacancies in the federal judiciary than it is to fill Supreme Court vacancies, of which there will rarely ever be more than one at a time, and for which suitors abound.²⁴⁴ All this being so, perhaps a district-court nominee should have to show (again, this is intended to be a conversation starter, not a concrete prescription) that the accusation is somewhat more implausible than

²³⁹ See Kaplow, *Burden of Proof*, *supra* note 137, at 748.

²⁴⁰ See *supra* Part III, section B and accompanying notes.

²⁴¹ See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

²⁴² See Kaplow, *Burden of Proof*, *supra* note 137, at 756.

²⁴³ See *Introduction to the Federal Court System*, *supra* note 232.

²⁴⁴ See *The Future of Federal Courts* (Remarks by Chief Justice William H. Rehnquist), 46 AM. U. L. REV. 263, 270 (1996) ("It is the federal district courts and the courts of appeals that are being hit hardest by this ever-increasing wave of litigation. The Supreme Court's docket is actually down from what it was several years ago. With the district courts, it is largely a question of having enough judicial manpower to adjudicate the incoming cases. The same is true to a large extent of the courts of appeals, except that indefinite enlargement of the number of judges on the courts of appeals poses problems of collegiality, maintaining a coherent body of law in the circuit, and the like. The majority of federal judges, if the Judicial Conference of the United States accurately reflects their views, thinks that the federal judiciary should remain a limited and somewhat specialized system of administering justice.").

plausible (or somewhat more incredible than credible, or somewhat more unreasonable than reasonable). This threshold will catch up fewer bad appointees than a more exacting threshold, but at this level of the federal judiciary, the risks would be at least somewhat limited; and a threshold like this would arguably be appropriate since the consequences of making a mistake are likely to be cabined by procedural safeguards built into the judicial system.

At the other end of the spectrum, we have Supreme Court justices. Given the grave consequences of making a mistake here and given the relatively de minimis cost associated with mistakenly “treating” a “healthy” nominee, i.e., depriving a wrongly accused nominee of his or her would-be appointment, the threshold should be set much higher. What I mean here is higher for the nominee, but in our medical analogy, the threshold for “treatment”—deprivation—would actually be “lower,” requiring the Senate to indulge a greater risk that a suitable nominee will be denied than that an unsuitable nominee will be seated; the Senate should “treat” more “healthy” nominees than it should fail to “treat” “unhealthy” nominees given that the failure to “treat” an “unhealthy” nominee could cause catastrophic results—the unleashing of a contagion that might infect a whole society. So, for a Supreme Court nominee, it would seem appropriate to require that he or she carry a heavier burden—perhaps that, in light of further development, the allegation is highly implausible, or manifestly incredible, or patently unreasonable.

Circuit court nominees, of course, fall somewhere in the middle.²⁴⁵ A bad circuit court appointment causes more damage than a bad district court appointment but less than a bad Supreme Court appointment, and there is a greater number of circuit judges (and thus a greater need to address vacancies), but not as many as there are district court vacancies and thus not creating as urgent a need.²⁴⁶ So perhaps at this level, the appropriate standard would be something like substantially implausible, or palpably incredible, or decidedly unreasonable.

No matter the level of judgeship at issue or the precise articulation of the standard, the burden of persuasion should be weighted in favor of the accuser and against the nominee; the burden is the nominee’s as the laded party, and the weight of evidence the nominee must produce in the face of a credible and plausible allegation should be significant.

²⁴⁵ See *Introduction to the Federal Court System*, *supra* note 232.

²⁴⁶ Cf. Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 211 (1994) (“It is beyond reasonable doubt that our federal courts, especially the courts of appeal, are in serious trouble. Caseloads are at levels that fundamentally undermine the ability of these courts to administer justice, given the courts’ current procedures and structural configuration; the courts of appeal, especially, are suffering from case overload — with nothing but worse times ahead if present courses are continued.” (footnote omitted)).

And one final point: since the burden belongs to the nominee, the accuser is entitled to an answer as to his or her allegation. It was the convenient and slippery way out to say, as Senator Susan Collins did, that she believed the accuser was credible and powerful in her presentation, but that she also believed that the nominee, now-Justice Kavanaugh, was passionate in defense of himself.²⁴⁷ Whether a nominee is passionate and forceful is beside the point: Dr. Ford, and much more importantly, the whole country, was entitled to hear Senator Collins say that she found Dr. Ford's allegation highly implausible or manifestly incredible or patently unreasonable. Failing that, Senator Collins and her colleagues, given the gravity of the interests at stake, the risk of error inhering in a "he was passionate" standard, and the potential consequences of a misfire at this level of statecraft, should have voted accordingly.

CONCLUSION

A judicial-nominee hearing, no matter what part or stage or species of inquiry it involves, is neither a criminal trial nor a mere job interview.²⁴⁸ It is a constitutionally mandated undertaking that pits the interest of the nominee against the interests of society in vetting the nominee, sometimes personified by a credible individual accuser. The Senate should adopt rules to lade and weight the burdens at each stage of a judicial-nominee proceeding, and it should also take care never to conflate its factfinding function—which is akin to legal investigation,²⁴⁹—with its deliberation function—its duty to decide—when a credible allegation against a nominee has been established and the nominee has failed to show that the allegation is implausible, whether the allegation is not just *potentially*, but *actually*, disqualifying.

As messy as this area of law—burdens of proof, production, and persuasion, and the functions of lading and weighting—can be, the Senate should adopt rules borrowed from legal proceedings and tweaked to suit the Senate's factfinding and litigating functions. There is every chance that a controversy like the Kavanaugh-nomination controversy will erupt again, and the Senate should not repeat the mistake it made after the Anita Hill fiasco: its failure to adopt standards and procedures that would foster, to the extent possible in a political body, some appearance of neutrality, truth-seeking, and good order.

²⁴⁷ See Stavros Agorakis, *Read the Full Transcript of Sen. Collins's Speech Announcing She'll Vote to Confirm Brett Kavanaugh*, VOX (Oct. 5, 2018, 5:50 PM), <https://www.vox.com/2018/10/5/17943276/susan-collins-speech-transcript-full-text-kavanaugh-vote> [<https://perma.cc/4NFZ-LXRY>].

²⁴⁸ See White, *Flight 93*, *supra* note 43.

²⁴⁹ See Rutkus, *supra* note 160, at 22–23.