

INTELLECTUAL PROPERTY LAW AND THE FIRST AMENDMENT AS A MANY-BODY PROBLEM

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ABSTRACT

This paper will introduce a new tool for legal analysis – a “many-body approach” – for complex legal interactions over extended periods of time. The approach takes inspiration from a many-body problem in physics, in which three or more “bodies,” whether electrons in an atom or planets in our Solar System, interact and change their positions. Admittedly, law is not physics. We cannot

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reduce the concept of “justice” to a number. Nevertheless, a many-body approach can help reveal the interactions, trajectories, expansion and contraction of legal “bodies” over time. A familiar example lies in the interactions and positions of nine U.S. Supreme Court Justices on any legal issue of interest, which would be a nine-body problem for the current Term. Alternatively, the “bodies” interacting might be the executive branch, the judicial branch, and the legislative branch of government, a three-body problem. This paper will focus on areas of law as legal “bodies.” Specifically, interactions between trademark, copyright, right of publicity, defamation law and the First Amendment will be explored in the context of the Supreme Court decision in Vidal v. Elster, which involved the U.S. Patent and Trademark Office’s refusal to register the trademark “TRUMP TOO SMALL” for clothing. As a transparent and normatively agnostic method, a many-body analytical framework can help map the changing interconnections between areas of law over decades, even centuries.

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I. INTRODUCTION

This paper proposes that substantive areas of law that interact are similar to the “many-body problem” in physics, such as the classic three-body problem of the Sun, the Earth, and the Moon.¹ Many-body problems in physics

¹ “The three body problem . . . can be simply stated: three particles move in space under their mutual gravitational attraction; given their initial conditions, determine their subsequent motion.” JUNE BARROW-GREEN, POINCARÉ AND THE THREE-BODY PROBLEM 7 (George E. Andrews et al. eds., 1997), <https://oro.open.ac.uk/57403/1/335423.pdf> [<https://perma.cc/PXV2-7F27>] [hereinafter Barrow-Green]. “[T]he

are notoriously difficult.² However, there are techniques that can be used to tackle such problems.³ Legal issues and

three body problem has a further attribute which has contributed to its attraction for potential solvers: its intimate link with the fundamental question of the stability of the solar system.” *Id.*

² *Id.* stating:

Like many mathematical problems, the simplicity of its statement belies the complexity of its solution. For although the one and two body problems can be solved in closed form by means of elementary functions, the three body problem is a complicated nonlinear problem, and no similar type of solution exists.

³ The restricted three body problem is a simplified form. *Id.* at 11 stating:

In this formulation two of the bodies revolve around their centre of mass in circular orbits under the influence of their mutual gravitational attraction and hence form a two body system in which their motion is known. A third body (generally known as the planetoid), assumed massless with respect to the other two, moves in the plane defined by the two revolving bodies and, while being gravitationally influenced by them, exerts no influence of its own. The problem is then to ascertain the motion of the third body. . . .

Apart from its simplifying characteristics, [the restricted three body problem] also provides a good approximation for real physical situations, as, for example, in the problem of determining the motion of the moon around the earth, given the presence of the sun. In this instance, the problem is almost circular (the eccentricity of the earth’s orbit is approximately 0.017) and, almost planar (both the earth’s orbit and the moon’s orbit are nearly in the plane of the elliptic), and the values of the mass ratios and the mean distances between the bodies satisfy the conditions.

For example, the Helium atom is a three-body problem because two electrons interact through electromagnetic forces (versus gravitational forces) at the classical mechanics level with the nucleus. *See generally* S.J. Blodgett-Ford, Jonathan Parker, K. T. Taylor and Charles W. Clark, *Intense-field multiphoton ionization of a two-electron atom*, 29 J. Physics B, 29 L33, L33–L42 (1996) (analyzing Helium using quantum mechanics); Yoyuki Yamamoto & Kunihiro Kaneko, *Helium Atom as a Classical Three-Body Problem*, 70 PHYS. REV. LETTERS., 1928, 1928

systems of law may also benefit from a systematic identification and analysis of relevant areas of law (the “bodies”) and potential interactions. Of course, bodies of law are not celestial bodies. Legal forces are not gravitational. Nevertheless, if bodies of law, such as copyright law, trademark law, right of publicity law,⁴ and First Amendment law⁵ also interact dynamically, then the physics many-body problem may offer useful lessons. At a minimum, if one is dealing with a many-body problem in law, it is important to be transparent about the time period, and the nature of the bodies and interactions, under consideration.

A many-body approach to legal analysis will be used to help uncover and illuminate the complexity of the legal world that is captured in a single Court decision. The (metaphorical) center of mass of this article will be the Supreme Court decision in *Vidal v. Elster*.⁶ *Vidal v. Elster*, involved a challenge to the U.S. Patent & Trademark Office’s (“USPTO’s”) refusal to register the mark

(1993), <https://journals.aps.org/prl/pdf/10.1103/PhysRevLett.70.1928> [<https://perma.cc/588W-LTXB>].

⁴ In this analysis, the right of publicity will be treated as belonging to the system of intellectual property laws. However, there is nothing particularly special about intellectual property law for the many-body analogy. Thus, it is also fine to treat the right of publicity as falling outside of the umbrella of intellectual property law—or to swap in contracts law, antitrust, real property law, administrative law, etc. in an analysis instead.

⁵ This paper focuses solely on US law, but there is no reason in principle that a many-body analogy would be limited to US legal systems. Interactions between international, regional, and country or state level areas of law may also be suitable for a many-body approach in law.

⁶ *Vidal v. Elster*, 602 U.S. 286 (2024). For additional analysis of the *Vidal v. Elster* case, see, e.g., Sherif Girgis, *Originalism’s Age of Ironies*, 138 HARV. L. REV. F. 1 (2024) (contrasting originalism versus “history and tradition” approaches).

“TRUMP TOO SMALL” for clothing.⁷ The USPTO rejected the registration based on the “names clause” of the trademark statute, due to the use of “TRUMP” without the consent of then-Presidential candidate Trump.⁸ The Court of Appeals for the Federal Circuit found the names clause to be unconstitutional as applied to the trademark application.⁹ By a vote of 9-0, the Court reversed the decision of the Court of Appeals for the Federal Circuit.¹⁰ However, the Justices were not in agreement as to the legal analysis.¹¹ A many-body legal analysis in Part III below will use *Vidal v. Elster* to reveal potential tensions in the relationship between trademark, the right of publicity, copyright, defamation law and the First Amendment.

For any particular legal context, fact-pattern or issue, a basic version of a many-body legal analysis proceeds through three steps. The first step is to identify potentially relevant bodies for the particular context. The second step is to identify potential interactions between the bodies, again for the particular context. The third and final step is to analyze the bodies and the interactions from any starting point through any particular period of time, using any preferred normative legal theory and goals.

⁷ *Vidal*, 602 U.S. at 290.

⁸ *In re Elster*, 26 F.4th 1328, 1331, 1339 (Fed. Cir. 2022); 15 U.S.C. § 1052 stating:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it— . . . (c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

⁹ *Vidal*, 602 U.S. at 292.

¹⁰ *Id.* at 289–90.

¹¹ *See id.* at 289.

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In a legal many-body problem, the legal interactions may be between legal persons, legal systems, or areas of law. For example, the interactions between the current Justices of the Supreme Court may be seen as a nine-body problem. Interactions for “bodies” as legal persons may be explicit, such as when a Supreme Court Justice specifically comments on an opinion of another Justice, or implicit, such as when it appears a legal analysis is an attempt to influence another Justice to join an opinion. The interactions between the legislative branch, the judicial branch and the executive branch may be seen as a three-body problem. An example of an interaction for bodies as branches of government might be when a court considers the standard of deference for review of a decision of an administrative agency interpreting a statute. The interactions between all the countries that are members of the United Nations may be seen as a many-body problem. Conflicts of law, questions of jurisdiction and venue, issue preclusion, and claim preclusion are all types of interactions for a many-body analysis depending on the legal “bodies” of interest. The focus of this article will be on the interactions of multiple areas of law. Intellectual property law and First Amendment interactions related to *Vidal v. Elster* will be used to illustrate the many-body approach.

On the rare occasions when legal scholars have explicitly identified a many-body problem in the law,¹²

¹² See, e.g., Adrian Vermeule, *The Administrative State: Law, Democracy, and Knowledge*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 259, 268 (Mark Tushnet et al. eds., 2015) (“I believe that the administrative state presents a clear example of the n-body problem in political science and theory.”); Daphne Keller, *The Three-Body Problem: Platform Litigation and Absent Parties*, LAWFARE (May 4, 2023, 9:00 AM), <https://www.lawfaremedia.org/article/the-three-body-problem-platform-litigation-and-absent-parties> [<https://perma.cc/S6SG-S9FN>] (“Put simply, the three parties are people who want to speak, people harmed by speech, and platforms.”)

they have not provided a systematic explanation of how to handle the problem. This paper is the first to introduce a formal process to analyze many-body problems in law. The process has three steps. The first step is to identify the selected relevant bodies of law for a particular legal context and question(s) of interest. The second step is to identify potential interactions between the selected bodies of law. The final step is to analyze the bodies and interactions using any preferred normative legal theory and any preferred goal(s). In a simplified version of the many-body approach, a single interaction between three bodies of law may be prioritized for analysis, during a specified period of time. All other bodies and interactions would then be expressly excluded, at least for the initial analysis. This approach is what many legal scholars do well already.¹³ It

The missing party is usually one of the first two.”); Sheila Jasanoff, *Judgment Under Siege: The Three-Body Problem of Expert Legitimacy*, DEMOCRATIZATION OF EXPERTISE? EXPLORING NOVEL FORMS OF SCIENTIFIC ADVICE IN POLITICAL DECISION-MAKING 209, 211 (Sabine Maasen & Peter Weingart eds., 2005), <https://peritia-trust.eu/wp-content/uploads/2021/10/Reading-Jasanoff-JUDGMENT.pdf> [<https://perma.cc/4K6D-9373>] (separating “the bodies of knowledge that experts represent (‘good science’); the bodies of the experts themselves (‘unbiased experts’); and the bodies through which experts offer judgment in policy domains.”); Caer Smyth, *What counts as expertise? The case of glyphosate and Jasanoff’s ‘three-body problem’*, 19 ENV’T L. REV. 168, 168 (2017), <https://journals.sagepub.com/doi/epub/10.1177/1461452917724137> [<https://perma.cc/8397-QZ9P>] (examining the problem when expert agencies produce opinions on the same topic).

¹³ Compare, for example, statutory interpretation. Eskridge introduced his work by tracing statutory interpretation from Aristotle to the Code of Justinian, to Saint Thomas Aquinas, to the Enlightenment, to modern hermeneutic theories. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 2–5 (1994). In the area of privacy law, Prosser surveyed the case law following the influential article by Samuel D. Warren and Louis D. Brandeis in *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), and introduced a taxonomy of four torts. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388–89 (1960)

should be familiar, even if the use of the “many-body problem” terminology and new method is not.

As the number of bodies and interactions increases, the many-body approach increases in complexity, likely requiring the use of computational modeling techniques. Quantification and computation are useful tools when faced with complexity. But they do not tell the whole story. Any numbers used, metrics or benchmarks, are inherently incomplete and flawed proxies for the broader concepts of justice, equality, fairness, progress etc. “The kinds of problems that planners deal with – societal problems – are inherently different from the classes of problems that scientists and perhaps some classes of engineers deal with. Planning problems are inherently wicked.”¹⁴ Problems of legal systems are also wicked problems. The formulation of the problem *becomes* the problem. Thus, the many-body approach is not intended to be a one-size-fits-all answer to every legal question. It can, however, work well with a variety of normative legal theories. It is well-suited for empirical techniques. Even the most basic version of a many-body approach may be an improvement over *ad hoc* analysis. The many-body approach is transparent and

(“1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”). Thus, Prosser’s analysis was similar to a many-body approach even though he did not use that term.

¹⁴ Horst Rittel & Melvin Webber, *Dilemmas in a General Theory of Planning*, 4 POLICY SCIENCE 155, 155, 159–60 (1973) (“We have been learning to see social processes as the links tying open systems into large and interconnected networks of systems, such that outputs from one become inputs to others. In that structural framework it has become less apparent where problem centers lie and less apparent where and how we should intervene even if we do happen to know what aims we seek.”). Rittel and Webber identify ten characteristics of wicked problems, including that “the formulation of a wicked problem is the problem!” *Id.* at 161.

systematic. It also offers a valuable perspective shift. Instead of assuming law is fixed, law is expected to be ever-changing.

Indeed, an advanced many-body approach using computational analytics *could* potentially be used to model any aspect of the U.S. legal system that can be defined with a reasonable degree of specificity. For example, a many-body approach could look at whether the more wealthy party in a dispute tended to prevail in Supreme Court cases for the past two hundred and fifty years, not just since 1953.¹⁵ Like a GPS system, a many-body approach does not care where you want to go, but it can help you get there.

¹⁵ Andrea Prat, Fiona Scott Morton, and Jacob Spitz, *Ruling for the Rich: the Supreme Court over Time*, Working Paper 34643, NATIONAL BUREAU OF ECONOMIC RESEARCH (Jan. 2026), <https://www.nber.org/papers/w34643> [<https://perma.cc/NL4N-WG9B>] ((citations omitted), stating:

In this paper we develop a protocol to identify and analyze all cases involving economic issues from 1953 to the present. We categorize the parties in these cases as ‘rich’ or ‘poor’ according to their likelihood of being wealthy. A justice’s vote is pro-rich if its outcome would directly shift resources to the party that is more likely to be wealthy. The likely wealth of a party is inferred from the average wealth of the category of person to which the party belongs. . . . Overall, close to 90% of stock in the US is held by the top 10% of households. When stock holdings in pension funds are included in the calculation, the proportion owned by the top 10% remains high, on the order of 80% (Economic Policy Institute (2004)). Therefore, we categorize votes that support businesses over consumers or workers (e.g. unions) as pro-rich. . . .

Using this dataset, we estimate case-specific intercepts, justice-specific latent ideal points, and party-level time trends using the Bayesian methods pioneered by Martin and Quinn (2002). In the 1950s, justices appointed by the two parties appear similar in their propensity to cast pro-rich votes. Over the sample period, we estimate a steady increase in polarization, culminating in an implied party gap of 47 percentage points by 2022. The magnitude of the gap suggests the usefulness of an economic metric for prediction relative to ideologies such as originalism or textualism.

The many-body approach takes inspiration from Henri Poincaré's analysis of the three-body problem in celestial mechanics.¹⁶ The most simplified version of the many-body approach provided in this article does not require advanced math. Nor does it require knowledge of the forces, economic or otherwise, involved in legal interactions. One can study the movement of the bodies without knowing the forces that cause such movement.¹⁷ If one does wish to use a theory of legal forces, such as law and economics or critical legal theory, a many-body approach would be well-suited to test the explanatory or predictive capacity of any such theory. A many-body approach builds on the strong existing body of legal analysis of the interactions between, and changes in, numerous areas of law. As a type of meta-theory, a many-body approach can be used with a wide variety of substantive legal theories and areas of law.

Moreover, a many-body approach can be even more powerful in law than in physics. While celestial bodies may be beyond human control, we can, and do, change areas of law and legal systems. For any goal—such as stability, fairness, or efficiency—if such goal (or a proxy for such goal) is identified with specificity, a many-body

¹⁶ See generally Barrow-Green, *supra* note 1; Matthew W. Parker, *Did Poincaré Really Discover Chaos?*, 29 STUD. HIST. AND PHIL. OF MOD. PHYSICS 574, 587 (1998), https://www.researchgate.net/publication/353031030_Did_Poincare_Really_Discover_Chaos [<https://perma.cc/286F-ND8N>] (reviewing FLORIN DIACU & PHILIP J. HOLMES, *CELESTIAL ENCOUNTERS: THE ORIGINS OF CHAOS AND STABILITY* (Princeton Univ. Press ed., 1999)).

¹⁷ Galileo died in 1642 and Isaac Newton's *PHILOSOPHIAE PRINCIPIA MATHEMATICA* (the "PRINCIPIA"), which introduced the law of universal gravitation, was not published until 1687. *Astronomer Galileo dies in Italy*, History (December 16, 2025), <https://www.history.com/this-day-in-history/January-8/astronomer-galileo-dies-in-italy> [<https://perma.cc/6J67-PZMK>]; ISAAC NEWTON, *PHILOSOPHIAE PRINCIPIA MATHEMATICA* (1687).

approach may help reveal: (a) whether selected bodies of law maximize the probability of achieving that goal “as is” or whether modifications may be needed; (b) what consequences, intended or unintended, might result from such modifications; and (c) what types of empirical assessments might be available to determine whether the law as is, or as modified, achieves the desired goal. The many-body approach was also inspired by the famous “Trolley Problem” in philosophy.¹⁸ Both can be useful tools in a wide variety of contexts.

This paper will proceed as follows. Part II.A will briefly discuss the many-body problem in physics. Part II.B will introduce a novel simplified three-step approach to the many-body problem in law. Part II.C will consider some of the strengths and weaknesses of a many-body approach. Part III.A will discuss *Vidal v. Elster*. Part III.B will provide examples of how a simplified many-body approach could be applied to interactions in intellectual property law, defamation law and the First Amendment, using *Vidal v. Elster*. Part III.C will add the right of publicity to the mix, and will lean heavily on the masterful work of Professors Post and Rothman.¹⁹ Part III.D will discuss advanced options for a many-body approach, including using the analysis to “play god” with bodies of

¹⁸ See generally Phillipa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5, 8 (1967). One version of the so-called Trolley Problem that Foot presented is an ethical thought experiment involving a runaway trolley headed toward five people who will be killed by the collision. The ethical choice presented is whether to steer the trolley onto a different track and then kill only one person versus five. There is no one right answer to the Trolley Problem. Like the many-body problem analysis presented in this paper, the Trolley Problem is an analytical tool.

¹⁹ Robert C. Post & Jessica E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 147 (2020) [hereinafter Post & Rothman].

law in a way that is not available for the Solar System. Part IV will conclude.

II. A MANY-BODY APPROACH TO LAW

After a very brief summary of the many-body problem in physics in Part II.A, a three-step approach to the many-body problem in law will be provided in Part II.B below. Part II.C will discuss some of the strengths and weaknesses of a many-body approach.

A. *The Many-Body Problem in Physics*

The many-body problem in physics is also called an “*n*-body problem.”²⁰ This problem may be roughly described as the challenge of describing and predicting, with mathematical precision, the positions of a number (*n*) of objects that are continuously interacting through a force (*F*), where the number of objects is at least three ($n \geq 3$).²¹ The movement and relationship between the celestial bodies of our own Solar System is a classic example of a many-body problem.²² From the Ptolemaic model (roughly

²⁰ See Richard Montgomery, *The Three-Body Problem*, SCI. AM. (Aug. 1, 2019) (providing a short summary of the three-body problem), <https://www.scientificamerican.com/article/the-three-body-problem/> [<https://perma.cc/VX6H-FQ72>]; A. S. Abdel-Rahman, *A closed-form solution for the three-body problem and a Sun-Earth-Moon orbit solution* (March 27, 2023), <https://doi.org/10.21203/rs.3.rs-2734925/v2> [<https://perma.cc/FT86-PVFJ>].

²¹ See Montgomery, *supra* note 20.

²² See *id.* While the nature of the bodies and forces involved vary, certain challenges of the many-body problem are independent of scale—whether cosmic or atomic. For example, Helium (He), which has two electrons and a proton, is also a classic three-body problem. Tomoyuki Yamamoto & Kunihiro Kaneko, *Helium Atom as a Classical Three-Body Problem*, 70 PHYSICAL REV. LETTERS 1928, 1928 (1993).

150 A.D.) with the Earth stationary at the center,²³ to the Copernican Revolution in the 1500s, which placed the Sun at the center (heliocentrism),²⁴ to Galileo's work in the 1600s confirming heliocentrism,²⁵ the many-body problem in celestial mechanics has been a source of intense interest and study. The French mathematician, physicist, and philosopher Henri Poincaré (1854–1912) demonstrated that there was no closed-form general mathematical solution.²⁶

One might reasonably ask why any legal scholar would want to consider the many-body problem if it is so challenging. Law is already hard. Won't the many-body problem approach make it even harder? Admittedly, this article will not *solve* any particular legal many-body problem. Instead, the goal is to show that the analogy can be a useful tool. Key techniques loosely inspired by Poincaré strategy to tackle the three-body problem can be used in a simplified three-step process for legal analysis without any advanced math.²⁷ Thus, the many-body

²³ Alexander Raymond Jones, *Ptolemaic system*, BRITANNICA, <https://www.britannica.com/science/Ptolemaic-system> [<https://perma.cc/2MWJ-FY22>] (last visited Oct. 13, 2025).

²⁴ Stephen G. Brush et al., *Copernican Revolution*, BRITANNICA, <https://www.britannica.com/topic/Copernican-Revolution> [<https://perma.cc/XNC7-KYQ3>] (Aug. 19, 2025).

²⁵ Albert Van Helden, *Galileo*, BRITANNICA, <https://www.britannica.com/biography/Galileo-Galilei> [<https://perma.cc/S7Y3-NRWP>] (Sept. 22, 2025).

²⁶ Barrow-Green, *supra* note 1, at 7.

²⁷ Legal scholars who are more mathematically or scientifically inclined, or who are interested in cross-disciplinary collaboration, can take the many-body analogy even further in empirical or computation analysis, such as in considering the role of chaotic or random behavior in a legal many-body problem. Early legal work on complexity theory includes, for example, J.B. Ruhl and Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. Davis L. Rev. 405 (1997) and Deborah Tussey, *IPods and Prairie Fires: Designing Legal Regimes for Complex Intellectual Property Systems*, 24 Santa Clara High Tech.

approach can be a more widely accessible bridge to complexity theory, law and economics frameworks, network theories, systems theories, or computational analysis, and is well-suited for such approaches.

Poincaré simplified the many-body problem in physics by identifying and analyzing the paired interactions separately.²⁸ This is called a “restricted” many-body problem.²⁹ Part III below will apply a type of restricted many-body problem approach to multiple areas (bodies) of intellectual property law interacting with defamation law and First Amendment law. This analysis will be done using *Vidal v. Elster*. First, Part II.A will describe *Vidal v. Elster*. Then, Part II.B will offer an introduction to the many-body approach for law. Strengths and weaknesses will be discussed in Part II.C.

B. The Many-Body Problem in Law: a Three-Step Approach

A many-body approach may be useful for any legal issue or legal system that involves interactions among different areas of law over extended periods of time. A many-body approach to legal analysis has three steps. Step 1— identify as many potentially relevant bodies of law as possible for the specific context. Step 2 – identify all of the potential interactions – paired, triplet, etc. Step 3 – analyze each of the bodies and the interactions in turn.

L.J. 105, 109–14 (2007). Similarly, it would be interesting to compare a many-body discrete approach with a continuum perspective, such as used to model fluid dynamics. For a fluid simulation model for landslides, see Yong Wu et al., *Flow-pile interactions for landslides: Fluid simulation model*, *J. Rock Mech. & Geotechnical Eng.*, SCIENCE DIRECT (July 8, 2025), <https://www.sciencedirect.com/science/article/pii/S167477552500304X> [<https://perma.cc/GD33-BUKU>].

²⁸ Barrow-Green, *supra* note 1, at 11

²⁹ *Id.*

Each of these steps is highly context-dependent, as will be explained further below. For present purposes, it may be helpful to consider the familiar three-body problem of the interactions between the legislative branch, the executive branch, and the judicial branch when it comes to statutory interpretation. Depending on the particular statutory provision and context, a court reviewing a dispute may need to consider one or more substantive areas of law (criminal law, environmental law, intellectual property law, etc.) as well as procedural law.

In each of the three steps, it may be reasonable to prioritize the bodies and interactions that seem to be of most importance to the particular context, as long as the remainder are explicitly reserved for possible future analysis. Indeed, in the most basic form of a many-body analysis, one might select a single prioritized interaction between three bodies for analysis. For *Vidal v. Elster*, for example, such an interaction might be trademark-defamation-First Amendment, or trademark-right of publicity-First Amendment, as will be discussed in Part III below. Typically, one would consider each of the paired interactions separately in turn, before adding triplet, quadrupole etc. interactions. A brief explanation of each of the steps below will provide the framework for the analysis in Part III.

1. Step 1 Identify the Bodies

In this initial analysis using interactions between different areas of law,³⁰ “bodies” of law should be understood to be functionally equivalent to the familiar concept of substantive “areas” of law. Indeed, the term “areas” of law will be used interchangeably with the term “bodies” of law. This paper will follow the helpful analysis

³⁰ Instead of “bodies” as legal persons, such as Supreme Court Justices, or bodies as branches of government.

of areas of law provided by Professors Khaitan and Steel in their work *Areas of Law: Three Questions in Special Jurisprudence*.³¹ As Khaitan and Steel explained,

(i) ‘an area of law’ is a set of legal norms that are intersubjectively recognised by the legal complex as a subset of legal norms in a given jurisdiction; (ii) the sub-division of law into multiple areas matters to the content and scope of legal doctrine, to law’s perceived legitimacy and possibly to its effectiveness; and (iii) the search for the normative foundations of an area of law is typically an inquiry into its ‘aims’ or ‘functions’.³²

³¹ Tarunabh Khaitan & Sandy Steel, *Areas of Law: Three Questions in Special Jurisprudence*, 43 OXFORD J. OF LEGAL STUD. 76, 76 (2023) [hereinafter Khaitan & Steel, *Three Questions*], <https://doi.org/10.1093/ojls/gqac025> [<https://perma.cc/7LPW-AJLA>]. (“This paper addresses three fundamental questions about a key phenomenon in special jurisprudence, ‘areas of law’: (i) what is an area of law; (ii) what are the consequences of dividing law into distinct areas; and (iii) what constitutes the foundations of an area of law. . . . This paper systematically articulates, explains and answers these three questions *generally*, ie in relation to areas of law *as such*.”). As a possible rough test of “intersubjective recognition by the legal complex” in practice, if a substantive legal subject is listed on the majority of the course offerings for a random sample of American Bar Association accredited law schools, it may be safe to say that such area of law qualifies for treatment as a “body” of law in a many-body approach. *Id.* at 96. Alternatively, one could use specialty law journal titles as an indication of areas of law. Admittedly this is not a scientifically precise definition, but law is not physics.

³² *Id.* at 76; see generally Tarunabh Khaitan & Sandy Steel, *Theorizing Areas of Law: A Taxonomy of Special Jurisprudence*, 28 LEGAL THEORY 325, 325–26 (2022) (“Legal theory has seen a surge in scholarly interest in theorizing discrete ‘areas of law’ (variously described as ‘special jurisprudence’ or ‘particular jurisprudence,’ to contrast the field with general jurisprudence). General jurisprudence focuses on the nature, normativity, and operation of law and legal systems generally. It concerns itself with questions such as the conditions of a norm being a legal norm, the nature of legal obligation,

For purposes of this introduction to the many-body problem in law, areas of law include, for example, constitutional law, criminal law, tort law, contract law, antitrust law, environmental law, administrative law, tax law, family law, intellectual property law, etc.³³

Transparency is essential in a many-body analysis. In Step 1, it is important to be explicit about exactly which bodies of law have been identified for the particular context. In Step 2, the interactions selected must be specified. Finally, in Step 3, the areas of law and interactions being analyzed, and the areas and interactions being excluded, or reserved for future analysis, also must be stated. Even if the choices are made based on the expertise or interests of the person doing the analysis, as long as they are set forth with specificity, a reviewer or future researcher can see what the choices were and modify

whether the rule of law is inherently valuable, the nature of adjudication, and the possibility and implications of legal pluralism. The subject matter of theoretical inquiry in special jurisprudence, on the other hand, is a discrete *area* of law, such as labor law, discrimination law, tort law, family law, international law, criminal law, and constitutional law.”) (footnotes omitted), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E53FFA4AF66C779DCF1A91BC38548ECC/S1352325222000192a.pdf/theorizing-areas-of-law-a-taxonomy-of-special-jurisprudence.pdf> [<https://perma.cc/VC85-TQSE>].

³³ Many substantive bodies of law can be readily identified by perusing any law school course catalog. We could also apply a many-body analogy to legal pedagogy, or to legal practice. In that situation, so-called ‘podium’ classes, experiential classes and legal research and writing programs could constitute at least three different ‘bodies’ of law for a many-body analogy. Even outside of law, “[w]e often face Many-Person Prisoner’s Dilemmas.” DEREK PARFIT, REASONS AND PERSONS 87 (1984). Comparative law across countries and regions—such as the robust work of Peter Yu—can also be analogized to a many-body problem. *See, e.g.*, Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 ILL. L. REV. 111 (2019). This initial analysis will focus on areas of substantive law in the United States only, in the hope that this outline could be a rough roadmap for further exploration.

as desired. This also facilitates better identification of sources of error in any analysis. For readers familiar with computer programming, using a many-body approach to legal analysis is a bit like maturing from a “hacker” style of writing source code for computer software, understandable only to the coder, to writing code in a robust manner for complex commercial enterprise software. Software that is intended to be used, and modified, over a decade or more ideally would include clear and detailed documentation and comments. Then future programmers may more easily understand the architecture and choices made in the coding. They can then make different choices if they wish. A many-body approach seeks to add some of this methodological rigor and long-term, collaborative thinking to legal analysis.

In practice, for a more limited legal context, such as a particular dispute involving a law or a regulation and a broader domain, such as the administrative state or a legal system as a whole, it will often be useful to select a prioritized group of bodies of law and analyze only a subset of interactions. It makes good sense to *start* any analysis of a particular feature of a body of law or a particular factual context by considering one body of law in isolation. The question is when it is reasonable to *stop* there. In other words, when can one feel confident one has reached a sufficiently correct³⁴ outcome when analyzing a particular body of law in isolation? There is no definitive answer to this question. However, one practical test might be to add another body of law and see if the outcome changes. Then repeat as needed.

Like “tells” in the game of poker, if a legal term or test is used across relevant bodies of law in similar but not

³⁴ The key term “sufficiently correct” depends on one’s preferred legal goal(s)—justice, efficiency, stability etc. —and whatever metrics one uses as a proxy for such broad concepts, all of which are important areas for further development.

identical ways, that may be a good indication that a many-body approach is appropriate. For the many-body problem involving intellectual property law and the First Amendment, examples of such terms include “commercial,” “fair” and “transform.” Variations of these terms are used in different ways in each of these areas of law. Indeed, in the many-body problem in physics, Poincaré discovered that astronomers were using the term “converge” in a different manner than mathematicians, all in good faith, but without realizing the differences.³⁵ To the credit of judges, lawyers and legal scholars, the importance of clear definitions in legal matters is well-understood in the law. One more lesson of the many-body problem is that it is particularly important to clearly define the terms that are used across the boundaries of different areas of law and indicate a many-body problem.

Like the many-body problem in physics, the many-body problem in law should, at least in principle, work on a wide range of scales. Thus, one could apply a many-body approach to interactions *within* an area of law as well as *between* areas of law, as long as the analysis is confined to the selected scale. For example, the so-called “administrative state” is well-suited to a many-body problem analogy. Indeed, Professor Adrian Vermeule made this connection a decade ago:

I believe that the administrative state presents a clear example of the n-body problem in political science and theory. Just as in physics it is vastly more difficult to predict the motion of three or more bodies interacting in a gravitational field than the motion of two bodies, so too a simple model of “principal” and “agent” cannot be applied in any straightforward way to a system in which a number of internally

³⁵ Barrow-Green, *supra* note 1, at 54 (“Poincaré’s initial researches dwelt on the distinction between absolute and uniform convergence.”).

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heterogeneous actors compete for control over other actors who are competing for control over them.³⁶

However, Vermeule concluded the complexity made the problem of the administrative state too difficult to model.³⁷ This paper suggests otherwise, based in part on the many advances in theory, mathematics, and computational analytics.³⁸ While the focus in Part III

³⁶ Vermeule, *supra* note 12, at 261.

³⁷ *Id.* (“[T]here are good grounds to suspect that, past a certain point, the administrative state is fundamentally intractable to positive modeling. At that point, there is no set of modeling assumptions that are both tractable and plausible. And although it is inevitably a matter of judgment where that point lies, in my view it has already been reached.”).

³⁸ See generally Jesmin Jahan Tithi et al., *Scaling Intelligence: Designing Data Centers for Next-Gen Language Models* (June 17, 2025), <https://arxiv.org/pdf/2506.15006v1> [<https://perma.cc/7TD3-YW8M>] (“Future data centers must be equipped to handle the demands of multi-trillion parameter large language models (LLMs) like OpenAI’s GPT-4 with mixture of experts transformer models featuring 1.8 trillion parameters.”) (footnote omitted). Advanced computational modeling is available. Surely the same advanced NVIDIA General Processing Units (GPUs) and data centers could be used to run a model of the administrative state. As a physics graduate student in the late 1980s, the author used a Thinking Machines Connection Machine parallel processing computer to model theoretical approaches to the many-body problem in quantum mechanics. Technology and advanced modeling approaches have come a long way since then. Cade Metz et al., *How A.I. Is Changing the Way the World Builds Computers*, *NEW YORK TIMES* (Mar. 16, 2025), <https://www.nytimes.com/interactive/2025/03/16/technology/ai-data-centers.html> [<https://perma.cc/GY89-EKBU>] (“In the past, computing largely relied on chips called central processing units, or CPUs. These could do many things, including the simple math that powers neural networks. But GPUs can do this math faster — a lot faster. At any given moment, a traditional chip can do a single calculation. In that same moment, a GPU can do thousands. Computer scientists call this parallel processing. And it means neural networks can analyze more data. . . . a new kind of supercomputer — a collection of up to 100,000 chips wired together in buildings known as data centers to hammer away at making powerful A.I. systems.”). The

below will be on the interactions between intellectual property law, defamation law and the First Amendment, there is no reason in principle that the same three-step approach proposed could not also be used to analyze the administrative state.

The many-body problem analogy may be applied for any area (or “body”) of law that changes over time, in size or strength, in its relationship to at least two other bodies of law. Unlike the waxing and waning of the Moon, the size and strength of a body of law may change substantively, not just in appearance. Courts and legal scholars typically consider how the law has changed over time in order to explain what the law is (at the time of the analysis) and how it should be applied in particular cases. In a many-body problem, changing one body of law requires additional consideration of potential impacts on other relevant bodies of law. Unintended consequences are an acute concern.

How can one determine when bodies of law are interacting strongly versus weakly? In other words, when might it be acceptable to ignore the many-body problem and deal with only one isolated body of law? If in doubt, it is safer to assume that more bodies of law are involved and either expressly exclude consideration or check whether they change the analysis. One mistake to avoid is assuming one has identified the full universe of potentially relevant areas of law. Similarly, it is not safe to assume other areas of law will not matter and will not be affected, without actually doing the analysis to check.

Once the relevant bodies of law have been identified and prioritized for further analysis, the next step

author is not suggesting that so-called generative AI is the solution. Rather, the same hardware and parallel processing software techniques needed to train an LLM could be re-purposed for many-body computational models without the wonkiness of generative AI.

in a simplified many-body approach is to identify all the potentially relevant interactions.

2. Step 2 Identify the Interactions Between the Bodies

*“When you come to a fork in the road, take it.”*³⁹ —
Yogi Berra

The second step in a many-body problem is to identify the interactions between the areas of law that may be relevant in the particular legal context under consideration. In this preliminary many-body analysis, an “interaction” will be loosely defined as the relationship between any two bodies of law in any contexts where such bodies of law are relevant to the same underlying fact pattern, legal question, or dispute. Fortunately, one can observe and study the relationships between bodies of law without knowing exactly what forces are causing those changes or how to represent them mathematically.

Once the potentially relevant bodies of law have been identified, the next step is to identify the relevant interactions between them. Consider, for example, the body of criminal law and the body of civil law. Even if all the evidence and testimony is identical, two trials for the same underlying conduct can result in both criminal and civil liability, only criminal liability, only civil liability, or neither. This is due, in part, to the different burdens of proof—“beyond a reasonable doubt” versus “preponderance of the evidence.” Similarly, by zooming out a bit further, one can see that in such a situation, three bodies of law are relevant: criminal law (substantive, e.g., murder, and procedural), civil law (substantive, e.g., wrongful death, and procedural), and constitutional law (Due Process).

³⁹ YOGI BERRA & DAVE KAPLAN, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT!: INSPIRATION AND WISDOM FROM ONE OF BASEBALL’S GREATEST HEROES (2002).

The number of paired interactions to consider will be equal to the number of bodies multiplied by the number of bodies minus one, divided in half.⁴⁰ Expressed in mathematical notation: $\frac{n(n-1)}{2}$.⁴¹ A two-body problem will have one paired interaction ($\frac{2(2-1)}{2} = \frac{2}{2} = 1$). A three-body problem, for example, Sun, Earth, Moon, will have three paired interactions ($\frac{3(3-1)}{2} = \frac{3(2)}{2} = \frac{6}{2} = 3$). Here, the paired interactions are Sun-Earth, Earth-Moon, and Sun-Moon. This is all the math needed for a basic analysis of a legal many-body problem. A matrix format also works for anyone who prefers to avoid math altogether. An example of such a matrix for interactions between criminal, civil and constitutional law is shown below.

BODY OF LAW	CRIMINAL	CIVIL	CONSTITUTIONAL
CRIMINAL		CRIMINAL-CIVIL	CRIMINAL-CONSTITUTIONAL
CIVIL			CIVIL-CONSTITUTIONAL
CONSTITUTIONAL			

Figure 1: Paired interactions between three bodies of law.

We can see there are three sets of paired interactions: criminal-civil, criminal-constitutional, and civil-constitutional interactions. In order to proceed further, we would need to have a specific legal context so we could identify the interactions of interest. For example,

⁴⁰ *Permutation and Combination Calculator*, CALCULATOR.NET, <https://www.calculator.net/permutation-and-combination-calculator.html> [<https://perma.cc/FPF2-4CW6>] (last visited Oct. 16, 2025) (explaining the equation for combinations) [hereinafter CALCULATOR].

⁴¹ *Id.*

if a member of a federal law enforcement or quasi-military force was accused of murdering a civilian U.S. citizen protestor, we might compare the burden of proof in criminal law against that in civil law, any governmental statutory immunity under criminal law against a constitutional right to due process, and any governmental statutory immunity under civil law against the same constitutional right to due process. Other choices might be similarly reasonable. The point is to make the choices and specify them explicitly.

This approach may be extended to intellectual property law. At first glance, one might think that each of the areas of intellectual property law—patent, copyright, trademark, right of publicity, and trade secret—are independent. Such a simplified view works well in many circumstances. However, if we are dealing with a many-body problem, isolated analysis of each individual body of law is necessary, but incomplete. Fortunately, the relationships between the various bodies of intellectual property law have been well-covered.⁴² Indeed, many intellectual property textbooks mention such relationships repeatedly, tracing each body of law to philosophical roots such as natural rights, personhood, distributive and social justice, autonomy, and utilitarian/economic incentive theories.⁴³

Five interacting areas of law, such as patent, copyright, trademark, right of publicity, and trade secret,

⁴² See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STANFORD L. REV. 1161 (2006); Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992).

⁴³ See, e.g., 1 Peter S. Menell et al., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2025*, 1–37 (Clause 8 Publ'g ed., 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5344140 [<https://perma.cc/4MEE-KPRR>].

will have ten paired interactions $\left(\frac{5(5-1)}{2} = \frac{5(4)}{2} = \frac{20}{2} = 10\right)$, as shown below.

BODY OF LAW	PATENT	COPYRIGHT	TRADEMARK	RIGHT OF PUBLICITY	TRADE SECRET
PATENT		PATENT-COPYRIGHT	PATENT-TRADEMARK	PATENT-RIGHT OF PUBLICITY	PATENT-TRADE SECRET
COPYRIGHT			COPYRIGHT-TRADEMARK	COPYRIGHT-RIGHT OF PUBLICITY	COPYRIGHT-TRADE SECRET
TRADEMARK				TRADEMARK-RIGHT OF PUBLICITY	TRADEMARK-TRADE SECRET
RIGHT OF PUBLICITY					RIGHT OF PUBLICITY-TRADE SECRET
TRADE SECRET					

Figure 2: Paired interactions between five bodies of law.

Adding First Amendment law to the mix results in fifteen paired interactions $\left(\frac{6(6-1)}{2} = \frac{6(5)}{2} = \frac{30}{2} = 15\right)$. Intellectual property law often interacts with administrative law, particularly for patents, copyrights, and trademarks, which have U.S. federal registration systems administered by the U.S. Patent & Trademark Office⁴⁴ and the U.S. Copyright Office.⁴⁵ Adding administrative law yields

⁴⁴ See 35 U.S.C. § 1(a) (“The United States Patent and Trademark Office is established as an agency of the United States, within the Department of Commerce. . . . Those operations designed to grant and issue patents and those operations which are designed to facilitate the registration of trademarks shall be treated as separate operating units within the Office.”).

⁴⁵ See 17 U.S.C § 701(a) (“All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian’s general direction and supervision.”). For a history of the U.S. Copyright Office, see *Copyright Office at 150*, 9 LIBRARY OF CONGRESS MAGAZINE 2 (2020) (“in 1897, Congress established the Copyright Office as a separate department within the Library [of

twenty-one paired interactions $\left(\frac{7(7-1)}{2} = \frac{7(6)}{2} = \frac{42}{2} = 21\right)$. Adding contract law, which may be at issue in certain intellectual property disputes, would result in twenty-eight paired interactions $\left(\frac{8(8-1)}{2} = \frac{8(7)}{2} = \frac{56}{2} = 28\right)$. Human rights law might also be relevant,⁴⁶ resulting in thirty-six interactions $\left(\frac{9(9-1)}{2} = \frac{9(8)}{2} = \frac{72}{2} = 36\right)$.

Realistically, even three sets of paired interactions are challenging to handle manually (versus handling via some sort of computational model, if available). Thus, one might ask whether interactions can ever be ignored in a many-body approach. The answer is sometimes, but it must be done explicitly so that the source of error is readily identifiable. An example from celestial mechanics may help illustrate this.

In daily Earth-bound life, the Ptolemaic theory that the Sun and Moon revolve around the Earth works well for most practical purposes. We do not need to use Galileo's more advanced theory, or even know the precise gravitational force, to predict that the Sun is going to rise and set with timing that is sufficiently accurate for most purposes. Similarly, we typically do not need to reflect the curvature of the Earth by using latitude and longitude to specify boundaries for real property. However, there are contexts where it is crucial for accuracy to reflect a more complete model. For example, we want greater precision when launching satellites or astronauts into space. We may also demand a high level of precision when specifying the borders of an island, a country or a continent. It is important to be transparent about what is being considered and what is being excluded.

Congress and named Thorvald Solberg the first dedicated register of copyrights.”).

⁴⁶ See, e.g., Peter K. Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37 (2016).

Even when it is reasonable to prioritize stronger interactions over weaker ones, such choices should be explicitly articulated and justified. Any results should be understood to have a higher margin of error as more potentially relevant interactions are ignored. To the extent that the many-body problem analogy applies to areas of law and particular legal contexts, judges, lawyers, and legal scholars may need greater epistemological humility. We should all be less confident that we have all the answers, or that any changes we recommend will actually work over an extended period of time. If we are facing a many-body problem, we should be hyper-alert for unintended consequences.

For present purposes, it is sufficient to recognize that just by identifying a few of the key bodies and the strongest paired interactions, a version of a restricted many-body problem approach is already being used. This alone offers a more systematic and transparent analytical approach. However, one might reasonably ask whether the order in which the paired interactions are considered matters. For example, is the outcome the same whether trademark-First Amendment is considered first, versus trademark-copyright or copyright-First Amendment? A many-body problem in physics cannot be fully solved generally, in all cases, by considering only paired interactions. Otherwise, it would not be difficult to go from two bodies to three bodies.

There is reason to suspect that the order of analysis (or, order of operations) of the interactions will matter in law, particularly when there are strong and varying interactions between at least three bodies of law. First, process matters in legal analysis. The order in which a court considers different issues or sources of authority in a

case may be determinative of the substantive result.⁴⁷ One example is lexical ordering rules, such as using top-tier sources for statutory interpretation (plain language of the statute) and only consulting lower-tier sources (such as legislative history) in case the top-tier sources are ambiguous.⁴⁸ Second, the order in which information is presented in legal disputes can be influential. First year law students learn that the “Statement of Facts” in a memorandum of law or a brief to a court should look very different depending on which side they are arguing, even if the “facts” given to both sides are identical. Since the many-body problem in law is a rough analogy, this paper will not attempt a definitive answer. However, if there are strong interactions between at least three bodies, it is likely a good idea to at least test out changing the order in which the interactions are considered to see whether order matters. That can be done, at least in a rough manner, without more advanced computational analysis.

The number of triplet interactions with n bodies of law is: $\frac{n(n-1)(n-2)}{6}$.⁴⁹ Thus, for five bodies of law, there are ten triplet interactions $\left(\frac{5(5-1)(5-2)}{6} = \frac{5(4)(3)}{6} = 10\right)$.⁵⁰ Ten

⁴⁷ See, e.g., Adam M. Samaha, *If the Text is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 157–60 (2018) (discussing how the importance of lexical ordering has waxed and waned over time). Lexical ordering in multiple areas of law, including administrative law, constitutional law, and intellectual property law, may be suitable for a many-body problem analysis.

⁴⁸ *Id.*

⁴⁹ CALCULATOR, *supra* note 40. Technically, in celestial mechanics, with a constant force F , the triplet interaction is the sum of pairwise interactions between the bodies. It is not safe to assume we are dealing with one constant legal force F . Thus, it is important to actually consider (or at least explicitly exclude and note the increased potential for error) the triplet interactions among legal bodies in a many-body approach.

⁵⁰ *Id.* (explaining the equation for permutations, which is similar to that for combinations but without the $r!$ in the denominator). It is important

triplet interactions are far too large a number of interactions for this paper to cover. Instead, Step 3 will skip right to the quadruplet interaction of trademark–copyright–right of publicity–First Amendment.

3. Step 3 Analyze the Bodies and Interactions

“*It ain’t over ‘til it’s over.*”⁵¹ —*Yogi Berra*

The third and final step in a simplified many-body approach is the most challenging. Like Poincaré, when he started his analysis of the three-body problem in celestial mechanics, we lack any rigorous mathematical formula to integrate the interactions of the bodies of law analyzed in Step 2. We know we are missing bodies and interactions based on our prioritization choices. Anything we do will be incomplete. The many-body approach does not itself provide normative rules for resolving conflicts between bodies of law. An additional normative legal theory is needed in such cases. These realities make Step 3 quite daunting. Fortunately, we will rarely need to start from scratch given the strong existing body of scholarly work on the interactions between various bodies of law. To provide some motivation for this effort, this paper will attempt to integrate the analysis of *Vidal v. Elster* as a many-body

to note that this formula, as with the formula for the paired interactions, assumes that the order of the interactions does not matter. In fact, there is reason to suspect the order might matter for legal forces, even if it does not for the gravitational constant force in celestial mechanics. If the order matters, then we do not divide by six, as it would be a permutation, not a combination. Thus, determining whether order matters in legal analysis using the many-body problem should be a very high priority for further analysis.

⁵¹ *Yogi-isms*, YOGI BERRA MUSEUM & LEARNING CENTER, <https://yogiberramuseum.org/about-yogi/yogisms/> [<https://perma.cc/4Z39-S26F>] (last visited Dec. 31, 2025) (quoting Yogi Berra).

problem by building upon the work of Professors Robert C. Post and Jennifer E. Rothman.⁵²

One of the strengths of the many-body approach is that it naturally directs attention to potential inconsistencies between bodies (areas) of law. “Coherence-seeking, both doctrinal and normative, is what areas of law do because the aspiration of every area of law is to become stable over time, with doctrinal contours that are more or less settled, and about whose normative foundations there exists a broad consensus.”⁵³ However, the many-body approach is designed to be a neutral analytical tool. Therefore, one or more normative legal theories will be needed to integrate the analysis of the interactions from Steps 1 and 2. This allows evaluation of the relationships between bodies of law and any potential impacts, versus simply describing the state of the bodies of law at any particular point in time.

Fortunately, the many-body approach is compatible with a wide variety of normative legal theories, even if not all of them are equally well-fitted. Consider, for example, the legal theory that is commonly referred to as “textualism.” Justice Scalia’s version of textualism directs that the language of the governing legal document, such as the U.S. Constitution or a statute, should take precedence over any drafting or legislative history in the event of a conflict.⁵⁴ Such a textual analysis can be used with a many-body approach. Normatively, such an approach may tend to systematically disfavor anything perceived as judicial “changes” to areas of law that are not expressly

⁵² Post & Rothman, *supra* note 19.

⁵³ Khaitan & Steel, *Three Questions*, *supra* note 31, at 88.

⁵⁴ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURES ON HUM. VALUES 1, 104 (1995), <https://tannerlectures.org/wp-content/uploads/sites/105/2024/07/scalia97.pdf> [<https://perma.cc/FTK3-H6HU>].

validated by amendments.⁵⁵ If so, that might be a desired result if one follows a particular version of textualism. If one wishes to demonstrate that a particular area of law has been clear and consistent since the founding, a many-body analysis can be used also, as long as one is prepared to acknowledge and handle evidence to the contrary that may be uncovered.

There is a potential additional challenge in Step 3, particularly if gaps have been identified or if there are conflicts resulting from the analysis of each of the paired interactions in turn. In a many-body problem, it is important *not* to assume that each of the bodies of law was analyzed *in the same manner* in each of the interactions. Consider, for example, a lawsuit in which patent law, copyright law, and First Amendment law have been identified as the most relevant bodies of law.⁵⁶ Suppose all interactions have been separately analyzed. Assume, hypothetically, that copyright law both fully and precisely

⁵⁵ Thomas Hemnes, *Copyright and the Limits of Textualism*, 68 J., COPYRIGHT SOC'Y U.S.A. 483, 526 (2021) (“[T]extualism is not sufficient for the exercise of judgment, at least in the most fundamental aspects of copyright and competition law. Judgment in such cases must be informed by consideration of the effect a decision will have on categories of creative behavior, whether they be the design of cheerleaders’ uniforms or the creation of software interfaces for ‘apps.’ The words of the Copyright Act can sometimes help to state the problem, but are never sufficient to resolve it.”) (arguing that textualism alone may be insufficient in an analysis of the paired interaction between copyright law and competition law), https://copyrightsociety.org/wp-content/uploads/2024/12/cpy_68-3-Copyright-and-the-Limits-of-Textualism.pdf [<https://perma.cc/4Y4B-H3UK>].

⁵⁶ For an outstanding discussion of the neglected intersection between patent law and the First Amendment, see Dan L. Burk, *Patenting and the First Amendment*, 96 WASH. U. L. REV. 197 (2018) [hereinafter Burk 1]; Ten-Jen Chiang, *Patents and Free Speech*, 107 GEORGETOWN L. J. 309 (2018); Dan L. Burk, *Patenting Speech*, 79 TEXAS L. REV. 99 (2000) [hereinafter Burk 2]. The author is grateful to Professor Rothman for calling this excellent work to the author’s attention.

incorporated all possible First Amendment concerns through the statutory fair use defense.⁵⁷ Assume again, hypothetically, that patent law has no First Amendment defenses incorporated, either by statute or case law. Which party (or body of law) should prevail if the analysis of the copyright-First Amendment interaction strongly suggested that the copyright owner should lose, the analysis of the patent-First Amendment analysis strongly suggested the patent owner should win, and the copyright-patent analysis did not yield a clear winner? What if the copyright owner and the patent owner were not the same person (or company)? The outcome is far from clear, given that the source of authority for copyrights and patents lies in the same Constitutional provision.⁵⁸ They are of Constitutional stature, as is the First Amendment. An additional normative legal theory (or theories) would likely be needed to resolve conflicts. As a type of “metatheory,” a many-body approach is complementary to many, but perhaps not all, legal theories.⁵⁹ Such a final step is beyond the scope of the initial analysis in this paper.

⁵⁷ See generally 17 U.S.C. § 107 (describing U.S. copyright law’s fair use defense).

⁵⁸ See U.S. CONST. art. I, § 8, cl. 8.

⁵⁹ See Garrick B. Pursley, *Metatheory*, 47 LOYOLA UNIV. CHICAGO L.J. 1333, 1334 (2016) (defining “metatheory” to mean “the analysis of the properties of theories in some field.”), <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=2572&context=luclj> [<https://perma.cc/9E8C-27XX>]. Empirical analyses, such as that of Barton Beebe, may be quite useful. See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTEL. PROP. & ENT. 1, 5 (2020). However, the analogy to an *n*-body problem in physics should not be taken literally. Law is not physics. In physics, computational methods are often used to calculate orbits. See, e.g., Veronica Saz Ulibarrena et al., *A hybrid approach for solving the gravitational N-body problem with Artificial Neural Networks*, 496 J. COMPUTATIONAL PHYSICS 2 (2024) (“Currently, the study of the evolution of *N*-body systems is limited by the large computational resources required to obtain an accurate solution. Newton’s equation of

With the abundant riches of legal theories we already have, it is fair to ask why we need a new legal meta-theory of law. After all, in law (and in everyday experience), sometimes the Earth is flat. We do not specify the curvature of the Earth on most property deeds, nor do we expect to need that information when walking or driving using any navigation system. The many-body approach is particularly useful when there are strong interactions between bodies of law. However, like all theories, it has both strengths and weaknesses.

C. *Strengths and Weaknesses of a Many-Body Approach*

The many-body problem analogy is useful because it offers a more systematic perspective on work that judges, lawyers and legal scholars have already been doing. Thus, it fits well with a wide variety of approaches and theories, without attempting to be a Grand Unified Theory or “Theory of Everything” that replaces all other theories. In particular, a many-body problem approach requires certain commitments that are likely to be valuable. First, it requires a commitment to respect the role of time—temporality—as a crucial variable. When dealing with a many-body problem, it is not safe to assume the bodies of law maintain a fixed relationship *at all times*. The time period of interest matters, and often, where the bodies were previously also matters in order to understand their

gravitation implies that the computational complexity of the problem scales with N^2 . As a consequence, for multiple applications in astrophysics such as the evolution of globular clusters or asteroids around a star, the large number of bodies in the system is one of the main reasons for the high computational cost.” (citations omitted). That does not mean so-called “computational law” approaches, such as those covered in the JOURNAL OF COMPUTATIONAL LAW AND LEGAL TECHNOLOGY or the MIT COMPUTATIONAL LAW REPORT, are automatically appropriate for an n -body problem in law.

movement. Second, a many-body problem requires a commitment to acknowledging that there may well be important interactions missing in a simplified approach, and to asking when and how to handle those excluded interactions.

As Alexander Meiklejohn admonished, “[t]he generalizing and particularizing elements in any intellectual activity must always join forces if they are to be effective. To think without facts is as ineffectual as to think without principles.”⁶⁰ To help illustrate how a three-step many-body approach might work, Part III will provide examples of interactions with and between various bodies of intellectual property law, including: trademark, copyright, defamation, right of publicity,⁶¹ and the First Amendment. This will be done using the Supreme Court decision in *Vidal v. Elster*, which involved the U.S. Patent & Trademark Office’s refusal to register the mark “TRUMP TOO SMALL” for clothing.⁶² The facts in the case, as well as hypotheticals based on the case, will be discussed. The integration of the analysis of interactions in Step 3 will build on the work of Professors Post and Rothman in their analysis of the paired interaction of the right(s) of publicity and the First Amendment.⁶³ Their approach is particularly apt for *Vidal v. Elster* because it is a longitudinal study and

⁶⁰ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 251 (1961).

⁶¹ The right of publicity has, at times, been characterized as more of a personal tort than an intellectual property right. See, e.g., Jennifer E. Rothman, *The Right of Publicity’s Intellectual Property Turn*, COLUMBIA J.L. & ARTS 277, 280 (2019) (discussing “the right of publicity’s split from the right of privacy, and its turn toward being treated as a distinct intellectual property or quasi-IP right.”) [hereinafter Rothman, *IP Turn*]. In the many-body problem in law, it may not matter what name is given to a particular area of law. A many-body analysis works whether Pluto is a ‘planet’ or a ‘dwarf planet.’

⁶² *Vidal v. Elster*, 602 U.S. 286, 290 (2024).

⁶³ See Post & Rothman, *supra* note 19.

considers copyright law and trademark law, in addition to the right(s) of publicity and the First Amendment.⁶⁴ Thus, it represents at least a four-body legal problem.

III. A MANY-BODY INTELLECTUAL PROPERTY ANALYSIS USING THE “TRUMP TOO SMALL” CASE – VIDAL *v.* ELSTER

To see a world in a grain of sand

And a heaven in a wild flower,

Hold infinity in the palm of your hand

And eternity in an hour⁶⁵

The “grain of sand” for this many-body legal analysis will be the 2024 decision of the Supreme Court in *Vidal v. Elster*, which involved an application to register “TRUMP TOO SMALL” as a trademark for clothing.⁶⁶ This paper will apply a many-body approach to *Vidal v. Elster*. Doing so can help reveal some of the strengths and weaknesses of the approach. One strength is that the many-body approach focuses greater attention on relationships and changes in the key bodies of law over time. The approach demands greater specificity (and intellectual honesty) about what the law *actually is*—meaning the positions and movement of the bodies—versus what one believes the law *should be*. The approach is also complimentary to many other theories of law. Alone, it cannot answer the normative question of what the law

⁶⁴ *See id.*

⁶⁵ William Blake, *Auguries of Innocence*, in *POEMS* (Dante Gabriel Rossetti ed., 1863).

⁶⁶ *Vidal*, 602 U.S. at 290; *See generally* Sherif Girgis, *Originalism’s Age of Ironies*, 138 *HARVARD L. REV. F.* 1 (2024) (providing additional analysis of *Vidal v. Elster* by contrasting originalism versus “history and tradition” approaches).

should be. Instead, the many-body approach is a tool to help reveal the trajectories, expansion and contraction, of the relevant bodies of law over time. With that information, one can better assess how near (or far) the reality of the relationships maps to the ideal relationships for any given goal(s). The present analysis will generally avoid taking a position as to whether the outcome in any particular case was correct. The focus instead will be on the interactions of the bodies of law under consideration.

An overview of the history and outcome of the *Vidal v. Elster* case will be provided in Part III.A. Then, in Part III.B, a three-step simplified many-body approach will be introduced and applied to certain interactions between bodies of law implicated (directly or indirectly) by *Vidal v. Elster*: Defamation-First Amendment, Copyright-First Amendment, and Trademark-Copyright-First Amendment. Part III.C will add right of publicity law to the mix. Part III.D will suggest advanced options for a many-body approach. Part IV will conclude.

A. *Vidal v. Elster* – the “TRUMP TOO SMALL” case

In 2018, political activist and attorney Steve Elster filed a trademark application with the U.S. Patent & Trademark Office (USPTO) for the word mark “TRUMP TOO SMALL” for: “Shirts; Shirts and short-sleeved shirts; Graphic T-shirts; Long-sleeved shirts; Short-sleeve shirts; Short-sleeved shirts; Short-sleeved or long-sleeved t-shirts; Sweat shirts; T-shirts; Tee shirts; Tee-shirts; Wearable garments and clothing, namely, shirts.”⁶⁷ Elster was inspired to design the T-shirts based on a comment made by Florida Senator and Presidential candidate Marco Rubio during a 2016 Presidential primary debate, which implied

⁶⁷ U.S. Trademark Application Serial No. 87/749,230 (filed Jan. 10, 2018).

then-candidate Donald Trump had small hands and small genitals.⁶⁸ As Elster explained, the phrase “criticizes Trump by using a double entendre, invoking a memorable exchange from a Republican presidential primary debate, while also expressing Elster’s view about ‘the smallness of Donald Trump’s overall approach to governing as president of the United States.’”⁶⁹ The full T-shirt, shown in Figure 3(a) and (b) below, is clearly consistent with this characterization of the message.⁷⁰ The shirt is blue, like the color of the Democratic Party, versus red for the Republican Party.⁷¹ It has a small American flag on the left sleeve.⁷² The front has the text “TRUMP TOO SMALL” in all capitals with a drawing of a hand gesture indicating small size.⁷³ The back has the text “TRUMP’S PACKAGE IS TOO SMALL: Small on the Constitution” and “Small on democracy.”⁷⁴ The reference to “package” is clearly intended as a double-entendre reference to Trump’s genitals.

⁶⁸ *Vidal*, 602 U.S. at 291; ABC News, *Trump v. Rubio | Trump Defends Size of His Manhood, ‘Little Hands’*, YOUTUBE (Mar. 4, 2016), <https://youtu.be/Ve6l92hEozo?si=egZHVNHKXFCfjZYE> [<https://perma.cc/A7YL-MAV3>].

⁶⁹ Brief of Respondent in Opposition to Petition for Writ of Certiorari at 6, *Vidal v. Elster*, 602 U.S. 286 (2024) (No. 22-704) [hereinafter Brief in Opposition].

⁷⁰ See *infra* Figure 3(a).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *infra* Figure 3(b).



Figure 3(a): Front of a “TRUMP TOO SMALL” T-shirt⁷⁵



Figure 3(b): Back of a “TRUMP TOO SMALL” T-shirt⁷⁶

⁷⁵ Steve Elster, Photograph of the front of a shirt with “TRUMP TOO SMALL” and a hand gesture indicating small size on it *in* TRUMP TOO SMALL, [trumptoosmall.com](https://perma.cc/5BA3-UP8G) [https://perma.cc/5BA3-UP8G] (last visited Oct. 17, 2025). This image is used with the permission of Steve Elster, Esq., the respondent in *Vidal v. Elster*.

The USPTO Trademark Examiner refused to register the mark based on the “names clause,” 15 U.S.C. § 1052(c), in the trademark statute (Section 2(c) of the Lanham Act).⁷⁷ The names clause allows the USPTO to refuse to register a mark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent”⁷⁸ Elster argued that “[t]he applied-for mark TRUMP TOO SMALL is political commentary about presidential candidate and president Donald Trump.”⁷⁹ The Examiner responded: “the fact that the proposed mark may be intended as political commentary is not determinative. Moreover, neither the statute nor the case law carves out a ‘political commentary’ exception to the *right of privacy and publicity*.”⁸⁰ Further, “applicant’s argument that consumers would not

⁷⁶ Steve Elster, Photograph of the back of a shirt with “TRUMP’S PACKAGE IS TOO SMALL: Small on the Constitution Small on democracy” on it *in* TRUMP TOO SMALL, [trumptoosmall.com \[https://perma.cc/5BA3-UP8G\]](https://perma.cc/5BA3-UP8G) (last visited Oct. 17, 2025). This image is used with the permission of Steve Elster, Esq., the respondent in *Vidal v. Elster*. Elster subsequently added more examples of policies where he felt then-Presidential candidate Trump was inadequate. This is the text on the back of the updated shirt: “TRUMP’S PACKAGE IS TOO SMALL: Small on the environment[;] Small on civil rights[;] Small on immigrant rights[;] Small on LGBTQ rights[;] Small on workers’ rights[;] Small on voting rights[;] Small on affordable health care for all.” A sample of the updated T-shirt is on file with the author.

⁷⁷ U.S. Trademark Application Serial No. 87/749,230 (Final Office Action mailed July 30, 2018) [hereinafter Final Office Action]. See also *Vidal v. Elster*, 602 U.S. 286, 291 (2024).

⁷⁸ See *Vidal*, 602 U.S. at 290 (2024); 15 U.S.C. § 1052(c). The Trademark Examiner also rejected the application based on the “false association” clause, Section 2(a) of the Lanham Act, on the grounds that it “falsely suggest[s] a connection with persons, living or dead.” Final Office Action, *supra* note 77; *In re Elster*, 26 F.4th 1328, 1330 (2022).

⁷⁹ Final Office Action, *supra* note 77.

⁸⁰ *Id.* (emphasis added).

understand the applied-for mark to be sponsored by, endorsed by, or affiliated with Donald Trump is also unavailing. The basis of the instant refusal is the *rights of privacy and publicity* that living persons have in the designations that identify them.”⁸¹

The references to the “right of privacy and publicity” may be surprising coming from a *Trademark Examining Attorney* in the context of a federal *trademark* application filed in the U.S. Patent and *Trademark Office*. It is an almost canonical principle of U.S. intellectual property law that there is no federal right of publicity law.⁸² Of course, as Professor Rothman has explained, the history and lineage of the right of publicity is much more nuanced.⁸³ For present purposes, from a many-body

⁸¹ *Id.* (emphasis added).

⁸² Indeed, the right of publicity is covered in Chapter VI (“State IP Protections”) in the excellent textbook the author uses for an Intellectual Property Introduction survey class. PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 1265 (2025). See also, Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, A.B.A. (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/.

⁸³ In tracing the history and interactions between many different bodies of law, Rothman’s analysis is a type of many-body approach. “The turn toward understanding the right of publicity as akin to a copyright or patent, as opposed to a right rooted in the individual identity-holder has created many of the challenges with today’s right of publicity laws. The right of publicity—emboldened by its status as a form of IP—has expanded in ways that increasingly clash with free speech, and with the privileges provided by copyright law. At the same time, its new-found IP status undercuts the ability of the First Amendment and copyright preemption to balance out the more expansive publicity laws.” Rothman, *IP Turn*, *supra* note 61, at 280 (“Many of the missteps in the right of publicity law have been driven by falsehoods repeated to the point of almost universal consensus and unassailability.”). For a comparison between the right of publicity and trademark law, see

perspective, the Trademark Examiner’s reference to the right of privacy and publicity suggests that *Vidal v. Elster* may implicate more than “pure” trademark law.

Elster filed a request for reconsideration, which was denied.⁸⁴ Elster appealed to the Trademark Trial and Appeal Board (“TTAB”). The TTAB affirmed the Examiner’s refusal under the names clause “on the ground that [the mark] comprises the name of President Donald Trump without his consent.”⁸⁵ The TTAB did not “reach

Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

⁸⁴ U.S. Trademark Application Serial No. 87/749,230 (Request for Reconsideration Denied, Feb. 25, 2019) (“[A]s previously explained, the fact that the proposed mark may be intended as political commentary is not determinative. Moreover, neither the statute nor the case law carves out a ‘First Amendment’ or a ‘political commentary’ exception to the right of privacy and publicity[fn2].”) (stating in footnote 2: “Regardless of whether applicant’s mark is protected free speech, it is noted that the Board’s decisions refusing registration of the mark do not implicate an applicant’s rights under the First Amendment, because a refusal to register a mark does not affect the applicant’s right to use the mark. *In re Congregation Ale House (AZUSA Chapter) LLC*, 2014 TTAB LEXIS 510, *17-18 (TTAB 2014); *see also In re Langham*, 2012 TTAB LEXIS 503, *16 (TTAB 2012) (noting that “the Board is an administrative tribunal of limited jurisdiction empowered solely to determine the registrability of trademarks” and that “it is not empowered to determine the right to use, nor may it decide broader constitutional questions”). The Trademark Examiner’s citation to decisions from 2012 and 2014 is notable. Based on subsequent Supreme Court decisions in *Matal v. Tam* and *Iancu v. Brunetti*, the denial of a federal trademark registration can, in fact, violate the First Amendment because a trademark registration confers important legal rights and benefits. *See Matal v. Tam*, 582 U.S. 218 (2017); *Iancu v. Brunetti*, 588 U.S. 388 (2019). The purpose of this article is not to weigh in on what the correct—or ideal—version of any particular law should be. Instead, the changing nature of the law is an indication of a many-body problem.

⁸⁵ *In re Steve Elster*, Serial No. 87749230 at 11 (T.T.A.B. July 2, 2020) (Opinion by Lynch, J.) (3-0 decision) (citation omitted) <https://ttabvue.uspto.gov/ttabvue/ttabvue-87749230-EXA-23.pdf>

the refusal to register under Section 2(a)'s false association clause."⁸⁶ The TTAB reviewed a prior precedential TTAB decision involving "TRUMP-IT" marks for utility knives, which affirmed a rejection under the names clause, and rejected constitutionality challenges to Section 2(c) and Section 2(a).⁸⁷ The TTAB quoted the prior decision in explaining the limited nature of the USPTO's role in constitutionality challenges to trademark registrations. "[R]egardless of the USPTO's inability to strike down statutory provisions as unconstitutional, 'a constitutional challenge may involve 'many threshold questions . . . to which the [agency] can apply its expertise.[']"⁸⁸ The

[<https://perma.cc/GZ7F-ZLRE>] [hereinafter TTAB Elster]. The opinion was labeled "This Opinion is Not a Precedent of the TTAB." *Id.*

⁸⁶ *Id.* at 11.

⁸⁷ *In re* ADCO Indus.-Techs., L.P., 2020 USPQ2d 53786 (T.T.A.B. 2020) [hereinafter TTAB ADCO] (showing the designs for the marks included Trump's hair on the "T" and may be seen in footnote 10 of the ADCO decision). No criticism or political commentary was apparent to the author in viewing the images. If anything, they seemed to be the type of marks and products that President Trump might endorse and therefore classic examples of infringing trademarks under 15 U.S. Code § 1114, without the need for the names clause. For some examples of President Trump's brand licensing projects, see Edward Helmore, *'This presidency is a brand-franchise': Trump has taken the commercialization of politics to a new level*, THE GUARDIAN (June 21, 2025), <https://www.theguardian.com/us-news/2025/jun/21/trump-products-presidency-as-a-brand> [<https://perma.cc/7F8W-B66T>]. For example, the mark "TRUMP HOME" has reportedly been registered in Peru for "Hand tools and implements (hand-operated); cutlery, knives, forks, and spoons; side arms; razors" (Reg. No. 270315), as reported on page 34 of Schedule 1 for Part 2 of the Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) for 2025 filed by President Trump with the U.S. Office of Government Ethics on June 13, 2025. Off. Gov't Ethics, Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) 34 (2025), <https://www.whitehouse.gov/wp-content/uploads/2025/06/President-Donald-J.-Trump.pdf> [<https://perma.cc/PK5G-YHFT>].

⁸⁸ *In re* Steve Elster, Serial No. 87749230 at 8–9 (T.T.A.B. July 2, 2020) (citations omitted).

TTAB explained that the names clause in Section 2(c) did not discriminate on the basis of viewpoint and instead applied “in an objective, straightforward way to any proposed mark that consists or comprises the name of a particular living individual, regardless of the viewpoint conveyed by the proposed mark.”⁸⁹ The TTAB further commented that, “even if Section 2(c) were subject to greater scrutiny, as [Elster] alleges, the statutory provision is narrowly tailored to accomplish these purposes [preventing deceptive use and confusion], and consistently and reliably applies to any mark that consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent.”⁹⁰

Regardless of whether one agrees with the TTAB, the discussion suggests we have at least one many-body problem. First, we have the three-body problem of the interactions between “bodies” as the three branches of the federal government. The legislative branch (Congress) enacted the names clause of the Lanham Act and presumably believed it to be constitutional. The executive branch, through the USPTO as an agency within the

⁸⁹ *Id.* at 10.

⁹⁰ Reasonable minds may differ as to how straightforward, consistent, or reliable the application of Section 2(c) is given that, absent identification by an applicant or in an Opposition filing, each individual Trademark Examiner reviewing any particular application is responsible for recognizing, *sua sponte*, whether a mark includes a “name, portrait or signature of a living individual,” 15 U.S.C. § 1052(c). In practice, distinctive names of very famous people will tend to be recognized. For example, would a Trademark Examiner be likely to recognize the name “Benito” as referring to the artist “Bad Bunny?” Bad Bunny’s full name is Benito Antonio Martínez Ocasio, *see* Chris Phelan, *What Is Bad Bunny’s Real Name? The Adorable Way He Got His Famous Stage Name*, NBC (Sept. 29, 2025), <https://www.nbc.com/nbc-insider/what-is-bad-bunny-real-name> [<https://perma.cc/N9WD-WVMQ>]. It is also difficult to imagine Trademark Examiners can recognize *signatures* in any straightforward, consistent and reliable manner.

Department of Commerce, administers the Lanham Act. The TTAB has provided its views on the constitutionality of the names clause. The judicial branch has the ultimate responsibility for the final determination on whether a statute is unconstitutional on its face or as applied.

Following the *Vidal v. Elster* trademark case to the judicial branch in the discussion below, the three-body problem interactions between the branches of government continues to be appear.⁹¹ In addition, there is a nine-body problem of the interactions between the Supreme Court Justices. Finally, and of most interest for the present analysis, there is (at least) a five-body problem in the interactions between trademark law, right of publicity law, copyright law, defamation law and the First Amendment. That five-body problem involving bodies as areas of law will be the main focus for the application of the many-body approach in this paper. The goal is to see a complex world of many-body problems in the single grain of sand that is *Vidal v. Elster*.

In *Vidal v. Elster*, Elster appealed the TTAB decision to the Court of Appeals for the Federal Circuit (“CAFC”).⁹² At this point, it may be worth noting that the existence and jurisdiction of the CAFC itself reflects the three-body problem of the tripartite system of federal government. The CAFC was formed through the Federal Courts Improvement Act of 1982,⁹³ The CAFC has had

⁹¹ U.S. v. Alvarez, 567 U.S. 70 (2012), and the Stolen Valor Act of 2005, Public Law 109-437 (as revised in 2013, Public Law No: 113-12), is an excellent example of such a three-body problem involving the three branches of government as “bodies.” See *Separation of Powers in Action - U.S. v. Alvarez*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/first-amendment-activities/us-v-alvarez/separation-powers-action-us-v-alvarez> [https://perma.cc/SWV8-UHT5] (last visited Feb. 6, 2026).

⁹² *Vidal v. Elster*, 602 U.S. 286, 292 (2024).

⁹³ Pub. L. 97-164, 96 Stat. 25 (codified as 28 U.S.C. §§ 1291–1296).

jurisdiction over appeals of decisions by the TTAB with respect to applications for registration of trademarks.⁹⁴ Thus, we can see the three-body problem of the interactions between legislative, judicial and executive branches in the existence and jurisdiction of the CAFC. In its ruling in *Vidal v. Elster*, the CAFC treated the question presented as a challenge to the names clause, *as applied* to Elster’s trademark application. The CAFC did not treat the dispute as a facial challenge to the constitutionality of the names clause. A three-judge panel of the court⁹⁵ concluded that “*as applied in this case*, section 2(c) involves content-based discrimination that is not justified by either a compelling or

⁹⁴ 28 U.S.C. § 1295(a) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction— . . . (4) of an appeal from a decision of — . . . (B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071)”). *See also* 15 U.S.C. § 1071(a)(1) (“An applicant for registration of a mark, . . . who is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, may appeal to the United States Court of Appeals for the Federal Circuit thereby waiving his right to proceed under subsection (b) of this section”).

⁹⁵ Also, we can see a three-body problem with the three CAFC judges as “bodies” for the analysis. Judge Dyk wrote the opinion for the court, and was joined by Judges Taranto and Chen. *In re Elster*, 26 F.4th 1328, 1328 (Fed. Cir. 2022) Judge Timothy B. Dyk was appointed by President William J. Clinton in 2000. *Judge Biographies*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <https://www.cafc.uscourts.gov/home/the-court/judges/judge-biographies/> [<https://perma.cc/47NT-4XDX>] (last visited Feb. 6, 2026). Judge Richard B. Taranto was appointed by President Barack H. Obama in 2013. *Id.* Judge Raymond T. Chen was also appointed by President Obama in 2013. *Id.* The CAFC itself may be seen as a twelve-body problem if the twelve active judges are viewed as “bodies.” The interactions between the Supreme Court, the CAFC, the federal District Courts, and the various administrative agencies subject to the jurisdiction of the CAFC, may also be explored using a many-body approach.

substantial government interest.”⁹⁶ The court emphasized that “the right to criticize public men” is “[o]ne of the prerogatives of American citizenship.”⁹⁷ This suggests a potential interaction between the names clause (as applied) and the First Amendment.

As a further indication of a many-body problem, the state law rights of privacy and publicity appeared in the CAFC’s opinion, as in the Trademark Examiner’s analysis and the TTAB decision. The appellate court also expressly added state unfair competition law to the mix. “The government appears to recognize that the section 2(c) restriction implicates First Amendment interests but contends that these interests are outweighed by the government’s substantial interest in protecting *state-law privacy and publicity rights, grounded in tort and unfair competition law*.”⁹⁸ The appellate court then discussed the Restatement (Second) of Torts and the Restatement (Third) of Unfair Competition.⁹⁹ Note that, from the perspective of a many-body approach with areas of law as “bodies,” this dispute may be seen as at least a six-body problem of tort law, unfair competition law, privacy law, right of publicity law, trademark law, and constitutional law (First Amendment). Or, in a simplified version, a three-body problem of state tort law, federal intellectual property law, and federal constitutional law.

With respect to the right to privacy, the CAFC found “there can be no plausible claim that President Trump enjoys a right of privacy protecting him from criticism in the absence of actual malice—the publication of false information with knowledge of its falsity or in reckless disregard of the truth.”¹⁰⁰ Thus, the court added

⁹⁶ *In re Elster*, 26 F.4th at 1331 (emphasis added).

⁹⁷ *Id.* at 1334 (citation omitted).

⁹⁸ *Id.* (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citation to *Time, Inc. v. Hill*, 385 U.S. 374 (1967) omitted).

defamation law to the many-body legal problem for purposes of the present analysis. The CAFC held that “[w]hether we apply strict scrutiny and the compelling government interest test, or *Central Hudson’s* intermediate scrutiny and the substantial government interest test, ‘the outcome is the same.’”¹⁰¹ “The PTO’s refusal to register Elster’s mark cannot be sustained because the government does not have a privacy or publicity interest in restricting speech critical of government officials or public figures in the trademark context—at least absent actual malice, which is not alleged here.”¹⁰²

The CAFC again noted that “Elster raised only an as-applied challenge before this court.”¹⁰³ However, the court expressed “concerns regarding overbreadth.”¹⁰⁴ The court held that the TTAB’s “*application of section 2(c) [the names clause] to Elster’s mark is unconstitutional under any conceivable standard of review, and accordingly reverse[d] the Board’s decision that Elster’s mark is unregistrable.*”¹⁰⁵

The government filed a petition for writ of certiorari to the U.S. Supreme Court, which was granted.¹⁰⁶

On July 15, 2024, four months before the 2024 Presidential election, the Supreme Court issued its ruling against Elster in the case in a 9-0 judgment.¹⁰⁷ Justice

¹⁰¹ *Id.* at 1338–39 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571 (2011)).

¹⁰² *In re Elster*, 26 F.4th at 1339.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1339 (“Nonetheless, we reserve the overbreadth issue for another day.”).

¹⁰⁵ *Id.* (emphasis added to indicate the decision was related to the application of the statutory provision, not a facial challenge).

¹⁰⁶ *Vidal v. Elster*, 602 U.S. 286 (2024), *cert. granted*, 91 U.S.L.W. 3316 (U.S. June 5, 2023) (No. 22-704) (petition filed Jan. 27, 2023).

¹⁰⁷ *Vidal v. Elster*, 602 U.S. 286, 289 (2024). Justice Thomas delivered the judgement of the Court and the opinion of the Court (except as to Part III of his opinion, in which Thomas briefly critiqued the

Thomas delivered the opinion of the Court (except as to Part III of the opinion, which briefly critiqued the concurrences of Justices Barrett and Sotomayor). No Justice dissented. However, multiple concurrences reflected different judicial viewpoints, which might be expected for a nine-body problem of the Supreme Court (with the Justices as legal “bodies”).

In *Vidal v. Elster*, Justice Thomas announced the judgment of the Court that the “names clause” in Section 1052(c) did not violate Elster’s First Amendment right to free speech.¹⁰⁸ Justice Thomas characterized it as “a content-based—but viewpoint-neutral—trademark restriction.”¹⁰⁹ However, the Justices were not in agreement as to the legal analysis.¹¹⁰ Justices Alito and Gorsuch joined Justice Thomas’ opinion in full.¹¹¹ Chief Justice Roberts and Justice Kavanaugh joined Parts I (brief recitation of facts and procedural history), II (analyzing the constitutionality of content-based—but viewpoint-neutral—trademark restrictions) and IV (briefly emphasizing the narrow scope of the decision) of Justice Thomas’ opinion, but not Part III (where Justice Thomas briefly critiqued the approaches of Justices Sotomayor and Barrett).¹¹² Justice Barrett joined Parts I, II-A (distinguishing between content-based and content-neutral regulations of speech) and II-B (discussing coexistence of content-based trademark rights with the First Amendment),

approaches of Justices Sotomayor and Barrett in their concurrences). *See id.* at 289, 308–10. For purposes of brevity, Parts I, II, and IV of Justices Thomas’s opinion will be referred to in this article as the “opinion of the Court.”

¹⁰⁸ *Vidal*, 602 U.S. at 295.

¹⁰⁹ *Id.* (Part II-B, joined by Justices Roberts, Alito, Gorsuch, Kavanaugh and Barrett).

¹¹⁰ *See id.* at 311, 325. The interactions and positions of the Supreme Court Justices are well-suited for a many-body approach.

¹¹¹ *Id.* at 289.

¹¹² *Id.* at 311.

but not II-C, which used “history and tradition” to analyze the Lanham Act names clause, as discussed further below.¹¹³ Justice Kavanaugh filed a very brief opinion concurring in part, joined by Chief Justice Roberts.¹¹⁴ Justice Barrett filed an opinion concurring in part, which was joined by Justice Kagan in full, by Justice Sotomayor as to Parts I, II, and III-B, and by Justice Jackson as to Parts I and II.¹¹⁵ Justice Sotomayor filed a separate opinion concurring in the judgment, which Justices Kagan and Jackson joined.¹¹⁶ These intricate judicial interactions in the nine-body problem of the Supreme Court are such that a simplified chart may be helpful. At a minimum, it would be useful to determine whether there are even five votes for any particular legal proposition.¹¹⁷ Such a chart is shown below. Admittedly, it does not capture the nuances of the judicial interactions and positions of the Justices.

¹¹³ *Id.*

¹¹⁴ *Vidal*, 602 U.S. at 311.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 325.

¹¹⁷ The author is grateful to Professor Anderson for the prompt to attempt to answer this question.

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	Opinion of the Court (Justice Thomas) Part I	Opinion of the Court (Justice Thomas) Part II	Opinion (Justice Thomas) Part III	Opinion of the Court (Justice Thomas) Part IV	Opinion concurring in part (Justice Kavanaugh)	Opinion concurring in part (Justice Barrett)	Opinion concurring in the judgment (Justice Sotomayor)
	Brief recitation of facts and procedural history (omits mention of “as applied” challenge)	II-A (distinguishing between content-based and content-neutral regulations of speech) II-B (discussing coexistence of content-based trademark rights with the First Amendment) II-C (using “history and tradition” to analyze the Lanham Act names clause)	Brief critique of approach in concurrences of Justices Sotomayor and Barrett	One paragraph emphasizing narrow decision	One paragraph	Lengthy opinion criticizing the use of “history and tradition”	Lengthy opinion criticizing the use of “history and tradition”
Chief Justice Roberts	Joined	Joined		Joined	Joined		
Justice Thomas	Author	Author	Author	Author			
Justice Alito	Joined	Joined	Joined	Joined			
Justice Sotomayor						Joined Parts I, II and III-B	
Justice Kagan						Joined	Joined
Justice Gorsuch	Joined	Joined	Joined	Joined			
Justice Kavanaugh	Joined	Joined		Joined	Author		
Justice Barrett	Joined	Joined Parts II-A and II-B				Author	
Justice Jackson						Joined Parts I and II	Joined
TOTAL JUSTICES	6	6 (Parts II-A and II-B only); 5 (Part II-C)	3	5	2	4 (Parts I and II); 3 (Part III-B only); 2 (Part III-A only)	2

*Figure 4: Simplified Chart of the Opinions of the Justices in Vidal v. Elster*¹¹⁸

¹¹⁸ See *Vidal*, 602 U.S. The decision was issued only a few months before the 2024 Presidential election involved a mark critical of President Trump. *Id.* Thus, it may be useful to mention the appointment history of each of the Justices. Chief Justice John G. Roberts, Jr. was nominated by President George W. Bush in 2005. Current Members,

As can be seen above, only Parts I, II, and IV of the opinion of the Court received more than four votes.¹¹⁹ Part I briefly recited the facts and procedural history.¹²⁰ Part IV briefly emphasized the narrow scope of the decision.¹²¹ “We hold only that history and tradition establish that the particular restriction before us, the names clause in § 1052(c), does not violate the First Amendment.”¹²² Part II contained the most detailed and extensive discussion. In Part II-A and Part II-B, Justice Thomas was joined by Chief Justice Roberts as well as Justices Alito, Gorsuch, Kavanaugh and Barrett (6-3).¹²³ Of those Justices, Justice Barrett did not join Part II-C.

When viewed from a many-body perspective, one of the most remarkable features of the case was that the Court, *sua sponte*, re-framed the legal question for analysis as a *facial challenge* to the names clause. Specifically, in Part I of the opinion of the Court, Justice Thomas characterized the question presented on certiorari as

Supreme Court of the United States, <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/SGR6-8V83>] (last visited Feb. 6, 2026). Associate Justice Clarence Thomas was nominated by President George H.W. Bush in 1991. *Id.* Associate Justice Sonia Sotomayor was nominated by President Barack Obama in 2009. Associate Justice Elena Kagan was nominated by President Obama in 2010. *Id.* Associate Justice Neil M. Gorsuch was nominated by President Donald J. Trump and was seated in 2017. *Id.* Associate Justice Brett M. Kavanaugh was nominated by President Trump and was seated in 2018. *Id.* Associate Justice Amy Coney Barrett was nominated by President Trump and was seated in 2020. *Id.* Associate Justice Ketanji Brown Jackson was nominated by President Joseph Biden and was seated in 2022. *Id.*

¹¹⁹ See *Vidal*, 602 U.S. at 289.

¹²⁰ See *id.* at 290–92.

¹²¹ *Id.* at 310–11

¹²² *Id.* at 310 (Part IV of the opinion of the Court).

¹²³ In her opinion concurring in the judgment, Justice Sotomayor repeatedly refers to “a five-Justice majority” of the Court. See, e.g., *id.* at 325. It is fair to say the Court was far from united as to the reasoning for the outcome, even if unanimous in the judgment.

“whether the Lanham Act’s names clause violates the First Amendment.”¹²⁴ Yet the petitioner framed the question presented as an *as applied* analysis, stating, “Whether the refusal to register a mark under Section 1052(c) violates the Free Speech Clause of the First Amendment *when the mark contains criticism of a government official or public figure.*”¹²⁵ As did the respondent (Elster), stating, “[t]he question presented is whether the U.S. Patent and Trademark Office violated the First Amendment *when it applied section 2(c) to refuse registration of a political slogan on T-shirts that criticizes former President Trump without his consent.*”¹²⁶ Thus, both the petitioner and the respondent treated the question presented as involving a challenge to the names clause as applied, not a facial challenge.¹²⁷ Moreover, the CAFC had also treated the case as an *as applied* challenge, as discussed above.¹²⁸ The purpose of this article is not to criticize the Court’s decision to change the question selected. Instead, the goal is to note that this threshold decision by the Court may well have influenced the outcome in the case, and it was by no means a foregone conclusion. Indeed, the evolution of the discretionary versus mandatory jurisdiction of the Court, as provided by various acts of Congress in the past two hundred and fifty years, as well as the authority and

¹²⁴ *Id.* at 292.

¹²⁵ Petition for Writ of Certiorari at 1, Vidal, 602 U.S. (No. 22-704) (emphasis added) [hereinafter Petition].

¹²⁶ Brief in Opposition, *supra* note 69, at 1 (emphasis added).

¹²⁷ See *Matal v. Tam*, 582 U.S. 218 (2017); *Iancu v. Brunetti*, 588 U.S. 388 (2019).

¹²⁸ *In re Elster*, 26 F.4th 1328, 1331 (Fed. Cir. 2022) (“[A]s applied in this case, [the names clause] involve[d] content-based discrimination that [was] not justified by either a compelling or substantial government interest.”).

practice of the Court with respect to question selection, could be a fascinating many-body problem analysis.¹²⁹

Justice Barrett was the only Justice who mentioned the “as applied” challenge, and she did so only briefly.¹³⁰ Part II of Justice Barrett’s opinion, which was joined by Justices Sotomayor and Jackson, concluded that: “The Government can reasonably determine that, on the whole, protecting marks that include another living person’s name without consent risks undermining the goals of trademark. The names clause is therefore constitutional, both facially and as applied to *Elster’s mark*.”¹³¹ It is not immediately obvious how to reconcile this brief analysis with the more detailed consideration of the as applied challenge by the CAFC. Nor is it clear how a “categorical judgment” by Congress would be the focus for an analysis of the constitutionality of the names clause in the specific application to *Elster’s* application only.¹³² A many-body approach can help highlight such tension. However, lacking a normative gloss, a many-body approach, standing alone, cannot answer the question of whether any apparent inconsistencies or gaps in reasoning are warranted based on other goals or values.

¹²⁹ For a critique of the Court’s question-selection powers, see Benjamin B. Johnson, *The Origins of the Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 864 (2022) (“The Supreme Court no longer decides cases. This statement is not particularly contestable. Its very rules limit consideration to questions presented. The Justices regularly add or subtract questions to frame cases in ways that allow the Justices to make the policy they want to make. This practice is so commonplace that it has largely escaped notice, to say nothing of close scrutiny. Such examination is long overdue, and it turns out that the historical development of the practice is not flattering to the Court. Question-selection power rests uneasily with text and history.”) (footnote omitted).

¹³⁰ See *Vidal v. Elster*, 602 U.S. 286, 319 (2024).

¹³¹ *Id.* (Part II of Justice Barrett’s opinion concurring in part) (emphasis added).

¹³² See *id.*

A threshold question in *Vidal v. Elster* was whether the USPTO’s refusal to register a trademark raises First Amendment concerns at all. Under trademark law, one is free to use the mark even if it is not registered.¹³³ Indeed, registration is not required for *use* under any area of intellectual property law—patent, trademark, copyright, or right of publicity.¹³⁴ Registration is required for enforcement of patents and copyrights,¹³⁵ but not for trademarks.¹³⁶ Thus, one might reasonably ask whether the denial of a federal trademark registration burdens speech at all, as long as the denial is viewpoint-neutral.

Based on Supreme Court precedent in *Matal v. Tam* and *Iancu v. Brunetti*, because a trademark registration confers important legal rights and benefits, the denial of a federal trademark registration can violate the First Amendment.¹³⁷ As the Court explained in *Matal v. Tam*:

¹³³ *Matal v. Tam*, 582 U.S. 218, 225 (2017) (“Without federal registration, a valid trademark may still be used in commerce.”).

¹³⁴ See, e.g. *id.* (“Without federal registration, a valid trademark may still be used in commerce.”); *Kaempe v. Myers* No. 01-02636, U.S. Dist. LEXIS 27610, at *5 (D.D.C. Mar. 21, 2002) (“A patent, by itself, gives the inventor no right to use his or her own invention. It merely gives the right to exclude others.”); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 678 (9th Cir. 2014) (“Though an owner has property rights without registration, he needs to register the copyright to sue for infringement.”). For case law related to the right of publicity, see Jennifer Rothman, *Navigating the Identity Thicket*, 135 HARV. L. REV. 1271 (2022) (cited by Justice Thomas in Part II-C of the opinion of the Court in *Vidal v. Elster*) [hereinafter Rothman, *Identity*].

¹³⁵ See 35 U.S.C. §§ 154(a)(1), 271(a) (providing exclusive rights to patentee); 17 U.S.C. § 411(a) (requiring preregistration or registration before instituting a copyright infringement action).

¹³⁶ 15 U.S.C. § 1125 (protecting both registered and unregistered marks).

¹³⁷ *Matal* 582 U.S. at 218 (holding that the USPTO’s refusal to register “THE SLANTS” violated the First Amendment); *Iancu v. Brunetti*, 588 U.S. 388, 388 (2019) (holding that the USPTO’s refusal to register

Federal registration [] “confers important legal rights and benefits on trademark owners who register their marks.” Registration on the principal register (1) “serves as ‘constructive notice of the registrant’s claim of ownership’ of the mark,” (2) “is ‘prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,” and (3) can make a mark “‘incontestable’” “once a mark has been registered for five years.” Registration also enables the trademark holder “to stop the importation into the United States of articles bearing an infringing mark.”¹³⁸

In his opinion for the Court (except as to Part III) in *Vidal v. Elster*, Justice Thomas acknowledged that content-based speech restrictions generally are subject to strict scrutiny.¹³⁹ However, Justice Thomas emphasized that “despite its content-based nature, trademark law has always existed alongside the First Amendment from the beginning.”¹⁴⁰ That longstanding, harmonious relationship suggests that heightened scrutiny need not always apply in this unique context.¹⁴¹

From a many-body problem perspective, Justice Thomas’s assertion of long-standing harmonious coexistence between trademark law (particularly the names clause) and the First Amendment is not clearly supported, as Justice Barrett emphasized. Similarly, the Articles in the U.S. Constitution and first ten Amendments in the Bill of

“FUCTION” due to “immoral or scandalous” nature violated the First Amendment).

¹³⁸ *Matal*, 582 U.S. at 226–27 (citations omitted).

¹³⁹ *Id.* at 254.

¹⁴⁰ *Vidal v. Elster*, 602 U.S. 286, 299 (2024).

¹⁴¹ *Id.* (Part II-B of the opinion, joined by Justices Alito, Gorsuch, Roberts, Kavanaugh, and Barrett).

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Rights have coexisted since 1791.¹⁴² Yet they are not all “harmonious” in any common understanding of that term. Consider, just as one example, the tension in the relationship between the powers of the executive branch, the legislative branch, and the judicial branch. Examples of such tension are all too easy to find.¹⁴³

Part II-C of Justice Thomas’s opinion is also interesting from a many-body perspective because Justice Thomas emphasized the importance of “history and tradition” for constitutional analysis.¹⁴⁴ Four Justices indicated agreement with Part II-C of Justice Thomas’s opinion, which included the following.

We have acknowledged that trademark rights and restrictions can “play well with the First Amendment.” In this case, we do not delineate an exhaustive framework for when a content-based

¹⁴² See U.S. CONST. amends. I–X. The U.S. Constitution might perhaps be usefully analyzed via a many-body approach. The newest “body” could be the Twenty-Seventh Amendment, originally proposed by the first Congress in 1789 but not ratified until over two centuries later. U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”). The Twenty-Seventh Amendment is a bit like Pluto—now demoted to a “dwarf planet”—in that its status is contested. See Sanford Levinson, *Authorizing Constitutional Text: on the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101 (1994).

¹⁴³ See generally *Trump v. U.S.*, 603 U.S. 593, 593 (2024) (holding a former President is entitled to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority) (Thomas, J., concurring) (Barrett, J., concurring in part) (Sotomayor, Kagan & Jackson, JJ., dissenting); *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 412–13 (2024) (Thomas & Gorsuch, JJ., concurring) (Kagan, Sotomayor & Jackson, JJ., dissenting) (“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry.”).

¹⁴⁴ See *Vidal*, 602 U.S. at 300–01.

trademark restriction passes muster under the First Amendment. But, in evaluating a solely content-based trademark restriction, we can consider its history and tradition, as we have done before when considering the scope of the First Amendment.

The Lanham Act’s names clause has deep roots in our legal tradition. Our courts have long recognized that trademarks containing names may be restricted. And, these name restrictions served established principles. This history and tradition is sufficient to conclude that the names clause—a content-based, but viewpoint-neutral, trademark restriction—is compatible with the First Amendment. We need look no further in this case.¹⁴⁵

Justices Barrett and Sotomayor strongly criticized Justice’s Thomas’s use of “history and tradition.”¹⁴⁶

¹⁴⁵ *Id.* at 300–01 (citations omitted); For additional analysis of the “history and tradition” approach to constitutional law analysis, see *Leading Case, First Amendment — Federal Trademark Law — History and Tradition — Vidal v. Elster*, 138 HARV. L. REV. 315 (2024) (“[W]hile the Court’s conservative Justices largely agree that history *should* be used to interpret the Constitution, there is still disagreement as to how to do so.”) (footnote omitted).

¹⁴⁶ *Vidal*, 602 U.S. at 311 (“The Court claims that ‘history and tradition’ settle the constitutionality of the names clause, rendering it unnecessary to adopt a standard for gauging whether a content-based trademark registration restriction abridges the right to free speech. That is wrong twice over.”) (Justice Barrett); *id.* at 325 (“Considering this Court has never applied this kind of history-and-tradition test to a free-speech challenge, and that ‘[n]o one briefed, argued, or even hinted at the rule that the Court announces today,’ one would have expected a more satisfactory explanation.” (citation to a dissent by Justice Thomas omitted)) (Justice Sotomayor). It is beyond the scope of this article, but a many-body approach could explore the meaning of “history and tradition” with respect to the intersection of statutory and constitutional analysis. See generally, Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017); Cary Franklin, *History and Tradition’s Equality Problem*, YALE L.J. F. 946 (2024); and Oren Bracha, *Pointless IP*, 135 YALE L.J. F. 100 (2025). Professor Bracha’s critique of a “jurisprudence of stasis,” in

Justice Barrett proposed that content-based restrictions, “whether new or old, are permissible so long as they are reasonable in light of the trademark system’s purpose of facilitating source identification.”¹⁴⁷ Justice Sotomayor suggested instead relying on certain First Amendment precedent:

This Court has held in a variety of contexts that withholding benefits for content-based, viewpoint-neutral reasons does not violate the Free Speech Clause when the applied criteria are reasonable and the scheme is necessarily content based. That is the situation here. Content discrimination is an inescapable feature of the trademark system, and federal trademark registration only confers additional benefits on trademark holders.¹⁴⁸

History also matters in a many-body approach to legal analysis. Specifically, the initial conditions or starting point of the “bodies” and changes during the period of time selected.¹⁴⁹ With the benefit of the context in *Vidal v.*

favor of a “dynamic and ever-developing” legal theory is compatible with a many-body approach. *See id.* Professor Karen Wallace has done so for the Iowa Supreme Court. *See* Karen Wallace, *Does the Past Predict the Future?: An Empirical Analysis of Recent Iowa Supreme Court Use of Legislative History as a Window into Statutory Construction in Iowa*, 63 *DRAKE L. REV.* 239 (2015) (updated version adding cases from 2014-2024, Karen Wallace, *Historical Analysis in Iowa Statutory Construction*, 73 *DRAKE L. REV. DISCOURSE* (forthcoming 2026) (draft on file with author)).

¹⁴⁷ *Vidal*, 602 U.S. at 312.

¹⁴⁸ *Id.* at 325.

¹⁴⁹ If “history and tradition” were to be considered in an *as applied* challenge to the constitutionality of the names clause in a mark involving the name of a President, it might be useful to trace the part of the statute that expressly mentioned a President: “(c) Consists of or comprises . . . the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.” 15 U.S.C. § 1052(c) (emphasis added). For a many-body legal analysis, it would be interesting to consider

Elster provided above, we can now apply a simplified version of a many-body approach in Part III.B below.

B. A Three-Step Simplified Approach

Let us begin with the first step, identifying the potentially relevant bodies of law. Then we can proceed to Step 2, identifying the potentially relevant interactions, and conclude with a prioritized integration analysis in Step 3.

1. Step 1: Identify the Bodies

In Step 1 of a many-body analysis, potentially relevant bodies of law are identified. This process should be familiar as a type of “issue spotting” exercise. Trademark law and First Amendment law are potentially relevant bodies of law for *Vidal v. Elster*. They were explicitly the basis of the dispute.¹⁵⁰ What other bodies of law might be relevant?

The “TRUMP TOO SMALL” mark calls to mind defamation law and the First Amendment as potential interacting bodies, in addition to trademark law. In the landmark case of *New York Times Co. v. Sullivan*, the Supreme Court held that the First Amendment required proof of actual malice, in addition to falsity, in defamation claims against public officials.¹⁵¹ Using even a simplified many-body approach, one could reasonably ask whether the analysis—and potentially the outcome—in *New York Times*

whether the names clause might have had a historical counterpart for President Washington’s right of publicity (and what, if any, rights would have been held by his widow after his death). That analysis could then be compared to the copyright issues related to President Washington’s personal correspondence raised in *Folsom v. Marsh*, 9 F. Cas. 342, 345, 349 (C.C.D. Mass. 1841) (finding that copying of 353 pages of President Washington’s papers in *THE LIFE OF WASHINGTON IN THE FORM OF AN AUTOBIOGRAPHY* was not fair use of *THE WRITINGS OF GEORGE WASHINGTON*).

¹⁵⁰ See generally *Vidal*, 602 U.S. at 286.

¹⁵¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

Co. v. Sullivan might have changed if the Supreme Court had considered a facial challenge to the Alabama state defamation law, versus a challenge to the law *as applied* to political criticism of a public official in an advertisement raising funds for civil rights activism.¹⁵²

One could ask a similar question for *Vidal v. Elster*. Would the analysis or outcome in *Vidal v. Elster* have changed if the Court had explicitly addressed the *as applied* challenge as the Court did in *New York Times Co. v. Sullivan*? The many-body approach may also reveal areas of influence. For example, the Supreme Court’s choice to ignore the *as applied* analysis in *Vidal v. Elster* is even more surprising because both the petitioner and the respondent characterized the question presented as involving an *as applied* challenge.¹⁵³ The Court of Appeals for the Federal Circuit had treated the case as an *as applied* challenge and held the “names clause” unconstitutional as applied.¹⁵⁴ During oral argument, Justice Alito asked the Deputy Solicitor General about the names clause as applied.¹⁵⁵ From a many-body perspective, the Court’s decision to ignore the *as applied* challenge is remarkable, even if it would not have affected the outcome in the case. Moreover, a many-body analysis would consider whether

¹⁵² See generally *id.* at 268 (addressing the *as applied* challenge specifically).

¹⁵³ Petition, *supra* note 125, at 12; Brief in Opposition, *supra* note 69, at 10.

¹⁵⁴ *In re Elster*, 26 F.4th 1328, 1331, 1339 (Fed. Cir. 2022).

¹⁵⁵ Oral Argument at 28:00, *Vidal v. Elster*, 602 U.S. 286 (2024) (No. 22-704), <https://www.oyez.org/cases/2023/22-704> (“Let me just ask one -- one final question. What should one do, what should a -- a justice or a judge do in a case in which the issue is the constitutionality of the federal statute and this jurist thinks that it might be constitutional under a theory other than the one that is advanced by the government in support of the theory? Should the statute be held unconstitutional under the -- under those circumstances under the party presentation rule, *or should it be held to be unconstitutional as applied in the case at hand?* What should one do in that situation?”) (emphasis added).

the Court's approach to question selection has changed over time. In fact, under the Judiciary Act of 1789, the Court had mandatory jurisdiction. The switch to discretionary jurisdiction did not occur until the Judges Bill of 1925. "For the next forty years, Congress continued to transfer cases from the Court's mandatory 'appeal' jurisdiction to its discretionary certiorari jurisdiction. This process culminated in the Supreme Court Selections Act of 1988, which ended all mandatory jurisdiction save cases coming from three-judge panels."¹⁵⁶ The Court's question selection power does not necessarily follow from the discretionary authority to grant or deny petitions for the writ of certiorari.¹⁵⁷

Justice Thomas noted that "the names clause respects the established connection between a trademark and its *protection of the markholder's reputation*."¹⁵⁸ This reference to "reputation" calls to mind the right of publicity

¹⁵⁶ Johnson, *supra* note 129, at 850 (footnotes omitted). The Supreme Court also retains original jurisdiction in certain cases. 28 U.S.C. § 1251 ((a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. (b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.") As noted, the Court has mandatory jurisdiction through direct appeal from special three-judge federal district court decisions under 28 U.S.C. § 1253.

¹⁵⁷ Johnson, *supra* note 129, at 858–59 ("The Roberts Court holds the American people and the other branches of government to eighteenth- and nineteenth-century meanings of constitutional language. . . . And yet, when it comes to certiorari, the Court's actual practice seems inconsistent with the statutory text and Congress's intent as to how the Court should use its certiorari discretion – to say nothing of the Justice's own testimony to Congress in 1925 or 1988.")

¹⁵⁸ *Id.* at 305 (emphasis added).

and the law of defamation.¹⁵⁹ Next, the “TRUMP TOO SMALL” T-shirt itself likely has sufficient expressive content to be potentially eligible for copyright protection. For purposes of exploring potentially relevant interactions in a many-body analysis, Elster could have sought copyright protection for the drawing of the hand, for example, with or without “TRUMP TOO SMALL.” This is not intended to criticize the Supreme Court for failing to expressly consider copyright law in the *Vidal v. Elster* case. Instead, one purpose of a many-body approach is to identify areas of law that may be exerting hidden influence on a particular legal context, or that may themselves be influenced in turn, or both. The textual work “TRUMP’S PACKAGE IS TOO SMALL: Small on the Constitution[:] Small on democracy” might be sufficiently lengthy for copyright protection. The U.S. Copyright Office provides the following guidance:

Words and short phrases, such as names, titles, and slogans, are uncopyrightable because they contain an insufficient amount of authorship. The Office will not register individual words or brief combinations of words, even if the word or short phrase is novel, distinctive, or lends itself to a play on words.¹⁶⁰

¹⁵⁹ Defamation is typically categorized under the broader area of personal injury in tort law, which provides potential additional candidates for bodies and interactions. See generally RESTATEMENT (SECOND) OF TORTS § 558 (A.L.I. 1977).

¹⁶⁰ U.S. Copyright Off., *Circular 33: Works Not Protected by Copyright*, COPYRIGHT.GOV (2021), <https://www.copyright.gov/circs/circ33.pdf> [<https://perma.cc/3RF3-TSZS>]. However, some musical lyrics and poems are quite short. Twelve words might make the cut. See, e.g., *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979) (finding infringement of copyright registration for "I MAY NOT BE TOTALLY PERFECT, BUT PARTS OF ME ARE EXCELLENT.").

Considering the direct reference in the mark “TRUMP TOO SMALL” (and the image) to genitalia, privacy law is also a potentially relevant body of law. Similarly, administrative law is potentially relevant given that the judicial branch is being tasked with reviewing the actions of an administrative agency – the USPTO.¹⁶¹ Considering the interactions of areas of law, it is interesting that, unlike the opinion of the Court of Appeals for the Federal Circuit, none of the opinions of the Justices mentioned the right of publicity, the right of privacy, or tort law. The closest example is Justice Thomas’s citation, in Part II-B of the opinion of the Court, to Professor Rothman’s excellent work, which connects trademark law with the right of publicity.¹⁶² But the opinion lacks any express reference to the right of publicity.

¹⁶¹ Tension between the Supreme Court and administrative agencies may perhaps be seen in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 398 (2024) (6-2) (Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett, in the majority) (overturning the “Chevron deference” doctrine for agency interpretations of congressional statutes that are “silent or ambiguous with respect to the specific issue at hand,” *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), as inconsistent with the Administrative Procedure Act) (quoting) and *Seven County Infrastructure Coalition v. Eagle County, Colorado*, No. 23-925, slip op. at 15 (2025) (8-0) (Justice Kavanaugh, joined in the judgment by all other Justices except Justice Gorsuch, who took no part in the consideration or decision of the case) (reversing the decision by the Court of Appeals for the District of Columbia finding deficiencies in an Environmental Impact Statement of the U.S. Surface Transportation Board for an 88-mile railroad line in northeastern Utah) (“The bedrock principle of judicial review in NEPA [National Environmental Policy Act] cases can be stated in a word: Deference.”). The author is grateful to Professor Anderson for suggesting this example.

¹⁶² “A corollary of the right to use one’s own name and identity in trade is the right to stop others from doing so – at least those who don’t share the same name.” Rothman, *Identity*, *supra* note 134, at 1306 (citation omitted); *see also* F. Treadway, *Personal Trade-Names*, 6 YALE L.J. 141, 143–44 (1897); both quoted at *Vidal v. Elster*, 602 U.S.

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As a whole, it may be fair to say that none of the opinions explicitly engaged with the analysis of the CAFC. While it is within the prerogative of each Justice to determine what to include in their opinion, this is a potential area for further exploration in a many-body analysis.

There is truly an abundance of riches in Step 1 of a many-body analysis for *Vidal v. Elster*. The sheer number of potentially relevant areas of law and interactions can be daunting. Do they all need to be identified and analyzed in Step 2? Perhaps. At this preliminary stage in a many-body approach there is really no way to be certain without doing the work. For example, consider the nine-body problem of the Supreme Court. It is rarely possible to know in advance whether or to what extent one needs to consider the views of Supreme Court Justices *who did not author an opinion* in order to understand the reasons for the outcome in the case.¹⁶³

286, 302 (2024). From a many-body perspective, Justice Thomas' citation to Rothman is also interesting because Rothman included the TTAB-Elster decision in a footnote to support this statement: "Collectively, these Lanham Act provisions [subsections 2(a) and 2(c)] are sometimes described as a federal form of a right of publicity." Rothman, *Identity*, *supra* note 134, at 1317, n.232, 1319.

¹⁶³ In addition, opinions and judicial philosophies of former Justices often influence the Court (and Congress), long after their passing. The work of Justice Scalia with respect to the use of legislative history in statutory interpretation as a contemporary example of such influence. See, e.g., Ralph A. Rossum, *The Textualist Jurisprudence of Justice Scalia*, 28 PERSPECTIVES ON POLITICAL SCIENCE 1, 8 (1999) ("Scalia has influenced members of Congress no less than his colleagues on the High Bench. When the House Judiciary Committee was drafting a 1991 anticrime bill, the Congressional Quarterly reported that 'some members suggested resolving a dispute by putting compromise language into a committee report, which accompanies a bill to the floor. But Barney Frank, D-Mass., warned off his colleagues with just two words: 'Justice Scalia.'" (footnote omitted).

In the interest of brevity, the initial bodies of law selected for the identification of potential interactions in Step 2 will be trademark, right of publicity, copyright, defamation, and the First Amendment. This is not to suggest the other areas of law are irrelevant, or that each body of law is of equal size, shape or significance. Indeed, a potential benefit of applying a many-body approach is that, when done systematically and in good faith, it should almost inevitably lead to greater epistemological humility. It is hard to make sweeping pronouncements about where bodies of law are, how they evolved, and where they should go, when one realizes how much of the picture is missing.

2. Step 2: Identify the Interactions between the Bodies

The selection of the five bodies of law—trademark, right of publicity, copyright, defamation, and the First Amendment—yields ten potential paired interactions, as shown in the matrix below.

BODY OF LAW	TRADEMARK	RIGHT OF PUBLICITY	COPYRIGHT	DEFAMATION	FIRST AMENDMENT
TRADEMARK		TRADEMARK-RIGHT OF PUBLICITY	TRADEMARK-COPYRIGHT	TRADEMARK-DEFAMATION	TRADEMARK-FIRST AMENDMENT
RIGHT OF PUBLICITY			RIGHT OF PUBLICITY-COPYRIGHT	RIGHT OF PUBLICITY-DEFAMATION	RIGHT OF PUBLICITY-FIRST AMENDMENT
COPYRIGHT				COPYRIGHT-DEFAMATION	COPYRIGHT-FIRST AMENDMENT
DEFAMATION					DEFAMATION-FIRST AMENDMENT
FIRST AMENDMENT					

Figure 5: Paired Interactions Chart

A subset of the relevant areas of law and two paired interactions will be prioritized for initial analysis: defamation-First Amendment and copyright-First Amendment. Then the triplet interaction of trademark,

copyright, and First Amendment will be considered before moving to the integration analysis in Step 3.

*a. Defamation–First Amendment
Paired Interaction*

No great stretch of the imagination is required to consider the possibility that President Trump (or then-candidate Trump) could have filed a defamation claim against Elster in 2018 or thereafter.¹⁶⁴ In July of 2025, Trump filed a lawsuit against Dow Jones & Company, Inc. d/b/a The Wall Street Journal, News Corporation, Keith Rupert Murdoch and others, alleging Defamation Per Se (Count I) and Defamation Per Quod (Count II) based on an article in the Wall Street Journal that reported Trump had given Jeffrey Epstein a signed drawing of a naked woman, inscribed with certain potentially embarrassing text, for Epstein’s 50th birthday in 2003.¹⁶⁵ Thus, defamation law is reasonable to include in a Step 2 analysis for *Vidal v. Elster*, as a way of understanding the positions and interactions of bodies of law over time. This does not necessarily mean the Court erred in omitting defamation law in its own analysis in the case.

¹⁶⁴ See generally Tyler Foggatt, “South Park” Skewers a Satire-Proof President, THE NEW YORKER (July 25, 2025), <https://www.newyorker.com/culture/the-lede/south-park-skewers-a-satire-proof-president> [<https://perma.cc/CZ2M-W2YX>] (discussing a “South Park” TV episode that was inspired by the Trump-Rubio exchange). Then-candidate Trump could have also filed a defamation claim against Paramount.

¹⁶⁵ See Complaint at 1–2, 15–16, Trump v. Murdoch, No. 1:25-cv-23232 (S.D. Fla. July 18, 2025) [hereinafter Complaint]; Civil Cover Sheet at 1, Trump v. Murdoch, No. 1:25-cv-23232 (S.D. Fla. July 18, 2025) (containing a check mark in the “Nature of Suit” section for the “TORTS PERSONAL INJURY” denoting “Assault, Libel & Slander”); See generally Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 78 MD. L. REV. 899 (2019) (providing an analysis of potential right of publicity claims and their theoretical foundations).

In analyzing the paired interactions in a many-body problem, it is crucial to ask what the relevant body of law is, and how it has evolved over time. In other words, it makes no sense to ask “What?” without also asking “When?” This is particularly true for any analysis of the body of law that constitutes First Amendment law. “The simple and absolute words of the First Amendment clause float atop a tumultuous doctrinal sea. The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.”¹⁶⁶ If Trump had brought a defamation claim against Elster to protect his reputation, the precedent of the 1964 Supreme Court decision in *New York Times Co. v. Sullivan* would have been relevant,¹⁶⁷ but one cannot be certain that the case would have been controlling, due to the passage of time.

In *New York Times Co. v. Sullivan*, the Supreme Court unanimously reversed and remanded a decision of the Alabama Supreme Court affirming a verdict of \$500,000 rendered for a Commissioner of the City of Montgomery in his libel action against the *New York Times* and other defendants related to a paid advertisement related to the civil rights movement.¹⁶⁸ The Court explained:

¹⁶⁶ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2355 (2000).

¹⁶⁷ See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This decision would have been relevant in addition to the relevant state defamation law of course, however, the Complaint itself does not cite to Florida statutes on defamation. See Complaint, *supra* note 165.

¹⁶⁸ *Id.* at 256–58, 292 (Black & Douglas, JJ., concurring) (Goldberg & Douglas, JJ., concurring in the result) (quoting the advertisement with the heading “Heed Their Rising Voices”); See generally *Calculate the Value of \$500,000 in 1964*, DOLLARTIMES, <https://www.dollartimes.com/inflation/inflation.php?amount=500000&year=1964> [<https://perma.cc/74UN-C5HY>] (last visited Oct. 25, 2025)

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In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.¹⁶⁹

The Court held:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹⁷⁰

The many-body problem approach does not tell us whether President Trump would have been able to meet the actual malice test in a (hypothetical) defamation lawsuit against Elster. What the approach does suggest is that such a test would have put a higher burden of proof on President Trump than was placed on the USPTO in justifying the rejection of the “TRUMP TOO SMALL” trademark. One could reasonably contend that a defamation action for damages is not comparable to the refusal to register a trademark. Elster was, after all, free to continue to use the trademark even if it was not registered. But caution is needed here. The argument that USPTO refusal to register

(demonstrating that \$500,000 in 1964 is roughly \$5 million in 2025 dollars when adjusted for inflation).

¹⁶⁹ *New York Times Co.*, 376 U.S. at 269 (footnotes omitted) (citation omitted).

¹⁷⁰ *Id.* at 279–80.

a mark is harmless and immune from First Amendment scrutiny was expressly rejected by the Supreme Court in *Matal v. Tam*,¹⁷¹ and *Iancu v. Brunetti*.¹⁷² And, as a public figure, President Trump would have had to prove Elster acted with “actual malice” (assuming *New York Times v. Sullivan* was still good law).¹⁷³

Consideration of the defamation-First Amendment paired interaction in a many-body analysis directs greater attention to the question of why the Supreme Court in *Vidal v. Elster* elected to examine the “names clause” in the Lanham Act on its face versus *as applied*.¹⁷⁴ One possible clue is that Justice Thomas, who wrote the opinion of the Court as to Parts I, II, and IV in *Vidal v. Elster*,¹⁷⁵ previously indicated that he thinks *New York Times Co. v. Sullivan* should be repudiated.¹⁷⁶ Neither Justice Thomas, nor any of the concurring Justices in *Vidal v. Elster*, even mentioned *New York Times Co. v. Sullivan*.¹⁷⁷ From the perspective of a many-body analysis, one wonders whether *New York Times Co. v. Sullivan* may be expressly reconsidered by the Supreme Court in the near future, as

¹⁷¹ *Matal v. Tam*, 582 U.S. 218, 218 (2017) (holding the USPTO’s refusal to register the trademark “THE SLANTS” for clothing was unconstitutional).

¹⁷² *Iancu v. Brunetti*, 588 U.S. 388, 388 (2019) (holding the USPTO’s refusal to register the trademark “FUCT” for clothing was unconstitutional).

¹⁷³ See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 46–47 (1988) (holding that actual malice was required by the First Amendment for an intentional infliction of emotional distress claim involving a public figure, Reverend Jerry Falwell). The question of falsity will not be addressed in this paper.

¹⁷⁴ See *Vidal v. Elster*, 602 U.S. 286 (2024).

¹⁷⁵ *Vidal v. Elster*, 602 U.S. 286, 289 (2024).

¹⁷⁶ *McKee v. Cosby*, 586 U.S. 1172, 1182 (2019) (Thomas, J., concurring in denial of certiorari).

¹⁷⁷ See *Vidal*, 602 U.S. 286.

has been the case for other long-established legal precedents under the Roberts court.¹⁷⁸

Under a defamation-First Amendment analysis, Elster would likely have had a stronger First Amendment defense than under the Supreme Court's trademark analysis. Assume, hypothetically, the First Amendment should prevent a Presidential candidate from successfully bringing a trademark opposition to prevent registration of a mark that directly criticized them, as a public figure, in the context of an election, or to cancel such a registration if it had been issued. If so, should it be acceptable for the U.S. Government to save the Presidential candidate the trouble by just rejecting the trademark application outright? A normative legal theory is needed to answer this question, but a many-body approach is helpful to frame it. Based on the simplified many-body analysis thus far, there are indications of tension in the defamation-First Amendment interaction when considered in the context of the trademark issue in *Vidal v. Elster*. Elster's position could have been even stronger if the body of trademark law incorporated the type of First Amendment defense for defamation cases, or, as will be discussed in the next section, the "fair use" defense available in copyright lawsuits.

This is not to suggest that the outer limits of the names clause are defined solely by defamation law. Nor is the purpose to assert that the Supreme Court in the particular case of *Vidal v. Elster* erred by not considering defamation law, or even by treating the case as a facial

¹⁷⁸ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling both *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). It may be fair to say that the opinions in *Vidal v. Elster* cannot be read in isolation without considering the Supreme Court's decision in these cases. If so, that is further indication of law as a many-body problem. That *Vidal v. Elster* was influenced by *Dobbs* seems likely, but it does not answer the question of why the *Vidal v. Elster* decision was unanimous.

challenge. Rather, the goal is to identify examples of tension between various areas of law as legal “bodies.” A many-body approach to legal analysis is normatively agnostic. Assume a many-body approach reveals trademark law and defamation law are inconsistent because trademark law lacks a fair use defense that is comparable to copyright law, or a public figure “actual malice” requirement as in defamation law. In that case, one way to resolve such inconsistency might be to weaken the fair use defense in copyright law and remove the “actual malice” requirement for public figures in defamation law. However, once one appreciates the delicate interconnections between areas of law and legal systems, and their dynamic nature, one may also feel greater caution is warranted before venturing to make any major revisions to the law.

b. Copyright–First Amendment Paired Interaction

The paired-interaction of copyright and First Amendment law is also potentially relevant in a many-body legal analysis, to uncover otherwise hidden interconnections and implications, even though copyright law was not presented as a claim in the case. Elster could have used an image of President Trump on the T-shirt, perhaps based on an embarrassing photo that was distributed in the news media. The example of the Associated Press lawsuit against the artist Shepard Fairey related to the photo used for Fairey’s Obama “HOPE” poster comes to mind.¹⁷⁹ Had Elster done so, he would have had little difficulty in obtaining a copyright

¹⁷⁹ See generally *Fairey v. Associated Press*, No. 09-01123 (S.D.N.Y. Feb. 9, 2009) (Fairey later settled, and the lawsuit had some additional complexities related to his testimony. See, e.g., William W. Fischer III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243 (2012) (noting that Mr. Fairey is a co-author)).

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registration even though the name “TRUMP” was used on the shirt. There is no direct analog to the trademark Lanham Act’s ‘names’ clause in copyright law. In copyright, it is common for new works to be based on pre-existing works. Indeed, the Copyright Office application forms, TX for literary works and VA for visual arts works, each have sections where applicants briefly describe pre-existing works.¹⁸⁰ Form VA includes these instructions: “Preexisting Material (space 6a): Complete this space *and* space 6b for derivative works. In this space identify the preexisting work that has been recast, transformed, or adapted. Examples of preexisting material might be ‘Grunewald Altarpiece’ or ‘19th century quilt design.’ Do not complete this space for compilations.”¹⁸¹ An image of section 6 in Form VA is below to show how simple the process is.

DERIVATIVE WORK OR COMPILATION Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation.
a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

b. Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

6
a See instructions before completing this space.
b

*Figure 6: U.S. Copyright Office Form VA Section 6*¹⁸²

¹⁸⁰ See *Form VA*, U.S. COPYRIGHT OFF. (May 2019), <https://www.copyright.gov/forms/formva.pdf> [https://perma.cc/6SJ8-PP26]; *Form TX*, U.S. COPYRIGHT OFF. (May 2019), <https://www.copyright.gov/forms/formtx.pdf> [https://perma.cc/7A6H-BN6D] (“Preexisting Material (space 6a): For derivative works, complete this space *and* space 6b. In space 6a identify the preexisting work that has been recast, transformed, or adapted. The preexisting work may be material that has been previously published, previously registered, or that is in the public domain. An example of preexisting material might be: ‘Russian version of Goncharov’s ‘Oblomov.’”).

¹⁸¹ *Form VA*, U.S. COPYRIGHT OFF. (May 2019), <https://www.copyright.gov/forms/formva.pdf> [https://perma.cc/6SJ8-PP26].

¹⁸² *Id.*

However, such a registration would not have given Elster ownership or rights to use any preexisting material (such as the photo of Trump in this hypothetical). A copyright owner has the exclusive right “to prepare derivative works based upon the copyrighted work.”¹⁸³ If Elster, like Fairey (whose Hope Poster also appeared on T-shirts), had used an image based on a photo for the “TRUMP TOO SMALL” T-shirt, the owner of the copyright in the photo could have sued Elster alleging copyright infringement. In such a case, Elster could have asserted that the accused infringement was a non-infringing fair use of the underlying copyrighted work (the photo of Trump). The fair use defense is set forth in Section 107 of the U.S. copyright statute, which specifies that:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

¹⁸³ 17 U.S.C. § 106(2).

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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹⁸⁴

Section 107 presents a multi-factored test for the fair use defense to copyright infringement.¹⁸⁵ Over the years, certain factors have been given more weight than others, depending on the facts of the particular case and the views of the specific court involved.¹⁸⁶

From a many-body perspective, it is useful to note that the legislative history of Section 107 expressly contemplated change:

The bill endorses the purpose and general scope of the judicial doctrine of fair use, but *there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change*. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine

¹⁸⁴ 17 U.S.C. § 107 (adding the final sentence subsequently by amendment in 1992, Pub. L. 102-492) (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”). Section 107 was generally consistent with the factors suggested by Justice Joseph Story in the 1841 decision *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (issuing an injunction against a biography of George Washington that used excerpts from his letters in a different biography without a license). However, there is a tendency to assume the common law was well-settled and reflected in *Folsom v. Marsh*. That was not necessarily the case. See Oren Bracha, *Commentary on Folsom v. Marsh (1841)*, in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer, eds., 2008).

¹⁸⁵ 17 U.S.C. § 107.

¹⁸⁶ See Beebe, *supra* note 59, at 22–36 (Intrafactor Analysis of each of the four fair use subfactors in Part III).

of fair use, not to change, narrow, or enlarge it in any way.¹⁸⁷

Some change did, in fact, occur with the additional gloss of the “transformative purpose” or “transformative use” test, introduced by Judge Pierre N. Leval in 1990. In his influential article “*Toward a Fair Use Standard*,” Leval suggested that “[i]f a quotation of copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors. *Factor One is the soul of fair use.*”¹⁸⁸ This formulation of the test refers to “transformative purpose” under the umbrella of the first fair use factor: “the *purpose* and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁸⁹

In addition, Judge Leval’s article suggested that a meta-level question should be considered after examining all four factors: “[t]he factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask *in each case* whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.”¹⁹⁰ In other words,

¹⁸⁷ H.R. REP. NO. 94-1476 (1976) (emphasis added).

¹⁸⁸ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990). See also *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 529 n.5 (2023) (“In theory, the question of transformative use or transformative purpose can be separated from the question whether there has been transformation of a work. In practice, however, the two may overlap.”). For a more detailed analysis of Judge Leval’s test, see S.J. Blodgett-Ford, *Copyright, Fair Use and AI Technology Development: Time to Sunset the “Transformative Purpose” Test*, in RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE (Woodrow Barfield & Ugo Pagallo, eds., Edward Elgar 2nd ed. 2025).

¹⁸⁹ 17 U.S.C. § 107(1).

¹⁹⁰ Leval, *supra* note 188, at 1111.

transformative purpose is potentially relevant to all of the factors, not just the first factor. The objectives of copyright that should be examined, according to Judge Leval, are the “utilitarian, public-enriching objectives” of copyright as being “the engine of free expression,” “increas[ing] and not . . . imped[ing] the harvest of knowledge,” and promoting “the Progress of Science and the useful Arts.”¹⁹¹

The first case in which the Supreme Court used a version of the transformative purpose test was in the 1994 decision *Campbell v. Acuff-Rose*, which was a unanimous judgment.¹⁹² In *Campbell*, the Supreme Court cited Judge Leval’s article with favor.¹⁹³ The Court held that 2 Live Crew’s version of Roy Orbison’s song “Oh, Pretty Woman” could be a fair use as a parody of the original, and remanded for further consideration.¹⁹⁴ Echoing Judge Leval, Justice Souter, in the opinion of the Court, suggested that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁹⁵ The Supreme Court found fair use was possible largely because it could reasonably perceive that speech as containing criticism or commentary of the original work.¹⁹⁶

The following selected lyrics from the two songs show the type of transformation the Supreme Court found to be key for a potentially successful fair use defense:¹⁹⁷

¹⁹¹ *Id.* at 1135 (citations omitted). See also L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 932 (2003).

¹⁹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

¹⁹³ See, e.g., *id.* at 576.

¹⁹⁴ See *id.* at 571.

¹⁹⁵ *Id.* at 579. Justice Kennedy wrote a concurring opinion. *Id.* at 596.

¹⁹⁶ See *id.* at 579, 583.

¹⁹⁷ For full lyrics, see *id.* at 594–96 (reciting the full lyrics in Appendix A and Appendix B).

Roy Orbison and William Dees "Oh, Pretty Woman" (excerpt)	2 Live Crew "Pretty Woman" (excerpt)
Pretty Woman, walking down the street, Pretty Woman, the kind I like to meet, Pretty Woman, I don't believe you, you're not the truth, No one could look as good as you Mercy ... Pretty Woman, look my way, Pretty Woman, say you'll stay with me 'Cause I need you, I'll treat you right Come to me baby, Be mine tonight	Pretty woman walkin' down the street Pretty woman girl you look so sweet Pretty woman you bring me down to that knee Pretty woman you make me wanna beg please Oh, pretty woman ... Big hairy woman come on in And don't forget your <u>bald headed</u> friend Hey pretty woman let the boys Jump in

*Table 1: Excerpts from "Oh, Pretty Woman" by Roy Orbison and William Dees and "Pretty Woman" by 2 Live Crew.*¹⁹⁸

Under the Court's analysis, the 2 Live Crew version may have had to be more of a parody than a satire in order to qualify for the fair use defense.¹⁹⁹ The Supreme Court observed:

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, *and a sign of relief from paternal responsibility*. *The latter words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies*. It is this joiinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.²⁰⁰

¹⁹⁸ See *Campbell*, 510 U.S. at 594–96.

¹⁹⁹ See *id.* at 581.

²⁰⁰ *Id.* at 583 (emphasis added) (footnote omitted).

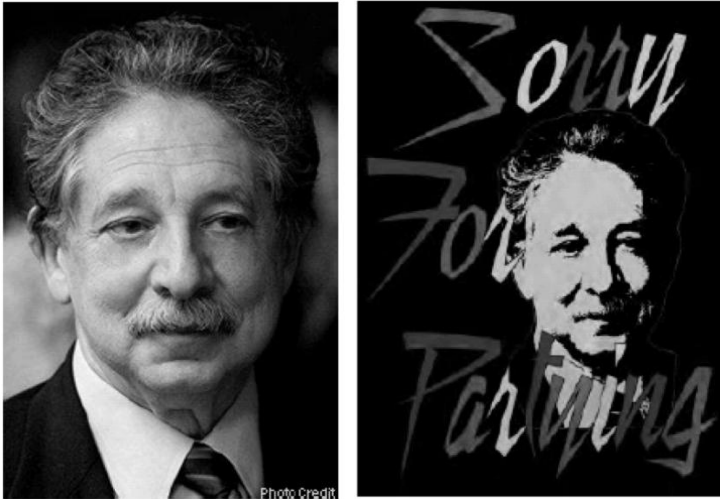
The Court appeared to say that 2 Live Crew’s “sigh of relief from paternal responsibility” was a part of what turned the song into a transformative parody of Orbison’s song versus a satire or general social commentary.²⁰¹ Regardless of whether one agrees with the Court’s analysis, it likely would have been easier to find parody versus satire if a copyrighted photo of President Trump had been used by Elster on his “TRUMP TOO SMALL” T-shirts. Elster’s T-shirts, as shown above in Figure 3, are laser-focused on criticizing President Trump, not society in general. This conclusion is consistent with a case from 2014, in which the Court of Appeals for the Seventh Circuit applied the fair use analysis of *Campbell v. Acuff-Rose* to another T-shirt in *Kienitz v. Sconnie Nation*.²⁰²

In *Sconnie Nation*, a group called “Sconnie Nation” sold a T-shirt using a photograph of Paul Soglin, the Mayor of Madison, Wisconsin, with the phrase “Sorry for Partying.”²⁰³

²⁰¹ *See id.* at 583.

²⁰² *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758, 759–60 (7th Cir. 2014) (holding adaption of a photograph of a local political figure for a T-shirt was fair use).

²⁰³ *Id.* at 757.



*Figure 7: Original Copyrighted Photo (on left) and Scinnie Nation T-shirt (on right)*²⁰⁴

As the court explained, the photo had been taken by the plaintiff, photographer Michael Kienitz, at the Mayor's inauguration in 2011, and posted (with the photographer's permission) on the City's website.²⁰⁵ Scinnie Nation downloaded the photo and used it for the T-shirt design.²⁰⁶

While a student at the University of Wisconsin in 1969, Paul Soglin attended the first Mifflin Street Block Party, whose theme (according to Soglin) was 'taking a sharp stick and poking it in the eye of authority.' Now in his seventh term as Mayor of Madison, Soglin does not appreciate being on the pointy end. He wants to shut down the annual event. For the 2012 Block Party, Scinnie Nation made some t-shirts and tank tops displaying an image of Soglin's face and the phrase 'Sorry for Partying.' The 54 sales, on which Scinnie Nation cleared a small profit,

²⁰⁴ *Id.* at 757–58 (images taken from the opinion of the court).

²⁰⁵ *Id.* at 757.

²⁰⁶ *Id.*

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led to this suit, in which photographer Michael Kienitz accuses Scconnie Nation and its vendor of copyright infringement.²⁰⁷

The Court of Appeals for the Seventh Circuit affirmed the finding of the Magistrate Judge Stephen L. Crocker that Scconnie Nation had made a fair use of the copyrighted Kienitz’s photo, applying the statutory fair use factors in 17 U.S.C. § 107.²⁰⁸ Judge Easterbrook wrote the opinion for the court and applied the statutory fair use factors (noting the tension between the “transformative purpose” test and the derivative works right of authors).²⁰⁹

We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect). We have asked whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited). ... A t-shirt or tank top is no substitute for the original photograph. Nor does Kienitz say that defendants disrupted a plan to license this work for apparel. Kienitz does not argue that defendants’ products have reduced the demand for the original work or any use of it that he is contemplating.²¹⁰

This analysis of the fourth fair use factor, market effect, would also favor Elster in our hypothetical many-body analysis of the interactions between copyright law and the First Amendment. However, in the analysis of the third

²⁰⁷ *Id.*

²⁰⁸ *Scconnie Nation*, 766 F.3d at 759–60

²⁰⁹ *Id.* at 758.

²¹⁰ *Id.* (citations omitted). Judge Easterbrook’s focus on market effect was prescient given the Supreme Court’s subsequent fair use decision in *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, (2023). Market effect was a key factor in Goldsmith’s favor because Goldsmith established a robust licensing of her copyrighted photo for use in magazines. *See Andy Warhol Found.*, 598 U.S. at 520, 526. Indeed, the Petitioner did not even challenge the lower court finding that factor four favored Goldsmith. *Id.* at 524.

fair use factor, amount and substantiality of the portion of the copyrighted work used in the allegedly infringing work, the *Sconnie Nation* case suggests that, had Elster used a photo of President Trump on the “TRUMP TOO SMALL” T-shirt, the strength of Elster’s fair use defense in the event of a copyright lawsuit might have depended on how many changes Elster had made to the hypothetical original copyrighted photo.

Below is Judge Easterbrook’s discussion of the third statutory fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²¹¹

Defendants removed so much of the original that, as with the Cheshire Cat, only the smile remains. Defendants started with a low-resolution version posted on the City’s website, so much of the original’s detail never had a chance to reach the copy; the original’s background is gone; its colors and shading are gone; the expression in Soglin’s eyes can no longer be read; after the posterization (and reproduction by silk-screening), the effect of the lighting in the original is almost extinguished. What is left, besides a hint of Soglin’s smile, is the outline of his face, which can’t be copyrighted. Defendants could have achieved the same effect by starting with a snap-shot taken on the street.²¹²

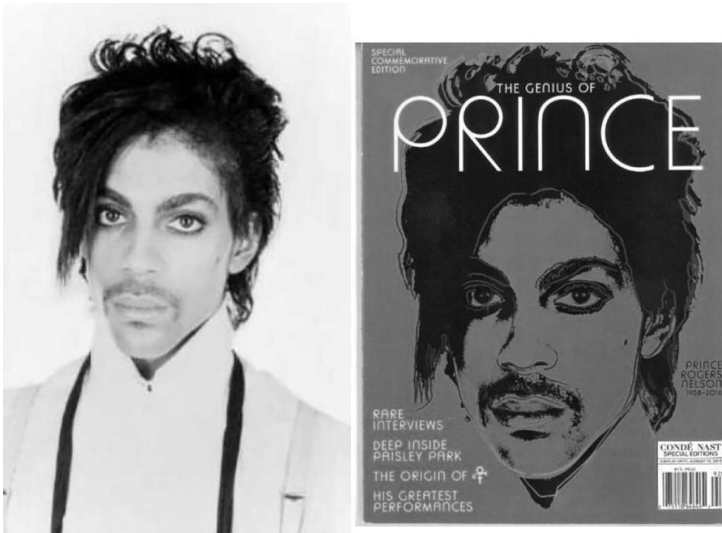
From a many-body perspective, the relative positions of the legal bodies of law may change over time. Thus, it may be useful to compare Judge Easterbrook’s description and the images at issue in *Sconnie Nation* with the Supreme Court’s analysis of the third fair use factor a

²¹¹ 17 U.S.C. § 107(3).

²¹² *Sconnie Nation*, 766 F.3d at 759.

decade later, in *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*.²¹³

In the *Andy Warhol Foundation* case, Condé Nast magazine used Andy Warhol’s “Orange Prince” silkscreen on its cover, which in turn was based on a photograph of Prince by Lynn Goldsmith.²¹⁴ The Court held that a magazine’s unlicensed use of the “Orange Prince” silkscreen infringed Goldsmith’s copyright and was not a fair use of the work.²¹⁵



*Figure 8: Goldsmith’s 1981 copyrighted original photo is shown on the left; Condé Nast’s special edition magazine cover from 2016 is shown on the right.*²¹⁶

²¹³ See *Andy Warhol Found.*, 598 U.S. at 513 (6-3) (Sotomayor, J. wrote the opinion for the Court) (Kagan, J. & Roberts, C.J. dissenting) (demonstrating another intellectual property decision where the Justices did not align along political ideological lines).

²¹⁴ *Id.* at 515, 519.

²¹⁵ *Id.* at 515–16.

²¹⁶ *Id.* at 517, 519 (images taken from the Opinion of the Court).

Should the fair use defense in a case like *Scornie Nation*—or our copyright law hypothetical for *Vidal v. Elster*—turn on how many changes the accused copyright infringer has made to an original photo? Or, is it true that the facial features of a public figure, whether Mayor Soglin, Prince or Trump, are such that they “cannot be copyrighted”? Simply put, does the analysis of the statutory fair use test in copyright law mean we have *fully* explored the First Amendment interactions under a many-body approach? This question is worth further exploration. An initial analysis across almost a half-century of copyright law suggests that the copyright fair use test may no longer map 1:1 to the First Amendment due to changes in both bodies of law since the 1970s.

In an influential 1970 article, copyright legend Professor Melville B. Nimmer suggested that no special First Amendment analysis was needed in a copyright infringement analysis.²¹⁷ Nimmer concluded that copyright law was generally compatible with the First Amendment because copyright offered an incentive for new expression and provided sufficient accommodation to First Amendment concerns via internal safety valves such as durational limits, the idea/expression dichotomy, and the fair use doctrine.²¹⁸ Thus, there would rarely be conflicts,

²¹⁷ Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180, 1181–82 (1970). Nimmer was a leading constitutional law scholar, and represented Paul Cohen in *Cohen v. California*, 403 U.S. 15 (1971) (reversing the conviction of Paul Cohen for wearing a “Fuck the Draft” jacket).

²¹⁸ Nimmer, *supra* note 217, at 1193–1204. From a many-body perspective, it is difficult to continue to put weight on durational limits as an accommodation of First Amendment concerns given that the length of the copyright term increased from an initial maximum of 28 years (14 years plus a 14-year renewal period under the Copyright Act of 1790) to the current term of the life of the author plus 70 years. See 17 U.S.C. § 302. The Sonny Bono Copyright Term Extension Act of

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such as a photo of the My Lai massacre²¹⁹ or film of the Kennedy assassination, where the underlying “idea” could not substitute for the “expression.”²²⁰ In 2023, the Court repeated this mantra in *Warhol*.²²¹

Reportedly, courts in copyright cases reviewed from 1978 to 2019 only mentioned the First Amendment approximately 25% of the time, and then they often immediately dismissed any free speech/expression

1998, Pub. L. No. 105-298, further extended the term of copyright for certain works to 95 years after publication. Another significant change over time relates to the scope of rights of the copyright owner. “[I]n 1841 the copyright act then in force provided no derivative work right at all. The 1831 Copyright Act gave the copyright owner ‘the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books.’ No dramatization right. No translation right. No abridgement right.” Glynn S. Lunney, Jr., *Transforming Fair Use*, 14 NYU J. Intell. Prop. & Ent. L. 169, 198 (2024) (footnotes omitted). “Beginning in 1870 with congressional recognition of the translation right, copyright has expanded its focus beyond competitive [market] substitution to encompass the opportunity to license an original work for uses that are not competitive substitutes.” *Id.* at 199 (footnote omitted).

²¹⁹ Nimmer, *supra* note 217, at 1203 (“One who wished to fully convey the ‘idea’ of the My Lai massacre photographs could do so only by copying the expression as well as the idea of the photographs. To attempt a simulated photograph with models posing as dead bodies in order to express the idea of the original My Lai photographs would be ludicrous.”). However, the content of the photo of the My Lai massacre could be expressed using words only – via text – without needing to pose models.

²²⁰ *Id.* at 1197–98 (“[I]t becomes necessary to strike the balance in the opposite direction with respect to certain types of graphic works. Consider the photographs of the My Lai massacre. Here is an instance where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue. No amount of words describing the ‘idea’ of the massacre could substitute for the public insight gained through the photographs. . . . Here I cannot but conclude that the speech interest outweighs the copyright interest.”).

²²¹ 598 U.S. at 550.

considerations for the reasons expressed by Nimmer.²²² For example, in the *New Era* case in 1989, the Court of Appeals for the Second Circuit expressed concern about the consideration of the First Amendment *at all*:

[T]he district court denied an injunction for several reasons, one being the existence of special circumstances in which free speech interests were said to outweigh the interests of the copyright owner. We are not persuaded, however, that any first amendment concerns not accommodated by the Copyright Act are implicated in this action. *Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field never has been repudiated.*²²³

The Supreme Court echoed Nimmer in *Eldred v. Ashcroft*, which involved the Sonny Bono Copyright Term Extension Act:

In addition to spurring the creation and publication of new expression, *copyright law contains built-in First Amendment accommodations*. . . . Second, the ‘fair use’ defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. . . . The fair use defense affords considerable ‘latitude for scholarship and comment[.]’²²⁴

²²² See Beebe, *supra* note 59, at 573.

²²³ *New Era Publications Intern. v. Henry Holt & Co.*, 873 F.2d 576, 584 (1989) (emphasis added) (citation omitted) (“An author’s expression of an idea, as distinguished from the idea itself, is not considered subject to the public’s ‘right to know.’ W. Patry, *The Fair Use Privilege in Copyright Law* 466 (1985).”).

²²⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 219, 220 (2003) (citations omitted). *But see* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 5 (2001) (arguing that First Amendment challenges to copyright law warrant a more rigorous analysis).

Many scholars have criticized the courts for failing to satisfactorily address the tensions between intellectual property law and the First Amendment.²²⁵ Indeed, Professors Lemley and Tushnet have criticized the Court's decisions in both copyright and trademark cases in *First Amendment Neglect in Supreme Court Intellectual Property Cases*.²²⁶ For copyright, they observed that the Supreme Court "reached [its] results using ideas about the lesser status of profitable speech that it flatly rejected in other cases the same term, and with rationales that seem directly at odds with its First Amendment jurisprudence."²²⁷ In a many-body type of legal analysis (albeit not called by that

²²⁵ See, e.g., Lunney, *supra* note 218, at 176 (commenting on the Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, (2023) opinion) ("Unfortunately, the Court's analysis and resulting checklist are fatally flawed. The Court's realism is unrealistic. Its textualism ignores the statutory text. And its purposivism frustrates Congress's purpose in elevating fair use from common law exception to statutory privilege. As for its reading of *Campbell*, the *Goldsmith* Court mistakes dicta for holding. The resulting mechanical checklist is contrary to the statutory text, contrary to the Court's own precedent, and frustrates Congress's purpose in enacting copyright."); Alfred C. Yen, *Rethinking Copyright's Relationship to the First Amendment*, 100 B.U. L. Rev. 1215, 1227-30 (2020) (expressly drawing inspiration from trademark law decisions to argue in favor of varying tiers of First Amendment scrutiny depending on the type of copyright provision at issue); David S. Olson, *First Amendment-based Copyright Misuse*, 52 Wm. & Mary. L. Rev. 537, 540 (2010) ("The Copyright Act serves First Amendment interests by encouraging authors to create works. The Copyright Act grants authors exclusive rights to their works, and thus, if they create works that the public is willing to buy, they can profit from their creations. But copyright law can also deter speech, and discourage the creation of new works, by preventing subsequent creators from using copyrighted work to make their own, new speech."); Burk 1, *supra* note 56, at 197; Chiang, *supra* note 56, at 309; and Burk 2, *supra* note 56, at 100.

²²⁶ Mark A. Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases*, 2023 THE SUPREME COURT REVIEW 85, 85 [hereinafter Lemley & Tushnet].

²²⁷ *Id.* at 85-86.

name), they also discussed similar problems with the Court's decisions in trademark cases, including *Jack Daniel's v. VIP Products*, in which the Court unanimously vacated and remanded a decision finding trademark infringement of the Jack Daniel's® trademark by the “Bad Spaniels” dog chew toy with only a cursory First Amendment analysis.²²⁸

Lemley and Tushnet explored three possible explanations for the “loud silence” of the Court on the First Amendment in these cases, and conceded none of the explanations were fully satisfactory.²²⁹ A many-body

²²⁸ See *id.* at 122–23; *Jack Daniel's v. VIP Prods.*, 599 U.S. 140, 143 (2023).

²²⁹ Lemley & Tushnet, *supra* note 226, at 113–14, 116. The first explanation was that the Court was engaged in a form of “siloing” in IP cases, where the Court focuses “on a particular legal issue to the exclusion of the broader framework of the law.” *Id.* at 113. This “begs the question of *why* the Court wants to reach” a particular result in a particular case. *Id.* at 114. The second explanation was that “trademark and copyright have become ensnared in the larger, sudden reversal of the political valence of the Free Speech Clause to conservatives, especially with respect to the commercial-speech doctrine.” *Id.* However, “this reversal of polarity is so far limited only to some conservative jurists, and they didn’t write either *Warhol* or *Jack Daniel's*.” *Id.* at 116. Indeed, the Court’s decision in *Vidal v. Elster*, 602 U.S. 286 (2024), was unanimous. *Vidal v. Elster*, 602 U.S. 286, 289 (2024). The final explanation offered was that the Court is more tolerant of judicial restrictions on speech versus legislative restrictions. Lemley & Tushnet, *supra* note 226, at 116. This might be because judges are confident (perhaps over-confident) about their epistemological knowledge. Or they want to use the First Amendment as a deregulatory engine, as suggested by Amanda Shanor in “The New *Lochner*.” Amanda Shanor, *The New Lochner*, WIS. L. REV. 133, 137 (2016) (“[A]dvocates of the new *Lochner* are forwarding a formal concept of liberty that has no apparent limiting principle. They contend that all speech is speech and equally subject to stringent constitutional scrutiny.”). See also Nathan Cortez & William Sage, *The Disembodied First Amendment*, 100 WASH. U. L. REV. 707, 713 (2023). *Matal v. Tam*, 582 U.S. 218 (2017), may have been consistent with this theory. However, in the more recent case of *Vidal v. Elster*, the Court upheld

problem approach offers a potential additional explanation. Put simply, if we are dealing with a many-body problem, it is incredibly difficult to manage three or more interacting areas of law. The Court might, understandably, want to simplify the analysis. Of course, the many-body problem is probably not the only reason for the Court's avoidance of First Amendment analysis in intellectual property cases. The Supreme Court is a complex and dynamically interacting nine-body system. There are a variety of reasons for any particular opinion in a Supreme Court case, none of which may be sufficient standing alone, and all of which may have influence, in varying degrees and at different times, on the Court's decisions.

However, Lemley and Tushnet observed that: "Courts in recent decades have carved out some space for free speech despite the expansion of infringement doctrine by applying judicially-created doctrines like transformative use and the *Rogers* test to stop the expansion *at the point* where the tension with the First Amendment became too great."²³⁰ If we are dealing with a many-body problem we need to ask when such a perfect balance occurred, where that precise point is located, and whether there were any material changes/movements in the relevant bodies of law after that moment in time. We might even assume, *arguendo*, that copyright law and the First Amendment were once perfectly balanced or, at some future point in time, may be perfectly balanced, as in a planetary alignment. Such a state of equipoise is unlikely to last if we are dealing with a many-body problem.

From a many-body perspective, the claim that the fair use doctrine encompasses all First Amendment

the governmental regulation being challenged, unanimously, and did not apply strict scrutiny. See *Vidal*, 602 U.S. at 289, 310, 317. Thus, while each of these three theories has some merit, none of them tells the full story.

²³⁰ Lemley & Tushnet, *supra* note 226, at 123 (emphasis added).

concerns in the copyright field, at all times, is difficult to believe given the changes in copyright law and the First Amendment in the past five decades.²³¹ Among other changes, the duration of copyright has dramatically expanded, leaving mainly the idea/expression dichotomy, which is itself likely a false dichotomy, and the fair use doctrine.²³² In a many-body analysis, we should be skeptical of claims that the First Amendment is in perfect balance with copyright law, or that copyright is “categorically immune from challenges under the First Amendment.”²³³ To explore this further, the next section will consider the triplet interaction of trademark–copyright–First Amendment.

*c. Trademark–Copyright–First
Amendment Triplet Interaction*

The ten sets of triplet interactions for trademark, copyright, right of publicity, defamation and the First Amendment are shown below.

1. trademark–copyright–right of publicity
2. trademark–copyright–defamation
3. **trademark–copyright–First Amendment**

²³¹ See Netanel, *supra* note 224, at 46. Even in 1970, others had a different view than Nimmer. See, e.g., Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 80 (1971).

²³² See, e.g., Netanel, *supra* note 224, at 12; Post & Rothman, *supra* note 19, at 147.

²³³ *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (upholding the constitutionality of the Sonny Bono Copyright Term Extension Act but not endorsing the court of appeals’ more aggressive suggestion that copyright is “categorically immune from challenges under the First Amendment” (quoting *Reno*, 239 F.3d at 375)). More generally, a many-body analysis in law may reveal interactions within one area (body) of law that implicate other areas of law, as well as interactions at the boundaries of areas of law.

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4. trademark–right of publicity–defamation
5. trademark–right of publicity–First Amendment
6. trademark–defamation–First Amendment
7. copyright–right of publicity–defamation
8. copyright–right of publicity–First Amendment
9. copyright–defamation–First Amendment
10. right of publicity–defamation–First Amendment

Figure 9: Ten Triplet Interactions for Five Bodies of Law
(The triplet selected for analysis in this paper is shown in **bold**)

In the interest of brevity, this section will analyze only the triplet interaction for **trademark–copyright–First Amendment**. However, that does not mean this triplet analysis is the most important. Moreover, the analysis of only one triplet interaction would not be adequate in a more robust approach to the many-body problem. The more modest hope of this paper is that this analysis will be sufficient to show that there is value in at least considering additional interactions. Doing so will build on a more common type of paired interaction analysis in legal scholarship. It will also be a bridge to the integration Step 3 below.

Trademark law has a fair use doctrine which is similar, but not identical, to the fair use doctrine in copyright law. The fair use language in the trademark statute carves out:

Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person *other than as a designation of source for the person's own goods or services*, including use in connection with . . . (ii) identifying and *parodying, criticizing, or commenting upon* the

famous mark owner or the goods or services of the famous mark owner.²³⁴

At first glance, the trademark fair use test would seem to have strong overlap with the fair use test as articulated in *Campbell v. Acuff-Rose*. Indeed, the 1989 case *Rogers v. Grimaldi*, in the Court of Appeals for the Second Circuit, supports that conclusion, and was the source of the widely used “*Rogers Test*.”²³⁵ Famous actress and dancer Ginger Rogers had brought suit related to a film entitled “*Ginger and Fred*” by filmmaker Federico Fellini.²³⁶ The District Court ruled in favor of Fellini and dismissed Rogers’ trademark and right of publicity claims on a motion for summary judgment.²³⁷ The Court of Appeals for the Second Circuit affirmed. Judge Newman, writing the opinion for the court, explained the *Rogers Test*:

We believe that in general the [Trademark] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. In the context of allegedly misleading titles using a celebrity’s name, that balance will normally not support application of the [Trademark] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.²³⁸

²³⁴ 15 U.S.C. § 1125(c)(3)(A) (emphasis added).

²³⁵ *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) This case involved both trademark and right of publicity claims by the famous actress and dancer Ginger Rogers, and therefore it is a further indication of the complex interactions between the various intellectual property bodies of law and the First Amendment. *See id.* at 996.

²³⁶ *Id.* (citations omitted).

²³⁷ *Rogers v. Grimaldi*, 695 F. Supp. 112, 124 (S.D.N.Y. 1988).

²³⁸ *Rogers*, 875 F.2d at 998.

However, the continued viability of the *Rogers* Test for trademark fair use is in question due to a 2023 Supreme Court decision involving the famous Jack Daniel’s® whiskey and a dog toy parody version sold under the brand name “Bad Spaniels.”²³⁹ In the “Bad Spaniels” case, the Court of Appeals for the Ninth Circuit relied heavily on *Rogers v. Grimaldi*, and held that the “Bad Spaniels” dog chew toy did not infringe the Jack Daniel’s® trademark.²⁴⁰ However, the Supreme Court reversed, in a unanimous opinion.²⁴¹ The Court found the accused infringer’s use was “as a designation of source for the person’s own goods or services.”²⁴² Justice Kagan, in the opinion of the Court, explained:

We do not decide whether the *Rogers* test is ever appropriate, or how far the ‘noncommercial use’ exclusion goes. On infringement, we hold only that *Rogers* does not apply when the challenged use of a mark is as a mark. On dilution, we hold only that the noncommercial exclusion does not shield parody or other commentary when its use of a mark is similarly source-identifying.²⁴³

From a many-body perspective, the Court’s explanation suggests that the Supreme Court may seek to carve back the parody exception for dilution and expand the power of the trademark body of law. Consider again a

²³⁹ *Jack Daniel’s Prop., Inc. v. VIP Prod. LLC*, 599 U.S. 140, 144 (2023) (9-0); *see also* *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 269 (4th Cir. 2007) (Niemayer, J.) (affirming District Court holding that LVM failed to demonstrate dilution by tarnishment related to “Chewy Vuitton” dog toys).

²⁴⁰ *Jack Daniel’s*, 599 U.S. at 152.

²⁴¹ *Id.* at 143 (Justice Kagan delivered the opinion for a unanimous Court. Justice Sotomayor filed a concurring opinion, in which Justice Alito joined. Justice Gorsuch filed a concurring opinion, in which Justices Thomas and Barrett joined).

²⁴² *VIP Products LLC*, slip op. at 19–20.

²⁴³ *Id.* at 20.

hypothetical trademark claim by President Trump against Elster’s “TRUMP TOO SMALL” T-shirt. If President Trump brought a trademark infringement claim against Elster to enforce any of his own numerous “TRUMP” trademark registrations, including for T-shirts, then, under the Court’s decision in the “Bad Spaniels” case, President Trump might have been able to prove dilution by tarnishment without needing to show any likelihood of confusion.²⁴⁴

In addition, from a many-body perspective, it is important to note that trademark dilution is relatively new to trademark law. Federal trademark law was expanded to include dilution in 1996.²⁴⁵ Since a statutory amendment in 2006, injunctive relief for trademark dilution by blurring or tarnishment has been available “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.”²⁴⁶ One could

²⁴⁴ See, e.g., TRUMP, Registration No. 77,029,020 (registering a “TRUMP” design mark in international class 25 to owner DTTM Operations LLC). The Federal Trademark Dilution Act (FTDA) of 1995 (Pub. L. No. 104-98) added dilution by blurring and tarnishment for “famous” marks, even in the absence of a likelihood of confusion. Federal Trademark Act of 1995, Pub. L. No. 104-98, 109 Stat. 985, (codified as amended at 15 U.S.C. § 1125, 1127). The law was changed with the Trademark Dilution Revision Act in response to a Supreme Court decision that required proof of actual economic injury. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (codified as amended at 15 U.S.C. § 1125(c)); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (“Victor’s Little Secret” case). As amended, Section 1125(c) allows for injunctive relief “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” 15 U.S.C. § 1125(c)(1).

²⁴⁵ Federal trademark law has, at times, been expanded to include initial interest and post-sale confusion. See, e.g., Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105 (2005); H. Straat Tenney, *Kicking Around the Post-Sale Confusion Doctrine in English and US Courts*, THE TRADEMARK LAWYER Issue 2 (2004).

²⁴⁶ 15 U.S.C. § 1125(c)(1).

reasonably say we are currently in a “waxing” phase of U.S. federal trademark law. Moreover, from a strict trademark portfolio perspective, President Trump has taken his brand to new heights during his second term.²⁴⁷ President Trump may have a stronger brand, for commercial licensing purposes, than the Jack Daniel’s® brand. Overall, it is not clear that the First Amendment would defeat a trademark infringement claim by President Trump against Elster in this hypothetical many-body analysis.

Another case worth considering for the trademark–First Amendment interaction is a decision by Judge Leval in *MGM-Pathe Communications Co. v. Pink Panther Patrol*.²⁴⁸ In 1990, Judge Leval formulated the “transformative” test(s) for copyright fair use.²⁴⁹ One year later, Judge Leval found no First Amendment issues in the trademark case *MGM-Pathe Communications Co. v. Pink Panther Patrol*.²⁵⁰ The Pink Panther Patrol T-shirts had a pink triangle with a black pawprint.²⁵¹ The shirts allegedly were referencing MGM’s trademark “Pink Panther.” The Pink Panther Patrol members wore the shirts at a protest march in New York against a rise in violent anti-LGBTQ hate crime. At that time, a likelihood of consumer confusion was required for plaintiff to prevail in a

²⁴⁷ See, e.g., Stephen Fowler, *Trump Opened a New Golf Course in Scotland. It’s Not His Only New Venture as President*, NPR Politics (July 29, 2025), <https://www.npr.org/2025/06/26/nx-s1-5446114/trump-wealth-business-crypto-brand-golf-course> [<https://perma.cc/HE9C-3E3C>] (“Trump reported income of more than \$630 million last year, including \$57 million from cryptocurrency sales and more than \$8 million licensing his name for products like watches, guitars and Bibles.”).

²⁴⁸ *MGM-Pathe Commc’ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991).

²⁴⁹ Leval, *supra* note 188.

²⁵⁰ *MGM-Pathe*, 774 F. Supp. at 877.

²⁵¹ *Id.* at 872.

trademark infringement case because the Federal Trademark Anti-Dilution Act of 1996 was not yet law. Nevertheless, Judge Leval held that under federal trademark law MGM was entitled to injunctive relief against the Pink Panther Patrol for both the “PINK PANTHER” mark *and* the pink triangle image.²⁵²

On its face, the Pink Panther Patrol’s speech would appear to be a strong candidate for First Amendment protection: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; *or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*”²⁵³

²⁵² For a photo of the march in which a T-shirt with the pink paws image can be seen on the left, see Julio Rivera Anti-Violence Coalition, Queer Nation, Pink Panther Patrol, and New York City Gay and Lesbian Anti-Violence Project demonstration in Queens, NY, 1991 (photograph), available at commiepinkofag.org/post/109711729370/queer-groups-protest-against-violence-in-queens-nyc [<https://perma.cc/FEB7-PNPT>] (2015).

²⁵³ U.S. CONST. amend. I (emphasis added) The First Amendment implications may be suggested by the work of Alexander Meiklejohn, Tom Emerson, and others stressing the importance of political expression. *See generally*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256 (1961) (“What I have said is that the First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen’s speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation.”); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970) (as a prescient early view of the law as a system in which impacts beyond those on the particular litigants matter, Emerson’s work can also be read as a type of many-body analysis); Rebecca Tushnet, “*Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*,” 114 YALE L.J. 535, 539 (2004) (“democratic self-governance builds on Alexander Meiklejohn’s classic defense of the First Amendment as a guarantor of democracy. His definition of democracy, however, meant only political speech - speech about government and what it should or shouldn’t be doing - was protected from suppression. His theory famously had trouble

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However, Judge Leval dismissed the First Amendment analysis in a single paragraph. Here is Judge Leval's discussion of the First Amendment defense - in its entirety:

IV. Defendants' First Amendment Defense

The Patrol contends MGM's suit is barred by the First Amendment. They contend that because the Patrol is engaged in political speech, it is less subject to the trademark laws. There is no legal support for this position. The seriousness and virtue of a cause do not confer any right to the use of the trademark of another. *See, e.g., N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Education Fund*, 559 F. Supp. 1337, 1342 (D.D.C. 1983), *rev'd on other grounds*, 243 App. D.C. 313, 753 F.2d 131 (D.C. Cir. 1985); *American Diabetes Ass'n v. National Diabetes Ass'n*, 533 F. Supp. 16 (E.D. Penn. 1981).²⁵⁴

The cases Judge Leval cited, the NAACP case and diabetes charity case, involved competing groups who wanted to use the same marks for exactly the same services. From the perspective of a many-body analysis, those situations were not necessarily the same as the Pink Panther Patrol case. MGM was not running a competing anti-LGBTQ bashing program. Moreover, if the Patrol had used an image of the *copyrighted* Pink Panther character instead of the words "PINK PANTHER," Judge Leval may have asked whether the use was "transformative" under his transformative test interpretation of the Copyright Act Section 107's fair use factors. It is remarkable that Judge Leval issued his Pink Panther Patrol decision only one year

explaining why art and literature should be protected, except as poor stepchildren of political speech. Meiklejohn was also more concerned with speech than with speakers; as long as everything worth saying got said, it didn't matter whether everyone had a chance to speak.").

²⁵⁴ *MGM-Pathé*, 774 F. Supp. at 877.

after he published his landmark article setting forth the “transformative” fair use doctrine for copyright law.²⁵⁵

From a many-body perspective, it would be helpful to better understand the possible reasoning behind Judge Leval’s cursory rejection of the First Amendment. Does the Commerce Clause, pursuant to which Congress has authority to protect trademark rights at issue in the Pink Panther Patrol case, generally trump the First Amendment? Are trademarks that powerful (and, if so, when)? *Vidal v. Elster* (2024) and *Jack Daniel’s* (2024) are consistent with that theory, but *Matal v. Tam* (2017) is not. The judgments in each of these decisions was unanimous and they were issued less than a decade apart. If the Commerce Clause trumps the First Amendment, wouldn’t the Patent and Copyright Clause similarly do so? Yet in *New York Times v. Sullivan*, the Court stated:

[W]e are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.²⁵⁶

Without speculating about the outcome if Judge Leval had applied a copyright fair use test, it seems safe to assume his analysis may have been different.

In the interests of brevity, additional interactions will not be explicitly covered in this Step 2 analysis. Instead, the right of publicity will be added in the third and

²⁵⁵ *Id.*; Leval, *supra* note 188, at 1116.

²⁵⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citation and footnotes omitted).

final many-body analysis step below, together with trademark, copyright, defamation and the First Amendment. Admittedly, this does not scrupulously adhere to the three-step process, which is recommended in practice. Hopefully, this will suffice to suggest the many-body approach is a useful tool in the law, as in physics.²⁵⁷

3. Step 3: Analyze the Bodies and Interactions

The third and final step in a many-body approach is the most challenging. Like Poincaré at the start of his quest, we lack any rigorous mathematical formula to integrate the interactions of the different bodies of law. We are missing bodies and interactions based on our prioritization choices, so anything we do will be incomplete. The many-body approach does not itself provide normative rules for resolving conflicts between bodies of law. An additional substantive legal theory is needed in such cases. This makes Step 3 quite daunting. Fortunately, we rarely need to start from scratch given the strong existing body of scholarly work on the interactions between various bodies of law. The following attempt to integrate the analysis of *Vidal v. Elster* as a many-body problem will build on the work of others.

²⁵⁷ It is beyond the scope of this paper, but the modified approach in this Step 3 may be closer to the work of Poincaré, which was influenced by G.W. Hill. Barrow-Green, *supra* note 1, at 30 (“Hill’s innovation was to abandon the idea of using an elliptic orbit for the moon as a starting point, i.e., abandon the idea of neglecting the action of the sun as a first approximation, and instead begin with a circular orbit. He then used the effect of solar perturbation to vary the circular orbit before varying it again by the introduction of the eccentricity of the lunar orbit. In essence, he began by solving a modified version of the restricted three body problem before making a variation in order to attempt the general problem. Previous efforts had always begun by first solving the two body problem and then making the appropriate variation.”).

The Step 3 integration analysis will start by summarizing the right of publicity and First Amendment analysis of Professors Robert C. Post and Jennifer E. Rothman.²⁵⁸ An effort will be made to extend aspects of their proposed framework to trademark law in *Vidal v. Elster*, and to copyright law in the hypothetical scenario where Elster used a copyrighted photo on the “TRUMP TOO SMALL” T-shirt. A many-body analysis suggests that the relationship between trademark, copyright and the First Amendment could be made more consistent if versions of a copyright fair use defense were used in trademark and right of publicity cases.

C. Mapping the Right of Publicity to the First Amendment

Post and Rothman mapped the right of publicity to the First Amendment in a manner quite close to a many-body approach.²⁵⁹ Their work is infused with thoughtful comparisons among and between the right of publicity, or, more accurately, the multiple right(s) of publicity in their model, trademark law, copyright law, defamation law, tort law, property law, and the First Amendment.²⁶⁰ Professor Rothman also separately analyzed the interactions between

²⁵⁸ Post & Rothman, *supra* note 19.

²⁵⁹ See Post & Rothman, *supra* note 19.

²⁶⁰ See, e.g., *id.* at 101 n.63, 112 nn.102–03, 131 n.186, 162 nn.327–28 (demonstrating comparisons between trademark law and right of publicity law); *id.* at 112 n.103 (“To the extent that empirical challenges to trademark dilution are merited, they likely have equal force in the context of diminishment-based right of publicity claims.”); *id.* at 101 n.64, 105 n.76 (demonstrating comparisons between copyright and the right of publicity); *id.* at 117 n.118 (adding property for a triplet interaction); *id.* at 120–21 (discussing the right of publicity and data privacy law). Truly, their analysis comes incredibly close to a many-body approach.

trademark law and the right of publicity.²⁶¹ These interactions are directly relevant to the *Vidal v. Elster* trademark case and the names clause in the Lanham Act. The integration analysis for Step 3 of the many-body approach that follows will first summarize, then build upon, the excellent foundation laid by Post and Rothman.

In an effort to bring coherence to these areas of law, Post and Rothman identified “four distinct interests that the right of publicity typically seeks to vindicate,” which they denominate as “the *right of performance*, the *right of commercial value*, the *right of control*, and the *right of dignity*.”²⁶² All four interests could be relevant in particular disputes, and there may be overlapping copyright, trademark, unfair competition, defamation, false light, emotional distress, and other claims. In addition, these interests could be conceived of as independent torts, similar to Prosser’s approach to privacy torts, or as a unitary tort with a variety of interests. Thus, their analysis is already a type of many-body approach.

For the First Amendment, Post and Rothman proposed a new category of communicative act—“*commodities*”—to add to “*public discourse*” which is, “core forms of speech that receive the full array of essential First Amendment protections” and “*commercial speech*.”²⁶³ They characterized the “commodities” category as “communicative acts, which courts appear to treat as if they had no First Amendment value at all.”²⁶⁴ They explained their hope “that by carefully surfacing the constitutional and policy stakes that beset the conflict between right(s) of publicity and the First Amendment, we have sketched a

²⁶¹ Rothman, *Identity*, *supra* note 134.

²⁶² Post & Rothman, *supra* note 19, at 92.

²⁶³ *Id.* at 113, 135-36.

²⁶⁴ *Id.* at 141.

map that might substantially assist those who must navigate this obscure and tumultuous terrain.”²⁶⁵

In an attempt to extend Post and Rothman’s proposed mapping to trademark and copyright law, we will follow their guidance and avoid any rigid approach that suggests T-shirts are categorically “commodities” such that no First Amendment issues arise. The “commodities” category is not so simplistic. Post and Rothman acknowledged the difficulty of identifying the boundaries.²⁶⁶ Indeed, “[d]ifficulties in constitutional categorization become especially complicated when uses occur outside of traditional media, *as for instance on t-shirts or coffee mugs.*”²⁶⁷

Post and Rothman mapped each of the four right(s) of publicity to the three categories of communicative acts. Since the right of control and the right of commercial value are the most relevant to *Vidal v. Elster*, this article will focus on those types of rights of publicity.

The right of control “asserts a state interest in maintaining the autonomy of individual personalities.”²⁶⁸ The attempt to assert the right of control over communicative acts that constitute public discourse would be contrary to the First Amendment.²⁶⁹ By contrast, the purpose of the right of commercial value is “protecting the market value of a person’s identity.”²⁷⁰

²⁶⁵ *Id.* at 172.

²⁶⁶ *Id.* at 157, 159 (“[C]ourts cannot distinguish among public discourse, commercial speech, and commodities by using any simple or mechanical ‘test.’”) (“Given the nearly infinite ways in which the names and images of persons can be communicated, courts dealing with actions for the right of commercial value are virtually at sea in distinguishing the three distinct constitutional tranches of communication that we have identified.”).

²⁶⁷ *Id.* at 160 (emphasis added).

²⁶⁸ *Id.* at 162.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 107.

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The right of commercial value may be relevant in three different contexts—*confusion*, such as mistaken endorsement or sponsorship; *diminishment*, such as when use would dilute or lessen market value, and which echoes dilution in trademark law; and *unjust enrichment*, such as when the images of private individuals are used in ads without their being paid a market rate.²⁷¹

Post and Rothman provide the chart below to map the relationship between the three main types of injuries at issue for violations of the *right of commercial value* and the three categories of communicative acts, in the context of the right of publicity.

	Public Discourse	Commercial Speech	Commodities
Confusion	Permissible (if confusion is explicit or serious)	Permissible (with fair use exceptions)	Permissible
Diminishment	Unconstitutional	Likely Permissible (with fair use exceptions)	Permissible
Unjust Enrichment	Unconstitutional	Likely Permissible (with fair use exceptions)	Permissible

*Figure 10: Post and Rothman’s proposed mapping of three kinds of injury for the right of commercial value type of right of publicity against three First Amendment categories of speech.*²⁷²

The following section will attempt to extend Post and Rothman’s proposed mapping to *Vidal v. Elster*. A many-body approach helps show where their mapping aligns for trademark and copyright, and where there might be gaps.

²⁷¹ *Id.* at 110–15.

²⁷² *Id.* at 156. Image is used with the permission of Post and Rothman.

1. Extending the Mapping to the “TRUMP TOO SMALL” T-Shirt

In a many-body approach, the potential right of publicity claim at issue for President Trump’s name in *Vidal v. Elster* strongly overlaps with the right of control as described by Post and Rothman. Under their proposed mapping, neither President Trump, nor the U.S. Patent & Trademark Office on its own initiative, should be able to assert a right of control over the use of President Trump’s name in a political context critical of the President: “The essence of public discourse lies in the public’s freedom to form its own judgments based on publicly available information *The state cannot intervene to shape how the public forms its opinion based upon public information.*”²⁷³

Moreover, the Supreme Court’s refusal to treat *Vidal v. Elster* as an *as applied* challenge is a sign of tension, in a many-body analysis.

Because the right of control invests persons with discretionary authority to regulate the communication of otherwise public information, it will be unconstitutional when applied to public discourse. Insofar as a person’s identity is a matter of public information, the state cannot create rules that constrain its use in public discourse, except for specific, narrow, and compelling reasons, like the possibility of serious confusion as to endorsement or participation.²⁷⁴

There was no possibility of any confusion, much less serious confusion, as to President Trump’s endorsement or participation in the “TRUMP TOO SMALL” mark. Thus, Elster likely should have prevailed

²⁷³ *Id.* at 163 (emphasis added).

²⁷⁴ *Id.* (emphasis added).

in a hypothetical right of publicity claim asserting the right of control.

The analysis is similar for the right of commercial value, as mapped to *Vidal v. Elster*. President Trump had a strong commercial portfolio of trademark rights in the “TRUMP” name even prior to his rise in politics. Thus, the right of publicity in *Vidal v. Elster* interacts with the *right of commercial value*, and the right to monetize one’s name, image or reputation.²⁷⁵ For the right of commercial value, the “TRUMP TOO SMALL” case fits well in the “[d]iminishment” injury category. Indeed, Post and Rothman noted that “[d]iminishment serves an analogous function to trademark dilution law.”²⁷⁶ They tread carefully by saying that:

We recognize that some scholars have expressed concern about both the legitimacy of dilution law’s goals and its effectiveness at achieving those goals . . . [but][o]ur point, however, is that the same impulses that have led courts and legislatures to recognize dilution claims in the context of trademark law operate *with equal force* in the context of the right of publicity.²⁷⁷

Post and Rothman’s discussion of their proposed right of publicity for ‘diminishment’ would seem to apply directly to Elster’s “TRUMP TOO SMALL” T-shirt:

²⁷⁵ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“For it is common knowledge that many prominent persons (especially actors and ballplayers), . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”); J. Thomas McCarthy, *Birth of the Right of Publicity*, 1 RIGHTS OF PUBLICITY AND PRIVACY n.14, § 1:26 (2d ed. 2014) (“Judge Jerome Frank in 1953 was the first to coin the term ‘right of publicity.’”).

²⁷⁶ Post & Rothman, *supra* note 19, at 112.

²⁷⁷ *Id.* (footnote with citations omitted) (emphasis added).

Diminishment plaintiffs likely qualify as public figures, about whom public discussion must be ‘uninhibited, robust, and wide-open.’ The Constitution does not permit the state to truncate the public assessment of public figures merely because persons wish to talk ‘too much’ about them and hence to overexpose their identities. Nor does it permit the state to maintain the reputation of public figures whom the public wishes to denigrate by associating their identities with unsavory connections. As is said in the context of trademark dilution: ‘[T]he trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function.’²⁷⁸

If a right of publicity claim by Trump against Elster fell in the right of commercial value category, the key question would be which category of communicative speech should have applied in *Vidal v. Elster*.

At first glance, because the “TRUMP TOO SMALL” trademark was for clothing, and was used on mundane products such as T-shirts, one might be tempted to categorize *Vidal v. Elster* as a “Commodities” case immune from any First Amendment concerns. That would be a mistake. “It is plain, however, that not all t-shirts, coasters, and other merchandise are mere commodities when it comes to First Amendment analysis. They can sometimes constitute public discourse.”²⁷⁹

²⁷⁸ *Id.* at 150 (footnotes with citations omitted).

²⁷⁹ *Id.* at 143. The test to distinguish between “commodities” versus “public discourse” in mundane products should turn on whether the communicative act contributes to the public discourse. *See id.* at 136 (“Public discourse is not defined by its content but by its function. Because democracy is essentially ‘government by public opinion,’ public discourse is composed of the communicative acts deemed necessary for the formation of public opinion.”) (citation omitted).

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The “TRUMP TOO SMALL” mark (and T-shirt) is best categorized as “public discourse.”²⁸⁰

Public discourse is not defined merely as speech that Robert Bork might have categorized as ‘political,’ which is to say ‘speech concerned with governmental behavior, policy or personnel.’ In a democracy what *becomes* ‘political’ in Bork’s sense is a result of how the public chooses to exercise its judgment. . . . Public opinion often comes to know itself through discussion about celebrities like Clint Eastwood and Reese Witherspoon – *not to mention reality-TV star Donald Trump*. Public discourse is thus not limited to matters that are overtly about governance; it includes broader communicative activities such as art, music and comedy.²⁸¹

Indeed, Elster’s T-shirts are “political” even under a narrow definition. “TRUMP TOO SMALL” was criticism of a Presidential candidate and former President, based on a political debate with another Presidential candidate and then-Senator. They were sold during a Presidential election campaign in an apparent effort to influence voters.

From the perspective of a many-body analysis, had President Trump asserted a right of publicity claim to protect the commercial value of his name, no reasonable person could have been confused, nor would the dispute have fallen in the “Unjust Enrichment” category. The “TRUMP TOO SMALL” T-shirt would have been a “Diminishment” type of injury. Based on the Post and Rothman mapping, Elster would likely have prevailed on First Amendment grounds (again, in a hypothetical right of publicity case). But what if President Trump had brought a *trademark dilution* claim against Elster? Under the PINK PANTHER PATROL precedent, which was Judge Leval’s

²⁸⁰ *Id.* at 136–37.

²⁸¹ Post & Rothman, *supra* note 19, at 136–37 (emphasis added) (citations and footnotes omitted).

decision, the outcome might well have been that President Trump prevailed, for the exact same communicative act, indeed on the exact same T-shirt.²⁸²

Pressing this hypothetical many-body analysis further, should the U.S. Patent and Trademark Office be able to pro-actively protect President Trump, or any political public figure, where the public figure might not have been able to succeed on their own in a lawsuit against a person or organization that used their name to criticize them? The answer is not clear. Moreover, under Supreme Court precedent, a “zone-of-interests” test is used to determine whether a party has standing to oppose a trademark registration.²⁸³ The Federal Circuit recently applied the zone-of-interests test in rejecting, for lack of standing, a challenge to an application for registration of the trademark “RAPUNZEL” for dolls.²⁸⁴ The court held that members of the public who are not commercial actors with competitive interests lack standing to challenge a trademark application or registration on First Amendment grounds.²⁸⁵ From a many-body perspective, copyright law interactions were also at issue in the case, since the famous fairy tale “Rapunzel” was in the public domain.²⁸⁶ Thus,

²⁸² Note that this is a hypothetical only, for purposes of a many-body analysis, and not a criticism of the outcome in any particular case.

²⁸³ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014) (Scalia, J.) (unanimous) (“We thus hold that to come within the zone of interests in a suit for false advertising under §1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales.”).

²⁸⁴ *See Curtin v. United Trademark Holdings, Inc.*, 137 F.4th 1359, 1363 (Fed. Cir. 2025)

²⁸⁵ *Id.* at 1361 (affirming the Trademark Trial and Appeal Board’s dismissal of a doll collector consumer’s opposition to the registration of the mark “RAPUNZEL” in International Class 28 for dolls and toy figures where the trademark applicant, United Trademark Holdings, sold dolls with long blonde hair under the name “Rapunzel”).

²⁸⁶ *Id.* at 1369 (citation omitted) (“Ms. Curtin’s alleged injury from the registration of the RAPUNZEL mark is that “[she] and other consumers

the court's decision may give public figures even more power over any uses of their names in trademarks.

As Post and Rothman have noted:

The right of control is frequently expressed through the metaphor of property. Persons are said to own their own identity and accordingly are authorized to control its use by others. If we press exactly why persons should be endowed with this property right, the answer, *most especially in modern times*, is that persons should be able to control their identity to the extent necessary for the full development of their own personhood. We therefore theorize this right of control as oriented toward the protection of the autonomy of personality rather than market damages.²⁸⁷

The protection of autonomy of personality for the right of publicity aligns with the protection of autonomy of personality for trademarks in personal names. Moreover, for President Trump, such interests align directly with his commercial interests in the “TRUMP” brand.

In the context of trademark law, in *Vidal v. Elster*, the Court repeatedly used the metaphor of property in a

will be denied access to healthy marketplace competition for products that represent Rapunzel if private companies are allowed ‘to trademark the name of a famous fairy tale character in the public domain.’”). The court did not mention copyright but the reference to “public domain” is likely a reference to copyright public domain for the original Rapunzel fairy tale by the Brothers Grimm. JACOB GRIMM AND WILHELM GRIMM, *CHILDREN’S AND HOUSEHOLD TALES* (1812).

²⁸⁷ Post & Rothman, *supra* note 19, at 116 (emphasis added). From a many-body problem framework, a key question would be what time period “modern times” covers (at least roughly) and what the prior situation was. Depending on the answer to that question, it is possible that a (hypothetical) trademark claim by Trump asserted against the “TRUMP TOO SMALL” trademark registration (or a (hypothetical) copyright registration attempt by Elster) might fit under the right of commercial value, the right of control, or both types of right of publicity.

commercial sense. For example, the Court favorably quoted a decision from 1891 : “[a] man’s name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property.”²⁸⁸ The Court also offered the following quote from an 1899 treatise on “Foreign Patent and Trademark Law”: “[t]he right of any one to place his own name on goods sold by him is recognized as a natural right and cannot be interfered with.”²⁸⁹ This natural rights theory of trademark protection puts the trademark body of law on a stronger footing. From a trademark perspective, President Trump’s fame as host of the television show “*The Apprentice*” from 2004-2015, and his many efforts to commercialize the “TRUMP” brand, provided him with an expansive trademark portfolio at the time of his 2016 election.²⁹⁰ Since then, commercial trademark and publicity rights have become inextricably intertwined with President Trump’s official actions and business interests under the umbrella of the “TRUMP”

²⁸⁸ Vidal v. Elster, 602 U.S. 286, 301 (2024) (citation omitted).

²⁸⁹ *Id.* (citation omitted).

²⁹⁰ David D. Kirkpatrick, *The Number: How much is Trump pocketing off the Presidency?*, THE NEW YORKER, Aug. 11, 2025, <https://www.newyorker.com/magazine/2025/08/18/the-number> [<https://perma.cc/5S3J-63WN>] (“‘The Apprentice,’ on which he played the outsized version of himself that he has always tried to project to the world, once covered his losses. In the seven years following its début, in 2004, the show paid him \$135.2 million. And its glamorizing effect allowed him to make money without buying or building anything, just by licensing his name and selling endorsements.”); Sharon LaFraniere and Danny Hakim, *Trump’s Trademark Continues Its March Across the Globe, Raising Eyebrows*, N.Y. TIMES, Apr. 11, 2017, <https://www.nytimes.com/2017/04/11/us/politics/trump-trademark-ethics.html> [<https://perma.cc/RST5-T63B>] (“A review of 10 trademark databases shows that Mr. Trump’s enterprise, now run by his two adult sons, has 157 trademark applications pending in 36 countries. Registered trademarks are valuable financial assets, especially for a business like Mr. Trump’s, which is increasingly focused on marketing his name, not building hotels.”).

brand.²⁹¹ If the First Amendment is like the Sun and trademark law is like the Moon, our many-body legal system may be experiencing a solar eclipse. If so, a normative legal theory is needed to answer the question of whether such an eclipse is good or bad.²⁹²

From a trademark and right of publicity perspective, President Trump has a strong commercial empire. Neither Madison, Wisconsin Mayor Paul Soglin in the case *Keinitz*

²⁹¹ Sharon LaFraniere and Danny Hakim, *Trump's Trademark Continues Its March Across the Globe, Raising Eyebrows*, N.Y. TIMES, Apr. 11, 2017, <https://www.nytimes.com/2017/04/11/us/politics/trump-trademark-ethics.html> [<https://perma.cc/RST5-T63B>] (estimating that President Trump's profits from commercial activities since his first Presidency in 2016 have been roughly three and a half billion dollars); see also David Yaffe-Bellany, *Trump Crypto Firm Announces \$1.5 Billion Digital Coin Deal*, N.Y. TIMES, Aug. 11, 2025, <https://www.nytimes.com/2025/08/11/business/trump-crypto-world-liberty-wlfi-alt5-sigma.html> [<https://perma.cc/J4ND-EDU2>] ("Not long after starting World Liberty, President Trump began selling a so-called memecoin, known as \$TRUMP, generating hundreds of millions of dollars for his family." . . . "At the same time that his family has invested in crypto, Mr. Trump has implemented policies designed to boost the industry. He ended a long-running regulatory crackdown on crypto companies, created a federal stockpile of Bitcoin and signed legislation that was heavily backed by the industry."); Cat Zakrzewski & Emily Davies, *Trump hosts Starmer in Scotland, promoting his own golf club*, WASH. POST, July 28, 2025, <https://www.washingtonpost.com/politics/2025/07/28/trump-starmer-golf-trade/> [<https://perma.cc/S6PC-M56L>]; David A. Fahrenthold & Ben Protes, *The Short-Lived Plan to Produce a Trump-Themed Instant Pot*, N.Y. TIMES, July 29, 2025, <https://www.nytimes.com/2025/07/28/us/politics/trump-maga-instant-pot.html> [<https://perma.cc/UY5N-QAPH>].

²⁹² For example, a law and economics approach might be applied, such as the analysis of Professor Merges. See Robert P. Merges, *Philosophical Foundations of IP law: The Law and Economics Paradigm*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW ch. 4 (Peter S. Menell, Ben Depoorter, & David L. Schwartz eds., Edward Elgar Publishing 2019). The many-body approach outlined in this article should be compatible with a wide variety of substantive legal theories.

v. Sconnie Nation, nor Montgomery, Alabama Public Safety Commissioner L.B. Sullivan in *New York Times v. Sullivan*, had rights of publicity or trademark rights as powerful as those of President Trump. How should the First Amendment be balanced against such rights? Post and Rothman admit that “[t]he right of control is . . . powerful and far-reaching.”²⁹³ It is challenging to provide any specific explanation of how such a strong right of control—whether for the right of publicity or for trademark rights, such as a trademark claim for dilution by tarnishment—is consistent with the First Amendment, at least standing alone. Indeed, Post & Rothman express concern about the right of control in the context of personal data and informational privacy.²⁹⁴

Post and Rothman also explored the influences of copyright’s fair use test on variations of a “transformative work” test within a right of publicity analysis. Again, this is consistent with a many-body approach. As Post and Rothman explained, the Third and Ninth Circuits “have developed what appears to be an unacknowledged variation” of the California Supreme Court’s transformative-work test.²⁹⁵

These courts do not focus on whether an overall work is transformative, but instead on whether a plaintiff’s specific identity has been transformed. This narrower approach requires that a defendant ‘distort[]’ or ‘transmogrif[y]’ a person’s identity ‘for the purposes of lampoon, parody, or caricature.’ The use must be ‘more of a ‘fanciful, creative character,’ than an ‘imitative character.’’ This narrower version of the test on its face seems to disfavor more realistic portrayals of people.²⁹⁶

²⁹³ Post & Rothman, *supra* note 19, at 119.

²⁹⁴ *Id.* at 120–21.

²⁹⁵ *Id.* at 130.

²⁹⁶ *Id.*

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It is not clear why the goals of the First Amendment would disfavor realistic portrayals of people being criticized. Should the First Amendment give a higher level of protection to “LET’S GO BRANDON”²⁹⁷ instead of

²⁹⁷ There have been quite a few unsuccessful trademark applications for the phrase “LET’S GO BRANDON” or variations thereof. *See, e.g.*, U.S. Trademark Application Serial No. 97/059,307 (Filed Oct. 4, 2021); U.S. Trademark Application Serial No. 97/061,110 (Filed Oct. 5, 2021); U.S. Trademark Application Serial No. 97/069,780 (Filed Oct. 12, 2021). For example, U.S. Trademark Application No. 97246737 was filed January 31, 2022, for the mark “LET’S GO BRANDON YOU STUPID SON OF A BITCH” in International Class 16 for “printed t shirts, tank tops and hats. bumper stickers, billboard, coffee cups.” U.S. Trademark Application Serial No. 97/246,737 (Filed Jan. 31, 2022). The application was abandoned in 2023, after being rejected in a Nonfinal Office Action dated November 15, 2022, for conflicts with prior-filed applications, a likelihood of confusion, and failure to function as a trademark (as well as minor issues with formalities). *Id.* The likelihood of confusion was with U.S. Registration No. 6,487,770 for “YOU SON OF A BITCH” for “Clothing and apparel, namely, shirts, tops, t-shirts, tank tops, hoodies, sweat shirts, jackets; socks; headwear” in International Class 25. YOU SON OF A BITCH, Registration No. 6,487,770. Interestingly, there was no rejection under the names clause, even though “BRANDON” clearly referred to “BIDEN.” *See* U.S. Trademark Application Serial No. 97/246,737 (Filed Jan. 31, 2022). In the Office Action, the Trademark Examiner described the results of an internet search on the phrase: “[t]he expression ‘LET’S GO BRANDON’ came into existence on October 2, 2021, and rapidly spread, being commonly used by many different entities in the following days and weeks as a political slogan.” *Id.* The Examiner would have known that the reference was a criticism of Presidential candidate Biden. By comparison, the names clause was one basis for the rejection of a trademark application filed November 11, 2020, for the mark “BOGUS JOE BIDEN, BOGUS JOE” for goods including hats and T-shirts. U.S. Trademark Application Serial No. 90312503 (Filed Nov. 11, 2020) (referring to the Nonfinal Office Action issued Jan. 26, 2021). All such documents are available at the U.S. Patent and Trademark Office website, using the Trademark Search and Document Retrieval (“TSDR”) search feature. *See* Trademark Status & Document Retrieval (TSDR), USPTO UNITED STATES

“FUCK JOE BIDEN”? Under the “doctrine of foreign equivalents” in U.S. trademark law, words in another language are translated into English for purposes of a trademark registration analysis.²⁹⁸ This raises the question of whether the U.S. Trademark Office should also translate the meaning of a term or phrase in a trademark application, when that meaning is readily apparent. Either way, a many-body approach reveals potential tension between the trademark names clause, at least as applied to prevent registration of marks critical of public figures, and the body of First Amendment law. Is the situation better for the right of publicity?

Post and Rothman argued that the right of publicity version of the “transformative work” test is “best interpreted as an effort to distinguish art from commodities (or commercial speech) by ascertaining the ‘transformative’ presence of an artist.”²⁹⁹ However, they note that “once we realize that the larger purpose of any such test is to determine the constitutional value of particular communicative acts, we can also see that the doctrine is woefully inadequate.”³⁰⁰ As just one example, realistic photography that portrayed “duplicative likenesses” might not qualify as a public discourse communicative act.³⁰¹ Is this the correct balance between the goals of trademark law and the goals of the First Amendment? In other words, are the bodies properly aligned?

PATENT AND TRADEMARK OFFICE, [https://tsdr.uspto.gov/\[https://perma.cc/ZQM5-CYS2\]](https://tsdr.uspto.gov/[https://perma.cc/ZQM5-CYS2]).

²⁹⁸ *In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1350 (Fed. Cir. 2005) (holding that the Russian word “MOSKOVSKAYA”, meaning “of or from Moscow,” was first translated to English before determining whether it was primarily geographically deceptively misdescriptive for vodka not from Moscow).

²⁹⁹ Post & Rothman, *supra* note 19, at 158.

³⁰⁰ *Id.*

³⁰¹ *Id.* (citation and footnote omitted).

If Elster's T-shirt had used a photo of President Trump, should copyright law require that Elster modify any photographs of Trump more than Warhol modified Goldsmith's photo of Prince? Would the "SORRY FOR PARTYING" T-shirt in *Sconnie Nation* have been infringing if the defendants had made fewer changes to the original photo? These are all potential areas of tension revealed by a many-body approach. The many-body analysis offers the benefit of revealing them systematically, to better ground and assess the results of the addition of a normative theory.

The many-body approach will not determine how to resolve tension between different areas of law, whether to weaken the First Amendment defenses in copyright cases or strengthen them in trademark, for example. Nevertheless, the approach is still useful, as can be seen from a particular gap that Post and Rothman identified, specifically in the First Amendment defenses for the right of performance. This gap will be explored further in the following section.

2. "Fair Use" and Tension

*"And yet it moves."*³⁰² —Galileo Galilei

Post and Rothman suggested that the right of performance should be modified to add a First Amendment defense, as in copyright law. They explained the current gap as follows:

Because the right of performance has not been recognized as such, it has yet to receive the kind of discriminating common-law and statutory attention that caused copyright to develop its own fair use

³⁰² Tradition, but not historical fact, holds that, after abjuring, Galileo mumbled, "*Eppur si muove* (and yet it moves)." Machamer, Peter and David Marshall Miller, *The Stanford Encyclopedia of Phil.*, "Galileo Galilei", Edward N. Zalta (ed.), <https://plato.stanford.edu/entries/galileo/> [<https://perma.cc/N9C4-F8KA>].

jurisprudence. One way or another, however, either through judicially imposed constitutional restraints or through state common or statutory law, the right of performance should be prevented from reaching uses that in the context of copyright would be exempt from legal regulation as fair uses.³⁰³

They then proposed one way to close the gap:

Insofar as the right of performance enjoys constitutional immunity in *pari materia* with copyright, the right of performance must also be construed to contain analogous “built-in First Amendment accommodations.” It seems clear enough that if the First Amendment requires such accommodations in the context of copyright, it must also require them in the context of a right of performance. Such accommodations should either be read into the elements of the tort as a matter of state common or statutory law, or they can be exogenously imposed as a matter of First Amendment limitations.³⁰⁴

In order to bring the two bodies of law into alignment, a many-body approach could, in theory, *either* weaken a fair use defense in copyright or strengthen a fair use defense in the right of publicity. However, the First Amendment may not be neutral between those two options. That is why it is important to do at least a three-body analysis of copyright, right of publicity and the First Amendment.

When we add trademark to the mix, a many-body analysis suggests there might be more going on here than

³⁰³ Post & Rothman, *supra* note 19, at 148 (footnote omitted).

³⁰⁴ *Id.* at 148 (citations omitted) (footnotes omitted). “We do not say that the determination of fair use is easy. . . . Our claim is rather that a doctrine of fair use should be applied in the context of the right of performance and that the doctrine should be interpreted in *pari materia* with the application of fair use in copyright.” *Id.* at n.273 (citations omitted).

just the difficulty of a case-by-case application of fair use doctrine. Whether in copyright or whether extended in *pari materia*, in a like manner, to a right of publicity or to trademark. Even if Nimmer was correct in 1970, the body of copyright law might no longer contain adequate built in accommodations to the First Amendment. Major changes have occurred in both copyright law and the First Amendment over just the past five decades. Part III.D below will offer some suggested advanced options to empirically assess whether the fair use defense should be ported to right of publicity or trademark.

While admittedly rough and incomplete, the initial analysis of the selected interactions above suggests that a many-body approach can leverage the strong body of legal scholarship to uncover and explore tensions between bodies of law. In a many-body problem, the starting position and configuration of each of the n bodies in relation to each other has a strong influence on their subsequent paths. The passage of time matters. In analyzing a particular decision in any of the relevant areas of law, it is contrary to a many-body approach to assume that the body of law at the time of the decision was the same as it is now or that the relationships with and between the other bodies of law will continue to be the same. A many-body approach demands an explicit analysis of the changing relationships between each particular area of law, or at the minimum an acknowledgement that such changes are not being addressed for simplicity, not because of wishful thinking that there is no need to consider changes.

As one example of the importance of temporal changes over time in a many-body approach, consider the *Rogers* Test from trademark law. In their 2020 article, Post and Rothman described the *Rogers* Test with approval, as a First Amendment accommodation.³⁰⁵ However, four years

³⁰⁵ *Id.* at 161–62.

later, the Supreme Court unanimously reversed the Court of Appeals for the Ninth Circuit, which had relied heavily on the *Rogers* Test in holding the “Bad Spaniels” dog chew toy did not infringe the Jack Daniels® trademark.³⁰⁶ The Court found the accused infringer’s use was “as a designation of source for the person’s own goods or services.”³⁰⁷ Justice Kagan, in the opinion of the Court, explained:

We do not decide whether the *Rogers* test is ever appropriate, or how far the ‘noncommercial use’ exclusion goes. On infringement, we hold only that *Rogers* does not apply when the challenged use of a mark is as a mark. On dilution, we hold only that the noncommercial exclusion does not shield parody or other commentary when its use of a mark is similarly source-identifying.³⁰⁸

In a many-body approach, this potential shift in long-established trademark law might have implications for Post and Rothman’s right of publicity analysis. In addition, a many-body approach can do much more than that, as will be discussed in Part III.D below.

Before moving further however, it might be helpful to provide a summary of what the analysis of the selected interactions has revealed thus far. Staying focused on our grain of sand of *Vidal v. Elster*, the table below summarizes the many-body approach analysis in this article for selected paired and triplet interactions. The specific context is a T-shirt (actual or hypothetical) that includes a communicative act that is either public discourse or political speech and that is accused of violating intellectual property rights or defaming a politician. The violation of intellectual

³⁰⁶ Jack Daniel’s Prop., Inc. v. VIP Prod. LLC, 599 U.S. 140, 163 (2023).

³⁰⁷ *Id.* at 162.

³⁰⁸ *Id.* at 163.

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property rights could be related to trademark, copyright or right of publicity. The politician could bring suit directly or their rights could be enforced by the USPTO (as in *Vidal v. Elster*).

INTERACTION(S)	EXAMPLE CASE	NOTES
DEFAMATION – FIRST AMENDMENT	Context: Public discourse or political speech on a T-shirt that is accused of violating IP rights or defaming a politician. N/A – no T-shirt example case was provided in this article.	First Amendment may require public figure to prove both actual malice and falsity (<i>New York Times Co. v. Sullivan</i> – SCT (1964)). However, Justice Thomas has indicated <i>New York Times Co. v. Sullivan</i> case may need to be <u>re-considered</u> . <i>McKee v. Cosby</i> , 586 U.S. 1172, 1182 (2019) (Thomas, J., concurring in denial of certiorari).
COPYRIGHT – FIRST AMENDMENT	Court of Appeals for the Seventh Circuit found fair use defense applicable to a T-shirt that criticized the Mayor of Madison (<i>Kientz v. Scennie Nation</i> – 7 th Cir. (2014)).	“Fair use” defense in statute (17 U.S.C. Sec. 107) and case law (<i>Campbell v. Acuff-Rose</i> – SCT 1994) provides some protection for parody-type criticism or commentary.
TRADEMARK – FIRST AMENDMENT	Supreme Court unanimously agreed names clause, on its face, did not violate 1 st Amend. (<i>Vidal v. Elster</i> – SCT (2024)). First Amendment defense rejected (<i>MGM-Pathe Commc’ns. Co. v. Pink Panther Patrol</i> (1991) (Leval, J.))	No reasonably comparable equivalent to copyright “fair use” defense exists for parody-type criticism in trademark infringement cases.

<p>TRADEMARK – RIGHT OF PUBLICITY – FIRST AMENDMENT</p>	<p>Three-judge panel on Court of Appeals for Federal Circuit agreed that names clause was unconstitutional as applied (<i>Vidal v. Elster</i> – CAFC (2022) (also referencing right of publicity)).</p>	<p>See above for trademark. Under Post and Rothman’s analysis: For a right of publicity violation of the “right of commercial value,” likely no First Amendment protection for the communicative act if a court (mis)classifies the T-shirt at issue as a “commodity” versus “public discourse” or “commercial speech.” For public discourse, restriction of communicative act is unconstitutional absent explicit or serious confusion. For commercial speech, certain fair use exceptions may apply but they may not map identically to the copyright fair use defense. Realistic portrayals may also be disfavored. Note that Post and Rothman also identified a potential lack of First Amendment defense protection in cases involving the right of performance. That is not at issue for the T-shirt context cases covered in this summary.</p>
<p>TRADEMARK – COPYRIGHT – FIRST AMENDMENT</p>	<p>N/A – no actual case provided in this article with this fact pattern.</p>	<p>In the hypothetical case of Elster adding a photo of President Trump to his T-shirt, Elster’s trademark application would likely still have been rejected under the precedent of the Supreme Court’s decision in <i>Vidal v. Elster</i>, he might not have been allowed to continue to use President Trump’s name if a trademark infringement case had been filed, under the precedent of the <i>Bad Spaniels</i> case (if the court had found that use was as a mark), and he might have been allowed to use the photo (if the photo was modified sufficiently), under the precedent of <i>Kienitz v. Sconnie Nation</i>.</p>

Figure 11: Summary of Selected Interactions in Political T-Shirt Context³⁰⁹

One advantage of this type of summary or review in a many-body approach is that we can immediately see several potential sources of error in the analysis. There are gaps where example cases would be helpful, versus speculation about hypothetical cases. Many paired, triplet, and higher-level interactions have been omitted. It would be useful to explore those and see if the picture changes.

³⁰⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *McKee v. Cosby*, 586 U.S. 1172, 1182 (2019) (Thomas, J., concurring in denial of certiorari); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758, 759–60; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994); *Vidal v. Elster*, 602 U.S. 286, 295 (2024); *MGM-Pathe Commc’ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991); *In re Elster*, 26 F.4th 1328, 1331, 1339 (Fed. Cir. 2022); see Post & Rothman, *supra* note 19.

Moreover, entire bodies of law have been omitted, such as administrative law and Supreme Court question-selection law. Finally, there has been no attempt to consider whether a change in the order of operations might affect the analysis of the triplet interaction (trademark-copyright-First Amendment versus copyright-trademark-First Amendment etc.), for example. Explicit identification of potential sources of error is a strength of the many-body approach.

In addition, a many-body approach reveals potential tension between different areas of law. It is not surprising in law that different legal claims may yield different outcomes. However, it is not immediately clear that there should be such different levels of protection for public discourse or political speech depending on whether trademarks, copyrights, right of publicity, or reputational rights (defamation) are involved (or combinations thereof). To answer that question, a normative theory would be needed to supplement the many-body analysis.

***D. Playing God with the Law – Advanced
Many-Body Options***

A many-body approach may be even more powerful in law than physics. A many-body approach can be used to “play god” with law in a way that is not available for the Solar System. Bodies of law are created and maintained by humans, unlike celestial bodies.³¹⁰ In this paper, “playing god with the law” is not intended to be a negative. Even if one believes judges should not try to guide the law, the

³¹⁰ Presumably, even one who subscribes to a natural law theory would agree that judges, legislators, and even perhaps occasionally, legal scholars, are flawed. We do not perfectly perceive and follow the light of reason and faith, as understood by Aquinas. For a discussion of natural law theory, see REV. STEVEN L. BROCK, *THE LIGHT THAT BINDS: A STUDY IN THOMAS AQUINAS’S METAPHYSICS OF NATURAL LAW* (1st ed. 2020).

U.S. Constitution, legislative statutes, and administrative regulations are, at least in part, human-made. Through amendments and repeal, they are also human-modified.

The (metaphorical) size, shape and mass of any body of law is open to modification, over decades or centuries. Is the U.S. legal system, or any particular subset of the U.S. legal system, “very good”? In order to answer that question using a many-body approach, one likely needs both a) greater definitional clarity about what “good” and “very good” should mean, including specific proxies (or metrics) used, and b) advanced mathematical, scientific, and computational modeling techniques and resources. Thus far, the discussion in this article has been intentionally light on any math or science. Rest assured the many-body approach can be useful even in the simplified form outlined above. However, it is much more powerful than that. This section will sketch out what an advanced version of the many-body approach could deliver. The many-body approach can be used as a *Formula 1*® race car or a Ford Model T car.

A caveat is in order first. When a many-body approach is used in an advanced manner, definitional precision and specificity as to goals become incredibly important. The directions to a store can be less precise than the directions to land a spaceship on the Moon. Indeed, one of Poincaré’s discoveries was that the term “convergence” was being used in different ways by astronomers and mathematicians, each in good faith but without either group recognizing the nature of the distinction.³¹¹

Poincaré’s initial researches dwelt on the distinction between absolute and uniform convergence. His first result showed that if the convergence was not uniform then the function could attain arbitrary large

³¹¹ Barrow-Green, *supra* note 1, at 41.

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values[.] . . . This was an important result in that it meant, contrary to what the astronomers had previously believed, that the ordinary convergence of a trigonometric series was not a sufficient condition for stability and so could not be used as a criteria for establishing results such as the stability of the solar system.³¹²

The entire U.S. legal system is as far beyond the scope of this paper as the Milky Way Galaxy is beyond the scale of our Solar System. However, the Milky Way Galaxy, which has roughly 100 billion stars, and roughly 3,000 stars with planets orbiting them,³¹³ is *not* beyond the capacity of an advanced many-body problem computational analysis. Modern computer hardware and software technology may soon be capable of handling over a trillion parameters.³¹⁴ Moreover, tremendous advances have been made in math and science, including in the understanding of complexity, randomness, systems theory, and the social sciences, in the centuries that have passed since Poincaré

³¹² Barrow-Green, *supra* note 1, at 54 (citations omitted). In the many-body problem of intellectual property law and the First Amendment, key terms such as “fair,” “commercial” and “transform” would also benefit from greater precision and a reconciliation, even if not mathematically rigorous.

³¹³ *Star Basics*, NASA, <https://science.nasa.gov/universe/stars/> [<https://perma.cc/P7Z2-6EP2>] (last visited Jan. 8, 2026); *How Many Solar Systems Are in Our Galaxy?*, NASA (Sep. 25, 2025), <https://spaceplace.nasa.gov/other-solar-systems/en/> [<https://perma.cc/T3QW-69CZ>].

³¹⁴ Tithi, *supra* note, at 53 (“Future data centers must be equipped to handle the demands of multi-trillion parameter large language models (LLMs) like OpenAI’s GPT-4 with mixture of experts transformer models (Cai et al., 2024) featuring 1.8 trillion parameters.”). Data visualization techniques for massive datasets have also advanced, such as the work by Professor Jason Leigh’s team at the University of Hawai’i Laboratory for Advanced Visualization & Applications. See HAWAII DATA SCIENCE, <https://datascience.hawaii.edu/> [<https://perma.cc/RDX2-MSZZ>].

discovered that even a deterministic system could behave chaotically.³¹⁵ Vermeule was right to recognize the administrative state as an example of a many-body problem.³¹⁶ He was just more skeptical than the author about the possibility of modeling it.³¹⁷ An advanced many-

³¹⁵ MELANIE MITCHELL, *COMPLEXITY: A GUIDED TOUR* (Oxford Univ. Press 2009); RODNEY G. DOWNEY & DENIS R. HIRSCHFELDT, *ALGORITHMIC RANDOMNESS AND COMPLEXITY* (Springer 2010); *ALGORITHMIC RANDOMNESS: PROGRESS AND PROSPECTS* (Johanna N.Y. Franklin & Christopher P. Porter, eds., Cambridge Univ. Press 2020); RUSSELL LYONS & YUVAL PERES, *PROBABILITY TREES AND NETWORKS* (Cambridge Univ. Press 2016); PETER D. GRUNWALD, *THE MINIMUM DESCRIPTION LENGTH PRINCIPLE* (Massachusetts Institute of Technology 2007); LUDWIG VON BERTALANFFY, *GENERAL SYSTEM THEORY: FOUNDATION, DEVELOPMENT, APPLICATIONS* (George Braziller, Revised Edition 1969).

³¹⁶ Vermeule, *supra* note 12, at 261 (“I believe that the administrative state presents a clear example of the n-body problem in political science and theory.”).

³¹⁷ *Id.* (“... there are good grounds to suspect that, past a certain point, the administrative state is fundamentally intractable to positive modeling. At that point, there is no set of modeling assumptions that are both tractable and plausible. And although it is inevitably a matter of judgment where that point lies, in my view it has already been reached.”). Testing models of the U.S. legal system as a whole, or a major subset like the Administrative State, would require not just the use of proxies, but also benchmarks that would need to be specific for the law. A benchmark that is a particular combination of datasets representing specific tasks that are particular specifications of a problem cannot be independent of context or application domains. Inioluwa Deborah Raji et al., *AI and the Everything in the Whole Wide World Benchmark*, in *PROCEEDINGS OF THE NEURAL INFORMATION PROCESSING SYSTEMS TRACK ON DATASETS AND BENCHMARKS* (J. Vanschoren & S. Yeung eds., 2021) (arguing that benchmarks for “general purpose” Large Language Models suffer from a “construct validity” problem). For both benchmarks and proxies, it is also important to be cautious of “wishful mnemonics.” See Drew McDermott, *Artificial Intelligence Meets Natural Stupidity*, *SIGART NEWSLETTER*, Apr. 1976, at 4 (“A major source of simple-mindedness in AI programs is the use of mnemonics like ‘UNDERSTAND’ or ‘GOAL’ to refer to programs and data structures.”); *Id.* (“When you

body approach should also be capable of modeling the U.S. legal system, even if not perfectly.³¹⁸

The more modest proposal in this paper is suggesting ways an advanced many-body empirical analysis may test possible goals for a “good” or “very good” fair use defense. In his 1990 article “*Toward a Fair Use Standard*,” Judge Leval observed: “[W]e should not adopt a bright-line standard unless it were a good one – and we do not have a good one.”³¹⁹ His transformative purpose test was not a bright-line standard, but it was an effort to improve copyright law. Leval played god with the law. He did so transparently, productively, and in good faith. His work was rightly influential. Leval persuaded the even more powerful legal gods on the U.S. Supreme Court to adopt a version of his “transformative purpose” test in *Campbell v. Acuff-Rose*, which was only four years after Leval’s article.³²⁰ That is a remarkable testament to the power and cogency of his analysis. In getting his test adopted, Judge Leval won. However, did he achieve his broader goals? An advanced many-body approach can help answer that question.

say (GOAL ...), you can just feel the enormous power at your fingertips. It is, of course, an illusion.”). If an AI researcher names the main loop of a program ‘UNDERSTAND,’ they are “(until proven innocent) merely begging the question.” *Id.* Similarly, one would need to be cautious and precise about any use of “good,” “stability,” “efficiency” – and even “coherence” in using an advanced many-body approach in legal analysis.

³¹⁸ Advances in quantum computing, to the extent they are realized in practice, offer the potential for even more powerful computational models. IBM, <https://www.ibm.com/roadmaps/quantum/> [<https://perma.cc/L23K-9QS8>] (last visited Jan. 9, 2026) (discussing how IBM has set a goal of 2033 or thereafter to “Scale fault-tolerant quantum computers to run circuits of 1 billion gates on up to 2000 qubits, unlocking the full power of quantum computing”).

³¹⁹ Leval, *supra* note 188, at 1135.

³²⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

The transformative purpose test has now been in wide use for over three decades.³²¹ The test is key in the analysis of deciding whether new so-called “generative Artificial Intelligence” infringes copyrighted works or is non-infringing fair use.³²² The time is ripe to use an advanced many-body problem approach to test whether Leval’s transformative purpose test is “a good one” or, even better, “very good.” To do so, we would need to better define at least the key term “good” and specify what proxy we want to use for measurement purposes. We can find some clues as to what Judge Leval meant by a “good” test in his own explanations. First, Judge Leval candidly acknowledged that he was prompted to develop his

³²¹ Beebe, *supra* note 59, at 5 (“[W]hile the transformativeness test appeared to be waning in influence by 2005, it has since recovered its previous level of influence, even in the lower-profile, workaday fair use opinions that make up the majority of the data.”) (footnote omitted); Clark D. Asay, Arielle Sloan & Dean Sobcazak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 912 (2020) (finding that “[t]ransformative use is eating the fair use world and is doing so more than previously suspected” in an empirical analysis of reported opinions from 1991 to 2017); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 768 (2011) (“Since 2005, the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history.”).

³²² For a detailed analysis of the “transformative purpose” test (and variations thereof) in the context of Artificial Intelligence, see Blodgett-Ford, *supra* note 152. In the recent “Order on Fair Use” in the pending copyright infringement lawsuit *Bartz v. Anthropic PBC*, Judge Alsup granted summary judgment for Anthropic that (a) Anthropic’s use of the nine copyrighted books authored by the plaintiffs to train the ‘Claude’ LLM was non-infringing fair use and (b) Anthropic’s conversion of printed books it had purchased to digital format was also fair use. *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007, 1034 (N.D. Cal. 2025). However, Judge Alsup denied Anthropic’s motion for summary judgment that Anthropic’s creation of a digital library of around 7 million pirated books was fair use. *Id.* Judge Alsup applied what the author considers to be the “transformative technology” version of the transformative purpose test.

influential “transformative purpose” test by the sting of two reversals:

Random distribution has dealt me a generous share of copyright suits involving claims of fair use. The court of appeals’ disagreement with two of my decisions provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values. Is this because no rational defining values exist, or is it rather that judges, like me, have repeatedly adjudicated upon ad hoc perceptions of justice without a permanent framework? This commentary suggests that a cogent set of governing principles exists and is soundly rooted in the objectives of the copyright law.³²³

Decades later, with his characteristic sense of humor, Judge Leval explained: “My first two [fair use] rulings were dismissively rejected by the Court of Appeals. I consoled myself that was exhilarating to be at the cutting edge of the law, even in the role of the salami.”³²⁴ A statistically significant reduction in the number of appellate court reversals of lower court rulings involving the fair use defense would be a reasonable proxy for a “good” test. An empirical analysis could examine whether the rate of reversals of lower court fair use decisions has decreased, increased, or stayed flat in the past three decades.³²⁵

³²³ Leval, *supra* note 188, at 1105 (citations omitted).

³²⁴ NYU SCHOOL OF LAW, *Fair Use: A Ramble Through the Bramble: Judge Pierre Leval*, at 2:58 (YouTube, June 6, 2019), https://www.youtube.com/watch?v=OGky_yG8dV8 [<https://perma.cc/7PCZ-M5R7>].

³²⁵ Any empirical analysis using a many-body approach should avoid common analytical mistakes, such as assuming correlation implies causation. For examples with terrific explanations, see Leif Nelson, Uri Simonsohn & Joe Simmons, DATA COLADA, <https://datacolada.org/>

Of course, we do not need to limit any analysis to Judge Leval's goals. However, his goal of providing greater clarity is admirable. Indeed, Post and Rothman sought to bring greater coherence to the areas of the right of publicity law and the First Amendment, by categorizing and by suggesting where adjustments might be needed.

An advanced many-body empirical test could be applied to Post and Rothman's analysis of the right(s) of publicity and the First Amendment. With four idealized rights of publicity torts interacting with each other and the First Amendment, we already have a five-body problem. There are a multitude of options. Using Post and Rothman's helpful chart, as shown below in Figure 12, we could narrow the right of publicity analysis to the "right of commercial value" and compare the results in cases involving trademark infringement due to likelihood of confusion to the "Confusion" category. We could compare trademark infringement due to dilution or tarnishment to the "Diminishment" category. Then we could see whether the outcome for the trademark cases changed when the underlying communicative act was "Public Discourse."

[<https://perma.cc/VEA7-KZH6>] (last visited Oct. 15, 2025). Professor Barton Beebe has already assembled an annotated spreadsheet that tracks copyright fair use decisions from 1978-2019. See Beebe, *supra* note 59. Beebe generously shares that raw data upon request. Beebe's data could be updated and expanded to test the 1970 Nimmer theory that copyright law has sufficient built in accommodations for the First Amendment. Beebe did not track judicial discussions of the First Amendment. The author, with the help of Research Assistants Andrea Reddick (Drake Law School Class of 2028) and Caitlin Figge (Drake University Class of 2026, as supervised by Dr. Lendie Follett, Associate Professor of Business Analytics, Co-Director of Data Analytics, and Department Chair of Actuarial Science, Analytics, and Information Systems, Drake University), is in the process of annotating and analyzing that data.

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	Public Discourse	Commercial Speech	Commodities
Confusion	Permissible (if confusion is explicit or serious)	Permissible (with fair use exceptions)	Permissible
Diminishment	Unconstitutional	Likely Permissible (with fair use exceptions)	Permissible
Unjust Enrichment	Unconstitutional	Likely Permissible (with fair use exceptions)	Permissible

*Figure 12: Post and Rothman’s proposed mapping of three kinds of injury for the right of commercial value type of right of publicity against three First Amendment categories of speech.*³²⁶

Such a test could be expanded, as an advanced many-body approach, to incorporate Post and Rothman’s categories of speech and right(s) of publicity, as well as trademark law. For example, copyright, right of publicity, and trademark cases could be reviewed over decades and categorized. The cases could be tracked based on which type of speech or communicative acts were involved, using the three categories suggested by Post and Rothman: public discourse, commercial speech, and commodities.³²⁷ Highlighting “public discourse” in particular, one could track which type of fair use defense was referenced by the court and how the court handled the First Amendment. If, hypothetically, intellectual property rights trumped the First

³²⁶ Post & Rothman, *supra* note 19, at 156. Image is used with the permission of Post and Rothman.

³²⁷ *Id.* at 171–72. It may perhaps be a good idea to include an “other” category. Post and Rothman appropriately noted that there are outliers that may not fit within their four idealized rights of publicity. *Id.* at 92 (“When taken together, we believe that these four interests encompass the vast majority of cases presently brought to remedy unauthorized uses of identity under state right of publicity laws.”) (emphasis added).

Amendment in significantly more public discourse cases involving trademark, or the right of performance, than in copyright cases, that would be a strong indication of a need for a normative theory to explain the difference. Depending on the normative theory used, adjustments might be needed to strengthen the fair use types of defenses in trademark law and right of publicity (performance) law, or to weaken the fair use defense in copyright law. Such an empirical analysis using an advanced many-body approach might also be used to test whether the fair use defense in copyright law can sufficiently accommodate First Amendment concerns without either explicitly or implicitly allowing for adjustment as the areas of law wax and wane over time. If we are truly dealing with a many-body problem, the assertion that the body of copyright law fits perfectly with the First Amendment, *at all times*, through “built in accommodations” sounds as unlikely as the assertion that the Sun and all the planets revolve around a stationary Earth. However, perhaps one of the rare Lagrangian stability points has been found?³²⁸ An empirical analysis can help answer that question.

The many-body approach can do more than that though. Like the many-body problem in physics, the many-body problem in law appears at a wide range of scales—from interactions within a given area of law to a legal system as a whole with a multitude of different areas of law. Indeed, the entire U.S. legal system as a whole is well within the reach of a many-body problem approach, but it would require more advanced techniques than the simplified three-step approach outlined in Parts I, II and III above. Fortunately, such advanced techniques are readily available, in part because of the centuries that many great

³²⁸ See Barrow-Green, *supra* note 1, at 16-17 (describing the five Lagrangian points of equilibrium in a three-body problem).

scholars have devoted to the many-body problem already. Most recently, the physicist Anne L’Huillier was awarded a Nobel prize in 2023 related to the study of many-body problems at the atomic level.³²⁹

In addition, to the extent that computational models are needed, the recent frenzied pursuit of so-called “generative artificial intelligence” has resulted in super-computers being built with computational power that would have been unimaginable only a decade ago.³³⁰ We can use such computational power with the many-body problem approach as an analytical tool in asking whether the U.S. legal system, or any sub-set of the U.S. legal system, is stable. A many-body approach can help promote greater transparency about the proxies being used to define “fairness,” “justice,” or even what the “progress of science and the useful arts” means. Given clear proxies, metrics and goals, a many-body approach is well-suited for any

³²⁹ Formally, L’Huillier’s Nobel award was “for experimental methods that generate attosecond pulses of light for the study of electron dynamics in matter.” *Anne L’Huillier*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/physics/2023/lhuillier/facts/> [<https://perma.cc/CW3L-XJFS>]. See also Emma Bubola & Katrina Miller, *Nobel Prize in Physics Awarded to 3 Scientists for Illuminating How Electrons Move*, N.Y. TIMES, Oct. 3, 2023, <https://www.nytimes.com/2023/10/03/science/nobel-prize-physics.html> [<https://perma.cc/8DP2-VMF3>]. As a physics graduate student, the author was privileged to meet Professor L’Huillier while working with more senior colleagues Dr. Jonathan Parker and Professor K.T. Taylor, who collaborated with L’Huillier, and whose work was cited by the Nobel Committee; *Nobel Prize in Physics 2023 Press Release*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/physics/2023/press-release/> [<https://perma.cc/JJV2-UHPY>]. The many-body problem is difficult, but meaningful progress has been made. Those hard-won lessons learned can be applied to a legal many-body problem also.

³³⁰ Advanced options will be covered in more detail in a forthcoming publication S.J. Blodgett-Ford, *The Plurality in the Singularity—A Many-Body Approach to Law and Technology*, in *LAW AND SUPERINTELLIGENCE: AFTER THE SINGULARITY* (Edward Elgar, Woodrow Barfield & Marc Blitz, eds., forthcoming 2026).

empirical or computational analysis, whether of concepts such as “justice,” “efficiency” or “balancing interests.”

In the context of the legal world as revealed in the grain of sand of *Vidal v. Elster*, the courts and legislative bodies can strengthen or weaken any of the areas of intellectual property law and/or the First Amendment. We know this because they have already done it—repeatedly—since the founding. In this regard, a weakness of the many-body approach is also a potential strength. The weakness is that, as an analytical tool, the many-body approach is as agnostic about whether law should be fair as it is about whether the rise and fall of the tides on Earth are good. A normative legal theory is needed to answer the question of what goals a legal system *should* seek. On the positive side, the many-body problem is compatible with a wide variety of such theories. Law and economics, network theories, systems analysis, and complexity theories are all fair game.³³¹ As an example, consider the “Social Force Model,” which is drawn from urban planning and emergency management.³³² The Social Force Model:

³³¹ Recent examples of law and economics approaches include: YAIR LISTOKIN, *LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS* (Harvard Univ. Press 2019); Edward R. Morrison, Belisa Pang & Jonathon Zytneck, *Manipulating Random Assignment: Evidence from Consumer Bankruptcies in the Nation’s Largest Cities*, *AMERICAN L. & ECONOMICS REV.* (forthcoming 2025). See, e.g., Ted Sichelman and Henry E. Smith, *A network model of legal relations*, 382 *PHIL. TRANSACTIONS OF THE ROYAL SOC’Y A* 1 (2024) <https://royalsocietypublishing.org/doi/epdf/10.1098/rsta.2023.0153> [<https://perma.cc/L8E5-XE4K>] (“Property, torts, contracts, intellectual property, and other areas of the law arguably reduce information costs in similar, quantifiable ways by chopping up the world of interactions between parties into manageable modules that are semi-autonomous. We also posit that our network science approach to jurisprudential issues can be adapted to quantify many other important aspects of legal systems.”).

³³² En Xu et al., *A Survey of Physics-Informed AI for Complex Urban Systems*, 1 *BNRIST* 1, 10 (2025).

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[T]reats pedestrian behavior as driven by virtual forces—toward goals, away from other individuals, and around obstacles—analogous to Newtonian dynamics. These forces encapsulate concepts such as repulsion, attraction, and inertia, allowing for the simulation of crowd behavior under stress. By grounding human movement in physical analogies, such models provide a quantitative framework for optimizing evacuation strategies and improving safety in complex urban environments.³³³

Admittedly, a many-body system, and its evolution over time, is incredibly complex. Even when chaotic behavior is involved, that does not mean a legal system behaves in a *completely random* manner. Bodies of law do not develop totally randomly, nor are all cases decided by a coin toss. Instead, we should expect to see trends and patterns in the interactions and changes in the complex legal system, as the excellent empirical analysis by Professor Beebe has shown,³³⁴ while also expecting some surprising behavior, such as that the First Amendment is weaker when interacting with trademark claims versus copyright claims or defamation claims involving similar facts.

Although it is powerful, there are some serious weaknesses of the many-body approach. It is difficult to apply manually as the number of relevant bodies increases. It is not clear what order of operations to perform and therefore one would need to test different orders in practice to see if the results changed. Without a supplemental substantive theory of law, it is not possible to know how to resolve conflicts that result when attempting to integrate the analysis of sets of interactions. More fundamentally, law is not physics. Quantification and computation are useful tools when faced with complexity. However, we should

³³³ *Id.*

³³⁴ *See, e.g.,* Beebe, *supra* note 59, at 5.

never forget that any numbers used, metrics or benchmarks, are inherently incomplete and flawed proxies for the broader concepts one hopes to capture, such as justice, equality, fairness, progress etc. Such is the challenge of all “wicked problems.”³³⁵ As Professors Rittel and Webber explained so clearly almost five decades ago, “There is no definitive formulation of a wicked problem.”³³⁶

The information needed to understand the problem depends upon one’s idea for solving it. That is to say: in order to describe a wicked-problem in sufficient detail, one has to develop an exhaustive inventory of all conceivable solutions ahead of time. The reason is that every question asking for additional information depends upon the understanding of the problem -- and its resolution -- at that time. Problem understanding and problem resolution are concomitant to each other.³³⁷

In addition, wicked problems have no stopping rule.³³⁸ But the perfect is the enemy of the good. We will

³³⁵ Horst Rittel & Melvin Webber, *Dilemmas in a General Theory of Planning*, 4 POLICY SCIENCE 155, 155, 159–60 (1973) (“We have been learning to see social processes as the links tying open systems into large and interconnected networks of systems, such that outputs from one become inputs to others. In that structural framework it has become less apparent where problem centers lie and less apparent where and how we should intervene even if we do happen to know what aims we seek.”) (“The kinds of problems that planners deal with – societal problems – are inherently different from the classes of problems that scientists and perhaps some classes of engineers deal with. Planning problems are inherently wicked.”). They identify ten characteristics of wicked problems, including that “the formulation of a wicked problem is the problem!” *Id.* at 161.

³³⁶ *Id.* at 161.

³³⁷ *Id.*

³³⁸ “In solving a chess problem or a mathematical equation, the problem solver knows when he has done his job. There are criteria that tell when the or a solution has been found. Not so with planning problems. Because (according to Proposition 1) the process of solving the

continue to have excellent legal scholarship and analysis even without express recognition and adoption of a many-body approach. However, a many-body approach has at least the potential to improve the transparency and rigor of the methodology involved over extended period of time. At a minimum, use of a many-body approach to legal analysis should facilitate greater collaboration between experts in different areas of law. With more work like that of Professors Post and Rothman, we may perhaps be better able to see both the forest and the trees, and how they change over time.

IV. CONCLUSION

We should not expect any simple solution to a many-body problem in law. Bodies of law are more challenging to define with precision than physical bodies. Legal forces are not known constants like the force of gravity. However, we can hope for near-term progress by acknowledging the challenge and approaching it in a systematic manner, using the three-step process outlined above. Identify the bodies, identify the potential interactions, then analyze the selected interactions. Doing so will likely reveal inconsistencies and force us to explicitly identify where the bodies are (and at what point in time) versus where we want them to be, under any normative theory. To the extent that the many-body problem analogy is correct, not only do judges need greater epistemological humility, we as legal scholars do also. We can all do better, together. To borrow from the legendary

problem is identical with the process of understanding its nature, because there are no criteria for sufficient understanding, and because there are no ends to the causal chains that link interacting open systems, the would-be planner can always try to do better. Some additional investment of effort might increase the chances of finding a better solution.” *Id.*

Professor Black, “one may move eastward, though ‘east’ itself will never be attained.”³³⁹

³³⁹ Charles L. Black Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986). The author is grateful to Professor Soifer for suggesting the connection to Professor Black’s work.